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The Proprietary Theory of Justice in the Libertarian Tradition

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The central ideas of contemporary libertarianism have taken many centuries to evolve. The single most important aspect of libertarian theory to have emerged during this time is the concept of proprietary justice. The proprietary theory of justice is concerned with just one thing: the crucial determination of just versus unjust property titles of individuals in their own bodies and in the material objects around them. The determination of property titles is highly critical because, in the deepest sense, all property is ultimately private.[1] It must ultimately be controlled or belong to some individual person or group of persons. Since individual survival is impossible without appropriation, the significant question in all social analysis is whether the actual owners, the actual users, are legitimate or criminal. The basic purposes of this paper are threefold: 1) to outline the framework of the proprietary theory of justice and show how it developed out of early natural law doctrine; 2) to describe and evaluate the contributions of such seventeenth-century thinkers as Grotius, Pufendorf, and Locke towards the development of the proprietary theory of justice; and 3) trace out the anarchistic implications of the proprietary theory of justice by examining the nineteenth-century thinking of Lysander Spooner. If these goals are met, the reader will attain some understanding of the proprietary theory of justice, of its place in the history of political thought, and of its significance and powerful import to the contemporary libertarian movement.

The proprietary theory of justice is based on two axioms which make the distinction between just and unjust property titles possible: the self-ownership and the homesteading axioms. By the self-ownership axiom, every individual has an absolute right to his or her own mind and body and the labor thereof. Each person has the right to control that mind and body free of coercive interference. People must necessarily exist in a particular place at any time, and in order to survive, they must apply their labor to the material objects around them. By the homesteading axiom, they become the rightful owners of hitherto unclaimed and untransformed natural resources. The full import of the homesteading axiom is well expressed by the phrase: "first ownership to the first user."[2] The central thrust of libertarian thinking (based on these two axioms) is to oppose any and all forms of invasion against the just property titles of individuals in their own

persons and in the material objects they have homesteaded or voluntarily acquired from other homesteaders. The entire libertarian creed consists of the spinning out of the logical implications of these two axioms.

Individualist anarchism is the logical outcome of the proprietary theory of justice. This doctrine proclaims that all States should be abolished and that all the affairs of people should be carried out by individuals or their voluntary associations.[3] For the libertarian, crime is an act of aggression against a man's property rights, either in his own person or in his materially owned objects. The fact that criminals call themselves "government officials" makes no difference to the libertarian. Crime is crime, aggression against rights is aggression, no matter how many people are involved or what those people call themselves. The criminal metaphor, in which governments are compared to organized gangs of banditti, thieves, pirates, and highwaymen, has been the darling of libertarians throughout history, precisely because of its accuracy: government and the participants in it are the greatest criminals of all.[4] Wherever and whenever governments exist, property rights are negated.[5] All governments exhibit at least two aggressive and therefore criminal features. First, governments obtain their revenues by means of taxation, that is, by compulsory levy. Secondly, all governments presume to establish a compulsory monopoly of defense services over some geographic area. All competing agencies are outlawed and property owners have no alternative but to patronize the government system.

The natural law tradition confirms the libertarian attitude towards the inherent criminality of government. Its principal subject matter was concerned with the determination of what is one's own and what is one's due.[6] Although there were inconsistencies in early natural law thinking, the natural law tradition forms the basis for much of the proprietary theory of justice. The quintessence of natural law thinking is epitomized by Porphyr's (circa 232–304 A. D.) statement that "justice consists in the abstaining from what belongs to others, and in doing no harm to those who do no harm."[7] The Stoic maxim of according everybody his own *(suum cuique tribuere)* expressed the same basic idea. As interpreted by the early teachers of natural law, this maxim had a purely negative significance. It only said that you shall leave to each what belongs to him. The principle of right behavior was to abstain from interfering from that which belongs to another *(alieni abstinentia)*. The Stoic maxim was therefore most often expressed in the sentence that you must not harm another *(neminem laedere)*. Robbing another of something that belonged to him was to commit an injury *(iniuria)* upon him. The ancient legal maxim of the Roman jurists: to live honestly, to hurt no one, and to give to everyone his due, was an expression of the proprietary theory of justice. The natural law presupposed that everyone had a sphere of his own, which was called the *suum*, or that which belongs to the individual. An *iniuria* consisted in an attack on the life, body, property, or liberty of another person. In its essence, an *iniuria* consisted in depriving another personality of something that belonged to it *(usurpatio alieni)*.

Critics of the natural law have pointed out that while it enjoined abstinence

from that which belongs to another, it did not define what is rightfully another's.[8] It has been argued that the principle of *suum cuique tribuere* was an empty phrase because it presupposed that the *suum* was already defined. The weakness and circularity of the natural law, in this regard, was that it only defined the *suum* as that sphere which must not be violated.[9] It did not furnish any means of positively identifying one's own, such as that provided by the self-ownership and homesteading axioms. Another problem that early natural law theorists faced was how to move from the known fact that man must produce and appropriate the fruits of his labor in order to survive to the conclusion that other men were obligated not to interfere with another's proprietorship. The basic question natural law theory had to answer in this regard was: *By having first appropriated something, how could one man impose upon others an obligation to respect his proprietorship?* Or phrased another way, these theorists wished to know *whether one man has any obligation, apart from promise or contract, to refrain from using that which has already been appropriated, but is not currently being used by its original appropriator?*[10]

In formulating answers to these questions, nearly all the natural law thinkers of the seventeenth century began with the premise that the world and all it contained was owned in common by all mankind.[11] Hugo Grotius, the earliest of the trio of seventeenth-century natural law thinkers that shall be examined here, adopted such a premise in his work on *The Law of War and Peace*, written in 1625. In Book II, Chapter II, titled "Of Things Which Belong to Men in Common," Grotius outlines his view of how private property came into existence:

> Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature. "All things," as Justin says, "were the common and undivided possession of all men, as if all possessed a common inheritance." In consequence, each man could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership; for whatever each had thus taken for his own needs another could not take from him except by an unjust act.[12]

However, since men were not content to live in primitive communism forever, Grotius provides us with a theory of how things become subject to private ownership:

> This happened not by a mere act of will, for one could not know what things another wished to have, in order to abstain from them — and besides several might desire the same thing — but rather by a kind of agreement, either expressed, as by a division, or implied, as by occupation. In fact, as soon as community ownership was abandoned, and as yet no division had been made, it is to be supposed that all agreed, that whatever each one had taken possession of should be his property.[13]

Although Grotius's terminology and thought were moving towards a theory of negative ownership (which Pufendorf more fully developed), his theory failed in making property a natural right, since he based private ownership on a supposititious convention subscribed to by the whole human race.[14] Starting from the basic premise that the world was owned in common, it was simply impossible to formulate a satisfactory theory of proprietary justice. Two difficulties emerged from Grotius's theory. One, which is common to all contract theories of ownership, is that men may deny that such a contract or agreement was ever made, and that even if it was, it could not obligate those who were not yet born. Secondly, if property rights were created by human authority, why could they not be abrogated by human authority, by the agreement of those who were dissatisfied with the existing distribution of property titles?

Grotius's response to these problems revealed another flaw in his theory. In common with earlier natural right theorists, he maintained that the institution of private property protected men's natural equality of rights. Instead of defining property as those material objects which each person acquired by first appropriation and first use, he emphasized that objects in the world were still owned in common even though individuals labored upon them. Hence common property could not become individual property merely because someone chose to labor on it, unless that ownership were ratified by a positive agreement.[15] In short, although Grotius uses all the familiar phrases, his theory of natural right is really no such theory at all. It derives the rights of property not from natural law, but from the agreement of men. It provides no rational explanation of why men should have subscribed to an agreement which legalized and perpetuated the unjust claims of those who had taken more than their fair share of the common property.[16]

At the same time that Grotius's ideas were gaining currency, the constitutional struggle against royal taxation was taking place in England. John Lilburne and the Leveller party helped to popularize the concepts of natural rights in mid-seventeenth-century England. The Levellers not only opposed Charles I but eventually became the opponents of Cromwell as well. Their opposition in both cases was based on their adoption of natural law theories. The Levellers insisted that by the law of nature all men were created equal and endowed with the same natural rights. From this principle they deduced that all special privileges granted by the government were usurpations. In 1647, a confrontation took place between the Levellers and the Army Grandees, which reflected the differences between themselves and Cromwell's supporters. The Putney Debates illustrated the radical nature of Leveller thought. When Henry Ireton, Cromwell's son-in-law, claimed that the Leveller party would destroy all property, they confidently appealed to the law of nature. They tried to demonstrate that the right of property is guaranteed by the law of nature, and not, as Ireton maintained, merely by positive government laws.[17] Clarke, one of the Leveller debaters, urged that the law of nature is the basis of all political constitutions. "Yet really properties are the foundations of constitutions, and not constitutions of property. For if so be there were no constitutions, yet the law of nature does give a principle for every man to have a

property of what he has or may have which is not another man's. This natural right of property is the ground of mine and thine.''[18]

Despite their party name, the Leveller leaders disavowed any claim that their intention was to level men's estates or forcefully redistribute property from rich to poor. They all insisted that property was a natural, individual right. It was on this concept of natural right that they rested their case for individual property, civil and religious liberty, and government by consent.[19] Their fundamental position was that every man is naturally the proprietor of his own person. Richard Overton, an associate of Lilburne, clearly set forth his concept of self-ownership in his pamphlet, *An Arrow Against All Tyrants* (October 12, 1642):

> To every individual in nature is given an individual property by nature, not to be invaded or usurped by any: for every one as he is himself, so he hath a self propriety, else could he not be himself, and on this no second may presume to deprive any of, without manifest violation and affront to the very principles of nature, and of the Rules of equity and justice between man and man; mine and thine cannot be, except this be; No man hath power over my rights and liberties, and I over no man's; I may be but an Individual, enjoy myself, and my self propriety, and may write myself no more than my self, or presume any further; if I do, I am an encroacher and an invader upon an other man's Right, to which I have no Right. For by natural birth, all men are equally alike and born to like propriety, liberty, and freedom, and as we are delivered of God by the hand of nature into this world, every one with a natural, innate freedom and propriety (as it were writ in the table of every man's heart, never to be obliterated) even so as we to live, every one equally and alike to enjoy his Birth-right and privilege; even all whereof God by nature hath made him free.[20]

Despite their strongly incipient libertarianism, the Levellers had no detailed theory of the natural right of property. Consequently they were unable to rebut Ireton's contention that by natural law all was common and that private ownership was a convention based on the consent of men. Because they had no total theory of ownership to divert it, the Levellers' concept of natural right and equality flowed in a radical direction — towards levelling of men's estates. Ireton repudiated their theory of natural rights in order to safeguard the rights of property.[21] The problem was that, although they had embraced the concept of self-ownership or self-proprietorship, the Levellers were lacking a true understanding of the significance of the homesteading axiom. Without it, they were unable to determine how much each individual might take from the common stock of nature. This was a problem that had always perplexed the natural law theorists.[22]

It was left to Samuel Pufendorf, a German, to make the next important improvement in the classical theory of property in 1672. Building on Grotius's theory, Pufendorf began by making an important distinction between negative and positive community in the state of nature. ''Things in positive community 'differ from things owned, only in the respect that the latter belong to one person while the former belong to several in the same manner.' ''[23] When a thing is positively or jointly owned, any disposition of the thing without the consent of all its owners

is a violation of their ownership rights.[24] Negative community, on the other hand, simply means that nothing belongs to anyone. Things in a state of negative community are said to belong to nobody more in a negative sense than a positive sense; that is, they are not yet assigned or owned by a particular person, not that they cannot be assigned or owned by a particular person. According to Pufendorf, it was a negative community established by the law of nature.

In Book IV of his *The Law of Nature and Nations,* Pufendorf devotes the whole of Chapter IV to "the origin of dominion." In Section 2 of that chapter, he sets forth his distinction between positive and negative community. In Section 5, he makes it clear

> that before any conventions of men existed there was a community of all things, not indeed, such as we have called positive, but a negative one, that is, all things lay open to all men, and belonged no more to one than another. But since things are of no use to men unless at least their fruits may be appropriated, and this is impossible if others as well can take what we have already by our own act selected for our uses, it follows that the first convention between men was about these very concerns, to the effect that whatever one of these things which were left open to all, and of their fruits, a man had laid his hands upon, with intent to turn it to his uses, could not be taken from him by another.[25]

In Section 10, Pufendorf analyzes the famous theater example taken from Cicero, which Grotius had touched on.[26] Grotius had written that although the theater is a public place, yet it is correct to say that the seat which each man has taken belongs to him. Pufendorf went further. Suppose a common theater is erected by the government for the use of its citizens:

> if one citizen rather than another is to secure a seat for a performance, from which he cannot be rightfully removed by another, there is need of a corporal act, that is, of his occupying the seat. Nay, more, individual citizens, with the consent of the State, can secure seats for themselves for all time. In the same way it is understood that, before the occurrence of a human act sufficient to cause dominion, anything is public property, negatively common to all, that is, belonging no more to one man than another. But when division has been made by express agreement, or occupancy has been granted by tacit agreement, the thing passes over from negative community into proprietorship.[27]

Thus the community of nature, being a negative community, allowed Pufendorf to dispense with one part of the agreement which previous natural right theorists had found necessary for the institution of private property. Since men had no joint or positive or overlapping rights in the state of nature, it was not necessary to assume that those rights must have been extinguished by universal consent, by an agreement subscribed to by all men. Pufendorf was one step nearer a theory of property which would dispense with agreement and convention altogether. His theory demonstrated that a man in the negative community of nature did not violate another man's rights when an appropriation of hitherto unused property was made. "But having first appropriated something," Pufen-

dorf wanted to know, "how could one man impose upon the others an obligation to respect his proprietorship?" Pufendorf concluded that the first appropriator still needed to obtain the voluntary consent of all other persons to respect his property.[28]

Ultimately Pufendorf's theory of property still failed to meet the criticisms to which Grotius's theory was liable. It still based property on the "sands of human agreement instead of the rock of natural law." Critics could still deny the validity and even the existence of such an agreement.[29] However, if natural community is negative community, if in the beginning no one has a right to anything, then an agreement extinguishing rights will be unnecessary. Then the problem will be simply to show that new rights may originate naturally and that a man may acquire property rights, which of themselves obligate others to respect his proprietorship. Pufendorf did not discover the solution to this problem, although he came close to it in an incidental passage. One reason for the introduction of private property, he wrote, is that "most things require labor and cultivation by men to produce them and make them fit for use. But in such cases it was improper that a man who had contributed no labor should have the right to things equal to his by whose industry a thing had been raised or rendered fit for service."[30]

John Locke was the first to demonstrate that the laws of nature imposed an obligation on men to respect the property rights of anyone who by his own labor had appropriated things from their state of nature. He accomplished this feat in his *Two Treatises on Government* published in 1690. Locke's theory of property rights was a direct answer to the critics of Grotius and Pufendorf. The problem Locke poses to solve is to "show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners."[31] Despite the applicability of Locke's reasoning to Pufendorf's theory, Locke in fact took two steps backward and one step forward in the advancement of proprietary justice for libertarianism.

Locke clearly began his theory of property rights with the premise that the world was given to men in common. He reasserted the Scholastic view, which Grotius had built upon, to stress the logical priority of "belonging to all in common."[32] By beginning with this approach, Locke was faced with the problem of robbery as it arises in communism. His answer was that if a man takes more than his share, it belongs to others.[33] Locke's advance in proprietary theory (his step forward) was to reject Pufendorf's claim that an agreement was necessary to institute property rights. Locke did this by redefining positive community. "Although the common belongs to everyone in the same manner, it belongs to them to use for the duty of acquiring the means necessary for support and comfort."[34] Pufendorf had posited that although things belong to no one, yet a man who wished to appropriate even an acorn would have to obtain the consent of all mankind. Locke rejected this contention as absurd, for men would be condemned to starvation had it been true.[35] Locke's two steps backwards consisted in his assumption of original communism and in the formulation of his proviso. In the context of Locke's theory, this proviso (that a man can have a right of property

only in things "at least where there is enough, and as good left in common for others") permits him to dispense with obtaining the consent or agreement of other persons because this negates the possibility of their being harmed by another's proprietorship over the material objects of the world. The one step forward was to formulate a theory of proprietary justice which did away with the necessity for obtaining the consent of others.[36]

The problem was to show how it came to be that when one man took a portion of the "unowned" common stock, the rest of mankind was obliged to respect that portion as his private property. Pufendorf could not see how that obligation could exist unless mankind had agreed to assume it. Locke discovered that it was imposed by the law of nature, and bound all men fast long before human conventions had been thought of.[37] Said Locke:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body 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 removes out of the State that Nature hath provided, and left it in, he hath mixed his Labor with, and joined to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labor something annexed to it, that excludes the common right of other Men. For this Labor being the unquestionable Property of the Laborer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.[38]
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> . . . It will perhaps be objected to this, That if gathering the Acorns, or other Fruits of the Earth, etc. makes a right to them, then any one may ingross as much as he will. To which I answer, Not so. The same Law of Nature, that does by this means give us Property, does also bound that Property too. . . . But how far has he given it us? To enjoy. As much as any one can make use of to any advantage of life before it spoils; so much may he by his labor fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.[39]
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> . . . As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labor does, as it were, inclose it from the Common. Nor will it invalidate his right to say, Every body else has an equal Title to it; and therefore he cannot appropriate, he cannot inclose, without the Consent of all his Fellow-Commoners, all Mankind. God, when he gave the World in common to all Mankind, commanded Man also to labor, and the penury of his condition required it of him. God and his Reason commanded him to subdue the Earth, i.e., improve it for the benefit of Life, and therein lay out something upon it that was his own, his labor. He that in obedience to this Command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his Property, which another had no Title to, nor could without injury take from him.[40]

Here in one of its earliest forms was a theory of proprietary justice. Despite Locke's problems, he clearly enunciated both the self-ownership and homesteading axioms. Locke clearly recognized that private acquisition and private ownership must be coeval with human existence. Out of a realistic consideration for the

only way men can exist, Locke maintained that labor, and not consent, established the title to private property.[41] In defending the original right of all men to private ownership, and in elevating this right above consent, in opposition to Grotius and Pufendorf, Locke preserved the status of natural law as independent of consent. Although Locke helped to advance the proprietary theory of justice, he made a devastating concession from the homesteading axiom in the formulation of his proviso clauses. If all things on earth are common, Locke supposed, taking something for one's use would not be an injury to one's fellow man, so long as his proviso (that there was enough left for others) was satisfied.[42] The proviso placed imposing limitations on the homesteading axiom. Property acquired in the state of nature included only those things which the individual could produce by his own labor and was limited to the amount that the individual could use; and it was further limited in the case of land by the rule that the appropriator must leave enough for the requirements of others. As we have seen, Locke's major theoretical problem concerning private property arose from his assumption that the original grant of the earth was made in common to mankind.[43] In order to describe the conditions of appropriation under which no one would be injured, Locke formulated the proviso. People suffered no injury if there was as much left for them to appropriate in turn. Hence the concession from the homesteading axiom, which if not subjected to the proviso would permit unrestricted appropriation.

The Lockean proviso takes on several different forms in the *Two Treatises*. It is mentioned at least seven times in the Second Book's chapter on property (Chapter V). The proviso is often referred to as the spoilation clause because Locke wrote that "As much as any one can make use of to any advantage of life before it spoils; so much he may by his labor fix a property in it."[44] The proviso was grounded in the idea that each person in the state of nature owned an unspecified but joint share of the world. If wild fruit rotted or venison putrified before a person could consume them, "he offended against the common law of Nature, and was liable to be punished; he invaded his neighbor's share, for he had no right farther than his use called for any of them.[45] Punishment of the person who violates the spoilation clause is justified because he has invaded his neighbor's share. His offense was to misuse the provisions he had made and so invade his neighbor's portion. "The proprietor is thus punished for taking more of the common goods than he can use, even though he made those goods."[46]

The collectivist assumptions of the *Two Treatises* and the supposition that the world is owned collectively by its inhabitants are plainly seen in the formulation of the proviso.[47] Natural acquisition and homesteading are legitimate in the state of nature as long as the "enough and as good for others" proviso is satisfied. The basic premise that God gave the earth to all men in common for all time, however, invalidates all exclusive rights once the proviso is no longer met. "In a world where nearly all resources are short," Locke's homesteading theory has little application. "When the vital proviso is no longer satisfied, goods once legitimately acquired can no longer be retained in exclusive possession, but revert to common ownership."[48] Given Locke's repeated insistence on the proviso, it is a

bit remarkable that he has been depicted as a defender of unconditional private property in land and possessions.[49] The crucial point for Locke in any distribution of property is that everyone must have the means necessary for comfortable subsistence.[50] The proviso undercuts Locke's homesteading theory and if logically applied makes it impossible for anyone to acquire ownership of anything so long as there are conditions of scarcity. Since scarcity will eventually arise and can be traced back to that first act of appropriation, therefore no appropriation whatsoever is justified.[51] Locke's proviso has been used as a justification for the claim that "the right to an equal share of the basic non-human means of production" is a natural right of all human beings and has been called the foundation for socialism.[52]

Despite Locke's one major contribution to the proprietary theory of justice, which was to show that the privatization of positive community was possible without consent, so long as the proviso held, subsequent critics have challenged him on three main grounds: 1) that his argument is self-contradictory since the proviso logically leads to the outlawry of all private property; 2) that his original assumption of positive community ownership is wrong; and 3) that he is incorrect in his position that individual appropriation worsens the conditions of those who do not possess a share of the appropriated resources. Walter Block and Israel Kirzner, both Austrian economists, have each criticized Locke on this last point. Block has argued that since no interpersonal comparisons of utility or welfare have any scientific foundation, there is no legitimate basis on which to say that anyone is worse off or harmed by private appropriation.[53] Similarly, Kirzner has refused to accede to Locke's assumption that "whenever a discoverer appropriates all of a limited deposit of resource, he is worsening the situation of others for whom the deposit was completely unknown and non-existent."[54] According to Kirzner, the homesteading axiom confers a just title on the discoverer or transformer of property, "not in the negative sense that such title involves no injustice to others, but in the positive sense that justice requires that the creator be recognized as the owner of what he has created."[55]

Another critic of the Lockean proviso is Roger Pilon, who questions: "What right of others do we violate when we acquire as much as we want?"[56] No rights were violated in the process of appropriation because "we do not have a right to the world's being the way it is at any particular time in its history."[57] The fact that appropriation benefits or worsens the conditions of non-appropriators is besides the point. Nineteenth-century English critics have pointed out that the land was made by no one and therefore belongs to no one until appropriated.[58] J. Greevz Fisher explained that in relation to land, each man must exclude all others from the spot under his feet. "Competing individuals are not responsible for the birth of others; and though sympathy may inspire generosity, there is no valid claim to sustenance conferred by birth and life alone. . . . Why should the multiplication of neighbors (causing various resources to become more scarce) vitiate the title of early comers?"[59]

Murray Rothbard has shown that Locke's proviso may lead to the outlawry

"of *all* private ownership of land, since one can always say that the reduction of available land leaves everyone else, who could have appropriated the land, worse off. In fact, there is no way of measuring or knowing when they are worse off or not."[60] Even if there were a way of determining whether they were worse or better off, it would not matter.[61] "Everyone should have the right to appropriate as his property previously unowned land or other resources. If latecomers are worse off, well then that is their proper assumption of risk in this free and uncertain world."[62]

Finally we will examine how Lysander Spooner dealt with Locke's proviso. From his assertion that "the natural wealth of the world belongs to those who first take possession of it," Spooner deduced the rule that "each one may take enough to supply his own wants, if he can find the wherewith unappropriated."[63] Spooner showed that, since the wealth of nature is available to supply man's wants only by way of individual appropriation, man must take possession of the earth and its produce, before he can apply them to the sustenance of his body.

> He must take possession of land, and thus make it his property before he can raise a crop from it, or fit it for his residence. If the first comer have no right to take possession of the earth, or its fruits, for the supply of his wants, the second comer certainly can have no such right. The doctrine, therefore, that the first comer has no natural right to take possession of the wealth of nature, make it his property, and apply to his uses, is a doctrine that would doom the entire race to starvation, while all the wealth of nature remained unused, and unenjoyed around them.[64]

Spooner's major contributions to the proprietary theory of justice are found in his book on *The Law of Intellectual Property; Or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas* (1855). In order to defend the right of ownership by inventors and authors in the products of their mental labors, Spooner had to elaborate a theory of justice in the ownership of land and chattels. There is no need to go into a detailed examination of Spooner's defense of self-ownership and his opposition to slavery. He was a radical abolitionist even among the Garrisonians of his day. "That human beings are born with the inalienable quality of freedom underlies all of Spooner's arguments. For him 'it was a self-evident truth that . . . *all* men are *naturally* and rightfully free.' 'A man cannot be subject of human ownership.' 'A man cannot alienate his right to liberty and to himself, — still less can it be taken from him.' Just by being born, a man is free."[65] Spooner was a firm defender of the self-ownership axiom, as his early attacks on slavery illustrate.

As to the material objects that surround a person and the land space he or she occupies, Spooner defended unlimited private land-ownership. His proprietary theory of justice, in this case, was built upon the homesteading axiom.

> The right of property, in material wealth, is acquired, in the first instance, in one of these two ways, viz.: first, by simply taking possession of natural wealth, or the productions of nature; and, secondly, by the artificial production of other wealth. . . .

1. The natural wealth of the world belongs to those who first take possession of it. The right of property, in any article of natural wealth, is first acquired by simply taking possession of it. . . .

There is no limit, fixed by the law of nature, to the amount of property one may acquire by simply taking possession of natural wealth, not already possessed, except the limit fixed by his power or ability to take such possession, without doing violence to the person or property of others. So much natural wealth, remaining unpossessed, as any one can take possession of first, becomes absolutely his property.*

This mode of acquiring property, by taking possession of the productions of nature, is a just mode. Nobody is wronged — that is, nobody is deprived of anything that is his own — when one man takes possession of a production of nature, which lies exposed, and unpossessed by any one. The first comer has the same right, and all the right, to take possession of it, and make it his own, that any subsequent comer can have. No subsequent comer can show any right to it, different in its nature, from that, which the first comer exercises, in taking possession. The wealth of nature, thus taken, and made property, was provided for the use of mankind. The only way, in which it can be made useful to mankind, is by their taking possession of it individually, and thus making it private property. Until it is made property, no one can have the right to apply it to the satisfaction of his own, or any other person's wants, or desires. The first comer's wants and desires are as sacred in their nature, and the presumption is that they are as necessary to be supplied, as those of the second comer will be. They, therefore, furnish to him as good an authority for taking possession of wealth of nature, as those of the second comer will furnish to him. . . .

2. The other mode, in which the right of property is acquired, is by the creation, or production, of wealth, by labor.

The wealth created by labor, is the rightful property of the creator, or producer. This proposition is so self-evident as hardly to admit of being made more clear; for if the creator, or producer, of wealth, be not its rightful proprietor, surely no one else can be; and such wealth must perish unused.

The material wealth, created by labor, is created by bestowing labor upon the productions of nature, and thus adding to their value. For example — a man bestows his labor upon a block of marble and converts it into a statue. . . . The additional value thus given to the stone . . . is a creation of new wealth by labor. And if the laborer own the stone . . . on which he bestows his labor, he is the rightful owner of the additional value which his labor gives to those articles. But if he be not the owner of the article, on which he bestows his labor, he is not the owner of the additional value he has given to them; but gives or *sells his labor* to the owner of the articles on which he labors.

*Some persons object to this principle for the reason that, as they say, a single individual might, in this way, take possession of a whole continent, if he happened to be the first discoverer . . . . But this objection arises wholly from an erroneous view of what it is to take possession of any thing. To simply stand upon a continent, and declare one's self possessor of it, is not to take possession of it. One would, in that way, take possession only of what his body actually covered. To take possession of more than this, he must bestow some valuable labor upon it, such, for example, as cutting down the

> trees, breaking up the soil. . . . In these cases he holds the land in order to hold the labor which he has put into it or upon it.[66]

Spooner elaborated his definition of property by explaining that the principle of property is that a thing belongs to one man and not another — "Mine, and thine, and his, are the terms that convey the idea of property." The word "property" is derived from *propius*, which means "one's own." Proprietorship is the principle of one's personal ownership, control, and dominion of and over any thing. The legal idea of property is that a thing belongs to one man and another thing to another man and that neither of these persons have a right to any voice in the control or disposal of that which belongs to the other.

> The proprietor of any thing has the right to an exclusive ownership, control, and dominion, of and over the thing of which he is the proprietor. The thing belongs to him, and not to another man. He has a right, as against all other men, to control it according to his own will and pleasure; and is not accountable to others for the manner in which he may make use of it. Others have no right to take it from him, against his will; nor to exercise any authority, control, or dominion over it, without his consent; nor to impede, or obstruct him in the exercise of such dominion over it, as he chooses to exercise. It is not theirs but his. They must leave it entirely subject to his will. His will, and not their wills, must control it. The only limitation, which any or all others have a right to impose upon his use and disposal of it, is, that he shall not so use it as to invade, infringe, or impair the equal supremacy, dominion, and control of others, over what is their own. . . .
>
> This right of property, which each man has, to what is his own, is a right, not merely against any one single individual, but it is a right against all other individuals, singly and collectively. The right is equally valid, and equally strong, against the will of all other men combined, as against the will of every or any other man separately. It is a right against the whole world. The thing is his, and is not the world's. And the world must leave it alone, or it does him a wrong; commits a trespass, or a robbery, against him. If the whole world, or any one of the world, desire anything that is an individual's, they must obtain his free consent to part with it, by such inducements as they can offer him. If they can offer him no inducements, sufficient to procure his free consent to part with it, they must leave him in the quiet enjoyment of what is his own.[67]

This argument has many implications for political theory. For one thing it ultimately leads to the total rejection of all government and thoroughly demolishes the doctrine of tacit consent. William Molyneux, a friend and correspondent of John Locke, was perhaps the first to apply this strict theory of proprietary justice to the justness of governmental institutions. Writing in 1698, Molyneux was intent on proving that Ireland was not obligated by acts of Parliament in his *The Case of Ireland's Being Bound by Acts of Parliament in England, Stated*. His argument was based on past English history and Irish precedent, as well as the doctrine of natural rights: "I shall venture to assert, that the Right of being subject ONLY to such Laws, to which Men give their *own* Consent, is so *inherent* in *all* Mankind, and founded on such *immutable* Laws of Nature and Reason, that 'tis

not to be alienated, or given up by any Body of Men whatever. . . . I have no other Notion of *Slavery;* but being bound by a Law, to which I do not consent."[68] According to Molyneux:

> The Obligation of all Laws having the same Foundation, if *One* Law may be imposed *without Consent,* any *Other* Law whatever, may be imposed on us *without our Consent.* This will naturally introduce *Taxing us without our Consent;* and this as necessarily destroys our *Property.* I have no other Notion of *Property,* but a *Power of Disposing my Goods as I please,* and not as another shall Command: Whatever another may *Rightfully* take from me *without my Consent,* I have certainly no *Property* in. To *Tax* me without Consent, is little better, if at all, than *downright Robbing me.* I am sure the Great Patriots of Liberty and Property, the Free People of *England,* cannot think of such a thing but with Abhorrence.[69]

Despite Molyneux's hopeful closing remark, we have nearly three centuries of government taxation and oppression to prove him wrong in practice. Spooner, writing a century and a half after Molyneux (and so far as we know, unaware of these earlier utterances) used the same powerful logic to formulate the doctrine of anarchistic opposition to government based on proprietary justice. Said Spooner:

> It was a principle of the Common Law, as it is of the law of nature, and of common sense, that no man can be taxed without his personal consent. . . . Taxation without consent is as plainly robbery, when enforced against one man, as when enforced against millions. . . . Taking a man's money without his consent, is also as much robbery, when it is done by millions of men, acting in concert, and calling themselves a government, as when it is done by a single individual, acting on his own responsibility, and calling himself a highwayman. Neither the numbers engaged in the act, nor the different characters they assume as a cover for the act, alter the nature of the act itself.
>
> If the government can take a man's money without his consent, there is no limit to the additional tyranny it may practise upon him; for, with his money, it can hire soldiers to stand over him, keep him in subjection, plunder him at discretion, and kill him if he resists. . . . It is therefore a first principle, a very *sine qua non* of political freedom, that a man can be taxed only by his personal consent. . . . Government have no more right, in nature or reason, to *assume* a man's consent to be protected by them, and to be taxed for that protection, when he has given no actual consent, than a fire or marine insurance company have to assume a man's consent to be protected by them, and to pay the premium, when his actual consent has never been given. To take a man's property without his consent is robbery; and to assume his consent, where no actual consent is given, makes the taking none the less robbery. If it did, the highwayman has the same right to assume a man's consent to part with his purse, that any other man, or body of men, can have. And his assumption would afford as much moral justification for his robbery as does a like assumption, on the part of the government, for taking a man's property without his consent. The government's pretence of protecting him, as an equivalent for the taxation, affords no justification.[70]

Spooner's analysis of government and taxation points up that it is impossible

to define taxation in a way which makes it different from robbery. Taxation is theft, despite government rhetoric. Simply put, a man cannot be presumed to have parted with his property without first having given his express, personal agreement. Spooner further developed these ideas in a series of three post–Civil War pamphlets entitled *No Treason*. According to Spooner, governments and nations, if they can be said to rightfully exist at all, can exist only by consent, and this means: "*the separate, individual consent of every man who is required to contribute, either by taxation or personal service, to the support of the government.* . . . Either the separate, individual consent of every man, *who is required to aid, in any way, in supporting the government,* is necessary, or the consent of no one is necessary."[71]

In *No Treason No. II* Spooner argued that "Either 'taxation without consent is robbery,' or it is not. If it is *not,* then any number of men, who choose, may at any time associate; call themselves a government; assume absolute authority over all weaker than themselves; plunder them at will; and kill them if they resist. If, on the other hand, 'taxation without consent is robbery,' it necessarily follows that every man who has not consented to be taxed, has the same natural right to defend his property against a taxgatherer, that he has to defend it against a highwayman."[72]

In his final pamphlet of this series, *No Treason No. VI, The Constitution of No Authority,* Spooner broke new ground by thoroughly demolishing the theory of tacit consent. Spooner argued that merely living in a certain geographic place under control of a government, or voting in government elections, in no way implied one's consent to the government of that territory. Elections mean nothing; for Spooner showed that a majority of people never vote, and of those who do, the number supporting the elected candidates are so small (as a percentage of the population) as to be ludicrous. "Elections are secret; therefore, you cannot call representatives legal agents, since they do not know specifically whom they do represent." They claim to represent those that voted for them, those that voted against them, and those that never voted at all; clearly a violation of every legal principle of agency and every proviso against conflict of interest. "On the question of the Constitution itself, no vote ever had been taken, and as a legal contract the Constitution has no validity."[73] According to Spooner,

> the Constitution was never signed, nor agreed to, by anybody, as a contract, and therefore never bound anybody, and is now binding upon nobody; and is, moreover, such a one as no people can ever hereafter be expected to consent to, except as they may be forced to do so at the point of the bayonet.[74]

The proprietary theory of justice highlights the anarchistic opposition to government. To contend that government rests on the consent of the governed is to begin the descent on the slippery slope to anarchism. Historically, most political theorists have attempted to avoid the anarchistic implications of the natural rights–social contract position by resorting to the doctrine of tacit consent.[75] "It was the great achievement of the nineteenth-century anarchist Lysan-

der Spooner to demolish the tacit consent doctrine, particularly as it applies to the U.S. Constitution. Spooner's natural rights theory, combined with his refusal to recognize the surrender of rights through tacit consent, brings out the radical anarchism latent in the Lockean tradition."[76]

As Spooner demonstrated, it is possible to break the tacit consent doctrine only by using the proprietary theory of justice. By forcing property owners in a given geographic area (whose boundaries are considered to be coextensive with the government of the area) to support and contribute to the taxing power at all times, such property owners are denied total control over their own properties. A property owner can never withdraw his support from the state by not paying his real property taxes.[77] If he attempted to discontinue his tax payments, the state would eventually confiscate and sell his land at auction. Taxation, whether it be of land or services, or in any other form, is the equivalent of robbery, because a just proprietor is being deprived of his money or goods against his will. The fact that the government is offering goods and services in exchange for tax revenues makes no difference. Government violates the rights of self-owners when it conscripts their services in the form of personal labor or when it seizes their material wealth. It violates the right of the original landowner and his heirs or assigns when it taxes property. Finally, government denies legitimate owners and entrepreneurs the rightful use of their labor and wealth by preventing competition in the production of any goods and services which the government itself monopolizes.

In *The Law of Intellectual Property,* Spooner also developed an argument which can be used to demonstrate that government and other criminals reject the homesteading axiom and operate on the principle of communism. The advocates of any doctrine which claims that commodities are not the private property of their producers obviously destroy the homesteading axiom. Such a doctrine proclaims that at most the producer of a commodity has rights in it equal to those of men who did not produce it; he certainly has no rights in it by virtue of having produced it. "This certainly is equivalent to denying that any exclusive right of property can be acquired by labor or production. It is equivalent to asserting that all our rights to the use of commodities depend simply upon the fact that we are men; because it asserts that all men have equal rights to use a particular commodity, no matter who may have been the producer."[78]

> This doctrine, therefore, goes fully to the extent of denying all rights of property whatsoever, even in material things (exterior to one's person); because all rights of property in such material things have their origin in labor; (that is, either in the labor of production, or the labor of taking possession of the products of nature;) not necessarily in the labor of the present possessor; but either in his labor, or the labor of some one from whom he has, mediately or immediately, derived it, by gift, purchase, or inheritance.
>
> The doctrine of the objection, therefore, by denying that any right of property can originate in labor or production, virtually denies all rights of property whatsoever . . .; because if no rights of property in such things can be derived from labor or production, there can be no rights of property in them at all.

> The ground on which a man is entitled to the products and acquisitions of his labor, is, that otherwise he would lose the benefit of his own labor. He is therefore entitled to hold these products and acquisitions, in order to hold the labor, or the benefit of the labor, he has expended in producing and acquiring them.[79]

In comparing the products of mental effort to the products of physical labor, Spooner pointed out that the fact that a tangible commodity may serve many people at one time (such as a road or canal or boat) without interfering with each other in their use of it, offers no justification for the rejection of the homesteading axiom by which an owner may deprive others of the use of his products, even though the owner's use is not being interfered with. If it is acknowledged that a man has an exclusive right of property in the products of his labor because they are the products of his labor, then it clearly makes no difference whether the commodity produced is in its nature capable of being possessed by many or only one person at a time. "That is a wholly immaterial matter, so far as his right of property is concerned; because his right of property is derived from his labor in producing the commodity; and not from the nature of the commodity when produced."[80] The principle of the doctrine that denies men the products of their labor is

> that all things should be free to all men, so far as they can be, without men's coming in collision with each other, in the actual possession and use of them; and, consequently, that no one person can have any rightful control over a thing, any longer than he retains it in his actual possession; that he has no right to forbid others to possess and use it, whenever they can do so without personal collision with himself; and that he has no right to demand any equivalent for such possession and use of it by others. From these propositions it would seem to follow further, that for a man to withhold the possession or use of a thing from others, for the purpose of inducing them, or making it necessary for them, to buy it, or rent it, and pay him an equivalent, is an infringement upon their rights.
>
> The principle of property is directly the reverse of this. The principle of property is, that the owner of a thing has absolute dominion over it, whether he have it in actual possession or not, and whether he himself wish to use it or not; that no one has a right to take possession of it, or use it, without his consent; and that he has a perfect right to withhold both the possession and use of it from others, from no other motive than to induce them, or make it necessary for them, to buy it, or rent it, and pay him an equivalent for it, or for its use.[81]

Again and again, Spooner reasoned that the objections to the homesteading axiom amounted to nothing more than the idea that the producer of a commodity has no right of property in it, beyond the simple right of using it himself without molestation; but that he has no right to forbid others to use it, whenever they can get possession of it and use it without collision with the original producer. This doctrine clearly implies that "men must avoid collision with each other in the possession and use of commodities."

> This principle would not allow the producer so much even as a preference over other men, in the possession and use of a commodity, unless he preserved his first actual possession unbroken. To illustrate. If, when he was not using it, he should let go his hold of it, and thus suffer another to get possession of it, he could not reclaim it, even when he should want it for actual use. To allow him thus to demand it of another, for actual use, on the ground that he was the producer of it, would be acknowledging that labor and production did give him at least some rights to it over other men. And if it be once conceded, that labor and production do give him any rights to it, over other men, then it must be conceded, that they give him all rights to it, over other men; for if he have any rights to it, over other men, then no limit can be fixed to his rights, and they are of necessity absolute. And these absolute rights to it, as against all other men, are what constitute the right of exclusive property and dominion. *So that there is no middle ground between the principle, that labor and production give the producer no rights at all, over other men, in the commodity he produces; and the principle, that they give him absolute rights over all other men, to wit, the right of exclusive property or dominion. There is, therefore, no middle ground between absolute communism,* on the one hand, which holds that a man has a right to lay his hands on any thing, which has no other man's hands upon it, no matter who may have been the producer; *and the principle of individual property,* on the other hand, which says that each man has an absolute dominion, as against all other men, over the products and acquisitions of his own labor, whether he retain them in his actual possession, or not.[82] (Emphasis added)

Spooner's arguments present a very clear and convincing framework for maintaining the proprietary theory of justice. Within the context of libertarianism, it has already been pointed out that the self-ownership and homesteading axioms form the basis of the libertarian creed. By spinning out the logical corollaries of these axioms, the proprietary theory of justice is able to provide libertarianism with a total world view. The point I wish to make however, involves the logical reduction of any political argument to its fundamental premises. As Spooner has demonstrated, such arguments must ultimately reduce themselves to either an acceptance or rejection of the self-ownership and homesteading axioms; that is, to either individual sovereignty and the principle of private property or to slavery and absolute communism. There is no middle ground of compromise possible between these premises. The use of the proprietary theory of justice as a method of logically reducing a political argument to its basic premises permits of only two possibilities: either the rejection of its initial axioms (which forces one to accept slavery and communism) or the rejection of the logic itself by which one is forced backward to one's fundamental axioms. Thus all disputes about justice and social and political arrangements ultimately reduce themselves to disputes about self-ownership and the homesteading axioms.[83]

Later in his career, Spooner summarized the proprietary theory of justice by referring to it as the "science of mine and thine." In his 1882 pamphlet on *Natural Law, or the Science of Justice: A Treatise on Natural Law, Natural Justice, Natural Rights, Natural Liberty, and Natural Society; Showing That All Legisla-*

tion Whatsoever Is an Absurdity, a Usurpation, and a Crime, he called proprietary justice the science of peace: "it is the science which alone can tell us on what conditions mankind can live in peace with each other." According to Spooner, these conditions are:

> first, that each man shall do towards every other, all that justice requires him to do; as, for example, that he shall pay his debts, that he shall return borrowed or stolen property to its owner, and that he shall make reparation for any injury he may have done to the person or property of another.
>
> The second condition is, that each man shall abstain from doing to another, anything which justice forbids him to do: as, for example, that he shall abstain from committing theft, robbery, arson, murder, or any other crime against the person or property of another. . . .
>
> Through all time, so far as history informs us, wherever mankind have attempted to live in peace with each other, both the natural instincts, and the collective wisdom of the human race, have acknowledged and prescribed as an indispensable condition, obedience to this one only universal obligation: viz., *that each should live honestly towards every other.*
>
> The ancient maxim makes the sum of a man's legal duty to his fellow men to be simply this: *"To live honestly, to hurt no one, to give to every one his due."*
>
> This entire maxim is really expressed in the single words, *to live honestly;* since to live honestly is to hurt no one, and give to every one his due.[84]

Based on his concept of natural law and proprietary justice, Spooner also demonstrated in this pamphlet that if there is no such thing as natural justice, then governments have no business to exist at all. Spooner argued for anarchism and the abolition of government in the following ways. First, if we admit the existence of natural law and an objective reality, there is no reason for government to monopolize the administration of justice or defense services. Because the principles of justice are grounded in objective, natural laws they fall within the province of human knowledge and are knowable by all who choose to study and reason them out. Just as we do not require a government to dictate what is right or wrong in steel making, so we do not require a government to dictate what is right or wrong in the realm of justice. If it is possible to verify objectively that one legal procedure is valid, whereas another is not, then it does not matter who employs the procedure in question. We should look to reason and fact; not to government.[85]

Secondly, if we deny the existence of natural law and objective reality, then we certainly do not require an institution such as government. What purpose could it serve? If there is no such thing as objective truth to differ about, then "there is no moral standard, and never can be any moral standard by which any controversy whatever, between two or more human beings, can be settled in any manner to be obligatory upon either." The human race must then be inevitably at war, "forever striving to plunder, enslave, and murder each other; with no instrumentalities but fraud and force to end the conflict."[86] If there is no such thing as justice, then there can be no such acts as crimes.

In this same pamphlet on natural law, Spooner laid out his views on charity and moral duties. These views are useful in demonstrating a significant difference between his theory of proprietary justice and that of earlier thinkers. Spooner wrote that:

> Man, no doubt, owes many other moral duties to his fellow men; such as to feed the hungry, clothe the naked, shelter the homeless, care for the sick, protect the defenseless, assist the weak, and enlighten the ignorant. But these are simply moral duties, of which each man must be his own judge, in each particular case, as to whether, and how, and how far, he can, or will, perform them.[87]

He concluded that a man may be compelled to fulfill his legal duty (of living honestly towards his fellow men) but that no man may be coerced into performing acts of charity.

Spooner's distinctions between legal duty and moral duty help clarify and eventually eliminate the concept of "the right to one's due," which was a favorite expression of the very early natural law thinkers. These thinkers, especially the Stoics, used two expressions, which have been previously referred to: the right to one's due and the right to one's own. One marked actual possession (that was one's own) and the other indicated potential possession (the right to one's due).[88] The two expressions were meaningful only if based on the premise that the world was the common property of mankind. One's due, from this perspective, represented the as yet unoccupied seat in the theater (to use Grotius' and Pufendorf's example) or the as yet unclaimed inheritance of mankind. It did not represent specific property, but merely one's unspecified right of joint ownership in the things of the world. Pufendorf's rejection of the concept of positive community effectively destroyed any person's claim to common property and therefore made the expression "the right to one's due" meaningless. Since the world was actually in an unowned or ownerless state of nature, no one had a claim to anything. From that time, onwards, the right to what one had homesteaded and actually had possessed constituted the sole definition of "one's own," and stolen property, if legitimately titled, could be reclaimed by the rightful owner. In such instances, such a claim was valid only if one was claiming back what had already been one's own.

Grotius's and Locke's views on charity will help clarify these distinctions.

> Grotius' account of rights and justice leads to a revision of the nature of charity. One exception to abstaining from that which belongs to another is incorporated into the original agreement to institute private property. If a person is in dire need, he may be said to have the original use right and, therefore, use another's property. The reason is not, and cannot be, that the needy have a claim to their due. . . . "The Property of Goods is supposed to have been established with this favorable Exception, that in such cases one might enter again upon the Rights of the Primitive Community." Charity is thus a negative duty and need only be observed once the needy have proven that they are in a state of absolute necessity.[89]

Locke, and Pufendorf, too, rejected the implication of the homesteading axiom in their theories of charity. "If first taking is the condition for the application of a right to exclude others, it follows that a person in dire need could conceivably be barred from things necessary for his preservation. But, according to Grotius, the right to use another's provisions, in the case of absolute necessity, is an exception built into the agreement to institute private property. Thus, prior to this agreement, it is possible that a man could perish as a consequence of the operation of natural rights."[90]

Locke, in accord with his proviso, looks upon charity as a natural right of mankind, a right which the owners of property are bound to respect and fulfill.

> "Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extreme want, where he has no means to subsist otherwise." Where no means are available for a man to provide for himself, the right to the means of subsistence applies directly to another person's goods. "God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods." A proprietor who has more than enough to sustain himself is under a positive duty to sustain those who do not: " 'twould always be a Sin in any man of Estate, to let his Brother perish for want of affording him Relief out of his plenty."[91]

It was Pufendorf who had actually pointed out that Grotius's theory of natural rights allowed for the needy to be excluded from the goods of the world, except that such an exception might be built into the pact instituting private property. Locke argued that charity is a natural duty which follows from the nature of property. "If a case of need arises then, 'ipso facto,' one man's individual right is overridden by another's claim, and the goods become his property. By failing to hand over the goods, the proprietor invades the share now belonging to the needy. . . . The necessary goods 'cannot justly be denied him.' "[92] The right of the needy imposes a positive duty on the property owner. "The needy like everyone else, have 'a right to live comfortably in the world.' "[93]

Spooner's theory of charity is diametrically opposed to that of Grotius and Locke. Charity for him was not a positive duty, but rather a negative one; one that could not be imposed by the needy on property owners. Proprietary justice consisted in doing no harm to others and did not imply any positive or special obligations of benevolence or charity towards others. Nothing is due to a man in strict justice but what is his own.[94] If a man has nothing he can call his own (except his body), then a man still has no claim against others unless they voluntarily agree to supply him with goods. For the libertarian, justice can only be negative, can only prohibit aggressive and criminal acts by one person upon another. Justice does not compel positive acts regardless of how praiseworthy or even necessary such actions may be. In the libertarian scheme of things, "there are no general positive obligations, obligations to do something for another as opposed to refraining from doing something to him. Positive obligations arise only from an individual's own actions, such as entering into a contract; the

unfortunate straits of another cannot create them.''[95] If the self-ownership and homesteading axioms are to apply equally to each and every person, then it is impossible that one's need (or greed or wealth) could serve as a justification for the infringement on another's person or property.

Several contemporary thinkers have realized that the self-ownership axiom means only the right not to be killed or let die unjustly, not the right to receive or acquire the means of survival. Under the self-ownership axiom a person literally has no claim whatsoever on the lives of others. To understand this right not to be killed or let die unjustly, consider the following example.

> Tom, Dick, and Gertrude are adrift on a lifeboat. Dick managed to bring aboard provisions that are just sufficient for his own survival. Gertrude managed to do the same. But Tom brought no provisions at all. So Gertrude, who is by far the strongest, is faced with a choice. She can either kill Dick to provide Tom with the provisions he needs or she can refrain from killing Dick, thus letting Tom die.[96]

Killing Dick would be unjust for several reasons, but most of all because he was a non-aggressor and a self-owner. Letting Tom die would not be unjust (*i.e.*, it would be just) because it would be the only way of respecting the self-ownership rights of all three. Obviously Gertrude's non-action (her failure to initiate aggression against Dick in order to give provisions to Tom) might result indirectly in the death of Tom. However, her responsibility in the event of Tom's death would be quite distinct from her responsibility in the event of Dick's death. In the one case, nature would take its toll and Tom would die from starvation; whereas the death of Dick would be caused by Gertrude's direct acts of violence against him. The obvious libertarian solution to this dilemma would be for Gertrude to exercise her own rights of self-ownership and homesteading and distribute some of *her own* provisions to keep Tom from starving. Of course she is under no more obligation to Tom than Dick would be. We may consider it to be her moral duty to assist Tom, but it is not her legal duty. The most she could do would be to share her own provisions with Tom and try to persuade Dick to voluntarily do the same.

Situations may arise in which some persons do not have property rights to goods that are necessary to meet their basic needs, while others have property rights to more than enough goods to meet their needs. Under this view of proprietary justice, if persons with property rights to surplus goods chose not to share their surplus with anyone else, they would not be violating anyone's right to self-ownership or homesteading, ''for although, by their decision not to share, they would be killing or letting die those who lack the means of survival, they would not be doing so unjustly, they would not be depriving anyone of his property.''[97] As Judith Jarvis Thomson has said, ''having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body'' or property ''even if one needs it for life itself.''[98] To repeat: self-ownership rights mean ''not the right not to be killed, but rather the right not to be killed unjustly.''[99] As we have seen in the case of Tom, Dick, and Gertrude, we must treat all other human beings with absolute respect

for their self-ownership rights. "You own yourself. . . . Other people own themselves. . . . You literally have no claim whatsoever on the lives of others. You can only relate to them when, where, and how they want you to; otherwise, you must let them be. You must treat them with respect for their self-ownership or not at all."[100]

The notion that the world is owned equally by mankind is integrally related to the view that each and every person has a right to the means of subsistence and that wealth is a limited quantity of goods to be transferred from rich to poor. If some do not have enough, it is because others have too much. What adherents of this view do not understand is that "wealth can be created." "It is created by the application of human muscle and brain."[101] From the view that everyone has a right to survival at any cost follows the question: At whose expense? Of course, the only answer is: At the expense of those who have created wealth by the application of their human muscle and brain; *i.e.*, at the expense of the original homesteaders and their heirs and assigns. Even if the world were jointly owned by mankind at large, nature provides the individual person with practically nothing to sustain his survival.[102] In order to survive one must produce; one must apply one's labor to the material objects of the world. To say that those in need have the right to appropriate the surplus goods of others is to imply that they have the right to confiscate the labor of those who have produced the goods. To take from the storehouse of nature never has been, is not now, and never can be, in the nature of things, classed as stealing. "The essence of stealing is the taking of things which belong to others." It is simply a fact of man's nature that if he does not exert himself he will die. His exertions can be directed either against nature or against other men. Men and women have been appropriating matter and the forces of nature from the earliest times to the present on the simple but practicable theory that anyone may appropriate anything so long as he does not thereby rob other people (that is, so long as he does not appropriate anything which has already been homesteaded by another person). It is not stealing to appropriate hitherto unhomesteaded property from the state of nature; but it is stealing to exert oneself against other men and confiscate the produce of their labor. Without appropriation by the original homesteaders there would have been no property — and consequently, no robbery.[103]

Thus concludes our survey of the history and theory of proprietary justice. The proprietary theory of justice furnishes the basis for a moral rationalism — a moral theory that insists that institutions, as well as individuals, are subject to scrutiny regardless of their longevity or "official" status. It provides for the rational dignity of the individual human being: each person is a self-owner with inalienable rights of control over his or her own body and efforts. No one has any claims upon another; nor do others have any claims against you. By permitting the individual to stand alone, outside the social or political bodies of mankind, it provides the only basis on which the individual may rightfully criticize in both word and deed every other individual and existent social institution. For these reasons the proprietary theory of justice stands at the apex of libertarian thought.

NOTES

1. Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N. J.: Humanities Press, 1982), pp. 54–55.
2. Murray N. Rothbard, *Man, Economy, and State* (Princeton, N. J.: C. Van Nostrand, 1962), 1:151. Also refer to Rothbard, *For A New Liberty* (New York: Collier Books, 1978), chap. 2, "Property and Exchange," for an extended discussion of the self-ownership and homesteading axioms.
3. Benjamin Tucker, *Instead of A Book* (1893; New York: Haskell House, 1969), p. 9.
4. See Carl Watner, "The 'Criminal' Metaphor in the Libertarian Tradition," *Journal of Libertarian Studies* 5, no. 3 (Summer 1981): 313–25.
5. Leonard Liggio, "Native American Property Rights," *Libertarian Forum*, January 1971, p. 4.
6. This paragraph draws largely on two articles, both by Karl Olivecrona: "Appropriation in the State of Nature: Locke on the Origins of Property," *Journal of the History of Ideas* 35 (April-June 1974): 211–30; and "Locke's Theory of Appropriation," *Philosophical Quarterly* 24 (July 1974): 220–34, esp. 222–23.
7. Porphyr, *On Abstaining from Animal Food*, bk. 3, chap. 3, sec. 26, quoted in Hugo Grotius, *The Law of War and Peace*, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925), "Prolegomena," p. 12, n. 3.
8. James Tully, *A Discourse on Property* (Cambridge: Cambridge University Press, 1980), pp. 82, 115.
9. Karl Olivecrona, "The Term 'Property' in Locke's *Two Treaties of Government*," *Archives for Philosophy of Law and Social Philosophy* 51 (1975): 112.
10. For the basic formulation of these questions see Richard Schlatter, *Private Property: The History of an Idea* (London: George Allen & Unwin, 1951), p. 147.
11. The claim that the world is owned in common by all mankind is both a logical and a methodological fallacy. Ownership means use and control by the individual. If the right of disownership cannot be exercised, if one cannot sell one's share or interest in that which is owned, then ownership does not really exist at all. Joint or common ownership can only be brought about by voluntary pooling of individual titles. It is simply exercising the fallacy of the stolen concept to advocate common ownership and at the same time deny the right of individual ownership to individual parts of the world. According to methodological individualism, a group cannot exercise any rights, except those already possessed by its individual members.

    The advocates of world communism, by claiming ownership of the world, have already implicitly acknowledged the case for individual ownership. The moment they concede ownership of the earth to the inhabitants of the earth, as opposed to ownership of the universe to the inhabitants of the universe, they are admitting the right of secession. If the inhabitants of the world may secede from the universe, why not the inhabitants of North America from the world? And if North Americans may secede, why not inhabitants of the United States, New York, or Manhattan? Each neighborhood? Each block? Each house? Each person? The right of secession for groups of people logically ends by recognizing the right of secession for the individual and his property. If each person may secede then we have arrived at individualist-anarchism based upon self-ownership and homesteading rights. (Arguments used here were suggested by Murray N. Rothbard, *Power and Market* [Menlo Park, Calif.: Institute for Humane Studies, 1970], pp. 3, 139.)

    There are many further problems associated with the formulation of the claim of common ownership of the world. How is it to be exercised? By whom is it to be exercised? At what age is it to be exercised? Is unanimous consent necessary, and if not, why not? And what effect do newcomers and future generations have on the exercise of the common right? Even if the concept were not a logical fallacy, the inherent inefficiency and impracticality would nullify the concept in actual use. (Also see the discussions of landownership by Auberon Herbert in *Symposium on the Land Question*, ed. J. H. Levy [London: T. Fisher Unwin, 1890], pp. 1–7, 68–79; and Rothbard, *For A New Liberty*, esp. pp. 34–35.)
12. Grotius, *Law of War and Peace*, vol. 2, bk. 2, chap. 2, sec. 1, p. 186.
13. *Ibid.*, vol. 2, bk. 2, chap. 2, sec. 5, pp. 189–90.
14. For the claim that Grotius developed a theory of negative ownership, rather than positing an

original world communism, see Tully, *Discourse on Property*, pp. 69–71. My argument rests on my own reading of Grotius. See also Schlatter, *Private Property*, pp. 126–131, esp. pp. 129–30.

15. Schlatter, *Private Property*, p. 130. Nozick develops a similar argument in examining "Locke's Theory of Acquisition." He asks, "Why does mixing one's labor with something make one the owner of it? . . . But why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?" (Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 174–75). This is a classic example examined by many natural law thinkers, including Grotius and Pufendorf. The essential question boils down to "who owns the property I am mixing my labor with?" To assume it is ownerless grants validity to the homesteading axiom; for to mix one's labor with an ownerless thing and still have that thing remain ownerless is absurd. To assume that the property I mix my labor with is owned in common by all mankind is to encounter the problems presented here in note 11.
16. This echoes Schlatter, *Private Property*, p. 131.
17. See A. S. P. Woodhouse, ed., *Puritanism and Liberty: Being the Army Debates (1647–1649), from the Clarke Manuscripts* (Chicago: Universityo f Chicago Press, 1951), "Introduction," p. 91.
18. *Ibid.*, "The Putney Debates," p. 75. This also reflects Clarence Carson's statement that "Property is antecedent to government, having a factual basis in production and possession" ("The Cold War," *The Freeman* 29 [March 1979]: 148). Clarke also uses traditional natural law concepts: "Yet the law of nature does give a principle for every man to have a property of what he has or may have which is not another man's" (Woodhouse, *Puritanism and Liberty*, p. 75).
19. C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Clarendon Press, 1962), p. 139. It is interesting to note the conjunction of "property as a natural right" and "government by consent" in this early setting. As we shall see, it was not until 1698 that a direct connection was made between these two concepts. However, the Levellers' agitation and opposition to both Charles I and Cromwell foretell the anarchistic implications of government by consent and respect for property rights.
20. Richard Overton, *An Arrow Against All Tyrants*, pp. 3–4, quoted in Macpherson, *Political Theory*, pp. 140–41.
21. I follow Schlatter in interpreting the Levellers. See Schlatter, *Private Property*, pp. 137–38.
22. *Ibid.*, pp. 139, 144.
23. *Ibid.*, p. 145, quoted from Samuel Pufendorf, *The Law of Nature and Nations*, trans. C. H. and W. A. Oldfather (Oxford: Clarendon Press, 1934), bk. 4, chap. 4, sec. 2, pp. 532–33.
24. Lawrence Becker, *Property Rights* (Boston: Routledge & Kegan Paul, 1977), p. 25.
25. Pufendorf, *Law of Nature and Nations*, bk. 4, chap. 4, sec. 5, p. 537.
26. Grotius, *Law of War and Peace*, vol. 2, bk. 2, chap. 2, sec. 1, p. 186.
27. Pufendorf, *Law of Nature and Nations*, bk. 4, chap. 4, sec. 10, p. 548.
28. Schlatter, *Private Property*, p. 147.
29. *Ibid.*, p. 148.
30. Pufendorf, *Law of Nature and Nations*, bk. 4, chap. 4, sec. 6, pp. 539–40, quoted in Schlatter, *Private Property*, pp. 149–50.
31. John Locke, *Two Treatises of Government*, ed. Peter Laslett, (Cambridge: Cambridge University Press, 1960), chap. 2, sec. 25, p. 304. See all of chap. 5, "Of Property." Also quoted in Schlatter, *Private Property*, p. 153.
32. See Locke, *Two Treatises*, chap. 2, sec. 26, p. 304; and Tully, *Discourse on Property*, pp. 126–27.
33. Locke, *Two Treatises*, chap. 2, sec. 31, p. 308.
34. Tully, *Discourse on Property*, p. 127.
35. Locke, *Two Treatises*, chap. 2, sec. 28, p. 306. Also see Olivecrona, "Locke's Theory of Appropriation," p. 227.
36. For the quote in the previous sentence see Locke, *Two Treatises*, chap. 2, sec. 27, p. 306. As we shall see, the pure libertarian theory of proprietary justice posits an ownerless world, a negative community, in which there is no need for homesteaders to obtain the consent of other men to their proprietorship. Precisely because men have no inherent vested interest in or ownership claim to the world around them, they are not harmed by another's appropriation of resources, even if there is not as much left or as good left for others to appropriate.
37. Schlatter and Tully disagree on the import and basis of Locke's theory. The formulation of this paragraph is based on Schlatter, *Private Property*, p. 154. Tully would disagree with Schlatter's

claims (*ibid.*, p. 153) that Locke followed Pufendorf in assuming "negative rather than a positive community of ownership." Based on my own reading of Locke, I think he rejected negative community and started out from positive community.

38. Locke, *Two Treatises*, chap. 2, sec. 27, pp. 305–306.
39. *Ibid.*, chap. 2, sec. 31, p. 308.
40. *Ibid.*, chap. 2, sec. 32, pp. 308–309.
41. M. Seliger, *The Liberal Politics of John Locke* (London: George Allen & Unwin, 1968), pp. 191, 194, 197.
42. Olivecrona, "Appropriation in the State of Nature," p. 227.
43. *Ibid.*, p. 221.
44. Locke, *Two Treatises*, chap. 2, sec. 31, p. 308.
45. *Ibid.*, chap. 2, sec. 37, p. 313.
46. Tully, *Discourse on Property*, p. 123.
47. Willmoore Kendall, *John Locke and the Doctrine of Majority Rule* (Urbana, Ill.: University of Illinois Press, 1941), p. 72.
48. J. L. Mackie, *Ethics* (Middlesex: Penguin Books, 1972), p. 176. Also quoted in Tully, *Discourse on Property*, p. 165.
49. Tully, *Discourse on Property*, p. 170.
50. *Ibid.*, p. 169.
51. Richard A. Epstein, "Possession as the Root of Title," *Georgia Law Review* 13 (Summer 1979): 1228.
52. Hillel Steiner, "The Natural Right to the Means of Production," *Philosophical Quarterly* 27 (January 1977): 49. Also see Becker, *Property Rights*, p. 43.
53. Walter Block, *Defending the Undefendable* (New York: Fleet Press, 1976), pp. 148–53.
54. Israel Kirzner, *Perception, Opportunity and Profit* (Chicago: University of Chicago Press, 1979), p. 220.
55. *Ibid.*, p. 222.
56. Roger Pilon, "Corporations and Rights," *Georgia Law Review* 13 (Summer 1979): 1282.
57. *Ibid.*, p. 1283.
58. J. C. Spence, *Property in Land* (London: Liberty and Property Defense League, 1897), p. 6.
59. Sir Roland K. Wilson, J. H. Levy, *et al.*, *Individualism and the Land Question: A Discussion* (London: Personal Rights Association, 1892), p. 60. Fisher added that "Individualists must surrender their case by claiming that there is any sort of wealth which must be owned by society as a whole."
60. Rothbard, *Ethics of Liberty*, p. 240.
61. Locke, Spooner, and other theorists have argued that individual appropriation makes the non-appropriator better off, but this is no more justification for private property than the argument that people are made worse off by the denial of private property.
62. Rothbard, *Ethics of Liberty*, p. 240. Nozick claims in this regard: "If my appropriating all of a certain substance violates the Lockean proviso, then so does my appropriating some and purchasing all the rest from others who obtained it without otherwise violating the Lockean proviso" (Nozick, *Anarchy, State, and Utopia*, p. 179).
63. Lysander Spooner, *The Law of Intellectual Property* (Boston: Bela Marsh, 1855), pp. 21, 23. (Spooner's use of italics has not been duplicated in the quotes.) Although not mentioned explicitly in the text of the paper it is obvious that Spooner rejected the premise of common ownership held by Grotius and Locke.
64. *Ibid.*, pp. 24–25.
65. *The Collected Works of Lysander Spooner*, Biography and Introduction by Charles Shively (Weston: M & S Press, 1971), "Biography," 1:34–35.
66. Spooner, *Law of Intellectual Property*, pp. 21–25.
67. *Ibid.*, pp. 16–17.
68. William Molyneux, *The Case of Ireland's Being Bound by Acts of Parliament in England, Stated* (Dublin: Rider and Harbin, 1725), pp. 113, 169.
69. *Ibid.*, p. 170.
70. Lysander Spooner, *An Essay on Trial by Jury* (1852), in *The Collected Works*, 2:222–23.
71. Spooner, *No Treason No. 1*, (1867), in *ibid.*, 1:10–11.

72. Spooner, *No Treason No. 2*, (1867), in *ibid.*, 1:13.
73. Charles Shively, "Introduction," to Lysander Spooner, *No Treason No. 6, The Constitution of No Authority*, (1870) in *ibid.*, 1:3.
74. Spooner, *No Treason No. 6*, in *ibid.*, 1:59.
75. This point was made to me by George H. Smith who referred to Josiah Tucker, *A Treatise on Civil Government* (London: T. Cadell, 1781). Tucker was one of the earliest critics to see the anarchistic implications of Molyneux, Locke, and the American rebels. See Tucker, *A Treatise*, pp. 12–13.
76. George H. Smith, "William Wollaston on Property Rights," *Journal of Libertarian Studies* 2, no. 3 (Fall 1978): 224.
77. Jonathan Hughes, *The Governmental Habit* (New York: Basic Books, 1978), pp. 232–33. Hughes adds with regard to property taxes: "this form of coercion is a product of history; it is not a system established by modern Americans as a matter of free choice on the basis of logic" (p. 233).
78. Spooner, *Law of Intellectual Property*, p. 76.
79. *Ibid.*, pp. 76–77.
80. *Ibid.*, p. 79.
81. *Ibid.*, p. 80.
82. *Ibid.*, pp. 87–88.
83. A contemporary Marxist has come to this same realization, although he is willing to dismiss the homesteading axiom in favor of the principle of communism. See G. A. Cohen, "Freedom, Justice, and Capitalism," *New Left Review* 126 (March-April 1981): 3–16. Cohen writes: "The key question, then, is whether capitalist private property is morally defensible. Now every piece of private property, large or small, either is or is made of something which was once the property of no one. If, then, someone claims a right to hold a certain piece of private property he has, then we must ask, apart from how he in particular got it, how the thing came to be (anyone's) private property in the first place, and examine the justice of that transformation. I believe that we shall find that the original transformation is unjust, that . . . property is theft, theft of what morally speaking belongs to us all in common" (p. 15).
84. Spooner, *Natural Law* (1882), in *The Collected Works* 1:5–6.
85. See R. A. Childs, "Objectivism and the State," *Rational Individualist* 1 (August 1969): 4–12; and George H. Smith, "Justice Entrepreneurship in a Free Market," *Journal of Libertarian Studies* 3, no. 4 (Winter 1979):405–26.
86. Spooner, *Natural Law*. See Section 13 of the version published in *Libertarian Forum*, September 1974, which differs slightly from that of *The Collected Works*.
87. *Ibid.*, in *The Collected Works*, 1:6.
88. Tully, *Discourse on Property*, pp. 67, 77.
89. *Ibid.*, pp. 84–85. Tully quotes from Grotius, *Law of War and Peace*, vol. 2, bk. 2, chap. 4, sec. 2, p. 193.
90. Tully, *Discourse on Property*, p. 87. Tully adds: "This contradicts natural law, which enjoins preservation. . . . " This is probably one reason why Locke found it necessary to formulate his proviso.
91. *Ibid.*, pp. 131–32. Tully quotes from Locke, *Two Treatises*, chap. 1, sec. 42, p. 188.
92. *Ibid.*, p. 132. Tully quotes from Locke, *Two Treatises*, chap. 2, sec. 37, pp. 312–13, and chap. 1, sec. 42, p. 188.
93. *Ibid.* Tully quotes from Lady Masham, cited in Maurice Cranston, *John Locke: A Biography* (London: Longmans Green & Co., 1957), p. 426.
94. Carl Watner, *Towards a Proprietary Theory of Justice* (Baltimore: by the author, 1976), pp. 16–17.
95. Davis E. Keeler, "Bearing Witness: Should You Be Forced?" *Reason*, February 1981, p. 42.
96. James P. Sterba, *The Demands of Justice* (Notre Dame: Notre Dame University Press, 1980), p.134.
97. *Ibid.*, p. 135. Failure to share would not be a direct killing in any case and could never be interpreted as such. Discussing the "right to life," Walter Block writes: "There are rights to liberty and to the pursuit of happiness, but there is no right to life itself. A Robinson Crusoe who has the misfortune of being shipwrecked alone on a desert island and starves to death there has not had any of his rights violated. He had no right to life in the first place. . . . We must always

distinguish between the means to live or to live well . . . and not being intefered with in one's attempt to live well" (Walter Block, "Woman and Fetus," *Reason*, April 1978, p. 24).

98. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (Fall 1971): 56.
99. *Ibid.*, p. 57.
100. Peter Breggin, *The Psychology of Freedom* (Buffalo: Prometheus Books, 1980), pp. 237, 239.
101. "Liberty and Bread," lead editorial on the "Review and Outlook" page of *The Wall Street Journal*, March 3, 1981, p. 30.
102. As argued here in note 11, the formula "owned by mankind at large" is meaningless and illogical and gives no basis for individual appropriation, which is necessary to sustain all life.
103. James Carmichael Spence, *The Conscience of the King* (London: Swan Sonnenschein & Co., 1899), pp. 86–89. Ayn Rand has made the point, brilliantly, in several places, that but for production there could be no parasitism or robbery.