



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Journal of Property Law

Volume 9
Number 4 *Fall 2021 Symposium: Natural
Property Rights*

Article 10

5-28-2023

The Natural Right of Property

Timothy Sandefur
Goldwater Institute, tmsandefur@gmail.com

Follow this and additional works at: <https://scholarship.law.tamu.edu/journal-of-property-law>



Part of the [Natural Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Timothy Sandefur, *The Natural Right of Property*, 9 Tex. A&M J. Prop. L. 673 (2023).
Available at: <https://doi.org/10.37419/JPL.V9.I4.10>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Journal of Property Law by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

THE NATURAL RIGHT OF PROPERTY

Timothy Sandefur

Abstract

This Article offers a critical examination of Eric Claey's argument for natural property rights, focusing in particular on the questions of self-ownership and the so-called "Lockean proviso." It argues that while Claey's is generally on the right track in his argument for natural property rights, he errs in omitting a self-ownership argument, some version of which is necessary for a proper naturalistic account of property, and that the Lockean proviso is neither necessary for such an account nor defensible in its own right. I conclude that the concerns animating the Lockean proviso argument are adequately dealt with by an alternative argument: that one has a right to equal participation in an existing property rights scheme.

I. INTRODUCTION673

II. WHAT A NATURAL RIGHTS THEORY ATTEMPTS TO DO675

 A. *The Meaning of "Natural"* 676

 B. *"Is" and "Ought"* 680

 C. *Life as Standard of Value*..... 685

 D. *Indefeasible Personal Responsibility*..... 686

III. PROPERTY RIGHTS.....690

 A. *Self-Ownership* 690

 B. *Working From Self-Ownership*..... 698

 C. *Hoarding/Engrossing* 703

IV. CONCLUSION706

I. INTRODUCTION

Eric Claey's has offered a defense of the natural right of private property that admirably weaves political philosophy with the real-life

DOI: <https://doi.org/10.37419/JPL.V9.I4.10>

† Vice President for Legal Affairs, Goldwater Institute. I thank Professor Eric Claey's and Professor Adam Mossoff for including me in this symposium and for the opportunity to exchange ideas about private property, and Ilya Shapiro for allowing me to use his office to participate in the online component of this symposium while traveling.

experiences of the common law. This is welcome given that our era is dominated by varieties of positivism and post-modern theories, according to which property is merely a “narrative” device for gaining and keeping power.¹ That perspective is not only philosophically impoverished but morally incoherent, and it marks a shameful regression from the great innovation of natural law/natural rights theories,² which aimed to formulate an understanding of human beings and their moral and political claims that would be universal—not divided into mutually incomprehensible cultural or political islands. Claeys is to be commended for pursuing the better path.

Yet while he makes an admirable effort to substantiate the idea that private property is not a mere social construct or cultural preference but a genuinely natural feature of human life, his argument does commit certain important errors. First, it is insufficiently grounded in an account of the objective human good or an explanation of inalienability—that is, the idea of self-ownership—which is essential to any defense of property rights. Second, Claeys’s argument, like John Locke’s, is based on the proposition that private property represents a privatization of a presumptive commons (and thus is subject to the Lockean proviso) when such a presumption is untenable. But as important as these errors are, they do not, in the end, defeat the conclusion that private property is a universal, natural human right. The natural law/natural rights argument for private property stands as our most persuasive account of the unique phenomenon of ownership.

In the following, I begin by examining the structure of natural-rights arguments generally to explain how and why they differ from the “narrative”-focused arguments favored by postmodernism and describing some of the longstanding objections to these theories—particularly the so-called gap between normative and descriptive statements. I explain why the alleged “naturalistic fallacy” is actually based on a misconception—although some, in seeking to avoid what they wrongly think is a fallacy, actually do adopt fallacious arguments in this respect. In part II,

1. See, e.g., Brendan Edgeworth, *Post-Property? A Postmodern Conception of Private Property*, 11 UNIV. NEW S. WALES L.J. 87 (1988).

2. Natural law, which holds that the rules governing human action depend for their validity on objective facts of the world, rather than mere agreement, is often distinguished from natural rights theory, which holds that normative claims about political liberty are similarly validated by objective facts, instead of being human constructs. While some thinkers believe in the former but not the latter (Lon Fuller, for example), the distinction does not matter for our purposes, so I combine them here. I also lay aside those who seek to distinguish natural rights theory from “natural right”—a confusing, and probably untenable distinction that appears loaded with an illegitimate effort to smuggle in certain contentious moral claims.

I address Claeys's argument specifically, focusing particularly on his failure to address one crucial element of the traditional natural rights argument for property—self-ownership—and why the Lockean provisos do not bear the weight Claeys places on them. I conclude by examining some of the alternative arguments that can shore up these holes, specifically what Eric Mack has called practice-based arguments for the right to participate in a system of property, and the role that trade, rather than initial acquisition, plays. I conclude with some observations about concerns regarding engrossing and a defense of the rights of hoarders.

II. WHAT A NATURAL RIGHTS THEORY ATTEMPTS TO DO

Claeys is right that many lawyers and law professors (though not ordinary people)³ regard the idea of natural law as “spooky.”⁴ The source of that attitude is an intuition that the term “law” is being used ambiguously when it is employed to describe both the invariant qualities of the physical universe—say, the law of gravity—and also the norms according to which human beings should guide their choices. Karl Popper, for example, argued that a “true” natural law has no exceptions and “can be neither broken nor enforced,” whereas the normative law is alterable, breakable, and enforceable.⁵ Popper and others have concluded from this that the latter sorts of laws (whether statutes or rules of etiquette) are a matter of human convention and stand in a normative realm neatly sealed off from the descriptive realm. Only in the latter do *true* natural laws apply, but these cannot speak across the chasm to provide objective grounds for conduct. Prescriptions are instead fundamentally subjective or arbitrary, and to attribute their binding force to anything other than human will is to “churn[] the void in the hope of making cheese.”⁶ But once this critique is better understood, it becomes clear

3. Ordinary people do not regard the idea of natural law as at all odd. We know this in part because they obey the law for reasons other than compulsion or material advantage: indeed, they obey the law largely as a consequence of its perceived legitimacy. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990). One—though of course not the only—form of the moral legitimacy within which law must be situated in order to entitle it to people's obedience is, of course, natural law.

4. Eric Claeys, *Natural Property Rights* 39 (Sept. 17, 2021) (unpublished manuscript) (on file with the Texas A&M Journal of Property Law); see also Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415 (2023) [hereinafter “Claeys, *Introduction*”].

5. KARL R. POPPER, *THE OPEN SOC'Y AND ITS ENEMIES* 63 (London: Routledge 2002) (1945).

6. OLIVER WENDELL HOLMES, JR., *Letter to Alice Stopford Green, Aug. 20, 1909*, in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR* 116 (Richard A. Posner ed., 2012).

that natural law/natural rights is not as vulnerable to it as one might think at first.

A. *The Meaning of "Natural"*

The fundamental flaw in this critique is its foundational premise: the alleged "is"/"ought" gap. The common notion that "is" and "ought" are qualitatively separate rests on a fallacy: specifically, the conflation of living and nonliving beings.⁷ These two differ in a crucial way. Living beings differ fundamentally from inanimate matter in that while matter cannot be created nor destroyed, living beings can be. Existence for a living being is always conditional—predicated on obtaining the necessary nutrition, for example. This provides the basis for a teleological argument about the goal-directed nature of living beings, which closes the "is"/"ought" gap. Different living beings, of course, have different natures according to their modes of existence; that is, their biological and psychological qualities. But it would be uncontroversial to say that it is in a horse's *nature* to eat hay, or a dog's *nature* to gnaw on bones, or that they *naturally* differ in these respects, or that, *ceteris paribus*, a horse that does not eat hay is defective and probably needs medical attention. This is not because such behaviors are conventional—dogs and horses do not have conventions, or at least not *mere* conventions⁸—and these behaviors can be explained in terms that do not partake of the explanandum:⁹ the fact that horses eat hay can be explained by evolution, which

7. See PHILIPPA FOOT, *NATURAL GOODNESS* (2001); TARA SMITH, *VIABLE VALUES: A STUDY OF LIFE AS THE ROOT AND REWARD OF MORALITY* (2000); LARRY ARNHART, *DARWINIAN NATURAL RIGHT: THE BIOLOGICAL ETHICS OF HUMAN NATURE* (1998); JULIA ANNAS, *THE MORALITY OF HAPPINESS* (1993); AYN RAND, *The Objectivist Ethics*, in *THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM* (1964).

8. There may be a sense in which animals can be said to have conventions—as, for example, ritualized displays that for evolutionary reasons substitute for physical combat. See, e.g., Jocelyn Crane, *Combat, Display, and Ritualization in Fiddler Crabs (Ocypodidae, genus Uca)*, 251 *PHIL. TRANSACTIONS ROYAL SOC'Y B* 459 (1966). But these conventions are, of course, *natural* for crabs in the relevant sense—just as culture is natural for human beings. Thus, I distinguish "culture" in the sense of conventional behaviors that fit within an explicable hierarchy of natural behaviors from "*mere* culture," meaning purely stipulative conventions. What I am getting at was best expressed (ironically enough) by David Hume: "Mankind is an inventive Species . . . and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as any thing that proceeds immediately from original principles without the intervention of thought or reflection." 2 *DAVID HUME, A TREATISE OF HUMAN NATURE* 190 (A.D. Lindsay, ed., New York: Dutton, 1911) (1740). See also DAVID BAYBROOKE, *NATURAL LAW MODERNIZED* 126–30 (2003) (discussing Hume's observation). It might be doubted whether there are such things as "*mere*" conventions—but if not, that only strengthens the argument for naturalism.

9. Cf. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 19 (1974) ("Invisible-hand

has fashioned a digestive tract whereby they are able to digest this plant, just as the dog's diet can be explained in terms of its evolution from its carnivorous ancestors. This is sufficient to say that their diets are a function of nature.

A horse that refuses to eat hay is a defective *qua* horse because that refusal is not consistent with its horsey nature—meaning that it is contrary to the horse's mode of survival and, if persisted in, will lead to the horse's demise. At the same time, the regularity by which horses prefer hay and dogs prefer bones is not *invariant*—dogs will not on *all* occasions gnaw bones, and horses will not *always* eat hay—nor is it an analytical truth. Therefore, if, like Popper, we demand of a purported natural law that it be unalterable, unbreakable, and unenforceable before we acknowledge it as a law, we would deny ourselves the ability to characterize the fact that dogs gnaw bones and horses eat hay as a “law.” That would clearly be indefensible because it would deny the name of natural law to virtually every observable and regular phenomenon.¹⁰ In short, to adopt unalterability, unbreakability, and unenforceability as the criteria of a valid “natural law” would render the critique of normativity a merely semantic argument. Even if we agreed with it, we would still need some new word for the observed regularities of the living world. We might as well use the word we already have and adhere to Aristotle's position that a natural law is a regularity that is always, or for the most part, true.¹¹

When discussing natural law or natural rights, we mean to differentiate these things from the merely *cultural* or *contingent*—i.e., from principles that depend exclusively upon social agreement for their validity or that are just stipulative. The Enlightenment era thinkers who developed the natural law/natural rights theory looked at human beings not as functions of their environment or culture but as members of a species. They asked two questions (which are actually the same question seen from different ends of the telescope). First, considering the *mass* of humanity in all its diversity, what common themes can we find in all societies (and why—and what lessons can we learn from this fact)? Alternatively, considering the human being in the abstract, what lessons can we derive from the features of her humanity by which we might

explanations minimize the use of notions constituting the phenomena to be explained.”).

10. J. BRONOWSKI, *THE COMMON SENSE OF SCIENCE* 81 (Cambridge: Harvard University Press, 1978) (1951) (“[T]here is no reason why laws should have this always, all-or-nothing form [I]f I say that after a fine week, it rains on seven Sundays out of ten...[s]omehow it seems to lack the force of law. Yet this is a mere prejudice.”).

11. ARISTOTLE, *Metaphysics*, in *THE BASIC WORKS OF ARISTOTLE*, 781 (Richard McKeon ed., 1941).

differentiate the contingent, conventional, or accidental elements of her life from those which are inescapable or necessary?

This project was, and remains, *the* great effort at a multicultural understanding of humanity. It is an attempt to comprehend human beings in the universal sense, as opposed to what is today referred to as their “situatedness,” and to rise above the “narratives” of race, religion, nation, etc., to grasp what people really are: what is true for people always and everywhere—and, to the extent that life is something else for people within a culture, to discern why. It represents an attempt to set aside mere accidents of history and bring society itself to the bar of justice.¹² For that reason alone, it is the noblest intellectual undertaking ever attempted.

If what we mean by “natural” here is not dependent on will or agreement, then what do we mean by “law”? Law means a rule or regularity controlling behavior and can therefore mean not only the regularities of the physical or biological universe but also the regularities arising from a scheme of principles. These regularities may occur within a framework of *conventional* rules but still be “natural” in the relevant sense. For example, if office managers declare that the office will be closed on national holidays and five years later a new national holiday is established the fact that the employees get that day off as well—even though it was not contemplated when the office policy was adopted—is *natural* in the relevant sense because it arises from “the nature and reason of the thing” rather than from express choice.¹³ This is so even though it arises within the framework of a rule established by mere convention. That is to say that natural law consists of the binding force of rules that is independent of human will (even when the rules are *themselves* creatures of human will), and it is to be found not only in the state of nature but also within conventions. It is for this reason that Hadley Arkes argues that even judges hostile to natural law reasoning practice it nonetheless.¹⁴ In any event, “natural law” means here not that the regularity is unalterable, unbreakable, and unenforceable, but that it is not purely stipulative—that its binding force exists “without reference to human sponsorship.”¹⁵

12. It is, for example, logically impossible to criticize the institution of slavery from anything other than a natural law foundation.

13. THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

14. Hadley Arkes, *The Natural Law Challenge*, 36 HARV. J.L. & PUB. POL’Y 961, 974 (2013).

15. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 110 (1966). Of course, there is an argument that these teleological laws are, indeed, unalterable, unbreakable, and unenforceable. Poet W.H. Auden put this point best in his poem “The Hidden Law”: “When we

For this reason, we can speak of natural law encompassing not only phenomena such as physical laws (that cannot be altered, broken, or enforced), but also the tendencies of human behavior and the emergent qualities of human tools or institutions. The law of supply and demand, for example, is a natural law: the fact that rare things tend to be more valuable within a system of limited resources and unlimited wants is not itself a product of human will even though it exists within a system (economic exchange) which is *itself* (largely) a function of human will. The fact that there are such laws is obvious. The fact that a rubber ball makes a poor substitute for a hammer is not a function of human will, even though rubber balls and hammers do not exist in a state of nature. The fact that a person who drinks too much will suffer a hangover and other maladies is not a function of human will, even though there is room for dispute over what type and degree of symptoms constitute “maladies.”

Also, when speaking of “natural” in this context, it is worth remembering that we are speaking specifically of *human* nature¹⁶—that is, of those qualities that mark out the human mode of existence. The term does not refer to mere biology, as some have claimed; the argument one often encounters, for example, that one cannot have a natural right to do something biologically “unnatural” trades on an equivocation about this and is therefore fallacious.¹⁷

We can better grasp what the natural law or natural rights theory seeks to do by looking at the example of sex. Sex is something human beings do in all cultures. There is a mind-boggling variety of taboos and traditions that have grown up around sex, and these certainly are social constructs—but sex itself remains a universal feature of human existence and is not *itself* a cultural artifact. It can be explained in terms that do not partake of culture (biological evolution), and when physicians, psychologists, anthropologists, historians, dramatists, poets, and others

escape It in a car, / When we forget It in a bar, / These are the way we're punished by / The Hidden Law.” AUDEN: POEMS 90 (Edward Mendelson ed., 1995); *see generally* Sandra Petersson, *A Poet's Concept of Law — What's Love Got to Do with It?*, in 18 REAL: YEARBOOK OF RESEARCH IN ENGLISH AND AMERICAN LITERATURE: LAW AND LITERATURE 131, 131–43 (Brook Thomas ed., 2002).

16. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 84 (1999); Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 661–62 (1997).

17. *See, e.g.*, HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 263 (1993) (arguing that homosexuality is contrary to biological nature and therefore that one can have no natural right to engage in homosexual acts). Daniel Dennett has termed the fallacy in question the “nudist fallacy,” DANIEL DENNETT, FREEDOM EVOLVES 185 (2003), since it would hold that clothing is “unnatural” because humans are born naked—when in reality human beings wear clothes “always or for the most part.” ARISTOTLE, *Metaphysics*, *supra* note 11.

seek to understand sex, they are seeking to grasp something that really *does* exist; it is an objective fact. The goal of their research is ultimately to come to an understanding that will fit it into the infinite tapestry of human comprehension—what Richard Feynman called the hierarchy of ideas that begins at one end with the fundamental laws of physics, moves up to the properties of substances, the phenomena of behavior, and rises to ever-more complex notions such as history, humanity, evil, and beauty.¹⁸

Our understanding of private property is of the same character. We begin by noting that it is a feature of every human society, notwithstanding Marxist fantasies to the contrary.¹⁹ Why? What are the cross-cultural, universal elements of humanity that account for this singular phenomenon? And if it is ubiquitous, what can we learn from this institution that might tell us how societies can be improved? That is, how they might better serve human flourishing? Or, we can ask, taking a human being on her own, and observing her tendency to claim exclusive possession of objects in her environment, what elements of the human personality might explain that behavior? Extrapolating from it, we might formulate principles to guide how we act with respect to people from other cultures or how we can improve our society.

B. “Is” and “Ought”

It might be thought that there is a relevant distinction here in that anthropologists studying the biology or sociology of sex do so in a descriptive sense and stand on the “is” side of the legendary “is/ought” divide, whereas private property is prescriptive, and thus stands on the “ought” side. This belief is mistaken. Consider how medicine works.²⁰ The physician is concerned with health.²¹ She begins by observing how

18. RICHARD FEYNMAN, *THE CHARACTER OF PHYSICAL LAW* 124–25 (1965).

19. See RICHARD PIPES, *PROPERTY AND FREEDOM* 76 (1999); BART WILSON, *THE PROPERTY SPECIES* 6 (2020).

20. It is no coincidence that both Aristotle and John Locke, our greatest natural rights/natural law thinkers, were both physicians; See generally PAUL BLOOMFIELD, *MORAL REALITY* (2001) (explaining that the model for natural ethics is medicine).

21. There is, of course, the metaethical question of why she should be concerned with health in the first place. Aristotle, for one, denies that anyone actually asks this. See *Nicomachean Ethics* 1112a, in MCKEON, *supra* note 11, at 969. Others contend that we do, but that the refusal to do so is self-destructive and thus logically invalid. See, e.g., Tibor R. Machan, *Rand and Choice*, 7 J. AYN RAND STUD. 257, 265 (2006). For our purposes, it is unnecessary to resolve this question because either way, the point is that, as distinct from the arbitrary metaethical *choice* of the existentialists, the neo-Aristotelian position here is about *discovering* morality.

people live and thrive, or fail to, and asks why in order to determine what might improve their health going forward. Or she begins with a hypothetical patient, constructing a model of “the healthy person,” and derives from that model what we actual people might do to improve our health. There is no such thing as *the* actual “healthy person” in medicine any more than there is the “beautiful person” in art or the “reasonable person” in law. Instead, these are mental constructs assembled out of observations of actual healthy, beautiful, and reasonable persons. But that does not mean the resulting principles of health are not valid, objective standards of value. Nor is this question begging because the physician does not rely on a culturally agreed-upon notion of health.²² Instead, she engages in a continuously ongoing process of thought that combines observation, induction, and deduction. This process recognizes living beings as goal-oriented—that is, they seek to maintain and improve their state in life—and then formulates a hypothetical model of the being that has attained, or is attaining, that goal.²³ This establishes a target at which the physician aims without committing any fallacious leap from one hermetically sealed intellectual world (“is”) to another (“ought”).

The “naturalistic fallacy” is a notion that has caused no end of confusion here. It is typically characterized as a rule that “you cannot derive an ‘ought’ from an ‘is,’” which is hasty and false. “Ought” certainly can be derived from “is” for living creatures, which, unlike inanimate matter, face the alternative of existence or nonexistence, and for whom there is consequently such a thing as “good for” or “bad for.”²⁴ Living creatures exist within the realm of “ought.” *Everything* is, in principle, either good for or bad for a living being. Thus, evaluative judgments straddle this boundary.²⁵ When the doctor says smoking is “bad for” the patient, the doctor is speaking both descriptively and normatively. This is a descriptive “is”-type statement because it is a factual matter that smoking will result in the patient’s death (i.e., nonexistence), and therefore it is an objectively provable descriptive claim that smoking is *deleterious* for the patient. But at the same time, it is also a normative statement in that

22. Sad to say, there has been a movement in recent years to do just that: to deny the reality of the concept of health in the name of “inclusivity.” See, e.g., Raya Muttarak, *Normalization of Plus Size and the Danger of Unseen Overweight and Obesity in England*, 26 *OBESITY (SILVER SPRING)* 1125 (2018). This is a perversion of the medicinal art.

23. DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, *LIBERTY AND NATURE* 42–43 (1991); ARNHART, *supra* note 7, at 244.

24. See, e.g., ARNHART, *supra* note 7, at 10–13; RASMUSSEN & DEN UYL, *supra* note 23, at 41–46.

25. See Philippa Foot, *Introduction*, in *THEORIES OF ETHICS* 9 (Philippa Foot ed., 1976).

deleteriousness has a prescriptive force and the doctor's statement prescribes behavior to the patient in terms of his or her flourishing. Claeys would call this a "relatively hypothetical directive" on the order of "X is valuable, and ϕ -ing produces X, so ϕ if you want X."²⁶ Because X in this case represents "exist," this prescription operates simultaneously as both a description and a prescription.

Those who criticize natural law/natural rights theory for crossing the line between descriptive and normative have fallaciously confused human beings with inanimate objects that do not face the existence/non-existence dilemma. For such objects, of course, nothing is either good or bad. They have no *telos*²⁷—no self-directed purposes—and therefore, nothing is at stake for them. But living beings' continued survival requires a course of action, and therefore their existence depends on choosing actions that will perpetuate or improve their existence. What's more, it is evident that living beings do not merely face a binary choice of existence or nonexistence but instead experience life on a spectrum of flourishing, such that things can, with varying degrees of complexity, improve or hinder the quality of their lives. In any event, it would be arbitrary and merely semantic to withhold the term "rightful" from actions that perpetuate and improve them.²⁸

This point about the "naturalistic fallacy" is worth emphasizing because misunderstanding about this matter has perversely generated a form of argument whereby thinkers who seem to try to avoid committing an allegedly illegitimate leap from descriptive to normative *actually do* end up committing a fallacy and indeed the very fallacy at issue: an insufficiently grounded leap from the observed state of affairs to the way things ought to be. Professor Bart Wilson appears to do just this in his book *The Property Species*. He begins with the premise that property is a natural feature of humanity—and complains about the way writers on these subjects "fear the moral connotations inherent in [words such as] right" to such a degree that they address questions of ownership in ways that "suck[] out" the "moral premises."²⁹ Yet his own account of rights characterizes them as something like "a feeling in our body," rooted in a sense of resentment against intrusions on our claims.³⁰ What distinguishes a justified sense of resentment against a misplaced one?

26. Claeys, *supra* note 4, at 60.

27. *Id.* at 61. Man-made objects have a *telos*, of course, but only insofar as they are created by living beings to serve their purposes.

28. See RAND, *supra* note 7, at 13–14.

29. WILSON, *supra* note 19, at 61.

30. *Id.* at 66, 80.

Wilson gives no answer. He argues that property “is moral” because “the community feels compelled through (morally justified) resentment to commit to the rule.”³¹ But absent an explanation of what constitutes the moral justification for such resentments—and he provides none—this can give us no normative ground for property. It can, at most, describe how people, in fact, behave. The journalist Rose Wilder Lane was fond of relating an incident that occurred during her travels in Albania in the 1920s: she encountered a group of native tribesmen arguing with a woman who claimed ownership of a house that she and her late husband had built with their own hands.³² Now that the husband was dead, they insisted on confiscating the house for their own use, and the woman insisted it belonged to her.³³ “They were unable to imagine” such an idea, Lane wrote.³⁴ Wilson would seem committed to the proposition that a woman could not possibly own a house because the community does not feel compelled through morally justified resentment (whatever this means) to acknowledge such a thing. Yet the woman—a member of the same tribe—still felt she could muster reasons in support of her claim.

Wilson’s entire argument boils down to the conclusion that property claims are legitimate whenever people (apparently, the majority) conclude that they own things—which is question-begging.³⁵ “I do own something in the physical world when I say ‘This is mine,’ and other people then judge the claim-act to be good or bad (as well as true or not true),” he writes. “We, in the full jointly attending meaning of the word, superimpose the abstract concepts ‘GOOD or BAD’ on the idea of the act itself.”³⁶ But even if it is true that people will reach a consensus about ownership—a dubious proposition, notwithstanding Wilson’s experimental evidence—to conclude that the person in question actually does have a morally justified property in that thing would be fallacious. That fallacy would indeed be an illegitimate leap from descriptive to normative: the conclusion that the woman does not own the house because

31. *Id.* at 84–85 (emphasis removed).

32. ROSE WILDER LANE, *THE DISCOVERY OF FREEDOM: MAN’S STRUGGLE AGAINST AUTHORITY* 7–8 (1943).

33. *Id.* at 7.

34. *Id.* at 8. Lane told the story in more detail in *THE PEAKS OF SHALA* 104–12 (1923).

35. See, e.g., WILSON, *supra* note 19, at 123 (“You have property in an object that you create because humans (and only humans) . . . recognize[s] the purposes of an ‘I’ in a created object, and one meaning of a created object is that by custom I can say, ‘This thing is mine.’”); see further Timothy Sandefur, *The Property Species: Mine, Yours, and the Human Mind* by Bart J. Wilson, *THE OBJECTIVE STANDARD* (Nov. 4, 2020) (book review), <https://theobjectivestandard.com/2020/11/the-property-species-mine-yours-and-the-human-mind-by-bart-j-wilson>. [<https://perma.cc/254Z-2LH8>].

36. WILSON, *supra* note 19, at 126.

observation shows that the tribesmen refuse to recognize her ownership.

To cite one example, Wilson, in discussing the famous case of *Durfee v. Jones*³⁷—which involved the ownership of money found in an old safe that Durfee purchased—cites research by psychologists who found that some 80% of people believed that Durfee owned the money.³⁸ This, he concludes, shows that such facts as the location of the money or whether Durfee was aware of its existence at the time of purchase “[do] not matter.”³⁹ But that is a *non sequitur* because these things might indeed matter; it may just be that 80% of people fail to see why. Polls can, at best, reveal only what public opinion is, and Wilson began by (rightly) rejecting the contention that property is a matter of mere convention.⁴⁰ The idea that property claims are legitimized by the collective “jointly . . . superimpos[ing] the abstract concepts of GOOD or BAD” on those claims is compatible only with a purely conventionalist or positivist account of property—the very one Wilson takes pains to reject.⁴¹ His approach is essentially like that of a botanist who examines a garden that has not been tended and—observing wilted leaves, dry soil, and small, shriveled fruit on the vines—concludes that this is how plants are supposed to look. Such a conclusion would (to borrow a phrase from Thomas Jefferson)⁴² mistake the abusive for the natural state of plants.

The Aristotelian gardener does something different: she observes that plants pursue goals (strong stems, bright green leaves, reproduction); perhaps she experiments to determine what improves or hinders their flourishing—and, finding that good water and fertilized soil tends to make them stronger, longer-lived, and more fruitful, she concludes that water and fertilizer are “good for” plants—that is, that they are *naturally* good for plants, not just good for them due to some socially constructed preference. She does not leap illegitimately from “is” to “ought,” but makes a logical conclusion, based on a combination of induction and deduction, that straddles these two categories: if the plant is to flourish instead of perishing and going out of existence, it must obtain water and nutrients.

Natural law/natural rights reasoning attempts to apply this method of reasoning to political and legal claims: it seeks to evaluate the political

37. *Durfee v. Jones*, 11 R.I. 588 (1877).

38. WILSON, *supra* note 19, at 140–41.

39. *Id.* at 141.

40. *See, e.g., id.* at 9.

41. *Id.* at 126.

42. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in JEFFERSON: WRITINGS, 1401 (Merrill Peterson ed.) (1984).

needs of human beings by considering mankind in the abstract—and drawing up a set of prescriptions for a healthful political and legal order.⁴³ Nothing about that analysis is necessarily fallacious or arbitrary. Far from “churning the void,” it examines the universe to grasp the causes and principles operating within it.⁴⁴

C. *Life as Standard of Value*

I have said the physician forms an abstract concept of the hypothetical “healthy” person and compares any particular patient to that model when assessing that patient’s condition. In doing so, the physician recognizes a standard of value—an idealized model that enables her to rank various states of health encountered in real-world people. In ethics—and, consequently, in politics—we need a similar standard of universal value, one that is “natural” or objective in that it does not depend on mere taste, tradition, or cultural consensus. This is the role *flourishing* plays.⁴⁵ Flourishing is an objective standard of value whereby we can avoid the arbitrariness of duty-based ethical schemes as well as the insularity and chauvinism of moralities that rely for their validity solely on majority preferences or cultural “identity.”

This is not merely a matter of convenience but a solution to one of the principal problems with relativism, which is that without a universal standard of value, we cannot deliberate about morality in the first place. An ethical or political perspective that views all such matters as social constructs ultimately makes political discourse incoherent. If moral or political values are exclusively and irreducibly functions of inherited culture, such that a person from one culture cannot validly criticize the practices or institutions of another, then moral discourse becomes impossible in principle because no two individuals, even within the same

43. Barnett, *supra* note 16, at 663–64.

44. On the contrary, it is the positivist or “realist” that occupies a fallacious position, by arguing that law is not really grounded on underlying propositions about justice or ethics, but is simply the application of force in specific situations. Such a position is not merely an alternative theory about law, but is actually the denial of the *existence* of law, since law just is the subordination of force to the government of rules, whereas the realist position regards such rules as only thinly disguised exertions of arbitrary force. Because the realist or positivist is essentially denying the existence of law, he cannot make valid prescriptions about how to improve the law; *see also* Timothy Sandefur, *Hercules and Narragansett among the Originalists: Examining Tara Smith’s Judicial Review in an Objective Legal System*, 39 REASON PAPERS 8, 8–13 (2017) (elaborating on this point in discussing J. Harvie Wilkinson’s *Cosmic Constitutional Theory*).

45. HENRY B. VEATCH, HUMAN RIGHTS: FACT OR FANCY? 68–69 (1985); Claeys, *supra* note 4, at 17 (“Flourishing sets a direct standard for conduct when people reason about ethics, how they should behave in their own lives.”).

cultural boundaries (whatever that might mean) share identical cultural awareness or engagement. Taken to its logical conclusion, cultural relativism necessarily reduces to an absolute moral cynicism according to which no two people can rationally deliberate about the good or about justice at all.⁴⁶ On the other hand, any effort by two people to deliberate about morality necessarily must assume *some* accessible moral standard. Otherwise, they are on a snipe hunt.⁴⁷

D. *Indefeasible Personal Responsibility*

Another preliminary point: the actions by which living beings survive and thrive are not only simultaneously normative and descriptive but are also *self-generated*. In the most elemental sense, each human being must breathe for herself, and her heart must beat for itself. She must also think for herself, desire for herself, be educated for herself, etc., and neither these responsibilities nor the benefits of discharging them can be transferred to anyone else. It is a universal fact of human beings that they possess this quality of inalienable personality—what I have called indefeasible personal responsibility.⁴⁸

This fact is important because it generates an asymmetry sometimes overlooked by writers on these topics. Often, those arguing over the nature of rights proceed from the unspoken premise that the choice between a social system that respects individual rights and one premised on the denial of these rights is a choice between equally valid alternatives—that is, that they can be weighed in the scales, and their costs and benefits compared, as we might balance the costs and benefits of replacing a downtown intersection with a traffic circle or buying a Ford

46. As Richard Epstein puts it, “[t]o deny the possibility of [moral] argument across cultures”—as does the relativist who views concepts such as “rights” as mere social constructs—is to deny them within cultures, or indeed between individual persons, each of whom could stoutly defend any moral proposition to the bitter end If individuals in different cultures are helpless to resolve differences in the face of disagreement, then individuals within the same culture are equally helpless to persuade. On the other hand, if people can communicate within cultures, then they can communicate between cultures.” RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM* 81 (2003).

47. Or, worse, they must settle their (purely subjective) differences by violence. This is the position Justice Oliver Wendell Holmes took. *See generally* ALBERT ALSCHULER, *LAW WITHOUT VALUES* (2000). It should be clear from this why moral relativism tends toward fascism. If there are no objective moral values, people are left only with traditions, with no moral currency with which to cross traditional boundaries. They will tend to default to favoring those traditions with which they personally identify, and find themselves embracing *völkisch* notions as the only refuge against moral chaos.

48. TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* 8 (2014).

instead of a Chevy. But infeasible personal responsibility means that, in matters of individual rights, there is a fundamental, biologically determined *asymmetry*. Just as a person cannot be deprived of his or her education, fears, appetites, etc., so a person cannot ultimately be deprived of the freedom of choice regarding his or her faculties. It is not, literally speaking, possible to force someone to think, for example, or to love or to appreciate. One might kill her, torture her, or submit her to great deprivation—but one cannot actually *compel* her personal choices. Nor can one take away another person's suffering or another person's responsibility or conscience. One person cannot breathe for another.

This fact about human nature tips the scales in favor of individual autonomy and against the control of the individual by another.⁴⁹ The costs and benefits of living are unalterably individual in nature. Someone who is raped or robbed, for example, suffers in a way that cannot be compared to the deprivation (if that is even the right word) that a person suffers when he or she is forbidden to engage in raping or robbing. Likewise, a king, a president, or a majority may experience some kind of injury when denied the authority to coerce the actions or seize the property of the citizen, but that cannot be compared to the injury the citizen suffers when she has her freedom or property snatched away from her by one of these sovereigns. Among other ways, this asymmetry is manifested as the fact that the individual who loses her home is now entirely without a home—she has lost something she once possessed—whereas the sovereign that is denied the ability to take away someone's home still possesses many different kinds of authority and has not lost something it once possessed; it has merely been denied the opportunity to obtain something it lacks. These are not the same thing. Claeys quotes Hanoch Dagan as fearing that emphasis on the individualistic nature of property rights “can ‘improperly bolster the cultural power of libertarian claims’”⁵⁰—as if these claims and their opposites are equally plausible rivals for cultural power.⁵¹ But tempting as it might be to those who

49. See also TIMOTHY SANDEFUR, *THE PERMISSION SOCIETY: HOW THE RULING CLASS TURNS OUR FREEDOMS INTO PRIVILEGES AND WHAT WE CAN DO ABOUT IT* 9 (2016).

50. Claeys, *supra* note 4, at 73.

51. To be fair, this appears to take Dagan's words out of context; he argues not that private property conceived as an individualistic institution “bolsters the cultural power of libertarian claims,” but rather that overemphasizing the significance of the right to exclude, as compared with other attributes of “the law of property as lawyers know it or . . . as citizens experience it in everyday life,” tends to give undue emphasis to extreme, unusual, or marginal aspects of property rights—rather in the same way that focus on “lifeboat” situations can distract us from the main thrust of ethical theories. HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 40–41 (2011). One might, however, dispute whether it is fair to label these latter “libertarian.”

wish to appear objective by maintaining a tone of neutrality, we cannot reduce the distinction between a propertyless society and a society with strong property rights to a mere duel between two competing social models. They are not opposite sides of the same coin.⁵²

That asymmetry suggests the answer to a question Claeys poses: when we speak of flourishing as the *telos*, which guides our understanding of institutions such as private property, do we mean the flourishing of the individuals who make up society or the flourishing of society as a whole? Claeys argues that “it is far easier to envision how one person flourishes than it is to envision how a group flourishes,” and this is true.⁵³ But even aside from questions of how we would measure it, the asymmetry between the experience of the individual whose life is at issue and that of the society or ruler who purports to dictate, through the state’s coercive power, how she shall live, or what experiences she shall have, or what choices she shall be allowed to make, is itself sufficient reason to conclude that individual flourishing is the proper standard of value. It is an immediate and irreversible personal experience to a specific personality—whereas social flourishing if it means anything, is measured as broad trends experienced by constantly fluctuating populations. Frederick Douglass’s enslavement hindered his individual flourishing in a manner that is simply not comparable to the way in which, say, abolitionist rhetoric hindered the survival of the “southern way of life” in southern polities (as slavery’s defenders claimed). Melanchthon Cliser’s suffering from the government’s confiscation of his home in 1935 was immediate and ineradicable in a way not comparable to the “suffering,” if it can be called that, which would have been inflicted on the public if the Shenandoah Parkway had not been built as planned.⁵⁴

Most of all, this asymmetry is all but decisive in any purported rivalry between a social system in which the individual’s responsibility for her own choices is respected and one in which the individual is regarded as responsible for other people’s choices and not for her own.⁵⁵ Moral

52. See LANE, *supra* note 32, at 149 (“Freedom is not a permission granted by any Authority. Freedom is a fact. Whether or not this fact is known, freedom is in the nature of every living person, as gravitation is in the nature of this planet. Life is energy; liberty is the individual control of human life-energy. It cannot be separated from life. Liberty is *inalienable*; as I cannot transfer my life to anyone else, I cannot transfer my liberty, my control of my life energy, to anyone else.”).

53. See Claeys, *supra* note 4, at 67; see also Claeys, *Introduction*, *supra* note 4, at 420.

54. See *generally* SUE EISENFELD, SHENANDOAH: A STORY OF CONSERVATION AND BETRAYAL 113 (2015).

55. The argument has sometimes been (rather crudely) put as, “the needs of the many outweigh the needs of the few.” See, e.g., *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 162 (Tex. 2010) (Willett, J., concurring) (quoting *STAR TREK II: THE WRATH OF*

responsibility is one of the inalienable and inescapable qualities of the individual: even in a slave society, slaves are held liable for crimes such as murder.⁵⁶ But if the slave may be punished for committing murder, then it logically follows that the slave must have the right to make (at a minimum) the choice *not* to murder. This is the implicit contradiction in slavery, and this extreme example reveals that even in the severest circumstances, the individual cannot be truly deprived of responsibility and, therefore, cannot be legitimately deprived of freedom. Ineradicable personal responsibility carries with it ineradicable personal freedom—or, at least, it must in any society comprehensible in rational terms.⁵⁷ All of this is to say that it really is *true* that “all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity.”⁵⁸ This is not a mere preference, nor is it morally on a par with the opposite position. It is a fact of the world.

To summarize, although we are sometimes tempted to view politics as a choice between a society organized along principles of (say) individual rights and private property on one hand and, on the other hand, collective ownership and duties to the state—as if these are mirror images of each other—they are not. The former is a genuine political rule because it accords with the inescapable facts of human nature—

KHAN (Paramount Pictures, 1982)). But taken to its logical conclusion, such a premise is a recipe for cannibalism. It certainly is not compatible with the rule of law; see William R. Maurer, *Should Judges Judge?: The Affordable Care Act, Subsidies, and Judicial Engagement*, 15 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 8, 9 (2014) (“the idea that the courts should operate on a ‘needs of the many outweigh the needs of the few’ [basis] means that we are not really a country of laws.”). Notably, even *Star Trek* itself rejected this view. See *STAR TREK III: THE SEARCH FOR SPOCK* (Paramount Pictures, 1984) (Spock: “Why would you do this?” Kirk: “Because the needs of the one outweigh the needs of the many.”).

56. See, e.g., THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES § 302 at 263 (1858).

57. It is possible, of course, for a society to be governed by arbitrary warlords who neither respect nor expect to be governed by any principles whatever. But such a regime does not purport to be a rule of law, and therefore is not amenable to rational analysis. Such a society is outside the scope of our inquiries because it is not, in fact, a political state. Cf. ARISTOTLE, *Politics* 1279a, in MCKEON, *supra* note 11 at 1185. As for the true totalitarian state, it is (to borrow a term from physics) a kind of political singularity, in which the laws of rational political discourse entirely break down. Cf. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 461 (San Diego: Harvest/HBJ, 1973) (1951) (“totalitarianism . . . has exploded the very alternative on which all definitions of the essence of governments have been based in political philosophy, that is the alternative between lawful and lawless government, between arbitrary and legitimate power.”).

58. Virginia Declaration of Rights § 1 (1776). See further Tom G. Palmer, *Saving Rights Theory from Its Friends*, in *INDIVIDUAL RIGHTS RECONSIDERED* 35, 69–84 (Tibor R. Machan ed., 2001).

particularly infeasible personal responsibility—whereas the latter inevitably collides with those facts,⁵⁹ and for that reason, is not properly classified as a political constitution in the first place.⁶⁰

III. PROPERTY RIGHTS

A. *Self-Ownership*

With those preliminaries in place, let us examine private property, beginning not as Claeys does with traditional terms of real estate, personal property, and the like, but with the most primordial of all property: the ownership of one's own body. Do I own my liver? If so, why? Asking the question that way should put us on guard against the assumption that ownership necessarily depends on *earning*. While moral desert can be one basis for legitimate claims, Claeys is right that "[n]o one needs to do or earn anything to be entitled to the right not to be touched; people are entitled to it simply by being persons."⁶¹ Unfortunately, he essentially leaves it at that. We should instead explore the source of this right—which, at least according to the long-standing tradition of natural rights theory, lies at the fountainhead of all rights claims—and examine its implications for a broader understanding of ownership.

Self-ownership is not *conferred* on the individual, and the individual cannot, of course, appeal to a right-by-creation argument. Instead, self-ownership is a species of ownership-by-discovery, the principles of which are that the first claimant of unowned property is presumptively entitled to it against anyone else.⁶² The reasons for that rule are, first, that it is subject to relatively simple objective determination—it's a question of ascertainable fact whether the purported owner did indeed discover the thing first—and, second, because such an easily enforceable rule resolves potential conflicts between rival claimants, while leaving them free to bargain for the disposition of the property afterwards. All of us are born into the world through no choice of our own, and we find ourselves in possession of our limbs and organs. A simple rule of presumptive self-ownership serves the goals of resolving or preventing disputes over rightful claims to things (in this case, body parts). Since all

59. Which is why collectivist regimes are inevitably preoccupied with trying to remake humanity. See also PIPES, *supra* note 19, at 211–17.

60. See ARISTOTLE, *Politics* 1279a, in MCKEON, *supra* note 11, at 1185.

61. Claeys, *supra* note 4, at 45.

62. See generally Lawrence Berger, *An Analysis of the Doctrine That "First in Time is First in Right"*, 64 NEB. L. REV. 349, 350 (1985).

men are created equal, with none marked out as the natural ruler of another, the individual is in the best position to claim ownership of herself.⁶³ Claeys tells us that slavery is contrary to the natural rights property theory because “someone who wants to be a slave master must deny that the people he wants to enslave are beings with the moral status that people all have,”⁶⁴ and that is true—but the “moral status” in question is the status of individual possessors of their own bodies.⁶⁵ The reason it is wrong for the master to deny that status is that to do so is to contradict the principle on which he implicitly proposes to act.⁶⁶

The presumption of self-ownership is irreconcilable with the proposition that property and other rights are privileges society bestows on the individual or that society lets the individual possess because of some kind of benefit to society that results from the private possession of resources. If, as Ronald Dworkin holds, “[t]he sovereign question of political theory, within a state supposed to be governed by the liberal conception of equality, is the question of what inequalities in goods, opportunities, and liberties *are to be permitted* in such a state, and why,”⁶⁷ then the state would presumptively own the newborn child; it must make some type of collective determination according to some egalitarian principle to *permit* her to possess her limbs and organs, to the exclusion of others—a decision the collective could just as easily reverse. In such a state, the individual would be a tenant at sufferance in her own body. The same would hold true of our opinions, appetites, educations, and fears, given that Dworkin, following John Rawls, holds that even “differences in talent” are “morally irrelevant” in the calculus when society decides what to allow individuals to possess.⁶⁸ This may seem an

63. The obvious exception to this is that children are naturally subject to the rule of their parents—which is the exception that proves the rule. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 345–61 (Peter Laslett, ed., Cambridge Univ. Press 1963) (1690).

64. Claeys, *supra* note 4, at 113; see also Claeys, *Introduction*, *supra* note 4, at 435.

65. A point Frederick Douglass often emphasized in his speeches, as when he said that he was “considered a thief and a robber, since I have not only stolen a little knowledge of literature, but have stolen my own body also.” Speech in Taunton England (Sept. 1, 1846), in *THE FREDERICK DOUGLASS PAPERS: SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS VOLUME 1: 1841-1846* 372–73 (John W. Blassingame, ed. 1979).

66. See ALAN GEWIRTH, *REASON AND MORALITY* 168 (1978) (exploring this proposition); see also Eric Mack, *Self-Ownership and the Right of Property*, 73 *MONIST* 519, 522 (1990) (“The recognition of others as reason-bearing and value-pursuing beings on a moral par with oneself does not, then, require allegiance to their good, nor to the promotion of a social good that is imagined somehow to be constructed out of everyone’s incommensurable values,” but instead it takes “the form of deontic constraints on one’s liberty to use others.”).

67. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 273 (1978) (emphasis added).

68. RONALD DWORIN, *A MATTER OF PRINCIPLE* 199 (1985).

exaggeration, but recall that Dworkin elsewhere asserts that “there is no such thing as any general right to liberty.”⁶⁹ All freedoms, he says, are permissions granted to the individual for social purposes. Socialist writer Sidney Webb took this view to its logical conclusion when he argued that the mere nationalization of real estate was insufficient because that would “leave untouched . . . the largest [monopoly] of them all, the monopoly of business ability.”⁷⁰ Consistently enough, he argued that the “special ability or energy with which some persons are born,” and which enables them to accumulate wealth, “is as much due to Society as the ‘unearned increment of rent’” and that it should therefore be nationalized as well.⁷¹

The proposition that ownership is a privilege bestowed on the individual by collective choice conflicts with infeasible personal responsibility. It is simply and self-evidently not true that society chooses to bestow a person with a personality or the contents of her mind. In a similar manner, the proposition that the individual’s body belongs presumptively to society unless and until society chooses to give her autonomy over the body she inhabits collides with the fact that it is impossible for society to do otherwise: it cannot *actually* foreclose on such an asset because it cannot breathe for the individual or cause her heart to beat. These things can only be done by that individual—and if they fail, she is the primary sufferer of the consequences.

The self-ownership principle plays another important role. In establishing social rules, we begin by drawing baselines—that is, default presumptions from which deviations must be justified.⁷² These take the form of “Do X unless there is good reason to do otherwise.” Baselines give us a framework for how to behave, while still allowing for flexibility when needed. While there is some degree of arbitrariness in these rules (driving on the right side of the road instead of the left, for example), there are natural limits on what kinds of rules are viable. “Drive backwards,” for example, or “tie goes to the catcher,” would be irrational and are therefore ruled out by the nature of the thing. And some rules are effectively dictated by the nature of the materials at hand: “fat over lean” in painting, for example, or, in horseback riding, “a horse should bear no more than 20% of its body weight,” or, in flying, “a pilot should abort takeoff if her plane has not reached 70% of takeoff speed by the time she’s halfway down the runway.” Natural law principles establish

69. DWORKIN, *supra* note 67, at 277.

70. SIR HENRY WRIXON, *SOCIALISM BEING NOTES ON A POLITICAL TOUR* 83 (1896).

71. *Id.*

72. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 25–38 (1993).

boundaries for positive law: there is “room for play in the joints,” as they say,⁷³ but there are limits that ultimately cannot be crossed. Self-ownership is a limiting principle, and one of the baseline propositions that arise from it is that the individual is presumptively free to act unless good reason exists to forbid that action.

As Anthony de Jasay has explained, this presumption of liberty is not a mere social construct or cultural preference; it is embedded in the logic of decision-making itself: for the same reason that the person asserting a claim bears the burden of proving it (*onus probandi*), as opposed to the person who denies that claim (*probatio diabolica*), so the individual who proposes to act is free to do so unless and until good reason is provided to block that person’s actions.⁷⁴ To adopt the contrary presumption would require the individual to provide an infinite number of justifications, rendering any individual action impossible and again colliding with infeasible personal responsibility since the individual cannot request social permission for each breath, heartbeat, thought, or desire. The baseline rule of the presumption of liberty is dictated by the nature of the materials (infeasible personal responsibility; the structure of logical argument).⁷⁵ It also serves important social purposes: it provides lawmakers and citizens with a simple and useful guide to action (everything is permitted which is not forbidden) which can apply in a variety of contexts.⁷⁶

In short, the principle Claeys calls “bodily security” is indeed something to which “people are entitled . . . simply by being persons,”⁷⁷ but it is not an arbitrary social preference or cultural tradition, let alone a principle created by the common law. It is a necessary implication of the nature of human beings and of the world in which they live. It is a natural right. As Tom G. Palmer puts it,

73. *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 669 (1970).

74. ANTHONY DE JASAY, *JUSTICE AND ITS SURROUNDINGS* 150–51 (2002); SANDEFUR, *supra* note 48, at 8–9.

75. Cf. HANNAH ARENDT, *On the Nature of Totalitarianism: An Essay in Understanding*, in HANNAH ARENDT, *ESSAYS IN UNDERSTANDING 1930-1954* 334 (1994) (“The very fact that in all free societies everything is permitted which is not explicitly prohibited reveals the situation clearly: The law defines the boundaries of personal life but cannot touch what goes on within them. In this respect, the law fulfills two functions: it regulates the public political sphere . . . while, at the same time, it circumscribes the space in which our individual destinies unfold—destinies which are so dissimilar that no two biographies will ever read alike. The law in its sublime generality can never foresee and provide the *sum* which everybody receives in his irrevocable uniqueness.”).

76. Cf. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 292 (2d ed. 2011) (describing how this principle is a “closing rule” that closes the gaps in a legal system).

77. Claeys, *supra* note 4, at 45; see also Claeys, *Introduction*, *supra* note 4, at 433.

the fact that each has a life to lead is coextensive in moral significance with the fact that each bears responsibility for acts in a well-delineated sphere of ownness Precisely because each person has one and only one body, rights over bodies—a ‘property in one’s person’—offer a secure foundation for the entire structure of rights . . . that are capable of being jointly realized.⁷⁸

Claeys, however, never uses the term “self-ownership.” He views property instead as essentially a group of principles whereby the community “confer[s] institutional status on certain *accepted* normative relations . . . to facilitate the productive use of separable resources.”⁷⁹ In other words, property rights are permissions from the collective, which is presumed to have all the rights at the outset; it parcels out these permissions in accordance with principles that Claeys contends are “natural” in the relevant sense. Thus “[a]s a threshold matter, all of the people in a political community are entitled to exercise equal and natural rights on the resources over which that community exercises jurisdiction,”⁸⁰ and his inquiry is aimed at discovering the principles that justify going past that threshold.

This, however, seems to clash with the usual social compact argument whereby the community cannot exercise any jurisdiction that was not first vested in it by the people. According to that argument, individuals, not the collective, are the primary rights-holders. The community is only a derivative rights-holder.⁸¹ If individuals do not have legitimate property rights to begin with, they cannot vest the community with any such claims, so it is not possible for the community to assert authority over all property in its jurisdiction as a basic axiom. Claeys reverses this argument and starts with collective jurisdiction—i.e., collective ownership—before seeking to deduce individual rights from that. This is question-begging because it assumes the existence of (collective) property rights as part of its purported proof of (individual) property rights.

What’s more, the community’s claims over property would presumably have to satisfy the same provisos and conditions to be valid.⁸² Yet

78. Palmer, *supra* note 58, at 80–81.

79. Claeys, *supra* note 4, at 159; *see also* Claeys, *Introduction*, *supra* note 4, at 434–35.

80. Claeys, *supra* note 4, at 231.

81. *Id.* at 353; LOCKE, *supra* note 63 § 135 (“the *Legislative* . . . is *not*, nor can possibly be absolutely *Arbitrary* over the Lives and Fortunes of the People. For it being but the joynt power of every Member of the Society given up to that Person, or Assembly, which is Legislator, it can be no more than those persons had in a State of Nature before they enter’d into Society, and gave up to the Community. For no Body can transfer to another more power than he has in himself.”).

82. If not—if the provisos are only hurdles a person must jump over in order to

the community is not making productive use of the property and is not leaving enough and as good for others, which is necessary *ex hypothesi* to justify the community's "threshold" claim of jurisdiction. Claeys simply assumes the collective owns everything and requires the individual to justify his or her claims without requiring any such justification on the part of the community with respect to its alleged initial ownership. It is not clear how this avoids leading to the absurd conclusion noted above: that the individual does not own his own organs, ideas, and fears but is vested with ownership of these and other things by the community so long as he satisfies the various criteria (productive use, sufficiency, etc.).⁸³

Consider, too, how this argument fares with respect to other rights, such as freedom of religion. Claeys confines his discussion to property, but the natural rights argument has typically held that freedoms of religion, speech, and so forth are all reducible to a form of property rights argument: it is because the individual owns herself that she owns her beliefs and ideas, and therefore nobody else may justly override those freedoms.⁸⁴ How, then, would Claeys's argument work with respect to these other rights? Is religious freedom, too, a principle by which the community confers institutional status on certain accepted relations in order to facilitate a broader social goal? Does the community, in the first instance, possess authority over all religious obligations and freedoms within its jurisdiction—and does it then allow people to worship God as they see fit so as to accomplish desirable collective ends? To answer these questions "yes" is to reveal that we are not really dealing with a natural rights argument at all, but a positivist argument whereby rights are actually privileges accorded to the individual by the ruling authority.

The substance of the two provisos Claeys asserts as limits on the transition from purported initial collective ownership to the state of individual ownership are also problematic. These are sufficiency—that is, the "Lockean proviso" holding that "anyone who appropriates and uses

establish a legitimate privatization of the commons—then the provisos are rules from which the community is exempt, which contradicts the equality principle. Because the community can have "no more" authority "than [the] persons had in a State of Nature before they enter'd into Society," LOCKE, *supra* note 63 § 135. To assert that the community as a whole is exempt from these provisos would indeed be putting "a Hobbesian stick into the Lockean bundle." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

83. See Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1239 (1979) ("[T]here is nothing in principle which says that the theory [of original common ownership] could not be extended as well to govern the way in which individuals acquire rights in themselves. Here the theory of common ownership clearly seems to lend itself to totalitarian uses and abuses.").

84. See, e.g., JAMES MADISON, *Property*, in MADISON: WRITINGS (Jack Rakove ed., 1999).

some resources must ‘leav[e] for others their shares and the opportunity to appropriate within them’⁸⁵—and the productive use requirement, that is, the rule that a person can only assert ownership of owned property where she profitably employs it.

The Lockean proviso is, in principle, impossible to satisfy and logically incoherent.⁸⁶ It assumes a positive claim by others to the resources in the state of nature prior to appropriation. As we have noted, however, that is question begging since this positive claim by others constitutes the existence of a (collective) property right, before our inquiry has established the existence of any such thing. When Claeys asserts that resources in the state of nature “are subject to a baseline of community access,”⁸⁷ he means just this: the unowned property in the state of nature in this model is not actually unowned at all but is presumptively owned by the “community,” and we are being asked not what the conditions are that justify initial acquisition of *unowned* property but what the conditions are for the enclosure of a commons. Not only is this fallacious—since, again, the point of the inquiry is to weigh the establishment of property rights in a hypothetical state in which no such legitimate ownership claims have yet been established—but it is an impossible standard to meet since in a world of finite resources, all acquisitions will necessarily *not* leave enough and as good for others.

This fact can be obscured by the typical examples, which consist of rights to the use of a river or the acquisition of apples in an orchard. It is possible for John Doe to acquire a certain number of apples and leave apples behind for others to acquire. But they are not the *same* apples, and John is therefore not literally leaving enough and as good for others.⁸⁸ The more acquirers there are, of course, the less possible it is to leave anything for others. Moreover, new property is constantly being created—within the individual human body, new blood cells are

85. Claeys, *supra* note 4, at 135 (quoting JOHN A. SIMMONS, *THE LOCKEAN THEORY OF PROPERTY RIGHTS* 288 (1992)).

86. It is also likely to exacerbate interpersonal conflict, contrary to its intent. Michael Makovi, *The “Self-Defeating Morality” of the Lockean Proviso*, 32 *HOMO OECOMICUS* 235, 239 (2017).

87. Claeys, *supra* note 4, at 136; see also Claeys, *Introduction, supra* note 4, at 436–37.

88. Claeys equivocates on this point when he says that “[t]he sufficiency proviso protects people’s access to some share of resources *in a class* when most of the resources *in that class* have already been appropriated,” *id.* at 118 (emphasis altered), but elsewhere characterizes it as requiring that “all people get some reasonable opportunity to acquire and use goods for their own preservation and self-government,” Claeys, *supra* note 4, at 135. What qualifies as a “class”? Apples? Fruit? Edible plants? Also, why “self-government”?

constantly being formed, and inventors and great business enterprises are constantly devising new technologies and new strategies—and these resources are instantly possessed by their creators without any thought of the sufficiency proviso.

The egalitarian presumption Claeys assumes in the state of nature necessarily affects every subsequent transaction. If the proviso really is essential, then the fact that it cannot be satisfied cripples his theory of private property. But it is not essential. In a state of nature where property is truly unowned, the initial acquirer has no obligation to refrain from acquisition in order to allow others (that is, rivals) to acquire or for any other reason. He is obligated only to avoid initiating force. All the equality principle really requires is that the initial acquirer respect the right of others to acquire the unowned, *not* that he refrain from acquiring himself. Would this entitle the initial acquirer to lay claim to the entire earth, leaving nothing for others? No, because the “productive use” requirement already addresses that case.⁸⁹

As to that requirement, Locke introduces it in order to avoid the obvious objection that in a state of nature theory, “any one [might otherwise] *ingross* as much as he will,”⁹⁰ leaving others unable to obtain resources necessary for their survival. He recognizes the extremely narrow application of this principle by concluding that it has been superseded by an economy that uses money as a means of storing value. Thus, it is not the case *in a state of civil society* that “[p]eople’s uses of things must contribute somehow to their own or others’ flourishing” in order for their possession to be legitimate.⁹¹ Nor can it be the case that nonuse renders an existing property right invalid. No human uses her appendix, but it cannot be thought that we do not own our appendices.⁹² Indeed, a property owner *typically* does not *actively* use property—we are away from home for long periods of time; we allow our cars to sit unused in parking lots for most of their existence—but this does not divest us of ownership. Claeys acknowledges that we have a right to “passive[ly]” being “gratified” by property ownership.⁹³ So if we are to avoid tedious, possibly question-begging arguments over the meaning of the word “productive” (do we put an artwork to “productive use?”), then the principle must be compatible with long periods of allowing

89. *Id.* at 212.

90. LOCKE, *supra* note 63 § 31; Claeys, *supra* note 4, at 332.

91. Claeys, *supra* note 4, at 123; *see also* Claeys, *Introduction*, *supra* note 4, at 420–21.

92. *But see* MONTY PYTHON’S THE MEANING OF LIFE (Terry Jones, dir. 1983) (“Can we have your liver, then?”).

93. Claeys, *supra* note 4, at 125.

property to lie fallow, in which case it becomes extremely hard, and likely profitless, to figure out where to draw the line between productive and nonproductive uses. To the extent that the productive use criterion accomplishes anything with regard to a state of civil society, therefore, it appears to be that it reminds us that individual rights exist within a context—that is, for reasons—and specifically that their role is to set the terms within which individuals can pursue to their flourishing.⁹⁴ Nonuse does not render a person's claim invalid except perhaps in the rarest of circumstances, but productive use is one reason a claimant can point to justify his claim, and the reason it is regarded as persuasive is because it fits in the hierarchy of values that all serve flourishing.

B. *Working From Self-Ownership*

Self-ownership plays an important grounding role in property rights because it establishes the presumption of liberty and the recognition of the asymmetry discussed above. It is also important because it operates as stage one of the traditional Lockean account of how we transition from the primitive stage of initial acquisition into a state of society.⁹⁵ The traditional argument is that because I own my labor, I may exchange it on mutually agreeable terms with others (who also own their labor) and keep the fruits of those transactions, and because I have committed no injustice in doing so, I can accumulate those fruits and retain them to use as I please. To deprive me of them is effectively to deprive me of my

94. Epstein notes that, even assuming we are seeking to justify a privatization of the commons, the productive use criterion is not constraining enough—because the individual would not appropriate if he was simply going to waste the property—and the Lockean proviso is too constraining, because no privatization will ever really leave enough and as good for others. Richard A. Epstein, *On the Optimal Mix of Private and Common Property*, 11 *SOC. PHIL. & POL.* 17, 17–18 (1994). Instead, it is better to ask whether the transition to private ownership makes everyone marginally better off. *Id.* at 20. But it seems preferable to reject the premise that ownership is fundamentally about privatizing what is prima facie collectively owned. The *self* is not collectively owned; it is presumptively (and inalienably) private. The question is not whether the individual has met the tests necessary to claim property; the proper approach is to ask whether others have satisfied the criteria to justify depriving the individual of his acquisitions. He has sufficiently satisfied the principle that all men are created equal if he has injured no other person in acquiring property.

95. Locke's own argument did not, precisely speaking, rely on self-ownership, because Locke held that God, not the individual, owns the individual. The individual holds only a life-estate in herself. This argument, which was meant to defuse the Hobbesian argument that the individual by entering into the social compact effectively surrendered all her rights, also means the individual cannot rightly engage in self-destructive behavior. As Erick Mack has shown, however, the argument is untenable and unnecessary to Locke's overall argument. See ERICK MACK, *JOHN LOCKE* 40–47 (2013).

labor and thereby, in some sense, make me a slave, for the same reason that to batter me or kidnap me is to deprive me of my legitimate authority to choose my actions. As Jasay puts it, injustice is only brought about by unjust acts.⁹⁶ Thus, as long as an exchange is “untainted by force, fraud, or unconscionability,” the outcome “is just, since those concerned jointly chose it.”⁹⁷

Of course, the question is whether certain types of constraints—the provisos—are necessary to prevent “unconscionability.” Claeys says yes: like Locke, he asserts that *actual* consent of the collective is not necessary to legitimize private ownership, as long as the claimant satisfies the provisos: “when consent comes into conflict with productive and clearly-communicated use, the person withholding consent lacks any objective justification to stop the user from appropriating the resource,” he writes.⁹⁸ “By the same token, the user has a corresponding justification to use the resource—and also justification to use force to repel challenges by the people withholding consent on irrational grounds.”⁹⁹

Eric Mack offers a more thorough explanation. He argues that self-ownership is the basis of what he calls *act*-based claims of ownership, in which the self-owning individual engages in some “property-generating act,” which suffices to establish one’s ownership of the *res*.¹⁰⁰ Relatively few ownership claims can be plausibly justified by such a theory, however, and it is implausible for large and abstract claims, such as one’s membership in a mutual fund or right to inherit something from a distant relative. Mack, therefore, argues that there is a second step: a right to the “practice” of private property—that is, the individual’s right to participate in a system of rules recognizing ownership.¹⁰¹ This nests within the self-ownership principle: “Although the specification of entitlement-conferring actions [within this system] must embody the truths that may be gleaned from Act theories of entitlement, some entitlement-conferring acts under a given justified practice will not involve the sort of extension of self-ownership which is the focus of Act theories.”¹⁰² This model seems admirably suited to the Lockean tradition since it parallels

96. JASAY, *supra* note 74.

97. *Id.* at 139.

98. Claeys, *supra* note 4, at 132.

99. *Id.*

100. Mack, *supra* note 66, at 525–27. This is distinct from “labor-mixing” in that what matters is not whether one has devoted labor to something but whether one has “de-employ[ed] . . . one’s liberty through the use of extra-personal objects so that one’s liberty is now hostage to others’ non-seizure of those objects.” *Id.* at 526.

101. *Id.* at 532, 534.

102. *Id.* at 537.

Locke's own observation about the transition from a state of nature to a society with money—a transition in which the provisos, *ex hypothesi*, fall away.¹⁰³

How this multistage process works becomes clearer if we compare it to how we view other kinds of property acquisition, such as the discovery of land. An explorer discovers an island and plants the flag on it, claiming it for his nation. Whether this claim is legitimate may depend on certain provisos that ensure against unconscionability—perhaps the treatment of the natives—but it conveys a kind of title that is valid against rival claimants, though perhaps subject to the right of the natives.¹⁰⁴ More important than this initial acquisition, however, is the alienability of the acquired property *after* acquisition. As Gary Lawson has explained, the “virtues that go into the process of wealth-generation” play a relatively minor role in this property theory because all that is necessary is

a principle of original acquisition combined with a theory of alienability of rightfully acquired items [T]he dominant theory of original acquisition is a theory of first possession that does not depend on the character or deservingness (beyond the fact of first acquisition) of the acquirer but rather on the simple absence of a prior claim by others.¹⁰⁵

Labor-mixing serves the role of discovery as far as objects that the individual creates are concerned, but whether it be discovery or labor-mixing, the act theory of initial acquisition only gets the property rights system off the ground.¹⁰⁶ After that, the legalistic or formalistic approach—and one's right to participate in it—takes over.

In thinking about that transition, however, we should never forget that while it is fruitful to think of property in social or economic terms, property plays its most fundamental and lasting (even erotic) role in the *psychology* of human life—one that is difficult to articulate and virtually

103. An even stronger parallel is with the distinction Lon Fuller offers between a society based on a shared commitment and a society based on legal principle. Lon L. Fuller, *Two Principles of Human Association*, in LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 81–99 (Kenneth I. Winston, 2d ed., 2001).

104. See generally *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572–74 (1823); see also J.C. BEAGLEHOLE, *THE LIFE OF CAPTAIN JAMES COOK* 150 (1974) (quoting Royal Society's instructions to Captain Cook: “the Natives of the several Lands where the Ship may touch . . . are the natural, and in the strictest sense of the word, the legal possessors of the several Regions they inhabit.”).

105. Gary Lawson, *Truth, Justice, and the Libertarian Way(s)*, 91 B.U. L. REV. 1347, 1353 (2011).

106. It is thus a kind of “big bang” theory: that is, an effort to explain the origin of an order, the rules of which do not govern the pre-order state, and may not be comprehensible in terms of that pre-order state.

impossible to measure and which is not fully captured by the language of use and trade. As Mihaly Csikszentmihalyi writes, property “help[s] objectify the self,” both psychologically and socially.¹⁰⁷ Ownership is not a mere matter of advantage, but of self-identification, self-expression, self-protection, and self-perpetuation. It plays an integral role in the projection of human personality and is therefore as much a part of the human being’s self-making as a spider’s web is a part of the spider’s existence. Moreso, in fact, given that as beings uniquely dependent upon symbols and representations, we need the tangibles of the world for our material survival and for the articulation of the narratives on which our personalities depend. If the performer needs the audience,¹⁰⁸ then in the self-performance that is the very existence of the self, property serves as the stage as well as the props. This is obvious in the case of personal property: say, the poet for whom pens and paper play an irreplaceable role in the creation of the poem that expresses her idea. It is for this reason that people even prize economically valueless property and feel themselves invaded by trespasses that, beyond the purely personal, are irrelevant (such as if a person touches something precious to us, without harming it).¹⁰⁹ But it is no less true of the land and the home with which the self is established, maintained, and perpetuated. Architecture, said Frank Lloyd Wright,

is man in possession of his earth It is more a part of man himself than the turtle’s shell is part of the turtle His building, in order to be architecture, [is] the true spirit of himself made manifest (objective) whereas the turtle [has] no freedom choice or any spirit at all in the making of his shell.¹¹⁰

This aspect of property—by far the most important aspect of this singular human phenomenon¹¹¹—tends to be overlooked in discussions of the subject for no better reason than that it is hard to measure or

107. Mihaly Csikszentmihalyi, *Why We Need Things*, in *HISTORY FROM THINGS: ESSAYS ON MATERIAL CULTURE* 20, 23 (Steven Lubar & W. David Kingery eds., 1993).

108. MIKEL DUFRENNE, *THE PHENOMENOLOGY OF AESTHETIC EXPERIENCE* 48 (Edward S. Casey, trans., Evanston: Nw. 1973).

109. See generally Lee Randall, *For the Love of Stuff*, *AEON* (Aug. 3, 2016), <https://aeon.co/essays/why-i-love-my-posessions-as-a-mirror-and-a-gallery-of-me> [<https://perma.cc/G6AV-4ANE>]. See also 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* (1980) 293 (New York: Holt, 1923) (“The parts of our wealth most intimately ours are those which are saturated with our labor. There are few men who would not feel personally annihilated if a life-long construction of their hands or brains . . . were suddenly swept away.”).

110. FRANK LLOYD WRIGHT, *THE FUTURE OF ARCHITECTURE* 34, 52 (1953).

111. See TIMOTHY & CHRISTINA SANDEFUR, *CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA* 5–31 (2016).

quantify. Yet this is akin to considering the phenomenon of sex solely in terms of biological reproduction while omitting discussion of how it relates to love, intimacy, or the sense of self.

Some critics of property accept the premise that if an acquisition is not unjust, it is just—but then trace back the chain of title to a hypothetical first owner who acquired property in a state of nature. If that initial acquisition was tainted with injustice, then the subsequent transactions were, also. Claeys approaches this argument by asserting that for ownership of previously unowned resources to be legitimate, the purported owner must not only make productive use of it and communicate his claim to others but also comply with the “sufficiency” and “necessity” principles.¹¹² Sufficiency is the Lockean proviso mentioned above. Necessity means that property is owned subject to claims of temporary appropriations or trespasses in extreme emergencies that leave the trespasser with no alternative but to use the property for some life-saving purpose.¹¹³

Claeys does not mention another element of this necessity rule at common law: the owner is entitled to *compensation* for that trespass.¹¹⁴ This is significant because it implies a connection between two other legal principles: *quantum meruit* and the power of eminent domain. *Quantum meruit* seems to be the inverse of the necessity rule in that it requires the recipient of an unchosen benefit conferred in an emergency—the doctor who saves the life of an unconscious accident victim—to tender a reasonable compensation afterward. The relationship between necessity and eminent domain is trickier because the common law distinguished between true *eminent domain* (taking property for a public use) and *public necessity trespasses*, such as the archetypical case of tearing down a house to make a firebreak to save the town from destruction. Although compensation was required in the former case, it was not required in the latter.¹¹⁵ The reasoning was that in the former case, the state takes title (or the equivalent of it) for some public purpose, but in the latter case, the property in question has become a public nuisance,

112. Claeys, *supra* note 4, at 121–37; *see also* Claeys, *Introduction, supra* note 4, at 420.

113. Claeys, *supra* note 4, at 135; *see also* Claeys, *Introduction, supra* note 4, at 436–38.

114. *See, e.g., Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221, 222 (Minn. 1910).

115. The connection is a complicated one. At common law, a private necessity trespass entitled the owner to compensation, while a *public* necessity trespass (or even destruction) did not. *Warner/Elektra/Atl. Corp. v. City of DuPage*, 991 F.2d 1280, 1286 (7th Cir. 1993); *Surocco v. Geary*, 3 Cal. 69, 71 (1853).

which the government may abate without compensation because the property is a threat to public safety.¹¹⁶ But the common thread is that there are rare circumstances in which, given the context, the property owner who refuses to allow the use or taking of the property is, in effect, not *defending* her rights at all, but using her property to *aggress* against another person.¹¹⁷ To use another analogy, one may not insist upon one's right of way in a manner that brings about an avoidable injury.¹¹⁸ This is nothing more than saying that the property owner's presumptive right to the property is just that—presumptive—and can be overridden in those narrowly limited circumstances in which the owner's use of the property is tantamount to aggression.¹¹⁹ Yet even where it is overridden, justice requires in many cases that the initial owner, who committed no wrong, be made whole for the deprivation of property.

C. Hoarding/Engrossing

The intuition underlying the productive use and sufficiency provisos is a distaste for hoarding. If an acquirer engrosses to himself the whole earth, then it becomes a race: he might simply seize land and leave it idle while others suffer. Rules allowing alienability may fail to resolve such concerns if the possessor is prejudiced, or for other irrational reasons refuses to alienate property. Professor Epstein argues that a rule allowing forced exchanges, so long as they are Pareto-improvements, is sufficient to resolve such concerns.¹²⁰ Yet it should also be borne in mind that we all hoard, and hoarding is, at bottom, just what it *means* to have a property right. There can be no doubt that forcing me to surrender one of my kidneys to a patient in need would be an improvement in life for the recipient, but it would nonetheless be an injustice to initiate force against me in that way. Social wealth would be improved by compelling every driver, during working hours, to let others use her car rather than allowing cars to sit unused in office parking lots. Yet respecting the right of people to “hoard” their own kidneys and cars is simply what

116. *Surocco*, 3 Cal. at 73–74.

117. One thinks of Justice Foster's argument that Whetmore was actually attempting to murder his colleagues by withdrawing from the lottery in *The Case of the Speluncean Explorers*. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 620–26 (1949).

118. *Oil Transfer Corp v. the Cree*, 121 F. Supp. 873, 876 (S.D.N.Y. 1954).

119. It is critical to construe “narrowly limited” in such a strict way because the temptation is ever-present to widen those exceptions, with the result of undermining the general rule. For necessity to truly mean necessity, and for property rights to really mean property rights, the necessity exception must be construed with *extreme* narrowness.

120. See EPSTEIN, *supra* note 46, at 135.

ownership is, and we respect that right for the same three reasons we respect all other individual rights: the Hayekian knowledge problem,¹²¹ the public choice problem,¹²² and the problem that violating such rights is immoral.¹²³ One need not deny that there are (rare) situations in which hoarding can legitimately be a concern to recognize that *all property is hoarding*, and that respecting the right to hoard is typically identical to accepting others' right to autonomy.

Concern with hoarding is not in principle misguided. Yet it seems that in circumstances where hoarding is a legitimate concern, it is accompanied by other injustices which, if addressed, would resolve concerns about hoarding, too. In other words, hoarding is a monopoly situation, and like other monopolies, it becomes a concern when accompanied by forms of coercion.¹²⁴ Eliminating coercion enables people to transact in ways that resolve hoarding concerns in the least bad way.

In 1785, while serving as minister to pre-revolutionary France, Thomas Jefferson witnessed the privations of that country and wrote to a friend about "that unequal division of property which occasions the numberless instances of wretchedness which I had observed."¹²⁵ The land, he said, was "absolutely concentrated in a very few hands"—those of aristocrats "who kept [the land] idle mostly for the sake of game," with the consequence that vast numbers of people "cannot find work . . . in a country where there is a very considerable proportion of uncultivated lands[.]"¹²⁶ This led Jefferson to conclude that "[w]henver there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right."¹²⁷

This might at first sound like a proto-socialist argument for land redistribution, but Jefferson was not criticizing the natural right of private property. He was criticizing the feudalistic *positive* laws of the France of

121. Cf. Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945); DON LAVOIE, NATIONAL ECONOMIC PLANNING: WHAT IS LEFT? (1985).

122. See generally JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

123. Thus, it would probably not be immoral to take a person's car from a parking lot in a dire emergency—say, the need to get a gunshot victim to the emergency room, providing compensation was provided.

124. As noted above, if the collective presumptively owns all property at the outset, it should be subject to the same rule against hoarding, unless we assume that the collective has rights not given to it by the people.

125. Letter from Thomas Jefferson to Rev. James Madison (Oct. 28, 1785), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 389 (Adrienne Koch & William Peden, eds., 1994).

126. *Id.*

127. *Id.* at 390. The recipient of this letter, Bishop James Madison, was cousin to President James Madison.

his era, whereby aristocrats could engross to themselves so much land that they barred would-be tillers of the soil from the opportunity to make a living. The existence of an inefficient disparity between supply and demand, maintained by coercive legal barriers, would worry even the most rigidly libertarian adherent of the natural law/natural rights perspective. This does not, however, warrant a restriction on ownership. Indeed, when Jefferson himself engaged in land reform, he did not propose a coercive divvying up of land but the far more modest measure of abolishing primogeniture and entail. His solution to the problem of the overextension of “the laws of property” was non-confiscatory: he sought to eliminate barriers to exchange so that individuals could trade property to suit their needs. This was consistent with the founding generation’s effort not to redistribute property to satisfy egalitarian demands but to open up the legal opportunity for all to acquire property.¹²⁸

As Thomas G. West has noted, that right was protected early on in American history by constitutional rules against monopolies and other coercive limits on trade.¹²⁹ It is also revealing that James Madison, in his essay *Property*, took time to mention that the “free use of [one’s] faculties and the free choice of the objects on which to employ them” are themselves forms of property and to observe that “property [is not] secure” in a society “where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.”¹³⁰ There is often a tension between the perpetual claims guaranteed by property rights and the freedom of economic competition,¹³¹ but for our purposes, the bottom line is this: the freedom of economic exchange is the best available solution to the theoretical concern that initial claimants might assert such broad ownership rights as to exclude others unjustly.

128. See generally THOMAS G. WEST, *VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS* 46–52 (1997); It is notable that the 1776 Virginia Declaration of Rights was the first to proclaim not only the right possess but also the right to *acquire* property. Va. Declaration of Rights § 1 (1776).

129. THOMAS G. WEST, *THE POLITICAL THEORY OF THE AMERICAN FOUNDING* 348–56 (2017). By monopolies, of course, the founders meant actual monopolies—i.e., government-maintained prohibitions on competition. It was not until the twentieth century that the term became generally, and fallaciously, synonymous with successful private businesses.

130. MADISON, *supra* note 84, at 516.

131. See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837) (majority and dissenting opinions), for the most famous expression of that tension.

IV. CONCLUSION

Eric Claeys has taken the unusual and important step of vindicating one of the most crucial elements of our constitutional legacy—indeed, of any possible constitutional legacy. The natural right to private property has been under sustained assault for at least a century, often leading to many hideous injustices. Although critics of this right often label themselves “progressive,” the fact is that they are the opposite—fundamentally reactionary opponents to the single institution that has done the most important work in raising humanity from a state of poverty and barbarism to a state of civilization and protected other freedoms along the way. While Claeys makes important errors in his argument, these do not ultimately defeat the legitimacy of the natural law/natural rights argument for private property.