

ARTICLES

You Stole Our Land: Common Law, Private Property, and Rothbardian Principles of Justice

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Demands for justice based on allegations that “you stole our land” seem to evolve interminably without resolution. In responding to these demands it seems trite to observe that the law must not let the violation of rights go without a remedy, but how should property law resolve cases of wrongful acquisition arising from historical conquest? It is easy to say in the abstract that stolen property must be returned to the true owner, but in the context of historical dispossession it is often difficult to identify the “true owner” when centuries have elapsed since the alleged dispossession. Based on a comparison between the common law tradition and Rothbardian principles of property rights, this article argues that the “stolen land” debates are characterized by arbitrary and unprincipled distinctions between different cases. Far from resolving any disputes, that approach only fuels fresh rounds of hostility and conflict. Allegations of wrongful acquisition of title must instead be evaluated by reference to an ethical theory of justice based on objective principles of natural law.

While allegations that “you stole our land” vary in detail from one continent to another, campaigns running under the banner of “land justice” share in common the assertion that the current ownership and distribution of land is unjust because the original acquisition of title was wrongful. In North America and Africa, the land is said to have been stolen from its original owners. In Europe the allegation is that the land was developed with proceeds from colonial theft, aggression, and exploitation. Similar claims are made about the United States, based on the skewed view of history described by Jeff Fynn-Paul (2020) as a “stolen country paradigm”:



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The United States was founded by a monumental act of genocide, accompanied by larceny on the grandest scale. Animated by racism and a sense of civilisational superiority, Columbus and his ilk sailed to the New World. They exterminated whomever they could, enslaved the rest, and intentionally spread smallpox in hopes of solving the “native question.” Soon afterwards, they began importing slave labour from Africa. They then built the world’s richest country out of a combination of stolen land, wanton environmental destruction and African slave labour. To crown it all, they have the audacity to call themselves a great country and pretend to moral superiority.

Based on that paradigm, some form of restitution, reparation, or wealth redistribution is demanded to restore the wrongfully acquired property to its rightful owners or compensate them for its loss.

In these debates the common law rules of possession which underpin the law in the United Kingdom, the United States, and other Commonwealth jurisdictions are said to be inadequate for the purpose of redressing historical injustice. Such critiques arise from the fact that the common law concept of open and exclusive possession is unfavorable to acquisition of title through communitarian or nomadic forms of land use and is therefore said to be irrelevant in addressing historical “stolen land” claims. For example, in Africa it is argued that “legal positivism as manifested in statutory law and common law remains the predominant legal and political interpretative framework. . . . Other acceptable legal remedies that are available to indigenous peoples [are ignored]” (Odendaal and Hebinck 2021, 247). The doctrine of possession is derided as a Eurocentric idea designed to defeat the claims of people from nonwhite races and cultures, the argument being that in order to redress historical injustice it is necessary to revise the definition of property rights (Davies 2020). This is a recurring theme in debates about native title in North America. For example, the *Britannica* entry on indigenous peoples in Canada notes that “the Indigenous peoples were primarily hunters and gatherers and often were nomadic. . . . Even though the Indigenous peoples had lived in the area for thousands of years, the Europeans perceived that they had found a pristine country.”¹

In cases where land was uninhabited—or appeared to be uninhabited—in what sense could settlement of those lands be said to be unjust? After all, in *Perpetual Peace* Immanuel Kant (1917, 137) depicts hospitality as a universal ideal—“the claim of a stranger entering foreign territory to be treated by its owner without hostility”—so the mere fact of arriving on the continent and

¹ *Encyclopaedia Britannica Online*, s.v. “Canada,” s.v. “Indigenous peoples,” accessed February 28, 2023, <https://www.britannica.com/place/Canada/Indigenous-peoples>.

proceeding to homestead uninhabited land is not in itself unjust. Moreover, even where hostilities between settlers and natives ensued, it is not clear where justice lies. Should all land that has ever been the subject of historical war, conquest, migration, or settlement henceforth be described as “stolen”?

Framing the “Land Justice” Debate

In addressing these questions there is no doubt that much brutality and violence was historically occasioned as land changed hands, a fact acknowledged, for example, by the US Supreme Court in *United States v. Sioux Nation of Indians* (448 U.S. 371 (1980)). The debate on how to redress that injustice focuses on issues such as how redress would work and whether it is feasible to return land to the descendants of the original inhabitants. For example, Jeremy Waldron (2002) frames the debate as analogous to returning stolen property but acknowledges the difficulties that would arise. Gregory Alexander (2014, 876) expresses skepticism of the feasibility of returning stolen land but nevertheless argues that in “limited circumstances” some form of reparation is appropriate.² Yet it remains unclear how such limited circumstances would be identified. There are no clear parameters by which to distinguish between deserving and undeserving cases. For example, if Alexander’s (2014, 882) reference to “land’s memory” is taken as a relevant factor in deciding land reallocation, whose memory would count? Which memory would take priority? Attempts to redistribute land based on group memories would be more likely to fuel further conflict between different groups who all have different memories associated with the same land. Alexander (883) indeed notes these complexities: “We are perhaps inclined to say that land’s memory favors existing owners. . . . Yet, no matter how much the current users have molded the character of the land in their own image, they likely have not entirely erased all prior memories of the land.” Further, the concept of land’s memory would also vary between literate cultures with a written historical record and illiterate cultures which rely on oral traditions or “other ways of knowing.”³

Similar ambiguities characterize other contributions to the “stolen land” debates: commentators acknowledge that returning land is not as straightforward as it seems, while insisting that some form of redress is nevertheless required. Many say, for example, that they do not favor land justice reparations other than in exceptional circumstances, yet they fail

² Alexander (2014, 875) argues that “there are, however, limited circumstances in which specific reparations are pragmatically and morally warranted, arguably even required”; he acknowledges that “the complexities involved in all the situations where claims for land reparations are made to correct historic injustices give us good reasons to be hesitant about granting such claims.” He classifies the relevant normative complexities as involving “the passage of time, changes in the land, and evolving groups of peoples,” arguing that “for pragmatic, conceptual, and moral reasons, a sceptical attitude toward backward-looking reparations, that is, return of unjustly appropriated land to original occupants and/or their successors, is generally warranted” (876).

³ See, for example, Wisconsin Department of Health Services (n.d.): “The American Indian population in Wisconsin dates back centuries. Their presence in this state predates Wisconsin statehood and the majority of the population who came during that time. Evidence suggests that the early peoples of Wisconsin arrived about 10,000 years ago.”

to specify what the exceptions would entail or the basis on which such exceptions would apply. Waldron (2002) suggests that an unjust acquisition may be superseded by subsequent events which make the prevailing land ownership just, so that reparations would only be necessary to redress injustices that are not superseded by such events—but what would be the principled basis of deciding which injustices have been thus superseded?

Alexander (2014, 875) argues that “reparations that take a form other than restitution of dispossessed land may be both necessary and sufficient to establish a public marker of acknowledgment,” but there are two problems with this. First, the “stolen land” claimants are not simply demanding a “public marker” of their claims. They have repeatedly said that they are interested not in markers or even apologies but in full recompense for their grievances through getting their land back.⁴ Many who categorically state “we want our land” claim to have a spiritual affinity with the land which cannot be vindicated by any form of compensation.⁵ Second, no such public marker would suffice if it conceded that it had not fully redressed the injustice: it would leave the sense of injustice still without redress, and would therefore fail to quell the demands.

These questions and ambiguities reveal that there is no principled basis for accepting some demands for reparations while rejecting similar demands in other cases. The distinctions drawn between the various demands are arbitrary and unprincipled. There is no clear basis on which to decide whether a claim falls within the exceptional circumstances where restitution is said to be required. Reference to categories of “extreme cases” does not suffice: where would the boundary lie between extreme cases and cases which are not deemed to be extreme? It is no answer to say that “justice turns out to be a very complex matter” (Alexander 2014, 899) or that justice depends on the facts of each case, because there is no clear benchmark by which to ascertain whether the outcome in specific cases is just. Arguments based on practical considerations are ultimately unsatisfactory, and the solutions they yield are compromises unlikely to satisfy anyone.

It is therefore necessary to address the deeper concerns about justice in the “stolen land” debates, and to formulate a principled theory by reference to which it can be determined whether particular claims for land restitution are just. As Murray Rothbard (1982, 56) argues, legislation by itself does not suffice in the absence of a theory of justice: “Modern variants of positive legal theory state that the law should be what the legislators say it is. But what

⁴ “An apology is great, but what does it look like in terms of moving into action?” said Morning Star Gali, a member of the Pit River tribe, in northern California. “We’re still here. We’re still fighting for recognition. We’re fighting for the protection of our sacred places. We’re fighting for visibility.” (Levin 2019).

⁵ See William Chin (2022); see also Naomi Ishisaka (2022): “The land is not just a place. ‘You need that land, that water and that connection to your culture,’ he said. ‘What our people wanted was the connection to the land. That’s all we wanted.’”

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

Rothbard (1998) draws upon the natural law tradition as both the foundation of a theory of ethics and the most powerful way to respond to threats to private property couched in the language of "justice." He emphasizes the need to draw upon principles of justice in defending private property rights as the foundation of liberty, asserting that "justice, not the weak reed of mere utility, must be the motivating force if liberty is to be attained" (1998, 258). In his theory of ethics, natural law concepts of self-ownership and property rights serve as "a guidepost for shaping and reshaping whatever positive law may be in existence" (1998, 17).

Adopting that perspective, this article evaluates the common law doctrine of possession as the root of title in light of the natural law concept of justice. The article draws upon examples from both English and US law to contrast the common law and Rothbardian approaches to resolving "stolen land" claims. In evaluating the common law principles of property acquisition the article does not attempt to offer a comprehensive description of property law—instead, the focus is limited to two key issues: how the common law contrasts with libertarian principles of justice, and how the common law doctrine of possessory title relates to historical claims arising from colonialism or conquest. The specific questions to be discussed are: What must be established to ascertain whether the original acquisition of property was unjust? What precise claim is advanced by those who say "You stole our land"? What evidence is necessary to substantiate that claim, and what redress is appropriate? The article emphasizes the importance of justice in the natural law tradition and explains why it is important to draw upon principles of justice rather than simply figure out what form of reparation would or would not work. The aim is to address the challenges in applying principles of justice to an evaluation of legal disputes about historical wrongful dispossession.

Why a Theory of Justice Matters

Principles of self-ownership and property rights need not be rooted in a theory of justice, and it is therefore necessary to explain why a theory of justice matters in defending private property in the context of "stolen land" claims. This article draws upon Rothbard's (1998, 43) definition of property rights as natural and universal rights to "ownership of one's own

self, ownership of the previously unused resources which one has occupied and transformed; and ownership of all titles derived from that basic ownership—either through voluntary exchanges or voluntary gifts.”⁶

The concept of property rights as natural rights provides the normative starting point for ascertaining just principles of property law. This starting point must be justified, as even in contexts where a theory of justice is deemed to be necessary in defending private property, that theory need not be derived from the natural law tradition. Moreover, perspectives on natural law as a normative foundation of justice vary greatly even among those who hold to a principle of justice. Rothbard (1998, 3) observes that the natural law tradition is contested: “Among intellectuals who consider themselves ‘scientific,’ the phrase ‘the nature of man’ is apt to have the effect of a red flag on a bull.” The earliest antecedents of natural law were rooted in the concept of divine law, which goes a long way toward explaining why modern lawyers regard natural law as vague, esoteric, and ambiguous (Rommen 2005, 5). In their view, “Natural rights theories employ a terminology that often borders upon the obscure. Some special thing, property, quality or attribute is all too often ‘immanent’ or ‘inherent’ in something else” (Epstein 1989). Richard A. Epstein (2019, 752) further observes that “there are few phrases today that make the modern lawyer recoil more than the two words ‘natural reason’ or their close sidekick, ‘natural law.’” Antony Flew (1982, 277) also cites the influence of Jeremy Bentham, whose remark that natural rights are “rhetorical nonsense, nonsense upon stilts” is well known.

In response to these critiques, natural rights as a foundation of justice may be justified by reference to their universal nature. Rather than being merely subjective cultural values or preferences, they reflect principles of value to all human beings regardless of race or cultural tradition (Gordon and Njoya 2023). In all civilized societies, regardless of culture, there are universal principles held in common by all human beings: for example, the ideas that wisdom and truth are important virtues, and that theft and murder are wrong. These principles supply the minimum moral content of the law, in the sense that one would not be bound in conscience to obey any law that purported to justify theft or murder: “Any positive law which offends against the natural moral law is not a law that is binding in a moral sense, i.e., in conscience. But only those laws are absolutely null and void that run counter to the prohibitive natural law. Therefore a law that would positively prescribe murder or perjury would not be a law at all, nor may one obey it” (Rommen 2005, 59).

⁶ The classic principle of self-ownership is stated by John Locke (1764, 216): “Every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his.” It is worth noting Rothbard’s (1995, 317; emphases in original) point that “Locke’s is a labour theory of *property*, that is, a theory of how material property justly comes into ownership by means of labour exertion or ‘mixing.’ This theory has absolutely nothing to do with what determines the *value* or price of goods or services on the market, and therefore has nothing to do with the later ‘labour theory of value.’”

Natural rights are in that sense rooted in objective truths. Flew (1982) emphasizes that people regard the concept of justice not as a subjective statement of preferences, but as an objective statement of values that all should uphold, or to which all should be bound. He writes, “The first essential of any natural right is that it must possess some kind of objectivity. If anyone is going to maintain, against Bentham and so many others, that there are such rights, then they have somehow got to show: both how this can be possible; and that it is the case” (Flew 1982, 278). Flew (1982, 280) depicts objective truths as

logically necessary truths . . . [that] neither are nor state facts about either human or non-human nature. It is a matter of individual or collective human choice—though certainly not by that token merely a matter of arbitrary choice—what concepts we use, and what words we employ to express those concepts. But it is not a matter of choice, whether human or Divine, what follows or does not follow from this or that proposition. We have therefore, truths here which are in the required sense objective. If the conclusion drawn does follow, then the inference is correct; and if not, not.

To the extent that they are founded on objective truths, the principles of natural law are those which universal human experience has shown to be logically necessary for society to function and for human beings to flourish. Although Epstein does not regard the natural law as a foundation for property rights, he does point out that while there are irreconcilable points of divergence between natural law and utilitarian theories there is nevertheless a significant degree of overlap between them in their justifications of private property. Utilitarians would defend the ideas underpinning natural law principles on grounds that these principles work as a foundation of the legal system: “Natural law, as an organizing concept, lasted for two millennia for good reason: it worked” (Epstein 2019, 754). The reason natural law works is that it is based on universal principles by which all human beings flourish. As Epstein (2019, 752) observes, “No community, however constituted, could long tolerate theft, trespass, murder, rape, or refuse to enforce any commercial promise. Quite simply, the control of aggression and advancing the gains from trade are too important to admit differences. The natural law framework seized on these facts and should be understood in that light.”

Utilitarians are often confident that they can resolve disputes about original acquisition and “stolen land” by pointing to the cost and inefficiencies of redistributive schemes. For example, some utilitarians oppose reparations by arguing that they are too costly and will not work due to innumerable practical impediments (see, for example, Posner and Vermeule 2003). However, in the absence of an ethical benchmark by which to evaluate

whether policies are just, the difficulty merely shifts from ascertaining the meaning of justice to ascertaining whether the relevant benchmarks of utilitarian analysis have been met—for example, debating what is meant by the “public interest” and what factors should be taken into account in benefit-cost analysis. More importantly, losing sight of basic moral distinctions between just and unjust action makes it harder to defend private property against claims that everything possible, including dismantling private property, should be done where necessary to achieve justice.

For these reasons, Rothbard (1982, 57) emphasizes the need for coherent philosophical principles and a normative theory of justice, and is critical of utilitarian perspectives which seek to bypass questions of justice: “In recent years, however, jurists and ‘Chicago School’ economists have attempted to develop theories of value-free property rights, rights defined and protected not on the basis of ethical norms such as justice but of some form of ‘social efficiency.’” Rothbard’s (1982, 57) answer to those who consider that resolving practical disputes should be value-free is that they have simply substituted efficiency as the overriding value in place of justice: “Pretending to be value-free, they in reality import the ethical norm of ‘efficiency,’ and assert that property rights should be assigned on the basis of such efficiency. But even if the concept of social efficiency were meaningful, they don’t answer the questions of why efficiency should be the overriding consideration in establishing legal principles or why externalities should be internalized above all other considerations. We are now out of *Wertfreiheit* and back to unexamined ethical questions.”

The Common Law Tradition

In the “stolen land” debates it is often argued that the common law tradition is biased in favor of colonial settler claims and therefore cannot provide a just foundation for objective analysis of property rights. In evaluating the common law conceptual framework it is important to bear in mind that the claimants in historical injustice cases do not allege that they have a good title to the land in the usual legal sense. Instead, they assert that they are entitled to seize property from the person currently in (allegedly wrongful) possession because the claimants happen to belong to the same race or tribe as the owner who was long ago dispossessed. In these circumstances the common law position is clear: nobody can seek vindication of a claim that vests or vested historically in someone else. If no valid claim vests in any individual member of a group, then that group of individuals as a collective unit cannot have a valid group claim. Further, as Alexander (2014, 886) observes, historical injustice cases do not fall within the categories of legal claim ordinarily recognized by the common law and principles of equity, which is precisely why the claimants do not seek legal redress and instead use political methods to achieve their goals. Alexander (886) explains: “Unlike ordinary restitution cases, land reparations involve whole cultures and collective identities. . . . It is a mistake to view land reparation disputes as involving merely an aggregation

of individual claims and, so, capable of being treated like ordinary restitution claims. In these cases, the whole is greater than the sum of the parts.” The question from a libertarian perspective is whether, to the extent that the common law fails to recognize historical injustice claims, the common law fails to comply with the demands of justice.

Britannica defines the common law as “the body of customary law, based upon judicial decisions and embodied in reports of decided cases, that has been administered by the common-law courts of England since the Middle Ages.” Bruno Leoni (1961) correctly observes that the common law was traditionally “not enacted but found or discovered.”⁷ Carlo Lottieri (2021) attributes this traditional quality of judicial decision-making to “the specificity of law: a practical and largely empirical science, historically situated and essentially oriented to finding reasonable solutions for very specific cases.” This is in contrast to law as a set of philosophical principles. Lottieri therefore argues that legal philosophy addresses different concerns from those addressed by courts of law in settling specific legal disputes: “If philosophy of law has to investigate the eternal and immutable principles of justice, juridical scholarship [case law analysis] must find the best translation of these for the specific problems of a society.”

This goes a long way toward explaining why the common law does not explicitly follow any philosophical principles and did not historically set out to conform to particular ideological values. Oliver Wendell Holmes (1881, 1) was right to say, in his well-known remarks in *The Common Law*, that “the life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” With so many conflicting conceptualizations of justice, there are advantages to a consequentialist approach which resolves specific disputes without regard to any explicit normative theory of justice.

This focus on the practical exigencies of dispute resolution largely explains the different legal categories which apply to the common law that may seem somewhat arbitrary from a philosophical perspective. For example, Rothbard (1998, 51) is concerned with the normative justification for property rights,

⁷ In his review of Leoni’s (1961) book, Rothbard (1962; emphases in original) summarizes Leoni’s view: “In the Roman private law, in the Continental Civil Codes, in the Anglo-Saxon common law, ‘law’ did not mean what we think today: endless enactments by a legislature or executive. ‘Law’ was not *enacted* but *found* or discovered; it was a body of customary rules that had, like languages or fashions, grown up spontaneously and purely voluntarily among the people. These spontaneous rules constituted ‘the law’; and it was the works of experts in the law—old men of the tribe, judges, or lawyers—to determine what the law was and how the law would apply to the numerous cases in dispute that perpetually arise.”

and he therefore describes the violation of property rights as criminal: “A criminal is anyone who initiates violence against another man and his property: anyone who uses the coercive ‘political means’ for the acquisition of goods and services.” As he explains, “We are here using ‘crime’ and ‘criminal’ in the ordinary language, rather than technical, legal sense.” In his view all rights are property rights and all property is private property, so it follows that all crimes against the individual should in that sense be viewed as “private” wrongs—crimes against the individual, not against the public generally or the state. Because he is concerned with ethics, his priority is to identify the nature of private property rights and the proper response to crimes against private property owners.

The common law, by contrast, regards theft as a wrong which is public in nature and vindicated by the state, not by the property owner. While there are some overlaps between civil and criminal liability (for example, trespass may be a tort or a crime), the common law distinguishes analytically between civil and criminal law and between private law (property law) and public law (for example, constitutional and administrative law).⁸ As noted in the *Cornell Law Review* in 1927, “This distinction between public and private law is a fixed feature of our law-school curriculum. It was expressed with characteristic 18th century neatness and clarity by Montesquieu, when he said that by political laws we acquire liberty and by civil law property, and that we must not apply the principles of one to the other. Montesquieu’s view that political laws must in no way retrench on private property because no public good is greater than the maintenance of private property, was echoed by Blackstone and became the basis of legal thought in America” (Cohen 1927, 8).

Although the demarcation between civil and criminal law is often blurred and is not necessarily meaningful in a philosophical sense, it is nevertheless important in a procedural and practical sense. Implausible as it may seem to the layperson, a homeowner who calls the police to report a squatter is likely to be informed that it is a civil matter which must be pursued through private litigation. An example may be cited from New York, where “according to New York State law, squatters obtain tenant rights after occupying a property for 30 days and homeowners can only evict them by taking the matter to court” (Pan 2024). In such cases the police are often reluctant to get involved unless there is a likelihood of a breach of the peace, and in that case both homeowner and trespasser are at risk of arrest. In a recent case, “a homeowner in New York found themselves removed from property they own and placed under arrest after changing the locks when they found people that they did

⁸ Public law is “the area of law that deals with the relationship between the government and other organizations or between the government and the public” (*Cambridge Dictionary*, s.v. “public law,” accessed February 28, 2023, <https://dictionary.cambridge.org/us/dictionary/english/public-law>), while private law is “the area of law that deals with disagreements between people or companies, rather than disagreements that involve government” (*Cambridge Dictionary*, s.v. “private law,” accessed February 28, 2023, <https://dictionary.cambridge.org/us/dictionary/english/private-law>).

not know occupying the home. Though the homeowner is now not facing any charges, the incident paints a picture of the difficulties faced by law enforcement and homeowners in ‘squatter’ cases in New York” (Mohammed 2024). Some states, including Georgia, have taken steps to ameliorate this situation. On April 24, 2024, Georgia passed a law creating an offense of unlawful squatting, which would give further options to homeowners: “The bill presents two avenues for prompt relief: 1) the issuance of a citation giving the occupant a short time to prove that they have the legal right to be there and 2) a quick process following receipt of a counteraffidavit to have a non-jury court hearing and access to prompt ejection through the added use of off duty sworn officers” (Dentons 2024).

These examples show why police are often reluctant to get involved in contested property disputes—the speedy three-day procedure envisaged in Georgia’s new law is appropriate for straightforward, uncontested cases where the squatter has no plausible claim to have a legal right to the property, but less so in contested cases where the squatter may have been in the premises for several weeks or months. This is not unusual in cases where the homeowner is on an extended absence—for example, due to deployment overseas. These examples also show why the theoretical and practical distinction between civil and criminal liability may lead to injustice in cases where the property owner has been wrongfully dispossessed (for further discussion of this point see Njoya 2024b).

In discussing the ethical foundations of law, Rothbard (1982, 56, 57) sees both tort and criminal law as serving the same normative function in the defense of property rights: “If ethics is a normative discipline that identifies and classifies certain sets of actions as good or evil, right or wrong, then tort or criminal law is a subset of ethics identifying certain actions as appropriate for using violence against them. . . . Tort or criminal law is a set of prohibitions against the invasion of, or aggression against, private property rights; that is, spheres of freedom of action by each individual.”

It follows that from a libertarian perspective, the burden and standard of proof would be the same in all cases where property rights are alleged to be violated, as the charge of unjust dispossession is in Rothbard’s view always to be treated as an accusation of a crime.⁹ Rothbard (1982, 71) explains: “At present, ‘preponderance of evidence’ is used to decide civil cases, whereas a far tougher standard is used for criminal cases, since penalties are so much stiffer. But, for libertarians, the test of guilt must not be tied to the degree of punishment; regardless of punishment, guilt involves coercion of some sort levied against the convicted defendant. Defendants deserve as much

⁹ I am grateful to David Gordon for drawing my attention to this important point.

protection in civil torts as in criminal cases. . . . A more satisfactory criterion, however, is that the trier must be convinced of the defendant’s guilt by ‘clear, strong, and convincing proof.’”

A further illustration of common law classification which is relevant in defining the nature and content of property rights in debates about historical injustice relates to the distinction between the common law and principles of equity. *Britannica* defines equity as “the custom of courts outside the common law or coded law. Equity provided remedies in situations in which precedent or statutory law might not apply or be equitable.”¹⁰ The common law as it applies in the resolution of property disputes cannot be comprehensively understood without reference to principles of equity—for example, where an innocent person’s *equitable* title (beneficial ownership) takes priority over the formal title of the *legal* owner. From the rules of equity emerge an important doctrine in resolving claims concerning stolen property where the thief is long gone and the claim lies between the original owner (or his heirs in legal title) and an innocent third party who purchased the property from the thief without knowing (and having no reason to believe) that it was stolen.

It is necessarily the case, in historical disputes about “stolen land,” that the dispute is not between the original owner and the actual thief but between groups who claim to be successors in title to the original parties. Where reparations claims concern a dispossession that occurred decades or even centuries ago, the claim to title successorship is based on grounds that the claimants belong to the same race, tribe or nation as the wrongfully dispossessed owners.¹¹ For example, in the case of disputed land in the Middle East, the conflicting claims to title are based on original acquisition and dispossession that occurred thousands of years ago, and the assertion of present entitlement is made by those claiming to belong to the same race or nation as the original owners wrongly evicted from their lands. Such claims are expressed entirely through extrajudicial means rather than through courts of law and often end in all-out war (see, for example, Block and Futerman 2021).

A further factor said to render the common law unsuitable for the resolution of historical land claims is that the usual remedy in civil claims is payment of damages, and a claimant who seeks the specific return of his property is certain to be disappointed if he is left instead to a monetary remedy. Principles of equity become more significant in such cases, as often the

¹⁰ *Encyclopaedia Britannica Online*, s.v. “equity,” <https://www.britannica.com/topic/equity-law>.

¹¹ As Alexander (2014, 875) observes, property law treats disputes between innocent parties differently from a simple case where a thief tries to sell stolen property: the situation is more complex when “the possessor of the [property] is not the original wrongdoer. Not only that, but the possessor is an innocent party whose own *bona fides* are apt to draw our sympathies. As between two innocent parties, who is entitled to the [property]?” Further, commercial principles and the integrity of markets also come into play: “Under a limited exception known as the doctrine of market overt, however, a bona fide purchaser may acquire good title from a thief if the sale takes place in an open market.”

reason for proceeding against the innocent third party who is in possession of specific property is not that the claimant regards the third party as morally culpable but precisely that the claimant wants the specific property back, so it makes sense to proceed against the person in possession of the property regardless of how possession was acquired. If the claimant were to proceed against the “guilty” party who is responsible for dispossessing him but who is no longer in possession of the property and thus unable to return it, the only available remedy would be damages. In this way the availability of specific remedies has historically played a significant role in shaping the contours and content of property law doctrines.¹²

Libertarian principles of justice, not being confined to this type of artificial categorization of civil law remedies, recognize no difficulty in seeking return of one’s property from the person wrongfully in possession. Rothbard (1998, 51) sees “no particular reason for redress or punishment to be confined to monetary payment.” If aggression against a property owner is conceptualized as criminal from an ethical perspective, the idea of punishment is in principle appropriate in any case where the owner seeks to recover property from the thief. But in complex cases coming before courts where the parties to the dispute are neither the original owner nor the original thief, and the original parties are neither present nor identifiable, it is not easy to see how or why a court could or should regard the case as a criminal matter when both parties before the court are innocent, nor why a third party should be entitled simply to seize property from the innocent person now in possession of it to redress the injustice of the original theft. Faced with two innocent parties, the courts resort to maxims of equity to decide, based on what is described as the conscience of the court, who should prevail. Courts are constrained by the remedies which are feasible in such situations, not by reference to coherent philosophical principles.¹³ The pragmatic approach adopted by courts of equity can be defended in that context (for an explanation of the courts of equity, see McCormick 1928). As will be seen in the next part of the article, in most disputes the libertarian approach would yield a very similar result when the practicalities of proving the case are taken into account.

Common Law Principles of Acquisition and Possession

This part of the article considers in more detail some of the points of divergence between the common law and Rothbardian approaches to “stolen property” claims, focusing on how the concepts of ownership and possession have influenced that divergence.

¹² Epstein (1979, 1222) writes, “Common law judges have—and traditionally have had—at their disposal only limited remedies to apply to redress a violation of a substantive right. . . . A court with modest remedial powers is not apt to choose, or even stumble upon, property doctrines whose enforcement requires elaborate administrative machinery.”

¹³ Epstein (1979, 1224) writes, “Law then is not philosophy, and the treatment of its fundamental premises may lack the quest for universals that is the hallmark of much philosophical inquiry.”

The Contrast between Absolute Ownership and Relativity of Title

One key distinction between the common law and Rothbard's approach to property rights is that Rothbard regards property rights as absolute rights vesting in an identifiable owner. The common law, by contrast, lacks a meaningful concept of ownership and instead regards title as relative, with property rights in land being conceptualized as a "bundle of rights" that may vest in different titleholders (Johnson 2007).

The common law principle of relativity of title is therefore not concerned with identifying the "true owner" of things but only with ascertaining the allocation of property rights. Despite William Blackstone's (1979, 2) famous words about property being "that sole and despotic dominion which an owner has to the exclusion of all others," the common law doctrine of relativity of title does not reflect the Roman concept of dominium, which Morris Cohen (1927, 8) defines as "the rule over things by the individual." The concept of dominium is closer to Rothbard's conceptualization of ownership, and the influence of Blackstone over the common law may lead observers wrongly to suppose that the same is true of the common law. Susan French and Gerald Korngold (2000, 20) explain that Blackstone "may be the best known English or American writer on the law. . . . Blackstone was particularly influential in the post-revolutionary period in the United States not only because it was one of the few available relatively comprehensive compilations of law in English but because it could be cited without violating statutory bans on citation of King's and Queen's Bench cases. Frontier lawyers are said to have carried a copy in their saddlebags." French and Korngold (2000, 20) further observe that "although few modern American scholars actually read much of Blackstone, the idea that property is a right of absolute dominion and exclusion continues to intrigue and provoke people who think about property."

However, the doctrine of relativity of title means that the common law in England and America does not seek to identify the "owner" of property in the abstract sense depicted by Blackstone. Instead, through its adversarial procedure it identifies, between the two parties before the court, who has the better title. Epstein refers to this as the common law "docket"—the fact that legal doctrine is often shaped by the nature of the disputes that come before the courts.¹⁴ In many cases neither of the parties to the property dispute is the true owner, and in such cases the identity of the true owner, who is absent from the proceedings or otherwise unknown, is generally irrelevant. Whoever has the better title in the case as framed wins the case, even if he is not the

¹⁴ "The judicial concern with its own docket influences the common law treatment of property rights. . . . Although property rights are defined as against the entire world, they are fashioned in legal disputes between two (or at least very few) parties" (Epstein 1979, 1223).

true owner. There is no further inquiry or investigation beyond the confines of the case. Examples of this would be a squatter in possession who sues a subsequent squatter in trespass, or the finder of lost property who generally has the legal right to keep the property even though he is not its “true owner” (French and Korngold 2000, 62).

In the common law, possession is the root of title (Epstein 1979). Where title is disputed, reference to “ownership” in common law jurisdictions is therefore linked to *possession*, either first possession or subsequent acquisition of possession (Merrill 2009). Possession in many cases is not absolute either in theory or in practice; an example is where a homeowner in possession owes money to a bank under a mortgage which gives the bank the overriding entitlement to possession—namely, a legal entitlement in defined circumstances to seize the property in priority to the homeowner. Common law disputes are resolved by reference to whose title takes priority (being prior in time or priority having been accorded by agreement between the parties) in defined circumstances, rather than by identifying the “true owner” in an absolute sense.

The common law principle of priority, except in cases where equitable or contractual principles intervene, is simply the first in time. This principle accords with ordinary expectations of common sense and fairness: “As you know from your own experience, competing claims are often resolved by deciding who got there first. . . . The same principle is frequently applied in law. If there are two legitimate claims and not enough to go round, the earlier claim wins” (French and Korngold 2000, 34). Alexander (2014, 888) depicts the “first in time” principle as a form of justice, in that it avoids the risk of conflict over just entitlement: “Prior possession is concerned with a form of justice, but the justice of order, stability, and security, rather than restorative justice.”

Although the first in time principle can be said to promote order, stability, and security, these are not principles of justice unless “justice” simply means ideals and concepts that are valuable to society. By contrast, libertarian principles of justice based on self-ownership have the advantage of relying on ethical considerations. Rothbardian ethics upholds the principle that any violation of self-ownership or property rights is unjust.

Possession as the Root of Title

It has been observed that the first in time takes priority, but it must still be ascertained what specific action counts in establishing that priority. As Epstein (2019, 759) puts it, “Temporal priority controls: prior in time is higher in right. But prior in doing what?” Epstein’s point is that the “first in time” rule is by itself incomplete; it still remains necessary to identify what precisely must be done first. As Epstein (2019, 759) observes, both Roman law and common law required first *occupation* (“the Roman and common law

rule on priority keyed it to occupation”), but that still leaves open questions about the activities necessary to constitute occupation for purposes of title acquisition. Such questions include: What historical facts are relevant in substantiating or proving a claim to first possession of disputed land? What precise facts must be established, and what are the analytical elements of the legal claim?

In the context of historical exploration of uncharted lands, settling on uninhabited property and mixing one’s labor with it gives rise to a claim to ownership in the Lockean sense. However, in Lockean theory a claim by any native tribe to prior ownership of settled land cannot extend over entire continents including uninhabited land, because a homesteader “owns only the part that he settles and transforms into use” (Rothbard 1998, 64). Transformation of the land into use is essential. Mere transitory occupation does not suffice. In Rothbard’s (1998, 65) example: “If Green comes upon land that has obviously never been transformed by anyone, he can move onto it at once and with impunity, for in the libertarian society no one can have a valid title to land that has never been transformed.”

The common law concept of “possession” has two key elements: factual possession (or acts of possession) and intention to possess (*animus possidendi*). The two common law elements may be explicated as “(a) exclusive physical control of the land or chattel; and (b) an intention, in one’s own name and on one’s own behalf, to exclude the world from it” (Rostill 2021, 7). Both elements must be present; it does not suffice to prove just one of the required elements. The same principles apply in US law, where physical control is key to possession: “Ownership is awarded to the first person who demonstrates a sufficient degree of control over some portion of these resources to be deemed to be in “possession” of them” (Merrill 2009, 463). In the American context there has been much debate on the *animus possidendi*, or requisite state of mind—for example, whether the trespasser must act honestly or in good faith in order to acquire possession. Richard Helmholz (1983, 342) argues that in practice courts are often unwilling to reward the dishonest person who seizes control of property. Courts are therefore more likely to find that the dishonest occupier has not succeeded in establishing *factual* possession. Helmholz explains: “One common way of refusing to reward the bad faith possessor has been to describe his possession as somehow less than sufficient to acquire title. A pejorative description can be fastened onto it. It may be described as ‘scrambling possession’ or ‘provisional and contingent’ occupancy. It may be called ‘naked possession’ or ‘mere occupancy’” (342).

It then follows, based on the principle of relativity of title discussed above, that the only relevant question in “stolen land” disputes would pertain not to who is the true owner but to which claimant has the *better* right to possession. If the facts show that the person claiming to have been

dispossessed of land was neither in factual possession nor had the requisite intention to possess it, there has been no wrongful dispossession and no injustice.

Adverse Possession and Limitation of Actions

In the context of adverse possession, described in some jurisdictions as “prescription,” once possession is established it must also be shown to be “adverse.” What is meant by “adverse” varies in its precise formulation, but in all common law jurisdictions, possession must be maintained by the interloper “openly, notoriously, adversely [meaning without permission or license granted by the true owner], exclusively and continuously for the prescribed period” in order to be deemed “adverse” in this sense (Thomas 1996, 12). The passage of a prescribed time period (the limitation of actions) is essential in establishing possessory title. These elements of possession—open, notorious, adverse, exclusive, and continuous for the requisite period of time and with the requisite intention to possess—are therefore both necessary and sufficient to give rise to legal title through adverse possession. Adverse possession in the common law need not be “rightful” or “justified”—it suffices that the person is in fact in exclusive possession—openly, notoriously, adversely, etc.—with the requisite intention to possess.

In English law, strictly speaking, the word “adverse” is superfluous to the legal analysis as the claim is based on the concept of exclusive possession. Exclusive possession by definition excludes all others, including the true or “formal” owner. Similarly, although adverse possession is often described as “hostile” in the US context, meaning hostile to the true owner, Helmholtz (337) observes that “hostility” simply denotes that the possession is adverse to the owner’s possession: “Hostility is ‘a term of art and does not imply ill will.’” In most cases, as Helmholtz notes, the person in possession believes (rightly or wrongly) that he is entitled to be in possession; therefore, “for possession to be hostile in its inception, no spirit of animosity or hostility is required” (337). However, Helmholtz (332) argues that although in theory the law does not require good faith as an analytical component of possession, the outcome of cases reflects just such an expectation on the part of many judges, who balk at granting title to the dishonest occupier: “The cases, taken as a whole, do not show that the adverse possessor must plead and prove that he acted in good faith. It is enough that the question may be raised under the rubric ‘claim of right.’ But the cases do clearly show that the trespasser who knows that he is trespassing stands lower in the eyes of the law, and is less likely to acquire title by adverse possession than the trespasser who acts in an honest belief that he is simply occupying what is his already.”

In both English and American law, disputes about historical wrongful acquisition and wrongful dispossession are resolved, to a large extent, by statutes of limitations under which attempts to reclaim title are barred

after a specified period of time. Brian Gardiner (1997, 129) observes that “early American property law followed English law closely” in setting a statutory limitation period of twenty years, although over time that has been reduced to shorter periods of time in both jurisdictions. The specified passage of time serves both to give rise to possessory title and to extinguish the previous title. Again, the wrongfulness of the original or subsequent acquisition is irrelevant as long as possession (as defined in the previous subsection) has been maintained for the requisite period. As expressed in the American context (French and Korngold 2000, 111), “A person can acquire good title to property owned by someone else by holding possession of the property ‘adversely’ to the true owner for the period specified in the statute of limitations governing an action to recover possession.”

The rationale is largely based on practical considerations, as Alexander (2014, 876) explains: “The reason is repose—we need to quiet titles, especially to land, in order to keep land records reliable. An efficient and well-functioning market in land depends on reliable records to title.” Quieting titles also has the advantage of avoiding endless disputes about the true owner: “A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man” (Ballantine 1918).

Time limits are necessarily arbitrary and therefore fit uneasily in a theory of justice. Alexander (2014, 882) suggests that justice might be served by distinguishing between cases where dispossession happened in the distant past, so that much has changed since then, and cases where the dispossession was recent enough that “little will have changed since the wrongful dispossession.” Alexander has in mind changes in land use that would be expected to occur over time—for example, new settlements being built or changes in the condition of the property, which may since have deteriorated or been improved. He argues that “the closer the current circumstances are to those that prevailed at the time of the initial dispossession, the more compelling the case for returning the land” (882). However, this approach would not avoid the need for arbitrary distinctions, as it would still have to be decided what counts as “recent” and what types of change would be deemed sufficient to override the validity of the dispossessed person’s claim. Moreover, from the perspective of justice, it is unclear why a dispossessed person whose circumstances have changed—Alexander (882) distinguishes between mere passage of time and specific changes that have occurred during that time—should go without a remedy while the dispossessed person whose circumstances have not changed over time would be entitled to a remedy.

The Evidentiary Burden and the Standard of Proof

Rothbard's theory of justice does not vary according to time, nor draw arbitrary time limits for the defense of property rights. Although Rothbard does not regard arbitrary time limits as just, and would not accept a principle that title is extinguished simply because a specified time has elapsed, he argues that where neither the owner nor the owner's heirs can be traced the title is dissolved and whoever subsequently acquires possession of the property therefore holds just title. In his example: "Suppose, for example, that Jones steals money from Smith. . . . Smith and his heirs die, and the money continues in Jones' family. In that case, the disappearance of Smith and his heirs means the dissolution of claims from the original titleholders *at that point*, on the 'homestead' principle of property right from possession of unowned property" (Rothbard 2006, 167; emphasis in original).

Moreover, because Rothbard attaches great importance to the presumption of innocence, it must be noted that the evidentiary burden and the standard of proof in cases of historical injustice will pose challenges to proving the "stolen land" allegation. As Alexander (2014, 876) observes, it becomes less likely with the passage of time that the title can be proved. Many difficulties arise—for example, "the difficulty of proof when claims have grown stale. Evidence disappears, records are lost, memories fade, and in general proof of title becomes less reliable the farther removed we are from the original dispossession" (Alexander 2014, 876). Therefore, most cases that would be time-barred by statutes of limitations would also be likely to fail under libertarian principles for lack of evidence. Libertarian justice would only be likely to yield a different outcome in exceptional cases where despite the passage of time the circumstances surrounding the dispossession and the identities of all the victims and perpetrators are uncontested and conclusive documentary evidence of title can be traced from the wrongful dispossession to the true heirs of the dispossessed owner.

The recent *Bruce's Beach* case in California, which involved land seized by the state in the 1920s from a black family under eminent domain powers (Molloy 2022), is an example of a straightforward case that would be resolved under Rothbard's theory of just title, though it would be time-barred under most statutes of limitations. But most "stolen land" cases are not so straightforward when it comes to questions of proof. The circumstances are politically and historically contested. It may not be clear whether the property was stolen, especially in contexts of war or conquest where both sides claim to have acted in self-defense. In the aftermath of hostilities there may be no clear answer as to the identity of the original owner of disputed property. A costly historical inquiry into the origins of the title would be necessary, which is why the common law regards it as sensible to let the title lie where it rests after a prescribed time. This includes cases where the current owner is widely *reputed*, but cannot be *proved*, to be a thief. Though the reasoning is different, the outcome is therefore similar under libertarian justice, as no

theory of justice would sanction seizing land without evidence merely because somebody alleged, without proof of the case, that “everybody knows” it was stolen. The claim of “stolen land” cannot simply be asserted. It must be *substantiated*. As Rothbard (1998, 51) puts it, “We can only find the answer through investigating the concrete data of the particular case, i.e., through ‘historical’ inquiry.” It would be unjust to seize property from the putative owner who is in possession unless it can be proved that he stole it.

Further, the burden of proof is on the person trying to gain possession. The presumption of innocence means the accused person is not required to prove that the property of which he is in possession was lawfully acquired. The presumption is the converse: in the well-known expression, possession is nine-tenths of the law.¹⁵ In the absence of evidence proving theft or wrongful acquisition, Rothbard (1982, 70) says,

the only procedure consonant with libertarian principles is to do nothing; to lean over backwards to ensure that the judicial agency is not coercing an innocent man. If we are unsure, it is far better to let an aggressive act slip through than to impose coercion and therefore to commit aggression ourselves. A fundamental tenet of the Hippocratic oath, “at least, do not harm,” should apply to legal or judicial agencies as well.

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

Generalized accounts of historical violence, unrelated to establishing title to specific property, do not constitute *evidence* of stolen title.

The Return of Stolen Property

The next issue concerns the appropriate remedy if property is proved to have been stolen. The basic legal principle is that stolen property must be returned. That a thief does not acquire good title and therefore has no title to convey is a principle that goes back to Roman law: *nemo dat quod non habet*. Nobody can acquire legal title to stolen goods even if they innocently purchased them, as the thief has no title to convey. This is the classic common law principle concerning stolen title, as well as a principle of natural law. As Epstein (2019, 761) observes, this is a universal principle: “No one protects the thief. The basic natural law uniformity holds firm.” Libertarian justice upholds the same principle: “The criminal has no natural right whatever to the retention of property that he has stolen; the aggressor has no right to claim any property

¹⁵ “Possession is nine-tenths of the law and the burden of proof is always on those who seek to overturn present property titles” (Block 2020, 31).

that he has acquired by aggression” (Rothbard 1998, 51). Therefore, title which is unjustly acquired should be returned to the original owner or his heirs.

In the common law, there are complex exceptions to the *nemo dat* principle based largely on the principles of equity, which may take into account factors such as the parties’ respective knowledge and conduct, the length of time that has passed since the theft, concepts of detrimental reliance, the existing state of the property, and who happens now to be in possession. Further, where the evidence is clear and the claimant is the original owner, many historical injustice claims may fall within the law of restitution and unjust enrichment, which operate in the sphere of equity (Posner and Vermeule 2003, 700).

While those principles may seem relatively straightforward, matters are rarely that simple in cases based on historical injustice. First, the return of stolen property assumes that the stolen property is identifiable. Given the passage of time in contexts of historical injustice, the stolen property has often been irrevocably transformed. For example, the land alleged to have been stolen may have been reclaimed from a river, with a city subsequently being constructed on the reclaimed land—in such a case would people whose ancestors had ancient fishing rights in the rerouted river now have title to the city?¹⁶ This may seem an unlikely scenario, but there are many cities built on reclaimed land or on similar artificial reconstruction of the natural landscape. A good example is Boston, Massachusetts: “The core areas of the city began to be settled and the land flattened, parts of the Charles River were dammed off, and the artificial landscapes of Boston Common and the Arnold Arboretum began to take shape. 1807 marks the first major reclamation project, the filling in of Mill Pond and the Great Cove using soil from Copp’s Hill and the Trimountain. 1814–1900 was the period of time during which the Back Bay was filled and most of the remaining hills were flattened” (Beck, n.d.). The City of Boston has now declared that “this land is the territory of the Massachusett, Pawtucket, and their neighbors the Wampanoag, and Nipmuc Peoples, who have stewarded this land for hundreds of generations. We recognize the repeated violations of sovereignty, territory, and water perpetrated by invaders” (City Council, n.d.). The question is whether in these types of cases, where the existing landscape bears no resemblance to the original land that is said to have been stolen, justice requires the land to be “returned” to those who now claim to be its rightful owners.

Waldron (2002) argues that where land use has changed so much over time that the land is unrecognizable it cannot be assumed that the original rights to use the land have survived in the same form. He argues that “even if we

¹⁶ For an example in relation to land on which the University of Washington now stands, see Korn (2022): “In other words, Mr. Reges says, citing philosopher John Locke’s theory that those who improve upon land own it, the Coast Salish people historically owned nearly none of the campus land.”

were sure that we had the right entity—the right right-bearer—we would need additional assurance that the right in question had survived. . . . So now we have to ask whether the rights remain stable during the prodigious lifetime of the group. On the face of it, it seems implausible that [the rights] would remain stable” (2002, 151).

Further, it must be questioned whether the person who improves the land is entitled to compensation if he is ordered to return the land to the original owners. Alexander (2014, 883) points out that in such cases “the improvements may be privately owned, such as residences and businesses, while others will be public improvements, for example, hospitals, schools, parks, and the like. Are present-day owners of these improvements entitled to compensation for the loss of the improvements, apart from the land? Would monetary compensation make them whole, assuming that they are entitled to be made whole?” A classic example of this type of problem would be a dilapidated cabin repaired over time with new material so that none of the original material remains. The “stolen land” case is akin to heirs of the original owner seeking to repossess the cabin, only to find that the cabin has been so much improved by the thief that seizing it amounts not to repossessing the original cabin but to stealing a new cabin: committing a new act of aggression worse than the original aggression. Other examples would be a stolen barrel of barley which has since been brewed into whisky, stolen flour baked into bread, or stolen lumber used to build a fine sailing vessel. The common law developed doctrines of accession and transformation to resolve such cases. Courts aim to ascertain whether the property now claimed is indeed the property that was originally stolen. If so, it must of course be returned. But if not, if the thing has been extinguished or irreversibly transformed into a new and different thing, the property belongs to the person who transformed it. These principles are derived from Roman law, as Merrill (2009, 466) explains:

The Romans applied three doctrines here: *accessio*, *specificatio*, and *confusio*. . . . *Accessio* applied when two different items were joined together in a production process, as when A supplied flour that was put into sacks owned by B. *Specificatio* applied when A owned raw material that was transformed by B’s labor into a different product, like lumber milled into barrel hoops. *Confusio* applied when two or more persons provided similar inputs that were mixed together in such a way that their contributions could not be distinguished, as when grain from two or more farmers was combined in single container. American courts today tend to use the word *accession* to cover both *accessio* and *specificatio* and then distinguish accession from *confusion* (*confusio*). Notwithstanding the verbal peregrinations, the basic principle in all areas reflects a straightforward application of the principle of accession. The question in each

case is which owner of inputs has supplied the larger or more valuable input—*i.e.*, has established the most prominent connection.

For example, stolen chattels affixed to land or buildings in such a way that they are not intended to be and cannot be separated from them are said to merge with the land and become fixtures. A similar result follows if the stolen thing is irretrievable—for example, stolen sugar dissolved into tea. Merrill (2009, 467) explains:

A fixture is “a thing which, although originally a movable chattel, is by reason of its annexation to, or association in use with land, regarded as part of the land . . .”. The case law is voluminous, and several factors play a role in determining whether a chattel is a fixture: physical attachment to the realty, appropriation to the use or purpose of the realty, and common understandings are all said to be relevant. . . . But the basic inquiry is similar to what we see under the principle of accession more generally, asking whether the chattel bears a relationship to the land that is so physically close or otherwise prominent that the chattel should be regarded as being owned by the owner of the land.

Doctrines of equity may also intervene, so that a case where someone innocently transforms someone else’s property without knowing it was stolen is different from a case where the person who transformed it knew (or ought to have known) it was stolen. For example, a thief would not be permitted to retain possession of an item he stole just because he improved it.¹⁷ An estoppel may however arise in equity if the value of the new thing is vastly superior to that of the old.¹⁸ The dispossessed owner would be unable to retrieve the vastly improved property from the person who transformed it, and his remedy against the thief would lie only in *compensation* for the loss of the old thing. These principles of equity would be considered unjust under Rothbardian principles of justice, as the person who vastly improves someone else’s property is not entitled to keep the improved property (Rothbard 1998, 59).

Rothbard argues that if it is proved that property was stolen, the fact that it has in the meantime been improved is no reason for the current possessor to keep the property (1998, 59). If the improvement is separable, the person in

17 Alexander (2014, 884) explains: “Generally, US law distinguishes between mistaken and intentional improving trespassers. The mistaken improver, because he acted in good faith, is protected against unjust enrichment through one or another remedy (such as a forced sale to the new owner).”

18 “Where the defendant’s labour—if he shall succeed in sustaining his offer of testimony—will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances” (Wetherbee v. Green, 22 Mich. 311, 313–14 (1871) (U.S.)).

possession may by all means extract his improvements before returning the property—Rothbard gives the example of installing a new radio into a car which turns out to have been stolen. If the improvement is not separable, the person in possession suffers the loss of it. He is not entitled to any compensation for having improved property belonging to another, though he may of course seek compensation from the thief who sold him stolen property.

However, while Rothbard does not see improving stolen property as a reason to keep the property, he does not assert that stolen property must in all cases be seized from the person currently in possession. The return of stolen property also assumes that the identity of the true owner is known, or that the claimant (if he is not the original owner but someone who claims to be a successor in title) has a better title than the person currently in possession of the stolen property. In Rothbard's view two further questions therefore arise: "(a) whether the *victim* (the property owner originally aggressed against) or his heirs are clearly identifiable and can now be found; or (b) whether or not the current possessor is *himself* the criminal who stole the property" (1998, 57; emphases in original). If the current possessor is not the criminal, the claim is likely to fail on the point discussed earlier about proving the theft. Moreover, if the claimant is neither the victim nor the victim's heir, then the claimant is nothing but an interloper or busybody who is not entitled to go around seizing property from others in order to right historical wrongs.

In the context of the historical injustice debates, Waldron (2002, 146) observes that one reason why many people support the payment of reparations for historical wrongs is that they view current members of particular races as the heirs of those originally deprived of property: "individual men and women are mortal; but groups are not," and therefore it seems to them that the groups which suffered historical injustice "are still there, even if their individual membership has changed." In cases where many generations have passed since the original dispossession, this assumption about the identity of the true owner may not hold true. As noted earlier, the common law does not recognize any legal claims based purely on group membership, such as membership of a race or nation. Rothbard (1998, 57, 58) concludes that such cases, where "we cannot now find the victim or his current heir," are resolved by the same principles that apply to unowned resources, and therefore the property belongs to the person in "first" possession (unless that person is himself the thief).

Conclusion

The following tentative conclusions may be drawn about resolving "stolen land" claims by reference to the common law doctrine of possession viewed in light of Rothbardian principles of justice. It is well established that the common law recognizes the right of the owner to retrieve his property. In straightforward cases where the facts of prior possession and wrongful

dispossession are clear, the property must be returned to the original owner if the identity of the owner is known and the property is in a state capable of being returned. Subject to broader nonaggression principles, the owner is entitled to seize his property from the thief. In Rothbard's (1998, 54) well-known example of a stolen wristwatch, the owner of the watch "would have been within his rights in forcibly repossessing his watch."

However, as this article has shown, such clear cases are not typical in the "stolen land" debates. In most cases the facts are contested, the truth lies buried in the mists of time, and the original owner, even if identifiable, is long since gone. The victims are long since gone too, and the claimants simply allege that they are entitled to seize property from others because they happen to belong to the same race or tribe as the owner who was long ago dispossessed. In these circumstances the common law position is clear: nobody can seek vindication of a claim that vests in someone else. There are no legal claims based on belonging to the same race, tribe, or nation as the previous owners who were long ago dispossessed.

Should such collective group claims now be recognized by law in order to meet the demands of justice? To those who do not see any reason for law to accord with principles of justice, or whose notion of justice is simply "whatever pleases me," there would seem to be no impediment to legislating the right to seize property from one race and give it to another based on claims of historical injustice. One such situation involves a proposal for the "expropriation without compensation" of land claimed to have been stolen: "A particularly egregious example is South Africa's Expropriation Bill [Parliament of the Republic of South Africa, n.d.] under which it is sought to seize private property without compensation: 'Local, provincial and national authorities will use this legislation to expropriate land in the public interest for varied reasons that seek to amongst others, promote inclusivity and access to natural resources.' The argument behind such policies is that social values such as equity and inclusivity require the restriction or abolition of property rights. The rationale is that, in promoting justice, it is necessary in such situations to abrogate private property rights" (Njoya 2024a).

This article has argued that law ought to uphold principles of justice, and that the natural law principles of justice have the advantage of being universal and objective. Natural law principles of justice emphasize the presumption of innocence and the right of the person in possession not to be dispossessed without evidence of wrongful title. A mere allegation that the person stole the land does not suffice. Where the claim is based on historical injustice that arose in war or conquest, it is not in dispute that many historical grievances did *occur*, but that does not suffice as evidence to prove any claimant's superior title to specific property. There must be a clear analytical, conceptual, or evidential connection between the previous owner, the grievance suffered by that owner in relation to being wrongfully dispossessed,

the specific property title now asserted, and the person who now claims to be successor in title to the original owner. Those who argue that historical injustice relates not to the precise acquisition of any specific title but to the prevailing overall historical context in which injustice was endemic wrongly presume that generalized accounts of historical violence suffice to substantiate their claim to seize property from others. For example, they argue that any land titles acquired during a colonial occupation are inherently unjust because colonial conquest is wrong, and that this entitles them to seize any property that was purchased during colonial rule. However, the mere fact that a wrong historically occurred does not mean that any interloper is now entitled to seize property from anyone on a whim.

After centuries of nations living on land which is now said to have been wrongfully acquired, clear and principled legal rules are needed to evaluate “stolen land” claims. Rothbard’s principles of justice provide an ethical benchmark by which to ascertain whether the common law doctrines of property rights accord with the demands of justice, thereby avoiding arbitrary rules, capricious edicts, and violent land seizures which would only fuel endless vengeance, retaliation, and war. It is not enough to say that the law must not leave historical wrongs without a remedy. Rothbard (1982, 56) exhorts jurists to consider also whether the proposed remedies accord with principles of justice: “Since the law is ultimately a set of normative commands, the true jurist or legal philosopher has not completed his task until he sets forth what the law should be, difficult though that might be. If he does not, then he necessarily abdicates his task in favor of individuals or groups untrained in legal principles, who may lay down their commands by sheer fiat and arbitrary caprice.”

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