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## Property and non-ideal theory

Adam Lovett

Department of Philosophy Logic and Scientific Method, The London School of Economics and Political Science, London, UK

### ABSTRACT

According to the standard story, there are two defensible theories of property rights: historical and institutional theories. The former says that you own something when you've received it via an unbroken chain of just transfers from its original appropriation. The latter says that you own something when you've been assigned it by just institutions. This standard story says that the historical theory throws up a barrier to redistributive economic policies while the institutional theory does not. In this paper, I argue that the standard story is wrong in almost every detail. For a start, neither of these theories are defensible. Both generate absurd consequences when combined with our non-ideal circumstances. In actuality, no unbroken chains of just transfers stretch from original appropriations to what we now possess. And our actual institutions are very seriously unjust. So both theories imply that we actually own almost nothing. I revise these theories so that they avoid this absurd consequence. Yet, when we do this, their distributive implications flip. The institutional theory throws up serious barriers to redistribution while the historical theory tears them down. In our non-ideal circumstances, the distributive implications of these theories are the opposite of what is standardly presumed.

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### Introduction

In the beginning, the world was unowned. There was no mine and thine: nobody had the exclusive right to decide what to do with things external to themselves. But then some people appropriated parts of the world. Perhaps they did so by improving these parts. Perhaps they did so by possessing them, or by mixing their labor with them. This gave them the

**CONTACT** Adam Lovett  adam.lovett@nyu.edu  Department of Philosophy Logic and Scientific Method, The London School of Economics and Political Science, London WC2A 2HE, UK

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exclusive right to do with those things whatever they wished. That is to say, it gave them property rights. Now, people couldn't appropriate everything. There were restrictions on what they could appropriate: perhaps, for example, they had to leave enough and as good for others. But, when such conditions were met, they could gain exclusive rights over entities outside themselves. These rights included the rights of transfer. They could give their property to other people. As long as such a transfer was just, the other person could come to own that part of the world. A just transfer was simply one untainted by coercion, deception, manipulation. And that, the story goes, explains the entire distribution of property rights. The idea is that we own something just in case we've been the first to appropriate it when unowned or received it through a series of just transfers from such an appropriation. Let us call this the historical theory of property rights.<sup>1</sup>

There is another story about property rights. According to this story, too, the world started off unowned. But people did not have the power to appropriate parts of the world unilaterally. They had the power to set up institutions. These were rules governing political, economic and social interactions. The most important of these institutions came to be the law, a body of rules eventually backed by the coercive power of the state. The laws distributed legal rights and duties among individuals. That includes property rights: the exclusive legal right to decide what to do with parts of the world. When these institutions were just, then the rights and duties they distributed were not merely legal rights. They were also moral rights. Thus, when such an institution assigned someone ownership of a thing, that gave them an exclusive moral claim to decide what to do with the thing. And that, the story goes, is what explains the distribution of property rights. You own something just in case you are assigned property rights over it by just institutions. Let us call this the institutional theory of property rights.<sup>2</sup>

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<sup>1</sup>This sort of theory stems from Locke (1690), but its most important modern advocate is undoubtedly Nozick (1974). For more discussion of the theory, see Simmons (1992, ch. 5), Sreenivasan (1995), Cohen (1995, ch. 3) and Rothbard (1998, 51–61).

<sup>2</sup>The theory is less often explicitly defended than the historical theory. The most influential version of a theory like this in the contemporary literature is, I believe, Murphy and Nagel (2002). They say that 'all [people] can be entitled to is what they would be left with after taxes under a legitimate system' (2002, 33–34) and 'income gives rise to clear moral entitlement only if the system under which it is earned ... is fair' (2002, 75). I read this as endorsing the position in the text, and Murphy clearly advocates this position in later work (e.g., Murphy 2020). Additionally, this seems to be the background theory of property in much of Rawlsian political theory. Rawls, after all, sticks stalwartly to ideal theory, and this sort of theory of property is all you need in an ideal world.

What are the differing consequences of these theories? Their primary difference has, typically, been taken to concern redistribution. The standard story is that historical theories create a moral barrier to redistribution while institutional theories do not.<sup>3</sup> Here is the idea. Suppose material inequality is unconscionably great. The rich have a lot; the poor have very little. Then the institutions which assign property rights must not be just. But then, if the institutional theory is true, the rich do not have a moral right to their riches. So there is no barrier to taking from them and giving to the poor. This violates no moral property rights. Thus Liam Murphy and Thomas Nagel claim that, because '[p]roperty rights are conventional ... they cannot be used to determine what taxes are just' (Murphy and Nagel 2002, 173). In contrast, if the historical theory is true, the rich might have moral rights to their riches. They might have received them via a series of just transfers from an original appropriation. But then there is a moral barrier to redistribution. As Nozick says, taking from the rich will involve 'the violation of people's [property] rights' (Nozick 1974, 168). Thus, on this standard story, the institutional theory is more welcoming to redistributive policies than is the historical theory.

I think that all these stories are wrong. For starters, both historical and institutional theories are unsustainable: they clash with deep and pervasive intuitions. Specifically, in the light of our non-ideal circumstances, both theories imply that we don't own anything. The historical theory implies this because of the sorry state of human history. Human history is, for the most part, the history of violence, deceit, manipulation. This means that there are no series of unerringly just transfers from first appropriation to what we own now. Everything we possess has, in the past, been stolen from someone else. So, on the historical theory, we own nothing at all.<sup>4</sup> The institutional theory implies this because of the sorry state of the human present. Our current institutions are not at all just. Take, for example, the institutions of the United States. The richest ten percent of Americans have seventy percent of the country's wealth and half own practically nothing (Piketty 2014, 247). Political power is monopolized by a small, wealthy elite (Bartels 2008; Gilens 2012). The institutions of the United States are not just. So, on the institutional theory, Americans own nothing at all. The same point applies in any country

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<sup>3</sup>The standard story comes up more often in conversation than in writing. But see Nozick (1974, 149–174) and Murphy and Nagel (2002, 58–59) for a reasonably clear endorsement of it.

<sup>4</sup>This is not a novel point. Zwolinski (2016) also makes much of it and, somewhat remarkably, it was acknowledged (in passing) by Nozick (1974, 231) himself.

that falls short of perfect justice. Thus, we don't own anything on either theory. In my view, that makes both theories untenable.

My first aim in this paper is to reformulate these theories so that they are compatible with our owning some things. Yet, when we do that, we will also see that the standard story about these theories' distributive consequences is exactly wrong. The reformulated historical theory poses very little barrier to redistribution. According to it, taking from the rich merely enforces their compensatory obligations. The reformulated institutional theory poses a substantial barrier to redistribution. According to it, taking from the rich infringes their property rights. Thus, my second aim in this paper is to show that, on the best versions of institutional and historical theories, their distributive consequences are exactly opposite of what they're ordinarily taken to be. In Section 2, I'll say more about the intuitions the above theories violate. In Section 3, I will reformulate the institutional theory and outline its distributive consequences. In Section 4 I'll do the same for the historical theory. In the conclusion, Section 5, I will state my own stance on which of these theories are preferable. My main goal, though, is not to defend any of these views. It is to show how coming to grips with the world's pervasive injustice, with our non-ideal circumstances, affects how we must think of property rights.

### **Intuitions about ownership**

Is it really a problem if the historical and institutional theories imply that we don't own anything? I believe it is an enormous problem: it renders these theories indefensible. To see this, let me start by emphasizing how pervasive are the intuitions that we own some things. Consider any possession you use in your daily life: your bicycle, your car, your laptop, your house. I wager that you think you own these things. That means you have both control and transfer rights over them.<sup>5</sup> You have control rights over them when you have the exclusive moral right to decide what happens them. You can use your laptop, alter your house, or destroy your car. You have transfer rights over them when you can give them to other people, and (more importantly) prevent other people from taking them from you. You can sell your car, but anybody who takes it without your permission wrongs you. And it is not just that you think you yourself own things: you think other people do too.

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<sup>5</sup>For the distinction, see Waldron (1988, 434–439). For an argument that these rights are bundled in ordinary thought, see Attas (2006).

You wouldn't dream of stealing someone's bicycle. That is because they have property rights over their bicycle. We very commonly think we own certain things.

These intuitions are deep and intractable. To underline that point, think about your reaction when people take your personal possessions. Imagine that you're working in a coffee shop and a stranger spills a drink on you. In the confusion, they pick up your laptop and run out of the shop. You would, I suspect, be enraged. You would take the stranger to have wronged you, to have violated your rights. You would darkly call them a 'thief' and you might try to run after them. You might try to seize the thing back yourself. You would probably ask armed agents of the state to take it back for you, even if that put the thief's life and liberty at risk. And you would feel justified in all these responses. A judgement that you have a moral claim to many material things must, I think, underpin this sense of justification. If the standard theories of property are correct, you have to give up this judgement and so condemn these reactions. The next time someone steals from you, you ought to take it with complete equanimity: what they stole was no more yours than theirs, for nobody owns anything at all. This is an extraordinarily revisionary view. It clashes with our deepest intuitions about our rights in this domain of morality.

Why is that a problem? I take it to be a basic tenet of moral philosophy that a theory of a domain that clashes with our deepest and most pervasive intuitions about that domain is typically unsustainable. Imagine, for example, that a theory of promises implied that you've never had a promissory obligation. It says that telling your friend 'I promise to help you move' gives you not the slightest moral reason to help them move. Or imagine that an account of gratitude implied that you've never been indebted. It says that, when a good Samaritan saves your life, you owe them not a word of thanks. These would be terrible accounts of promissory obligations and debts of gratitude. Likewise, an account of property rights that says we have none is a terrible account of property rights. The basic thought here is methodological: intuitions are evidence in moral philosophy. It tells against a moral theory that it clashes with our deep moral judgments. If it clashes with our deepest and most pervasive moral judgments, we are usually justified in rejecting the theory. This makes both the standard institutional and historical theories unsustainable.

One might resist this view. Specifically, one might claim that we can debunk our intuitions about ownership. Perhaps these intuitions merely

reflect the interests of the powerful. It has perhaps historically been in powerful people's interests that we think people own things, because powerful people tend to claim to own a lot. They may have used their power, therefore, to mold our views. Our ownership intuitions might just reflect such power relations.<sup>6</sup> This is a causal history of these intuitions that does not require those intuitions to be true. And one might think that, if our intuitions have any such genealogy, that undermines their justification. I have two things to say about this point. First, I doubt that such genealogies do completely undermine justification. That is because there are such debunking stories about our intuitions in every part of morality. Our views about promises or rights or gratitude can all be given undermining genealogies. At a minimum, they all have evolutionary histories that do not require them to be true.<sup>7</sup> So accepting a debunking argument about ownership, I suspect, requires us to accept them about all moral domains. That leaves us with two options: we can either reject an epistemic intuition, that debunking stories completely eradicate justification, or we can give up on all of morality. It seems to me obvious that rejecting the epistemic intuition is the more plausible position.<sup>8</sup>

Second, this particular debunking story of our intuitions about property rights is doubtful. Many anthropologists believe that 'all societies recognize personal property'.<sup>9</sup> Hunter-gatherers like the !Kung seem to have property rights in their tools, and this can give them property rights in the animals killed by these tools. Nomadic pastoralists like the Yanomamo have property rights over living space in communal buildings. Moreover, words expressing ownership appear in every known language, and indeed don't seem semantically reducible to other concepts: this suggests that 'property is a human universal'. (Wilson 2020, 15). That's bad news for the debunking story. Many human societies are egalitarian. There is, for example, no accumulation of wealth among the !Kung. So it is hard to see how, in such societies, the notion of property rights could merely be the product of powerful interests. That is not to say that we can give a truth-tracking account of intuitions about property in general: *per* my first comment, this is very difficult to do for any moral notion. But it means that this specific brand of ideology critique, one

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<sup>6</sup>This sort of view is common in Marxist thought. See e.g., Wood (2004, 142–147).

<sup>7</sup>See e.g., Street (2006).

<sup>8</sup>For a related general critique of debunking arguments, see Clarke-Doane (2020, ch. 4).

<sup>9</sup>Linton (1952, 655). For a more general overview, see Earle (2017). This is not to say that the notion of property is the same in every society. But it includes the core rights necessary for the argument in this paper to go through.

that invokes power and influence, is hard to sustain. More generally, sustaining a debunking story requires careful engagement with contemporary anthropological and historical evidence. I don't know any such sustainment when it comes to our intuitions about property.

My own view is that, thus, these intuitions are in good standing. So the fact that standard theories of property clash with these intuitions is very weighty, indeed decisive, evidence against these theories. But, even if one resists this view, constructing versions of these theories that are less revisionary seems to me a valuable project. So let us now turn to that task: my first aim will be to reformulate the institutional theory so that it is consistent with our owning things.

### **Institutional theories**

The core idea behind the institutional theory is that we have moral property rights over something because certain institutions have granted us property rights over that thing. What is an institution? We'll think of institutions as rules.<sup>10</sup> These rules are sometimes written down, as the laws often are. The statute book tells us what we're legally prohibited from doing. Sometimes, it tells us what we're legally allowed to do. But perhaps more common are unwritten rules, rules underpinned by practices and expectations. In the first instance these institutions don't assign moral rights to people. The rights assigned to batsmen by the rules of cricket, for example, are normative in a non-moral sense. Their normativity is keyed to the game of cricket. The rights assigned to citizens by the laws are legal rights. Their normativity is keyed to the legal system. The institutional claim is that, sometimes, when institutions assign property rights to people, these rights are moral rights. The lowly kind of normativity one gets from any rule whatsoever transforms into the most exalted kind of normativity: the normativity of moral claims.

The problem with the institutional theory is that it says that only just institutions can generate moral property rights. But justice is not to be achieved in the earthly realm – or at any rate it hasn't yet been achieved. All contemporary societies are seriously unjust. So this theory implies that nobody owns anything. And that, I claimed, is absurd. The simplest solution to this is to drop the appeal to justice in the theory altogether. Now of course it can't be any old institutions that can grant moral property rights. Imagine you ran a putsch at the Marylebone Cricket Club. You

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<sup>10</sup>This is the conception in Rawls (1971, ch. 2, sec.10).



added a 43rd rule to the Laws of Cricket: this rule declared that you were owner of Buckingham Palace. That doesn't give you a moral claim to the Queen's house. The rules of cricket are irrelevant to property rights. But perhaps all legal institutions grant moral property rights. So we might say that whenever someone is legally granted ownership of something, then they are moral owner of it. The justice of the relevant legal institutions doesn't matter. Thus, since the laws grants us ownership of our laptops and bicycles and cars and so on, we do own these things.<sup>11</sup>

Unfortunately, this theory also seems completely untenable. The problem is that the laws can be deeply unjust. They might, for example, be the laws of the American South in 1858; laws which give human beings property rights over other human beings. The view under discussion implies that such ownership is as secure as your rights over your shirt or your driveway. On this view, slave owners were in the right to reproach enslaved people who escaped their captivity. Those enslaved people had violated the slaveowners' property rights. This is a repugnant, and clearly false, conclusion. The laws underpinning chattel slavery were too unjust to generate moral property rights. Deeply unjust institutions are not normatively self-vindicating. So the justice of institutions matters to whether they can generate property rights.

Fortunately, there is a very natural alternative to this view. One doesn't drop reference to justice in the institutional theory altogether. But one insists that the justice required to generate property rights needn't be *perfect* justice. Institutions needn't reach this lofty aim for them to give rise to ownership. There are two ways to execute this idea. First, one could say that, when institutions are *sufficiently* just, then they generate property rights. Here 'sufficient' justice picks out a level of justice that falls short of perfection but exceeds that of the Antebellum South. On this view, we presume that institutions in most contemporary societies have reached this level. Only then will this view grant us actual people property rights. Yet this assumption seems tenable, so this theory seems consistent with our owning roughly what we take ourselves to own. Nonetheless, this is not my preferred way to execute the general approach. The basic trouble with it is that any level of 'sufficiency' seems implausibly arbitrary.

Let us think this though in the American case. When, exactly, did the institutions of the United States become sufficiently just to give people property rights? If they were not sufficiently just when they underpinned

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<sup>11</sup>As I read it, this is essentially the Humean theory of property outlined in Waldron (1994).

slavery, perhaps they were after emancipation. But the emancipation proclamation didn't do much until Union boots made their way onto Southern plantations. So perhaps, when de facto emancipation was completed, American institutions were sufficiently just. But these institutions made the free Black population dependent on the white population, for they gave the former no land. To survive, they had to work for, or rent land from, those who had enslaved them (and were soon terrorizing them). This seems still quite seriously unjust. From here things go downhill rather than uphill. When Reconstruction ends, Jim Crow begins. So perhaps we need to jump to the dismantling of Jim Crow in the mid-1960s. But the dismantling of Jim Crow left many of America's racial disparities untouched. And of course it did very little to address America's other economic disparities, which began to explode in the 1980s. Many think that the U.S. is now in a 'new gilded age' (Bartels 2008), an age of extreme material inequality. So, when, exactly, should we say that the institutions of the United States became sufficiently just to underpin property rights? This question seems to me impossible to answer with a straight face. Any point one picks seems entirely arbitrary. And that seems to me a hefty blow to this account.

But there is a second, much more elegant, way to execute the approach under discussion. One doesn't say that there is some *level* of justice at which institutions can grant property rights. Rather, one says that the *more* just are our legal institutions the *weightier* are the property rights that they grant. This weight consists in two things. First, rights are weightier when violating them is a more serious wrongdoing. Violating weighty rights warrants more guilt, blame, shame than does violating lightweight rights. Second, rights are weightier when they are more likely to outweigh other moral considerations. Utilitarian considerations, for example, can be more easily outweighed by heavyweight property rights. On this view, we needn't look back into U.S. history and identify a point at which its institutions became sufficiently just to grant property rights. Rather, the more just the United States got, the more weighty were Americans' property rights.

Let's address a major question that arises for this view. Is there a level of justice such that, when institutions reach or fall below this level, they grant no property rights at all? Can institutions be so unjust that they grant no property rights? The most natural answer is 'yes' – the institutions of the Antebellum South fitted the bill. It's not that slaveowners had only a lightweight property right in human beings; they had no rights at all. But here one might worry that the problem of arbitrariness

rears its head again: how do we pick where this bottom level lies? This is no doubt difficult. Yet in this case, the problem seems to me less pressing. For wherever the level lies, there won't be much moral difference between property rights granted by institutions which are exactly at that level of justice and those granted by institutions slightly above this level. The latter will grant pathetically weak property rights. The flimsiest of moral considerations overrule such rights. The former will grant no moral property rights at all. Thus any moral considerations overrule such (merely legal) rights. The difference between these two states of affairs does not seem so serious. So, it seems tenable to suppose that there is a level of justice that institutions have to exceed in order to grant moral property rights.

Let us turn to a final choice point. I have so far been talking rather airily about the justice of institutions. The view we have arrived at, in particular, says that above a certain level the more just are the laws the weightier are the property rights they assign. But this obscures an important issue. Is the justice of the *entire* body of a society's institutions the important thing? Or should we consider the justice of each institution individually? The first option faces severe difficulties.<sup>12</sup> Consider, for example, a freedman in the Antebellum South. The body of the institutions that govern their life, taken in its entirety, is very unjust. Yet, still, we would like to say that this person owns some things. Imagine that they are an artisan. If someone steals their tools, they have a weighty complaint against that person. They own their tools. It seems perverse to think that the injustice of slavery, an injustice they in no sense benefit from, undermines this ownership. So it can't be the justice of the entire body of institutions that matters to the weight of someone's property rights. We must distinguish between the justice of different institutions.

How do we assess the justice of individual institutions? There are two issues here. The first is how we distinguish between different institutions in the first place. This is a metaphysical question: it is a question about individuating rules. Sometimes this is straightforward. Institutions are often just laws, and we can distinguish between different laws: the Affordable Care Act is a different law from the Tax Cuts and Jobs Act of 2017. Here the key individuation criteria seem to concern text and origins: the acts say very different things, and their concrete legislative history also differs. The actual legislative processes that led to the passage of the first bill happened at a different time and place than those that led

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<sup>12</sup>A Rawlsian focus on society's 'basic structure' as a whole, I think, embodies this first approach.

to the passage of the second. Now, of course, in many cases individuating different institutions will be more difficult than in this case. But it is clearly possible in principle. Looking at the content and origins of an institution can put that possibility into practice.

The second issue is how to actually evaluate the justice of individual institutions. A natural way to do this is to consider the contribution an institution, or set thereof, makes to (in)justice, holding all other circumstances fixed. Thus, consider the rule: only property owners may vote. Were everyone to have property, then this would not be an unjust rule. It wouldn't deny anyone voting rights. But, when only some have property, then it is an unjust rule. Now we may imagine that the freedman in the case above is granted their property by rules governing the sale and ownership of tools, rather than of human beings. These do not contribute much at all to the injustice realized in slavery, and so are sufficiently just to give the freedman ownership of those tools. The more just these rules are, the more secure is that ownership. So, we can evade the noxious consequences of taking the justice of whole bodies of institutions to be critical in determining the weight of property rights.

That completes my reformulation of the institutional view. The overall picture, to sum up, is this: *S* has property rights over some object, *o*, of a weight proportional to the justice of the institution that assigned them ownership over *o*. If this institution is very just then *S* has weighty property rights over *o*. If it is deeply unjust then *S* may have no ownership rights over *o* at all. This view is an institutional view in that it explains our property rights in terms of preexisting institutions. But it is consistent with our owning the things we take ourselves to own. To cash this consistency out, we need only posit that the institutions that assign us property rights over these things are sufficiently just for us have such rights. This, then, seems to me a defensible version of the institutional theory of property. It is an institutional theory that grants that we own roughly what we take ourselves to own.

I have said that, on this view, property rights present a barrier to redistribution. Let me show that now. The key point here is that our actual institutions assign the rich ownership of their riches every bit as much as they assign you ownership of your ordinary possessions. This protects the rich from people taking their riches in the same way that you are protected from people taking your things. With this in mind, suppose the state sends agents to seize your house. They eject you from the building, change the locks and install someone else in it. This would

straightforwardly infringe your control rights over your house. You have the right to use your house and stop others using it. By taking your house, the state infringes this right. So the state should not send agents to eject you from your home. The exact same point extends to the rich. Our actual institutions assign Mark Zuckerberg ownership of his huge mansions and Jeff Bezos ownership of his shares in Amazon. If the state seizes Zuckerberg's mansions, it infringes his control rights over it. If it takes control of Amazon, it infringes Bezos' rights to control it. That is an initial barrier the institutional theory creates to redistribution. Because the rich own their riches, simply taking those riches infringes their property rights.

There are craftier ways for states to expropriate things than by simply taking them. States can change the law. When a state wants your house, it can reassign ownership of that house from you to it. Then when it sends its agents to eject you from the house, it won't violate any of your control rights; you no longer own the house. Yet it would be peculiar if this was morally anodyne: that would make a complete mockery of the idea that you should control what you own. And it is not anodyne, for control rights come along with at least minimal transfer rights. When you own something, other people cannot just transfer it from you without your permission. The state infringes these transfer rights by reassigning ownership of your house to it. But, likewise, the rich enjoy such transfer rights over what they own. When the state levies redistributive taxes on the rich, it transfers what they own without their permission. It reassigns ownership of some of their riches from them to it. And so the state has moral reason not to levy redistributive taxes. That is the true barrier the institutional theory creates to redistribution. On the institutional theory, the rich own their riches and that protects them from the redistributive transfer of those riches; such transfers infringe their property rights.

Let us look at a few ways to resist this argument. For a start, it is useful to distinguish between two kinds of redistributive taxation: taxes on *wealth* and taxes on *income*. The above argument focuses on the state expropriating property. This is a kind of wealth tax. Wealth taxes are a sort of property transfer: they transfer part of your wealth to the state. The argument concludes that such transfers infringe people's property rights. Yet one might deny that the argument also applies to taxes on income. After all, it is far from clear that our actual institutions grant people ownership of their pretax income.<sup>13</sup> So it is far from clear that

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<sup>13</sup>For debate, see Murphy and Nagel (2002) and Attas (2006).

redistributive taxation on income infringes the property rights of the recipients of income. Perhaps, then, the argument provides a much lower barrier to economic redistribution than it first appears. It allows redistribution via income taxation.

There are two replies to this objection. First, a barrier to the imposition of wealth taxes is of utmost import. Many existing taxes are wealth taxes. Corporate taxes, property taxes and estate taxes are all taxes on what people own.<sup>14</sup> And you aren't going to dent Jeff Bezos's 175-billion-dollar fortune by taxing his income. To really erode the enormous fortunes of the super-rich, taxing their wealth is critical.<sup>15</sup> So if we cannot levy redistributive wealth taxes, that prevents effective redistributive policy. Second, the argument can anyway be extended to income taxes. The key idea behind such an extension is that, by taxing income, you are stopping people from using their wealth to pay others to do things. If you tax my income, that constrains how Bezos can use his money; it means he cannot use \$100,000 to pay me \$100,000, since some amount of that will be eaten up by income taxes. So redistributive taxation of income might well not infringe the rights of the recipients of that income, but it infringes the property rights of the already-wealthy. These latter infringements are plausibly less serious than property seizure, but they are still infringements.

Let's turn to a second objection. We have so far been thinking of property rights as a natural bundle of rights that get assigned wholesale by institutions to different people. But one might think that the contours of the rights in the bundle are also sensitive to our institutions. The exact control and transfer rights we have over what we own are, one might think, at least somewhat dependent on the control and transfer rights our actual institutions grant us. If so, this means that our actual institutions may not grant us the unrestrained right to transfer our property. And that seems plausible: it seems that there are at least some current redistributive taxes that our institutions provide no transfer rights against. For example, when you came to own your house, the laws did not grant you the (legal) right to transfer it in its entirety after your death. You gained some right to transfer it, but only subject to the recipient paying inheritance taxes on the transfer. Likewise, the law did not grant you the right to simply exchange it for someone else's money. To legally make such an exchange, you (or the buyer) likely

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<sup>14</sup>For more on this point, see Saez and Zucman (2019, 11ff).

<sup>15</sup>Piketty (2014, 515–540) and Saez and Zucman (2019, 145–153, 173–176) both take this view.

must pay a transfer tax. So, current redistributive laws don't infringe property rights.

This point is essentially correct, and important. But it does not show that property rights create no barrier to redistribution. To see this, we need to distinguish current from future laws. It is plausible enough that, when you first come to own something, the legal rights you gain over it are constrained by the laws in place at that time. Thus, on the institutional theory, it is plausible that the moral rights you gain over it are also so constrained: the enforcement of existing redistributive taxation – on inheritance, for example – do not infringe people's property rights. But *new* redistributive taxes were, definitionally, not in place when you came to own what you own. So they could not have at that time constrained what rights you were being granted when you were granted ownership. If, for example, there was no wealth tax when you came to own something, the institutions that granted you ownership of it granted you the right to enjoy it without paying a wealth tax. So instituting a new wealth tax infringes your existing property rights. Thus the institutional theory raises a barrier to new taxes. This is a critical barrier to effective redistribution: we need many new taxes to effectively combat inequality.

Let us now look at a third objection. Here the underlying thought is again that the exact structure of our property rights may well be determined by our actual institutions. And, in particular, the key thought again is that these institutions do not provide us exclusive transfer rights over what we own. They provide us some such rights. We are permitted to transfer our property to who we want, and other people cannot just seize it from us. But there is an enormous and important exception for the *state* in these transfer rights. Our actual institutions, the idea goes, allow the state to transfer our property as it sees fit. They provide no protection to state redistribution of property. On this picture, it is wrong when private individuals steal or destroy your property. But the state is special: it can do whatever it wants with what you own. It is not constrained in the way others are constrained.

I have two points to make about this objection. First, perhaps the exact structure of our property rights is sensitive to our institutions. But that structure is not entirely malleable: there is a limit to how much of our control over what we own they can waive. Plausibly, the putative exception for the state would transgress that limit. The state may not seize our property willy-nilly, whatever our institutions say. As we've already seen, if the state sends agents to take your house, it infringes your rights. The

state cannot expropriate whatever it wants whenever it wants. The key point to understanding this, I think, is that there is a core bundle of rights that any institutions assign when they assign property. Institutions can give and take away the rights peripheral to this core. But they can't subtract rights from the core at the same time as actually assigning people property. A blank cheque for state expropriation would be to subtract rights from the core. Thus, our institutions cannot write such a cheque; they cannot waive the protection property gives from expropriation.

Perhaps I am wrong about this: perhaps our actual institutions can and do let the state seize our property with impunity. This leads me to my second point. Even if that is so, it is surely a contingent fact about our institutions. The next government could change these institutions in order to make owners' rights against the state similar to their rights against everyone else. It could rejig the laws in order to remove the putative impunity enjoyed by the state. This shows, I think, that the objection concedes much of my point. On the institutional theory, property rights easily can provide constraints on state action. Even if they don't in fact create such constraints, they might and could create exactly these constraints. So if institutional theories are correct, we must pay careful attention to property rights before supporting redistributive economic policies. Such rights, on the institutional theory, pose a serious (potential) barrier to redistributive policies.

The picture that emerges from this discussion is one on which property rights pose an important, but specific, barrier to redistributive taxation. Specifically, they pose a barrier to the institution of new redistributive taxes. And they pose a higher barrier to the institution of new wealth taxes than to new income taxes. Unfortunately, that pinpoints exactly the economic policies needed to deal with contemporary inequality: we need new wealth taxes to really reduce inequality. Now, to be clear, this barrier to redistribution can be overcome. Although, on this institutional theory, the state has moral reason not to seize the property of its citizens, that reason can sometimes be outweighed. Two factors make it more likely to be outweighed. First, it is more likely to be outweighed the more pressing is the demand for redistribution. If redistribution is required to prevent people from starving, this would outweigh the import of property rights. Second, this reason is more likely to be outweighed the weaker are the property rights. Thus, suppose institutions that create inequality are unjust to the extent that they create that inequality. Then the more unequal are existing distributions of property



rights, the less weighty are those rights. So the state will likely be permitted to interfere with very unequal distributions of property. But, still, and contrary to the standard story, institutional theories of property constrain economic redistribution by the state.

## Historical theories

We now turn to historical theories of property. The basic problem with these theories is that, historically speaking, humans have not been excellent towards one another. Consider any bit of land in the world. The history of that land, I'll bet, includes a lot of violence. Its current possession does not reflect an unbroken series of just transfers from original acquisition. And that infects anything taken from the land: wood, iron, zinc, gold. If the land was stolen, then the thief does not have moral title to the products of that land. If the iron in your car comes from land stolen from Australia's first peoples, your ownership of the car is suspect. The iron belongs to the first peoples.<sup>16</sup> If the indium in your laptop comes from land stolen from Chinese landowners, again your ownership is suspect. The indium belongs to the landowners, or their heirs. This fraught history, according to the historical theory, imperils all our material property. It means we own practically nothing.

It is not obvious how historical theories can be plausibly reformulated to avoid this consequence. One might, for instance, suppose that *a little bit* of theft in the history of what we own doesn't imperil our ownership. But that position seems absurd. If you originally appropriate something, and I then steal it, I don't gain moral rights over it. I cannot claim that only 'a little bit' of theft stands between me and original appropriation. You are owed the return of the thing. Alternatively, one might claim that theft *long ago* doesn't really count in determining ownership. The mere fact that such theft happened back in the mists of time means it doesn't imperil our property rights. But why should mere temporal distance matter? It seems like it should not. If we became very long-lived, and I found out you had stolen a family heirloom from me many years ago, I need not let sleeping dogs lie. You should give me back the heirloom. The fact that the theft was long in the past does not give you the right to keep the thing. So neither of these approaches, on the face of it, seem sustainable. Historical theories look to be in a desperate situation.

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<sup>16</sup>Waldron (1992) denies this. But he does so by denying the historical theory of property (1992, 17), so this is not so relevant to our discussion.

I am going to outline a way to rescue such theories from their desperate situation. Here is the basic story. When something is stolen from an original appropriator it is initially clear that that person still owns it. But eventually they die. Who owns the thing then? Whoever inherits it from the first owner now owns it. And, after that person dies, the next owner is whoever inherited it from them. And so on *ad infinitum*: ownership is passed on by a chain of inheritance. Yet this process is extremely unlikely to continue *ad infinitum*. At some point, there is bound to be no heir, or it is bound to be unclear who the heir is. At that point, nobody owns the thing: it is unowned. Thus, it is open for re-appropriation. So we needn't stretch our ownership back to the dawn of property, via just transfers, in order to establish title to what we own. We need but stretch it back to when the thing was last appropriated. That may well be a much shorter period of time than five thousand years. Maybe we need but reach back to the 1980s. But, from here, we can be much more confident that the chain of possession that ended with us has been untainted by coercion, manipulation, or deceit. So we can be more confident that we own what we take ourselves to own.

Let us spell out this story in more detail. We first need to get clear on how inheritance works. Typically, you inherit something when someone bequeaths it to you. Bequeathment is a kind of illocutionary act: it consists in telling you (for instance, in a will) that the thing is now yours. It would, perhaps, be impossible to maintain chains of inheritance for stolen objects were all inheritance to require bequeathment. I simply have no idea what was stolen from my great-great-great-great-great grandfather, and so I cannot tell my children that they now own such things. But, plausibly, one can inherit something without being explicitly bequeathed it. If one's parents or spouse die suddenly, without having made a will, then it seems plausible that one can inherit their property. In these cases one should understand inheritance counterfactually: one's spouse would have bequeathed their property to you had they thought of it. The truth of this counterfactuals underpins the inheritance. And we perhaps might think that the inheritance of stolen goods works analogously. When something is stolen from you, the person who owns it when you die is the person you would have given it to had you possessed it at that point. And the person who owns it when they die is the person that they would have given it to had they possessed it, and so on. Inheritance is passed down by dint of counterfactuals.

It is this process that is extremely unlikely to continue *ad infinitum*. There are two ways to support this point. For a start, somewhere along

the chain of inheritance, we are bound to encounter a case where it's not true, of anyone, that the owner would transfer the ownership to them. Imagine, for example, that one of your ancestors back in 500 CE was dislodged from their land in Libya by a marauding army. Who would you give this land to were you to possess it when you die? Your son? Your daughter? Your wife? Your best friend? You *might* give it to any of these people, but it may well not be true of any of them that you *would* give it to them. In the language of possible worlds, the world where you give it to your daughter may be as close as that in which you give it to your son.<sup>17</sup> But, if so, the relevant inheritance counterfactuals are not true of anyone: nobody inherits it. Plausibly, such cases crop up regularly. So chains of inheritance for stolen things are unlikely to last for very long. As time goes on it becomes very likely that the relevant counterfactuals are not true for anybody, and so the thing drops out of ownership.

The second way to support this point involves somewhat strengthening our account of inheritance. It is in fact a little peculiar that the truth of these counterfactuals alone suffices for inheritance. After all, they might be true without anybody having the remotest inkling that they were true. It may be that your father was in fact the legitimate owner of half of Egypt and would have given it to you had he possessed it on his deathbed. But the fact nobody had any idea of any of this seems to undermine your claim to the property. This suggests that inheritance requires at least a certain amount of publicity: at least someone has to *know* that the relevant counterfactuals are true. But it seems very unlikely that you, or your relatives, or anyone else, knows who you would give your distant ancestor's Libyan land to were it returned to you. Likely, you've never considered the issue; it's not the sort of hypothetical that we think about very much. And so, even if there is a truth of the matter here, in many cases nobody will know what it is. This makes it much more likely that anything stolen from your ancestors many years ago has, at some point, dropped out of ownership; it has become unowned, and is thus free to be (re)appropriated.<sup>18</sup>

This is why our property needn't have come to us via a series of just transfers from its original appropriation. It just needs to come to us via such a series from the last time it dropped out of ownership and was reappropriated. But this is a much less demanding condition. Perhaps what we

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<sup>17</sup>Here I assume a Lewisian semantics for counterfactuals. See Lewis (1973).

<sup>18</sup>Interestingly, Rothbard ([1982]1998, 56–60) endorses much the same story. The main advance of my story on his is that he gives no account of why things drop out of ownership.

own now dropped out of ownership in the 1960s or 1970s or 1980s and was then reappropriated. It is much more likely that a series of just transfers stretches back from today to such a point in the relatively recent past than to 5,000 BCE. In part, that is because 1960–2023 is a much shorter time period than 5,000 BCE–2023CE. In part, it is because the recent past has been relatively peaceful. Especially in Western Europe, North America and much of Asia, the violent seizure of property has become very rare. Thus consider, for example, a piece of land in Manhattan. There is no way that a series of just transfers links its current owner to its very first appropriation. But it is plausible that such a series would link them to an appropriation of this land in the 1980s. So, if all we need are the latter sorts of series, then we can be confident that what we now possess stretches by a chain of just transfers to its last appropriation.

We now have a reformulated version of the historical theory. It starts with a picture of inheritance. On this picture, inheritance is passed down by dint of certain counterfactuals. But, when things are stolen, those counterfactuals often become false or unclear. This leads to a break in the chain of inheritance, and thus to stolen goods dropping out of ownership. This allows them to, at that point, be (re)appropriated. When that point is in the recent past, we can be relatively confident that unbroken chains of just transfers span from then to now. And so we can come to own some things; we own them because they were appropriated in recent history and ended up in our hands through a series of just transfers. This, it appears, might be a defensible version of the historical theory of property.

But appearances sometimes deceive. Let me address some worries about the theory. First, one might worry it illicitly allows one to benefit from one's own wrongdoings. Suppose one acquires land through a brutal conquest. One murders the previous inhabitants of the land and destroys all their property records. This might mean that those inhabitants have no clear heirs, and so their property drops out of ownership. And so, through this great wrongdoing, it seems as if one is now able to appropriate the land. Yet, one might object, one cannot acquire beneficial moral claims as a consequence of one's own serious wrongs. Fortunately, this objection is easily incorporated into this theory. We simply say that if something is open to your acquisition because of your great wrongdoing, you forfeit your right to acquire it. This is not an ad hoc incorporation: a similar truth holds in other moral domains. If someone has made a promise to you only because you have wronged them, that invalidates the promise. If you helped someone out of a sticky situation

that you wrongly put them in, they do not owe you gratitude. Wrongdoing forfeits claims. As with promises and gratitude, so with property rights. Now, importantly, that you forfeit your rights does not forfeit those of your descendants. Children are not on the hook for the sins of their parents. So the descendants of people in, say, the American West can own their houses. But the actual perpetrators of wrongdoing do not get to acquire property as a result of that wrongdoing.

Let's turn to a second, more significant, worry. The version of the historical theory I've sketched says people appropriated things in the recent past. But almost all advocates of historical theories think that appropriation can only happen when a proviso is met.<sup>19</sup> We mentioned Locke's proviso in the introduction: one can only appropriate something when one leaves as much and as good for everyone else.<sup>20</sup> There are many ways to clarify this, but the most influential (and I think plausible) is Nozick's.<sup>21</sup> Nozick thought that we could appropriate something when doing so left others no worse-off than they would have been had the thing been left unowned. The problem is that it is much harder to satisfy this proviso in 1985 than in 5,000 BCE. In 5,000 BCE, appropriating a piece of land in Manhattan may not have much worsened the lot of others at all. There was a lot of land to go around, and other people could just appropriate some productive land elsewhere. The improvements you made to the land might more than compensate for the mild inconvenience of their not being able to use or appropriate it themselves. But the situation was obviously very different in 1985. By then, land had become scarce: most land, and certainly all the land in Manhattan, was owned or possessed by someone. Appropriating land in this context is much more liable to worsen the lot of other people. They cannot simply use, or appropriate, other equally good land. That makes meeting Nozick's proviso very difficult. So, it seems this version of the historical theory isn't defensible after all: it does not allow us to appropriate anything.

To resolve this, the historical theorist who adopts the story above has to reject Nozick's proviso. But it is wildly implausible to just reject every

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<sup>19</sup>For some contemporary examples, see (Schmidtz 1994; Wenar 1998; van der Vossen 2020). Rothbard ([1982]1998, 244–245) is a prominent dissenter.

<sup>20</sup>For more discussion of what Locke meant with this proviso, see Simmons (1992, ch. 5) and Sreenivasan (1995, ch. 3).

<sup>21</sup>See Nozick (1974). For a classic discussion of Nozick's proviso, see Cohen (1995, ch. 3). As Cohen points out, Nozick's proviso makes it much easier to appropriate property than do defensible alternatives. That is another reason to focus on it: alternative provisos will be even more friendly to redistribution, for they will impose greater constraints on appropriation. For a more contemporary discussion of Nozick's view, see Van der Vossen (2020).

proviso on appropriation. For suppose I come across all the water in the desert and claim it as my own; it is simply implausible to think that others must respect my putative appropriation of it (Cf. Nozick 1974, 180). I propose, then, that instead of rejecting Nozick's proviso wholesale the historical theorist makes a relatively slight modification to it. They say that one *can* appropriate things when one worsens the position of others but that this generates *compensatory* obligations. Moreover, these obligations are enforceable obligations in the sense that people may take your property to satisfy them. Your property rights do not include rights against the enforcement of these obligations. This idea is of a piece with how Nozick was thinking about things. Nozick suggested that compensation might help one appropriate by ensuring appropriation would avoid worsening the position of others.<sup>22</sup> My suggestion is that one can appropriate without compensating, but this gives one enforceable compensatory obligations to those one makes worse-off. And *this*, finally, gives us a historical theory that is defensible. On this theory, we can come to own some things.

I have said that, on this theory, property rights present little barrier to redistribution. It is perhaps clear by now why that is. The key point is that appropriators incur enforceable obligations to compensate those made worse-off by their appropriation. When the appropriations were recent, these obligations are extremely demanding, and they are especially demanding towards the poor. Imagine, for example, that you appropriated a plot of land in Manhattan in the 1980s. It would be a real benefit to many poor New Yorkers if you'd never done this. They could have occupied it and otherwise used it. For rich people maybe this does not matter so much: they have their own homes and access to private land. But such activities would have improved the lives of many poor New Yorkers substantially, and so your appropriation worsened their lives. This gives you hefty compensatory obligations to poor New Yorkers. Plausibly, these obligations travel with the property: we can enforce them against whoever is its current owner. Thus, on the revised version of the historical view, all current property is associated with demanding duties of compensation.

In this light, consider redistributive schemes by the state: imagine that the state institutes big new wealth taxes in order to lift up the material condition of the poor. These schemes simply enforce the demanding

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<sup>22</sup>See Nozick (1974, 178). Indeed, Nozick (1974, 180) later talks of people owning things despite their ownership violating his proviso but suggests that in these cases their property rights are constrained. So perhaps Nozick's considered view just is the one in the text.

compensatory obligations just discussed. By seizing (some of) the wealth of the rich and giving it to the poor, the state compensates the poor for being made worse-off by relatively recent acts of appropriation. As the relevant duties of compensation are enforceable, the state is permitted to do this. It may well be required to do it; it may be obliged to enforce compensatory duties. So this way of formulating a historical theory of property allows for, indeed encourages, a very substantial redistribution of wealth. And that establishes the conclusion I said we would reach: that when one reformulates historical theories of property to make them consistent with our owning anything, they in fact pose very little barrier to redistributive state policies.

## Conclusion

Let me sum up. My aim in this paper has been to sketch how the major theories of property must be reformulated in the face of our non-ideal conditions.<sup>23</sup> The sense in which our conditions are non-ideal is simply that we live in an unjust world. People act unjustly, and our institutions are not perfectly just. These facts undermine classic formulations of historical and institutional theories. Such formulations, given these facts, imply that we don't own anything. The practical pay-off from this reformulation is, I think, a clearer understanding of how these theories impact issues of central political import. I've argued that the reformulated version of the institutional theory provides a barrier to such redistribution. But the reformulated version of historical provides very little such barrier. So we must invert the ordinary conception of how these issues interact. Historical theories are more welcoming of redistribution than are institutional theories.

Deciding between these theories has not been my aim. But it will perhaps be worth stating my position. I think institutional theories are more plausible than historical theories. My reasons for this are not particularly novel. People's property rights simply seem molded by institutions in ways which are very difficult to capture on historical theories. My favorite example is the aforementioned property rights of the !Kung. !Kung men hunt animals with bow and arrow. Each man makes distinctive arrows. They swap these arrows among themselves. The person who owns the carcass of an animal brought down in a hunt is, according to the !Kung,

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<sup>23</sup>Have I missed out on a third, Kantian, theory of property, as outlined by e.g., Gregor (1988)? I don't think so: I agree with Murphy (2020, 461–462) that we can see this as a species of institutional theory.

the one who made the arrow that killed it. It is not the one who shot it: they must wait like everyone else for the maker of the arrow to decide how the meat from the carcass is distributed.<sup>24</sup> It seems to me that the !Kung aren't mistaken about who owns what. It really is the maker of the arrow who owns the carcass. But that seems utterly mysterious on the historical theory. It is hard to see what sensible theory of original appropriation would imply that the arrow's owner has appropriated the animals' carcass. What seems to have happened, instead, is that the !Kung have a set of institutions determining who owns what, and by the lights of those institutions the arrow's owner owns the carcass.<sup>25</sup> But that is just to say: it seems that the institutional theory explains this case. And there are many other cases in which our institutions mold our property rights. Historical theories look hard-pressed to explain any of these cases. Thus, the institutional theory seems to me the better theory of property rights.

Now where does this leave the status of redistribution? It means that, in our societies, there is a moral barrier to redistribution. When you take from the rich to give to the rest you infringe property rights. The key question, then, is how high this barrier is in our own societies. My own view is that it is not high enough to preclude more redistribution, at least not in the United States. Here two factors are critical. First, the institutions of the United States are deeply unjust. This weakens the property rights of all Americans, rich ones included. Second, the claim poorer Americans have to more redistribution is a very weighty one, precisely because of the enormous inequality of contemporary America. This claim, in my judgement, outweighs the barrier to more redistribution created by an institutional theory of property. In the United States, more redistribution is overall justified. Yet, although more redistribution is, in my eyes, justified, it does infringe the property rights of those on its losing end. The truth of the institutional theory does create a barrier to redistribution.<sup>26</sup>

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No potential conflict of interest was reported by the author(s).

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<sup>24</sup>For this account, see Flannery and Marcus (2012, 32–34).

<sup>25</sup>Van der Vossen (2009) advances a story like this. He thinks of it as a historical theory, but I myself read it as an institutional theory.

<sup>26</sup>I'd like to thank Marius Backman, Eilidh Beaton, Campbell Brown, Alex Dietz, Giacomo Gianni, Lisa Hecht, Laurenz Hudetz, Liam Murphy, Stefan Riedener, Lewis Ross, Daniel Sharp and Johanna Thoma for helpful discussion of this paper.



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