

PROPERTY RIGHTS AND THE MAKING OF CHRISTENDOM

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The contemporary turmoil in Eastern Europe and the former Soviet Union reflects acceptance by their populations that collectivism has failed them and that they have more to hope for from the property rights systems of the West. In economic terms, indeed, Western culture has depended fundamentally on these rights, and in recent years economic historians have been paying increasing attention to them. In doing so, however, they have encountered a problem which they are unable to solve within the terms of their own discipline: economics relies on the concept of agents who act only according to rational self-interest, but property rights as they can actually be found in history have often reflected forces that can only be described as altruism. Economics is now therefore having to take account of cultural factors in the formation of property rights, and the deeper these are studied the clearer the religious influence on them appears to be.

I. "THE TRAGEDY OF THE COMMONS"

The earliest type of property must have been in the form of "exclusive communal" rights which, by establishing some form of defence against "outsiders," prevented the latter from sharing in a resource which a tribe considered to belong to it. It is plausible that the historical shift from hunting and gathering to settled agriculture depended on the development of such rights. However, the extent to which they can lead to prosperity on their own is quite limited. In what must be the most famous article on economics ever written by a biologist, *The Tragedy of the Commons*, Garrett Hardin used the analogy of a pasture open to all to describe how the pursuit of self-interest in any common property situation causes no problem at all as long as the limits of the resource have not been reached, but becomes altogether disastrous the very moment they are, when

the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to in-

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create his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.¹

II. INDIVIDUAL RIGHTS

The only way out of such a crisis is through the generation of individual property rights in the resource. These can completely reverse the effect of self-interest. Previously, this led an individual to act in a way which, when matched similarly by all the other users, would destroy their common resource. Now, it is in the interest of each property owner to act so as to preserve his own piece of property intact. The herd owner in Hardin's example will take care not to expand his herd beyond the grazing capacity of his patch of ground. So will all the other herdowners, also acting in their own interest, with the result that the entire resource is preserved. Even more important, it is now in each owner's interest to *learn* how to use his property to the best advantage. For the first time, there is a link between individual creative energy and investment in the generation of information. This learning process makes it possible to increase the output—frequently many-fold—from a resource which would have been destroyed if it had remained a commons. Innovation becomes possible. Private property rights can in fact "civilize" self-interest, by constraining it to serve the common good.

They can civilize self-interest, but they need not necessarily do so. Instead of submitting to the constraint which "civilizing" property rights imposes, the self-interest of individuals, often organized into pressure groups, can be directed towards *changing the property rights structure* to suit themselves. To the extent that such efforts succeed, they will also distort property rights in the direction of *inefficiency*:

The rise of impersonal rules and contracts means the rise of the state and with it an unequal distribution of coercive power. This provides the opportunity for individuals with superior coercive power to enforce the rules to their advantage, regardless of their effects on efficiency. That is, rules will be devised and enforced on behalf of the interests of the politically advantaged.²

1. Hardin, *The Tragedy of the Commons*, 1243, 1244 (1968).

2. North, *Institutions, Transaction Costs and Economic Growth*, 25 ECONOMIC INQUIRY 419, 421-22 (July 1987).

Such rights may still be able to prevent resources from being destroyed, but their power to underwrite innovation will be lessened.

Here is the nub of the problem for economists: our present levels of wealth could not possibly have been reached without vast amounts of innovation, for which efficient property rights in the past were necessary. These rights could not therefore have come about through the operation of self-interest alone, since this acts to produce *inefficient* rights that do not discipline it. Altruism must have been at work in some way, at the very least to counterbalance self-interested efforts to distort the property rights system.

There is an analogy here with the way in which the laws of any State, the ordinary rules of behaviour which govern and constrain the self-interested actions of individuals, are obeyed. Douglass North has pointed out that if enforcement of each and every one of these rules demanded use of the State's power, it would collapse under the weight of the policing costs. States are saved from such collapse by the observable reality that many rules are obeyed voluntarily by individuals even when it would be in their own perceived interest to break them. This happens, North holds, because individuals possess an "interconnected, comprehensive view" of their existence within a larger and at least partly intelligible system. Such a view he calls "ideology," which he sees as an economizing device that enables the State to dispense with enough policing effort to be able to survive. "Ideology is inextricably interwoven with moral and ethical judgments about the fairness of the world the individual perceives. . . . Strong moral and ethical codes of a society is the cement of social stability which makes an economic system viable."³

III. RELIGION AND CULTURE

But where are these "strong moral and ethical codes" to come from? The most convincing answer to this question comes from the work of Christopher Dawson. In a whole series of books, he argued his meticulously-constructed thesis that religion (a conscious orientation to a *cosmic order*) is the dynamic of all human social cultures. This is where social order originates, and its source cannot be found *within* social life. As Dawson put it, writing about Western culture:

The element of higher culture did not spring naturally from the traditions of the social organism itself, but came in from outside as a spiritual power which had to remould and transform the social

3. D. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 49, 47 (1981).

material in which it attempted to embody itself.⁴

Even the briefest survey of the history of the tension between self-interest and altruism in shaping the property rights of Western culture, adds substance to Dawson's thesis that religion has indeed been the dynamic element.

IV. CLASSICAL SOURCE

It was in Classical civilization that private property rights first emerged in a developed form. "[T]he Graeco-Roman world was essentially . . . one of private ownership, whether of a few acres or of the enormous domains of Roman senators and emperors, a world of private trade, private manufacture."⁵

Individual property rights in Rome applied to human beings through the institution of slavery as well as to land. The power of ownership (*dominium*) was *absolute* in the sense that it was hardly restricted at all in the general interest by public law.⁶ This is perfectly expressed by the employer in the parable of the labourers in the vineyard: "Am I not entitled to do just what I like with what I own?"⁷ These rights enabled specialization of production, trading over an extraordinarily wide geographical area, and entrepreneurship to develop.

The resulting prosperity was in sharp contrast to the situation in the East, where the characteristic type of rule in classical times was despotism. In this, the ruler was all-powerful, economic organization was built up on the principle of centralization and Government control as well as nationalization of all production in agricultural and industrial life. The ruler was all-powerful, and an individual could find himself deprived of his possessions and even of his life by arbitrary decision. No worse climate for entrepreneurial activity can be imagined.

With the passage of time, Rome moved in the same direction. Her economic and military strength had been based on the political freedom of large numbers of small landowners, and indeed these numbers increased with successful conquest through the policy of settling veterans (often slaves who had bought their freedom by serving in the army) on newly-acquired lands. But the combination of the military

4. C. DAWSON, *PROGRESS AND RELIGION* 167 (1929).

5. M.I. FINLEY, *THE ANCIENT ECONOMY* 29 (1973).

6. B. NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 153-57 (1962). *But see also* T. HONORE, *MAKING LAW BIND* ch. 8 (1987).

7. *Matt.* 20:15.

anarchy of the third century and the barbarian invasions forced Diocletian to replace the old institutions of the city state, which rested on private property, by a bureaucratic unitary state based on the principle of universal service.

Parallel with this was the growth of the large estates whose owners lived off the rents they could exact from their tenants. The property rights that were protected and enforced were no longer the *efficient* property rights which had contributed to productivity, entrepreneurship and the expansion of output and trade. The constraint on self-interest which directed it towards the common good was grievously weakened; those who had political influence were able to mould the property rights system towards their own interest. Gibbon commented that by the third century A.D., property ownership was highly concentrated in the hands of those who would not fight to preserve it, because at heart they did not believe they deserved to have it.⁸

V. EARLY CHRISTIANITY: INDIFFERENCE TO SECULAR LAW

It was only at this point that some of the Fathers of the Christian Church, both Western and Eastern, began to concern themselves with questions of ownership. Christ had taken the property rights of his milieu for granted. Apart from the parable of the labourers in the vineyard, the injunction to lend money without hope of return is only another of many instances which accept the contemporary concept of ownership.⁹ The communism of the primitive Church reflected conviction of the imminence of the *eschaton* or Second Coming of the Lord, which made social questions unimportant:

No one bothered with the legal questions connected with property, with entries in land registers and the like. The things of this age had become inessential. Organization was kept to a minimum, and in view of the intensive expectation of the return of Jesus, further forward planning was completely absent.¹⁰

St. Paul preached the need for productive work both by word and example, and shows no inclination to attack property rights as such.¹¹

However, as the Second Coming receded into an indefinite future, and as the Christian Church expanded within the increasingly exploitative property rights regime of the later Roman Empire,

8. E. GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* chs. 1-3 (1776-1778).
9. *Matt.* 5:42; *Luke* 6:30.

10. M. HENGEL, *PROPERTY AND RICHES IN THE EARLY CHURCH* 34 (English ed. 1973).

11. *Acts* 18:3; *1 Thess.* 4:12, 5:14.

Church thinkers began to *attack* these rights.¹² Ownership was now concentrated in the way Gibbon described, resulting in a proletariat juxtaposed to the conspicuous wealth of a very few. St. Basil the Great, for example, preached to the rich that their possessions had been given them only to distribute to others in need, and not to do this was robbery. St. Ambrose's target is precisely the expropriations and evictions which were extending the great estates (*latifundia*). St. John Chrysostom reinforces the argument of St. Basil by arguing that all great wealth can only have originated in injustice, since God in the beginning did not make one man rich and another poor. St. Augustine sets up against the absolute Roman property right, a right which is only a qualified one, dependent upon how wealth is used: "the one who uses his wealth badly possesses it wrongfully, and wrongful possession means that it is another's property."

VI. NATURAL LAW

The Churchmen were attacking the property rights system of their time because it was unjust. They could hardly be expected to advert to the fact that it was also *inefficient*. It was progressively less able to direct human creative energy and labour into productive channels—even, in the end, to the fundamental task of defending the Empire against the barbarians. As both political and economic structures collapsed, Church officials found themselves, as the only remaining source of order, progressively saddled with the *de facto* administration of many aspects of the later Empire. They had not sought these new responsibilities, and there was nothing in Scripture or their tradition to provide them with an intellectual warrant or guidance for an extension of their activity and authority into these new areas.

Instead, they found the intellectual justification they needed in the Stoic doctrine of Natural Law. This is clear from the pronouncements on property rights of the Church Fathers mentioned earlier. The Stoics' objective was to live in conformity with nature, whose laws they held human reason could discern. In its Roman version, their philosophy was essentially practical rather than speculative, and it was of course a practical guide that Christian leaders needed at that time. St. Basil praises those who use their property correctly and according to right reason; St. Ambrose uses the Stoic writers, Seneca and Epictetus, as authorities, as well as Holy Writ; St. Augustine's

12. C. AVILA, OWNERSHIP: EARLY CHRISTIAN TEACHING 45-58 (1983). References to individual Church Fathers *supra* 57-115.

emphasis upon the way mankind shares a common nature and a common universe reflects the very strong Stoic elements in his education. Indeed, wherever Christianity came into contact with social issues, Stoic influence became all-pervasive, under the guise of Natural Law:

[T]he fiction of a Christian Natural Law, which makes it possible to regard the State and Society as though both were ordered by one Christian law, will be the means through which it will become possible to speak of a Christian unity of civilization at all, and it is this alone which makes men able to believe in such a possibility . . . as a scientific theory it is wretchedly confused, but as a practical doctrine it is of the highest importance for the history of civilization and of social evolution—it is the real ecclesiastical doctrine of civilization¹³

The theocratic Christian culture of the middle ages was indelibly marked by the idea of Natural Law, and, as will be seen below, Natural Law was also an important element in Reformation thinking about economic matters.

VII. ADOPTION OF ROMAN PROPERTY RIGHTS: MONASTICISM

The attacks on ownership by the Fathers were one way in which the Christian Church sought to come to grips with the problems of secular society. However, there was a second way which, because it was positive rather than negative, proved to be far more creative. This was monasticism. It had started as a "society-rejecting" movement in the deserts of the East, but was transformed, primarily by the genius of St. Benedict, into the most positive formative force of Western culture. "It was the disciplined and tireless labour of the monks which turned the tide of barbarism in Western Europe and brought back into cultivation the lands which had been deserted and depopulated in the age of the invasions."¹⁴

The Carolingian age can be seen as an attempt to revive the corpse of the Roman Empire under the inspiration of Christianity. In it, the idea of Christendom as a unitary church-state emerged clearly for the first time, as did also a new, non-Roman root of secular law, the Christian ethos. This did not yet change the approach to property rights, for the obvious reason that the Carolingian culture was essentially monastic in character. Because of the barbarian invasions, the law of the jungle had by then replaced Roman law almost everywhere

13. I. E. TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES 160 (English trans. 1931).

14. C. DAWSON, RELIGION AND THE RISE OF WESTERN CULTURE 57 (1950).

outside the monasteries. The economic basis of the latter was exactly the absolute property rights of the Roman type against which the Church Fathers had preached. This, of course, was largely obscured because of the vow of poverty which was a key element of the monastic rule. No matter how rich his abbey might be (and some of them came to own vast properties, often greater in extent even than the *latifundia* of the later Empire) the individual monk himself owned nothing. Through this "fudge," the very same absolute property rights which had been so economically inefficient in the hands of the owners of the *latifundia*, became outstandingly *efficient* in the hands of the monks. The monasteries provided health care and alms to the poor, as well as being patrons of artists and providing a vital social principle which led to a revival of civilized living.

Silent men were observed about the country, or discovered in the forest, digging, clearing and building; and other silent men, not seen, were sitting in the cold cloister, tiring their eyes and keeping their attention on the stretch, while they painfully copied and recopied the manuscripts which they had saved. There was no one that "contended or cried out," or drew attention to what was going on, but by degrees the woody swamp became a hermitage, a religious house, a farm, an abbey, a village, a seminary, a school of learning and a city.¹⁵

VIII. FEUDALISM AND QUALIFIED PROPERTY RIGHTS

What did inaugurate a new kind of property right was the destruction of Charlemagne's Empire after less than a century by the barbarian invasions of Vikings, Saracens and Magyars:

The reign of law which Charlemagne and the ecclesiastical statesmen of the Carolingian Empire had attempted to impose was forgotten. . . . The rule of law and the political authority of the state had disappeared, and the only remaining principle of social cohesion was the direct personal bond of loyalty and mutual aid between the warrior and the chief, and that of service and protection between the serf and the lord.¹⁶

This was Feudalism, which provided whatever security was to be had in those chaotic times on the material basis of the self-sufficient manor and the wooden or earth castle. As a property rights system, it is in sharp contrast to the Roman type, through being heavily quali-

15. J. H. NEWMAN, HISTORICAL SKETCHES 410 (1876).

16. C. DAWSON *supra* note 14 at 102, 170. Also, see C. DAWSON, THE MAKING OF EUROPE 212-13 (1932).

fied instead of absolute. The "customs of the manor" were a set of expressed or implied contracts for an inter-related series of reciprocal rights and duties. *Villeins* or *cottars* held strips of land for themselves on condition of providing an agreed amount of work for the Lord of the Manor, who in turn provided a specified amount of manpower for military service to a greater Lord. Thus, duties corresponded to rights in a set of complex and carefully balanced property arrangements. Such a system may well have exploited the serfs and villeins, but it should be judged against the alternative the latter faced. Even the poorest set of property rights, backed by any power that can enforce them, leaves an individual unimaginably better off than a situation of every man for himself and constant warfare between the strong.

By the tenth century, therefore, Christendom had two quite different property rights systems, one of absolute ownership, going back to Roman Law and virtually synonymous with monastic ownership; and one of qualified rights, whose origin was the practical arrangements which had developed as a defensive response to the barbarian invasions. The monasteries suffered greatly from these invasions, but they also suffered from feudalism, since they became the prey of the new military adventurers, who often made them into fiefs for their families and followers.

IX. THE MEDIEVAL CITIES

In any event, however, the spiritual power of which the monasteries were an expression (especially once they were renewed by the Cluniac and Cistercian reforms) was the stronger force. Under its influence, the barbarian chief became a knight bound by a religious oath of chivalry, the territorial lord became an anointed king, and many of the monasteries themselves became the nuclei of medieval cities in which civic activities and civic spirit were hardly less intense than in those of the classical era. "The [medieval urban economy is] worthy of the Gothic architecture with which it is contemporary. It created [in every detail], and [one might say] *ex nihilo* [a system of] social legislation more complete than that of any other period of history, including our own."¹⁷

As part of that social legislation, the property rights of the medieval city took their cue from the qualified rights of feudalism, rather than the absolute rights of Roman law. The guilds, for example, con-

17. H. PIRENNE, MEDIEVAL CITIES 158 (English trans. 1925).

strained the economic activity of their members in many ways. Qualified rights, too, were to be those preferred by the philosophers and theologians of the time, in the intellectual synthesis they were attempting to build up between Christian revelation and the rationalism of rediscovered Greek philosophy.

It is clear from the historical record that in the medieval period, these property rights provided incentives for individuals to undertake the risks of extensive trading. Also, they provided a multiplicity of decision points concerning economic matters, something which is now recognized as a highly desirable condition for economic innovation. It is not surprising, therefore, that this period saw a growth in Europe of both population and commerce, a great increase in agricultural productivity, and many significant technological advances. Although the internal struggles which destroyed the medieval synthesis were ostensibly about theological and moral matters, Church/State relations and Church organization, and the corruption of the monastic ideal, they also reflected disagreements about who was to own this new wealth—in other words, about property rights.

X. THE REFORMATION AND ABSOLUTE PROPERTY RIGHTS

Consequently, in economic terms the Reformation is intelligible as a more intense focussing of forces which had been in evidence for a considerable time previously, rather than as a revolutionary event. These forces had seriously undermined the medieval system of constrained property rights well before the Reformation damaged them almost fatally.¹⁸

This can be seen with particular clarity in the case of usury which concerns the ownership of money. The religious prohibition of lending at interest in the absence of shared risk (explicit since 1312) was a serious diminution of ownership rights in money. The ban was progressively evaded by ingenious devices such as false leases instead of mortgages, up to the point when Calvin formally taught that it was *not* wrong to lend at interest. This teaching meant that owners of money were free to do what they liked with it, i.e. Calvin was defining its ownership in the absolute sense of classical Rome instead of the constrained sense of Christian Rome.

Calvin's re-definition of the meaning of ownership was not of course limited to ownership of money, just as it was eventually adopted far more widely than Calvinism was as a religious creed. The

18. R. SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 75-76 (1951).

Reformation was a reaction against the medieval Church-dominated cultural synthesis. Constrained ownership rights were part of this, and so came under attack from the Reformers. Naturally, this suited those whose business ambitions were adversely affected by the constraints, and how far Calvin was a follower of such interests rather than a leader, is one of the most interesting questions in the sociology of religion.¹⁹

Weber based his famous thesis, *The Protestant Ethic and the Spirit of Capitalism*, on three elements which he claimed were to be found in Protestantism—and especially in Puritanism of the Benjamin Franklin type—and not in Catholicism. These were: the "calling," "thrift" and "rationalism." For Tawney, who developed this thesis further in his *Religion and the Rise of Capitalism*, what mattered most was that

[t]he idea of economic progress as an end to be consciously sought . . . found a new sanction in the identification of labor and enterprise with the service of God. The magnificent energy which changed in a century the face of material civilization was to draw nourishment from that temper.²⁰

Linked to these intellectual changes of the time and probably as important as any of them, was rediscovery of the "natural law" philosophy of the Stoics by Grotius in the sixteenth century. This led to revival of the Roman concept that property rights should be absolute, i.e. unconstrained in the general interest by public law.²¹ One of Weber's most perceptive critics, Brentano, observed that "natural law" is inherently in tune with business. If the universe is rationally ordered, what "works" must be "right," i.e. success reflects being at one with the world and its Creator.²² Many changes in property rights had in fact been leading in this direction for several centuries before the Reformation. The increasing cost of new technology in warfare had forced feudal lords, first to exchange labour for rent, and eventually in many cases to yield ownership of the land to those who lived and worked on it. But there were many other ways in which this trend was also apparent. Trading over wider geographical areas and the beginnings of manufacturing, on however small a scale, were both associated with escape from constraints on ownership:

[P]roperty . . . was often hedged around in the pre-industrial period

19. K. SAMUELSSON, *RELIGION AND ECONOMIC ACTION* (English trans. 1961).

20. R.H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 249 (1926).

21. J.N. FIGGIS, *THE POLITICAL ASPECTS OF ST. AUGUSTINE'S CITY OF GOD* 99 (1921).

22. Quoted material in K. SAMUELSSON, *supra* note 19, at 12-14.

by restrictions on use and disposition and by complications of title. Land especially was caught up in a thicket of conflicting rights of alienation and usufruct, formal and customary, which were a powerful obstacle to productive exploitation. Over time, however, the nations of Western Europe saw an increasing proportion of the national wealth take the form of full property—full in the sense that the various components of ownership were united in the person or persons of the possessor, who could use the object of ownership as he saw fit.

Concomitant with this development and, indeed, implicit in it was the growing assurance of security in one's property—an indispensable condition of productive investment and the accumulation of wealth.²³

The revival of "full" or "absolute" property in the West therefore came about as part of a process of rejection of religious authority. Medieval Christianity had held elements of both classical and barbarian cultures together in its own synthesis. When it lost its creative power, these partially absorbed elements re-emerged in their individuality. The artistic component of Classical culture surfaced again as the Renaissance and the tribal cohesion of the northern barbarians revived as nationalism.²⁴ As part of this process Roman property rights—individual, absolute, and now sanctioned by the new religious teaching—re-emerged as the enabling dimension of modern *laissez-faire* capitalism. Not the least important of these effects was release of the extraordinary talent for business of the Jewish people. Their contribution to both the spirit and the mechanisms (especially the financial mechanisms) of the Western world has been out of all proportion to their numbers.²⁵

To illustrate this point, all of the stratagems which had been used in pre-Reformation times to evade the ban on usury increased the cost of capital, and reduced the amount of it that was available. Once it became accepted that money could be owned without constraint on how it was used, capital markets could develop, and did so very rapidly. Typical rates of interest in the seventeenth century were only one-tenth of what they had been in 1500.²⁶ This dramatic reduction in the cost of capital as a result of widespread acceptance of Calvin's teaching about interest, and of the (mainly Jewish) invention of credit

23. D. LANDES, *THE UNBOUND PROMETHEUS* 15-16 (1969).

24. C. DAWSON, *supra* note 4, at 178-79.

25. W. SOMBART, *THE JEWS AND MODERN CAPITALISM* ch. 6 (English trans. 1913).

26. D. NORTH & R. THOMAS, *THE RISE OF THE WESTERN WORLD* 142 (1973).

instruments, was surely a necessary condition for the enormous expansion in economic activity of modern times.

It is not a coincidence, therefore, that it was above all in the countries of the Reform that this activity originated, because these countries now had a property rights system that encouraged investment and risk-taking. By the eighteenth century:

[A] structure of property rights had developed in the Netherlands and England which provided the incentives necessary for sustained growth. These included the inducements required to encourage innovation and the consequent industrialization. The industrial revolution was not the source of modern economic growth. It was the outcome of raising the private rate of return on developing new techniques and applying them to the production process. Moreover, international competition provided a powerful incentive for other countries to adapt their institutional structures to provide equal incentives for economic growth and the spread of the "industrial revolution." Success has been a consequence of the reorganization of property rights in those countries. The failures—the Iberian peninsula in the history of the Western World, and much of Latin America, Asia and Africa in our times, have been a consequence of inefficient economic organization.²⁷

What eventually clinched the re-establishment of absolute property rights of the old Roman type, however, was the wars of religion. These wars were essentially about attempts to base civil society on a religious foundation. When the protagonists fought each other to exhaustion, they at last realized that this was no longer possible. Consequently, they had to find another reason for the existence of the State, and what they found was its function in securing the rights of private property. This, according to John Locke, the prime articulator of the mind of the age, is why men enter into civil society in the first place.²⁸

The era which followed was consequently one in which absolute ownership was elevated into the supreme value of society. This could not have happened except as part of a process of profound secularization, and the next stage of the interaction between property rights and religious values in the West can only be understood in such a context. The new valuation placed upon human creativity and emphasis upon the equal worth in this world of each individual, are both secularized versions of the medieval Christian teaching about individual salva-

27. *Id.* at 157.

28. J. LOCKE, *TWO TREATISES ON GOVERNMENT* II, § 124 (1690). See also *supra* §§ 87, 94, 123.

tion. Out of the first of these came our modern systems of intellectual property; from the second we obtained universal suffrage, with the vote in fact as a new kind of property right.

XI. THE ETHICAL ROOT OF INTELLECTUAL PROPERTY

Technology, the application of craft and art to practical problems, is indigenous to the culture of Christendom. It has even been argued that the very possibility of technology as it is known in the West depends upon a development that is found for the first time anywhere in the world in the monastic Rule of St. Benedict:

In the classical tradition, there is scarcely a hint of the dignity of labor.²⁹ In Antiquity learned men did not work, and workers were not learned.³⁰ The provision of St. Benedict, himself an aristocrat, that his monks should work in fields and shops therefore marks a revolutionary reversal of the traditional attitude towards labor.³¹ Moreover . . . a great tradition of learning developed in the abbey following his *Rule*: for the first time the practical and the theoretical were embodied in the same individuals. . . . The monk was the first intellectual to get dirt under his fingernails.³²

This novel ethical viewpoint, that productivity and wealth are the natural results of labour, consequently resulted in a more or less continuous series of valuable improvements in agriculture, in building techniques and in the harnessing of wind and water power.

In contrast to craft and art, it was quite otherwise with science, both pure and applied. This came to Christendom from outside, and quite late. The world dominance of Western applied science until it was challenged by Japan quite recently, has obscured this striking reality. Classical science was Greek and speculative, and since the genius of the Romans was essentially practical, they had little interest in it. The Christians of the Dark Ages in the West were the heirs of Rome, not Greece, in this as in so many other ways. Consequently, it was through Islam that the Greek scientific tradition was carried on. Only from the twelfth century onwards, and then from Arabic sources, did science begin to penetrate Christian culture in parallel with the rediscovery of Greek philosophy by the Schoolmen.³³

Moreover, in the process of absorption and transmission, science

29. L. WHITE JR., *MACHINA EX DEO* 64 (1968).

30. *Id.* at 65.

31. *Id.* at 64.

32. *Id.* at 65.

33. C. DAWSON, *MEDIEVAL RELIGION* 57-59 (1934).

changed from being a search for knowledge for its own sake, as it had been for the Greeks, to a search for knowledge as power over nature. Applied science, the latter type, is by definition carried on in an economic context. It is in fact a special case of Hardin's "commons," freedom in which, it will be recalled, "brings ruin to all." If any new information that is produced is going to be free for everybody to use, then nobody can rationally invest in producing it. As in the case of physical resources owned in common, therefore, there is need for individual property rights, not in this case to prevent the resource from being destroyed, but in order for it to come into existence at all. Such a right is *intellectual* property.

There is only the very faintest hint of a property right of this kind in Roman law.³⁴ It is first found in any substantial sense in Venetian patents for invention in 1474, and was soon followed by copyright, which was made necessary by the invention of printing.

Because science had come into Christendom through contact with the Arabs; in Italy, Southern France and Spain, it was at first part of the culture of the Counter-Reformation. Virtually all the early applications of science took place in Italy. Consequently, the first versions of intellectual property were essentially pragmatic devices for the transfer of the resulting innovations to other countries, and they had a limited economic impact. The point at which intellectual property coalesced with the economic dynamism of the Reformation was in the Constitution of the United States. The values of the men who framed this were expressed by Madison: "The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors."³⁵

This concept, like many other aspects of the natural rights thinking which inspired the members of the Continental Congress, reflected Christian teaching on individual salvation at one remove, in its secularized form of valuing individual creativity.

It is almost impossible to overstate how important to economic development these and subsequent intellectual property rights have been, adding as they do in Abraham Lincoln's words, "the fuel of interest to the fire of genius." They have underwritten unprecedented advances in technology and in the application of science to industry

34. In *Specificatio*, whereby a right could be obtained in some cases by the maker of something new out of existing materials. See H.F. JOLOWICZ & B. NICHOLAS, *HISTORICAL INTRODUCTION TO ROMAN LAW* 143 (1972); see also B. NICHOLAS *supra* note 6, at 136.

35. J. MADISON, *THE FEDERALIST* No. 43 (1788).

and especially to human health (patents); in education, publishing and the media (copyright); in marketing, the entire modern advertising industry and professional sport (trade marks); in greatly improved agricultural and horticultural productivity (plant breeders' rights) and in computers (semiconductor chip protection).

It is true that these laws today reflect the results of lobbying by interest groups far more than their ethical (natural rights) origin. Nevertheless, it is interesting to note that intellectual property rights are invariably limited in both time and scope, and are never absolute, as are property rights of the type that originated in classical Rome. This adds weight to the view that their development has been influenced by the qualified property rights of medieval Christendom, rather than the absolute property rights of classical Rome, or in these rights as revived by the Reformation.

It is surely also significant that none of the other great social cultures of the world has ever developed anything comparable to Western intellectual property rights. Islam, in fact, has difficulty in coming to grips with them at all, because it teaches that if a man has an idea, it has been given to him for the benefit of all his fellows, and it is therefore wrong that there should be ownership rights in it.³⁶ It is only within the Western tradition that it has been realized that for mankind to benefit economically from an individual's creativity, that creativity on its own is not enough. There must also be arrangements for it to be backed by the resources of society in the form of capital. By far the most effective arrangements of this type ever to have been developed are rights of intellectual property, and these are a unique product of the Christian tradition even if in a secularized form.

XII. REACTION AGAINST ABSOLUTE PROPERTY RIGHTS

This dual combination of property rights, both revived absolute ownership in the Roman sense, and intellectual property, generated unprecedented wealth and prosperity in the Western world. But these rights, with their derivatives in the laws such as that of limited liability, which underwrite the modern giant corporation, also concentrated wealth into fewer and fewer hands, just as it had done in Rome. They also made the bourgeoisie into the characteristic social class of the advanced countries. It is ironic indeed that the economic achieve-

36. Interestingly, Jefferson thought the same until convinced otherwise by personal experience of the working of the Patent system. See Federico, *Operation of the Patent Act of 1790*, 18 JOURNAL OF THE PATENT OFFICE SOCIETY 237 (1936).

ments of this class has never received greater praise than from its deadliest enemy, Karl Marx:

[D]uring its rule of scarce one hundred years, [the bourgeoisie] has created more massive and more colossal productive forces than have all preceding generations put together. Subjection of Nature's forces to man, machinery, application of chemistry to industry and agriculture, steam-navigation, railways, electric telegraphs, clearing of whole continents for cultivation, canalization of rivers, whole populations conjured out of the ground—what earlier century had even a presentiment that such productive forces slumbered in the lap of social labour?³⁷

In the days of the Old Regime before the French Revolution, the bourgeoisie had been allowed a position of privileged inferiority in which to amass wealth without acquiring direct responsibility or power. The French Revolution swept away the Church and the aristocracy as sources of influence on the formal rules of society, leaving the bourgeoisie as the only effective source of such rules. But since this class had been brought into being only by economic self-interest, it had nothing better than this to offer as a principle of the organization of society—and this is far from being enough. Self-interest directed to no higher objective than the amassing of still more wealth cannot provide the cement that is needed to hold a society together. The contrast with the prestige of the monasteries in their era of spiritual dynamism could scarcely be more marked. Their wealth had also been built up on the basis of absolute property rights, but a living religion caused this wealth to be directed largely towards social purposes.

It is precisely the lack of this element of social concern in *laissez-faire* capitalism that explains the violence of the reaction to bourgeois culture which spread throughout Europe during the nineteenth century. Proudhon's dictum that "Property is theft" and Brecht's question "What is the crime of robbing a bank compared with that of owning one?" are typical expressions of the passion which underlay it. Such criticisms, as well of course as Marx's own apocalyptic attacks, are uncannily similar to the anathemas uttered by the Church Fathers, also against the owners of wealth gained as a result of absolute property rights, quoted earlier in relation to the Roman Empire.

It was in Communism, which purported to represent the side of the proletariat in the class war, that antagonism to the contemporary

37. K. MARX & F. ENGELS, *THE COMMUNIST MANIFESTO* 85 (Penguin London ed. 1967).

pattern of property rights reached its extreme form. In Russia, where the gap between wealth and poverty was at its widest, the Revolution swept away individual property rights altogether. In Europe generally, the movement against property rights took a milder form, which was Socialism. This tempered reaction to *laissez-faire* capitalism owed much of its inspiration to Protestant Christianity. The Labour Party in Britain, for example, has always been largely Nonconformist in moral inspiration. In South America, Catholic reaction to absolute property rights which had brought about great extremes of wealth and poverty, also espoused socialism in its "liberation theology." This is at variance with official Roman teaching, which has always been anti-socialist. Because of the traditional influence of the idea of Natural Law on this teaching, the right to private property has been correspondingly endorsed. However, the abstract terms in which this right was expressed have been more appropriate to a pre-industrial society than to a modern one. Only in the immediate past has capitalism, defined as "freedom in the economic sector, circumscribed within a strong juridical framework," been given Papal approval.³⁸

The widespread growth of the Welfare State under socialist influence defused the most revolutionary forms of the reaction against absolute property rights. Religion, too, may be given credit for the fact that these forms of reaction never appeared to any significant extent in the United States. This is only partially because the strength of Puritanism there caused so much wealth to be directed to philanthropic or public purposes. Many like Andrew Carnegie, who both made great sums of money and gave them away, disclaimed religion as their motive. At least equally important was the way in which the Natural Law and Natural Rights philosophy on which the United States was based, inevitably moved the country in the direction of universal suffrage. In the Western world as a whole, this has probably been the most important single factor in taming the reaction against absolute property rights, and it can be shown that this is a new kind of property right in itself.

XIII. UNIVERSAL SUFFRAGE: THE VOTE AS PROPERTY

Representative assemblies of various kinds are as old as Athens, but virtually without exception until the present century, these were exclusively made up of property-owners, and males at that. The mod-

38. ON THE HUNDRETH ANNIVERSARY OF RERUM NOVARUM, CENTESIMUS ANNUS, Encyclical Letter (May 1991).

ern right to vote is quite different, in that the conditions of possessing it are no more than being a citizen of at least a prescribed age. Universal suffrage is a means of giving weight to numbers simply as numbers. This weight is given irrespective of whether or not the recipient possesses any other kind of power or property. Votes are now indeed frequently used *against* traditional property rights, to make up for the inevitable imperfection and consequent perceived unfairness of these.

As a special type of property right, the modern vote is analogous to ownership of money. Just as money is sterile in itself but can be exchanged for any kind of goods, the vote can be (and usually is) exchanged at election-time for promises by politicians. These promises relate to delivery of benefits to the voter, sometimes in the form of public goods, sometimes in terms of legal or other changes that will bring private benefit.

Although the franchise serves as a counterbalance to other types of property rights, it differs from them in that it is a *derived* right, because it depends upon the prior existence of these other rights to survive.

The alternative to property rights as means of organizing economic life is some sort of command system. In this, the citizens are dependent upon the state, just as to the extent that they *do* possess property rights, they are independent of it. If there is not enough independence from the state as a result of primary property rights, the derived property right of the vote will not be independent either. The franchise is capable of counterbalancing other property rights, but not the state itself. The historical evidence is that in a contest between the state and the electorate in the absence of property rights, it is the state which always wins, and the outcome is a parody of democracy, in the shape of one-party rule.

Dan Usher has shown in a most rigorous theoretical analysis, why this is inevitable.³⁹ His study makes it clear that unless a substantial proportion of all incomes arises outside of the political process (i.e. as a result of property rights which make their owners independent of the state) democracy cannot survive. There is nothing easier than to find contemporary examples which prove his case. Nowhere in the world are public affairs run through the ballot-box more than in Switzerland, where even questions such as lengthening the runways at Geneva airport are the subject of a referendum. But equally, there is no country in which property and incomes are more

39. D. USHER, THE ECONOMIC PREREQUISITE TO DEMOCRACY 7-8 (1981).

independent of the State. In stark and unhappy contrast, in most of the Third World, consulting the electorate is largely a sham, because of lack of independent property there for the franchise to counterbalance. It is through lack of genuine individual property rights that all the countries where the Colonial powers left one-person-one-vote, either replaced it quickly with some form of authoritarian regime or are constantly on the brink of doing so. The tripartite balance between the state, the right to vote and other kinds of property rights is a fragile one.

How was universal suffrage arrived at? In the long progression to it throughout the nineteenth and twentieth centuries in the Western world, there have no doubt been instances when an extension of the franchise was brought about by fear of revolution or as a stroke of party political policy. Both of these factors are certainly to be found in efforts to defuse the explosive reaction to absolute property rights. But at least equally widespread was acceptance of the value of individual human beings, which is a secularized version of Christian teaching. Universal suffrage can be regarded as the conscience of property. The vote as a special kind of property right is therefore yet another case where the influence of religion cannot be ignored in the informal, cultural context within which formal rules, especially rules relating to property, are established.

XIV. PROBLEMS OF CONTEMPORARY PROPERTY RIGHTS

Collectivism tried to solve the perceived injustices of absolute property rights by getting rid of them, altogether in the case of Communism and partially in that of Socialism. It is tempting to see a scriptural analogy for this in the solution to the problem of tares in the field which destroys the wheat as well.⁴⁰ Now that collectivism is in world-wide eclipse, brought about by its inability to deliver its economic promises, the mixture of failure with success in existing property rights systems, has to be faced directly again in all its complex intermingling of self-interest and altruism. What is at issue was very well posed by John Stuart Mill:

The laws of property have never yet conformed to the principles on which the justification of private property rests. They have made property of things which never ought to be property, and absolute property where only a qualified property ought to exist. They have not held the balance fairly between human beings, but have heaped

40. *Matt.* 13:29.

impediments on some, to give advantage to others; they have purposely fostered inequalities and prevented all from starting fair in the race. That all should indeed start on perfectly equal terms, is inconsistent with any law of private property: but if as much pains as has been taken to aggravate the inequality of chances arising from the natural working of the principle, had been taken to temper that inequality by every means not subversive of the principle itself; if the tendency of legislation had been to favour the diffusion, instead of the concentration of wealth—to encourage the subdivision of the large masses, instead of striving to heap them together; the principle of individual property would have been found to have no necessary communion with the physical and social evils which almost all Socialist writers assume to be inseparable from it.⁴¹

Private property rights establish the conditions for economic growth by forcing individual self-interest into channels where it serves the common good, instead of working against it so as to result in the tragedy of the commons. There is obviously a range of degrees of "efficiency" between the two extreme outcomes, depending upon how well the property rights regime corresponds to the prevailing economic environment. It is inevitable, too, that there should be a constant tension between self-interest and property rights when these rights are acting to "civilize" self-interest for the common good. The contemporary version of this problem is quite new in that it presents itself in terms of an equation with property rights on *both* sides. This is because of the way in which the right to vote now interacts with other individual property rights. Attempts to escape from the constraints which "efficient" property rights impose are now directed towards capturing critical sections of voting power, so as to shape legislation in a desired way:

We may observe a notable expansion in the range and extent of collective activity over the last half century—especially in that category of activity appropriately classified as differential or discriminatory legislation. During the same period we have witnessed also a great increase in investment in organized interest-group efforts designed specifically to secure political advantage.⁴²

This process can be explained by Mancur Olson's theory of "distributive coalitions." These lobby in democratic societies for law which suits them, their objective being to modify the pattern of property rights. Such groups "have the incentive and often also the power

41. 2 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* ch. I, § 3 (1848).

42. J.M. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 289 (1962).

to prevent changes that would deprive them of their enlarged share of the social output."⁴³

As more and more of any society is taken over by such influences, therefore, its pattern of property rights becomes unjust as well as inefficient. In this context, Gibbon's observation, referred to earlier, can be taken as meaning that the law-making and policing apparatus of the Roman State had been captured by what Olson would call "distributional coalitions." In our own times, the effects of such coalitions are evident in the property rights systems that produced junk bonds and the savings and loan debacle in the U.S., the mountains of unsaleable agricultural produce in the European Community, the modern *latifundia* of Latin America or the corruption that is endemic to commerce throughout Africa. These are manifest failures of commission. There are also failures of *omission* which leave many aspects of economic life in the global village as a "commons," with corresponding future ruin through self-interest in prospect. The issues which concern the "green" movements internationally will all be found to be of this latter type.

XV. EASTERN BLOC DISILLUSIONMENT?

Because voting rights are only a counterbalance to other kinds of property rights, democracy on its own cannot produce prosperity. This may yet cause much disillusionment in those countries that are now emerging from the collectivist experiment. The reaction to the latter's economic failure has expressed itself in the first instance as a demand for voting rights. But since the franchise is a derivative kind of property right, economically effective only as a counterbalance to other types of property, introducing the counterweight on its own is not enough. The regimes that are moving in this direction are also talking about placing more reliance upon market forces in their economies, a process which some call "market socialism." This is a chimera, however, since genuine markets can only develop to the extent that the State ceases to intervene in the economic process and is content to make and impose impersonal rules covering the actions of independent agents. It is possible to have property rights without markets, but it is not possible to have markets without property rights.⁴⁴ Whereas universal suffrage can be introduced or re-introduced quickly, the other property rights on which markets depend,

43. M. OLSON, *THE RISE AND DECLINE OF NATIONS* 144-45 (1982).

44. Y. BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* (1989).

grow only very slowly and, as it were, organically. Markets are not natural phenomena. They are human artifacts, arising out of, and completely dependent upon individual property rights. The complex systems of property rights on which Western wealth has been based, and which still prevail in those countries where markets (however imperfect) are in existence, took many centuries to evolve. It may well be that they cannot be restored in or transplanted to the countries of the Eastern bloc, within the time-span that their new electorates will accept. In that case, pressure for reversion to an authoritarian form of rule might not have the same fortunate outcome as the 1991 attempted coup in the Soviet Union.

On the positive side, reverting to an economic system based upon property rights offers great opportunities for any of these countries to gain "first mover" advantages in institutional change. Instead of blindly copying Western property rights which have become inefficient to the extent that they have been shaped by interest groups, it is open to such countries to devise new ones which reflect their own fresh start. Just as in the West every forward economic thrust has involved an identifiable change in the law which regulates how business is done, so in the former Iron Curtain countries new creative legislation could release untapped resources of entrepreneurial energy.

XVI. HOW CAN WE GET EFFICIENT PROPERTY RIGHTS?

Even from such a brief and necessarily superficial historical survey, therefore, there seems to be no escape from the conclusion that the source of efficiency in property rights has to be sought *outside* the economic sphere, in some spiritual dynamic of social cultures. Altruism is indispensable if self-interest is not to be dominant in shaping the laws which confer property rights. It is upon these laws that we depend for the "civilizing" of self-interest, which has shown itself to be the best formula for economic progress yet discovered. This progress is uneven and has its debit side, but only a crank would claim that its overall balance is not positive, and substantially so.

We know little enough, indeed, about how to get property rights that are efficient as well as just. It seems reasonable, however, to start from the principle that rights which are solely the result of lobbying by self-regarding power should be identified as such and eliminated as far as possible. In this context, Usher, for example, has pointed out that: "[p]roperty, if it is to be justified at all, must be justified in the interest of the propertyless, or at least in the interest of the majority of

voters whose property is small by comparison with the great fortunes.⁴⁵

This, he holds, demands that property rights should be defined more restrictively and with more room for public intervention than libertarians or pure free-enterprisers would allow. His ideas find support from contemporary analyses of the philosophic basis of property rights. According to Stephen Munzer, the three principles of justification of property rights—utility, justice and desert based on labor—support moderate egalitarianism concerning the distribution of private property; favor workers' rights within large business corporations and substantial taxes on large gifts and bequests; and justify a good deal of government regulation of rights.⁴⁶ Lawrence Becker finds "four independent and sound lines of general justification for private property—two from labor, one from utility (buttressed by two economic variants) and one from liberty."⁴⁷

Assuming that the preservation of a democratic political system is a moral necessity, new measures will have to be devised to limit accumulations. The present tax structure and the old rule against perpetuities are not capable of preventing the accumulation of vast wealth in management, use, and transfer rights—wealth of the sort possessed by corporate boards, trustees and the like; wealth which confers political power in quantities sufficient to undermine the democratic ideal.⁴⁸

Becker's conclusions are supported by those of Jeremy Waldron, who writes in the Hegelian political tradition and consequently sees private property as a right that all men have rather in the way they are supposed to have the right to free speech or to an elementary education; not because they have contingently acquired it, but because its recognition is part and parcel of respect for them as free moral agents.⁴⁹

The implications of this are not strict egalitarianism or anything like it; they

are requirements that everyone must have private property in some significant holding, not that everyone must have at most a certain or an equal amount . . . [involving guarding against] tendencies towards the accumulation of enormous holdings, particularly of capital resources, on the one hand, and the accompanying develop-

45. D. USHER, *supra* note 39, at 8.

46. S. MUNZER, A THEORY OF PROPERTY 469 (1990).

47. L. BECKER, PROPERTY RIGHTS 99 (1977).

48. *Id.* at 117.

49. J. WALDRON, THE RIGHT TO PRIVATE PROPERTY 444 (1988).

ment of long-term propertylessness, on the other.⁵⁰

Perhaps Becker's reference to the "democratic ideal" points to an important factor which needs to be taken into account in the search for efficient property rights. As discussed earlier, the amount of democracy an economy can stand depends upon how much *independent* property it contains. In a similar way, the degree of "absoluteness" that property rights can have and still be efficient probably depends upon the otherworldliness of those who work under them. In their day, the monks of the West were able to make absolute property rights humane as well as efficient in ways that neither the later Romans nor the modern bourgeoisie were able to do. This suggests that in a society which is less informed by spiritual values, fruitful property rights can only be devised, incorporated into law and administered, on a *qualified* basis. Absolute ownership is too dangerous for a society which is held together by weak non-economic ties.

In the making of Christendom, the threefold tension between self-interest, individual property rights and the power of religious ideals was enormously fruitful in its economic consequences. With waning of belief, that tension slackened, resulting in property rights that are in evident need of modification and improvement. Learning how to meet this need is a task which calls for special attention now that the formerly supposed alternative of collectivism is everywhere in ruins.

The scriptural injunction to be as wise as serpents and as innocent as doves seems to look for a curious mixture in human conduct.⁵¹ Perhaps this mixture in fact is the equally remarkable one that is needed if we are to obtain the benefits of efficient property rights: self-interest in acting within the laws but altruism in formulating them.

50. *Id.* at 438-39.

51. *Matt.* 10:16.