

GARY CHARTIER*

Natural Law and Non-Aggression

Abstract. Natural law theory can render the so-called “non-aggression principle” (NAP), which prohibits the initiation of force against person or property, intelligible and can ground a robust, even if not exceptionless, version of the principle. Natural law and natural rights theories share common roots, but are often seen as divergent, if not antagonistic. But I believe it can plausibly be maintained that claims about natural rights find their home within the context of more comprehensive natural law theories. I seek to illustrate this claim by showing how a central claim about natural rights can be defended using the resources provided by the best contemporary version of natural law theory. I consider the significance of the NAP and its place in natural rights theory. I outline the contours of one contemporary natural law position, the new classical natural law (NCNL) theory. I go on to indicate what form I suspect a version of the NAP framed using the categories provided by the NCNL theory might take.

Keywords: natural law, non-aggression principle, natural rights, Finnis, John, Rothbard, Murray, property

I. Introduction

Natural law theory can render the so-called “non-aggression principle” (NAP), which prohibits the initiation of force against person or property, intelligible and can ground a robust, even if not exceptionless, version of the principle.

Natural law and natural rights theories share common roots, but are often seen as divergent, if not antagonistic. But I believe it can plausibly be maintained that claims about natural rights find their home within the context of more comprehensive natural law theories. I seek to illustrate this claim by showing how a central claim about natural rights can be defended using the resources provided by the best contemporary version of natural law theory. In Part II, I consider the significance of the NAP and its place in natural rights theory. In Part III, I outline the contours of one contemporary natural law position, the new classical natural law (NCNL) theory. In Part IV, I indicate what form I suspect a version of the NAP framed using the categories provided by the NCNL theory might take. I suggest that NCNL theory provides a strong foundation for absolute prohibitions on purposeful or instrumental attacks on people’s bodily and mental health, rooted in what is often called the Pauline Principle, and a sturdy but less-than-absolute basis for rights in tangible property, grounded in the Golden Rule. I conclude with a recap in Part V.

II. The Place of the NAP in Natural Rights Theory

An influential strand of natural rights thinking gives pride of place, as far as political ethics are concerned, to the non-aggression principle. One of its most influential advocates frames the principle this way: “no one may threaten or commit violence (‘aggress’) against another man’s person or property. Violence may be employed only against the man who commits such violence; that is, only defensively against the aggressive violence of another. In short,

* Associate Dean and Associate Professor of Law and Business Ethics, School of Business, La Sierra University Riverside, CA 92515-8247.
E-mail: Gary.Chartier@GMail.Com

no violence may be employed against a nonaggressor”.¹ (For convenience, we can call the two aspects of the principle its person-aspect and its property-aspect.)

The principle is sometimes described as an axiom, given its arguably crucial position as the foundation for civilized life. A range of justifications have been offered for it, however, including ones purporting to derive it from the notion of self-ownership and from the simple fact of the agent’s status as a living being. I want to argue here that an important contemporary expositions of the natural law tradition in which much natural rights thinking is rooted can provide limited philosophical grounding for the NAP.

Natural rights theory is characteristically concerned not with “personal morality” but only with “the proper sphere of ‘politics’, i.e. with violence and non-violence as modes of interpersonal relations.”² Talk about rights in this context is narrow: to say that a given interest is safeguarded by a right is to say that that interest may not be “interfered with by violence”; it is not at all to deny that there may be “immoral ways of exercising that right”. Whether there are is a question for ethics, not for political philosophy—the subset of ethics concerned specifically with the just use of force.³ Natural rights theory is thus not a general theory of ethics: serious moral inquiry extends well beyond questions about when force might be appropriate. However, natural law theorists may be inclined to argue, it is most important to get clear on the moral limits of violence. As long as rejecting aggression is accepted as a ground-rule, people can get along satisfactorily even if their views on other moral questions differ. This does not, of course, imply that all moral stances compatible with a commitment to the NAP are, for natural rights theorists, equally appropriate.⁴ Talk about natural rights, rooted in the natural law tradition, is plausibly understood as a subset of natural law ethics more broadly construed. Natural law political ethics cannot reasonably be seen as free-standing; rather, natural law convictions about proper limits on the use of force are intelligible to the extent that they flow from natural law ethics more generally. This way of thinking about the relationship between political ethics and general ethics does not follow strictly, of course; perhaps there are moral principles that are concerned exclusively with the use of force and don not depend on more general principles. But it seems more economical and elegant to suppose that, if there are more general natural law principles of ethics, principles of political ethics make sense in light of those more general principles.

There are obviously multiple strands in the natural law tradition. The Spanish Scholastics, for instance, have been seen as in many ways the precursors of contemporary natural rights theorists. But their thought, of course, was grounded in the earlier work of Aquinas and Aristotle. And subsequent descendants of Aquinas have reworked the Aristotelian tradition to which he was a major contributor in ways quite different from those of the Spanish (and other) Scholastics.

The position of the contemporary “new classical natural law” (NCNL) theorists is an obvious example. It reflects the influence of the post-World War II analytic tradition in

¹ Rothbard, M. N.: War, Peace, and the State. In: Hoppe, H.-H. (ed.): *The Myth of National Defense: Essays on the Theory and History of Security Production*. Auburn (AL), 2003, 66.

² Rothbard, M. N.: *The Ethics of Liberty*. Atlantic Heights (NJ), 1982, 25.

³ *Ibid.* 24.

⁴ Johnson, Ch. W.: Liberty, Equality, Solidarity: Toward a Dialectical Anarchism. In: Long, R. T.–Machan, T. (eds): *Anarchism/Minarchism: Is a Government Part of a Free Country?* Aldershot, 2008, 155–188.

English-language philosophy, and is particularly dependent on the work of the late G. E. M. Anscombe. I believe a plausible version of NCNL theory can provide a version of the NAP with both intelligibility and justification.

III. The Contours of the New Classical Natural Law Theory

A. Introduction

NCNL theory features two key components: basic aspects of well being and basic practical principles. I consider the first in Section B and the second in Section C. In Section D, I explain why NCNL theory can regard basic moral principles as absolute while treating others as relative. I sum up in Section E.

B. Basic Aspects of Well Being

Basic goods, or aspects of human welfare or well being, are central to the NCNL view. These goods include life, speculative knowledge, practical reasonableness, friendship, religion, self-integration, æsthetic experience, and play.⁵ What matters, in general, is not just what counts as a basic aspect or dimension of welfare or well being. What's significant, instead, is that these aspects of welfare are not reducible to anything else (either a substantive good like pleasure or felt satisfaction, or a formal good like preference-satisfaction) and that each category and each instance of each category is incommensurable and non-fungible.⁶ An aspect of well being may be identified as basic in multiple ways.⁷ Classifying it this way may be the result of a process of reasoning that leading to reflective equilibrium among convictions including the belief that a given dimension of welfare is basic. It may simply be *seen* non-inferentially to be fundamental in nature. Denying its status as a basic good can be shown to be self-contradictory. A phenomenological analysis of reflection and choice can lead to the conclusion that a given good provides a terminus for reasoning, so that no further justification is required to pursue it. And the experience of privation or loss may be seen, by implication, to point to the value of what has been lost.

It is possible, the NCNL theorists emphasize, to choose among instances of various aspects of welfare in various combinations. And our choices are constrained by reason in two ways—to be reasonable, they must be for real goods rather than illusory ones (like emotional satisfaction untethered to objectively satisfactory states of affairs in the real world) and they must be consistent with the principles of practical reasonableness (about which more anon). But provided a choice is a choice for a real good and is otherwise consistent with the demands of practical reasonableness, there will be no objective way to rank one choice as “better” or “worse” than another (except in terms of the actor's own prior commitments).

⁵ Some heterodox NCNL thinkers have been inclined to include more subjective aspects of welfare, like sensory pleasure and peace of mind on the list see Murphy, M. C.: *Natural Law and Practical Rationality*. Cambridge, 1999; Chartier, G.: *Economic Justice and Natural Law*. Cambridge, 2009; and there may be good reason *not* to include self-integration (Chartier 2007). The details are not crucial.

⁶ Finnis, J.: *Natural Law and Natural Rights*. Oxford, 1980; Finnis, J.: *Fundamentals of Ethics*. Oxford, 1986.

⁷ Chartier: *op. cit.*

This basic fact of incommensurability and non-fungibility renders consequentialism a non-starter. For standard consequentialism, at least, depends on the ability to rank-order states of affairs incorporating many different aspects of welfare. And if there is no rationally inescapable way to combine all of the goods realized in a given state of affairs—as one cannot if the assignment of weights to different instances of different goods must be a matter of choice rather than of rational necessity—then there will be, can be, no objectively required ranking of states of affairs in the standard consequentialism demands. (Classical utilitarianism offers the possibility of objective ranking by focusing on the amount of pleasure embodied each possibility to be ranked; but as early as Mill it was becoming apparent that this sort of Benthamite project was inattentive to crucial aspects of the human experiences of valuation and moral judgment.)

C. Practical Principles

NCNL theory maintains that reasonable participation in basic aspects of well being is participation governed by a set of practical principles. Two of these principles, the Golden Rule and the Pauline Principle, provide the basis for a version of the NAP grounded in NCNL theory.

1. The Golden Rule

The Golden Rule requires that one treat those affected by one's actions fairly. It can be variously formulated, of course. NCNL theory characteristically emphasizes two features. First, if one treats two moral subjects differently, one should do so only for the purpose of participating, or fostering someone else's participation, in a genuine aspect of well being. (Thus, one may reasonably pick capable players for a football team in order to foster the good of play; one may reasonably select good art over trash in order to foster the good of æsthetic experience; friendship requires distinctions between friends and non-friends.) Second, one should not treat another moral subject—even when in otherwise reasonable pursuit of an intelligible aspect of welfare—in a way such that one would be resentful if one were treated that way oneself.

2. The Pauline Principle

The Pauline Principle as understood by NCNL theorists is grounded in the incommensurability of basic aspects of well being. The expression "Pauline Principle" reflects St. Paul's exasperated rejection⁸ of the notion that we might reasonably do evil to bring about good. The twist in the NCNL version of this principle, though, is that the principle is not seen as dependent on previously specified deontic norms.

The idea behind the principle is often cashed in something like this way: a set of rules (say, the Ten Commandments) is treated as given; and the Pauline Principle is understood as stipulating that the rules should be treated as exceptionless, so that they may not be violated even in pursuit of particularly good consequences. Framed this way, the principle appears unavoidably arbitrary. Why should I accept the relevant moral rules in the first place? And what reason, exactly, does the Pauline Principle give me to treat them as exceptionless? Thus, the strength of the NCNL version. The NCNL theorists *do not* offer a version of the Pauline Principle that begins with a set of specific moral rules treated as

⁸ Romans Chapter 3 Verse 8.

givens. Rather, they derive it in large part simply from the idea that there are objective aspects of human welfare. The NCNL version of the Principle can be framed like this: *do not purposefully or instrumentally cause harm to any basic aspect of a moral subject's welfare.*

Now, consider someone contemplating an attack on someone else's welfare. If her action is to be reasonable, she will need to act in order to participate in some aspect of well being or in order to foster someone else's participation in some dimension of welfare. Presuming she correctly understands what she is doing as an attack on some aspect of someone else's good, then she needs to see her attack as justified in virtue of the good she seeks to realize or pursue. It can not, *ex hypothesi*, be because the good she's attacking is valueless. But the good she's attempting to realize does not, could not, outweigh the good she's attacking: it's not commensurable with it. So any purposeful attack on an acknowledged basic good in the service of another acknowledged basic good will be unreasonable, because it will involve treating a genuine good as if it were not a genuine good, or as if it could be rationally subordinated to another genuine good when it can not. (The same line of argument fairly clearly rules out acting with hostility toward any basic aspect of well being.)

Another way the point is sometimes made by NCNL theorists is to say that attacking a basic good directly amounts to the choice to make being an attacker of basic goods part of one's identity. Thus, Grisez⁹ talks about treating oneself as giver of life and death when one chooses to attack someone's life.

There's obviously more to be said about this argument, and my purpose here is not to spell out all of its ramifications or to defend it against all possible objections. The point of this post is to talk about the degree to which the NCNL approach to natural law theory might be able to justify something similar to the NAP. But I wanted to outline the basis an NCNL theorist might offer for the Pauline Principle so it would be clear how the NCNL version differs from other versions of "Don't do evil to bring about good." No detailed moral principles are presupposed: all the argument needs to get off the ground is the recognition that certain aspects of welfare are, indeed, aspects of welfare and that they're incommensurable and non-fungible.

D. Practical Principles as Absolute

The Golden Rule, the Pauline Principle, and other relevant practical principles are all, on the NCNL view, absolute and exceptionless. That is, there is never a time when it is reasonable to ignore the Golden Rule or the Pauline Principle. But there's one fairly obvious difference between the two. The Pauline Principle rules out certain generically specifiable action-types absolutely. For example: any instance of targeting non-combatants in war-time is fairly clearly going to be an instance of purposefully causing harm to one or more basic aspects of well being. So it is possible to be quite clear in general terms about various sorts of conduct that will always be inconsistent with the Pauline Principle. And this means, in turn, that someone potentially on the receiving end of such conduct will have an absolute right not to be subjected to the ill effects of that conduct. By contrast, while everyone has an absolute right not to be treated in a manner inconsistent with the Golden Rule, just what conduct will prove inconsistent with this prohibition on arbitrariness will vary significantly from situation to situation. (For instance: supposing that promissory obligation is rooted in

⁹ Grisez, G.: Toward a Consistent Natural-Law Ethics of Killing. *American Journal of Jurisprudence*, 15 (1970), 64–96.

the Golden Rule, there will likely be no way to specify whether someone may be exempted from the requirement to keep a promise without a good deal of quite situation-specific information.)

The Pauline Principle is quite compatible with causing unintended but foreseen harm, harm as an anticipated but unsought by-product or side-effect of action intended to realize or pursue a genuine good. (Thus, it can allow for the use of force to defend oneself or others: one's purpose in this case need not be to cause harm, but simply to repel or resist an attack.) But the fact that the harm is not purposeful or instrumental does not mean it's automatically permissible. There will be multiple constraints on bringing about unintended harms. But the most important will be the Golden Rule: one may not impose a risk of unintended but anticipated harm on someone else if one would resent the imposition of a similar risk, in comparable circumstances, on oneself or one's loved ones.

E. Conclusion

Practical reasonableness, as understood by NCNL theorists, calls for consistent acknowledgement of the value of all of the varied aspects of well being and of those who participate in them. Discerned in diverse ways, the basic aspects of welfare are objective, incommensurable, and non-fungible. Regard for the welfare of real people requires acknowledgement of the irreducible significance of these aspects of well being. The Pauline Principle precludes acting purposefully or instrumentally to harm any of these aspects of welfare, or out of hostility toward it; the Golden Rule requires that we treat the moral subjects with whom we interact fairly. Moral rules derived from the Pauline Principle are exceptionless; the Golden Rule itself is exceptionless, but rules derived from it will of necessity be more flexible and responsive to particular circumstances.

IV. Natural Law and the Property-Aspect of the NAP

A. Alternative Natural Law Grounds for Property Rights

It is clear that the Pauline Principle provides very solid grounding for the person-aspect of the NAP. Any purposeful or instrumental violence against a person's body, mental health, or peace of mind will clearly be ruled out by the Pauline Principle; using force to defend oneself or others will be permissible, but imposing unreasonable risks of harm on others will not.

The NAP as standardly formulated implies that a person's property in material realities external to her person should be treated as equivalent to her person, as an extension of her body. Just as it would be wrong to attack a person's body, on this view, it would be equally wrong, and wrong for the same basic reason, to attack her property. However, the NCNL theorists typically demarcate body and property quite clearly. They would be inclined, I think, to treat regarding one's property as an extension of oneself as an instance of fetishization. That does not mean, though, that they could not come to endorse something similar to the property-aspect of the NAP. In the remainder of Part IV, I consider three ways in which they might be able to do so: they could seek to show that the Golden Rule could justify robust property rights (Section B); they could treat property as a basic good, view individual pieces of property as aspects of the self, or resist interferences with property rights as exercises in retrospective enslavement (Section C); or while distinguishing property from the basic goods, they could argue that essentially any assault on property is simultaneously a purposeful or instrumental assault on a basic aspect of well being (Section D). I conclude in Section E.

B. Property Rights and the Golden Rule

Standard NCNL theory grounds property rights primarily in the Golden Rule. It can provide strong support for property rights; it is not clear, though, that the Golden Rule can ground the full property-aspect of the NAP. Just as there's an absolute right not to be treated in a manner inconsistent with the Pauline Principle, there's also an absolute right not to be treated in a manner inconsistent with the Golden Rule. But what the Golden Rule requires will vary far more from situation to situation than what the Pauline Principle requires. Thus, mid-level general norms that flow from the Golden Rule—like *Keep promises* or *Avoid rudeness*—may admit of a variety of exceptions. In Subsection 1, I explain the basis for such rights in standard NCNL theory. In Subsection 2, I outline some proposed additions to the typical NCNL rationales for property rights. In Subsection 3, I consider the limitations on Golden Rule-based property rights that would seem to flow even from the sort of robust grounding for them I envision.

1. Standard NCNL Rationales for Property Rights

The NCNL theorists begin from what they see as essentially Aristotle's point of view: everything in principle belongs to everyone, but there are good reasons to give responsibility for each thing to someone or some group of people in particular, for the benefit of all.¹⁰ Their view, in effect, is that property rights flow primarily from the Golden Rule. This basic principle of fairness, along with some contingent but persistent facts about human nature and the human situation, impose some limits on what might count as a just property regime. Finnis focuses primarily on three constraints, overlapping and mutually reinforcing rationales for property rights which may also be seen as justifications for particular property claims (the labels are mine):

1. *Incentivization*: in general, a just property system will be one that facilitates people's contribution to the productivity of a community's economy through the use of incentives; someone can sometimes reasonably offer the fact that a property rule would incentivize people to engage in productive activity as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.¹¹
2. *Stewardship*: in general, a just property system will facilitate stewardship—taking good care of property, cultivating and developing it responsibly, and preventing it from falling into disrepair; someone can sometimes reasonably offer the fact that a property rule would likely foster the effective stewardship of property as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.¹²
3. *Autonomy*: in general, a just property system will be one that facilitates people's autonomy—their freedom to determine the contours of their own lives and major life choices without intrusion by others; someone can sometimes reasonably offer the fact that a property rule would help people to be autonomous as a reason for others to

¹⁰ Aristotle: *Politics*. (Trans. Benjamin Jowett), Oxford, 1905, II. 5.

¹¹ Finnis, J.: *Natural Law and... op. cit.* 170, 173; Grisez, G.: *The Way of the Lord Jesus 2: Living a Christian Life*. Steubenville, 1994, 794.

¹² *Ibid.* 170.

support the rule and so in support of her claim to a piece of property that would be hers under the rule.¹³

3. *Additional Considerations Supportive of Property Rights*

Each of the standard NCNL rationales is plausible and persuasive, but I suggest that several others might also be relevant, too. Someone evaluating a given property rule in light of the Golden Rule could reasonably be expected to take all of these additional rationales into account along with those highlighted by the NCNL theorists.

1. *Generosity*: in general, a just property system will be one that makes it possible for people to be generous; someone can sometimes reasonably offer the fact that a property rule would enable people to be generous as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.¹⁴
2. *Reliability*: in general, a just property system will enable people to rely on their expectations that otherwise just property rules will continue in force, that decisions made about individual claims in light of such rules will be respected, and that otherwise just property titles will be respected; someone can sometimes reasonably offer the fact that a property rule would honor people's past expectations or enable them to depend on their expectations in the future as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.¹⁵
3. *Productivity*: in general, a just property system will be one that ensures that property is put to its most productive use; someone can sometimes reasonably offer the fact that a property rule would ensure that property was put to its most productive use as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.¹⁶
4. *Compensation*: in general, a just property system will be one that makes it possible for people to receive, and likely that they will receive, compensation for the goods and services they provide to others; someone can sometimes reasonably offer the fact that a property rule would enable people to be compensated for providing goods and services as a reason for others to support the rule, and so in support of her claim to a piece of property that would be hers under the rule.¹⁷
5. *Identity*: in general, a just property system will take reasonable account of people's identity-constitutive attachments to pieces of property; someone can sometimes reasonably offer the fact that a property rule would protect people's identity-constitutive attachment to pieces of property as a reason for others to support the rule, and so in support of her claim to a piece of property that would be hers under the rule.¹⁸
6. *Simplicity*: in general, a just property system will be one that features rules that are simple—that are easy to formulate, articulate, learn, and apply; someone can sometimes reasonably offer the fact that a property rule is simple as a reason for others to support

¹³ *Ibid.* 172; 168–169, 192, Grisez: *The Way of the Lord Jesus* 2... *op. cit.* 794–795.

¹⁴ Aristotle: *op. cit.* II. 5.

¹⁵ Fried, Ch.: *Modern Liberty and the Limits of Government*. New York, 2006, 156–160; Munzer, S. R.: *A Theory of Property*. Cambridge, 1991, 191–226.

¹⁶ Cp. the discussion of utility and efficiency in Munzer: *ibid.* 191–226.

¹⁷ *Ibid.* 254–291.

¹⁸ Radin, M.: *Reinterpreting Property*. Chicago, 1994, 35–71; Chartier: *op. cit.*

the rule, and so in support of her claim to a piece of property that would be hers under the rule.¹⁹

7. *Peacemaking*: in general, a just property system will be one that features rules that minimize conflict—notably by clearly allocating responsibility for particular things to particular people; someone can sometimes reasonably offer the fact that a property rule would be conflict-minimizing as a reason for others to support the rule, and so in support of her claim to a piece of property that would be hers under the rule.²⁰

8. *Coordination*: in general, a just property system will be one that coordinates people's interactions by making possible the aggregation of information about their interests and needs and the determination of appropriate production patterns and distribution levels for goods and services; someone can sometimes reasonably offer the fact that a property rule would foster this kind of coordination as a reason for others to support the rule, and so in support of her claim to a piece of property that would be hers under the rule.²¹

These additional concerns (1) add to the support for a system of private property provided by the considerations adduced by the NCNL theorists and (2) further constrain the kinds of systems that could reasonably count as just.

4. *Limited Implications of Golden Rule-Based Support for Property Rights*

The standard natural law approach to property, grounded in the Golden Rule, can justify a system of private ownership safeguarded by reliable rights. The stability and determinateness of the system is, in general, enhanced when the multiple additional considerations I have identified as relevant are also taken into account. But the Golden Rule does not require that people endorse the Lockean property rules many natural rights proponents read into the NAP.

The Golden Rule does not leave reasonable people with a single option as regards property rules as regards (i) acquisition, (ii) abandonment, or (iii) the extent of control. (Thus, for instance, it does not seem to provide one for a definitive basis for deciding between Lockean and occupancy-and-use views, and they certainly leave open, say, the length of time property might need to be abandoned before title might pass to a homesteader.) It constrains and highlights the range of considerations relevant to the deliberations of reasonable people seek to determine which property rules their legal system should enforce, but they leave open the question just what option is finally chosen.²²

¹⁹ Epstein, R.: *Simple Rules for a Complex World*. Cambridge (MA), 1995.

²⁰ Hasnas, J.: Toward a Theory of Empirical Natural Rights. *Social Philosophy and Policy*, 22 (2005) 1, 111–147; Shaffer, B.: *Boundaries of Order*. Auburn (AL), 2009; Friedman, D.: A Positive Account of Property Rights. *Social Philosophy and Policy*, 11 (1994) 2, 1–16.

²¹ Barnett, R.: *The Structure of Liberty: Justice and the Rule of Law*. Oxford, 1998; Friedman: *ibid.*

²² To be clear, I do not regard this as a criticism: variability in property rules seems perfectly reasonable to me. (i) Some empirical facts and some implications of particular ideas are unclear and need still to be discovered or understood more fully, and experimentation among different property rules, within the constraints of justice, will facilitate greater understanding. (ii) Different people's personalities will obviously vary, and some people will simply be more comfortable with some rules than other people will be—and there seems no reason why they should not be able to proceed accordingly.

In addition, whatever general rules *are* compatible with the Golden Rule in light of these considerations, *these rules will not be exceptionless*. To take an obvious example: both Aquinas and Locke explicitly acknowledged that emergencies justified violating otherwise stable, reliable property rights. Aquinas maintains that when a need is “so manifest and urgent, that it is evident that the present need must be remedied by whatever means be at hand (for instance when a person is in some imminent danger, and there is no other possible remedy), then it is lawful for a man to succor his own need by means of another’s property, by taking it either openly or secretly: nor is this properly speaking theft or robbery”.²³

Aquinas seems primarily to be thinking of emergency cases. But Locke, so far from being the exemplar of “possessive individualism” Macpherson and others claimed him to be, is if anything more expansive in this regard. He writes: “charity gives every man a title to so much out of another’s plenty, as will keep him from extreme want, where he has no means to subsist otherwise”.²⁴ Locke and Aquinas both seem to see property rules as fuzzy in just the way one might expect them to be if they were rooted in a general principle of fairness like the Golden Rule.

C. Property as a Basic Good

An alternative approach to generating a version of the property-aspect of the NAP using natural law theory would be to argue that justly acquired property, or controlling the disposition of such property—we can use *ownership* as a useful short-hand for this possibility—is itself a basic aspect of well being.

This is not, of course, an approach the NCNL theorists take themselves. They clearly view the value of property as instrumental. They argue that “anything human persons make, or have, considered as distinct from persons ... cannot be basic. It is always for ... reasons which culminate within persons ... that individuals and communities are concerned with such goods”.²⁵ But of course they might be mistaken about this. And, of course, even if individual items of property are sought and held for instrumental reasons, it does not follow that *ownership itself* is instrumental. Perhaps one or more pathway to the identification of other aspects of human well being as basic might also justify characterizing ownership of and control over justly acquired property in this way (Subsection 1). It might also be possible to treat, not ownership, but actual goods made or acquired by persons as aspects of those persons’ selves, deserving the same sort of immunity from purposeful or instrumental assault as their bodies because directly or indirectly acquired through labor (Subsection 2). A similarly labor-related approach might frame justify absolute property rights by framing interference with someone’s property as a kind of retrospective enslavement (Subsection 3).

1. Ownership as a Basic Good

i) *Reflective Equilibrium*. One might simply seek to ascertain whether affirming the good of ownership can be grounded in the attempt to achieve reflective equilibrium among one’s

²³ Aquinas, St. Th.: *Summa Theologica*. (Trans. Fathers of the English Dominican Province), London, 1920, II–II q. 94 a. 7c.

²⁴ Locke, J.: *Two Treatises of Government*. London, 1689. ch. IV, § 42.

²⁵ Finnis, J.–Boyle, J.–Grisez, G.: *Nuclear Deterrence, Morality and Realism*. Oxford, 1987, 178.

considered judgments about basic aspects of well being.²⁶ It seems to me that recognition of ownership rights of some sort will form part of a system of beliefs in reflective equilibrium, but it is unclear to me that a reflective equilibrium-based approach would be sufficient to justify the claim that ownership was a basic good.

ii) *Non-Inferential Discernment*. Perhaps we might directly, non-inferentially *see* that ownership was a basic good.²⁷ I suspect that many people *have*, indeed, understood themselves to see this: but note that they have not seen the same thing. While cross-cultural support for the identification of something as a basic good is a pointer to—not a demonstration of—its status,²⁸ cultural variation in this area is enormous. Some control over resources has been seen as crucial, but whether that control has been individual or collective, how far it has extended, and how it has been established have been viewed quite differently. It does not seem, then, that this sort of non-inferential discernment would yield an understanding of ownership as a basic aspect of well being that would undergird property rights any more robust than those grounded in the Golden Rule.

iii) *Undeniability or Self-Evidence*. We might attempt to determine whether the good of ownership is undeniable or self-evident.²⁹ However, even if it really were undeniable that assuming some kind of control over the natural environment was reasonable, it would not follow that Lockean rules were. And there is really no plausible claim that denying the value of ownership, much less Lockean ownership, is self-refuting. I suspect that a sufficiently clever dialectician³⁰ could produce an argument designed to show that assertion presupposes the value of autonomy and that this value cannot be affirmed or preserved without property rights of some kind, but I am not clear that any very specific theory could be generated in this way.³¹

iv) *Reflection on the Deliberative Process*. Alternatively, we might seek to determine whether we in fact treat ownership as a reason-terminator, whether we regard acquiring or maintaining ownership as itself an exhaustive explanation of or justification for an action.³² But there is little reason to think that we *do* reason this way. We acquire property because it is beautiful, because it will provide space for a family to flourish—because it will enable us to achieve other goals. Even if we do not know just what we will want to do with money we acquire, we understand that we acquire it to achieve other ends. We can and do explain our acquisition of particular items of property in terms of the value of intrinsically valuable dimensions of fulfillment in which we will or might participate.

But though owning particular items is instrumentally valuable, it may be that we value ownership itself—control over aspects of the non-sentient world that have come legitimately to be ours. That is because we extend ourselves into the physical world when we own things: property rights would seem to be constitutive components of personal autonomy.

²⁶ Rawls, J.: *A Theory of Justice*. Rev. ed. Cambridge (MA), 1999, 18–19, 42–46; Larmore, Ch.: *The Morals of Modernity*. Cambridge, 1996, 55–64; McNaughton, D.: *Moral Vision: An Introduction to Ethics*. Oxford, 1988, 102–103.

²⁷ See Gomez-Lobo, A.: *Morality and the Human Goods: An Introduction to Natural Law Ethics*. Washington (DC), 2002, 9–10; Finnis: *Fundamentals of Ethics*. *op. cit.* 51.

²⁸ Finnis: *Natural Law and... op. cit.* 83–85, 97.

²⁹ Chappell, T.: *Understanding Human Goods*. Edinburgh, 1998, 36.

³⁰ Hoppe, H.-H.: *The Economics and Ethics of Private Property*. Auburn (AL), 2006.

³¹ Friedman n.d.

³² Finnis: *Fundamentals of Ethics*. *op. cit.* 51–52; Finnis: *Natural Law and... op. cit.* 51–99; Chappell: *op. cit.* 35.

It remains an open question, however, whether recognizing that they are is sufficient to generate a scheme of property rights any sturdier than those supported by the Golden Rule.

v) *Privation*. Perhaps it is. We can see why it might be by means of an approach to the status of ownership as a basic good by way of *privation*.³³ The general idea, for natural law theorists, is that a basic good is what has been damaged any time we can agree that someone has suffered a genuine harm or loss. Certainly, when something has been stolen from me, I am inclined to see the wrong done not only as instrumental—so that theft, say, is objectionable just because it keeps me from enjoying some future benefit—but also as a violation of a protected sphere of my existence. Taking something that is mine is, apart from its obvious instrumental undesirability, itself a violation. And it is easy to characterize what has been harmed as something like the good of ownership.

We ordinarily pursue the ownership of particular things as an instrumental rather than as an intrinsic good, and I think we would be inclined to regard the pursuit individual objects, or of material wealth more broadly, as fetishistic unless undertaken for some ulterior purpose (we might be inclined to regard the attempt to obtain or retain ownership of a specific identity-constitutive piece of property, understood as inherently valuable, as a different matter). This is clearly the way the NCNL theorists view political liberty: they argue that “[p]eople want liberty in order to pursue the truth, to worship as they think right, to participate in the responsible play of political decision-making, to live in friendship, and so on”.³⁴ If property only mattered instrumentally, as the NCNL theorists believe liberty matters, then, of course, it could not reasonably be regarded as a basic aspect of well being.

I suspect, in fact, that people often seek liberty because they do not wish to be dominated, subordinated, pushed around—that they value liberty for its own sake. Similarly, we *do* seem sometimes to regard an attack on ownership as a harm in its own right, apart from any particular property loss resulting from the attack. Our concern in these cases may be seen as with the attacker’s *attitude*—her disrespect for our ownership—as well as with her *violation* of our *autonomy* and our related right to *control* our property.

It is important not to let the approach from privation prove too much. After all, thieves with no claim at all to property they have stolen may be angrily resentful when it is reclaimed—even by the rightful owners. While the recognition of harm in the case of theft does highlight something of moral importance, it is crucial to build into any account of ownership as a basic good the requirement that the ownership that is a basic good be ownership of justly acquired property. That this is so highlights the dependence of any credible account of ownership as a basic good on independently specified rules governing the acquisition, retention, and extent of property rights.

vi) *The Limited Implications of Conceiving of Ownership as a Basic Good*. Reflective equilibrium might provide some general support for the value of ownership, but certainly quite little support for treating it as an intrinsic good. There is little reason to think that Lockean property rights can be seen to be self-evident or undeniable—or even just non-inferentially evident. Asking whether ownership of some particular thing serves as the terminus in a plausible chain of practical reasoning seems to lead to a negative answer; but ownership itself seems a more likely candidate for status as a basic good. And the approach

³³ Grisez, G.: *The Way of the Lord Jesus 1: Christian Moral Principles*. Chicago, 1983, 123; Murphy: *op. cit.* 40.

³⁴ Finnis–Boyle–Grisez: *op. cit.* 278.

by way of privation also suggests that we may see, at least, control over what is already legitimately ours as a basic value.

But even if there might be some limited reason to think of ownership as a basic good, many infringements on someone's property cannot plausibly be understood as purposeful or instrumental attacks on that person's right to own. Theft will be, since the thief's project can succeed only if she is the owner of a piece of property and the prior owner is not. There is no way to understand theft except as an attack on the ownership of the existing owner. But other actions which cause harm to property and may impede the owner's control over her property may be incidental rather than purposeful or instrumental, and so will potentially be justifiable in terms of the more permissive Golden Rule.

The fundamental problem, in any case, is that acknowledging the intrinsic value of ownership would not answer the question of what scheme or schemes of ownership rights are just. Treating ownership as intrinsically valuable does provide a strong moral argument against theft, once property rights are defined. But it provides no particular basis for defining just what rights ought to be secure against theft and how these rights ought to be acquired.

If the definition of property rights—including both their acquisition and their extent—is primarily dependent on the Golden Rule, the case, the actual contours of property rights will be little different from what they would be if they had been defined in light of the Golden Rule without any reference to a basic good of ownership. If the Golden Rule, for instance, were understood to underwrite Aquinas/Locke-style exceptions to general property rules in the context of a system defined exclusively by the Golden Rule, it is not clear why it would not similarly be understood to do so if a good of ownership were acknowledged. It's just that, in this latter case, while theft would clearly be out of moral bounds, the Golden Rule would ground a prior definition of the boundaries theft would be seen as trespassing in such a way that those boundaries would not be understood to be violated by someone taking another's property in an Aquinas/Locke-style case.

2. Property as an Aspect of Identity

Alternatively, a natural rights theorists working within the constraints of NCNL theory might argue, not that ownership was a basic good, but rather that individual items of justly acquired property should be treated as aspects of the self, so that an attack on a person's justly acquired property was morally objectionable for the same reasons as an attack on her body. On this sort of view, property might be acquired justly either in virtue of the labor of the person acquiring it (who has either directly created it using unowned materials, claimed it from among unowned resources, or acquired it using resources gained in exchange for her labor or other justly acquired property) or, if it is a gift, in virtue of the labor of the person giving it to her. In virtue of this labor, the property would be understood to be incorporated into the identity of the person acquiring it.

On this view, the things people make or have really are aspects of those who make or have them. The labor involved in making or acquiring property would be what justified treating the property as an aspect of the self. And it would simultaneously provide a non-arbitrary basis for defining the limits of property distinct from general considerations rooted in the Golden Rule.

The NCNL theorists argue, recall, that "anything human persons make, or have, considered as distinct from persons ... cannot be basic. It is always for ... reasons which culminate within persons ... that individuals and communities are concerned with such

goods”³⁵ But this cannot be entirely correct, even from the standpoint of the NCNL theorists themselves. Consider a prosthesis, for instance—made by persons and attached to a person’s body. While the prosthesis is an artifact, an attack on it seems to be invasive, an assault on well being, for the same reasons as an attack on a healthy leg. It does not seem reasonable to regard the prosthesis “as distinct from” the person who employs it.

The NCNL theorists might argue, in response, that the prosthesis was no longer distinct from the person employing it once it was attached to her body. But what kind of attachment is required? Does an artificial leg that is attached by straps count as distinct from its owner, while one that is attached surgically does not? A focus on the mode of attachment seems arbitrary. It is easy enough to imagine an entirely artificial body that is physically distant from a human brain but which is fully controlled by the brain, say, via radio transmission, and which provides a full range of sensory inputs to the brain in the same way. Despite the lack of direct physical connection, it could certainly be argued that body was not distinct from the person controlling it. It seems, in short, as if the extent of control over an item, rather than the precise physical relationship between the item and the person’s brain, might be decisive for the question whether the item was or was not distinct from its owner.

Even this cannot be quite right, of course, because a person whose body was completely paralyzed, and who thus had no control over it at all, might well regard it, almost certainly would regard it, as an integral aspect of herself. Perhaps, then, whether something counts as distinct from a person or not might be understood to be in part of a function of how she understood it.

It is clear that this criterion cannot reasonably be employed by the law or by a general system of social norms or rules, however, since how people regard things will vary quite dramatically from person to person. The law could certainly establish a limited number of presumptions concerned with familiar, predictable cases—so that, for instance, a person’s paralyzed body might be expected to be identity-constitutive for the person, and a home that had been owned by successive members of a given family for generations might be expected to be identity-constitutive for members of the family. In general, however, the identity-constitutive character of a piece of property can only be introduced into a legal dispute at the cost of considerable confusion. The extent of a person’s control over something is, by contrast, relatively easy to ascertain.

If the extent of control is used, however, to determine whether the property control is distinct from the owner, it is clear that very few items of property—essentially only the person possesses and controls bodily on a consistent basis—might have any reasonable chance of being seen as not distinct from their owners. The labor involved in the production and acquisition of the property would not seem to be sufficient on its own to justify treating the property as incorporated into the owner’s identity: the property can be distinguished from the owner.

3. Interference with Property as Retrospective Enslavement

A related approach might seek to bridge the gap between person and property by arguing that interfering with someone’s justly acquired property was tantamount to enslaving her. This view would begin, again, with the claim that justly acquired property was property acquired directly or indirectly or indirectly through labor. To use force to compel someone to labor is to enslave her. But to use force to acquire what she has already labored to produce or

³⁵ Finnis–Boyle–Grisez: *op. cit.* 178.

acquire seems morally similar to using force to make her labor to produce or acquire it in the first place. But if the former is enslavement, then the latter arguably is as well. If enslavement is unjust, then using force to acquire someone's property is unjust. Slavery is generally regarded as a paradigmatic instance of injustice. So it seems to follow that partially or completely depriving someone of her justly acquired property by force is unjust.

Whether this intuitively plausible argument can be persuasively defended using NCNL theory depends, of course, on how NCNL theory understands the wrongness of slavery. NCNL theory begins with a conviction that persons are morally equal, and that there is thus no "natural right to rule".³⁶ There cannot, therefore, be any permanent classes of slaves or slave-owners. Similarly, one cannot reasonably attack another's physical or mental health in order to realize the goods achievable through her labor as a slave: to do so would be to violate the Pauline Principle by causing harm instrumentally. And even if retributive punishment is justified (as I maintain that it is not), punishing someone for failing to labor as a slave will obviously be justified only if one may justly enslave her.

For the NCNL theorists, then, using bodily force to keep someone as a slave or to punish her for not laboring as a slave will be wrong in principle. But it will be wrong because it involves actual or threatened purposeful or instrumental attacks on bodily health or other basic aspects of well being. The aspect of enslavement that is inconsistent with the Pauline Principle is not, *per se*, the control of someone's labor without her consent but rather the use of force against someone's bodily well being in order to compel her to serve the enslaver's purposes. To be sure, other techniques used to influence slaves' behavior will also be objectionable, from the standpoint of NCNL theory, because they are inconsistent with the Golden Rule. But interference with property after labor has already been used to acquire it, by contrast, will not involve attacks on basic goods. It may involve conduct inconsistent with the Golden Rule, of course; but whether it does will depend on just what kinds of property rights the Golden Rule requires people to acknowledge or support. It does not seem, then, that the right not to be enslaved entails a right to possess labor-based property without interference. The argument from slavery does not provide a route within NCNL theory to an account of property rights rooted in something other than the Golden Rule.

4. Conclusion

If the goods of ownership were understood as involving a full array of Lockean constraints on the acquisition, retention, and extent of property rights, the Pauline Principle might generate something quite like the NAP. But it is difficult to see how the panoply of procedures natural law theorists employ to identify fundamental aspects of well being would lead to the identification not just of ownership, but of *this sort of Lockean ownership*, as a basic good. Labor-based approaches might be thought to provide non-arbitrary limits on the kind of ownership that could be seen as a basic good. But there do not seem to be good arguments either for treating labor-based property as incorporated into the self or for judging interference with rights to such property as retrospective enslavement.³⁷

³⁶ Finnis, J.: *Aquinas*. Oxford, 1998, 184–185.

³⁷ While the understanding of interference with property rights as retrospective enslavement is to some degree intuitively attractive, it does have counter-intuitive implications. I would be unlikely to judge that your breaking into my mountain cottage to escape an avalanche was equivalent to enslaving me (cp. the range of cases discussed in Friedman, D.: *The Machinery of Freedom: Guide to a Radical Capitalism*. 2d ed. Chicago, 1989, 168–176).

D. Property Interests as Coincident with Basic Goods

Whether or not ownership is a basic aspect of well being, claims on specific items of property clearly function instrumentally to foster participation in various basic goods. Another alternative grounding for a natural-law version of the NAP might build on this recognition. Someone might argue, that is, that because of this instrumental relationship, any attempt to damage a person's property or deprive her of it will also, at the same time, be an attack on one or more basic aspects of well being and so be precluded by the Pauline Principle.

Clearly, people sometimes seek to participate in unreal goods using their property, or to participate unjustly in genuine goods. But this possibility need pose no serious threat to the argument linking property instrumentally with basic goods. The legal system cannot meaningfully distinguish between property used in pursuit of unreal goods from property used in pursuit of real ones. In the interests of simplicity, in recognition of the value of autonomous decision-making, and in full view of the legal system's frequent and unavoidable ignorance of people's purposes, it will characteristically be most reasonable for the legal system to operate as if people are pursuing real goods whether they are or not. The legal system, then, should, if this argument were correct, incorporate a straightforward prohibition on attacks on property, even though not all property actually functioned to facilitate participation in one or more basic aspects of well being.

A property right need not be entitled to full protection to the extent that it is being employed in pursuit even of a genuine aspect of well being but in the course of an unjust attack on person or property. I have no particular right to use a weapon I legitimately own to engage in aggression against someone else, and others may rightly interfere with my control over my property to stop me from doing so (as well as to require restitution, etc.).³⁸ The use of my property to rob another can (ordinarily) be clearly distinguished from uses of my property that are consistent with just property rules. So the possibility that there might be unjust uses of property need not make a moral or legal principle precluding all direct attacks on property being used justly unduly difficult to operationalize. It does, however, make the Golden Rule decisive, again, since without the Golden Rule (or some similar principle) it will be difficult to know just what uses will count as just or unjust. The argument does not feature any independent specification of just uses. Perhaps, for instance, any use that precludes someone else's access in an Aquinas/Locke-style cases will count as an unjust use.

Suppose, however, that we could provide a reasonable independent specification of just uses which was not simply a specification of the Golden Rule, so that the second argument I have envisioned could, in principle, do some further work in addition to the Golden Rule in safeguarding property rights if it succeeded. We would still need to determine whether the argument's premise, that purposeful or instrumental assaults on property rights are, at the same time, purposeful or instrumental assaults on basic goods, was correct. (Obviously, if they are not purposeful or instrumental, they would not fall foul of the Pauline Principle whether they affected basic goods or not.)

While there are many cases in which assaults on property will be assaults on basic goods (an attack on a painting may be both an attack on someone's property *and* an attack

³⁸ That others have the right to restrain me does not imply that they also have the right to permanently deprive me of the property I am using unjustly. Thanks to Roman Pearah for emphasizing the need to clarify this point.

on the basic good of aesthetic experience) it is hard to see that this will be true in every case. Using a computer to embezzle money from someone's bank account *could* be an attack on some basic good if its purpose was to keep someone from participating in that good (the thief might want the victim not to be able to pay medical bills and so to die; this would surely count as an attack on the good of life and bodily well being), but harm to a basic good might well be neither the thief's purpose nor an accepted means to some other end embraced by the thief. And it would be easy to identify a range of other cases in which an attack on someone's property did not count as an attack on any basic aspect of well being.

E. Conclusion

A set of mutually reinforcing, overlapping rationales rooted in the Golden Rule can ground robust individual property rights that deserve acknowledgement within legal systems and respect by individual moral actors. Such rationales will not, however, be absolute in character. Property rights rooted in the Golden Rule will almost certainly not be as sacrosanct as rights against purposeful or instrumental attacks on basic aspects of one's well being. Assaults on the latter are ruled out absolutely by the Pauline Principle; interference with the former will often be unjust, but need not always be.

Alternate approaches to grounding property rights that are as robust as rights against, say, purposeful bodily harm are hard to defend within the terms of NCNL theory. Ownership might qualify as a basic good, but its boundaries are relatively undefined. A limited number of items of property distinct from persons might be viewed as aspects of those persons' identities comparable to their bodies, and so subject to the same protections, but most items of property, even if clearly rooted in labor, are clearly distinct from their owners. Interfering with labor-based property after it is acquired is importantly different from compelling people to labor to acquire it, and so does not seem to fall foul of the moral prohibitions that preclude enslavement. And assaults on property need not involve purposeful or instrumental attacks on basic aspects of well being recognized as such by the NCNL theorists. An account of property rights consistent with NCNL theory will likely be rooted in the Golden Rule.

V. Conclusion

The NCNL theory gives pride of place to an account of human flourishing and a set of basic practical principles. It provides a straightforward grounding for the person-aspect of the NAP and, through a more tortuous path, strong support for a robust but non-absolute version of the property-aspect of the NAP.

1. The basic fairness considerations embodied in the Golden Rule will count against the cost shifting represented by many of the property regulations the NAP is rightly seen as attacking. Most people will resent being asked to pay for the realization of other people's aesthetic, religious, or cultural preferences or to pay for services they could obtain more inexpensively on the market; and, if they do, they will act unreasonably if they ask other people to do so. More generally, whatever judgments people tend to make about their own property rights will be judgments fairness will demand that they accept when reaching conclusions about others'.
2. Our participation in basic goods will characteristically involve the use of property. Attacks on someone's property will sometimes be ruled out precisely because they are also purposeful or instrumental attacks on basic goods.

3. Similarly, people often protect their property using their bodies, and attacks on their property will thus sometimes be inappropriate precisely because it involves using force purposefully or instrumentally in ways that harm people's bodies.
4. Acting out of hostility toward someone by harming her or his property will always be consistent with the Pauline Principle.
5. The overlapping considerations I have adduced in support of a property rights regime tend to provide mutually reinforcing, and so quite robust, justification for largely undisturbed property rights.
6. The NCNL theorists offer a set of rock-solid arguments against classical utilitarianism and its various consequentialist cousins: global consequentialism is, they show persuasively, incoherent.³⁹ That does not mean, of course, that expected consequences are never relevant to deliberation about reasonable action; but their reasonableness is to be gauged in light of the Golden Rule rather than in terms of a putatively objective metric that allows a "best overall state of affairs" to be identified. Multiple options are consistent with the demands of reason. So, while pragmatic considerations can certainly enter into moral deliberation, *global consequentialism* can not justify any sort of attack on someone's person, and can not be invoked in support of any infringement of someone's property rights.

A version of the NAP that can be defended on natural-law grounds—with the person-aspect rooted in the Pauline Principle and the property-aspect rooted in the Golden Rule—may not feature all of the elements preferred by some natural rights theorists, but it can provide moral grounding for the security of both persons and property. Instead of proceeding from a simple, free-standing, substantive value—self-ownership or life, for instance—a natural-law approach to the NAP renders this principle intelligible and defensible in light of a comprehensive moral theory. In so doing, it can make a modest contribution to justifying a norm that is basic to all civilized interaction and so, perhaps, to fostering the creation of a society in which that norm is more consistently observed.

³⁹ Grisez, G.: Against Consequentialism. *American Journal of Jurisprudence*, 23 (1978), 21–72.; Finnis–Boyle–Grisez: *op. cit.* 254–260.