

WHY THERE ARE NO DILEMMAS IN WIDERQUIST’S “A DILEMMA FOR LIBERTARIANS”

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KARL WIDERQUIST HAS RECENTLY ARGUED that libertarians face a dilemma.¹ The dilemma is that, if Widerquist’s arguments go through, libertarians can either “remain committed to natural property rights and drop their commitment to the moral necessity of a libertarian state or ... maintain their commitment to a libertarian state and drop or amend their principles of property rights.” (Widerquist 67) The problem is to be that the libertarian commitment to natural property rights does not necessitate the libertarian state. I call this the “Conceptual Dilemma.”

Widerquist poses a second dilemma. Libertarians can try to undermine state property rights by showing that the means by which all present states came to have their property were unjust. But doing so would presumably undermine almost all the property claims of private individuals. So the dilemma is that libertarians can undermine state property rights only by undermining individual property rights, on the one hand. On the other hand, libertarians can vindicate private property rights of individuals only by vindicating state property rights. (Widerquist, 52) I will refer to this as the ‘Empirical Dilemma’.

In this discussion I attempt to show that neither dilemma is genuine. The argument against the Conceptual Dilemma is that it relies on a mistaken characterization of the libertarian position. Simply, libertarians are not committed to there being a conceptual link between natural property rights and the libertarian, or minimal, state.

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¹Karl Widerquist, “A Dilemma for Libertarians,” *Politics, Philosophy & Economics* 8, no. 1 (2009), 43–72. All in-text citations to Widerquist are from this source.

I spend less time here discussing the Empirical Dilemma. I do try to show two things, however. First, the primary force of the Empirical Dilemma derives from the premise that libertarians are committed to there being a conceptual link between natural property rights and the libertarian state. Once the Conceptual Dilemma is resolved, the force of the Empirical Dilemma is mitigated. Second, I try to show that the Empirical Dilemma is not in fact a dilemma. It is instead a challenge to demonstrate who has just property rights: the government or private individuals. I do not try to settle this issue here. I instead argue that there is no reason to believe libertarians have failed to argue that at least some governments lack the property rights necessary to justify their treatment of private individuals. Put differently, libertarians have put forth evidence to show that in at least some countries private individuals hold private property rights which their governments are morally obliged to respect.

1 The Dilemma(s)

A terminological point needs to be made in order to frame this discussion. I will regard a genuine “dilemma” as a forced choice between two equally unacceptable alternatives. This is a fairly standard understanding of the notion and it fits with Widerquist’s general remarks. It must be kept in mind that the primary task of this paper is to show that Widerquist manages to raise nothing of this nature. Importantly, I do not demonstrate that libertarian arguments to resolve Widerquist’s Empirical Dilemma actually succeed. I lack the space and resources to take up a detailed defense of that conclusion here. Instead, I direct the reader to the attempts others have made to establish this conclusion.

Widerquist characterizes the libertarian as endorsing roughly the following three principles.² A—Individuals should enjoy equal maximal liberty and non-interference. (Widerquist, 43) B—Strong inviolable property rights without regard to the pattern of distribution of those rights. (Widerquist, 43) C—The libertarian state “which is either a government limited to protecting property rights and self-ownership, or no government at all.” (Widerquist, 44)

Widerquist implies that libertarians see there to be a conceptual link between A and B, on the one hand, and C on the other. On its most natural reading this “necessary link between” A and B, and C should be translated as

²Widerquist is careful to note that it is only Right libertarians who endorse A through C. Thus, he is not offering a criticism of Left Libertarians. Very roughly, Right Libertarians argue that self-ownership can properly yield disparities in wealth while Left Libertarians either deny this or limit the amount of disparities that can occur.

(A & B) \rightarrow C. Thus, if individuals enjoy maximal liberty and strong property rights, this must yield a libertarian state. I take it this is in line with Widerquist's suggestions.

Widerquist begins his argument by driving a wedge between these principles. There is no conceptual link between A and B, on the one hand, and C, on the other. The satisfaction of A and B does not entail C. (Widerquist, 44) This is the Conceptual Dilemma.

To illustrate this lack of entailment Widerquist has us imagine an island called "Britain." (Widerquist, 47) This island is appropriated in the state of nature according to the Lockean Proviso. The woman who acquires the island is now the owner and enjoys full property rights in it. She then sells indefinite tenancy rights to different people, but "she retains the right to charge a royalty on all titles... regulate the use of titles, and reclaim any rights granted under the title." (Widerquist, 47–48)³

Over time the commerce in Britain grows. The original appropriator begins calling herself "Queen" and her tenants "subjects." (Widerquist, 48) She uses the money she collects on titles to defend "the realm (and) give alms to the poor." (Widerquist, 48) The queen protects all the individuals within her realm and all the property rights in Britain. (The only property rights are her own, of course.) Thus, she now meets Nozick's two criteria for statehood: she has a monopoly over the use of coercive power and she protects all rights of those within her realm. (Widerquist, 48) Importantly, the nature of the Queen's income has not changed. And the Queen's power arose from "her inviolable libertarian property rights." (Widerquist, 48)

One brief correction to Widerquist's story needs to be made so that A is satisfied. Widerquist says the Queen's power arose only through her just exercise of her libertarian property rights and "not... consent of the governed." (Widerquist, 48) Surely the tenants must consent though, otherwise, the Queen's contract with them would not meet the libertarian's prohibition on coercion. The tenants must accept the terms of the Queen's contract; she cannot simply force them to do so without allowing them the opportunity to leave. We can, of course, stipulate that at least this much consent has occurred.

We now have a very non-libertarian government, but A and B are satisfied. This is the dilemma Widerquist poses: the libertarian can defend A

³I do not wish to challenge Widerquist on whether it is actually possible to appropriate land the size of Britain without violating the Lockean Proviso. If it is not, so much the worse for Widerquist. However, I wish to grant Widerquist this point and show that he still fails to generate a genuine dilemma.

and B, but have no principled argument for C. Alternatively, the libertarian can uphold C, but, as the story illustrates, this requires eliminating or severely mitigating the strong property rights the libertarian wants (principle B). Worse, holding C seems to require the libertarian to abandon the entitlement theory and adopt an end-state view of just holdings.⁴ (Widerquist, 59) Given the mileage libertarians get out of end-state criticisms, this is an unappealing option.

The Empirical Dilemma arises here if the libertarian argues that the story of the Queen is not literally true. Widerquist's historical addendum to this story is that the account most likely to be true is that states do hold many property rights while private individuals do not. Most of the entities which have laid claim to property have been states; and the fact that most early human societies were agrarian and tended not to make use of full private property rights also counts against the libertarian idea that current individuals have strong property rights in anything. Instead, for early societies, property was communal. (Widerquist 56–57) As I suggested above, if libertarians aim to undermine state property rights, they might also undermine many individual property rights. Conversely, if libertarians defend individual property rights, they will presumably be forced to admit that some state property rights are legitimate.

2. The Conceptual Dilemma

Here is something puzzling that happens in *Anarchy, State, and Utopia* (ASU, henceforth). Robert Nozick set forth the structure of ASU as follows. “Part I justifies the minimal state; Part II contends that no more extensive state can be justified.” (Nozick, xi) As mentioned above, Nozick characterizes the minimal state as one that fulfills only the two following conditions. First, it must protect the rights of everyone in a certain geographical territory. Second, it maintains a monopoly over the use of coercive power. (Nozick, 51) Thus, it might seem that Nozick endorses $[(A \ \& \ B) \rightarrow C]$ from above; but if we look at the last two (often ignored) sections of ASU, we find that this is not the case. Nozick does not endorse C in the manner Widerquist suggests.

In chapter 9 Nozick considers whether a “more than minimal state (might) arise through boycott.” (Nozick, 292) He imagines individuals refusing to participate in a social arrangement unless the state apparatus is much more extensive than the minimal state. He even considers individuals

⁴This is Nozick's term, of course. The term refers to a theory of just distribution which requires that the holdings in society be of a certain structure. Cf. Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974), pp. 153–59.

selling rights over themselves, including rights to prevent drug use, restrict trade, limit marriage partners and so on. (Nozick, 283) Individuals could sell all these rights to a single individual or corporation. If the entity holding the titles meets Nozick's two conditions on statehood, we would have a just non-libertarian state.

In chapter 10, his "Framework for Utopia" Nozick says, very reasonably, "the idea that there is one best society... for *everyone* to live in seems to me incredible." (Nozick, 311, emphasis original) Then, "the ultimate purpose of utopian construction is to get communities that people will want to live in and will choose voluntarily to live in." (Nozick, 317) Nozick then considers a sundry list of potential sorts of social arrangements and almost all of them clearly extend beyond the function of the minimal state. The only stricture Nozick places on these societies is that "no one can impose his own utopian vision upon others." (Nozick, 312) Thus, the only stricture Nozick imposes is that libertarian rights must not be violated. There is no suggestion that the libertarian state is the only one that is just.

It seems also relevant to note Widerquist's misreading of Murray Rothbard in this regard. Widerquist cites Rothbard's claim that taxation is robbery. (Widerquist 57) And Widerquist seems to regard this as evidence of the libertarian's belief that there is a conceptual link between A and B, and C. But this is to take Rothbard's most hyperbolic statement as representative of his actual position.

As Rothbard considers the issue of taxation he repeatedly returns to the question of whether the taxation in question is voluntary. Thus, he writes "anyone who persists in thinking of taxation as in some sense "voluntary" payment can see what happens if he chooses not to pay."⁵ Rothbard again returns to the question of whether taxes are voluntary when he considers the legitimacy of those who live off taxes.⁶ The point, then, is that even Rothbard does not see a conceptual link between A and B, and C. It is *possible* to have a non-libertarian state provided that state arises voluntarily.⁷

Of course, the fact that libertarians have said certain things is not necessarily the question. The question is whether libertarians can endorse principles A and B while denying that C necessarily follows. And it seems

⁵Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (Fox & Wilkes: San Francisco, 1978), p. 51.

⁶*Ibid.*, p. 53.

⁷I stress the "possible" here because Rothbard seems to grant only that such is possible. He does not take as seriously as Nozick the likelihood that individuals would choose to live in very unlibertarian states. In any event, Rothbard thinks *every* individual subject to taxes must consent to such taxes in order for them to be just.

Nozick shows us that the answer is clearly affirmative. The crux of Nozick's discussion in the final chapters of *ASU* is that libertarianism is compatible with a wide variety of voluntary social arrangements. As long as basic rights, as understood by the libertarian, are satisfied⁸, people may choose to live in whatever society they wish. So it seems the libertarian would have no qualms about choosing the A and B horn, while jettisoning C, at least in a sense. In the following section I try to make clear the role C plays in libertarian discussions. Once that role is understood, we can see why the conceptual link Widerquist takes to hold between A and B, and C, is mistaken.

3. Factual and Justificatory Readings

Imagine that I own a plot of land containing a pond. Without violating anybody's rights I put a fence around my plot of land. Because I know people will be tempted to hop over my fence and enjoy the refreshing water in my pond, I put up a sign saying "No Swimming."

Now, suppose on a hot summer day I invite some friends to my land and we decide to cool off by swimming in my pond. A passerby shouts "Can't you read the sign?" When I note that the land, and the pond contained within it, is mine, it seems I have justified the swimming that is going on. If the passerby is unmoved and insists that I am doing exactly what the sign forbids, he seems to be missing something important. And for the libertarian, what the passerby is missing is that property rights entail discretionary control over the exercise of a given right. When I invited my friends to swim with me, I waived my right to prohibit them from swimming in my pond.

The initial two paragraphs of this section aim at bringing to light a distinction. The distinction is one between a factual reading and a justificatory reading. Factual readings, say, are regarded as absolute. There is no way a factual proposition F can fail to obtain unless F is false.⁹ So if we read the libertarian view of the relation between A, B and C as a factual claim, Widerquist's dilemma arises. To be clearer, if libertarians say the conjunction of A and B necessarily yield C, then they are simply wrong.

A justificatory reading, on the other hand, tells us how things must be unless certain facts hold. In the case of my pond, nobody may swim in it unless I say otherwise. Likewise, the libertarian's view of the relation between A, B and C is that C is what holds unless individuals consent to not-C. The

⁸One could waive one's rights, of course.

⁹The factual proposition F, it seems, must refer to the present. If F refers to the future, its status may be indeterminate. I do not think this undermines the point I am making here. I thank Bill Glod for this point.

minimal state would thus mark the extent to which we could justify in regards to our treatment of those unwilling to contract with an enforcement agency. Thus, the minimal state could arise by just processes only if two conditions are met. First, the fact that many individuals have contracted to work with a single protective agency. Second, the fact that some individuals who come into close contact with members of the protective agency are likely to have their rights violated unless they are protected by the agency. However, if everybody agrees to a more extensive state, Nozick has no objection. So the minimal state is an all-we-can-have-without-consent claim.

Widerquist reads Nozick and other Right libertarians as arguing that a more extensive state is incompatible with maximal liberty and strong property rights. But Nozick's discussion from the latter chapters of *ASU* shows that a more extensive state is compatible with maximal liberty and strong property rights. Widerquist has only come up with another means by which the three principles may exist harmoniously. Given the arguments from sections 2 and 3, I conclude that libertarians do not take there to be the conceptual link between A and B, and C that Widerquist requires in order to generate a genuine conceptual dilemma. I thus turn to the Empirical Dilemma.

4. The Empirical Dilemma

The gravamen of Widerquist's discussion thus far is the manner by which the property owning monarch in Britain came to power. As Widerquist puts it, "It appears that (libertarians) have not considered whether the power to tax and regulate trade reflect divided ownership because they have believed that appropriation, voluntary transfer, rectification, and the state of limitations can only support *private* property." (Widerquist, 51, emphasis original) Widerquist tells us that "libertarians might be able to claim partial success in the USA, but such a victory would be dissatisfying if the same principles also imply full parliamentary sovereignty in Britain and autocracy in Russia." (Widerquist, 57) He then goes on to consider three kinds of arguments libertarians may offer to "rule out or limit full or partial government ownership of property, either in principle or based on particular history." (Widerquist 51)

If I have demonstrated that the Conceptual Dilemma is a false dilemma, we should see that there is no need for the libertarian to offer the principled argument against government ownership.¹⁰ The Empirical

¹⁰Of course, saying that there is no need to do so does not imply that there are no grounds for doing so. One means by which Widerquist attempts to block principled arguments against a property owning monarch is by arguing that Eric Mack's self-ownership proviso has no prospects of accomplishing this task. But Widerquist's

Dilemma thus poses the following challenge. Libertarians must demonstrate that the private property rights they defend are just. To avoid the conclusion that all, or at least some, government property rights are just, Widerquist suggests the libertarian has two options. The libertarian may implement a statute of limitations on property rights, but doing so would preserve some government property. (Widerquist, 52) Alternatively, the libertarian could abandon the statute of limitations, but this would undermine almost all claims of private property. (Widerquist, 52)¹¹

Before offering my suggestion about which approach the libertarian should take here, it should be clear that things are not quite as gloomy as Widerquist suggests. The libertarian is in a position to argue that even if Czar Nicholas once had just property rights, his actions abdicated those rights. The libertarian's criticism of Russian autocracy goes through largely because there was no presumption of consent of those governed by the autocrats. Further, walls and pistols precluding emigration, especially in the absence of any sort of consent, serve as notice that the libertarian principles of contract and legitimacy have been violated. Thus, while it may be dissatisfying for the libertarian that he lacks an argument showing that consensual autocracy is logically incompatible with libertarian principles, the empirical truth (based on those principles) that Czar Nicholas was murderer and his government unjust is at least some solace. Further, the libertarian's commitment to historical entitlements does not permit the sort of treatment of individuals that Czar Nicholas perpetrated. While a property owning monarch is possible, murder and imprisonment (by precluding individuals from leaving a country) are impermissible no matter on whose property they occur. Thus, the libertarian can still wage powerful criticisms of the Czar even if the Czar had just property rights.

With that issue out of the way, I want to suggest that the libertarian should endorse something like a statute of limitations. The version I suggest the libertarian should take up is suggested by Murray Rothbard, and is mentioned, though I believe misinterpreted, by Widerquist. Here is

interpretation of Mack is erroneous, or so it seems to me. I will allow the reader to decide. See Widerquist 62–65 and Mack's "The Self-Ownership Proviso: A New and Improved Lockean Proviso" *Social Philosophy and Policy* 12 (1995); see also Mack's "The Natural Right of Property" (forthcoming) in which Mack takes up considerations like Widerquist's.

¹¹It should be clear that Widerquist assumes government claims to property rights are just by the libertarian's standards. This is highly controversial as claiming land the size of Britain or the United States would presumably violate the Lockean Proviso. This is a point on which I do not challenge Widerquist, but it seems worth noting this significant assumption.

Rothbard's suggestion "Where the victims are lost in antiquity, the land properly belongs to any non-criminals who are in current possession."¹²

Widerquist interprets Rothbard as endorsing the same statute of limitations defended by Richard Epstein¹³. Widerquist spells out Epstein's statute of limitations as follows, "A cannot claim property against B because B stole it from C. Only C (or C's heirs) can make that claim. If B's title is older than A's, B's claim beats A's." (Widerquist, 46) He calls this the principle of 'Relative Title' and says Rothbard endorses without naming this principle in the line cited above from *The Ethics of Liberty*.

One thing that should be clear about the Rothbard passage is that he is not suggesting anything like the view Widerquist attributes to him. There are two reasons why this is so. The first is that the consequences of the principle of Relative Title are preposterous as Widerquist presents it. As Widerquist presents it, B gains a title by stealing it from C. This is a view no one, let alone a libertarian, should defend. Also, in Widerquist's scenario, it seems killing all of C's heirs is sufficient for eliminating any claim against the justice of B's holding. I will not consider whether Widerquist has adequately interpreted Epstein here, largely because I think Rothbard's actual suggestion is much more intuitive and promising.

The second reason, then, for doubting that Rothbard accepts the principle of Relative Title is that B's stealing property from A renders him a criminal. Thus, one of the conditions Rothbard places on a just title is not met by Relative Title, at least as Widerquist formulates it. More importantly, Rothbard's position clearly turns on the issue of whether we have any idea who the victims of past injustices are. In cases in which we cannot specify who has a claim to rectification we should hold the present titles as presumptively just, subject to correction by the arrival of new information. This is not so much an endorsement of the statute of limitations as it is an account of what we should do when we do not know who has an antecedent just claim to some particular bit of property. Notice also that Rothbard in no way commits himself to the claim that if the true title-holder is discovered, she would be owed nothing.

I am in no position to develop here the promising idea I see in Rothbard's suggestion. I only wish to suggest that there is nothing in it that obviously undermines the libertarian project. Indeed, it seems to me to be more in line with respect for self-ownership than, say, returning all property

¹²Widerquist cites Rothbard's *The Ethics of Liberty* (Atlantic Highlands, New Jersey: Humanities Press, 1982), p. 63

¹³Richard Epstein, *Simple Rules for a Complex World* (Cambridge, MA: Harvard University Press), 1995.

to the commons or turning it all over to the government. But I will not defend this idea here. Instead, I will round out this discussion by suggesting that Widerquist has ignored the vast amount of empirical data libertarians have presented to tackle Widerquist's Empirical Dilemma.

What needs to be noted is that Widerquist ignores almost entirely the many libertarian attempts to present *historical evidence* in favor of individual property rights. Rothbard himself sketches the classical liberal (or libertarianesque) roots of the constitution. He also discusses the quasi-libertarian Celtic states—states which we know were unjustly conquered by England. Widerquist never takes Rothbard or any other libertarian historians to task on these points.¹⁴

I agree, then, with Widerquist that private property rights are most likely be found in the United States. (See Widerquist, 56) Of course, I would disagree with his interpretation of the people's rights to change property rights protected by the Constitution. I think a proper interpretation of the Constitution (and the Founders' writings) shows that we are to have a republic which strictly limits the powers of any agent or group to infringe in the property rights of others. Randy E. Barnett's *Restoring the Lost Constitution: The Presumption of Liberty*¹⁵ nicely represents an attempt to meet Widerquist's challenge. The Empirical Dilemma, then, is one libertarians have attempted to meet; that is, libertarians think that (at least in America and perhaps many other places) they have the evidence Widerquist challenges them to produce.

One point needs to be made before closing out this discussion. This point deals with Widerquist's claim that titles are necessarily a governmental construction. When he considers historical objections to his Queen, Widerquist tells us that "for an individual to defend his property 'right', he has to trace the origin of his *title*, but a 'title' is a legal concept, owing its existence to government." (Widerquist, 52 emphasis original) However, this purported factual claim cannot function in an argument against the libertarian for two reasons. The first is that Widerquist makes this claim while trying to rebut the libertarian's historical objection to the Queen. Unless Widerquist demonstrates that all extant titles are tied to *legitimate* governments, he cannot

¹⁴For a discussion of how property rights can be, and have been, protected in the absence of any obvious governmental structure, see Bruce L. Benson's "Enforcement of Private Property Rights in Primitive Societies: Law Without Government" *The Journal of Libertarian Studies*, IX, no. 1 (Winter 1989); see also the wonderful collection of similar essays in Edward P. Stringham's *Anarchy and the Law: the Political Economy of Choice* (The Independent Institute, 2007).

¹⁵Princeton New Jersey: Princeton University Press, 2004. I do not wish to suggest that I agree with all Barnett's historical or conceptual claims. I wish only to note that Widerquist ignores efforts like Barnett's.

simply state that all current titles are legitimate *because* they are tied to governments. Indeed, Widerquist grants that in the United States, some pre-governmental property rights were protected when the United States was formed. (Widerquist, 56) Widerquist thus begs the factual question against the libertarian.¹⁶ Second, the libertarian denies that governments are required to generate legitimate titles. This is a normative claim.¹⁷ The fact that governments fail to recognize titles the libertarian recognizes as legitimate cannot be proof that the libertarian is wrong. Thus, Widerquist begs the normative question.

This paper has argued that Widerquist fails to pose a genuine dilemma for libertarians. The Conceptual Dilemma is based on a misunderstanding of the libertarian position. The Empirical Dilemma is one libertarians have been battling for years; and Widerquist's ignorance of this literature fails to cast doubt on the project's prospects for success. I have not demonstrated that libertarians win the day on the empirical front, but I have argued that libertarians have attempted to do so. Thus, since the conceptual and historical dilemmas are not actually dilemmas, the libertarian position is not an end-state position; just property owning governments are *possible*; and there is no new problem confronting libertarians.

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¹⁶See Benson's "Enforcement of Private Property Rights in Primitive Societies: Law Without Government" *The Journal of Libertarian Studies*, IX, no. 1 (Winter 1989).

¹⁷In Rothbard's discussion of Irish history he presents historical evidence that property rights existed and were respected despite the absence of anything resembling a state by today's standards. Cf. pages 231–33 in *For a New Liberty*. Also, see Joseph Peden's "The Stateless Society: Ancient Ireland" in *The Libertarian Forum* April, 1971.

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