



## PROPERTY AND FREEDOM

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### INTRODUCTION

In the Western legal and political tradition, private property is often defended on the grounds that it promotes individual freedom.<sup>1</sup> The nature of this relationship between property and freedom, however, remains contentious. Discussion of this subject often takes place as part of a debate over the legitimacy of government interference with private property, particularly in the contexts of regulatory takings and redistributive taxation. Pro-property, anti-interference advocates tend to suggest that there is a strong relationship between property and freedom.<sup>2</sup> Those on the other side of the debate, however, tend to be more skeptical.<sup>3</sup> The political philosopher G.A. Cohen, for example, has asserted that “the familiar idea that private property and freedom are conceptually connected is an ideological

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<sup>1</sup> This theme can be seen in the titles of various books taking pro-property positions. See, e.g., TIMOTHY SANDEFUR, *CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA* (2006); TERRY L. ANDERSON & LAURA E. HUGGINS, *PROPERTY RIGHTS: A PRACTICAL GUIDE TO FREEDOM AND PROSPERITY* (2003); RICHARD PIPES, *PROPERTY AND FREEDOM* (1999); BERNARD H. SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION* (1997); JAMES M. BUCHANAN, *PROPERTY AS A GUARANTOR OF LIBERTY* (1993); JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992). Two prominent works that justify property on the basis that it promotes individual freedom, both of which are discussed at length *infra* Part II are Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964) and MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

<sup>2</sup> See sources cited *supra* note 1. This association is also reflected in the statements and principles of the Property and Freedom Society. See The Property and Freedom Society Homepage, <http://www.propertyandfreedom.org> (last visited Oct. 3, 2008).

<sup>3</sup> See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 65–66 (2002); G.A. Cohen, *Illusions About Private Property and Freedom*, in 4 *ISSUES IN MARXIST PHILOSOPHY, SOCIAL AND POLITICAL PHILOSOPHY* 223 (John Mephan & David Hillel Ruben eds., 1981); Eduardo M. Peñalver, *Property as Entrance*, 91 *VA. L. REV.* 1889 (2005).

illusion.”<sup>4</sup> In a book on tax policy, Liam Murphy and Thomas Nagel similarly deny any relationship between “the right to speak one’s mind, to practice one’s religion, or to act on one’s sexual inclinations” on the one hand, and property rights on the other, on the grounds that interference with property rights “is just not the kind of interference with autonomy that centrally threatens people’s control over their lives.”<sup>5</sup>

In this essay, I argue against both sides of this intractable debate. Property and freedom are inextricably linked, and the broad statements to the contrary by Cohen, Murphy, and Nagel are wrong. At the same time, however, a strong relationship between property and freedom does not immunize property from government interference. To support these positions, I shift the discussion of property and freedom away from debates about the inviolability of property. Instead, I focus on the institutional relationship between property and freedom.

Accordingly, this essay focuses on two questions: to what degree does the institution of private property protect individual freedom, and to what degree is individual freedom possible without the institution of private property? These questions have been neglected in the heat of the debate over government interference with property, and they have not before been comprehensively addressed. The answers to these questions hinge on the real-world consequences that the institution of private property has on individual freedom. In Part I, I elaborate on this new approach and explain how it relates to other ways of talking about property issues. I also explain how I use “property” and “freedom,” both of which have many potential meanings, and how these usages relate to existing deontological and consequential approaches to property theory.

In Part II, I discuss three distinct ways that property as an institution promotes individual freedom: by creating a zone of individual autonomy and privacy, by distributing power, and by providing access to the resources that people need to be free. These

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<sup>4</sup> G.A. COHEN, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY* 89 (1995).

<sup>5</sup> MURPHY & NAGEL, *supra* note 3, at 65.

institutional connections between property and freedom draw out three important substantive points. First, individual freedom depends in an institutional sense on private property. Second, because the relationship between property and freedom is complex, different types of property (e.g., land versus money) and different aspects of property ownership (e.g., the ability to exclude others versus the ability to transfer to another owner) promote freedom in different ways. Third, and most importantly, the relationship between property and freedom in this context may be used to support, rather than oppose, arguments for the redistribution of property. Indeed, I demonstrate that a strong connection between property and freedom can be maintained without any reference whatsoever to libertarian or other theories that hold that property rights should be immune from state interference.

Finally, in Part III, I deploy this new perspective on the relationship between property and freedom to critique two of John Rawls's positions on property. Rawls, the most influential moral philosopher of the twentieth century, asserted that the basic liberties protected by his First Principle of Justice include the right to hold personal property, but not productive property, and that either a property-owning democracy or a liberal socialist regime could comport with his two principles of justice.<sup>6</sup> In my critique of Rawls, I first explain why the concept of freedom embodied in the First Principle of Justice provides a better defense of private property than the inequality allowed by the so-called "difference principle" that is part of Rawls's Second Principle of Justice. I then use the connections between property and freedom discussed in Part II, and Rawls's own positions on freedom, to argue that Rawls's positions on property are wrong, that the First Principle must include the right to hold productive property, and that therefore only a property-owning democracy would satisfy the requirements of the two principles of justice.

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<sup>6</sup> See *infra* Parts III, III.A (providing an overview of Rawls's positions on property, the two principles of justice, and other basic components of Rawls's political conception of justice).

## I. TWO WAYS OF TALKING ABOUT PROPERTY

Theories that justify private property tend to fall into two broad categories, deontological and consequential. I address each in turn and explain why the institutional perspective that I take in this essay loosely fits within the consequential category. I then identify the concept of freedom that I use, and explain how these understandings of property and freedom frame the discussion in the remainder of the essay.

### A. DEONTOLOGICAL VIEWS OF PROPERTY

Deontological approaches to private property are structured around claims of a moral right or entitlement to private property. Two classic examples of deontological theories of property are those advanced by John Locke in *The Second Treatise of Government*<sup>7</sup> and by Robert Nozick in *Anarchy, State, and Utopia*.<sup>8</sup> Locke's theory is rooted in a natural law concept of self ownership: when a person mixes her labor with an unowned object, that person obtains the same degree of ownership over that object as she has over herself.<sup>9</sup> Nozick's theory, in contrast, is rooted in an idea of moral desert. Nozick argues that if a person justly acquires property (in the sense that both the initial acquisition and the subsequent transfers of the property were just), then that person morally deserves, or is morally entitled, to that property.<sup>10</sup>

Under either of these deontological approaches, the baseline position is that an interference with property is an interference with

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<sup>7</sup> See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 111-21 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

<sup>8</sup> See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 150-53 (1974).

<sup>9</sup> LOCKE, *supra* note 7, at 111-12. Some recent scholarship based on his other writings argues that Locke's broader property theory contained a significant consequential element. See Eric R. Claeys, *The Private Society and the Liberal Public Good in John Locke's Thought*, *SOC. PHIL. & POL'Y.*, July 2008, at 201, 207-09, available at <http://journals.cambridge.org/action/displayFulltext?type=6&fid=18917&jid=SOY&volumeId=25&issueId=02&aid=1891708&fulltextType=RA&fileId=SO265052508080242>. Taken in isolation, however, Locke's position in Chapter 5 of the *Second Treatise* is predominantly deontological. See LOCKE, *supra* note 7, at 111-21.

<sup>10</sup> NOZICK, *supra* note 8, at 150-53.

a moral right, and therefore wrong in and of itself regardless of its consequences. The claim being made here is that justly acquired property should be immune from outside interference. This is not the only type of deontological claim that can be made regarding property ownership. For example, a deontological claim could be made that each person has the right to acquire certain types of property. This right would be violated either by outright prohibitions on acquisition or by rules limiting acquisition of those types of property to certain classes of people.<sup>11</sup> In the form made by Locke and Nozick, however, deontological claims have been central to the debates about the inviolability of property mentioned in the introduction to this essay. Defenders of the position that property should be inviolable often imply that interference with property is an interference with individual freedom.<sup>12</sup> In response, critics of the inviolability position tend to express doubts about the connection between property and freedom.<sup>13</sup>

To sidestep this well-established debate, I presume for the purposes of this essay that there is no deontological right that makes justly acquired private property inviolable to outside interference.<sup>14</sup> This, of course, is a contestable position on an issue that has been the subject of volumes of academic discourse. Fully engaging in this debate would defeat the purpose of sidestepping it, but it has been too prominent to ignore completely. As a middle ground, I will briefly note four reasons why it is defensible to presume that justly acquired property should not be immune from interference.

First, several recent works have effectively critiqued deontological theories that suggest that property should be inviolable.<sup>15</sup> Although I argue that some of these critics have gone too far in their

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<sup>11</sup> See *infra* text accompanying note 90 (discussing this type of claim in the context of Rawls's political theory).

<sup>12</sup> See *supra* note 1.

<sup>13</sup> See, e.g., *supra* notes 4–5 and accompanying text.

<sup>14</sup> Consistent with this assumption, I use “property rights” in the colloquial sense, and do not mean to imply any deontological significance by the use of the term “rights.”

collateral assertions that there is no connection between property and freedom,<sup>16</sup> in my view the core of their critiques of deontological claims to inviolable property have been successful.

Second, even the strongest assertions of deontological claims to justly acquired property contain limits on acquisition that, if exceeded, justify interference with property rights. In his famous proviso, for example, Locke suggested that the right to acquire property is contingent on there being “enough, and as good, left in common for others.”<sup>17</sup> The availability of vast unclaimed stretches of the Americas may have made this seem plausible in 1690, but from a contemporary perspective it is difficult to claim that there is “enough and as good” property left for those without property to claim as their own.<sup>18</sup>

Third, political theorists tend not to assert that justly acquired property should be completely immune from government interference. Even Nozick, for example, would be hard pressed to suggest that property cannot be taxed to provide for the provision of public goods such as policing and the enforcement of justice.<sup>19</sup> Instead, discussions of the supposed inviolability of property tend to reflect underlying claims about the legitimate functions of government; if a particular governmental act is seen as extending beyond the legitimate powers of government, then any interference with property resulting from that act would be illegitimate. It could be argued, of course, that property redistribution of any sort exceeds the legitimate scope of government, but this overarching claim must be

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<sup>15</sup> See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988); *supra* notes 4–5 and accompanying text.

<sup>16</sup> See *supra* notes 3–4 and accompanying text.

<sup>17</sup> See LOCKE, *supra* note 7, at 112; see also NOZICK, *supra* note 8, at 178–82 (discussing Locke’s proviso).

<sup>18</sup> Consistent with the abbreviated approach I am taking to deontological theories of property, this is a relatively superficial take on Locke’s proviso and its significance. The exact significance of the proviso as a limit to acquisition is a topic of some debate. See WALDRON, *supra* note 15, at 209–18.

<sup>19</sup> See NOZICK, *supra* note 8, at 88–90 (arguing for state monopoly on provision of policing and enforcement of justice; state provision of these public goods could not be provided without taxation).

established before it can be maintained that property should be inviolable. While political philosophers understand the need to make the overarching argument, “everyday libertarians” often skip without justification directly to the position that private property should always be immune from redistributive government interference or taxation.<sup>20</sup>

Fourth, even if it can be accepted as a matter of theory that justly acquired property should be inviolable, real-world considerations make such a theoretical point of limited practical importance. For an owner to make a claim of inviolability under Nozick’s theory, for example, the initial acquisition of the property from the commons must have been just, and each subsequent transfer of the property must have been just.<sup>21</sup> Even strong advocates of property rights recognize the injustice that occurred in the United States from both the conquest of Native American land and the widespread impact of slavery on the American economy.<sup>22</sup> The moral stain of these injustices arguably clouds the title of the entire American property system and therefore casts serious doubts on the ability of any owner to make a valid Nozickian claim of entitlement to her property.<sup>23</sup> To be clear, I am not suggesting here that this taint of injustice mandates property redistribution to redress these sometimes ancient wrongs. Rather, I am simply suggesting that the injustice in the history of American

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<sup>20</sup> See MURPHY & NAGEL, *supra* note 3, at 31–36.

<sup>21</sup> NOZICK, *supra* note 8, at 150–53.

<sup>22</sup> See, e.g., SANDEFUR, *supra* note 1, at 59–60.

<sup>23</sup> Doubts about the justice of American land title, and of Lockean acquisition more generally, are encapsulated in a passage from William Faulkner’s *The Bear*, in which a character questions his family’s ownership of property:

[H]is grandfather, had bought with white man’s money from the wild men whose grandfathers without guns hunted it, and tamed and ordered, or believed he had tamed and ordered it, for the reason that the human beings he held in bondage and in the power of life and death had removed the forest from it and in their sweat scratched the surface of it to a depth of perhaps fourteen inches in order to grow something out of it which had not been there before . . . .

WILLIAM FAULKNER, *The Bear*, in THE PORTABLE FAULKNER 177, 227 (Malcolm Cowley ed., revised ed., Penguin Books 2003) (1946).



property ownership undercuts any claim that existing property interests should be immune from redistributive government actions.<sup>24</sup>

#### B. CONSEQUENTIAL AND INSTITUTIONAL VIEWS OF PROPERTY

In contrast to deontological approaches, consequential theories justify property by the positive consequences that result from respecting private property. A classic example is Jeremy Bentham's utilitarian justification of property, which emphasizes that property law, by securing in a person the fruits of her labor, encourages production.<sup>25</sup> This approach is closely related to economic theories that defend property on the grounds that it is necessary for economic efficiency and the maximization of social wealth.<sup>26</sup>

Under utilitarian or economic theories of property, a particular interference with private property will not be seen as inherently

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<sup>24</sup> A similar point can be made in a more theoretical context. In making a case that property is pre-political and therefore should be immune from government redistribution, Richard Epstein has suggested that Lockean rules of acquisition should apply and that each person entering into civil society should preserve her relative share of the resources that she held in the state of nature. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 3-18 (1985). Epstein illustrates this concept with a pie chart, where the gains of leaving the state of nature are divided among the members of society in proportion with their holdings in the state of nature. *Id.* at 4. Locke's pastoral view of the state of nature makes this position somewhat palatable. Epstein, however, argues for a Hobbesian conception of the state of nature, hence the title of his second chapter: "Hobbesian Man, Lockean World." *Id.* at 7. The difficulty with Epstein's position is that the Hobbesian Man is, to be blunt, a thug. *Id.*; THOMAS HOBBS, *LEVIATHAN* 99-104 (Thoemmes Continuum 2003). It is difficult to accept the contractarian fiction that respect for property is required to obtain people's consent to leave the state of nature when holders of large shares in the state of nature likely obtained those shares through violence and coercion.

<sup>25</sup> See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 110 (C.K. Ogden ed., Harcourt, Brace 1931) (1789). Bentham wrote:

Law does not say to man, *Labour, and I will reward you*; but it says: *Labour, and I will assure to you the enjoyment of the fruits of your labour – that natural and sufficient recompense which without me you cannot preserve; I will insure it by arresting the hand which may seek to ravish it from you.* If industry creates, it is law which preserves; if at the first moment we owe all to labour, at the second moment, and at every other, we are indebted for everything to law.

*Id.*

<sup>26</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 31-38 (7th ed. 2007).

wrong. Rather, the question of whether an interference with private property is justified turns on the long-term consequences of that interference. If the consequence of the interference is a net improvement in utility or efficiency, the interference is justified. If the consequence of the interference is a net loss in utility or efficiency, then the interference is not justified.<sup>27</sup>

In discussing property as an institution, this essay focuses on the real-world consequences of a private property system. This focus is reflected in the two questions raised at the outset of the essay: to what degree does the institution of private property protect individual freedom, and to what degree is individual freedom possible without the institution of private property? I use the term “institutional,” rather than “consequential,” in part to avoid confusion with certain issues surrounding the dichotomy between deontological and consequential approaches to moral theory. Consequential theories can be read to assert that consequences are all that matter in addressing moral issues. By focusing on the institutional aspects of property, I do not mean to suggest that there are no deontological claims that might be relevant to property. Indeed, the institutional relationship between property and freedom is relevant to both deontological and consequential conceptions of freedom. Deontologists may be very concerned about consequences, even if they are skeptical that consequences themselves provide the answers to moral questions.

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<sup>27</sup> David Hume emphasizes the importance of considering the long-term, rather than just the immediate, impact of the interference:

A single act of justice is frequently contrary to *public interest*; and were it to stand alone, without being followed by other acts, may, in itself, be very prejudicial to society. . . . Though in one instance the public be a sufferer, this momentary ill is amply compensated by the steady prosecution of the rule, and by the peace and order which it establishes in society.

DAVID HUME, A TREATISE OF HUMAN NATURE 497 (L.A. Selby-Bigge ed., Oxford Univ. Press 1978) (1739). Even if an interference with property appears to have a short-term positive impact on the public welfare, consistent respect for property rights may better serve the public over the long term.

## C. "PROPERTY" AND "FREEDOM"

In part because of the many theoretical issues that surround it, the word "property" can have many meanings. In this essay, I use it to refer to a human-created legal institution that places resources in private hands and, generally speaking, leaves issues of the use and disposition of those resources to their owners. The private property system that exists as a legal institution in the United States is an example.

"Freedom" is also a slippery word. It can be used in the purely negative sense—freedom from certain things, such as bodily harm, forced labor, or interference with property rights. In this essay I use "freedom," unless otherwise defined, in a more positive sense to mean an individual's ability to make basic life choices for herself. This conception of freedom closely resembles that articulated by John Stuart Mill, who wrote that "[t]he only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."<sup>28</sup> Joseph Raz similarly asserted that "[t]he autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."<sup>29</sup> It is also close to Rawls's views on the relationship between freedom and the ability of a person to form, revise, and act on their own conception of the good, which I will explore at some length below.<sup>30</sup>

In the remainder of this essay, I explore the institutional relationship between these conceptions of property and freedom. I examine whether the institution of private property promotes the ability of people to make basic life choices for themselves and whether it is possible for people to make basic life choices for themselves without the institution of private property.

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<sup>28</sup> JOHN STUART MILL, ON LIBERTY 19 (Prometheus Books 1986) (1859).

<sup>29</sup> JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986); see also JAMES O. GRUNEBAUM, PRIVATE OWNERSHIP 143 (1987).

<sup>30</sup> See *infra* notes 67–73 and accompanying text.

## II. THE INSTITUTIONAL RELATIONSHIP BETWEEN PROPERTY AND FREEDOM

In this Part, I explore three distinct ways that property as an institution promotes individual freedom: by creating a zone of individual autonomy and privacy, by distributing power, and by providing access to the resources that people need to be free.

### A. PROPERTY CREATES A ZONE OF INDIVIDUAL AUTONOMY AND PRIVACY

Property, in the words of Charles Reich, “draw[s] a boundary between public and private power . . . maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.”<sup>31</sup> These zones are not inviolable; rather, they create areas where the state or community must justify interference with the private sphere. These zones promote the ability of individuals to make basic life choices for themselves by creating physical spaces where they can engage in behavior frowned on by the rest of the community and where they can withdraw if they want to be alone or to interact only with people of their choice.

The connection between freedom and property in this context is highly spatialized: the core idea is that property creates a zone of personal space that is relatively free from outside interference.<sup>32</sup> Of the four classic incidents of property ownership—the rights to exclude, use, possess, and alienate—only three are relevant to preserving this physical zone of autonomy. The rights to exclude and possess clearly are essential to the creation of private space, and those rights would be meaningless without some ability to use the property. The right to alienate, however, is not directly relevant in this context, and the right to use may be significantly limited. Zones of individual freedom can be maintained even if the owner does not

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<sup>31</sup> Reich, *supra* note 1, at 771. Richard Pipes has made a similar argument. See PIPES, *supra* note 1, at 281.

<sup>32</sup> Put another way, property in this context can be seen as giving the property owner a degree of freedom to withdraw, or exit, from the community. See Peñalver, *supra* note 3, at 1891.

have the right to use the property for profit or to transfer the property in any way. As a result, this aspect of the connection between property and freedom could be maintained with something less than the entire bundle of rights that characterizes private property as it exists in contemporary market economies.

An objection to defending property on the ground that it creates zones of personal autonomy is that the freedom granted to the property owner comes at the expense of the freedom of other people to enter and use the property at issue. To illustrate this point, G.A. Cohen used the example of a homeless person who wants to pitch a tent in a property owner's garden.<sup>33</sup> The importance of the freedom and privacy created by property is particularly important in the context of the home,<sup>34</sup> and Cohen's example would lose much of its attractiveness if the homeless person wanted to sleep not in the garden, but in the property owner's bedroom. But it certainly is true that the property owner's freedom to eject the camper infringes on the homeless person's freedom to camp, and that a property system therefore "is a distribution of freedom and unfreedom."<sup>35</sup>

Cohen's example of the homeless person is compelling in part because the homeless person has little, if any, property and therefore does not have the level of freedom that property gives the homeowner.<sup>36</sup> In this form, the example is less an objection to property per se and more of an objection to the problem that only some people have property, and therefore freedom, while other people have none. If Cohen's example is changed so that the two people involved each have homes but one is more desirable than the other, then each is able to benefit from the zone of privacy and autonomy created by property, even if their relative positions are unequal in other ways.

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<sup>33</sup> Cohen, *supra* note 3, at 226.

<sup>34</sup> See D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 259–76 (2006).

<sup>35</sup> Cohen, *supra* note 3, at 226–27.

<sup>36</sup> See Jane B. Baron, *Property and "No Property,"* 42 HOUS. L. REV. 1425, 1427 (2006) (arguing that homeless persons lack the rights-asserting power that persons with property possess).

It could be argued that privacy and autonomy can be maintained if there is sufficient public property available to allow those who lack private property to maintain some measure of isolation. A person lacking private property, for example, could conceivably achieve a degree of freedom and privacy in a remote corner of a vast public park. The degree of freedom provided by this sort of isolation, however, is a bare shadow of that provided by private ownership of real property.<sup>37</sup> Without the right to exclude, the propertyless person on public land is subject to interference by any other person who happens to wander by. Isolation on public property also does not provide any real protection to the individual who engages in activities frowned upon by the rest of the community.

Meaningful zones of freedom and autonomy therefore require individual ownership (either freehold or leasehold) of specific parcels of real property. As noted above,<sup>38</sup> however, the conception of ownership at issue here could both limit the right to use and eliminate the right to alienate. In a practical sense, this conception of freedom requires that an individual have a home; it is conceivable to imagine someone enjoying their zone of autonomy and privacy in a tent next to a campfire, but this is an unappealing conception of freedom in the modern world. I do not mean to suggest here that every person has a deontological claim to a home or to a certain amount of real property. Rather, I simply suggest that to the degree that a claim can be made—on deontological, consequential, or other grounds—that each person should be able to enjoy the zone of autonomy and privacy created by private property, then that claim is empty if a person has no property. The link between property and freedom in turn may support an argument for property redistribution sufficient to allow each person to have at least a degree of privacy and autonomy.

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<sup>37</sup> See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 300–01, 311–15 (1991) (discussing the limitations of public spaces as a source of freedom to homeless people).

<sup>38</sup> See *supra* note 33 and accompanying text.

## B. PROPERTY PROMOTES FREEDOM BY DISPERSING POWER

The economist Milton Friedman, with whom this argument is most closely associated, argued that private property-based capitalism “promotes personal freedom because it separates economic power from political power and in this way enables the one to offset the other.”<sup>39</sup> Friedman defined freedom as the absence of coercion and argued that freedom could be best promoted by the dispersal of the power to coerce. “By removing the organization of economic activity from the control of political authority, the [private property-based free market] . . . enables economic strength to be a check to political power rather than a reinforcement.”<sup>40</sup>

An objection, made by Alan Ryan, is that private property is not sufficient in and of itself to prevent the accumulation of despotic governmental power, as illustrated by the rise of Nazism and Fascism in European countries that featured private property.<sup>41</sup> This is a fair objection, and it seems clear that private property in and of itself cannot maintain freedom, particularly if the government does not respect property rights or the rule of law. This objection, however, does nothing to undercut the core of Friedman’s argument that, by separating economic and political power, private property reduces (though does not eliminate) the potential for the accumulation of coercive governmental power.

Another objection is that, while private property does help separate government and economic power, economic power itself can be very concentrated in a private property system. This may result in the substitution of coercion by the government with coercion by private parties.<sup>42</sup> Coercion of any sort, of course, is antithetical to the ability

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<sup>39</sup> FRIEDMAN, *supra* note 1, at 9.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> ALAN RYAN, PROPERTY 87-88 (1987).

<sup>42</sup> The idea that private property gives one private person coercive power over another was developed by Morris R. Cohen in *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1928). Cohen observed that:

If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that

of people to make and act on their own basic life choices. Here again, the tie between property and freedom may be used to support at least a degree of property redistribution, and even F.A. Hayek thought it important that “property . . . be sufficiently dispersed so that the individual is not dependent on particular persons who alone can provide him with what he needs or who alone can employ him.”<sup>43</sup>

#### C. PROPERTY GIVES PEOPLE ACCESS TO THE RESOURCES TO BE FREE

The argument that private property is necessary to give people access to resources to be free is based on two related points. First, with the exception of the barest forms of negative freedom, freedom is an empty concept if a person does not have the resources to act (or refrain from acting) consistent with that freedom. Second, absent private property, people will be beholden to others for the resources that they need to live their lives, and as a result will be unable to act independently and freely. As Reich observed, “[p]olitical rights presuppose that individuals and private groups have the will and the means to act independently.”<sup>44</sup>

These points are well illustrated by asking how, in the absence of private property, various resources are to be allocated. Who gets to decide how to distribute food, housing, transportation, education, and other goods and resources? As Charles Lindblom, a skeptic of private property and markets, observed:

Consider in [a system without property or markets] some characteristic problems in the allocation of housing to the population, for example. How to decide who gets what? Is every individual, regardless of age, to be allocated a room or some standard amount of floor space? Or is the allocation to

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these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.

*Id.* at 12.

<sup>43</sup> F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 141 (1960).

<sup>44</sup> Reich, *supra* note 1, at 771.



depend on age and family structure? Is one's allocated space to be near one's place of employment, near one's friends and relatives, within a mixed socioeconomic group or within a stratified one? Or suppose one wishes to make a trip. Who is to be entitled to transportation? For what reasons? How often? By air or bus? Suppose that one wishes to publish a book or pamphlet. Who is to be allowed to call on the services of editors, typesetters, distributors, and shipping services? Who is to be allowed to play the role of artist, musician, publicist, clergyman, union organizer, or party official?

All these decisions, which the market leaves in the hands of individuals, must now be made by governmental authorities. Nothing we wish to do that requires expensive equipment, other resources, or help from others beyond the favors of family and friendship can be done without a request to and the cooperation of a government official.<sup>45</sup>

It is possible to imagine non-private property systems where distribution is made by a non-government decision maker, but in any communal property system there will be some method of resource allocation. Even if this method involved decisions by the community as a whole, rather than by a functionary, individuals would not make resource distribution decisions. Individuals therefore would not be free to make decisions of their own on how to pursue their needs and desires. Individuals in such a system also could not be politically free because the resource decision maker—be it a government agent or the community as a whole—could use resource distribution to retaliate for criticism or perceived disloyalty. As John Gray observed, “the constitutive features of a private-property system—its decentralization of decision-making and the ability individuals have to deploy their resources without recourse

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<sup>45</sup> CHARLES LINDBLOM, *POLITICS AND MARKETS* 50 (1977).

to any procedure of collective choice" – make it uniquely suited for maintaining individual freedom.<sup>46</sup>

Objectors could argue that individual freedom could be preserved by providing rights to the resources at issue—for example, the food needed to subsist, housing, education, or transportation. If unequal allocations of resources are allowed, however, the risks of retaliation or coercion by those responsible for resource distribution become more pronounced because of the ability to give dissenters undesirable allocations. If retaliation is prevented by guaranteeing each person a right to an equal amount of each resource, then individuals are not free to make basic life choices. For example, if person A values housing more than education, and person B values education more than housing, then equal allocations prevent both A and B from making the resource choices needed to enable them to choose for themselves how to live their lives.

An advocate for a communal property system might try to address these concerns by giving people well-defined rights in certain resources while withholding the right to alienate those resources. Specific rights—say the right to inhabit a particular house—would, on the surface, reduce the problem of retaliation. The complete removal of the right to alienate, however, again would limit the ability of people to make basic life choices. Using the example of the right to inhabit a particular house, what happens if the person wants to move or would prefer to live in a smaller house in exchange for a larger amount of another resource? Without any right to alienate, the person cannot exercise these basic life choices.<sup>47</sup> If the person can move,

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<sup>46</sup> John Gray, *Contractarian Method, Private Property, and the Market Economy*, in *MARKETS AND JUSTICE: NOMOS XXXI* 13, 41 (John W. Chapman & J. Roland Pennock eds., 1989); see also Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 *HARV. J.L. & PUB. POL'Y* 37, 37 (1990) ("A regime in which the state controlled all resources would threaten both individual liberty and true democracy. Quite literally, in such a socialist society, the citizen would have no ground of her own on which to stand, to define herself, and to resist government tyranny.").

<sup>47</sup> See Hanoeh Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549, 567-70 (2001) (discussing the importance of alienability to a person's ability to exit a community).

but must get permission from the government or community, then the issue of retaliation reappears.

Even here, however, freedom can be preserved with something short of the full right to alienate that typically exists in contemporary market economies. For example, a system of social-republican property, in which the right to transfer is protected but the right to profit is restricted,<sup>48</sup> would maintain individuals' ability to make basic life choices about resource allocation. To be sure, restriction on the right to profit would undercut one of the core consequential justifications of private property—that the pursuit of profit motivates people to work hard and increase net social wealth. The right to profit may also have some relationship to maintaining freedom: a case can be made, for example, that artists became free from patronage only after the development of intellectual property gave them the ability to profit from their creations. But strictly from the perspective of maintaining individuals' ability to make and act on their own basic life choices, the right to transfer is more important than the right to profit.

A related alternative proposal might try to restrict the ability to pool resources into privately owned entities or enterprises. Many endeavors, however, are too complex for an individual to be able to pursue alone—schools, presses, churches, hospitals, and manufacturing facilities are just a few examples. Restricting individuals' ability to form these organizations would therefore restrict their ability to make choices about endeavors that are beyond the capability an individual alone can achieve. I do not mean to suggest here that any restraint on the ability to accumulate and aggregate resources would reduce freedom. As noted above, concentrations of economic power can result in economic coercion and limit individual freedom.<sup>49</sup> Maintaining individuals' freedom to make basic life choices for themselves, however, requires at least some ability to pool resources and form collective enterprises.

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<sup>48</sup> William H. Simon, *Social-Republican Property*, 38 *UCLA L. REV.* 1335 (1991).

<sup>49</sup> See *supra* notes 42–43 and accompanying text.

Here again, the relationship between property and freedom can be used to support arguments for resource redistribution because a claim that a person should have a certain degree of freedom is empty without a corresponding claim that the person have sufficient resources to achieve that freedom.<sup>50</sup> Objectors could argue that taking property from A to give to B reduces A's freedom to act consistently with her own life choices. Making a related point with characteristic vigor, Ayn Rand argued that "[t]he man who produces while others dispose of his product, is a slave."<sup>51</sup> The resources that a person possesses, of course, are often very different from the resources that the person has produced. There is a core truth to Rand's statement, however, in that taking all of A's production from A to give to B renders A a slave of B. Redistributing property from A to B also unquestionably reduces A's freedom to act on her own life choices.

If A is significantly wealthier than B, however, the reduction in A's freedom by modest resource redistribution is likely to be trivial in comparison to the increase of freedom that the resources give to B. Balanced against Rand's position is Hannah Arendt's observation that "[p]overty forces the free man to act like a slave."<sup>52</sup> Taking away all of A's property to give to B would reduce A to a slave-like position. Taking a small portion of A's wealth and transferring it to the poorer B, however, would result in a net increase in freedom. Marginal freedom in this sense resembles marginal utility. Just as having \$1 has less of an impact on the net utility of a wealthy person than on the net utility of a poor person, so too having \$1 does far less to promote the wealthy person's freedom to act on personal choices than it increases the poor

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<sup>50</sup> Cf. Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255, 1259-60 (2007) (arguing that claims of freedom cannot justify the enforcement of property rights against a propertyless person).

<sup>51</sup> AYN RAND, *Man's Rights* (1963), reprinted in *THE VIRTUE OF SELFISHNESS* 94 (1964).

<sup>52</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 64 (1958), citing DEMOSTHENES, ORATIONES § 57.45 ("Poverty forces the free to do many slavish and base things.").

person's freedom to act on personal choices.<sup>53</sup>

Redistribution, of course, can be done in ways that reduce, rather than enhance, freedom. For example, targeted redistribution could be used to take property from political dissenters. Too frequent reallocation of resources would undermine freedom by undercutting people's ability to make long-term decisions about how to lead their own lives. Redistributive acts could have a negative impact on the incentives to create wealth, which could in turn have a long-term negative impact on net freedom within a society. As practiced in the United States today, however, broad-based progressive taxation is not prone to singling out particular individuals, is far from reducing taxpayers to the position of slaves, and maintains incentives for production. In the takings context, the importance of resources to individual freedom highlights the importance of the compensation requirement, which places a critical limit on the financial impact that government action can have on an individual.<sup>54</sup> Consider the example of Susette Kelo, whose home was taken by eminent domain as part of a controversial redevelopment scheme.<sup>55</sup> The taking of her home unquestionably impinged on Kelo's ability to make a basic life choice about where to live. The harm to Kelo would have been much greater, however, if she had not been paid compensation and been deprived of the resources that she needed to act on her remaining freedom.<sup>56</sup>

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<sup>53</sup> As Akhil Amar observed,

Private property is such a good thing that every citizen should have some. Indeed, a minimal entitlement to property is so important, so constitutive, and so essential for both individual and collective self-governance that to provide each citizen with that minimal amount of property, the government may legitimately redistribute property from other citizens who have far more than their minimal share.

Amar, *supra* note 46, at 37.

<sup>54</sup> See U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

<sup>55</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>56</sup> Similarly, a regulation that renders property valueless may greatly impair the property owner's freedom to the degree that compensation is warranted. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-30 (1992).

The relationship between property and freedom does not create a deontological requirement for resource redistribution, nor does it support unlimited redistributionist activity by the government. The relationship may, however, be used to support arguments for resource redistribution. Outside the realm of deontology, a claim based on freedom does not trump a competing claim based on another social good. Strong arguments can be made, for example, that redistributive government actions reduce aggregate social wealth and that redistributive actions can lead to a dependency on the state that is harmful to the recipient's personhood. Competing claims can be made as to where to strike the balance among, say, freedom, equality, and wealth maximization. Wherever the balance is struck, however, if a claim for freedom is made, then that claim is empty without an accompanying claim that a person have access to the resources to attain that freedom.

### III. PROPERTY, FREEDOM, AND RAWLS

On the surface, property plays little role in John Rawls's political philosophy.<sup>57</sup> The absence of a comprehensive discussion of property in Rawls's theory seems notable when compared to the more explicit discussion of property in the works of other western political philosophers. It is easily explained, however, in the context of Rawls's political conception of justice, which is concerned with the evaluation of the "basic structure" of society.<sup>58</sup> By "basic structure," Rawls means "a society's main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next."<sup>59</sup> The core social institutions in the basic structure include the constitution and "the legal order and its specification of property and the like."<sup>60</sup>

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<sup>57</sup> See Thomas C. Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980) ("[t]he concept of property plays only the most minor role in" John Rawls's political philosophy).

<sup>58</sup> See JOHN RAWLS, POLITICAL LIBERALISM 11 (3d ed. 2005) [hereinafter RAWLS, POLITICAL LIBERALISM].

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 301.

For Rawls, a society is just if its basic structure comports with the two principles of justice. As formulated in *Political Liberalism*, the First Principle requires that “[e]ach person has an equal right to a *fully adequate* scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.”<sup>61</sup> Rawls’s Second Principle states that “[s]ocial and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.”<sup>62</sup> The second half of the Second Principle is widely referred to as the “difference principle.” Applied to the property context, the difference principle mandates that an unequal distribution of resources is permitted only if it improves the position of the least advantaged compared to their position if resources had been more equally distributed.

A property system is but one of many institutions that make up the basic structure of society and that must be consistent with the two principles of justice. Rawls therefore was able to omit a detailed theory of property because the concepts of property and ownership do not do any special work for him. Rawls also was able to profess a degree of agnosticism on the specifics of a property system by treating them as problems of institutional design to be made by the legislative process.

Although not a central component, property is not entirely absent from Rawls’s political philosophy. In connection with his discussion of the basic liberties, Rawls made two mirror-image assertions about property. First, he included the “right to hold and to have the exclusive use of personal property” within the basic liberties protected by the First Principle.<sup>63</sup> Second, Rawls repeatedly asserted that

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<sup>61</sup> *Id.* at 291 (emphasis added). As originally stated in *A Theory of Justice*, the First Principle requires that “each person is to have an equal right to the *most extensive* scheme of equal basic liberties compatible with a similar scheme of liberties for others.” JOHN RAWLS, *A THEORY OF JUSTICE* 53 (rev. ed. 1999) [hereinafter RAWLS, *A THEORY OF JUSTICE*] (emphasis added).

<sup>62</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 58, at 291.

<sup>63</sup> *Id.* at 298.

the principles of justice could be satisfied through either a property-owning democracy like the United States or through a liberal socialist regime in which natural resources and productive assets are collectively owned.<sup>64</sup> The ultimate choice between the two systems, for Rawls, is a legislative decision to be made based on “historical conditions and the traditions, institutions, and social forces of each country.”<sup>65</sup> The salient distinction between a property-owning democracy and a liberal socialist regime is that the former allows private ownership of productive property and natural resources where the latter does not. Taking the two positions together, Rawls can be seen as holding the position that the right to hold and use personal property is a basic liberty, but the right to hold and use productive property and natural resources is not.

This Part criticizes Rawls’s position on these points. After reviewing some core elements of Rawls’s political theory of justice, I explain why the First Principle of Justice provides a better avenue for criticism of Rawls’s positions on property than the difference principle of the Second Principle of Justice. I then critique Rawls’s position on property by combining his own methodology for determining the scope of the basic liberties with the connection between property and freedom established in Part II. I argue that some rights to hold productive property should be included in the basic liberties under Rawls’s scheme, and that as a result a property-owning democracy would better conform with the two principles of justice than a liberal socialist regime.

#### A. RAWLS AND THE BASIC LIBERTIES

The difference principle directly impacts the evaluation of resource allocation and, as a result, presents a superficially tempting tool to use to critique Rawls’s positions on property. For example, critics could argue that private ownership is superior to state or communal ownership from the perspective of the least advantaged.

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<sup>64</sup> See RAWLS, *A THEORY OF JUSTICE*, *supra* note 61, at xv–xvi, 234–42, 249–51; POLITICAL LIBERALISM, *supra* note 58, at 298.

<sup>65</sup> RAWLS, *A THEORY OF JUSTICE*, *supra* note 61, at xvi.



It is a fairly obvious point that private ownership of productive resources as currently allowed in market economies leads to a degree of resource inequality. A case could be made on efficiency grounds, however, that increased social productivity in a private property system benefits the least advantaged, justifying this inequality under the difference principle.

This approach suffers from at least two serious problems. First, it is based on underlying empirical claims that are contestable: that private property leads to increased productivity and that this increase benefits the least advantaged. Second, and more fundamentally, even if these empirical claims can be supported, the difference principle would not mandate (as opposed to tolerate) a private property system. Inequality can be justified under the difference principle only if it benefits the least advantaged. Equality, conversely, is the default position and can be defended even if it comes at the cost of efficiency or of the wellbeing of the least advantaged. Thus, to the extent that state ownership of productive resources can be defended on equality grounds, it would be consistent with the Second Principle even if it made the least advantaged worse off. The Second Principle alone, therefore, supports Rawls's position that both private property and state ownership can be consistent with the principles of justice, even if it can be empirically established that a private property system makes the least advantaged better off.

An alternative critique of Rawls's positions on property, which I develop further below,<sup>66</sup> is based on the commitments to freedom in the First Principle of Justice. For Rawls, liberty trumps equality, and—as a result—the First Principle takes priority over the Second Principle.<sup>67</sup> This priority of liberty over equality means that a private property system will be mandated under the principles of justice—even if it results in otherwise unjustifiable inequality—if it can

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<sup>66</sup> See *infra* notes 80–95 and accompanying text.

<sup>67</sup> See RAWLS, A THEORY OF JUSTICE, *supra* note 61, at 53, 230; RAWLS, POLITICAL LIBERALISM, *supra* note 58, at 6, 294–95.

be shown that private property is required to maintain a fully adequate scheme of basic liberties.

Whether private property is required to maintain a fully adequate scheme of basic liberties, of course, depends on the meaning of "fully adequate." Rawls provides substantive guidance on this score through his view of moral personhood. At the core of Rawls's political conception of justice is a "focus . . . on persons as capable of being normal and fully cooperating members of society over a complete life."<sup>68</sup> The key to achieving this view of moral personhood is the development of two moral powers: "the capacity for a sense of right and justice (the capacity to honor fair terms of cooperation and thus to be reasonable), and the capacity for a conception of the good (and thus to be rational)."<sup>69</sup> A substantive test for whether a liberty is sufficiently basic to be included in the First Principle is to ask "which liberties are essential social conditions for the adequate development and full exercise of the two powers of moral personality over a complete life."<sup>70</sup>

It is important for Rawls that people not only hold a conception of the good, but that they be able to form and revise this conception for themselves and be able to protect and advance this conception during their lifetime.<sup>71</sup> By conception of the good, Rawls means "a conception of what we regard for us as a worthwhile human life."<sup>72</sup> A liberty is basic, therefore, if it promotes an individual's ability to continuously make and revise basic decisions about what constitutes a worthwhile life and to live her life consistent with these decisions. This conception of freedom is remarkably similar to that discussed in the first section of this

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<sup>68</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 58, at 301.

<sup>69</sup> *Id.* at 302.

<sup>70</sup> *Id.* at 293.

<sup>71</sup> *Id.* at 302.

<sup>72</sup> *Id.*

essay: freedom is the individual's ability to make basic life choices for herself.<sup>73</sup>

#### B. CONTESTING RAWLS'S POSITIONS ON PROPERTY

As I noted at the outset of this Part, Rawls took two positions on property. First, Rawls asserted that some rights to own some forms of personal property are within the basic liberties protected by the First Principle, but that rights to own productive property or natural resources are not.<sup>74</sup> Second, Rawls asserted that the two principles of justice can be satisfied by either a property-owning democracy or a liberal socialist regime.<sup>75</sup> These two positions are related in that individual ownership of productive property and natural resources is the key difference between a property-owning democracy and a liberal socialist regime. The positions also have the same conceptual derivation: both are based on Rawls's view that some ownership of personal property is essential, but that ownership of productive property and natural resources is not essential to the "development and exercise of the moral powers."<sup>76</sup>

Before discussing these positions further, I should note that Rawls never defined the concept of personal property with precision, and it is not as easy to demarcate categories of property as Rawls implied. It is clear that Rawls did not use the term "personal property" in the legal sense but instead tried to contrast personal property with productive property.<sup>77</sup> While it is possible to pick out relatively clear examples at the margins, the borderline between the two is hard to set. Drawing on a similar point made by Robert Nozick, James Nickel observed that "personal property can easily

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<sup>73</sup> See James W. Nickel, *Economic Liberties*, in *THE IDEA OF POLITICAL LIBERALISM: ESSAYS ON RAWLS* 155, 161 (Victoria Davion & Clark Wolf eds., 2000).

<sup>74</sup> See *supra* notes 63–65 and accompanying text.

<sup>75</sup> See *supra* notes 64–65 and accompanying text.

<sup>76</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 58, at 298; JOHN RAWLS, *JUSTICE AS FAIRNESS* 114 (2001) [hereinafter RAWLS, *JUSTICE AS FAIRNESS*].

<sup>77</sup> See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 76, at 114. Rawls includes some forms of real property within the concept of personal property. *Id.* at 114 n.36. He therefore is

be put to productive uses: Familiar examples are using one's kitchen and utensils to cook food for sale, using one's household tools to earn income as a repair person or painter, and using one's household gardening equipment to earn income as a gardener."<sup>78</sup> If dwellings are included in the category of personal property, as Rawls suggested in *Justice as Fairness*,<sup>79</sup> then renting out a spare room could be added to this list of examples.

The question presented by Rawls's disparate treatment of personal and productive property is whether Rawls is correct that protection of the former is essential to the development of the moral powers, and therefore within the basic liberties, while the protection of the latter is not. In Part II of this Essay, I discussed three ways that property protects individual freedom: (1) by providing a zone of personal autonomy, (2) by dispersing power, and (3) by giving people access to the resources that they need to be free. Rawls implicitly accepts the first<sup>80</sup> and implicitly rejects the second.<sup>81</sup> My arguments that Rawls's commitment to individual liberty undercuts his positions on property, however, largely

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not relying on the legal distinction between real property (i.e., ownership of land and buildings) and personal property (i.e., ownership of everything else).

<sup>78</sup> Nickel, *supra* note 73, at 166.

<sup>79</sup> RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 76, at 114 n.36.

<sup>80</sup> Rawls's inclusion of "at least certain forms of real property, such as dwellings and private grounds" within the basic liberties, RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 76, at 114 n.36, seems to implicitly accept the importance of a zone of personal autonomy and privacy, *see supra* notes 31–36 and accompanying text.

<sup>81</sup> Rawls's position that either a property-owning democracy or a liberal socialist regime could satisfy the two principles of justice suggests that he does not place importance on the separation of political and economic power; the defining characteristic of a liberal socialist regime, after all, is a high percentage of state ownership of the economy. Rawls's position on this point is perhaps explained by his presumption that certain basic freedoms will be protected in a just society. For example, he takes the protection of such freedoms as "[l]iberty of conscience and freedom of thought" for granted. RAWLS, *A THEORY OF JUSTICE*, *supra* note 61, at 243. The observation that separating governmental and economic power will promote individual freedom by reducing the potential for coercion is a practical one, based on a certain lack of faith that governments will not always protect liberties on their own. Such practical concerns may not be particularly relevant at the rarefied level at which Rawls operates and where it can be presumed that liberties will be respected. *See id.* at 235.

hinge on the third. These arguments take two forms. The first is derivative and makes what Nickel called a “linkage” argument that suggests that certain basic liberties such as free association, freedom of thought, and political liberty cannot be maintained without including some right to productive property in the basic liberties.<sup>82</sup> The second argues that certain rights relating to productive property should be included in the basic liberties because of their direct contributions to the development of the moral powers. I will discuss each type of argument in turn.

### *1. The Linkage Argument*

The linkage argument for recognizing a basic liberty in productive property is based on the necessity of property to secure other basic liberties. This powerful argument highlights the difficulty in drawing a line between personal and productive property. A relatively simple example is freedom of expression. Although an individual can exercise free expression on a soapbox on a street corner, truly effective expression in the modern world requires the ability to disseminate opinion widely. For the last several hundred years, this has meant having access to a printing press. More recently, access to a computer and the internet have become substitutes for the ability to print. A printing press is a fairly clear example of a productive asset: its purpose is to produce printed matter. In contemporary society, computers have a role as personal property, but they are widely used in business and in the information economy are becoming more important sources of wealth than classic industrial assets. With either the printing press or the computer, the important point is that truly free expression requires access to assets that can be considered productive.

Nickel made this point well in the context of political freedom: “A system that grants political freedom but heavily restricts economic liberties tells people that they can engage in politics but that

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<sup>82</sup> Nickel, *supra* note 73, at 157.

they should do it without offices and equipment, without professional employees, without starting organizations with commercial dimensions to promote a political agenda, and without the use of substantial resources.”<sup>83</sup> A similar example can be made with religious liberty. As Rawls noted, some people “count among their religious obligations going on pilgrimages to distant places or building magnificent cathedrals or temples.”<sup>84</sup> Going on a pilgrimage requires access to transportation resources. Building a cathedral or temple requires access to building materials and construction equipment. All of these things are productive resources. Without some ability to access them, these people cannot fulfill their religious obligations. Guaranteeing each citizen the resources necessary to satisfy the demands of their religion would be unfair to those whose religious obligations are not as demanding of resources and, as Rawls noted, would be “socially divisive, a receipt for religious controversy if not civil strife.”<sup>85</sup> This problem suggests that many uncontroversial basic liberties can only be achieved through a property system that allows private individuals and groups to hold productive assets and to use them in whichever way they judge to be consistent with the priorities they set in making basic life choices for themselves.

## 2. *The Direct Argument*

As discussed in Part II, the right to transfer is important in the context of the third aspect of the relationship between property and freedom—that property gives people access to the resources needed to make basic life choices for themselves. Rawls repeatedly recognized the importance of material goods in allowing people to formulate and pursue their own conceptions of the good. In discussing the role of personal property in the scheme of basic liberties, Rawls highlighted the need “to allow a *sufficient material basis* for a sense of

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<sup>83</sup> *Id.* at 159.

<sup>84</sup> RAWLS, POLITICAL LIBERALISM, *supra* note 58, at 329.

<sup>85</sup> *Id.* at 329–30.

personal independence and self-respect.”<sup>86</sup> The importance of resources is also reflected in Rawls’s concept of primary goods, which he developed to avoid concerns about unknowable individual preferences from behind the veil of ignorance in the original position. Primary goods are identified “by asking which things are generally necessary as social conditions and all-purpose means to enable persons to pursue their determinate conceptions of the good and to develop and exercise their two moral powers.”<sup>87</sup> The idea is that the primary goods would be useful and desirable to any person regardless of the specifics of that person’s ends. The primary goods include “[i]ncome and wealth, understood broadly as all-purpose means (having an exchange value).”<sup>88</sup> Income and wealth specifically “are needed to achieve directly or indirectly a wide range of ends, whatever they happen to be.”<sup>89</sup> Resources, and the ability to exchange them, are therefore critical to the pursuit of any individuals’ conception of the good.

All of these passages reinforce the importance of access to resources in allowing individuals to pursue their own ends. If certain resources are off-limits to private holding, then people who need those assets to pursue their own ends cannot do so. If these resources are not available at all, then a person has an interest in producing them, which by definition requires productive assets.<sup>90</sup>

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<sup>86</sup> *Id.* at 298 (emphasis added). Similarly, in his introduction to the revised *Theory of Justice*, Rawls states that the right to hold personal property is “necessary for citizens’ independence and integrity,” RAWLS, A THEORY OF JUSTICE, *supra* note 61, at xvi, and in *Justice as Fairness*, he writes that “[h]aving this right and being able effectively to exercise it is one of the social bases of self-respect,” RAWLS, JUSTICE AS FAIRNESS, *supra* note 76, at 114.

<sup>87</sup> RAWLS, POLITICAL LIBERALISM, *supra* note 58, at 307.

<sup>88</sup> *Id.* at 308-09. In the same vein, Rawls writes in *A Theory of Justice* that “[w]ith more of these goods men can generally be assured of greater success in carrying out their intentions and advancing their ends, whatever their ends may be.” RAWLS, A THEORY OF JUSTICE, *supra* note 61, at 79.

<sup>89</sup> RAWLS, POLITICAL LIBERALISM, *supra* note 58, at 309.

<sup>90</sup> See Nickel, *supra* note 73, at 167 (“[T]he interest in protecting and advancing one’s determinate conception of the good, is among other things an interest in production, an interest in changing or rearranging the world so that it will contain more goods or better conform to one’s life plan. . . . Advancing one’s conception of the good often requires production by oneself and others.”).

To be free to pursue their own conception of the good, individuals must be able to pursue “ambitious or demanding projects that allow [them] to construct complicated and extended relations with other persons, expand and test [their] abilities, challenge assumptions about what humans can do, and create new options for other people.”<sup>91</sup> Pursuit of large, complicated projects requires the abilities to have access to productive assets and to pool those assets in economic organizations with other people. Similarly, it is difficult to see how freedom of choice of occupation, which is expressly valued by Rawls, is useful without the ability to start a business in the event that work in an individual’s chosen field is not otherwise available.<sup>92</sup>

A related point is that a property-owning democracy allows people who want nothing to do with the market economy to pursue their own conception of the good, while a liberal socialist regime prevents those who require productive assets to achieve their conception of the good from doing so. As John Gray observed, “[w]ithin a private-property regime, but not within a socialist [regime], individuals may join workers’ cooperatives or communes: they may achieve a partial or (as with the Amish) a near-total withdrawal from the surrounding capitalist economy.”<sup>93</sup>

Consequently, using Rawls’s own criteria, a case can be made for including at least some rights to productive property within the basic liberties. Rawls’s inclusion of a right to hold personal property within the basic liberties reflects the importance of property in allowing individuals to form, test, and act on their own conceptions of a good and worthwhile human life. The importance of property in this context, however, cannot be limited to non-productive property. The line between productive and non-productive resources is too permeable to allow for clear distinctions between the categories, and resources that would seem to fall within the productive category are necessary both for the promotion of uncontroversial liberties such as freedom

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<sup>91</sup> *Id.* at 163.

<sup>92</sup> RAWLS, POLITICAL LIBERALISM, *supra* note 58, at 308.

<sup>93</sup> Gray, *supra* note 46, at 40.



of association, speech, and religion, and for the broader exercise of freedom that is necessary to allow all people to develop and define their own conceptions of the good.

Under Rawls's approach, the inclusion of some rights to hold productive property within the basic liberties would result in a deontological right that would be violated if the ability to own that type of property was infringed.<sup>94</sup> This type of deontological right to property, however, would be very different from the Lockean or Nozickian right discussed in Part I: the Rawlsian right would be concerned merely with the legal right to own a kind of property, whereas a Lockean or Nozickian right is concerned with the inviolability of actual holdings of property.<sup>95</sup> A Rawlsian right to own productive property would not support an argument that holdings of such property should be inviolable from government interference or redistribution. Under Rawls's scheme, basic liberties can be regulated, and even denied, if necessary to protect the basic liberties of others and assure that the fully adequate scheme of basic liberties is available to all.<sup>96</sup> Further, the relationship between property and freedom may require less than the full set of rights typically associated with property ownership in the United States today. For example, while the right to own and freely transfer productive property is important to individual freedom in at least some contexts, an unrestrained right to profit from that productive property may not be.<sup>97</sup> Finally, as discussed in Part II, promoting individual freedom does not require an unlimited right to accumulate property or immunity from redistributive government action.<sup>98</sup>

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<sup>94</sup> See *supra* text accompanying note 11.

<sup>95</sup> See *supra* notes 9-13 and accompanying text.

<sup>96</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 58, at 295-96; Nickel, *supra* note 73, at 170.

<sup>97</sup> See *supra* text accompanying note 48.

<sup>98</sup> See *supra* notes 43, 48 and accompanying text; Nickel, *supra* note 73, at 169 ("To protect the property rights most valuable to ordinary people one does not have to believe that respect for holdings worth billions of dollars is a requirement of justice.").

#### IV. CONCLUSION

The institution of private property is vital to individual freedom. It provides individuals with a zone of privacy and autonomy, reduces the possibility of coercion by dispersing power, and gives people the access to resources that they need to be free. Interference with property rights, contrary to Murphy and Nagel's assertion, is "the kind of interference with autonomy that centrally threatens people's control over their lives."<sup>99</sup> It is difficult to see how other freedoms to speech, religion, or association could be secure in a society without the institution of private property. Freedom is diminished in socialist economies that prevent private ownership of productive resources, and Rawls was wrong to suggest that liberal socialist regimes and property-owning democracies are equivalent from the standpoint of freedom.

The strong relationship between property and freedom developed in this essay does not depend at all on libertarian theories that resist property redistribution and suggest that justly acquired property should be inviolable from interference. Indeed, the relationship between property and freedom in many ways supports property redistribution, because claims for freedom are empty if people do not have access to resources to act on that freedom. This does not mean that property redistribution is always warranted in the name of freedom. Redistribution can be done in ways that reduce, rather than enhance, freedom. There are also powerful, non-freedom-related arguments against redistribution, among them that redistribution tends to undercut the incentives for production that constitute one of the most powerful justifications for private property. Different people in different societies may make different choices about where to strike the balance among competing social interests such as equality, freedom, and wealth maximization. Regardless of where this balance is struck, however, a society that values people's freedom to make basic life choices for themselves will inevitably have the institution of private property.

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<sup>99</sup> MURPHY & NAGEL, *supra* note 3, at 65-66.