exploit. Each new statistical technique, whether it be flow of funds, inter-industry economics, or activity analysis, soon acquires its own subdivision and application in government. A particular example is input-output analysis, which began as a purely theoretical attempt to lend empirical content to the Walrasian system of general equilibrium. It has now advanced to the point where its champions hail it as providing:

> an integrated picture of the industrial mechanism. They believe it can measure with fair accuracy the changes in inter-industry relations. . . that would follow assumed changes in the "final bill of goods. . . ." In practice, the most important change in the bill of goods is that called for by way of large-scale rearmament. It is hardly astonishing, therefore, that most of the development and application of input-output studies have been connected with industrial mobilization.[16]

There are other reasons why the statistically-oriented will tend to become interventionists. For one thing, the economic statistician will tend to be impatient of all theory as "armchair speculation," and hence will tend to advocate piecemeal, pragmatic, decide-every-case-on-its-"merits" type of government planning. It is perhaps true, as Stigler declares, that few empirical economists have become outright socialists or communists; such a course would be much too theoretical for them. But neither do they become adherents of *laissez*

---

[16]Raymond W. Goldsmith, "Introduction," in *Input-Output Analysis, An Appraisal* (Princeton, N.J.: National Bureau of Economic Research, 1955), p. 5. As Evans and Hoffenberg state: "It is because of the necessity for doing a better job in industrial mobilization analysis . . . that most current developments in the field of interindustry economics are under way." W. Duane Evans and Marvin Hoffenberg, "The Nature and Uses of Interindustry-Relations Data and Methods," ibid., p. 102. Also see ibid., pp. 116ff., and the criticisms of input-output analysis by Clark Warburton and Milton Friedman, ibid., pp. 127, 174.

Another example of input-output analysis as a spur to statistics-gathering and government planning: "while there may be systematic thinking among economists about economic analysis as applied to regions, they can offer little guidance to policy-making unless the latter are prepared to make it easier to obtain statistical raw material." A.T. Peacock and D.G.M. Dosser, "Regional Input-Output Analysis and Government Spending," *Scottish Journal of Political Economy* (November 1959): 236.

faire; instead, a case-by-case *ad hoc* approach drives them down the path of a muddled government interventionism. I do not know whether, as Stigler asserts, "the most radical wing of the new dealers was not distinguished for its empirical knowledge of the American economy." But certainly the Tugwells and the Stuart Chases and the Veblenians proclaimed their empiricism often enough. And historians of the New Deal generally praise it highly for its flexible, pragmatic approach.

Another reason why statistics and political pragmatism are mutually congenial is that the very hallmark of the pragmatic approach is to begin by looking for problems or "problem areas" in the society. The pragmatist looks for areas where the economy and society fall short of the Garden of Eden, and these, of course, abound. Poverty, unemployment, old people with scurvy, young people with cavities—the list is indeed endless. And as each problem multiplies under the care of his eager research, the pragmatist calls ever more stridently for government to do something—quickly—to solve the problem. Only hard-headed, deductive, *a prioristic*, economic theory can teach him about ends and means, allocation of resources, opportunity cost, and the other rigors of the economic discipline.

Considering the above discussion, it is no wonder that conservative members of Congress, in the days before they were indoctrinated in the modern economic niceties by the Joint Committee on the Economic Report, were very suspicious of the seemingly harmless expansion of federal statistical activities. Thus, in 1945, Representative Frank Keefe, conservative Republican Congressman from Wisconsin was in the process of questioning Dr. A. Ford Hinrichs, head of the Bureau of Labor Statistics, on the latter's request for increased appropriations. In the course of the questioning Keefe's misgivings about government statistics emerged as a cry from the heart—unsophisticated perhaps, but at least of sound conservative instinct:

> There is no doubt but what it would be nice to have a whole lot of statistics. . . . I am just wondering whether we are not embarking on a program that is dangerous when we keep adding and adding and adding to this thing. . . .
>
> We have been Planning and getting statistics ever since 1932 to try to meet a situation that was domestic in character, but were never able to even meet that question. . . . Now we are involved in

> an international question. . . . It looks to me as though we spend a tremendous amount of time with graphs and charts and statistics and planning. What my people are interested in is, what is it all about? Where are we going, and where are you going?[17]

I think we can conclude that the nub of the difference between Stigler and myself is this: to him a radical or nonconservative is essentially a socialist or a communist. To me, a nonconservative is someone who advocates intervention rather than *laissez faire*. The difference is one of frame of reference If we define conservatism as Stigler does, then it is true that most economists are conservatives; if we define it as believing in *laissez faire*, then the conclusion must be very different. For the key then becomes not so much economics and noneconomics as theory versus empiricism. Empiricists will tend less to be full-scale socialists, but will also drift generally toward intervention.[18]

Still, when all is said and done, it is probably true that even the proportion of believers in *laissez faire* is much greater among economists than in other academic disciplines, and that the "average" point on the ideological spectrum in economics is considerably "to the right" of the average in other fields of study. It appears that the economic discipline, *per se*, imposes a rightward shift in ideological belief. And this, after all, is the main point of Stigler's article.

---

[17]*Department of Labor—FSA Appropriation Bill for 1945*. Hearings Before the Subcommittee of the House Committee on Appropriations. 78th Congress, 2d Session, Part I (Washington, D.C.: United States Printing Office, 1945), pp. 258f., 276f.

[18]There are also profound epistemological reasons for empiricism in the "social sciences" tending toward statism. This involves the whole problem of positivism and "scientism." On this, see F.A. Hayek, *The Counter-Revolution of Science* (Glencoe, Ill.: The Free Press, 1952).

19

Justice and Property Rights

The Failure of Utilitarianism

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

---

Originally appeared in *Property in a Humane Economy*, Samuel Bluemenfeld, ed. (LaSalle, Ill.: Open Court, 1974), pp. 101–22.

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

the justice and the propriety of my original ownership of the dollar and retailer's ownership of the hula hoop.

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

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

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

In recent years, free-market economists Ronald Coase and Harold Demsetz have begun to redress the balance and to focus on the importance of a clear and precise demarcation of property rights for the market economy. They have demonstrated the importance of such demarcation in the allocation of resources and in preventing or compensating for unwanted imposition of "external costs" from the actions of individuals. But Coase and Demsetz have failed to develop any theory of justice in these property rights; or rather, they have

advanced two theories: one, that it "doesn't matter" *how* the property titles are allocated, so long as they are allocated precisely; and, two, that the title should be allocated to minimize "total social transaction costs," since a minimization of costs is supposed to be a *Wertfrei* way of benefiting all society.

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

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

---

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

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

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

It should be clear that since the utilitarians base their theory of justice in property only on *whatever the government defines* as legal, they can have no groundwork whatever for any call for restoring the property in question to its original owners. They can only, willy-nilly,

---

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

and despite any emotional reluctance on their part, endorse the *new* allocation of property titles as defined and endorsed by government. Not only must utilitarians endorse the *status quo* of property titles, they must endorse whatever *status quo* exists and however rapidly the government decides to shift and redistribute such titles. Furthermore, considering the historical record, we may indeed say that relying upon government to be the guardian of property rights is like placing the proverbial fox on guard over the chicken coop.

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

Let us consider a hypothetical example of the failure of utilitarian defense of private property. Suppose that somehow government becomes persuaded of the necessity to yield to a clamor for a free-market, *laissez-faire* society. Before dissolving itself, however, it redistributes property titles: granting the ownership of the entire territory of New York to the Rockefeller family, of Massachusetts to the Kennedy family, and so on. It then dissolves, ending taxation and all other forms of government intervention in the economy. However, while taxation has been abolished, the Rockefeller, Kennedy, and so on, families proceed to dictate to all the residents in what is now "their" territory, exacting what are now called "rents" over all the

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

inhabitants.[5] It seems clear that our utilitarians could have no intellectual armor with which to challenge this new dispensation; indeed, they would have to endorse the Rockefeller, Kennedy, and so on, holdings as "private property" equally deserving of support as the ordinary property titles which they had endorsed only a few months previously. All this because the utilitarians have no theory of justice in property beyond endorsement of whatever *status quo* happens to exist.

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

Toward a Theory of Justice in Property

> We conclude that utilitarianism cannot be supported as a groundwork for property rights or, *a fortiori*, for the free-market economy. A theory of justice must be arrived at which goes beyond government allocations of property titles and which can therefore serve as a basis for criticizing such allocations. Obviously, in this space I can only outline what I consider to be the correct theory of justice in property rights. This theory has two fundamental premises: (a) the absolute property right of each individual in his own person, his own body: this may be called the *right of self-ownership*; and (b) the absolute right in material property of the person who first finds an unused material resource and then in some way occupies or transforms that resource by the use of his personal energy. This might be called the *homestead principle*—the case in which someone, in the phrase of John Locke, has "mixed his labor" with an unused resource. Let Locke summarize these principles:

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

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

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

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

The second alternative, which we might call "participatory communalism" or "communism," holds that every man should have the right to own his equal quotal share of everyone else. If there are three billion people in the world, then everyone has the right to own a three-billionth of every other person. In the first place, this ideal

---

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

itself rests upon an absurdity: proclaiming that every man is entitled to own a part of everyone else and yet is not entitled *to own himself.* Second, we can picture the viability of such a world: a world in which *no* man is free to take *any* action whatever without prior approval or indeed command by *everyone* else in society. It should be clear that in that sort of "community" world, no one would be able to do anything, and the human race would quickly perish. But if a world of zero self-ownership and 100 percent other-ownership spells death for the human race, then any steps in that direction also contravene the natural law of what is best for man and his life on earth.

Finally, however, the participatory communist world *cannot* be put into practice. For it is physically impossible for everyone to keep continual tabs on everyone else and thereby to exercise his equal quotal share of partial ownership over every other man. In practice, then, any attempt to institute universal and equal other-ownership is utopian and impossible, and supervision, and therefore control and ownership of others, would necessarily devolve upon a specialized group of people, who would thereby become a "ruling class." Hence, in practice, any attempt at communist society will automatically become class rule, and we of would be back at our rejected first alternative. We conclude, then, with the premise of absolute universal right of self-ownership as our first principle of justice in property. This principle, of course, automatically rejects slavery as totally incompatible with our primary right.[7]

Let us now turn to the more complex case of property in material objects. For even if every man has the right to self-ownership, people are not floating wraiths; they are not self-subsistent entities; they can only survive and flourish by grappling with the earth around

---

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

them. They must, for example, *stand* on land areas; they must also, in order to survive, transform the resources given by nature into "consumer goods," into objects more suitable for their use and consumption. Food must be grown and eaten; minerals must be mined and then transformed into capital and finally into useful consumer goods, and so on. Man, in other words, must own not only his own person, but also material objects for his control and use. How, then, should property titles in these objects be allocated?

Let us consider, as our first example, the case of a sculptor fashioning a work of art out of clay and other materials; and let us simply assume for the moment that he owns these materials while waiving the question of the justification for their ownership. Let us examine the question; *who* should own the work of art, as it emerges from the sculptor's fashioning? The sculpture is, in fact, the sculptor's "creation," not in the sense that he has created matter *de novo*, but in the sense that he has transformed nature-given matter—the clay—into another form dictated by his own ideas and fashioned by his own hands and energy. Surely, it is a rare person who, with the case put thus, would say that the sculptor does *not* have the property right in his own product. For if every man has the right to own his own body, and if he must grapple with the material objects of the world in order to survive, then the sculptor has the right to own his own product which he has made, by his energy and effort, a veritable *extension* of his own personality. He has placed the stamp of his person upon the raw material, by "mixing his labor" with the clay.

As in the case of the ownership of people's bodies, we again have three logical alternatives: (1) either the transformer, the "creator," has the property right in his creation; or (2) another man or set of men have the right to appropriate it by force without the sculptor's consent; or (3) the "communal" solution—every individual in the world has an equal, quotal share in the ownership of the sculpture. Again, put baldly, there are very few who would not concede the monstrous injustice of confiscating the sculptor's property, either by one or more others, or by the world as a whole. For by what right do they do so? By what right do they appropriate to themselves the product of the creator's mind and energy? (Again, as in the case of bodies, any confiscation in the supposed name of the world as a whole would in practice devolve into an oligarchy of confiscators.)

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

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

> He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask then, when did they begin to be his? When he digested? or when he ate? or when he boiled? or when he brought them home? or when he picked them up? And 'tis plain, if the first gathering made them not his, nothing else could. That labor put the distinction between them and common. That added something to them more than Nature, the common mother of all, had done, and so they became his private right. And will any one say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man has starved, notwithstanding the plenty God had given him. . . . Thus, the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in my place, where I have a right to them in common with others, become my property without the assignation or consent of any body. The labor that was mine, removing them out of that common state they were in, hath fixed my property in them.[8]

---

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

If every man owns his own person and therefore his own labor, and if by extension he owns whatever material property he has "created" or gathered out of the previously unused, unowned "state of nature," then what of the logically final question: who has the right to own or control the earth *itself*? In short, if the gatherer has the right to own the acorns or berries he picks, or the farmer the right to own his crop of wheat or peaches, *who* has the right to own the land on which these things have grown? It is at this point that Henry George and his followers, who would have gone all the way so far with our analysis, leave the track and deny the individual's right to own the piece of land itself, the ground on which these activities have taken place. The Georgists argue that, while every man should own the goods which he produces or creates, since Nature or God created the land itself, no individual has the right to assume ownership of that land. Yet again we are faced with our three logical alternatives: either the land itself belongs to the pioneer, the first user, the man who first brings it into production; *or* it belongs to a group of others; *or* it belongs to the world as a whole, with every individual owning an equal quotal part of every acre of land. George's option for the last solution hardly solves his moral problem: for if the land itself should belong to God or Nature, then why is it more moral for every acre in the world to be owned by the world as a whole, than to concede individual ownership? In practice, again, it is obviously impossible for every person in the world to exercise his ownership of his three-billionth portion of every acre of the world's surface; in practice a small oligarchy would do the controlling and owning rather than the world as a whole.

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

transformed the character and usefulness of the nature-given soil by his labor and his personality. The homesteader is just as legitimately the owner of the property as the sculptor or the manufacturer; he is just as much a "producer" as the others.

Moreover, if a producer is *not* entitled to the fruits of his labor, who is? It is difficult to see why a newborn Pakistani baby should have a moral claim to a quotal share of ownership of a piece of Iowa land that someone has just transformed into a wheatfield—and *vice versa* of course for an Iowan baby and a Pakistani farm. Land in its original state is unused and unowned. Georgists and other land communalists may claim that the entire world population "really" owns it, but if no one has yet used it, it is in the real sense owned and controlled by no one. The pioneer, the homesteader, the first user and transformer of this land, is the man who first brings this simple valueless thing into production and use. It is difficult to see the justice of depriving him of ownership in favor of people who have never gotten within a thousand miles of the land and who may not even know of the existence of the property over which they are supposed to have a claim. It is even more difficult to see the justice of a group of outside oligarchs owning the property, and at the expense of expropriating the creator or the homesteader who had originally brought the product into existence.

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

The moral issue involved here is even clearer if we consider the case of animals. Animals are "economic land," since they are original nature-given resources. Yet will anyone deny full title to a horse to the man who finds and domesticates it? This is no different from the acorns and berries which are generally conceded to the gatherer. Yet

in land, too, the homesteader takes the previously wild, undomesticated land, and tames it by putting it to productive use. Mixing his labor with land sites should give him just as clear a title as in the case of animals.

From our two basic axioms: the right of every man to self-ownership; and the right of every man to own previously unused natural resources that he first appropriates or transforms by his labor—the entire system of justification for property rights can be deduced. For if anyone justly owns the land himself and the property which he finds and creates, then he of course has the right to exchange that property for the similarly acquired just property of someone else. This establishes the right of free exchange of property, as well as the right to give one's property away to someone who agrees to receive it. Thus, X may own his person and labor and the farm be clears on which he grows wheat; Y owns the fish he catches; Z owns the cabbages he grows and the land under it. But then X has the right to exchange some of his wheat for some of Y's fish (if Y agrees) or Z's cabbages. And when X and Y make a voluntary agreement to exchange wheat for fish, then that fish becomes X's justly acquired property to do with what he wishes, and the wheat becomes Y's just property in precisely the same way. Further, a man may of course exchange not only the tangible objects he owns but also his own labor, which of course he owns as well. Thus, Z may sell his labor services of teaching farmer X's children in return for some of the farmer's produce.

We have thus established the property-right justification for the free-market process. For the free-market economy, as complex as the system appears to be on the surface, is yet nothing more than a vast network of voluntary and mutually agreed upon two-person or two-party exchanges of property titles, such as we have seen occurs between wheat and cabbage farmers, or between the farmer and the teacher. In the developed free-market economy, the farmer exchanges his wheat for money; the wheat is bought by the miller who processes and transforms the wheat into flour; the baker sells the bread to the wholesaler, who in turn sells it to the retailer, who finally sells it to the consumer. In the case of the sculptor, he buys the clay and the tools from the producers who dug the clay out of the ground or those who bought the clay from the original miners; and he

bought his tools from the manufacturers who in turn purchased the raw material from the miners of iron ore.

How "money" enters the equation is a complex process; but it should be clear here that conceptually the use of money is equivalent to any useful commodity that is exchanged for wheat, flour, and so on. Instead of money, the commodity exchanged could be cloth, iron or whatever. At each step of the way, mutually beneficial exchanges of property titles—to goods, services, or money—are agreed upon and transacted.

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

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

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

from it, then he has the right to give that money to the baby Clemente.

Armed with a theory of justice in property rights, let us now apply it to the often vexing question of how we should regard existing titles to property.

Toward a Critique of Existing Property Titles

Among those who call for the adoption of a free market and a free society, the utilitarians, as might be expected, wish to validate all existing property titles, as so defined by the government. But we have seen the inadequacy of this position, most clearly in the case of slavery, but similarly in the validation that it gives to *any* acts of governmental confiscation or redistribution, including our hypothetical Kennedy and Rockefeller "private" ownership of the territorial area of a state. But how much of a redistribution from existing titles would be implied by the adoption of our theory of justice in property, or of any attempt to put that theory into practice? Isn't it true, as some people charge, that all existing property titles, or at least all land titles, were the result of government grants and coercive redistribution? Would *all* property titles therefore be confiscated in the name of justice? And who would be granted these titles?

Let us first take the easiest case: where existing property has been stolen, as acknowledged by the government (and therefore by utilitarians) as well as by our theory of justice. In short, suppose that Smith has stolen a watch from Jones; in that case, there is no difficulty in calling upon Smith to relinquish the watch and to give it back to the true owner, Jones. But what of more difficult cases—in short, where existing property titles are ratified by state confiscation of a previous victim? This could apply either to money or especially to land titles, since land is a constant, identifiable, fixed quotal share of the earth's surface.

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

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

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

But suppose a third, more difficult, case; Smith is still the thief, but Jones and his entire family and heirs have been wiped out, either by Smith himself or in the natural course of events. Jones is intestate; what then should happen to the property? The first principle is that Smith, being the thief, cannot keep the fruits of his aggression; but in that case, the property becomes unowned and is up for grabs in the same way as any piece of unowned property. The "homestead principle" becomes applicable, in the sense that the first user or occupier of the newly declared unowned property becomes the just and proper owner. The only stipulation is that Smith himself, being the thief, is not eligible for this homesteading.[9]

Suppose now a fourth case, and one generally more relevant to problems of land title in the modern world. Smith is not a thief, nor has he directly received the land by government grant; but his *title* is derived from his ancestor who *did* so unjustly appropriate title to the property; the ancestor, Smith I, let us say, stole the property from Jones I, the rightful owner. What should be the disposition of the property now? The answer, in our view, completely depends on

---

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

whether or not Jones's heirs, the surrogates of the identifiable victims, still exist. Suppose, for example, that Smith VI legally "owns" the land, but that Jones VI is still extant and identifiable. Then we would have to say that, while Smith VI himself is not a thief and not punishable as such, his *title* to the land, being solely derived from the inheritance passed down from Smith I, does not give him true ownership, and that he too must disgorge the land—without compensation—and yield it into the hands of Jones VI.

But, it might be protested, what of the improvements that Smiths II–VI may have added to the land? Doesn't Smith VI deserve compensation for these legitimately owned additions to the original land received from Jones I? The answer depends on the moveability or separability of these improvements. Suppose, for example, that Smith steals a car from Jones and sells it to Robinson. When the car is apprehended, then Robinson, though he purchased it in good faith from Jones, has no title better than Smith's, which was nil, and therefore he must yield up the car to Jones without compensation. (He has been defrauded by Smith and must try to extract compensation out of Smith, *not* out of the victim Jones.) But suppose that Robinson, in the meantime, has improved the car? The answer depends on whether these improvements are separable from the car itself. If, for example, Robinson has installed a new radio which did not exist before, then he should certainly have the right to take it out before banding the car back to Jones. Similarly, in the case of land, to the extent that Smith VI has simply improved the land itself and mixed his resources inextricably with it, there is nothing he can do; but if, for example, Smith VI or his ancestors built new buildings upon the land, then he should have the right to demolish or cart away these buildings before handing the land over to Jones VI.

But what if Smith I did indeed steal the land from Jones I, but that all of Jones's descendants or heirs are lost in antiquity and cannot be found? What should be the status of the land then? In that case, since Smith VI is not himself a thief, he becomes the *legitimate* owner of the land on the basis of our homestead principle. For if the land is "unowned" and up for grabs, then Smith VI himself has been occupying and using it, and therefore he becomes the just and rightful owner on the homesteaded basis. Furthermore, all of his descendants have clear and proper title on the basis of being his heirs.

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

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

In South America and much of the undeveloped world, however, matters are considerably different. For here, in many areas, an invading state conquered the lands of peasants and then parcelled out such lands to various warlords as their private fiefs, from then on to extract rent from the hapless peasantry. The descendants of the *conquistadores* still presume to own the land tilled by the descendants of the original peasants, people with a clearly just claim to ownership of

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

the land. In this situation, justice requires the vacating of the land titles by these feudal or coercive landholders (who are in a position equivalent to our hypothetical Rockefellers and Kennedys), and the turning over of the property titles without compensation to the individual peasants who are the true owners of their land.

Much of the drive for "land reform" by the peasantry of the undeveloped world is precisely motivated by an instinctive application of our theory of justice: by the apprehension of the peasants that the land they have tilled for generations is *their* land and that the landlord's claim is coercive and unjust. It is ironic that, in these numerous cases, the only response of utilitarian free-market advocates is to defend existing land titles, regardless of their injustice, and to tell the peasants to keep quiet and "respect private property." Since the peasants are convinced that the property is *their* private title, it is no wonder that they fail to be impressed; but since they find the supposed champions of property rights and free-market capitalism to be their staunch enemies, they generally are forced to turn to the only organized groups that at least rhetorically champion their claims and are willing to carry out the required rectification of property titles—the socialists and communists. In short, from simply a utilitarian consideration of consequences, the utilitarian free-marketeers have done very badly in the undeveloped world, the result of their ignoring the fact that others than themselves, however inconveniently, *do* have a passion for justice. Of course, after socialists or communists take power, they do their best to collectivize peasant land, and one of the prime struggles of socialist society is that of the state *versus* the peasantry. But even those peasants who are aware of socialist duplicity on the land question may still feel that with the socialists and communists they *at least* have a fighting chance. And sometimes, of course, the peasants have been able to win and to force communist regimes to keep hands off their newly gained private property: notably in the cases of Poland and Yugoslavia.

The utilitarian defense of the *status quo* will then be *least* viable—and therefore the least utilitarian—in those situations where the *status quo* is the most glaringly unjust. As often happens, far more than utilitarians will admit, justice and genuine utility are here linked together.

To sum up: all existing property titles may be considered just under the homestead principle, *provided* (a) that there may never be

any property *in people*; (b) that the existing property owner did not himself steal the property; and particularly (c) that any identifiable just owner (the original victim of theft or his heir) must be accorded his property.

It might be charged that our theory of justice in property titles is deficient because in the real world most landed (and even other) property has a history so tangled that it becomes *impossible* to identify who or what has committed coercion and therefore who the current just owner may be. But the point of the "homestead principle" is that if we *don't know* what crimes have been committed in acquiring the property in the past, or if we don't know the victims or their heirs, then the current owner becomes the legitimate and just owner on homestead grounds. In short, if Jones owns a piece of land at the present time, and we don't know what crimes were committed to arrive at the current title, then Jones, as the current owner, becomes as fully legitimate a property owner of this land as he does over his own person. Overthrow of an existing property title only becomes legitimate if the victims or their heirs can present an authenticated, demonstrable, and specific claim to the property. Failing such conditions, existing landowners possess a full moral right to their property.

20

Law, Property Rights, and Air Pollution

Law as a Normative Discipline

Law is a set of commands; the principles of tort or criminal law, which we shall be dealing with, are negative commands or prohibitions, on the order of "thou shalt not" do actions, X, Y, or Z.[1] In short, certain actions are considered wrong to such a degree that it is considered appropriate to use the sanctions of violence (since law is the social embodiment of violence) to combat, defend against, and punish the transgressors.

There are many actions against which it is not considered appropriate to use violence, individual or organized. Mere lying (that is, where contracts to transfer property titles are not broken), treachery, base ingratitude, being nasty to one's friends or associates, or not showing up for appointments, are generally considered wrong, but few think of using violence to enjoin or combat them. Other sanctions—such as refusing to see the person or have dealings with him, putting him in Coventry, and so on—may be used by individuals or

---

Originally published in the *Cato Journal* 2, no. 1 (Spring, 1982): 55–99.

[1]Legal principles setting down certain prohibited actions as torts or crimes are to be distinguished from statutes or administrative edicts that lay down positive demands, such as "thou shalt pay X amount of taxes" or "thou shalt report for induction on such and such a date." In a sense, of course, *all* commands can be phrased in such a way as to appear negative, such as "thou shalt not refuse to pay X amount of taxes," or "thou shalt not disobey the order to appear for induction." Why such rephrasing would be inappropriate will be discussed below. See below also for a discussion of "torts" *vis-à-vis* "crimes."

groups, but using the violence of the law to prohibit such actions is considered excessive and inappropriate.

If ethics is a normative discipline that identifies and classifies certain sets of actions as good or evil, right or wrong, then tort or criminal law is a subset of ethics identifying certain actions as appropriate for using violence against them. The law says that action X should be illegal, and therefore *should* be combated by the violence of the law. The law is a set of "ought" or normative propositions.

Many writers and jurists have claimed the law is a value-free, "positive" discipline. Of course it is possible simply to list, classify and analyze existing law without going further into saying what the law should or should not be.[2] But that sort of jurist is not fulfilling his essential task. Since the law is ultimately a set of normative commands, the true jurist or legal philosopher has not completed his task until he sets forth what the law should be, difficult though that might be. If he does not, then he necessarily abdicates his task in favor of individuals or groups untrained in legal principles, who may lay down their commands by sheer fiat and arbitrary caprice.

Thus, the Austinian jurists proclaim that the king, or sovereign, is supposed to lay down the law, and the law is purely a set of commands emanating from his will. But then the question arises: On what principles does or should the king operate?[3] Is it ever possible to say that the king is issuing a "bad" or "improper" decree? Once the jurist admits that, he is going beyond arbitrary will to begin to frame a set of normative principles that should be guiding the sovereign. And then he is back to normative law.

Modern variants of positive legal theory state that the law should be what the legislators say it is. But what principles are to guide the

---

[2]Ronald Dworkin, however, has pointed out that even positive legal analysis necessarily involves moral questions and moral standards. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), chaps. 2, 3, 12, 13. Also see Charles Fried, "The Law of Change: The Cunning of Reason in Moral and Legal History," *Journal of Legal Studies* (March 1980): 340.

[3]The Austinians, of course, are also smuggling in a normative axiom into their positive theory: The law should be what the king says it is. This axiom is unanalyzed and ungrounded in any set of ethical principles.

legislators? And if we say that the legislators should be the spokesmen for their constituents, then we simply push the problem one step back, and ask: What principles are supposed to guide the voters? Or is the law, and therefore everyone's freedom of action, to be ruled by arbitrary caprice of millions rather than of one man or a few?[4]

Even the older concept that the law should be determined by tribal or common-law judges, who are merely interpreting the custom of the tribe or society, cannot escape normative judgments basic to the theory. *Why* must the rules of custom be obeyed? If tribal custom requires the murder of all people over six feet tall, must this custom be obeyed regardless? Why cannot reason lay down a set of principles to challenge and overthrow mere custom and tradition? Similarly, why may it not be used to overthrow mere arbitrary caprice by king or public?

As we shall see, tort or criminal law is a set of prohibitions against the invasion of, or aggression against, private property rights; that is, spheres of freedom of action by each individual. But if that is the case, then the implication of the command, "Thou shall not interfere with A's property right," is that A's property right is just and therefore should not be invaded. Legal prohibitions, therefore, far from being in some sense value-free, actually imply a set of theories about justice, in particular the just allocation of property rights and property titles. "Justice" is nothing if not a normative concept.

In recent years, however, jurists and "Chicago School" economists have attempted to develop theories of value-free property rights, rights defined and protected not on the basis of ethical norms such as justice but of some form of "social efficiency." In one such variant, Ronald Coase and Harold Demsetz have asserted that "it doesn't make any difference" how property rights are allocated in cases of conflicting interests, provided that some property rights are assigned to *someone* and then defended. In his famous example, Coase discusses a railroad locomotive's blighting of nearby farms and orchards. To Coase and Demsetz, this damage of a farmer's crops by the railroad is an "externality" which should, according to the tenets of social efficiency, be internalized. But to these economists, it does

[4]Again, these modern, democratic variants of positive legal theory smuggle in the unsupported normative axiom that statutes should be laid down by whatever the legislators or the voters wish to do.

not make any difference which of two possible courses of action one adopts. Either one says that the farmer has a property right in his orchard; therefore the railroad should have to pay damages for his loss, and the farmer should be able to enjoin the railroad's invasive actions. Or the railroad has the right to spew forth smoke wherever it wishes, and if the farmer wishes to stop the smoke, he must pay the railroad to install a smoke abatement device. It does not matter, from the point of view of expenditure of productive resources, which route is taken.

For example, suppose the railroad commits $100,000 worth of damage, and in Case 1, this action is held to invade the farmer's property. In that case, the railroad must pay $100,000 to the farmer or else invest in a smoke abatement device, whichever is cheaper. But in Case 2, where the railroad has the property right to emit the smoke, the farmer would have to pay the railroad up to $100,000 to stop damaging his farm. If the smoke device costs less than $100,000, say $80,000, then the device will be installed regardless of who was assigned the property right. In Case 1, the railroad will spend $80,000 on the device rather than have to pay $100,000 to the farmer; in Case 2 the farmer will be willing to pay the railroad $80,000 and up to $100,000 to install the device. If, on the other hand, the smoke device costs more than $100,000, say $120,000, then the device will not be installed anyway, regardless of which route is taken. In Case 1, the railroad will keep pouring out smoke and keep paying the farmer damages of $100,000 rather than spend $120,000 on the device; in Case 2, it will not pay the farmer to bribe the railroad $120,000 for the device, since this is more of a loss to him than the $100,000 damage. Therefore, regardless of how property rights are assigned—according to Coase and Demsetz—the allocation of resources will be the same. The difference between the two is only a matter of "distribution," that is, of income or wealth.[5]

There are many problems with this theory. First, income and wealth are important *to the parties involved*, although they might not be to uninvolved economists. It makes a great deal of difference to

[5]See the article launching this analysis by Ronald H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (October 1960): 10. For a critique, see Walter Block, "Coase and Demsetz on Private Property Rights," *Journal of Libertarian Studies* (Spring, 1977): 111–15.

both of them who has to pay whom. Second, this thesis works only if we deliberately ignore psychological factors. Costs are not only monetary. The farmer might well have an attachment to the orchard far beyond the monetary damage. Therefore, the orchard might be worth far more to him than the $100,000 in damages, so that it might take $1 million to compensate him for the full loss. But then the supposed indifference totally breaks down. In Case 1, the farmer will not be content to accept a mere $100,000 in damages. He will take out an injunction against any further aggression against his property, and even if the law allows bargaining between the parties themselves to remove the injunction, he will insist on over $1 million from the railroad, which the railroad will not be willing to pay.[6] Conversely, in Case 2, there is not likely to be a way for the farmer to raise the $1 million needed to stop the smoke invasion of the orchard.

The love of the farmer for his orchard is part of a larger difficulty for the Coase-Demsetz doctrine: Costs are purely subjective and not measurable in monetary terms. Coase and Demsetz have a proviso in their indifference thesis that all "transaction costs" be zero. If they are not, then they advocate allocating the property rights to whichever route entails minimum social transaction costs. But once we understand that costs are subjective to each individual and therefore unmeasurable, we see that costs cannot be added up. But if all costs, including transaction costs, cannot be added, then there is no such thing as "social transaction costs," and they cannot be compared in Cases 1 or 2, or indeed, in any other situation.[7]

---

[6]It is now illegal to bargain one's way out of an injunction by dealing with the injured party. In that case, of course, Coase-Demsetz cost internalization totally breaks down. But even with bargaining allowed, it would probably break down. Moreover, there may well be farmers so attached to their orchards that no price would compensate them, in which case the injunction would be absolute, and no Coase-Demsetz bargaining could remove it. On allowing bargaining to remove injunctions, see Barton H. Thompson, Jr., "Injunction Negotiations: An Economic, Moral and Legal Analysis," *Stanford Law Review* 27 (July 1975): 1563–95.

[7]On the impermissibility of the social cost concept and its application here, see Mario J. Rizzo, "Uncertainty, Subjectivity, and the Economic Analysis of Law," and Murray N. Rothbard, "Comment: The Myth of Efficiency," in *Time, Uncertainty, and Disequilibrium: Exploration of Austrian Themes*, Mario Rizzo, ed. (Lexington, Mass.: Lexington Books, 1979), pp.

Another serious problem with the Coase-Demsetz approach is that pretending to be value-free, they in reality import the ethical norm of "efficiency," and assert that property rights should be assigned on the basis of such efficiency. But even if the concept of social efficiency were meaningful, they don't answer the questions of why efficiency should be the overriding consideration in establishing legal principles or why externalities should be internalized above all other considerations. We are now out of *Wertfreiheit* and back to unexamined ethical questions.[8,9]

Another attempt by Chicago School economists to make legal public policy recommendations under the guise of *Wertfreiheit* is the contention that over the years common-law judges will always arrive at the socially efficient allocation of property rights and tort liabilities. Demsetz stresses rights that will minimize social transaction costs; Richard Posner stresses maximization of "social wealth." All this adds an unwarranted historical determinism, functioning as a kind of invisible hand guiding judges to the current Chicago School path, to the other fallacies examined above.[10]

71–95; included in this volume as chapter 13. Also see John B. Egger, "Comment: Efficiency is not a Substitute for Ethics," in ibid., pp. 117–25.

[8]Social efficiency is a meaningless concept because efficiency is how effectively one employs means to reach given ends. But with more than one individual, who determines the ends toward which the means are to be employed? The ends of different individuals are bound to conflict, making any added or weighted concept of social efficiency absurd. For more on this, see Rothbard, "Myth of Efficiency."

[9]Charles Fried has pointed out that efficiency is, willy-nilly, an attempted moral criterion, albeit unexamined, wrong, and incoherent. Fried, "The Law of Change," p. 341.

[10]The concept of social wealth suffers from the same disabilities as Coase-Demsetz, as well as other problems of its own. For a devastating critique of Posner, see Ronald M. Dworkin, "Is Wealth a Value?" and Richard A. Epstein, "The Static Conception of the Common Law," in *Journal of Legal Studies* (March 1980): 191–226, 253–76. Also see Anthony J. Kronman, "Wealth Maximization as a Normative Principle"; Mario J. Rizzo, "Law Amid Flux: The Economics of Negligence and Strict Liability in Tort"; Fried, "The Law of Change"; and Gerald P. O'Driscoll, Jr., "Justice, Efficiency, and the Economic Analysis of Law: A Comment on Fried," in ibid.: 227–42, 291–318, 335–54, 355–66.

If the law is a set of normative principles, it follows that whatever positive or customary law has emerged cannot simply be recorded and blindly followed. All such law must be subject to a thorough critique grounded on such principles. Then, if there are discrepancies between actual law and just principles, as there almost always are, steps must be taken to make the law conform with correct legal principles.

Physical Invasion

The normative principle I am suggesting for the law is simply this: No action should be considered illicit or illegal unless it invades, or aggresses against, the person or just property of another. Only invasive actions should be declared illegal, and combated with the full power of the law. The invasion must be concrete and physical. There are degrees of seriousness of such invasion, and hence, different proper degrees of restitution or punishment. "Burglary," simple invasion of property for purposes of theft, is less serious than "robbery," where armed force is likely to be used against the victim. Here, however, we are not concerned with the questions of degrees of invasion or punishment, but simply with invasion *per se*.

If no man may invade another person's "just" property, what is our criterion of justice to be?[11] There is no space here to elaborate on a theory of justice in property titles. Suffice it to say that the basic axiom of libertarian political theory holds that every man is a self-owner, having absolute jurisdiction over his own body. In effect, this means that no one else may justly invade, or aggress against, another's person. It follows then that each person justly owns whatever previously unowned resources he appropriates or "mixes his labor with." From these twin axioms—self-ownership and "homesteading"—stems the justification for the entire system of property rights titles in a free-market society. This system establishes the right of every man to his own person, the right of donation, of bequest

[11]The qualification of property being "just" must be made. Suppose, for example, that A steals B's watch and that several months later, B apprehends A and grabs the watch back. If A should prosecute B for theft of "his" watch, it would be an overriding defense on B's part that the watch was not really and justly A's because he had previously stolen it from B.

(and, concomitantly, the right to receive the bequest or inheritance), and the right of contractual exchange of property titles.[12]

Legal and political theory have committed much mischief by failing to pinpoint physical invasion as the only human action that should be illegal and that justifies the use of physical violence to combat it. The vague concept of "harm" is substituted for the precise one of physical violence.[13] Consider the following two examples. Jim is courting Susan and is just about to win her hand in marriage, when suddenly Bob appears on the scene and wins her away. Surely Bob has done great "harm" to Jim. Once a nonphysical-invasion sense of harm is adopted, almost any outlaw act might be justified. Should Jim be able to "enjoin" Bob's very existence?[14]

Similarly, A is a successful seller of razor blades. But then B comes along and sells a better blade, teflon-coated to prevent shaving cuts. The value of A's property is greatly affected. Should he be able to collect damages from B, or, better yet, to enjoin B's sale of a better blade? The correct answer is not that consumers would be

---

[12]For more on this libertarian, or "neo-Lockian," view, see Murray N. Rothbard, "Justice and Property Rights," in *Property in a Humane Economy*, Samuel Blumenfeld, ed. (LaSalle, Ill.: Open Court, 1974), pp. 101–22. In a sense, Percy B. Lehning is right when he comments that rather than being two independent axioms, the homesteading principle really follows from the single axiom of self-ownership. Lehning, "Property Rights, Justice and the Welfare State," *Acta Politica* 15 (Rotterdam, 1980): 323, 352.

[13]Thus, John Stuart Mill calls for complete freedom of individual action "without impediment from our fellow-creatures, so long as what we do does not harm them." Mill, "On Liberty," in *Utilitarianism, Liberty, and Representative Government* (New York: E.P. Dutton, 1944), p. 175. Hayek, after properly defining freedom as the absence of coercion, unfortunately fails to define coercion as physical invasion and thereby permits and justifies a wide range of government interference with property rights. See Murray N. Rothbard, "F.A. Hayek and the Concept of Coercion," *Ordo* 31 (Stuttgart 1980): 43–50.

[14]Robert Nozick appears to justify the outlawry of all voluntary exchanges that he terms "nonproductive," which he essentially defines as a situation where A would be better off if B did not exist. For a critique of Nozick on this point, see Murray N. Rothbard, "Robert Nozick and the Immaculate Conception of the State," *Journal of Libertarian Studies* (Winter, 1977): 52ff.

hurt if they were forced to buy the inferior blade, although that is surely the case. Rather, no one has the right to legally prevent or retaliate against "harms" to his property unless it is an act of physical invasion. Everyone has the right to have the physical integrity of his property inviolate; no one has the right to protect the value of his property, for that value is purely the reflection of what people are willing to pay for it. That willingness solely depends on how *they* decide to use their money. No one can have a right to someone else's money, unless that other person had previously contracted to transfer it to him.

In the law of torts, "harm" is generally treated as physical invasion of person or property. The outlawing of defamation (libel and slander) has always been a glaring anomaly in tort law. Words and opinions are not physical invasions. Analogous to the loss of property *value* from a better product or a shift in consumer demand, no one has a property right in his "reputation." Reputation is strictly a function of the subjective opinions of other minds, and they have the absolute right to their own opinions whatever they may be. Hence, outlawing defamation is itself a gross invasion of the defamer's right of freedom of speech, which is a subset of his property right in his own person.[15]

An even broader assault on freedom of speech is the modern Warren-Brandeis-inspired tort of invasion of the alleged right of "privacy," which outlaws free speech and acts using one's own property that are not even false or "malicious."[16]

---

[15]We may therefore hail the "absolutist" position of Mr. Justice Black in calling for the elimination of the law of defamation. The difference is that Black advocated an absolutist stand on the First Amendment because it is part of the Constitution, whereas we advocate it because the First Amendment embodies a basic part of the libertarian creed. On the significant weakening of the law of defamation in the last two decades, see Richard A. Epstein, Charles O. Gregory, and Harry Kalven, Jr., *Cases and Materials on Torts*, 3rd ed. (Boston: Little, Brown, 1977), pp. 977–1129 (hereafter cited as Epstein, *Cases on Torts*).

[16]There should be no assertion of a right to privacy that cannot be subsumed under protection of property rights of guarding against breach of contract. On privacy, see ibid., pp. 1131–90.

In the law of torts, "harm" is generally treated as physical invasion of person or property and usually requires payment of damages for "emotional" harm if and only if that harm is a consequence of physical invasion. Thus, within the standard law of *trespass*—an invasion of person or property—"battery" is the actual invasion of someone else's body, while "assault" is the creation by one person in another of a fear, or apprehension, of battery.[17]

To be a tortious assault and therefore subject to legal action, tort law wisely requires the threat to be near and imminent. Mere insults and violent words, vague future threats, or simple possession of a weapon cannot constitute an assault[18]; there must be accompanying

---

[17]"Apprehension" of an imminent battery is a more appropriate term than "fear," since it stresses the awareness of a coming battery and of the action causing that awareness by the aggressor, rather than the subjective psychological state of the victim. Thus, Dean Prosser: "Apprehension is not the same thing as fear, and the plaintiff is not deprived of his action merely because he is too courageous to be frightened or intimidated." William L. Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul, Minn.: West Publishing, 1971), p. 39.

[18]It is unfortunate that starting about 1930, the courts have succumbed to the creation of a brand new tort, "intentional infliction of mental disturbance by extreme and outrageous conduct." It is clear that freedom of speech and person should allow verbal insult, outrageous though it may be; furthermore, there is no cogent criterion to demarcate mere verbal abuse from the "outrageous" variety. Judge Magruder's statement is highly sensible: "Against a large part of the frictions and irritations and clashing of temperaments incident to participation in community life, a certain toughening of the mental hide is a better protection than the law could ever be." Magruder, "Mental and Emotional Disturbance in the *Law of Torts*," *Harvard Law Review* 40 (1936): 1033, 1035; cited in Prosser, *Law of Torts*, p. 51. Also see ibid., pp. 49–62; Epstein, *Cases on Torts*, pp. 933–52.

In general, we must look with great suspicion on any creation of new torts that are not merely application of old tort principles to new technologies. There is nothing new or modern about verbal abuse.

It seems that both the infliction-of-harm and the new invasion-of-privacy tort are part and parcel of the twentieth-century tendency to dilute the rights of the defendant in favor of excessive cossetting of the plaintiff—a systematic discrimination that has taken place in tort rather than criminal proceedings. See Epstein, "Static Conception of the Common Law," pp. 253–75. See also below.

overt action to give rise to the apprehension of an imminent physical battery.[19] Or, to put it another way, there must be a concrete threat of an imminent battery before the prospective victim may legitimately use force and violence to defend himself.

Physical invasion or molestation need not be actually "harmful" or inflict severe damage in order to constitute a tort. The courts properly have held that such acts as spitting in someone's face or ripping off someone's hat are batteries. Chief Justice Holt's words in 1704 still seem to apply: "The least touching of another in anger is a battery." While the actual damage may not be substantial, in a profound sense we may conclude that the victim's person was molested, was *interfered with*, by the physical aggression against him, and that hence these seemingly minor actions have become legal wrongs.[20]

Initiation of an Overt Act: Strict Liability

If only a physical invasion of person or property constitutes an illicit act or tort, then it becomes important to demarcate *when* a person may act as if such a physical invasion is about to take place. Libertarian legal theory holds that A may not use force against B except in self-defense, that is, unless B is initiating force against A. But when is A's force against B legitimate self-defense, and when is it *itself* illegitimate and tortious aggression against B? To answer this question, we must consider what kind of tort liability theory we are prepared to adopt.

Suppose, for example, that Smith sees Jones frowning in his direction across the street, and that Smith has an abnormal fear of being frowned at. Convinced that Jones is about to shoot him, he therefore pulls a gun and shoots Jones in what he is sure is self-defense. Jones presses a charge of assault and battery against Smith. Was Smith an aggressor and therefore should he be liable? One theory of liability—

---

[19]Prosser, *Law of Torts*, pp. 39–40.

[20]Hence, the wisdom of the court's decision in *South Brilliant Coal Co.* v. *Williams*: "If Gibbs kicked plaintiff with his foot, it cannot be said as a matter of law that there was no physical injury to him. In a legal sense, it was physical injury, though it may have caused no physical suffering, and though the sensation resulting therefrom may have lasted but for a moment" *South Brilliant Coal Co.* v. *Williams*, 206 Ala. 637, 638 (1921). In Prosser, *Law of Torts*, p. 36. Also see Epstein, *Cases on Torts*, pp. 903ff.

the orthodox "reasonable man" or "reasonable conduct" or "negligence" theory—says he should, because frowning would not rouse the apprehension of imminent attack in a "reasonable man." A competing theory, once held and now being revived—that of "strict liability" or "strict causal liability"—agrees because it should be clear to a judge or jury that Jones was *not* an imminent aggressor. And this would hold regardless of how sincere Smith was in his fear of attack.

Two serious flaws in the "reasonable man" theory are that the definition of "reasonable" is vague and subjective, and that guilty aggressors go unpunished, while their victims remain uncompensated. In this particular case, the two theories happen to coincide, but in many other cases they do not. Take, for example, the case of *Courvoisier* v. *Raymond* (1896).[21] In this case, the defendant, a storekeeper, was threatened by a rioting mob. When a man who happened to be a plainclothes policeman walked up to the defendant, trying to help him, the defendant, mistaking him for a rioter, shot the policeman. Should the storekeeper have been liable?

The trial court decided the case properly—on the basis of strict liability—and the jury decided for the policeman. For it is clear that the defendant committed a battery by shooting the plaintiff. In strict liability theory, the question is causation: Who initiated the tort or crime? An overriding defense for the defendant's action was if the plaintiff *in fact* had committed an assault, threatening an imminent initiation of a battery against him. The question traditionally then becomes a factual one for juries to decide: Did the plainclothesman in fact threaten battery against the storekeeper? The jury decided for the policeman.[22] The appeals court, however, reversed the trial court's decision. To the court, the storekeeper acted as a "reasonable

---

[21]*Courvoisier* v. *Raymond*, 23 Colo. 113, 47 Pac. 284 (1896), and discussion by Epstein in *Cases on Torts*, pp. 21–23; and in Richard A. Epstein, "A Theory of Strict Liability," *Journal of Legal Studies* 2 (January 1973): 173.

[22]As Epstein puts it,

> Under a theory of strict liability, the statement of the *prima facie* case is evident: the defendant shot the plaintiff. The only difficult question concerns the existence of a defense which takes the form, the plaintiff assaulted the defendant. That question is a question of fact, and the jury found in effect that the plaintiff did not frighten the defendant into shooting him. (Ibid.)

man" when he concluded, though incorrectly, that the plainclothesman was out to attack him.

When is an act to be held an assault? Frowning would scarcely qualify. But if Jones had whipped out a gun and pointed it in Smith's direction, though not yet fired, this is clearly a threat of imminent aggression, and would properly be countered by Smith plugging Jones in self-defense. (In this case, our view and the "reasonable man" theory would again coincide.) The proper yardstick for determining whether the point of assault had been reached is this: Did Jones initiate an "overt act" threatening battery? As Randy Barnett has pointed out:

> In a case less than a certainty, the only justifiable use of force is that used to repel an overt act that is something more than mere preparation, remote from time and place of the intended crime. It must be more than "risky"; it must be done with the specific intent to commit a crime and directly tend in some substantial degree to accomplish it.[23]

Similar principles hold in innocent-bystander cases. Jones assaults and attacks Smith; Smith, in self-defense, shoots. The shot goes wild and accidentally hits Brown, an innocent bystander. Should Smith be liable? Unfortunately, the courts, sticking to the traditional "reasonable man" or "negligence" doctrine, have held that Smith is not liable if indeed he was reasonably intending self-defense against Jones.[24] But, in libertarian and in strict liability theory, Smith has indeed aggressed against Brown, albeit unintentionally, and must pay for this tort. Thus, Brown has a proper legal action against Smith: Since Jones coerced or attacked Smith, Smith also has an independent and proper action for assault or battery against Jones. Presumably, the liability or punishment against Jones would be considerably more severe than against Smith.

---

[23]Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," in *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, R. Barnett and J. Hagel, eds. (Cambridge, Mass.: Ballinger, 1977), p. 377. Barnett has since pointed out that his article was in error in mentioning "specific intent to commit a crime"; the important emphasis is on action constituting a crime or tort rather than the intent involved.

[24]See *Morris* v. *Platt,* 32 Conn. 75 (1864), and the discussion by Epstein in *Cases on Torts*, pp. 22–23.

One of the great flaws in the orthodox negligence approach has been to focus on one victim's (Smith's) right of self-defense in repelling an attack, or on his good-faith mistake. But orthodox doctrine unfortunately neglects the other victim—the man frowning across the street, the plainclothesman trying to save someone, the innocent bystander. The *plaintiff's* right of self-defense is being grievously neglected. The proper point to focus on in all these cases is: Would the plaintiff have had the right to plug the defendant in *his* self-defense? Would the frowning man, the plainclothesman, the innocent bystander, if he could have done so in time, have had the right to shoot the sincere but erring defendants in self-defense? Surely, whatever our theory of liability, the answer must be "yes"; hence, the palm must go to the strict liability theory, which focuses on everyone's right of self-defense and not just that of a particular defendant. For it is clear that since these plaintiffs had the right to plug the defendant in self-defense, then the defendant must have been the tortious aggressor, regardless of how sincere or "reasonable" his actions may have been.

From various illuminating discussions of Professor Epstein, it seems evident that there are three contrasting theories of tort liability interwoven in our legal structure. The oldest, strict causal liability, apportioned blame and burden on the basis of identifiable cause: Who shot whom? Who assaulted whom? Only defense of person and property was a proper defense against a charge of using force. This doctrine was replaced during the nineteenth century by negligence or "reasonable man" theory, which let many guilty defendants off the hook if their actions were judged reasonable or did not exhibit undue negligence. In effect, negligence theory swung the balance excessively in favor of the defendant and against the plaintiff. In contrast, modern theory emerging increasingly in the twentieth century, anxious to help plaintiffs (especially if they are poor), seeks ways to find against defendants even if strict cause of physical invasion cannot be proven. If the oldest theory is termed "strict causal liability," the modern one might be termed "presumptive liability," since the presumption seems to be against the defendant, in flagrant violation of the Anglo-Saxon *criminal law* presumption of innocence on the part of the defendant.[25]

[25]On the relationship between the criminal and tort law, see the section here entitled "Collapsing Crime Into Tort."

Extending our discussion from crimes against the person to crimes against property, we may apply the same conclusion: Anyone has the right to defend his property against an overt act initiated against it. He may not move with force against an alleged aggressor—a trespasser against his land or chattels—until the latter initiates force by an overt act.

How much force may a victim use to defend either his person or his property against invasion? Here we must reject as hopelessly inadequate the current legal doctrine that he may use only "reasonable" force, which in most cases has reduced the victim's right to defend himself virtually to a nullity.[26] In current law, a victim is only allowed to use maximal, or "deadly" force, (a) in his own home, and then only if he is under direct personal attack; or (b) if there is no way that he can retreat when he is personally under attack. All this is dangerous nonsense. *Any* personal attack might turn out to be a murderous one; the victim has no way of knowing whether or not the aggressor is going to stop short of inflicting a grave injury upon him. The victim should be entitled to proceed on the assumption that *any* attack is implicitly a deadly one, and therefore to use deadly force in return.

In current law, the victim is in even worse straits when it comes to defending the integrity of his own land or movable property. For there, he is not even allowed to use deadly force in defending his own home, much less other land or properties, The reasoning seems to be that since a victim would not be allowed to kill a thief who steals his watch, he should therefore not be able to shoot the thief in the process of stealing the watch or in pursuing him. But punishment and defense of person or property are not the same, and must be treated differently. Punishment is an act of retribution after the crime has been committed and the criminal apprehended, tried, and convicted. Defense while the crime is being committed, or until property is recovered and the criminal apprehended, is a very different story.

---

[26]While modern law discriminates against the defendant in economic cases, it discriminates heavily against the victim in his use of personal force in self-defense. In other words, the state is allowed to use excessive force through the courts in economic cases (where corporations or the wealthy are defendants), but individual victims are scarcely allowed to use force at all.

The victim should be entitled to use any force, including deadly force, to defend or to recover his property so long as the crime *is in the process of commission*—that is, until the criminal is apprehended and duly tried by legal process. In other words, he should be able to shoot looters.[27]

The Proper Burden of Risk

We conclude, then, that no one may use force to defend himself or his property until the initiation of an overt act of aggression against him. But doesn't this doctrine impose an undue risk upon everyone?

The basic reply is that life is always risky and uncertain and that there is no way of getting round this primordial fact. Any shifting of the burden of risk away from one person simply places it upon someone else. Thus, if our doctrine makes it more risky to wait until someone begins to aggress against you, it also makes life *less* risky, because as a nonaggressor, one is more assured that no excited alleged victim will pounce upon you in supposed "self-defense." There is no way for the law to reduce risk overall; it then becomes important to use some other principle to set the limits of permissible action, and thereby to allocate the burdens of risk. The libertarian axiom that all actions are permissible except overt acts of aggression provides such a principled basis for risk allocation.

There are deeper reasons why overall risks cannot be reduced or minimized by overt legal action. Risk is a subjective concept unique to each individual; therefore, it cannot be placed in measurable quantitative form. Hence, no one person's quantitative degree of risk can be compared to another's, and no overall measure of social risk can be obtained. As a quantitative concept, overall or social risk is fully as meaningless as the economist's concept of "social costs" or social benefits.

---

[27]For the current state of legal doctrine, see Prosser, *Law of Torts*, pp. 108–25, 134ff. As Epstein indicates, basing the proper limits of self-defense on permissible punishment would imply that in jurisdictions that have abolished capital punishment, no one may use deadly force even in self-defense against a deadly attack. So far the courts have not been willing to embrace this *reductio ad absurdum* of their own position. Epstein, *Cases on Torts*, p. 30.

In a libertarian world, then, everyone would assume the "proper burden of risk"[28] placed upon him as a free human being responsible for himself. That would be the risk involved in each man's person and property. Of course, individuals could voluntarily pool their risks, as in various forms of insurance, in which risks are shared and benefits paid to losers from the pool. Or, speculators could voluntarily assume risks of future price changes that are sloughed off by others in hedging operations on the market. Or, one man could assume another's risks for payment, as in the case of performance and other forms of bonding. What would not be permissible is one group getting together and deciding that another group should be forced into assuming their risks. If one group, for example, forces a second group to guarantee the former's incomes, risks are greatly increased for the latter, to the detriment of their individual rights. In the long run, of course, the whole system might collapse, since the second group can only provide guarantees out of their own production and incomes, which are bound to fall as the burden of social parasitism expands and cripples society.

The Proper Burden of Proof

If every man's proper burden of risk is to refrain from coercion unless an overt act against his person or property has been initiated against him,[29] then what is the proper burden of proof against a defendant?

First, there must be *some* rational standards of proof for libertarian principles to operate. Suppose that the basic axiom of libertarianism

---

[28]This is the same concept but a different name for Williamson Evers's pioneering phrase, "the proper assumption of risk." The current phrase avoids confusion with the concept of "assumption of risk" in tort law, which refers to risk voluntarily assumed by a plaintiff and that therefore negates his attempts at action against a defendant. The "proper burden of risk" is related to the legal concept but refers to what risk *should* be assumed by each person in accordance with the nature of man and of a free society, rather than what risk had voluntarily been incurred by a plaintiff. See Rothbard, "Nozick and the Immaculate Conception of the State," pp. 49–50.

[29]Or an overt act against someone else. If it is legitimate for a person to defend himself or his property, it is then equally legitimate for him to call upon other persons or agencies to aid him in that defense, or to pay for this defense service.

—no initiation of force against person or property—is enshrined in all judicial proceedings. But suppose that the only criterion of proof is that all persons under six feet tall are considered guilty while all persons over six feet tall are held to be innocent. It is clear that these procedural standards of proof would be in direct and flagrant violation of libertarian principles. So would tests of proof in which irrelevant or random occurrences would decide the case, such as the medieval trial by ordeal or trial by tea leaves or astrological charts.

From a libertarian point of view, then, proper procedure calls for rational proof about the guilt or innocence of persons charged with tort or crime. Evidence must be probative in demonstrating a strict causal chain of acts of invasion of person or property. Evidence must be constructed to demonstrate that aggressor A in fact initiated an overt physical act invading the person or property of victim B.[30]

Who, then, should bear the burden of proof in any particular case? And what criterion or standard of proof should be satisfied?

The basic libertarian principle is that everyone should be allowed to do whatever he or she is doing unless committing an overt act of aggression against someone else. But what about situations where it is unclear whether or not a person is committing aggression? In those cases, the only procedure consonant with libertarian principles is to do nothing; to lean over backwards to ensure that the judicial agency is not coercing an innocent man.[31] If we are unsure, it is far better to let an aggressive act slip through than to impose coercion and therefore

---

[30]Thayer, in his classical treatise on evidence, wrote: "There is a principle . . . a presupposition involved in the very conception of a rational system of evidence which forbids receiving anything irrelevant, not logically probative," James Thayer, *Preliminary Treatise on Evidence* (1898), pp. 264ff., cited in *McCormick's Handbook of the Law of Evidence*, E.W. Cleary, ed., 2nd ed. (St. Paul, Minn.: West Publishing, 1972), p. 433.

[31]Benjamin R. Tucker, the leading individualist-anarchist thinker of the late nineteenth century, wrote: "No use of force, except against the invader; and in those cases where it is difficult to tell whether the alleged offender is an invader or not, still no use of force except where the necessity of immediate solution is so imperative that we must use it to save ourselves." Benjamin R. Tucker, *Instead of a Book* (New York: B.R. Tucker, 1893), p. 98. Also see ibid., pp. 74–75.

to commit aggression ourselves.[32] A fundamental tenet of the Hippocratic oath, "at least, do not harm," should apply to legal or judicial agencies as well.

The presumption of every case, then, must be that every defendant is innocent until proven guilty, and the burden of proof must be squarely upon the plaintiff.[33]

If we must always insist on *laissez-faire*, then it follows that such a weak standard of proof as "preponderance of evidence" must not be allowed to serve as a demonstration of guilt. If the plaintiff produces evidence adjudged in some sense to weigh a mere 51 percent on behalf of the guilt of the defendant, this is scarcely better than random chance as justification for the court's using force against the defendant. Presumption of innocence, then, must set a far higher standard of proof.

> At present, "preponderance of evidence" is used to decide civil cases, whereas a far tougher standard is used for criminal cases, since penalties are so much stiffer. But, for libertarians, the test of guilt must not be tied to the degree of punishment; regardless of punishment, guilt involves coercion of some sort levied against the

[32]Cleary puts the point well, though he unfortunately applies it only to criminal cases:

> Society has judged that it is significantly worse for an innocent man to be found guilty of a crime than for a guilty man to go free. . . . Therefore, as stated by the Supreme Court in recognizing the inevitability of error in criminal cases . . . this margin of error is reduced as to him [the defendant] by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. In so doing, the courts have . . . the worthy goal of decreasing the number of one kind of mistake—conviction of the innocent. (*McCormick's Handbook of Evidence*, pp. 798–99)

[33]The burden of proof is also on the plaintiff in contemporary law. Cleary writes: "The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." Ibid., p. 786. Cleary also speaks of "the natural tendency to place the burdens on the party desiring change." Ibid., pp. 788–89.

> convicted defendant. Defendants deserve as much protection in civil torts as in criminal cases.[34]

A few judges, properly shocked by the dominant view that a mere 51 percent of the evidence may serve to convict, have changed the criterion to make sure whoever is trying the case—-judge or jury—is *convinced* of guilt by the preponderance of evidence. A more satisfactory criterion, however, is that the trier must be convinced of the defendant's guilt by "clear, strong, and convincing proof."[35] Fortunately, this test has been used increasingly in civil cases in recent years. Better yet were stronger but generally rejected formulations of certain judges such as "clear, positive, and unequivocal" proof, and one judge's contention that the phrase means that the plaintiffs "must. . . satisfy you to a moral certainty."[36]

But the best standard for any proof of guilt is the one commonly used in criminal cases: Proof "beyond a reasonable doubt." Obviously, *some* doubt will almost always persist in gauging people's actions, so that such a standard as "beyond a scintilla of doubt" would be hopelessly unrealistic. But the doubt must remain small enough that any "reasonable man" will be convinced of the fact of the defendant's guilt. Conviction of guilt "beyond a reasonable doubt" appears to be the standard most consonant with libertarian principle.

The outstanding nineteenth-century libertarian constitutional lawyer, Lysander Spooner, was an ardent advocate of the "beyond a reasonable doubt" standard for all guilt:

> the lives, liberties, and properties of men are too valuable to them, and the natural presumptions are too strong in their favor to justify the destruction of them by their fellow men on a mere balancing of probabilities, *or on any ground whatever short of certainty beyond a reasonable doubt*. [Italics Spooner's][37]

---

[34]See section here entitled "Collapsing Crime Into Tort."

[35]See McCormick's *Handbook of Evidence*, pp. 794ff.

[36]Ibid., p. 796. Here we must hail the scorned trial judges in *Molyneux* v. *Twin Falls Canal Co.*, 54 Idaho 619, 35 P. 2d 651, 94 A.L.R. 1264 (1934), and *Williams* v. *Blue Ridge Building & Loan Assn.*, 207 N.C. 362, 177 S.E. 176 (1934).

[37]C. Shiveley, ed., *The Collected Works of Lysander Spooner* (Weston, Mass.: M. and S. Press, 1971), vol. 2, pp. 208–09. It should be pointed out

While the reasonable doubt criterion generally has not been used in civil cases, a few precedents do exist for this seemingly bold and shocking proposal. Thus, in the claim of an orally offered gift in a probate case, the court ruled that the alleged gift "must be proven by forceful, clear and conclusive testimony which convinces the court beyond a reasonable doubt of its truthfulness." And in a suit to revise a written contract, the court ruled that the mistake must be "established by evidence so strong and conclusive as to place it beyond reasonable doubt."[38]

Strict Causality

What the plaintiff must prove, then, beyond a reasonable doubt is a strict causal connection between the defendant and his aggression against the plaintiff. He must prove, in short, that A actually "caused" an invasion of the person or property of B.

In a brilliant analysis of causation in the law, Professor Epstein has demonstrated that his own theory of strict tort liability is intimately connected to a direct, strict, commonsense view of "cause." Causal proposition in a strict liability view of the law takes such form as, "A hit B," "A threatened B," or "A compelled B to hit C." Orthodox tort theory, in contrast, by stressing liability for "negligence" rather than for direct aggression action, is tangled up with vague and complex theories of "cause," far removed from the commonsense "A hit B" variety. Negligence theory postulates a vague, "philosophical" notion of "cause in fact" that virtually blames everyone and no one, past, present and future for every act, and then narrows cause in a vague and unsatisfactory manner to "proximate cause" in the specific case. The result, as Epstein trenchantly points out, is to vitiate the concept of cause altogether and to set the courts free to decide cases arbitrarily and in accordance with their own views of social policy.[39]

---

that Spooner, too, made no distinction between civil and criminal cases in this regard. I am indebted to Williamson Evers for this reference.

[38]*St. Louis Union Co.* v. *Busch*, 36 Mo. 1237, 145 S.W. 2d426, 430 (1940); *Ward* v. *Lyman*, 108 Vt 464, 188 A. 892, 893 (1937). *McCormick's Handbook of Evidence*, pp. 797, 802.

[39]According to Epstein: "Once it is decided that there is no hard content to the term causation, the courts are free to decide particular lawsuits

To establish guilt and liability, strict causality of aggression leading to harm must meet the rigid test of proof beyond a reasonable doubt. Hunch, conjecture, plausibility, even mere probability are not enough. In recent years, statistical correlation has been commonly used, but it cannot establish causation, certainly not for a rigorous legal proof of guilt or harm. Thus, if lung cancer rates are higher among cigarette smokers than noncigarette smokers, this does not in itself establish proof of causation. The very fact that many smokers never get lung cancer and that many lung cancer sufferers have never smoked indicates that there are other complex variables at work. So that while the correlation is suggestive, it hardly suffices to establish medical or scientific proof; *a fortiori* it can still less establish any sort of legal guilt (if, for example, a wife who developed lung cancer should sue a husband for smoking and therefore injuring her lungs).[40]

---

in accordance with the principles of 'social policy' under the guise of proximate-cause doctrine." Epstein, "A Theory of Strict Liability," p. 163. Such nebulous and unworkable concepts as "substantial factor" in a damage or "reasonably foreseeable" have been of little help in guiding decisions on "proximate cause." For an excellent critique of "but for" tests for "cause in fact" in negligence theory, as well as the Chicago-Posnerite attempt to scrap the concept of cause altogether in tort law, see ibid., pp. 160–62, 163–66.

[40]If a long-time smoker who develops lung cancer should sue a cigarette company, there are even more problems. Not the least is that the smoker had voluntarily assumed the risk, so that this situation could hardly be called an aggression or tort. As Epstein writes, "Suppose plaintiff smoked different brands of cigarettes during his life? Or always lived in a smog-filled city? And if plaintiff surmounts the causal hurdle, will he be able to overcome the defense of assumption of risk?" Epstein, *Cases on Torts*, p. 257. Also see Richard A. Wegman, "Cigarettes and Health: A Legal Analysis," *Cornell Law Quarterly* 51 (Summer, 1966): 696–724.

A particularly interesting cancer tort case that is instructive on the question of strict causality is *Kramer Service Inc*. v. *Wilkins* 184 Miss. 483,186 So. 625 (1939), in Epstein, *Cases on Torts*, p. 256. The court summed up the proper status of medical causal evidence in *Daly* v. *Bergstedt* (1964), 267 Minn. 244, 126 N. W. 2d 242. In Epstein, *Cases on Torts*, p. 257. Also see Epstein's excellent discussion, ibid., of *DeVere* v. *Parten* (1946), in which the plaintiff was properly slapped down in an absurd attempt to claim that the defendant was responsible for a disease she had contracted.

Milton Katz points out, in a case where the plaintiff sued for air pollution damage:

> Suppose the plaintiff should claim serious damage: for emphysema, perhaps, or for lung cancer, bronchitis or some other comparably serious injury to his lungs. He would face a problem of proof of causation. . . . Medical diagnoses appear to have established that sulphur dioxide and other air pollutants often play a significant role in the etiology of emphysema and other forms of lung damage. But they are by no means the only possible causative factors. Emphysema and lung cancer are complex illnesses which may originate in a variety of causes, for example, cigarette smoking, to name one familiar example. If and when the plaintiff should succeed in establishing that the defendants' conduct polluted the air of his home, it would not follow that the pollution caused his illness. The plaintiff would still have to meet the separate burden of proving the etiology of his lung damage.[41]

Thus, a strict causal connection must exist between an aggressor and a victim, and this connection must be provable beyond a reasonable doubt. It must be causality in the commonsense concept of strict proof of the "A hit B" variety, not mere probability or statistical correlation.

Liability of the Aggressor Only

Under strict liability theory, it might be assumed that if "A hit B," then A is the aggressor and that therefore A and only A is liable to B. And yet the legal doctrine has arisen and triumphed, approved even by Professor Epstein, in which sometimes C, innocent and not the aggressor, is *also* held liable. This is the notorious theory of "vicarious liability."

Vicarious liability grew up in medieval law, in which a master was responsible for the torts committed by his servants, serfs, slaves, and wife. As individualism and capitalism developed, the common law changed, and vicarious liability disappeared in the sixteenth and seventeenth centuries, when it was sensibly concluded that "the master should not be liable for his servant's torts unless he had commanded the particular act."[42]

---

[41]Milton Katz, "The Function of Tort Liability in Technology Assessment," *Cincinnati Law Review* 38 (Fall, 1969): 620.

[42]Prosser, *Law of Torts,* p. 458.

Since the eighteenth and nineteenth centuries, however, the vicarious liability of masters or employers is back with a vengeance. As long as the tort is committed by the employee in the course of furthering, even if only in part, his employer's business, then the employer is also liable. The only exception is when the servant goes "on a frolic of his own" unconnected with the employer's business. Prosser writes:

> The fact that the servant's act is expressly forbidden by the master, or is done in a manner which he has prohibited, is . . . usually not conclusive, and does not in itself prevent an act from being within the scope of employment [and therefore making the master liable]. A master cannot escape liability merely by ordering his servant to act carefully. . . . Thus instructions to a sales clerk never to load a gun while exhibiting it will not prevent liability when the clerk does so, in an effort to sell the gun. . . . [T]he master cannot escape responsibility no matter how specific, detailed, and emphatic his orders may have been to the contrary. This has been clear since the leading English cases (*Limpus* v. *London General Omnibus Co.*, [1862] 1H. & C. 526, 158 Eng. Rep. 993) in which an omnibus company was held liable notwithstanding definite orders to its driver not to obstruct other vehicles.[43]

Even more remarkably, the master is now held responsible even for intentional torts committed by the servant without the master's consent:

> In general, the master is held liable for any intentional tort committed by the servant where its purpose, however misguided, is wholly or in part to further the master's business.
>
> Thus he will be held liable where his bus driver crowds a competitor's bus into a ditch, or assaults a trespasser to eject him from the bus, or a salesman makes fraudulent statements about the products he is selling.[44]

Prosser is properly scornful of the tortured reasoning by which the courts have tried to justify a legal concept so at war with libertarianism, individualism, and capitalism, and suited only to a precapitalist society.

---

[43]Ibid., p. 461.

[44]Ibid., p. 464.

> A multitude of very ingenious reasons have been offered for the vicarious liability of a master: he has a more or less fictitious "control" over the behavior of a servant; he has "set the whole thing in motion," and is therefore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrongs, rather than an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ another at all, and there should be a corresponding responsibility as the price to be paid for it. . . . Most courts have made little or no effort to explain the result, and have taken refuge in rather empty phrases, such as . . . the endlessly repeated formula of "respondeat superior," which in itself means nothing more than "look to the man higher up."[45]

In fact, as Prosser indicates, the only real justification for vicarious liability is that employers generally have more money than employees, so that it becomes more convenient (if one is not the employer), to stick the wealthier class with the liability. In the cynical words of Thomas Baty: "In hard fact, the reason for the employers' liability is the damages are taken from a deep pocket."[46]

In opposition, too, we have Justice Holmes's lucid critique: "I assume that common sense is opposed to making one man pay for another man's wrong, unless he has actually brought the wrong to pass. . . . I therefore assume that common sense is opposed to the fundamental theory of agency."[47]

One would expect that in a strict causal liability theory, vicarious liability would be tossed out with little ceremony. It is therefore surprising to see Professor Epstein violate the spirit of his own theory. He seems to have two defenses for the doctrine of respondeat superior and vicarious liability. One is the curious argument that "just as the employer gets and benefits from the gains for his worker's activities, so too should he be required to bear the losses from these activities."[48] This statement fails to appreciate the nature of voluntary

---

[45]Ibid., p. 459.

[46]Ibid.

[47]In his *Harvard Law Review* articles on "Agency," 1891. See Epstein, *Cases on Torts*, p. 705.

[48]Ibid., p. 707.

exchange: Both employer and employee benefit from the wage contract. Moreover, the employer does bear the "losses" in the event his production (and, therefore, his resources) turn out to be misdirected. Or, suppose the employer makes a mistake and hires an incompetent person, who is paid $10,000. The employer may fire this worker, but he and he alone bears the $10,000 loss. Thus, there appears to be no legitimate reason for forcing the employer to bear the *additional* cost of his employee's tortious behavior.

Epstein's second argument is contained in the sentence: "X corporation hurt me because its servant did so in the course of his employment." Here Epstein commits the error of conceptual realism, since he supposes that a "corporation" actually exists, and that it committed an act of aggression. In reality, a "corporation" does not act; only individuals act, and each must be responsible for his own actions and those alone. Epstein may deride Holmes's position as being based on the "nineteenth-century premise that individual conduct alone was the basis of individual responsibility," but Holmes was right nevertheless.[49]

A Theory of Just Property: Homesteading

There are two fundamental principles upon which the libertarian theory of just property rests: (a) Everyone has absolute property right over his or her own body; and (b) everyone has an absolute property right over previously unowned natural resources (land) which he first occupies and brings into use (in the Lockean phrase, "Mixing his labor with the land").

The "first ownership to first use" principle for natural resources is also popularly called the "homesteading principle." If each man owns the land that he "mixes his labor with," then he owns the product of that mixture, and he has the right to exchange property titles with other, similar producers. This establishes the right of free contract in the sense of transfer of property titles. It also establishes the right to give away such titles, either as a gift or bequest.

Most of us think of homesteading unused resources in the old-fashioned sense of clearing a piece of unowned land and farming the soil. There are, however, more sophisticated and modern forms of

[49]Ibid., p. 705.

homesteading, which should establish a property right. Suppose, for example, that an airport is established with a great deal of empty land around it. The airport exudes a noise level of, say, X decibels, with the sound waves traveling over the empty land. A housing development then buys land near the airport. Some time later, the homeowners sue the airport for excessive noise interfering with the use and quiet enjoyment of the houses.

Excessive noise can be considered a form of aggression but in this case the airport has already homesteaded X decibels worth of noise. By its prior claim, the airport now "owns the right" to emit X decibels of noise in the surrounding area. In legal terms, we can then say that the airport, through homesteading, has earned an *easement right* to creating X decibels of noise. This homesteaded easement is an example of the ancient legal concept of "prescription," in which a certain activity earns a prescriptive property right to the person engaging in the action.

On the other hand, if the airport starts to *increase* noise levels, then the homeowners could sue or enjoin the airport from its noise aggression for the extra decibels, which had not been homesteaded. Of course if a new airport is built and begins to send out noise of X decibels onto the existing surrounding homes, the airport becomes fully liable for the noise invasion.

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

Given a prescriptive easement, the courts have generally done well in deciding its limits. In *Kerlin* v. *Southern Telephone and Telegraph Co.* (1941), a public utility had maintained an easement by prescription of telephone poles and wires over someone else's land (called the "servient estate" in law). The utility wished to string up two additional wires, and the servient estate challenged its right to do so. The court decided correctly that the utility had the right because there was no proposed change in the "outer limits of space utilized by the

owner of the easement." On the other hand, an early English case decided that an easement for moving carts could not later be used for the purpose of driving cattle.[50]

Unfortunately, the courts have not honored the concept of homestead in a noise or pollution easement. The classic case is *Sturgis* v. *Bridgman* (1879) in England. The plaintiff, a physician, had purchased land in 1865; on the property next to him the defendant, a pharmacist, used a mortar and pestle, which caused vibrations on the physician's property. There was no problem, however, until the physician built a consultation room 10 years later. He then sued to enjoin the pharmacist, claiming that his work constituted a nuisance. The defendant properly argued that the vibrations were going on before the construction of the consultation room, that they then did not constitute a nuisance, and that therefore he had a prescriptive right to keep operating his business. Nevertheless, defendant's claim was denied.

Consequently, we have such injustice as compulsory changes of character in a business and a failure to provide prescription through first use. Thus, Prosser notes that "the character of a district may change with the passage of time, and the industry set up in the open country may become a nuisance, or be required to modify its activities, when residences spring up around it. It will acquire no prescriptive right."[51] A just law would tell the later arriving residents that they knew what they were getting into, and that *they* must adapt to the industrial ambience rather than vice-versa.

In some cases, however, the courts have held or at least considered that by the plaintiff's "coming to the nuisance," he has voluntarily entered a pre-existing situation, and that therefore the defendant is not guilty. Prosser states that "in the absence of a prescriptive right the defendant cannot condemn the surrounding premises to endure the nuisance," but our whole point here is that the homesteader of a noise

---

[50]*Kerlin* v. *Southern Telephone & Telegraph Co.* (Ga.), 191 Ga. 663, 13 S.E. 2d 790 (1941); *Ballard* v. *Dyson* (1808) 1 Taunt. 279, 127 Eng. Rep. 841. In William E. Burby, *Handbook of the Law of Real Property*, 3rd ed. (St. Paul, Minn.: West Publishing, 1965), pp. 84–85.

[51]Prosser, *Law of Torts*, pp. 600-1. Also see Burby, *Law of Real Property*, p. 78. *Sturges* v. *Bridgman* (1879), 11 Ch., Div. 852.

or a pollution easement has indeed earned that right in cases of "coming to the nuisance."[52]

Dominant court opinion, as in the case of *Ensign* v. *Walls* (1948), discards or minimizes "coming to the nuisance" and dismisses the idea of a homesteaded easement. But minority opinion has strongly supported it, as in the New York case of *Bove* v. *Donner-Hanna Coke Co.* (1932). Plaintiff had moved into an industrial region, where defendant was operating a coke oven on the opposite side of the street. When plaintiff tried to enjoin the coke oven out of existence, the court rejected the plea with these exemplary words:

> With all the dirt, smoke and gas which necessarily come from factory chimneys, trains and boats, and with full knowledge that this region was especially adapted for industrial rather than residential purposes, and that factories would increase in the future, plaintiff selected this locality as the site of her future home. She voluntarily moved into this district, fully aware of the fact that the atmosphere would constantly be contaminated by dirt, gas and foul odors; and that she could not hope to find in this locality the pure air of a strictly residential zone. She evidently saw certain advantages in living in this congested center. This is not the case of an industry, with its attendant noise and dirt, invading a quiet, residential district. This is just the opposite. Here a residence is built in an area naturally adapted for industrial purposes and already dedicated to that use. Plaintiff can hardly be heard to complain at this late date that her peace and comfort have been disturbed by a situation which existed, to some extent at least, at the very time she bought her property.[53]

---

[52]Prosser, *Law of Torts*, p. 611.

[53]*Bove* v. *Donner-Hanna Coke Corp.*, 236 App. Div. 37, 258 N. Y.S. 229 (1932), quoted in Epstein, *Cases on Torts*, p. 535. Contrary to Epstein, however, the coming-to-nuisance is not simply an assumption of risk on the part of the plaintiff. It is a stronger defense, for it rests on an actual assignment of property right in the "nuisance" creating activity, which is therefore absolute, overriding, and indefeasible. Cf. Richard A. Epstein, "Defenses and Subsequent Pleas in a System of Strict Liability," *Journal of Legal Studies* 3 (1974): 197–201.

Nuisances, Visible and Invisible

An invasion of someone else's land can be considered a *trespass* or a *nuisance*, and there is considerable confusion about the boundaries of each. For our purposes, the classic distinction between the two is important. Trespass occurs when "there is a physical entry that is a direct interference with the possession of land, which usually must be accomplished by a tangible mass."[54] On the other hand, "contact by minute particles or intangibles, such as industrial dust, noxious fumes, or light rays, has heretofore generally been held insufficient to constitute a trespassory entry, on the ground that there is no interference with possession, or that the entry is not direct, or that the invasion failed to qualify as an entry because of its imponderable or intangible nature."[55]

These more intangible invasions qualify as private nuisances and can be prosecuted as such. A nuisance may be, as Prosser points out:

> an interference with the physical condition of the land itself, as by vibration or blasting which damages a house, the destruction of crops, flooding, raising the water table, or the pollution of a stream or of an underground water supply. It may consist of a disturbance of the comfort or convenience of the occupant, as by unpleasant odors, smoke or dust or gas, loud noises, excessive light or high temperature, or even repeated telephone calls.[56]

Prosser sums up the difference between trespass and nuisance:

> Trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it. The difference is that between . . . felling a tree across his boundary line and keeping him awake at night with the noise of a rolling mill.[57]

---

[54]"Note: Deposit of Gaseous and Invisible Solid Industrial Wastes Held to Constitute Trespass," *Columbia Law Review* 60 (1960): 879.

[55]Ibid., pp. 879–80. Also see Glen Edward Clover, "Torts: Trespass, Nuisance and $E=mc^2$," *Oklahoma Law Review* 11 (1966): ll8ff.

[56]Prosser, *Law of Torts*, pp. 591–92.

[57]Ibid., p. 595. A nuisance generally emanates from the land of A to the land of B; in short, stems from outside B's land itself. Prosser's attempt to rebut this point (defendant's dog howling under plaintiff's window or defendant's cattle roaming over the other's fields) misses the point. The offending

But what precisely does the difference between "exclusive possession" and "interference with use" mean? Furthermore, the practical difference between a tort action for trespass and for nuisance is that a trespass is illegal *per se*, whereas a nuisance, to be actionable, has to *damage* the victim beyond the mere fact of invasion itself. What, if any, is the justification for treating a trespass and nuisance so differently? And is the old distinction between tangible and invisible invasion really now obsolete as Prosser maintains, "in the light of modern scientific tests?"[58] Or, as a *Columbia Law Review* note put it:

> The federal court . . . suggested that historically the reluctance of courts to find that invasion by gases and minute particles were trespassory resulted from the requirement that to find a trespass a court must be able to see some physical intrusion by tangible matter; it then found that this difficulty no longer exists because courts may today rely on scientific detecting methods, which can make accurate quantitative measurements of gases and minute solids, to determine the existence of a physical entry of tangible matter.[59]

The distinction between visible and invisible, however, is not completely swept away by modern scientific detection methods. Let us take two opposite situations. First, a direct trespass: A rolls his car onto B's lawn or places a heavy object on B's grounds. Why is this an invasion and illegal *per se*? Partly because, in the words of an old English case, "the law infers some damage; if nothing more, the treading down of grass or herbage."[60] But it is not just treading down; a tangible invasion of B's property interferes with his exclusive use of the property, if only by taking up tangible square feet (or cubic feet). If A walks on or puts an object on B's land, then B cannot use the space A or his object has taken up. An invasion by a tangible mass is a *per se* interference with someone else's property and therefore illegal.

---

dog and cattle themselves wandered over the land of A, the defendant, and since they are domesticated, their deeds are the responsibility of their owners. On animals, see ibid., pp. 496–503.

[58]Ibid., p. 66.

[59]"Note, Deposit of Wastes," pp. 880–81. Also see Clover, "Torts: Trespass, Nuisance and $E=mc^2$," p. 119.

[60]Prosser, *Law of Torts*, p. 66.

In contrast, consider the case of radio waves, which is a crossing of other people's boundaries that is invisible and insensible in every way to the property owner. We are all bombarded by radio waves that cross our properties without our knowledge or consent. Are they invasive and should they therefore be illegal, now that we have scientific devices to detect such waves? Are we then to outlaw all radio transmission? And if not, why not?

The reason why not is that these boundary crossings do not interfere with anyone's exclusive possession, use or enjoyment of their property. They are invisible, cannot be detected by man's senses, and do no harm. They are therefore not really invasions of property, for we must refine our concept of invasion to mean not just boundary crossing, but boundary crossings that in some way interfere with the owner's use or enjoyment of this property. What counts is whether the senses of the property owner are interfered with.

But suppose it is later discovered that radio waves are harmful, that they cause cancer or some other illness? Then they *would* be interfering with the use of the property in one's person and should be illegal and enjoined, provided of course that this proof of harm and the causal connection between the specific invaders and specific victims are established beyond a reasonable doubt.

So we see that the proper distinction between trespass and nuisance, between strict liability *per se* and strict liability only on proof of harm, is not really based on "exclusive possession" as opposed to "use and enjoyment." The proper distinction is between visible and tangible or "sensible" invasion, which interferes with possession and use of the property, and invisible, "insensible" boundary crossings that do not and therefore should be outlawed only on proof of harm.

The same doctrine applies to low-level radiation, which virtually everyone and every object in the world emanates, and therefore everyone receives. Outlawing, or enjoining, low-level radiation, as some of our environmental fanatics seem to be advocating, would be tantamount to enjoining the entire human race and all the world about us. Low-level radiation, precisely because it is undetectable by man's senses, interferes with no one's use or possession of his property, and therefore may only be acted against upon strict causal proof of harm beyond a reasonable doubt.

The theory of homestead easements discussed earlier would require no restriction upon radio transmissions or on people's low-level radiation. In the case of radio transmissions, Smith's ownership of land and all of its appurtenances does *not* entitle him to own all radio waves passing over and across his land, for Smith has not homesteaded or transmitted on radio frequencies here. Hence, Jones, who transmits a wave on, say, 1200 kilohertz, homesteads the ownership of that wave as far as it travels, even if it travels across Smith's property. If Smith tries to interfere with or otherwise disrupt Jones's transmissions, he is guilty of interfering with Jones's just property.[61]

Only if the radio transmissions are proven to be harmful to Smith's person beyond a reasonable doubt should Jones's activities be subject to injunction. The same type of argument, of course, applies to radiation transmissions.

Between tangible trespass and radio waves or low-level radiation, there is a range of intermediate nuisances. How should they be treated?

Air pollution, consisting of noxious odors, smoke, or other visible matter, definitely constitutes an invasive interference. These particles can be seen, smelled, or touched, and should therefore constitute invasion *per se*, except in the case of homesteaded air pollution easements. (Damages beyond the simple invasion would, of course, call for further liability.) Air pollution, however, of gases or particles that are invisible or undetectable by the senses should not constitute aggression *per se*, because being insensible they do not interfere with the owner's possession or use. They take on the status of invisible radio waves or radiation, *unless* they are proven to be harmful, and

---

[61]During the 1920s, the courts were working out precisely such a system of homesteaded private property rights in airwave frequencies. It is because such a private property structure was evolving that Secretary of Commerce Hoover pushed through the Radio Act of 1927, nationalizing ownership of the airwaves. See Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics* 2 (October 1959): 1–40. For a modern study of how such frequencies could be allocated, see A. De Vany, et al., *A Property System Approach to the Electromagnetic Spectrum* (San Francisco: Cato Institute, 1980).

until this proof and the causal connection from aggressor to victim can be established beyond a reasonable doubt.[62]

Excessive noise is certainly a tort of nuisance; it interferes with a person's enjoyment of his property, including his health. However, no one would maintain that every man has the right to live as if in a soundproofed room; only *excessive* noise, however vague the concept, can be actionable.

In a sense, life itself homesteads noise easement. Every area has certain noises, and people moving into an area must anticipate a reasonable amount of noise. As Terry Yamada ruefully concedes:

> An urban resident must accept the consequences of a noisy environment situation. Courts generally hold that persons who live or work in densely populated communities must necessarily endure the usual annoyances and discomforts of those trades and businesses located in the neighborhood where they live or work; such annoyances and discomforts, however, must not be more than those reasonably expected in the community and lawful to the conduct of the trade or business.[63]

In short, he who wants a soundproof room must pay for its installation.

The current general rule of the civil courts on nuisance suits for noise is cogent:

> A noise source is not a nuisance *per se* but only becomes a nuisance under certain conditions. These conditions depend on a consideration of the surrounding area, the time of day or night when the noise-producing activities take place and the manner in which the activity is conducted. A private nuisance is compensable only

---

[62]On prescriptive rights, tangibility, and the concept of "coming to the tort" in relation to air pollution, see William C. Porter, "The Role of Private Nuisance Law in the Control of Air Pollution," *Arizona Law Review* 10 (1968): 107–19; and Julian C. Juergensmeyer, "Control of Air Pollution Through the Assertion of Private Rights," *Duke Law Journal* (1967): 1126–55.

[63]Terry James Yamada, "Urban Noise: Abatement, Not Adaptation," *Environmental Law* 6 (Fall, 1975): 64. Unfortunately, like most authors writing on environmental law, Yamada writes like a fervent special pleader for environmental plaintiffs rather than as a searcher for objective law.

> when it is unreasonable or excessive and when it produces actual physical discomfort or injury to a person of ordinary sensibilities so as to interfere with the use and enjoyment of the property.[64]

Owning the Technological Unit: Land and Air

In our discussion of homesteading, we did not stress the problem of the size of the area to be homesteaded. If A uses a certain amount of a resource, how much of that resource is to accrue to his ownership? Our answer is that he owns the technological unit of the resource. The size of that unit depends on the type of good or resource in question, and must be determined by judges, juries, or arbitrators who are expert in the particular resource or industry in question. If resource X is owned by A, then A must own enough of it so as to include necessary appurtenances. For example, in the courts' determination of radio frequency ownership in the 1920s, the extent of ownership depended on the technological unit of the radio wave—its width on the electromagnetic spectrum so that another wave would not interfere with the signal, and its length over space. The ownership of the frequency then was determined by width, length, and location.

American land settlement is a history of grappling, often unsuccessfully, with the size of the homestead unit. Thus, the homesteading provision in the federal land law of 1861 provided a unit of 160 acres, the clearing and use of which over a certain term would convey ownership to the homesteader. Unfortunately, in a few years, when the dry prairie began to be settled, 160 acres was much too low for any viable land use (generally ranching and grazing). As a result, very little Western land came into private ownership for several decades. The resulting overuse of the land caused the destruction of Western grass cover and much of the timberland.

With the importance of analyzing the technological unit in mind, let us examine the ownership of airspace. Can there be private ownership of the air, and if so, to what extent?

---

[64]Ibid., p. 63. Note, however, that in our view the requirement of "reasonable" for actual injury or discomfort is correct for noise but not, say, for visible smoke or noxious odors, unless "discomfort" is interpreted broadly so as to include all interference with use.

The common-law principle is that every landowner owns all the airspace above him upward indefinitely unto the heavens and downward into the center of the earth. In Lord Coke's famous dictum: *cujus est solum ejus est usque ad coelum*; that is, he who owns the soil owns upward unto heaven, and, by analogy, downward to Hades. While this is a time-honored rule, it was, of course, designed before planes were invented. A literal application of the rule would in effect outlaw all aviation, as well as rockets and satellites.[65]

But is the practical problem of aviation the only thing wrong with the *ad coelum* rule? Using the homesteading principle, the *ad coelum* rule never made any sense, and is therefore overdue in the dustbin of legal history. If one homesteads and uses the soil, in what sense is he also using all the sky above him up into heaven? Clearly, he isn't.

The *ad coelum* rule unfortunately lingered on in the *Restatement of Torts* (1939), adopted by the Uniform State Law for Aeronautics and enacted in 22 states during the 1930s and 1940s. This variant continued to recognize unlimited ownership of upward space, but added a superior public privilege to invade the right. Aviators and satellite owners would still bear the burden of proof that they possessed this rather vague privilege to invade private property in airspace. Fortunately, the Uniform Act was withdrawn by the Commissioners on Uniform State Laws in 1943, and is now on the way out.

A second solution, adopted by the Ninth Circuit Federal Court in 1936, scrapped private property in airspace altogether and even allowed planes to buzz land close to the surface. Only actual interference with present enjoyment of land would constitute a tort.[66] The most popular nuisance theory simply outlaws interference with land use, but is unsatisfactory because it scraps any discussion whatever of ownership of airspace.

The best judicial theory is the "zone," which asserts that only the lower part of the airspace above one's land is owned; this zone is the limit of the owner's "effective possession." As Prosser defines it,

---

[65]See the discussion of various theories of land and air ownership in Prosser, *Law of Torts*, pp. 70–73.

[66]In *Hinman* v. *Pacific Air Transport*, 9 Cir. (1936), 84 F.2d 755, cert. denied 300 U.S. 654. In ibid., p. 71.

"effective possession" is "so much of the space above him as is essential to the complete use and enjoyment of the land."[67] The height of the owned airspace will vary according to the facts of the case and therefore according to the "technological unit." Thus, Prosser writes:

> This was the rule applied in the early case of *Smith* v. *New England Aircraft Co.*, where flights at the level of one hundred feet were held to be trespass, since the land was used for cultivation of trees which reached that height. A few other cases have adopted the same view.
>
> The height of the zone of ownership must vary according to the facts of each case.[68]

On the other hand, the nuisance theory should be added to the strict zone of ownership for cases such as where excess aircraft noise injures people or activities in an adjoining area, not directly underneath the plane. At first, the federal courts ruled that only low flights overhead could constitute a tort against private landowners, but the excessive noise case of *Thornburg* v. *Port of Portland* (1962) corrected that view. The court properly reasoned in *Thornburg*:

> If we accept . . . the validity of the propositions that a noise can be a nuisance; that a nuisance can give rise to an easement; and that a noise coming straight down from above one's land can ripen into a taking if it is persistent enough and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some direction other than the perpendicular.[69]

While there is no reason why the concept of ownership of airspace cannot be used to combat air pollution torts, this has rarely been done. Even when *ad coelum* was riding high, it was used against airplane overflights but not to combat pollution of one's air, which was inconsistently considered as a communal resource. The law of

---

[67]Ibid., p. 70.

[68]Ibid., pp. 70–71. See *Smith* v. *New England Aircraft Co.*, (1930), 270 Mass. 511,170 N.E. 385. Also see Prosser, *Law of Torts*, pp. 514–15.

[69]*Thornburg* v. *Port of Portland* (1962), 233 Ore. 178, 376 P.2d 103. Quoted in Clover, "Torts: Trespass, Nuisance and $E=mc^2$, p. 121. The previous view was based on *United States* v. *Causby* (1946). Also see Prosser, *Law of Torts*, pp. 72–73.

nuisance could traditionally be used against air pollution, but until recently it was crippled by "balancing of the equities," negligence rules against strict liability, and by declaration that "reasonable" air pollution was not actionable. In the classic case of *Holman* v. *Athens Empire Laundry Co.* (1919), the Supreme Court of Georgia declared: "The pollution of the air, so far as reasonably necessary to the enjoyment of life and indispensable to the progress of society, is not actionable."[70] Fortunately, that attitude is now becoming obsolete.

Although air pollution should be a tort subject to strict liability, it should be emphasized that statements like "everyone has the right to clean air" are senseless. There are air pollutants constantly emerging from natural processes, and one's air is whatever one may happen to possess. The eruption of Mount St. Helens should have alerted everyone to the ever-present processes of natural pollution. It has been the traditional and proper rule of the common-law courts that no landowner is responsible for the harm caused by natural forces originating on his property. As Prosser writes, a landowner

> is under no affirmative duty to remedy conditions of purely natural origin upon his land, although they may be highly dangerous or inconvenient to his neighbors. . . . Thus it has been held that the landowner is not liable for the existence of a foul swamp, for falling rocks, for the spread of weeds or thistles growing on his land, for harm done by indigenous animals, or for the normal, natural flow of surface water.[71]

In sum, no one has a right to clean air, but one does have a right to not have his air invaded by pollutants generated by an aggressor.

Air Pollution: Law and Regulation

We have established that everyone may do as he wishes provided he does not initiate an overt act of aggression against the person or property of anyone else. Anyone who initiates such aggression must be strictly liable for damages against the victim, even if the action is

---

[70]*Holman* v. *Athens Empire Laundry Co.*, 149 G. 345, 350, 100 S.E. 207, 210 (1919). Quoted in Jack L. Landau, "Who Owns the Air? The Emission Offset Concept and Its Implications," *Environmental Law* 9 (1979): 589.

[71]Prosser, *Law of Torts*, p. 354.

"reasonable" or accidental. Finally, such aggression may take the form of pollution of someone else's air, including his owned effective airspace, injury against his person, or a nuisance interfering with his possession or use of his land.

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

With these principles in mind, let us consider the current state of air pollution law. Even the current shift from negligence and "reasonable" actions to strict liability has by no means satisfied the chronic special pleaders for environmental plaintiffs. As Paul Downing says, "Currently, a party who has been damaged by air pollution must prove in court that emitter A damaged him. He must establish that he was damaged and emitter A did it, and not emitter B. This is almost always an impossible task."[72] If true, then we must assent uncomplainingly. After all, proof of causality is a basic principle of civilized law, let alone of libertarian legal theory.

Similarly, James Krier concedes that even if requirement to prove intent or unreasonable conduct or negligence is replaced by strict liability, there is still the problem of *proving the causal link* between the wrongful conduct and the injury. Krier complains that "cause and effect must still be established."[73] He wants to "make systematic reallocation of the burden of proof," that is, take the burden off the plaintiff, where it clearly belongs. Are defendants now to be guilty until they can prove themselves innocent?

---

[72]Paul B. Downing, "An Introduction to the Problem of Air Quality," in *Air Pollution and the Social Sciences*, Downing, ed. (New York: Praeger, 1971), p. 13.

[73]James E. Krier, "Air Pollution and Legal Institutions: An Overview," in ibid., *Air Pollution and the Social Sciences*, pp. 107–08.

The prevalence of multiple sources of pollution emissions is a problem. How are we to blame emitter A if there are other emitters or if there are natural sources of emission? Whatever the answer, it must not come at the expense of throwing out proper standards of proof, and conferring unjust special privileges on plaintiffs and special burdens on defendants.[74]

Similar problems of proof are faced by plaintiffs in nuclear radiation cases. As Jeffrey Bodie writes, "In general the courts seem to require a high degree of causation in radiation cases which frequently is impossible to satisfy given the limited extent of medical knowledge in this field."[75] But as we have seen above, it is precisely this "limited extent of knowledge" that makes it imperative to safeguard defendants from lax canons of proof.

There are, of course, innumerable statutes and regulations that create illegality besides the torts dealt with in common-law courts.[76] We have not dealt with laws such as the Clean Air Act of 1970 or regulations for a simple reason: None of them can be permissible under libertarian legal theory. In libertarian theory, it is only permissible to proceed coercively against someone if he is a proven aggressor, and that aggression must be proven in court (or in arbitration) beyond a reasonable doubt. Any statute or administrative regulation necessarily makes actions illegal that are not overt initiations of crimes or torts according to libertarian theory. Every statute or administrative rule is therefore illegitimate and itself invasive and a criminal interference with the property rights of noncriminals.

Suppose, for example, that A builds a building, sells it to B, and it promptly collapses. A should be liable for injuring B's person and property and the liability should be proven in court, which can then enforce the proper measures of restitution and punishment. But if the legislature has imposed building codes and inspections in the name of "safety," innocent builders (that is, those whose buildings

---

[74]See section entitled "Joint Torts and Joint Victims" for a discussion of joint tortfeasors, multiple torts, and class actions suits.

[75]Jeffrey C. Bodie, "The Irradiated Plaintiff: Tort Recovery Outside Price-Anderson," *Environmental Law* 6 (Spring, 1976): 868.

[76]With respect to air pollution regulations, see Landau, "Who Owns the Air?" pp. 575–600.

have not collapsed) are subjected to unnecessary and often costly rules, with no necessity by government to prove crime or damage. They have committed no tort or crime, but are subject to rules, often only distantly related to safety, *in advance* by tyrannical governmental bodies. Yet, a builder who meets administrative inspection and safety codes and then has a building of his collapse, is often let off the hook by the courts. After all, has he not obeyed all the safety rules of the government, and hasn't he thereby received the advance *imprimatur* of the authorities?[77]

The only civil or criminal system consonant with libertarian legal principles is to have judges (and/or juries and arbitrators) pursuing charges of torts by plaintiffs made against defendants.

It should be underlined that in libertarian legal theory, only the victim (or his heirs and assigns) can legitimately press suit against alleged transgressors against his person or property. District attorneys or other government officials should not be allowed to press charges against the wishes of the victim, in the name of "crimes" against such dubious or nonexistent entities as "society" or the "state." If, for example, the victim of an assault or theft is a pacifist and refuses to press charges against the criminal, no one else should have the right to do so against his wishes. For just as a creditor has the right to "forgive" an unpaid debt voluntarily, so a victim, whether on pacifist grounds or because the criminal has bought his way out of a suit[78] or any other reason, has the right to "forgive" the crime so that the crime is thereby annulled.

Critics of automobile emissions will be disturbed by the absence of government regulation, in view of the difficulties of proving harm to victims from individual automobiles.[79] But, as we have stressed, utilitarian considerations must always be subordinate to the requirements of justice. Those worried about auto emissions are in even

---

[77]For an excellent discussion of judicial as opposed to statutory or administrative remedies for adulteration of products, see Wordsworth Donisthorpe, *Law in a Free Society* (London: Macmillan, 1895), pp. 132–58.

[78]Criminals should have the right to buy off a suit or enforcement by the victim, just as they should have the right to buy out an injunction from a victim after it has been issued. For an excellent article on the latter question, see Thompson, "Injunction Negotiations," pp. 1563–95.

[79]See section entitled "Joint Torts and Joint Victims."

worse shape in the tort law courts, because libertarian principle also requires a return to the now much scorned nineteenth-century rule of *privity*.

The privity rule, which applies largely to the field of products liability, states that the buyer of a defective product can only sue the person with whom he had a contract.[80] If the consumer buys a watch from a retailer, and the watch does not work, it should only be the retailer whom he can sue, since it was the retailer who transferred ownership of the watch in exchange for the consumer's money. The consumer, in contrast to modern rulings, should not be able to sue the manufacturer, with whom he had no dealings. It was the retailer who, by selling the product, gave an implied warranty that the product would not be defective. And similarly, the retailer should only be able to sue the wholesaler for the defective product, the wholesaler the jobber, and finally the manufacturer.[81]

In the same way, the privity role should be applied to auto emissions. The guilty polluter should be each individual car owner and not the automobile manufacturer, who is not responsible for the actual tort and the actual emission. (For all the manufacturer knows, for example, the car might only be used in some unpopulated area or used mainly for aesthetic contemplation by the car owner.) As in the product liability cases, the only real justification for suing the manufacturer rather than the retailer is simply convenience and deep pockets, with the manufacturer presumably being wealthier than the retailer.

While the situation for plaintiffs against auto emissions might seem hopeless under libertarian law, there is a partial way out. In a libertarian society, the roads would be privately owned. This means that the auto emissions would be emanating from the road of the road owner into the lungs or airspace of other citizens, so that the road owner would be liable for pollution damage to the surrounding

---

[80]For hostile accounts of privity and a discussion of implied warranty, see Richard A. Epstein, *Modern Products Liability Law* (Westport, Conn.: Quorum Books, 1980), pp. 9–34; and Prosser, *Law of Torts*, pp. 641ff.

[81]Some of the practical difficulties involved in such suits could be overcome by joinder of the various plaintiffs. See section entitled "Joint Torts and Joint Victims."

inhabitants. Suing the road owner is much more feasible than suing each individual car owner for the minute amount of pollutants he might be responsible for. In order to protect himself from these suits, or even from possible injunctions, the road owner would then have the economic incentive to issue anti-pollution regulations for all cars that wish to ride on his road. Once again, as in other cases of the "tragedy of the commons," private ownership of the resource can solve many "externality" problems.[82]

Collapsing Crime Into Tort

But if there is no such entity as society or the state, or no one except the victim that should have any standing as a prosecutor or plaintiff, this means that the entire structure of criminal law must be dispensed with, and that we are left with tort law, where the victim indeed presses charges against the aggressor.[83] However, there is no reason why parts of the law that are now the province of criminal law cannot be grafted onto an enlarged law of torts. For example, restitution to the victim is now considered the province of tort law, whereas punishment is the realm of criminal law.[84] Yet, punitive damages for intentional torts (as opposed to accidents) now gener-

---

[82]On the "tragedy of the commons" and private ownership, see, for example, Garrett Hardin, "The Tragedy of the Commons," *Science* 162 (1968): 1243–48; Robert J. Smith, "Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife," *Cato Journal* 1 (Fall, 1981): 439–68.

[83]Notes Prosser:

> A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole. . . . A criminal prosecution is not concerned in any way with compensation of the injured individual against whom the crime is committed. (Prosser, *Law of Torts*, p. 7)

[84]For an illuminating discussion of the roots of the modern split between criminal and tort law, with the former as pursuing crimes against the "king's peace," see Barnett, "Restitution: A New Paradigm of Criminal Justice," pp. 350–54.

ally are awarded in tort law. It is therefore conceivable that more severe punishments, such as imprisonment, forced labor to repay the victim, or transportation, could be grafted onto tort law as well.[85]

One cogent argument against any proposal to collapse criminal into tort law is that, in the reasoning against allowing punitive damages in tort cases, they are "fixed only by the caprice of the jury and imposed without the usual safeguards thrown about criminal procedure, such as proof of guilt beyond a reasonable doubt [and] the privilege against self-incrimination."[86] But, as argued above, standards such as proof beyond a reasonable doubt should be applied to tort law cases as well.[87]

Professor Epstein, in attempting to preserve a separate realm for criminal law as against a proposed collapse into tort law, rests much of his case on the law of attempts. In criminal law, an attempted crime that for some reason fails and results in no damage or invasion of the rights of the victim, is still a crime and can be prosecuted. And yet, Epstein charges, such an attempted crime would not be an invasion of rights and therefore could not be a tort and could not be prosecuted under tort law.[88]

---

[85]On punitive damages in tort law, see Prosser, *Law of Torts*, pp. 9ff. This is not the place to set forth a theory of punishment. Theories of punishment among libertarian philosophers and legal theorists range from avoiding any coercive sanctions whatever to restitution only, restitution plus proportional punishment, and allowing unlimited punishment for any crime whatever.

For my own view on proportional punishment, see Murray N. Rothbard, "Punishment and Proportionality," in Barnett and Hagel, eds., *Assessing the Criminal*, pp. 259–70. On the concept of transporting criminals, see Leonard P. Liggio, "The Transportation of Criminals: A Brief Politico-Economic History," in ibid, pp. 273–94.

[86]Ibid., p. 11. Also see Epstein, *Cases on Torts*, p. 906.

[87]As would the privilege against self-incrimination. In fact, the ban against compulsory testimony should not only be extended to tort cases, it should be widened to include all compulsory testimony, against others as well as against oneself.

[88]Richard A. Epstein, "Crime and Tort: Old Wine in Old Bottles," in Barnett and Hagel, eds., *Assessing the Criminal*, pp. 231–57.

Randy Barnett's rebuttal, however, is conclusive. Barnett points out, first, that most unsuccessful attempts at invasion result nevertheless in "successful" though lesser invasion of person or property, and would therefore be prosecutable under tort law. "For example, attempted murder is usually an aggravated assault and battery, attempted armed robbery is usually an assault, attempted car theft or burglary is usually a trespass."[89] Second, even if the attempted crime created no invasion of property *per se*, if the attempted battery or murder became *known* to the victim, the resulting creation of fear in the victim would be prosecutable as an assault. So the attempted criminal (or tortfeasor) could not get away unscathed.

Therefore, the only attempted invasion that could not be prosecuted under the law of torts would be one that *no one ever knew anything about*. But if no one knows about it, it cannot be prosecuted, under any law.[90]

Furthermore, as Barnett concludes, potential victims would not be prevented under libertarian law from defending themselves from

---

[89]Barnett, "Restitution: A New Paradigm of Criminal Justice," p. 376. Barnett adds:

> In this way the law of attempt is actually a form of double counting whose principal function is to enable the police and prosecutor to overcharge a crime for purposes of a later plea negotiation. Furthermore, some categories of attempt, such as conspiracy laws and possessory laws—for example, possession of burglarious instruments—are short-cuts for prosecutors unable or unwilling to prove the actual crime and are a constant source of selective, repressive prosecutions. (Ibid.)

We might add that the latter always would be illegitimate under libertarian law.

[90]According to Barnett:

> The only type of unsuccessful attempt that would escape liability [under tort law] would be the case of someone who unsuccessfully tried to commit a crime without otherwise violating anyone's rights and without anyone knowing about it. . . . In any case, no system governed by any principle can prosecute acts that no one knows about. (Ibid., pp. 376–77)

Professor Ronald Hamowy of the University of Alberta should also be mentioned as contributing significantly to this solution to the problem.

attempts at crime. As Barnett says, it is justifiable for a victim or his agents to repel an overt act that has been initiated against him, and that in fact is what an attempt at crime is all about.[91]

Joint Torts and Joint Victims

So far in discussing invasions of person or property, we have confined ourselves to single aggressors and single victims, of the "A hit B" or "damaged B" variety. But actual air pollution cases often have multiple alleged aggressors and multiple victims. On what principles may they be prosecuted or convicted?

When more than one aggressor has contributed to a tort, it is generally more convenient for the plaintiffs to join the defendants together in one suit ("joinder"). Convenience, however, should not be allowed to override principle or rights, and in our view the original common-law rule of joinder was correct: Defendants can be compulsorily joined *only* when all the parties acted in concert in a joint tortious enterprise.

In the case of truly joint torts, it also makes sense to have each of the joint aggressors equally liable for the entire amount of the damages. If it were otherwise, each criminal could dilute his own liability in advance by simply adding more criminals to their joint enterprise. Hence, since the action of all the aggressors was in concert, the tort was truly joint, so that

> "all coming to do an unlawful act and of one part, the act of one is the act of the same part being present." Each was therefore liable for the entire damage done, although one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons. All might be joined as defendants in the same action at law. [92]

Unfortunately, for purposes of convenience, the joinder rule has been weakened, and the courts in many cases have permitted plaintiffs to compel joinder of defendants even in cases where torts are

---

[91]One can agree with Barnett here without adopting his own pure-restitution-without-punishment variant of tort law. In our own view, elements of criminal law such as punishment could readily be incorporated into a reconstructed tort law.

[92]Prosser, *Law of Torts*, p. 291. Also see, ibid., pp. 293ff.

committed separately and not in concert.[93] The confusion in joinder for both joint and separate torts has caused many courts to apply the full or "entire" liability rule to each aggressor. In the case of separate torts impinging upon a victim, this makes little sense. Here the rule should always be what it has traditionally been in nuisance cases, that the courts apportion damage in accordance with the separate causal actions contributed by each defendant.

Air pollution cases generally are those of separate torts impinging upon victims; therefore, there should be no compulsory joinder and damages should be apportioned in accordance with the separate causal factors involved. As Prosser writes:

> Nuisance cases, in particular, have tended to result in apportionment of the damages, largely because the interference with the plaintiff's use of his land has tended to be severable in terms of quantity, percentage, or degree. Thus defendants who independently pollute the same stream or who flood the plaintiff's land from separate sources, are liable only severally for the damages individually caused, and the same is true as to nuisance due to noise, or pollution of the air.[94]

But because the injuries are multiple and separate, it is then up to the plaintiffs to show a rational and provable basis for apportioning the damage among the various defendants and causative factors. If this rule is properly and strictly adhered to, and proof is beyond a reasonable doubt, the plaintiffs in air pollution cases generally will be able to accomplish very little. To counter this, environmental lawyers have proposed a weakening of the very basis of our legal system by shifting the burden of proof for detailed allocation of damages from the plaintiffs to the various defendants.[95]

Thus, compulsory joinder of defendants may proceed on the original common-law rule only when the defendants have allegedly committed a truly joint tort, in concerted action. Otherwise, defendants may insist on separate court actions.

---

[93]In this situation, joinder is compulsory upon the defendants, even though the plaintiffs may choose between joinder and separate actions.

[94]Prosser, *Law of Torts*, pp. 317–18.

[95]See Katz, "Function of Tort Liability," pp. 619–20.

What about joinder of several *plaintiffs* against one or more defendants? When may that take place? This problem is highly relevant to air pollution cases, where there are usually many plaintiffs proceeding against one or more defendants.

In the early common law, the rules were rigorous on limiting permissible joinder of plaintiffs to cases where all causes in action had to affect all the parties joined. This has now been liberalized to permit joint action by plaintiffs where the joint action arises out of the same transaction or series of transactions, and where there is at least one question of law of fact common to all plaintiffs. This appears to be a legitimate liberalization of when plaintiffs shall be allowed voluntary joinder.[96]

While permissive joinder of plaintiffs in this sense is perfectly legitimate, this is not the case for "class action" suits, where the outcome of the suit is binding even upon those members of the alleged class of victims who did not participate in the suit. It seems the height of presumption for plaintiffs to join in a common suit and to press a "class action" suit, in which even those other alleged victims who never heard of or in some way did not consent to a suit are bound by the result. The only plaintiffs who should be affected by a suit are those who voluntarily join. Thus, it would not be permissible for 50 residents of Los Angeles to file a pollution suit on behalf of the class of "all citizens of Los Angeles," without their knowledge or express consent. On the principle that only the victim and his heirs and assigns may press suit or use force on his behalf, class action suits binding on anyone except voluntary plaintiffs are impermissible.[97]

Unfortunately, while the 1938 Federal Rule of Civil Procedure 23 provided for at least one type of nonbinding class action, the "spurious class action," the revised 1966 rules make all class action suits binding upon the class as a whole, or rather on all those members of

---

[96]However, a better course would be to require that common interests predominate over separate individual interests, as is now being required for class action suits. See the discussion of *City of San Jose* v. *Superior Court* below.

[97]The type of class action suit once known as "spurious class action," in which a judgment binds only those members actually before the court, was not actually a class action suit but a permissive joinder device. Fed. R. Civ. P. 23 (1938).

the class who do not specifically request exclusion. In an unprecedented step, voluntary action is now being assumed if *no* action is taken. The residents of Los Angeles, who might not even know about the suit in question, are required to take steps to exclude themselves from the suit, otherwise the decision will be binding upon them.[98] Furthermore, most states have followed the new federal rules for class action suits.

As in the case of voluntary joinder, the post-1966 class action must involve questions of law or fact common to their entire class. Fortunately, the courts have placed further limits on the use of class action. In most cases, all identifiable members of the class must be given individual notice of the suit, giving them at least an opportunity to opt out of the action; also, the class must be definitely identifiable, ascertainable, and manageable. Under this rule, the federal courts generally would not allow "all residents of the city of Los Angeles" to be party to a class action suit.[99] Thus, a suit allegedly on behalf of all residents of Los Angeles County (over seven million persons) to enjoin 293 companies from polluting the atmosphere was dismissed by the court "as unmanageable because of the number of parties (plaintiffs and defendants), the diversity of their interests, and the multiplicity of issues involved."[100]

---

[98]The 1938 Rules provided that in some cases any class action must be of the spurious kind mentioned in the previous footnote. The revised 1966 Rules made all class action suits binding by eliminating the spurious action category. See Fed. R. Civ. P. 23 (1966).

[99]Fed. R Civ. P. 23(a) (1966). On the question of whether individual notice to class manners is or is not mandatory, see Fed. R Civ. P23(d)(2), Fed. R. Civ. P. 23(e), *Mattern* v. *Weinberger*, 519F.2d 150 (3d Cir.1975), *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), *Cooper* v. *American Savings & Loan Association*, 55 Cal. App. 3d 274 (1976).

[100]The case was *Diamond* v. *General Motors Corp*. 20 Cal. App. 2d 374 (1971). On the other hand, some state court decisions, such as in California, have been highly favorable toward class action suits. The California court actually allowed a class action of one man against a defendant taxi company for alleged overcharges, on behalf of himself and several thousand unidentifiable customers of the company. *Dear* v. *Yellow Cab Co.*, 67 Cal. 2d 695 (1967).

Another sensible limitation placed on most class action suits is that common class interests in the suit must *predominate* over separate individual interests. Thus, a class suit will not be allowed where separate individual issues are "numerous and substantial," and therefore common issues do not predominate. In the case of *City of San Jose* v. *Superior Court* (1974), the court threw out a class action suit of landowners near an airport, suing for damages to their land resulting from airport noise, pollution, traffic, and so on. Even though the airport affected each of the landowners, the court properly ruled that "the right of each landowner to recover for the harm to his land involved too many individual facts (for example, proximity to flight paths, type of property, value, use, and so on)" to permit a class suit.[101]

Thus, class action suits should not be allowed except where every plaintiff actively and voluntarily joins and where common interests predominate over separate and individual ones.[102]

How, then, have the recent class action rules been applied to the question of air pollution? Krier says with dismay that while the 1966 Federal Rule 23 is indeed more liberal than its predecessor in allowing class action, the U.S. Supreme Court has virtually nullified its impact by ruling that class members may aggregate individual claims for federal courts *only* when they share a common undivided interest.[103] According to Krier, this cogent limitation rules out most class action suits in air pollution cases. He adds that while this restriction does not apply to state suits, these are often even less viable than federal class suits before

---

[101]*City of San Jose* v. *Superior Court*, 12 Cal. 3d 447 (1974).

[102]Epstein provides an interesting note on ways in which plaintiffs, in a purely libertarian way, were able to overcome the fact that neither joinder nor class action suit were permitted because of the extent and diversity of individual interests involved. The drug MER/29 was taken off the market in 1962, after which about 1,500 lawsuits were initiated against the drug company for damage. While the defendant successfully objected to a voluntary joinder, most of the attorneys voluntarily coordinated their activities through a central clearinghouse committee with fees for services assessed upon all lawyers in the group. Epstein reports that the lawyers who participated in the group were usually more successful in their respective suits than those who did not. Epstein, *Cases on Torts*, p. 274.

[103]In *Snyder* v. *Harris*, 394 U.S. 332 (1970). Krier, "Air Pollution and Legal Institutions."