Libertarianism and Pollution

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I. Introduction

Libertarianism is a species of political philosophy distinguished by its commitment to strong rights of private property, free markets, and strictly limited government. Most libertarians believe these institutions to be justified on both pragmatic and moral grounds. So, they think, free markets are to be praised not merely because they produce efficient outcomes, but also because they embody respect for individual rights. For libertarians, individual rights to private property and freedom of contract are thought to be relatively inviolable, and to place strict limits on the scope of permissible regulation by government. My right to my justly acquired property does not give way merely because you happen to need it more, or even because the welfare of society as a whole could be greatly improved by overriding it. If seizing my land through the exercise of eminent domain is the only effective way of building a public highway then, libertarianism must conclude, so much the worse for the public. Or at least for its highway.

Because of its support for strong rights of private property and relatively unregulated capitalism, libertarianism is often perceived as being fundamentally incompatible with the kinds of policy goals demanded by a thoroughgoing commitment to environmentalism. And many libertarians themselves, by their often hostile rhetoric toward environmentalism, seem to have gone out of their way to confirm this perception (see, for example, Rand 1999).

Despite this common perception, however, a libertarian regime of strong private property rights might actually better serve environmental values than commonly proposed policies that undercut or infringe upon such rights. It is true that respect for libertarian property rights would in some cases serve as a block against certain forms of environmental regulation. Libertarians believe, after all, that government may not legitimately restrict what a company does with the land or natural resources in which it has a valid property right. It is vitally important to remember, however, that it is not merely the property rights of business that libertarians are committed to protecting. Other people have property rights too – both in whatever land and other resources they might own and, by virtue of their self-ownership, a kind of property right in their person that makes it impermissible to physically intrude against their body without their prior consent. Businesses have a right to do what they want with their own property, but they have no such right when it comes to the property of others.

This simple fact has profound implications for the libertarian position on environmental issues, especially when it comes to the issue of pollution. Indeed, the libertarian commitment to property rights is so absolute, and so far-reaching in its implications, that it actually flips our initial worry about libertarianism on its head. Once we consider the full implications of respect for libertarian property rights, it appears that the real problem with libertarianism isn’t that it’s not sensitive enough to environmental considerations, but that it is too sensitive by far.

This paper will examine the implications of libertarian political philosophy for the problem of pollution. Its focus will be on the kind of rights-based libertarianism embodied in the work of Robert Nozick, Murray Rothbard, and Eric Mack, though the concluding section will also briefly discuss the more consequentialist libertarianism derived from the work of Friedrich Hayek and Ronald Coase. Section II will begin with a discussion of the libertarian emphasis on property rights, and the implications of those rights for environmental policy. Section III will go on to explain why those implications are more radical, and more implausible, than they might at first appear.
Section IV examines various libertarian attempts to avoid those implausible conclusions. And section V concludes with a discussion of consequentialist libertarian approaches to the problem of pollution, and how those considerations can and must be a part of, rather than a substitute for, a coherent libertarian theory of environmental justice.

II. Taking Property Rights Seriously

Among academic philosophers, the best-known version of libertarianism is that articulated by Robert Nozick in his 1974 book, *Anarchy, State, and Utopia*. In that book, Nozick defends a form of minimal-state libertarianism based on a roughly Lockean conception of individual natural rights. For our purposes, two features of that conception are particularly relevant: Locke’s commitment to each individual’s right of self-ownership, and his commitment to their right to acquire private property in external resources through a process of homesteading and voluntary exchange.

For Locke, the most fundamental sort of property right is each person’s ownership of his or her own person. “[E]very man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his” (Locke, Second Treatise, Book 5, Sect. 27). Because each person has property in her own self, and because all are governed by a law of nature that “teaches all mankind...that...no one ought to harm another in his life, health, liberty, or possessions,” it follows that each person has a right against others not to have harms imposed on her body without her consent (Locke, Second Treatise, Book 2, Sect. 6).

Each person’s right of self-ownership also, for Locke, grounds their moral right to acquire legitimate property rights in external resources such as land, minerals, and crops. Because each individual owns the labor of her body, she can come to own these external resources by “mixing her labor” with them. “The labour that was mine, removing them out of that common state they were in, hath fixed my property in them” (Locke, Second Treatise, Sect. 28). But because God has given the earth to mankind for their common use, no individual may appropriate so much to herself that she fails to leave “enough, and as good...for others.” Subject to this proviso, however, private property in external resources is not only permissible, but necessary in order for individuals to preserve themselves and flourish.

For Robert Nozick, Lockean rights to self-ownership and private property take the more specific form of “side constraints” against aggression (Nozick 1974). These side constraints strictly limit the actions others may permissibly take in pursuit of either their own good, the good of the right-holder his or her self, or any conception of a greater social good (ibid.). Predation, paternalism, and utilitarian trade-offs are thus prohibited in almost all circumstances, save perhaps for those (presumably quite rare) cases in which respect for rights would lead to what Nozick described as “catastrophic moral horror” (ibid.).

Nozick invites us to imagine individual rights as a kind of “line (or hyper-plane) [that] circumscribes an area in moral space around an individual (ibid.).” Actions that “transgress the boundary or encroach upon the circumscribed area” are to count as infringements of those rights. And, in general, such infringements may be justly prohibited. Murder, theft, and assault all involve the crossing of an individual’s moral boundaries without his or her consent, and are all therefore properly criminalized by the libertarian minimal state.

The Nozickian theory of rights as side constraints is a controversial doctrine. Many theorists, including but certainly not limited to consequentialists, will worry that the absolutism of these rights renders them too incapable of responding to the kind of trade-offs that seem necessary in a morally complicated world. But at least a certain level of immunity seems to be an important part of our ordinary understanding of both rights in general, and property rights in particular. The common law tort of assault, for instance, prohibits others from touching your body without your consent, regardless of whether that touching causes you “harm” or not. And common law trespass prohibits anyone from entering your land, or causing some object or person to enter your land, without your consent (Glannon 2010). Neither of these rights is conditional on the cost-benefit analysis turning out the right way. The benefit you receive from touching me without my consent might be greater than the harm I suffer. And society as a whole might be better off if you could trespass across my land. But neither of these facts, even if uncontestably true, would serve as a valid defense against the tort.
On its face, the libertarian commitment to strong rights of private property would seem to provide a strong basis for opposing environmental pollution. For many of the most worrisome forms of pollution can be understood as a violation of property rights. In the words of libertarian and former Reagan White House official Martin Anderson,

Just as one does not have the right to drop of a bag of garbage on his neighbor’s lawn, so does one not have the right to place any garbage in the air or the water or the earth, if it in any way violates the property rights of others. (Anderson 1989)

A pro-business conservative might be willing to tolerate some pollution of this sort. After all, pollution is often a byproduct of productive economic activity, and productive economic activity is the key to long-term economic growth. But a principled libertarian should have no truck with this argument. Just as property rights may not be sacrificed for government regulations that purportedly serve the public good, neither may they be sacrificed for business interests that do so. Taking property rights seriously means taking pollution seriously. Anderson thus has little patience for the policy of Tradable Pollution Permits:

Now some even seriously propose that we should have economic incentives, to charge polluters a fee for polluting — and the more they pollute the more they pay. But that is just like taxing burglars as an economic incentive to deter people from stealing your property, and just as unconscionable … What we need are tougher clearer environmental laws that are enforced — not with economic incentives but with jail terms.

In his rejection of economic cost-benefit analysis in favor of a principled opposition to pollution, Anderson mirrors the doctrine of Murray Rothbard. Rothbard, one of the most influential libertarian theorists of the twentieth century, frequently defined libertarianism in terms of its commitment to the “non-aggression axiom,” a principle which holds that “no man or group of men may aggress against the person or property of anyone else,” where aggression is understood as “the initiation of the use or threat of physical violence against the person or property of anyone else” (Rothbard 1973).

Like Anderson, Rothbard held that pollution was to be condemned as a violation of property rights. In his 1973 book, For a New Liberty, Rothbard wrote that the “vital fact” with respect to air pollution is that

the polluter sends unwanted and unbidden pollutants—from smoke to nuclear fallout to sulfur oxides—through the air and into the lungs of innocent victims, as well as onto their material property. All such emanations which injure person or property constitute aggression against the private property of the victims. Air pollution, after all, is just as much aggression as committing arson against another’s property or injuring him physically. Air pollution that injures others is aggression pure and simple. (Ibid.)

Like Anderson, Rothbard had little patience for the Chicago School argument that pollution could be justified by a kind of cost-benefit analysis, writing that such arguments are “as reprehensible as the pre-Civil War argument that the abolition of slavery would add to the costs of growing cotton” (Ibid.). For Rothbard, matters of basic moral principle trump merely pragmatic considerations. If stopping aggression sets back economic progress, then so be it. Such is the price of respect for human rights.

In many ways, then, the libertarian commitment to strong rights of private property actually seems capable of providing much stronger grounds for opposing pollution than alternative political ideologies, such as Rawlsian liberalism, are capable of providing. Insofar as industrial pollution violates the property rights of landowners downriver, nearby foresters whose trees are damaged by acid rain (see Dolan 1990), or individual persons whose lungs are intruded upon by airborne pollutants, that pollution constitutes aggression and should be prohibited. Indeed, as long as we make the not unreasonable assumption that some of the harms associated with global climate change constitute a violation of property rights, there is no reason why the libertarian framework could not be extended to address even this most difficult and challenging of environmental problems.
III. Ending Pollution: An Impossible and Implausible Demand

Libertarianism’s radical critique of environmental pollution is exhilarating, and an important reminder of the way in which its principled support for free markets and private property stands sharply at odds with a conservative apology for the corporatist status quo. Indeed, upon reflection it may appear that libertarianism’s real problem is not that it is not radical enough when it comes to the protection of the environment, but that it is too radical.

David Friedman, himself a libertarian but a critic of the kind of natural rights position espoused by Locke, Nozick, and Rothbard, was the first to point out the problem:

[C]arbon dioxide is a pollutant. It is also an end product of human metabolism. If I have no right to impose a single molecule of pollution on anyone else’s property, then I must get the permission of all my neighbors to breathe. Unless I promise not to exhale. (D. Friedman 1989; see also J. Friedman 1992 and Sagoff 1992)

Light pollution, too, constitutes a physical, nonconsensual invasion of one’s neighbor’s property. This is obvious enough if we consider, as Friedman goes on to ask us to do, a case in which you fire a thousand megawatt laser beam at your neighbor’s front door. But is shining a flashlight at your house any less a violation of your right against unconsented-to boundary crossings? Is lighting a match within eyesight of your property?

There is a sense in which questions like Friedman’s are puzzles for any view that takes individual rights seriously. Libertarians are not the only theorists who believe in property rights, and any view that takes property rights seriously will have to draw a line between permissible and impermissible infringements on those rights.

Nevertheless, the problem is especially pressing for libertarians, for reasons having to do the distinctive and relatively absolutist character of libertarian property rights. On the libertarian view, property rights can be justifiably overridden only in very unusual situations and only by the very weightiest of competing moral concerns, if at all. Libertarians of the Rothbardian/Nozickian type hold, for instance, that a person’s property right in his justly acquired wealth is so strong that it would be impermissible to steal (or tax) even a nickel from him, no matter how great a social benefit we could produce by doing so. But this seems to commit libertarians to the extremely demanding view that it is equally wrong to impose a nickel’s worth of damage on one’s neighbor through pollution. In the same way that the libertarian’s property absolutism leads her unable to recognize any morally significant difference between excessive and acceptable levels of taxation, so too is she unable to distinguish between relatively serious and relatively trivial forms of pollution.

It is hard to see how libertarians could back away from the (unwanted) radical implications of respect for property rights on the issue of pollution while maintaining the (wanted) radical implications with respect to theft, taxation, and regulation (see J. Friedman 1992). But it is not at all hard to understand why libertarians would be very strongly motivated to do just this. After all, to describe the environmental implications of a strict libertarian respect for property rights as “radical” is a severe understatement. The demands that libertarianism seems to place on us go far beyond asking us to recycle more of our wasteproducts, bicycle more to work, or pass a few more laws for the protection of wilderness areas. Indeed, not even the complete abolition of the automobile or electrical power would seem to go far enough. The only way to ensure that the actions of one human being do not cross the moral boundaries surrounding any other human being in even the slightest of ways is to abolish human society altogether (cf. J. Friedman 1992). Libertarianism’s apparent demand that we eliminate pollution altogether thus appears to be an impossible and grossly implausible goal.

IV. Backing Away from Environmental Radicalism

There is still relatively little literature addressing the problem of pollution from the perspective of natural rights libertarianism. However, a few prominent libertarians have recognized the scope and importance of the problem, and have made arguments that purport to show that libertarianism is not, in fact, committed to the radical and deeply counterintuitive conclusions described in the last section.
a. Robert Nozick and the Attenuation of Rights

Given Nozick’s insistence that individuals are protected by strict side constraints against aggression, one might have expected him to take a hard line against pollution. Instead, however, Nozick embraces a position that looks less like what one would expect from a principled advocate of a natural and inviolable right of private property, and much more like the kind of cost-benefit analysis one would expect from a straightforward utilitarian – a moral theory that Nozick famously and decisively rejected just one chapter prior to his discussion of the problem of pollution (Nozick 1997). Nozick’s position is that pollution should be permitted whenever the “benefits are greater than the costs,” and prohibited when they are not (ibid.). Permissible pollution ought to be able to “pay its way” in the sense that those who benefit from the activity could in principle compensate those who are harmed by it.

It is true that, unlike a utilitarian, Nozick believes that such compensation ought actually to be paid, not merely that such payment be possible in principle (ibid.). If the pollution you create crosses my moral boundaries and sets back my interests, then you ought to pay me a sufficient amount of money to fully compensate me for that harm. But even with the requirement of compensation, Nozick’s principle of “cross and compensate” still represents a significant weakening of the conception of rights as moral side constraints.13 Nozick’s position seems to abandon the intuitive idea with which he began that individuals are “inviolable,” and replace it with the idea that violating individual rights is perfectly fine, so long as you’re willing to pay the price.14 Such a principle appears to be the moral equivalent of a policy of eminent domain – a policy that libertarians have vocally and consistently opposed.

Nozick’s position on pollution is somewhat less surprising when one considers the context in which it occurs. The discussion of pollution takes place in the first part of Anarchy, State, and Utopia, in which Nozick is concerned to refute the individualist anarchist and show that a minimal state could evolve out of a state of nature by morally permissible means.15 One of the most important moments in that argument occurs when Nozick asks what steps the “Dominant Protective Association” (DPA) could permissibly take to deal with the risks posed by competing “independent” protective associations enforcing their clients’ rights in possibly unreliable ways. Nozick’s surprising answer is that the DPA may justly prohibit the risky activity, but only if it compensates those who are disadvantaged by that prohibition (see Nozick 1997).

This move is absolutely essential for Nozick’s “invisible hand” argument for the minimal state. But its success depends on an important switch in the way in which rights are understood, from a conception of rights as claims protected by property rules (that forbid boundary-crossings) to a conception of rights as being at their core claims that are protected by liability rules (that allow crossings as long as liability for due compensation is paid). (Mack 2011)

As Eric Mack notes, this “attenuation of rights” seems deeply inconsistent with the moral core of Lockean/Nozickian libertarianism. The imposition of slavery is wrong (at least in part) because it violates a person’s ownership rights over his or her own person. It would not cease to be wrong “if only we could be sure that the slave is receiving at least as much compensation as would have induced him to agree to enslavement” (Mack 2011).

Nozick’s move thus succeeds at avoiding an implausibly radical view regarding the impermissibility of pollution, but arguably does so only at the cost of abandoning the moral core of libertarianism. Once the status of libertarian rights has been softened from property claims to mere liability claims, it is unclear what grounds the libertarian has for maintaining his distinctively steadfast opposition to other kinds of violation – particularly those involved in paternalistic interferences with an individual’s person or property for his or her own good (see Sobel 2012 and 2013).

b. Murray Rothbard and the Reformulation of Torts

In an ambitious 1982 paper, Murray Rothbard seeks to address the problem of pollution by re-conceptualizing the law of torts from a libertarian perspective (Rothbard 1982). Starting with the Non-Aggression Principle, Rothbard proceeds to consider issues of liability, causation, and evidence. Three ideas are particularly relevant to the problem of pollution.

1) Trespass/Nuisance distinction – Rothbard builds on common law doctrine to distinguish between trespass and nuisance. He defines trespass as...
involving “visible and tangible or ‘sensible’ invasion, which interferes with possession and use of the property.” Nuisance, on the other hand, involves “invisible, ‘insensible’ boundary crossings that do not” interfere in this way (ibid.). Trespass, Rothbard notes, is and ought to be regarded as illegal per se, even if it causes no harm to the owner beyond the mere act of invasion itself, while nuisance ought to be illegal only if harm can be demonstrated. Thus, “[a]ir pollution, consisting of noxious odors, smoke, or other visible matter, definitely constitutes an invasive interference. These particles can be seen, smelled, or touched, and should therefore constitute invasion per se” (ibid.). On the other hand, “[a]ir pollution…of gasses or particles that are invisible or undetectable by the senses should not constitute aggression per se, because being insensible they do not interfere with the owner’s possession or use. They take on the status of invisible radio waves or radiation, unless they are proven to be harmful” (ibid.).

2) Strict causal connection – In demonstrating that A harmed B, and is thus the proper object of judicial coercion, statistical correlation is not enough. It is not enough, in other words, to demonstrate that A emitted pollutants, and that B and others exposed to A’s pollution suffered a certain kind of harm much more frequently than the general population. Instead, plaintiffs must prove beyond a reasonable doubt that “a strict causal connection between the defendant and his aggression” (ibid.).

3) Homestead easements – Finally, A will not be liable for harm caused to B if A has homesteaded the right to emit that pollution. Rothbard believes that pollution rights, like property rights in land, can be obtained by possession and use. If A builds a factory on a piece of land and starts emitting pollution on to unoccupied neighboring land, he acquires what Rothbard describes as a “pollution easement” (ibid.). Should that neighboring land eventually come to be put to residential use, homeowners would have no right to enjoin the pollution since, in effect, the pollution was there first.

Taken together, Rothbard’s conditions make effective action against mass torts such as air pollution caused by automobile emissions virtually impossible. We might know, as a general matter, that automobiles emit pollutants, and that these pollutants can be harmful to human beings in various ways. But Rothbard’s conditions entail that no individual B can bring legal action against any particular driver A unless he can demonstrate beyond a reasonable doubt that the pollution emitted by A himself caused demonstrable harm to B.

Nor can B bring action against automobile manufacturers, since those manufacturers are not themselves individually responsible for B’s harm. Thus, in the vast majority of cases, even those in which B has suffered real physical harm as a result of automobile emissions, she will lack effective recourse to enjoin the pollution or to demand compensation for the harm she has suffered. In these cases – which represent a wide range of environmental harms – the victim must, in Rothbard’s words, “assent uncomplainingly” to the harm she suffered (ibid.).

Quite apart from this implausible implication, however, Rothbard’s analysis suffers from several serious weaknesses. First, the insistence that plaintiffs establish a “strict causal connection” between the action of the defendant and the harm suffered by the victim seems both intuitively much too strong and ill-suited for coping with the kinds of complexly interconnected network of causes and effects that characterize environmental phenomena.

Consider an analogy. Suppose a group of 100 individuals celebrate the New Year by firing their rifles into the air in the middle of a residential neighborhood. Several minutes later, a person standing in his backyard a few blocks away is struck and killed by a bullet falling from the air. Let us stipulate that ballistics tests are insufficient to determine from which particular gun the bullet was fired. It’s reasonably certain that the bullet came from one of the hundred guns fired by the crowd. But we have no way of knowing whose. Must we conclude, then, that nobody can be prosecuted for the murder? Or even – since endangerment without harm is apparently no crime on Rothbard’s view – for reckless endangerment?

Rothbard’s distinction between trespass and nuisance is even more problematic. Rothbard relies heavily on this distinction to block the deeply counter-intuitive conclusion that all pollution, even harmless radio waves, must be prohibited out of respect for the absolute rights of property owners to control their property. But the basis on which he draws this distinction appears to be entirely arbitrary. Rothbard might have plausibly argued that what matters is that individuals maintain the right to exclusive control over their property, and that any “invasion” that undermines that control is
impermissible, whether harmless or not. Or he might have plausibly argued that actual harm is what really matters, such that invasions that do not result in harm really don’t count as invasions at all. But what Rothbard actually argues is that harm to the victim determines the legality of invisible invasions, but not for visible ones. And this is difficult to make sense of.

If harm is relevant to legality, then it ought to be relevant across the board, and Rothbard ought to conclude that harmless invasions by detectable masses are just as permissible as harmless invasions by undetectable ones. Likewise, if harm is irrelevant to legality, then it ought to be irrelevant across the board, with harmless undetectable invasions being just as impermissible as harmless detectable ones. Drawing the line at detectability helps Rothbard avoid the extremely counterintuitive conclusion that radio waves (and CO2 emissions, and thermal radiation) are the proper subjects of prohibition. But it does so in a way that seems entirely *ad hoc* and unprincipled.

c. Eric Mack and “Live and Let Live”

A more recent, and more promising, attempt to resolve the problem has been presented by Eric Mack.17 For Mack, the libertarian commitment to rights of private property is itself grounded in a more basic moral “ur-claim” of each individual to be allowed to pursue her good in her own way (see Mack 2010). Since, Mack argues, the ability to acquire, transform, and use external resources is essential to an individual’s ability to pursue her good, and since this ability is greatly extended by a regime of private property, a right to private property (or, more precisely, a right not to be excluded from living under a justifiable rule-constituted practice of private property) flows out from the moral ur-claim.

But what is the precise nature of the property rights that flow out of that ur-claim? To some degree, Mack argues, this is a matter to be settled by convention (Mack 2015). The ur-claim doesn’t specify the precise shape, for instance, that riparian rights ought to take. There are many ways in which conventions might specify the contours of such rights compatible with each individual’s ur-claim to pursue her own good in her own way. But the ur-claim does rule *some* conventions out: namely, those that would *not* be compatible with this basic claim.

Turn now to the problem of pollution. Suppose we understood property rights to be so absolute as to rule out even the most minor kinds of infringement. Understood in this way, property rights would render impermissible even the most ordinary activities of human life. Breathing, radiating heat, and lighting matches visible from your neighbor’s property would all be violations of the property rights of others, and hence impermissible. The result, Mack notes, would be a kind of moral paralysis, or “hog-tying” (Mack 2011). Property rights, which were supposed to *facilitate* individuals’ ability to pursue their own good, on this understanding instead wind up making that pursuit *impossible*.

For Mack, this is sufficient reason to reject this understanding of libertarian property rights. Any specification of rights, according to Mack, must be consistent with what he calls the “elbow room postulate,” which holds that “a reasonable delineation of basic moral rights must be such that the claim-rights that are ascribed to individuals do not systematically preclude people from exercising the liberty-rights that the claim-rights are supposed to protect” (Mack 2015).

When applied to the problem of externalities, Mack argues, this postulate supports a principle much like the principle invoked by the majority in the case of Bamford v. Turnley, an 1862 case in which the plaintiff sued his neighbor for introducing noxious fumes into his home by his operation of a brick kiln. The court ruled that Turnley’s was liable for the damages caused by his brick kiln, but took pains to distinguish Turnley’s actions from other more reasonable uses of one’s property that might nevertheless “annoy” one’s neighbors. In his separate opinion in support of the majority, Baron Bramwell wrote that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without submitting those who do them to an action…. It is as much for the advantage of one owner as of another; for the very nuisance one complains of, as the result of the ordinary use of his neighbor’s land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live….18
Mack’s analysis appears to cope nicely with the problem posed by the absolutism of libertarian property rights. Mack avoids the implausibly radical implications of this position by saying, in effect, that minor everyday crossings of other people’s (physical) boundaries do not really count as infringements of their (moral) rights at all. Property rights remain absolute, but those rights are specified in such a way that they give people no claim to be immune from minor, unintentional intrusions (see Shafer-Landau 1995).

Contemporary environmental problems arise largely as a result of the complexly interrelated activities of large numbers of dispersed individuals. Moreover, the elbow room postulate appears to provide a sensible rationale for distinguishing between the unintentional minor harms caused by pollution and the intentional minor harms caused by stealing a nickel. After all, a system of rights that prohibited all minor, unintentional boundary crossings would result in moral paralysis. But no such paralysis results from the prohibition of minor but “wanton and malicious” intrusions. Indeed, that kind of prohibition would seem to advance the goal of allowing each individual to pursue her own good in her own chosen way.

But while Mack’s theory copes well with the problem of absolutism, it has nothing to say about a second major problem posed for libertarianism by the problem of pollution – the problem of interconnectedness. Mack’s analysis, like Rothbard’s, is focused entirely on the harm caused by individual acts. So long as the harm caused by an action falls below a certain threshold, it is deemed permissible. But this exclusive focus on the outcome of individual actions leaves many of the most serious problems posed by environmental pollution entirely unaddressed. Air pollution in the Los Angeles basin is not the result of any single individual’s actions. Nor are the problems of global climate change, species extinction, river pollution, and so on. Any particular action by an individual, considered in itself, makes only a miniscule contribution to the overall problem. Either no one is harmed at all by such actions (the harm resulting only once the cumulative amount of pollution crosses a certain threshold), or the harm produced is minimal (becoming significant only when it is added up with all the other harms resulting from other individuals’ actions).

Intuitively, a morality of individual rights ought to have something to say about actions of this sort. If I violate your rights by poisoning you, then I also violate your rights when I, along with 9 of my friends, each add 1/10 of a lethal dose of poison to your drink. Does the rights-violation disappear if the poisoning is performed by a million people, instead of ten? Or if their “cooperation” in poisoning you is the unintended (but foreseeable?) byproduct of their actions, rather than their intended aim? Contemporary environmental problems arise largely as a result of the complexly interrelated activities of large numbers of dispersed individuals.

V. Free-Market Environmentalism

So far, this essay has focused on those libertarian approaches to pollution that emphasize issues of
rights and justice rather than economic efficiency. But not all libertarians approach questions of institutional design from that particular moral perspective. And even those libertarians who do employ a rights-based perspective on morality often concede that consequentialist considerations can play both a justifying and constraining role in shaping those rights. Before this essay comes to a close, then, it is worth devoting some attention to those considerations and their relation to the libertarian approach to pollution. What follows is a very brief survey.

First, libertarians have long stressed the vital role of private property in providing individuals with an incentive to care for natural resources. Pollution is a problem mainly when individuals are able to externalize the costs of the harmful byproducts of their activities onto other people’s property or bodies. When the benefits of use are internalized, but the costs are externalized, tragedies of the commons ensue. But when resources have an owner, those owners have a strong incentive to protect their property from harmful invasion by others, and to ensure that their own use is sustainable.

Libertarians thus recommend extending property rights over as wide a range of objects as possible – not just land and trees but lakes, highways, and even oceans. Such property rights would not only provide owners with incentives to use their own resources efficiently, they also serve as a necessary prerequisite for the formation of a market and of a market price system, which most libertarians regard as essential mechanisms for coordinating the activities of large numbers of dispersed individuals in their use of scarce resources. In cases where technological constraints make the establishment of full property rights impractical, as with rights to air or atmospheric space, some libertarians favor the kind of “quasi” property rights embodied in a policy of tradable pollution credits. But neither the desirability nor the feasibility of such policies are uncontroversial among libertarians.

Second, libertarians argue that much existing pollution is due not to the excesses of the untrammelled free market, but to various forms of “government failure.” In crafting both particular regulations and the more fundamental definition and enforcement of property rights, government is prone to being unduly influenced by powerful economic interests. Those interests influence the government’s policy for its own benefit, often at the expense of the rights or interests of the broader citizenry. In terms of environmental policy, this means that businesses are often given a license to pollute by the state, at least when that pollution is perceived to serve some important interest of key decision-makers of the state. Moreover, due to its extraordinary legal status, the state itself is able to externalize costs with relative impunity (see Pennington 2005). There is thus relatively little direct incentive for governments to take effective action to curb their own polluting activity.

Third and finally, libertarians note that a variety of private, voluntary solutions exist to the problem of pollution. Following the ideas of Ronald Coase, many libertarians argue that so long as property rights are clearly defined and transaction costs are low, resources will be put to efficient use in the sense that the potential externality will be internalized by whichever party is able to do so in the most cost-effective way. And following the work of Elinor Ostrom and others, many libertarians argue that even in the absence of well-defined property rights, communities can develop social norms to cope effectively with the problems posed by costly externalities (see Ostrom 1990; Ellickson 1991 and 1993).

Libertarians, by and large, want a system in which property rights are taken seriously, but in which the minor but ubiquitous “dust” that is kicked up as part of people going about the everyday business of life is not regarded as a violation of those rights.

Taken together, these three considerations make a compelling case for expanding the role of market and other non-governmental responses to the problem of pollution. At best, however, these considerations can serve as a substitute to a theory of rights, and never as a substitute for one. Considerations of efficiency such as those embodied in the Coase theorem, or in cost-benefit analyses of mitigation vs. adaptation to global climate change, are important to take into account in formulating public policy. But they are far from sufficient. Even if adaptation is
cheaper than mitigation as an approach to dealing with the problems of climate change, it might nevertheless be deeply unjust. After all, we have good reason to care not merely about the total costs and benefits of alternative policies, but about how those costs and benefits are distributed among separate parties. And libertarians have especially good reason to care if some of those costs are imposed through the violation of property rights, such as would seem to occur when the activities of power plants in the Midwestern United States contributes to the flooding of a farmer’s property in Bangladesh (see Adler 2009; Dolan 2006; Shahar 2009).

In this respect, at least, the Rothbardian approach to thinking about pollution in terms of homesteading has an intuitive advantage over the pure Coasian law and economics approach (Rothbard 1982). In deciding which party ought to bear the responsibility for dealing with pollution, what matters is not just who can do so more cheaply, but who got there first. From the perspective of justice, if not efficiency, there is a world of difference between a person who buys a home near an already existing airport and complains about the noise, and a one who has an airport built next to the home in which he’d lived for the last twenty years.31 Priority of use might not be the only moral principle that matters in determining rights and liabilities, but it is certainly one such principle, and sufficient to demonstrate the inadequacy of efficiency considerations by themselves.

To say that rights matter, of course, does not yet tell us anything in particular about which rights matter. And, as the survey in the first part of this essay revealed, there is considerable debate even among libertarians about how precisely the various rights and responsibilities relevant to the problem of pollution should be understood. Still, it is worth noting the considerable overlap among otherwise diverse libertarians on the principle of “Live and Let Live” as expressed by Justice Bramwell in Bamford v. Turnley.32

In this respect, there appears to at least be considerable consensus among libertarians about where they want to end up. Libertarians, by and large, want a system in which property rights are taken seriously, but in which the minor but ubiquitous “dust” that is kicked up as part of people going about the everyday business of life is not regarded as a violation of those rights. Still, both the theoretical underpinnings of this principle, and its practical application to difficult problems such as those posed by global climate change, remain a fruitful subject for future research.

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Notes:

1 Though this is true to a certain extent of all libertarians, it is most clearly and consistently true of so-called “right-” or “market-” libertarians, on whose thought this essay will focus. Left-libertarians such as Hillel Steiner, Michael Otsuka, Peter Vallentyne, and others, affirm libertarian rights of individual self-ownership but deny that self-ownership can yield full private property rights in external goods, and often countenance a significant scope for governmental activity in the realization of a broadly egalitarian conception of justice. See, for an overview, Otsuka 2003; Steiner 1994; Vallentyne 2000, chapter 2. For purposes of this essay, market libertarianism is understood broadly to include not just the minimal-statism of Robert Nozick (Nozick 1974) and Ayn Rand (Rand 1961 and 1964), but also the anarcho-capitalism of Murray Rothbard (Rothbard 1970 and 1973) and David Friedman (D. Friedman 1989), and the classical liberalism of Milton Friedman (M. Friedman 1962; M. Friedman and Friedman 1990) and Friedrich Hayek (Hayek 2007 and 2013). For overviews of market-libertarian thought, see Mack and Gaus 2004; Zwolinski 2008; Zwolinski and Tomasi 2016, chapter 1.

2 Libertarians, of course, deny the antecedent of this conditional. See Block 2006; Klein 1990.

3 This is true, at least, with respect to the specific issue of pollution, which is of course but one environmental consideration among many.

4 See, for a discussion, Arneson 2011.

5 Technically, it is the common law tort of battery that prohibits unwanted touching, while the tort of assault prohibits acting in a way that causes a reasonable fear of battery. For purposes of simplification, I ignore this distinction in the present discussion and refer to both sorts of tort as “assault.” For a helpful discussion, see Glannon 2010, chapter 2.
This should not be read as suggesting that the common law regarded property rights as absolute and inviolable. The common law doctrine of necessity, along with the concept of easements, can be seen as weakening owners' rights in certain ways for the sake of the social good. But there is a great deal of difference between this sort of limited, narrowly-defined weakening, and the kind of radical weakening that would be involved in subjecting all property claims to a cost-benefit analysis.

As seems to be typical of those who claim justice should be done though the heavens fall, Rothbard did not appear to believe that the heavens were, as a matter of fact, in any grave danger of falling. Greater respect for private property rights, Rothbard argued, would promote both environmentalist aims and economic growth. See Rothbard 1973, pp. 244-254.

On the environmental implications of Rawlsianism compared with libertarianism, see Taylor 1992.

For a friendly reflection on the implications of libertarianism for climate change by a critic of libertarianism, see Singer 2004, chapter 2. For two attempts by libertarians to tackle the issue themselves, see Dolan 2006; Shahar 2009.

This difference is especially manifest in the critiques of corporatism and capitalism by mid- to late-19th and early-20th century libertarians such as Thomas Hodgskin, Benjamin Tucker, and William Graham Sumner. See Chartier and Johnson 2012 for a representative sampling of readings and Zwolinski and Tomasi 2016, chapters 1, 3, and 4 for an overview.

Libertarians, of course, see no essential moral difference between taxation and theft. “If anyone but the government proceeded to "tax," this would clearly be considered coercion and thinly disguised banditry. Yet the mystical trappings of "sovereignty" have so veiled the process that only libertarians are prepared to call taxation what it is: legalized and organized theft on a grand scale.” Rothbard 1973.

The libertarian tradition “holds that stealing a penny or a pin or anything else from someone violates his rights. [It] does not select a threshold measure of harm as a lower limit.” Nozick 1974, p. 75.

The label for Nozick’s view comes from Sobel 2012.

Nozick 1974, pp. 31-32. See also the opening sentences of the book: “Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do.”

The individualist anarchist position Nozick likely had in mind was that set forward by Murray Rothbard in Rothbard 1970.

Rothbard’s discussion has received surprisingly little critical attention in the literature. The one notable exception is J. Friedman 1992, which subjects Rothbard’s arguments to severe criticism.

Mack’s discussion of the problem of minor intrusions occurs in Mack 2015, but draws heavily on some of his earlier work on property and rights, especially Mack 2010, 2011.

Bamford v. Turnley, 122 Eng. Rep. (1862), pp. 32-33. Interestingly, Bramwell’s reasoning in this decision appears to be endorsed by every libertarian who has discussed it, despite the significant underlying differences in their moral philosophies. In addition to the roughly Nozickian Eric Mack, it is also endorsed by the consequentialist Richard Epstein in Epstein 2009, p. 16, and the Rothbardian Walter Block in Block and McGee 2011, pp. 61-62.

The example is modified from J. Friedman 1992, p. 436. Some of these questions might fruitfully be analyzed as questions about imposing risks of harm on others. And Mack, to his credit, recognizes the seriousness of such problems, even if he puts them to the side in his 2015 paper. Questions about rights and risks have been most famously taken up in Thomson 1986, but have mostly been neglected in the libertarian literature on pollution. See Sauer 1982 for one notable exception.

This, presumably, is why libertarians so often argue for the immorality of various governmental programs by pointing out that the same activities, if done by private individuals, would clearly be wrong. See, for examples of this sort of argument, Huemer 2012, chapter 1; Rothbard 1973, chapter 3.

The most obvious example is to be found in Nozick’s discussion of the Lockean proviso Nozick 1974, p. 177. See Zwolinski and Tomasi 2016, chapters 1-2 for further discussion.

For the classic discussion of the tragedy of the commons, see Hardin 1968. For a discussion of private property rights as a (partial) solution to the problem, see Schmidtz 1994.

See, for a discussion, T. L. Anderson and Leal 1991.

See Block 1990b and 1998.

The classic treatment of this issue is Hayek 1945. For a discussion applied to environmental issues, see T. L. Anderson and Leal 1991, chapter 2.

See, for example, Dolan 1990 and 2006; Pennington 2005, p. 42.

For criticisms of the policy, see Block and McGee 2011; Cordato 1997. To a large extent, the intra-libertarian divide over tradable pollution credits appears to mirror the split between those libertarians who favor a roughly Chicago school law and economics approach and those who adhere to the tenets of the Austrian school of economics. Austrians such as Block and Cordato argue that the kind of cost-benefit analysis involved in such programs is incompatible with the strongly subjective nature of economic value.
See, for an overview, Krueger 1974; Tullock 1967.
20 See, for example, Ronald Coase’s famous discussion of the “long list of legalized nuisances” in Coase 1960, p. 24, and the summary in Block 1990b, pp. 282-285
30 See Coase 1960. For a helpful summary, see D. Friedman 1997.
31 See Coase’s description of Delta Air Corporation v. Kersey, Kersey v. City of Atlanta in Coase 1960, p. 25
32 supra, note 18.

Sources:


