

# Ownership and Punishment

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*It almost goes without saying that governments should not punish without sound moral justification. For example, if legislators defined crimes arbitrarily or corruptly, the resulting punishments would be unjust.*

*The same kind of logic applies to ownership of private property. If private ownership claims are not just, their enforcement is morally questionable.*

*But what justifies ownership of private property? Perhaps tellingly, the story has changed over time. Aristocratic notions of entitlement fell from favor after the feudal era. Early modern theories justified private property as a reward for labor. Contemporary justifications instead rely on the idea that private property promotes economic efficiency.*

*Interestingly, the contemporary reasoning suggests that if an alternative to private property better promoted economic efficiency, we should strongly consider adopting it. This is no small “if.” But Posner and Weyl’s work<sup>1</sup> sketches an alternative that, on paper, appears to be more efficient—that is, to serve private property’s most salient purported purpose better than private property itself. Therefore, scrutinizing private property’s basic moral justifications is more than a moot exercise.*

*This Essay begins by surveying the logic behind the Harberger taxation proposal in Posner and Weyl’s work. Second, it observes that criminal punishment and private property ownership are two sides of the same coin: each institution casts light on the justificatory logic of the other. Third, if efficient common ownership schemes work in practice as theory suggests, they jeopardize the consequentialist justifications of private property, forcing us to reexamine non-consequentialist, desert-based justifications. Finally, Posner and Weyl’s Harberger taxation mechanism lets us treat assets as hybrids of private and common property, which helps address the practical problems faced by older common property schemes, such as Henry George’s Single Tax.*

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<sup>1</sup> Eric A. Posner and E. Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* 30–79 (Princeton 2018).

### I. A BRIEF INTRODUCTION TO HARBERGER TAXATION

Harberger taxation is the mechanism at the core of Posner and Weyl's proposal to reform property law.<sup>2</sup> It is a property taxation scheme designed to weaken monopoly power and make markets more efficient. At its core:

1. It lets property holders self-assess their assets for taxation purposes, reporting those values to a public ledger; and also
2. Requires property holders to sell (within a reasonable time) their assets (or tranches of their assets that they have defined) at the prices they report.

Notice that these two features create opposite incentives. The "self-assessment" feature incentivizes under-assessment. And the "requirement-to-sell" feature incentivizes over-assessment.

One of Posner and Weyl's novel insights is that if a Harberger tax on an asset were set precisely at the *probability of that asset finding a buyer in a given period* (the "turnover rate"), then the two opposite incentives would fall into perfect equipoise.<sup>3</sup> Thus, property holders would be best served by truthfully reporting the exact prices for which they would be willing to sell their assets.

The clearest consequence of this scheme would be making it expensive to possess assets: it is a form of wealth taxation. Because people would have reduced incentives to hoard, assets would flow more efficiently into the possession of those willing to pay the most for them at any point in time.

But Posner and Weyl's proposal also has an important redistributive component.□They argue that the revenue streams generated by Harberger taxation should be broadly shared, like a dividend on commonly-owned capital.<sup>4</sup> These "dividends," however—at least in the most refined versions of the proposal—are not welfare.<sup>5</sup> Rather, they are a form of approximate compensa-

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<sup>2</sup> Id. The authors use the term Common Ownership Self-Assessed Tax or "COST" to refer to their specific proposal. Here I use the broader term, Harberger taxation, because my commentary is not narrowly concerned with the specifics of the COST; it is also relevant to variations and refinements of that scheme that are now being developed. But the COST is my primary model.

<sup>3</sup> Id at 58–9.

<sup>4</sup> Id at 74–5.

<sup>5</sup> Since publishing *Radical Markets*, Weyl has suggested that the book was wrong to propose perfectly equal dividend distribution, and should have instead proposed weighting dividends according to criteria that are not obviously connected to need. See E.

tion for the value that individuals create by participating in broad communities and networks—but which inures to assets under narrow control, in traditional private property schemes.<sup>6</sup> To illustrate: the barbers, bartenders, and retail entrepreneurs whose work increases the value of neighboring apartment buildings ought to share in that value.

Because these dividends on capital would be distributed much more evenly than property ownership, they would, by definition, exceed the Harberger tax liabilities of people of modest net worth. Therefore, asset value increases would become cause for common celebration, not division.

Further, owners of scarce desirable assets would have to pay taxes on the true value of their monopolies, thus forfeiting any gains they enjoyed from inefficient market power.<sup>7</sup> In this way, a key hindrance to economic growth might vanish.

More formally, Harberger taxation would increase allocative efficiency at the expense of investment efficiency. It would cause assets to end up in the hands of people who need them or put them to their highest and best use, rather than speculators content to warehouse them. But it would also decrease incentives for people to improve their property.

Excessive Harberger taxation would harm investment efficiency so much that gains in allocative efficiency would be erased. But near the margin, low Harberger taxes would generate allocative efficiencies exceeding harm to investment efficiency. This insight is illustrated in the following graph, in which “tau” represents the Harberger tax rate and the red, blue, and purple lines represent allocative, investment, and overall market efficiency.<sup>8</sup>

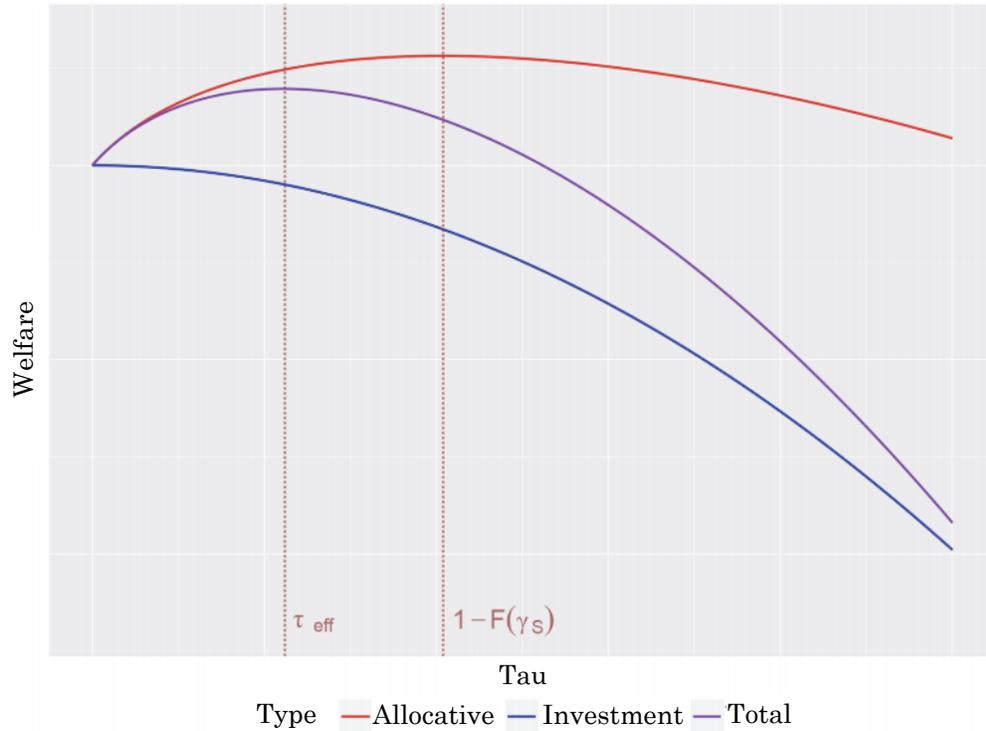
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Glen Weyl, *A Radical Change between Vitalik Buterin and Glen Weyl*, (Medium, Sept 29, 2018), archived at <http://perma.cc/C82U-55ZHf>. (“In general, it seems to me, ownership shares need to be allocated as much as possible across communities and individuals in proportion to the probability that those communities or individuals are (in discounted present value terms) the efficient owner of the asset eventually.”)

<sup>6</sup> Id.

<sup>7</sup> Posner and Weyl, *Radical Markets* at 61 (cited in note 1).

<sup>8</sup> For the original version of the graph, see E. Glen Weyl and Anthony Lee Zhang, *Depreciating Licenses*, (SSRN, Jan 25, 2018), archived at <http://perma.cc/4UN4-NGMK>.

FIGURE 1: Allocative, Investment, and Total Welfare vs  $\tau$ 

Zero-level Harberger taxes are exceedingly unlikely to be optimally efficient because the initial marginal Harberger taxes would simultaneously have the greatest positive effects on allocative efficiency, and the smallest negative effects on investment efficiency.<sup>9</sup> In other words, at low Harberger taxation rates, property possessors would pay modest taxes calculated against well-above-market self-reported valuations. Thus, they could buy strong security in possession very cheaply. And the few transactions that occurred would be exceptionally welfare enhancing. These would occur at high prices, between pleasantly-surprised sellers and uniquely-positioned buyers who saw value that the rest of the market did not.

To be sure, theory is only theory. Robust experimentation is necessary to answer important implementation questions. For example, should owners of large or varied asset sets be permitted to “bundle” any possessions with any other ones, making them hard to acquire and properly value? (Jeff Bezos might be

<sup>9</sup> Posner and Weyl, *Radical Markets* at 61 (cited in note 1).

able to improperly shield various minor assets if he bundled them with a private island.) Yet some sort of bundling must be permitted, or else owners of complementary assets would be forced to overpay to maintain possession of the discrete pieces of a synergistic whole. Relatedly, Harberger taxation would create unwelcome incentives to “game” the system by making assets appear less valuable than they really are.

Despite these open questions, the prospect of meaningfully improving our system of property-holding demands serious attention. After all, we know private property to be highly imperfect, in terms of both efficiency and justice. And given the weight and depth of these imperfections, a demonstrably better system could rapidly become a moral imperative.

## II. TWO SIDES OF THE SAME COIN

It might seem odd to compare private property with criminal punishment, but the connection is actually fairly natural. Indeed, private property protection and criminal punishment are probably the two most commonplace instances of domestic government coercion. But the connection runs deeper than that. One institution begets the other: Whenever a government recognizes a claim to private property, it concomitantly announces an array of acts for which everyone but some owner shall be punished.

To be sure, property and punishment are neither identical nor coextensive. Not all offenses against property are criminal: Much private property protection occurs through civil, rather than criminal law. And not all punishment relates to property strictly speaking, because much of the criminal law consists of crimes against the person. But we should not exaggerate these distinctions. After all, civil remedies depend on the threat of criminal punishment. And if one thinks of the body as a special case of private property, there is an obvious continuity between crimes against the person and crimes against property.<sup>10</sup>

How deep, and how important, is this connection? I think that we can roughly understand every private property claim as an exemption from punishment for a certain set of otherwise-

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<sup>10</sup> See generally G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge 1995). See also John Locke, *Second Treatise of Government*, § 27 (1689) (“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 labour of his body, and the work of his hands, we may say, are properly his.”).

criminalized acts. On this view, it is almost odd to think of private property and criminal punishment as separate institutions with separate justifications. They are different aspects of the same moral problem: Where private property claims are unjustly recognized, doubt arises as to the justness of punishing trespass.

#### A. Property: The Flip Side of Criminalization

I should begin by clarifying my usage of certain terms. First “private property” is a special kind of property, as distinct from collective, common, or public property. Thus the term “property” simply denotes the characteristic of attaching rightly—*properly*—to some party or parties. *Private* property refers to property attaching exclusively to non-public parties. Moreover, I use the term “property” in a positive legal sense. I do not intend any moral or natural-law valence, unless I specify otherwise.

Given that, in this usage, property is a creation of positive law, one might think that it arises only when the government explicitly says so. But this is not quite true.

Notice that when the government criminalizes certain actions, it automatically brings about property-like phenomena. By criminalizing drug smuggling, for example, the government grants dominion over that business to a category of people, whom we might call “lawbreakers.” Lawbreakers need not worry about pesky things like regulations, antitrust lawsuits, and competition from Unilever. They operate in a shadow of criminalization, pursued by police, but otherwise unmolested by legitimate overseers and competitors. This shadow of criminalization is different from legal property, of course, but it bears a loose family resemblance to a monopoly or a charter.<sup>11</sup>

The property-like reverse side of criminalization also appears where crimes apply differently to different people. For example, when the law forbids unaccompanied adults from playgrounds, playgrounds become the domains of children, as bars are for adults. Similarly, the proscription of crimes against the person, such as assault or battery, gives each of us a special, property-like dominion over our bodies.

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<sup>11</sup> See, for example, James M. Buchanan, *A Defense of Organized Crime?*, in Simon Rottenberg, ed., *The Economics of Crime and Punishment* 119, 119 (AEI 1973) (“If monopoly in the supply of ‘goods’ is socially undesirable, monopoly in the supply of ‘bads’ should be socially desirable, precisely because of the output restriction.”).

Now consider the domain of a private landowner. She enjoys the coolest legal shadow of all—for she receives exceptional treatment. In the absence of her property claim, anyone might use that same land, but in virtue of it, the government forbids all human activity there, except hers. Title is a far stronger version of the protection that criminalization gives to lawbreakers, who must, after all, still vie with one another and avoid the police. And it is a more exceptional version of the protection that we all enjoy from crimes against the person, because while everybody enjoys police protection against murder, not everybody owns things.

Thus, there is a close connection between two sorts of government proclamations: that certain property claims are valid, and that certain activities are criminal. But governments do more than just proclaim property lines and crimes. They also enforce and punish them.

#### B. Ownership: The Flip Side of Punishment

Criminalization and private property both single out certain individuals for special treatment. Criminalization marshals government force against criminals, and private property marshals it on behalf of owners. Criminals receive exceptional hard treatment called punishment, and owners receive exceptional good treatment called ownership. We should understand the justifications of both forms of special treatment, and the connection between the two.

While property scholars have worried surprisingly little about the basic justifications of ownership, philosophers of punishment have scrutinized its justifications for centuries. Is hard treatment of criminals always punishment for past action, or is it sometimes an inducement for a better future? How do we know when the hard treatment is too weak, or too strong?

Precisely inverted versions of these questions are relevant to the justification of ownership. So let us review the canonical justifications of punishment, and see whether they shed light on the justifications of private property ownership.

## III. DESERT OF PUNISHMENT, DESERT OF OWNERSHIP

## A. Consequentialist and Retributive Justifications of Punishment

Criminal punishment has two traditional classes of justifications: consequentialist and retributive. Consequentialist accounts justify punishments that bring about desirable ends, such as specific deterrence, general deterrence, incapacitation, or offender reform. Retributive accounts, on the other hand, take punishments to be intrinsically justified insofar as they are deserved by the punished party in virtue of her past actions.<sup>12</sup>

It is important to realize that there is nothing inherently vengeful or draconian about retributive reasoning. In fact, it can readily serve as a humane limiting principle, ruling out harsh punishments that consequentialism might recommend. In a standard example, suppose that punishing small speeding infractions by the death penalty would save lives by reducing automobile accidents. Is the punishment therefore just? A consequentialist might struggle to say why not, but retributive reasoning offers an easy path to an attractive answer: such punishments are unjust because they exceed what the criminal deserves, and therefore treat her as a mere means to an end.<sup>13</sup>

In other cases, though, retributivists might lack the concern for the future welfare of society that comes naturally to consequentialists. Thus, neither retributivism nor consequentialism has an exclusive claim to barbarity or enlightenment.

There is a more helpful way of classifying retributive and consequentialist justifications. Retributivism justifies punishments in virtue of past events, while consequentialism does so in virtue of future ones.<sup>14</sup> Retributivism is “backward-looking” and rooted in the concept of desert, where consequentialism is “forward looking.”<sup>15</sup> This modest reframing emphasizes the comple-

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<sup>12</sup> See generally, for example, Lawrence H. Davis, *They Deserve to Suffer*, 32 *Analysis* 136 (1972); Ted Honderich, *Punishment: The Supposed Justifications Revisited* (Pluto 2005).

<sup>13</sup> I am referring to Kant’s categorical imperative. See Immanuel Kant, *Grounding for the Metaphysics of Morals* 36 (Hackett 3d ed 1993) (James W. Ellington, trans) (“Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never simply as a means.”).

<sup>14</sup> For a discussion, see generally Mitchell N. Berman, *Rehabilitating Retributivism*, 32 *L & Phil* 83 (2013).

<sup>15</sup> See Honderich, *Punishment*, at 17–57, 74–111 (cited in note 12).

mentarity of both modes of justification. After all, why should either the past or the future be all that matters?

Thus, we have two modes of justifying criminal punishment: a forward-looking mode and a backward-looking mode. Since private property and criminalization mirror one another, we should ask how these two modes of justification apply to private property ownership.

#### B. Forward-Looking and Backward-Looking Justifications of Ownership

Suppose it were proved that Harberger taxation mechanisms promote economic efficiency better than private property does. This would seriously weaken the dominant consequentialist, or forward-looking justification for private property.

How, then, would we justify private property? Would we fall back on alternative forward-looking arguments—for example, that private property generates an elite that checks sovereign power? Perhaps, but that particular argument holds limited appeal in liberal democracies where we generally worry that the rich hold too much political sway, not too little.

Instead, I think it more likely that desert-based,<sup>16</sup> or backward-looking justifications of property ownership—that is, a notion of *property as reward*—would take on new and surprising importance. This conception of property is of no use to collectivists who would appropriate the work of others. But it also fails to satisfyingly justify traditional private property, which clearly deprives some of their rightful due while affording windfalls to others. Insofar as property is a reward, justified by desert, common ownership schemes are indispensable.

#### C. John Locke and Property as Reward

Perhaps counterintuitively, pivoting toward a notion of property as reward marks a return to the Lockean roots of liberal thinking about property. John Locke argues that private entitlements to unowned land arise when people (1) appropriate such land and (2) “mix [their] labor” with it: “Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something

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<sup>16</sup> The somewhat clunky term “desert-based”, in my usage, means approximately the same thing as “retributivist”, with the important advantage that it can refer to the justification of reward as well as punishment.

that is his own, and thereby makes it his property.”<sup>17</sup> Thus, by linking just property claims to past labor, his theory conceives of property as a reward. For several reasons, this remains a useful template.

First, Locke’s story focuses on the moment of inception of a private property claim—the moment when a (proverbial) homesteader stakes a claim on a (proverbial) piece of common, unowned land. This is helpful and correct, because we might otherwise be tempted to avoid the question by concluding that property claims are deserved in virtue of their purchase for consideration. Even if this is true of your property and mine, we really want to know whether private property claims *ought to have been instantiated in the first place*, not whether their current owners did something to deserve them. (The analogous questions in the context of criminal punishment would be whether the punished conduct was rightly criminalized, as opposed to whether the punished party committed the conduct.)

Second, Locke’s past-labor requirement emphasizes that property claims arise as a reward, and not an incentive. Otherwise, why not grant private property to people who have not yet put forth any labor, as an incentive to do so? In fact, whenever private property is granted as an incentive, it suggests certain important questions. Namely, why did the government choose this particular property owner over that? (Remember that if the grant includes some claw-back provision in case the grantee puts forth no labor, it is not really a grant of title.) And, if the government really can choose the most beneficial owner (say, through an auction), why would it grant a perpetual privilege? Obviously, at some point in the future, a suboptimal owner will come into possession of the property. So why would the government forfeit its right to exercise its allocative wisdom again, at a later date?

Therefore, Locke’s labor-mixing account basically gets things right. But puzzles remain. Because if private property arises as a reward for labor, why should people own the land itself, rather than simply the products of their labor, such as harvested crops? There is a line-drawing problem here: What kind of labor must I put forth to create a property claim, and how large is the claim? Surely, building a sand castle does not give me any permanent right to the beach—that does not seem like

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<sup>17</sup> Locke, *Second Treatise* at § 27 (cited in note 10).

the right kind of labor. Conversely, if I mix proper labor into a small plot, but claim a wide unoccupied swathe around it, how far exactly does my claim extend?<sup>18</sup>

Locke began to resolve this puzzle by articulating an important limiting principle to his theory of ownership. In his famous “proviso,” he argues that any appropriation of unowned land must always leave “enough and as good” in the common domain.<sup>19</sup> Otherwise, the appropriation prejudices others, and is neither just or valid.<sup>20</sup> In other words, the outer limits of any just private property claim are determined by the interests of others. This is a very radical limitation, quite at odds with the operation of real-world private property rights.

Moreover, the proviso is consistent with the idea of property as reward. As Robert Nozick put it in his famous analysis, a landowner “may [not] charge what he will if he possesses [a water hole], and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights.”<sup>21</sup> In other words, it might be acceptable to have a water hole within a private claim as long as there are plenty of other, public ones. But as soon as that condition is not met, the owner gains a windfall opportunity which is not a logical reward for her labor, or that of her predecessors in title.

To summarize, for Locke, private property claims initially arise out of desert to the products of labor. But where the inability of others to access similar resources in the commons creates a private profit opportunity, the spoils of property exceed the logic of reward, and reach their proper limit.

Incidentally, it is hard not to conclude that many real-world private property claims are tainted by Locke’s proviso. Removed from Locke’s ideal state of nature,<sup>22</sup> private property is riddled

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<sup>18</sup> See Robert Nozick, *Anarchy, State, and Utopia* 174 (Basic Books 1974) (“If a private astronaut clears a place on Mars, has he mixed his labor with (so that he comes to own) the whole planet, the whole uninhabited universe, or just a particular plot?”).

<sup>19</sup> Locke, *Second Treatise* at §§ 27, 33 (cited in note 10).

<sup>20</sup> *Id.*

<sup>21</sup> Nozick, *Anarchy, State, and Utopia* at 180 (cited in note 18).

<sup>22</sup> We should recall that Locke’s thinking was likely influenced by his involvement in the early governance of the colonial Carolinas—land which he might have (incorrectly) conceived as a nearly-ideal limitless plain, from which appropriations could be made without prejudicing others. See generally, David Armitage, *John Locke, Carolina, and the Two Treatises on Government*, 32 *Political Theory* 602 (2004).

with potential “last-water-holes-in-the-desert”—that is, respects in which the claims exceed any plausible reward rationale justifying their legal inception.

But we cannot hope to exhaustively chronicle these latent defects in title, because they depend on ever-changing contextual variables. The extent to which the Lockean proviso limits title to a water hole depends, among many other things, on the number of other water holes and the amount of recent rainfall.

Therefore, instead of chronicling the limits to title, we must price them. Pricing mechanisms can reflect vast information through supply and demand, and thereby reflect the subtle limits to property claims that the Lockean proviso implies. In short, they let us cut through troublesome binaries and instead place property on a spectrum between private and common.

#### IV. ARTIFICIAL AND NATURAL CAPITAL, LABOR AND NETWORK VALUE: HOW TO SPLIT THE MIDDLE

A century ago, economists inspired by Henry George spoke of a distinction between “natural” and “artificial” capital—that is, the products of nature and labor, respectively. They argued that private property rights attach more properly to the latter than to the former. This distinction reflects the idea that some things are more appropriate subjects of private property claims than others, and also tracks the distinction I have elaborated between private property claims with and without reward justifications.

I will now suggest a more practical and contemporary formulation of the same distinction: Justified private property claims capture *value from labor*, while unjustified private property claims capture *value from network effects*. The most attractive feature of Harberger taxation is that it can place property on a spectrum between private and common, thus separating these two streams of value, instead of crudely trying to sort pieces of property into two buckets.

##### A. The Georgist View

In perhaps Henry George’s most famous writing, he depicted the process by which land increases in value.<sup>23</sup> He invited the reader to begin by imagining an unoccupied, infinite, and fea-

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<sup>23</sup> Henry George, *Progress and Poverty* 212–19 (Appleton 1886).

tureless plain, into which a lone settler embarked to establish a homestead.<sup>24</sup>

Obviously, at the outset, no parcel in this theoretical expanse would have any more value than any other. But now suppose our settler chose an arbitrary spot and built a modest farm there. Operating in an economy of one, he would need to perform an enormous variety of tasks and would struggle to produce life's necessities.

Now suppose a second settler set out upon the same plain, looking for a place to settle. The plain is still infinite, but no longer unoccupied or featureless: it has a settler and a homestead on it. Clearly, the best place for the second settler is near the first one. Each would benefit from the proximity of the other, because they could trade their labor to mutual advantage, and pool their resources for common goods. A third settler would add to the per-capita welfare; and so on, and so on.

Thus, while all the land once had equal value, the land near the population center now grows far more valuable than any other. New immigrants flock to this developing city, where life is more socially stimulating and productive than it would be on an isolated homestead.

Yet the early settlers, now urban landlords, cannot tell a compelling desert-based story about their entitlement to the wealth and power they wield. For the value of their land is predicated upon the presence of the newcomers, who unfortunately forfeit most of the land-value they create through high rents.

The more immigrants arrive, the better the city becomes, and the higher the rents rise. Buildings add floors; but this again simply makes room for even more immigrants, who keep on improving the city, making it yet more desirable, and pushing rents up still higher. The city is booming, but nobody's welfare is necessarily increasing more than marginally—except, of course, for the landlords, who are becoming wildly rich without doing anything.

Seeing the injustice here, George proposed that land itself, unlike things made by labor, is an improper subject of private property. He called land natural capital, and man-made things artificial capital—word choices influenced by the idea that hu-

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<sup>24</sup> This is not unlike the abstract version of early colonial Carolina that John Locke might have imagined.

mans should not have private rights to things made by nature or God.<sup>25</sup>

But there is a more helpful way of articulating the same distinction. Observe that even if land was created by God, its market value was not. As George's thought experiment elegantly reveals, land's market value arises through the mutual, interrelated actions of many people, in what we might call a network. The value of natural capital thus *emerges in virtue of network effects*.

But how does this distinguish natural from artificial capital? After all, things like manufactured tools—paradigmatic artificial capital—also derive their market value from the networks that create demand. To be sure, people exert labor in tool manufacture, giving rise to a Lockean property claim over these products that is absent in raw land. But this does not answer the entire question, because the value unlocked by the tool-making labor is still network value. We thus need a more precise articulation of what makes the products of labor different.

To complete the picture, we need to define labor as *private responses to incentives*. Only value that is proximately unlocked by private responses to incentives is properly captured by private property claims. Other value—which is to say value that accrues to assets without the possessor's labor, but instead in virtue of complex network effects—ought, all else being equal, to flow back to the network of participants whose activities are the cause of the value. For here it is the broad network, not the narrow property owner, to which further incentives should be addressed if we hope for more value to emerge.

## B. Updating the Georgist View

Henry George wanted to tax away the entire rental value of natural capital, while eliminating other taxes (the "single tax").<sup>26</sup> But he had a big problem: most capital is not entirely artificial or natural. It's both, frustratingly intermixed—such as land with buildings on it, and manufactured goods made from resources with scrap value. How to tease natural and artificial capital apart and tax only the former?

The same problem arises for Posner and Weyl. But recognizing that actual capital cannot be sorted cleanly into two buckets,

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<sup>25</sup> See, for example, George, *Progress and Poverty*, at 269–94 (cited in note 23).

<sup>26</sup> *Id.* at 367–78.

they devised a workaround. Their mechanism enables subtle adjustments to the *level* of Harberger taxation, so that different kinds of assets can be treated as occupying different places on a spectrum.

The Harberger tax level has two clear bookends. Ideally, capital whose value comes wholly from incentivized labor<sup>27</sup> would have a Harberger tax near zero (which is to say, it would function exactly like private property), and perfectly, capital whose value comes wholly from network effects<sup>28</sup> would have a Harberger tax near the turnover rate. Let us briefly see why these bookends make sense.

Turnover-rate Harberger taxation would siphon off a large part of any non-depreciating asset's financial value. But for capital whose value comes largely from network effects, this diminution is a feature rather than a bug. Lower prices put such assets within reach of more potential purchasers, who may have unique abilities to beneficially use them. Moreover, possessors of this kind of capital have no desert or reward-based entitlement to its market price.

The other bookend, a Harberger tax rate of zero, is identical to private property. This is the ideal rate for assets whose entire value arose from incentivized labor.

But such assets exist only in an ideal world: labor always “mixes” with something else, however trivial. The painter needs oil, and the blacksmith needs iron. Posner and Weyl therefore suggest setting Harberger tax rates as a percentage of the turnover rate, based on the investment elasticity of assets. In other words, assets whose value increases more readily with investment should *ceteris paribus* enjoy lower Harberger taxation relative to their turnover rate, in order to facilitate such investment.<sup>29</sup> This methodology reflects the idea that assets whose values tend to dramatically increase with investment likely owe more of their value to incentivized labor, and less to ambient network effects. Investment elasticity is only a proxy for the percentage of the value unlocked by labor. But it is a proxy for the right thing: It sensitizes the mechanism to value that sits justly—or unjustly—within private property claims.

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<sup>27</sup> Here I am applying the gloss from the previous Section on the Georgist concepts of artificial and natural capital.

<sup>28</sup> *Id.*

<sup>29</sup> See Weyl and Zhang, *Depreciating Licenses*, at 5–7 (cited in note 8).

## V. CONCLUSION

Private property and criminal punishment belong together. They are the key domestic applications of government force, and often two sides of the same coin. Accordingly, they both demand rigorous moral justification.

Contemporary justifications of private property often tell a consequentialist, forward-looking story about its effects on economic efficiency. Harberger taxation challenges these consequentialist justifications insofar as it induces better efficiency gains.

The non-consequentialist story about private property goes something like this. People working for incentives deserve private claims to the fruits of their labor as a reward. But the value that accrues to preexisting property claims in virtue of network effects is not a deserved reward for the holders of those claims. Thus, non-consequentialist justifications cannot fully support our current system of property.

Posner and Weyl's Harberger taxation proposal suggests a practicable approach to dealing with property on a spectrum from private to common, corresponding to Harberger tax rates between zero and the turnover rate. This would effectively separate labor value from network value, leading to a fairer, more deserved, and more nearly equal allocation of each.

If we take the justifications of our institutions seriously, we need to take this new property scheme seriously.