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# The Capability to Hold Property

RUTGER CLAASSEN

Department of Philosophy, Utrecht University, Utrecht, the Netherlands

**ABSTRACT** *This paper discusses the question of whether a capability theory of justice (such as that of Martha Nussbaum) should accept a basic “capability to hold property.” Answering this question is vital for bridging the gap between abstract capability theories of justice and their institutional implications in real economies. Moreover, it is vital for understanding the difference between egalitarian and libertarian versions of the capability approach. In the paper, three main arguments about private property are discussed: those relating property to a private sphere of control, to the market system of allocating goods, and to the ability to keep the fruits of one’s labor. On the basis of this discussion it is argued that the capability theory of justice should accept a basic capability to hold private property, albeit one that is restricted in scope and has an egalitarian character. Special attention is paid to libertarian arguments about property acquisition, and it is argued that capability theories of justice must reject them because they presuppose a method of justifying capabilities that the capability approach cannot accept.*

**KEYWORDS** Capability approach, Human rights, Justice, Property, Labor, Subsistence

## 1. Introduction

In its current state of development, the capability approach is not a full theory of social justice. The most elaborated version, Martha Nussbaum’s capability theory, holds that each citizen should be entitled to a threshold level of each of her 10 central capabilities. She argues that this only gives us a partial theory of justice, because her theory is silent on distributive matters above the threshold (Nussbaum 2006, 71). This, however, underestimates the gap in the capability approach’s contribution to theorizing justice. Samuel Freeman gives an excellent summary of what is missing:

The capabilities approach says little or nothing about the standards for deciding who should control means of production; how widespread the distribution of land and capital should be; limits on accumulation of resources and wealth; the degree to which private or social ownership of natural resources and real capital are each in order; about government’s role in the economy and in ensuring full employment; about the kinds of property interests that are legitimate and their extent; permissible and impermissible uses of property; the relationship of distributive justice to the

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Correspondence Address: Dr Rutger J. G. Claassen, Department of Philosophy, Utrecht University, Janskerkhof 13a, 3512 BL Utrecht, the Netherlands. Email: [R.J.G.Claassen@uu.nl](mailto:R.J.G.Claassen@uu.nl)

common good and exercise of basic rights and liberties, and so on. Other than questions of distribution of final product needed to reach the threshold of central capabilities, Nussbaum's approach gives little if any guidance in resolving many of the crucial questions about the basic structure of economic life in a democratic society. (Freeman 2006, 409–410)

I will refer to these demands on a full capability theory of justice (CTJ)<sup>1</sup> as “Freeman's order”. Freeman's order is a tall one, as it would be for any theory of justice. He requires a full view of the implications for economic life of adopting the capability metric as the basis of one's theory of justice. Nonetheless, it is urgent that capability theorists start to work on Freeman's order, for two reasons.<sup>2</sup>

First, knowing the “correct principles” of distribution is useless if one has no idea what they would imply for the organization of economic life (one can even wonder whether it is possible to assess principles without looking at their implications). It is true that many competing theories of justice suffer from the same abstractness. Despite numerous exceptions, the field remains dominated by a form of theorizing that focuses on moral ideals and eschews institutional details (Waldron 2013, 5). But that cannot be an excuse.<sup>3</sup> The lacuna is especially problematic for capability theory because part of its popularity lies in its promise to deliver a real political alternative to a Washington Consensus-style politics obsessed with economic growth and unfettered markets. Capability theorists want to do away with “commodity fetishism” (Sen 1987, 16). The capability approach has been worked out in the UNDP's Human Development Index, an alternative to the narrow focus on gross domestic product growth. Amartya Sen has cooperated in a report for the former French president on alternative indicators to economic growth (Stiglitz, Sen, and Fitoussi 2009). Examples such as these show that there often is a political impetus to capability theorizing. However, if the approach aspires to become an attractive alternative to orthodox economic theorizing, more needs to be said about which institutions would foster capability justice.

In Freeman's order, the question of property is central. In this paper I will therefore start working on his order by asking whether a CTJ would justify a regime of private property. Property is a good place to start because it stands at the intersection of principles of justice and their institutional embodiment. Property regimes are one of the main institutions defining the “rules of the game” in any economy. At the same time, the justification of property plays a crucial role in political philosophy. The divergences between Marxist, egalitarian and libertarian theories of justice can largely be explained in terms of their different positions on private property. This brings me to the second main reason for working on Freeman's order: considering the status of property turns out to be necessary for understanding the CTJ's position in the field of political philosophy. For, as I argue in Section 2, a CTJ is not necessarily an egalitarian theory, as is commonly assumed. It could just as well be a libertarian theory, depending on how one handles the question of property. A great deal of the paper will therefore be engaged with showing how a CTJ should deal with the libertarian arguments for private property (Sections 4 and 5).

In a CTJ, property is discussed in terms of the question whether there should be a basic “capability to hold property.” From the few remarks Nussbaum made about this question, I will derive my agenda of three issues that need to be elaborated for a full capability view of property: the content, justification, and limitations of property (Section 2). I then discuss two of the main arguments in favor of accepting a system of private property—which I refer to as the “direct argument” and the “indirect argument”—and argue that a CTJ can endorse both of them (Section 3). Then I present a third influential argument, the “labor argument.” I argue against the libertarian version of this argument, on the grounds that

the CTJ's method of justification cannot accept the strategy for acquiring property proposed by the libertarian (Section 4). Finally, I do endorse an egalitarian version of the labor argument, and show how it fits together with the direct and indirect arguments to justify a basic, yet restricted capability to hold property (Section 5).

## 2. The Capability to Hold Property

Almost no one seems to doubt that the capability approach is an egalitarian theory. The most obvious reason for believing this is that the capability approach emphasizes effective freedom or "real opportunity" (Sen 1992, 31), not merely formal freedom. But this connection is misleading. Imagine a capability theory that only accepts the civil and political liberties as basic capabilities. Such a theory would advocate that governments should ensure the effective enjoyment of these liberties by all means. Such a government not only refrains from depriving citizens from these basic liberties, but also actively protects citizens against attempts by other citizens to deprive them of this right (Shue 1996, 52). However active this government is in doing so, this still is a libertarian government, given the restricted list of basic liberties that it acknowledges.<sup>4</sup> The capability approach, then, is not inherently egalitarian. Whether it is egalitarian depends on which capabilities it acknowledges as basic. If it only secures equality of civil and political liberties, this is egalitarianism in a highly formal sense only, in which every political theory is egalitarian merely because it advocates equalization of some rights or resources. Libertarianism then also is an egalitarian theory (Kymlicka 2002, 3–4).

The three main families of liberal political theories—egalitarian liberalism, classical liberalism and libertarianism—all share the idea that there should be a list of basic rights that provide a bulwark against political attempts to pursue some purported notion of the common good. These rights can be legitimately limited only when some other basic right is at stake. Moreover, they all accept that civil and political rights should be on the list. What differentiates these theories is the status they give to property rights (Arnold 2009, 69–116). Egalitarian liberals give the weakest protection to property rights; they either do not include them on a list of basic rights or do include them but allow (severe) restrictions on the basis of distributive principles (Freeman 2011, 30–34; Tomasi 2012, 27–31). Classical liberals always include property rights on their lists of basic rights and do not allow restrictions of them to realize distributive principles, although they do allow restrictions to promote economic efficiency (Freeman 2001, 118; 2011, 21–24; Tomasi 2012, 22–24). Libertarians make property rights into absolute rights, and tend to subsume all other basic rights under the category of property rights (Freeman 2001, 127; Tomasi 2012, 48). So with the right of private property, the CTJ's egalitarian character is at stake.

Let us now turn to Martha Nussbaum's treatment of property. Nussbaum has shifted her opinion on this subject. In her earlier work she did not include the ability to hold property on her list. Instead, she held that the question of property is instrumental and derivative: "the claim citizens have is to sustenance in their various essential functionings [...] And the question about property must simply be, what form or forms of ownership best promote this situation?" (Nussbaum 1990, 231). She briefly discussed Aristotle's defense of certain types of common ownership as well as private property arrangements, but did not take a stance on these issues. In her later work, however, Nussbaum does include the ability to hold property on the list. She describes it as:

being able to hold property (both land and moveable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others;

having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. (Nussbaum 2000, 80)

Unfortunately, Nussbaum does not give a very elaborate defense of her new position. For a full analysis, she would have to answer three questions.

First, the *content* of the capability must be clear. Private property as a basic right can either refer to the “eligibility to hold property” or to a “right to have private property” (Waldron 1988, 20–24). The first merely denotes one’s status as a potential holder of rights in things. The latter is a right to actually have some amount of property, either a minimal amount or a fully equal amount or anything in between. Nussbaum’s formulation above clearly rejects the eligibility interpretation as merely formal, but this leaves much open. Elsewhere, Nussbaum has stated that human dignity does not require full equalization of property holdings, but property up to a threshold of adequacy, below which no citizen should be allowed to fall (Nussbaum 2006, 293). Such a minimum guarantee goes beyond a protection of any property one may happen to hold on the basis of voluntary market exchanges. Nussbaum’s capability is more substantial than what classical liberals or libertarians would offer. Unfortunately, she never argues the case against these more minimal interpretations of the right to property, nor against those who would want to further equalize property holdings.

The second question is what the *justification* of such a right is. The only remark Nussbaum makes for her change of mind is that the ability to hold property rights has a very important role “in self-definition, in bargaining, and in developing a sense of self.” This observation is based on her experience with poor Indian women demanding some property in land for themselves (Nussbaum 2000, 156). Moreover, the fact that the capability to property is presented as part of her Capability Number 10, “control over one’s environment,” suggests that property is valued by Nussbaum for its contribution to such control. However valuable these hints, given the controversial nature of property rights, more is needed than this. Libertarians share the importance of property to personhood, but flatly deny the egalitarian distribution of property that Nussbaum advocates. What, from a capability perspective, is exactly the justification for recognizing a capability to hold property, how does that justification lead one to reject libertarianism, and what does that mean for the determination of the amount (minimum, equal) of private property that everyone has a right to?

Third, one needs to determine the *limitations* on property. Which limitations are legitimate will depend on which other capabilities one recognizes as basic and on the method for balancing these capabilities. Even if private property gets a special status by being placed on a list of basic capabilities, the practical implications depend heavily on what else is on the list. For example, a standard list of civil and political rights does not protect the right to a playing ground for children in the local neighborhood. If the only way to create such a playing ground would be to expropriate some private land, a basic right to the protection of private property would effectively prohibit expropriation. But Nussbaum’s list also includes a “capability to play,” including the ability “to enjoy recreational activities.” Assuming that the playground is necessary to guarantee this capability in this particular neighborhood, Nussbaum’s theory does not give standard priority to the protection of private property over the creation of recreational facilities, like a classical liberal or libertarian would. Instead, both interests will have to be balanced, but it is unclear how this is to be done.

In the remainder of this paper, I will work on these three desiderata for a well worked out capability to hold property. But before doing so, an important preliminary question needs answering. Some may worry that the whole idea of a capability to hold property is

incoherent. There are actually two worries here. If any of these worries is substantiated then the whole question of fitting a capability to property into the CTJ is a non-starter.

The first worry is purely conceptual. If by a capability to hold property one means the opportunity to be a property-holder, then the functioning itself is a normative status, not a non-normative “being or doing.” But the latter is a requirement for fitting the capability framework. A right to a capability to hold property would be a “right to an opportunity to be a rights-holder”—which is one reference to one’s normative status too many. In response to this concern, we have to remind ourselves that property refers to a bundle of rights: the rights to use one’s property holdings, to consume them, to manage them, to destroy them, to transfer them to others, to exclude others from use, and so forth. These are the famous “incidents” of property that are standard in the legal literature (Honoré 1987).<sup>5</sup> The right to hold property, then, is a right to do one or more or all of these things. Each of these incidents itself is a functioning (being or doing), not a normative status. This removes any sense of incoherence. The functionings “riding a bike” or “eating food” are structurally analogous to the property incidents “using an object” or “destroying an object.” The main difference is in the level of abstraction, not in the alleged normative character of either of these functionings.

A second worry is that accepting a capability to hold property does not fit the capability approach because it is essential to the latter to maintain a distinction between capabilities and resources. The latter are merely a means to the former. Accepting a capability to hold property would then bring in through the back door the commodity fetishism that the approach wants to avoid. A clear example of this is that an equalization of property between a group of citizens would necessarily make them unequal in the extent to which they can use this property to realize other capabilities, given interpersonal variations in their conversion rates. A full answer to this worry presupposes the arguments to be made in the next section. Here, suffice it to say that we can accept that the possession of a capability can have effects on other capabilities (there are mutual effects between many different capabilities), without accepting the restriction that this must be the only reason why property is valuable. Property can in addition be directly valuable for a person’s life. Indeed, this is one of the main arguments for private property (see next section). If correct, then the indirect value of having property (its contribution to the realization of other capabilities) must be traded-off against its direct value in case of conflict.

These worries, while not being a reason to abandon the concept of a capability to hold property, do provide a warning against overly general normative justifications for property rights. The first worry suggests that we might need to unpack the capability and discuss the different incidents of property as separate capabilities. For example, we may want to reach different normative conclusions about the capability to consume or manage things than about the capability to destroy or transfer things. Similarly, the second worry suggests that it is necessary to distinguish property in different types of objects. For example, being able to have a house or land of one’s own might be more or less directly valuable to one’s person compared with having ownership in a factory or a highway. I will acknowledge some of these complications in the discussion to come, but nonetheless maintain the focus on the more general justification for property. The abstract discussion serves as a necessary first step to identify the problems with this capability in determining its appropriate place in a CTJ. Only then can we proceed to these more fine-grained questions.

### **3. Property and Agency: Two Arguments**

The justification of property in a CTJ depends on the justification of capabilities themselves: which capabilities are justified and why? If we want to discuss whether property is valuable,

we will first have to decide upon a criterion of value. Nussbaum here refers to a rather vague notion of a “fully human life,” or a life of human flourishing. Many authors have criticized her theory as having objectionably perfectionist implications.<sup>6</sup> Elsewhere, I have endorsed these critiques and defended an alternative proposal: that we should use a concept of individual agency to justify a list of basic capabilities (Claassen 2009: 430–435; Claassen & Düwell 2013: 506–508). I define an agent as an individual who is both autonomous and free: an agent is able to deliberate autonomously (i.e. has the capacities necessary to set himself goals and decide upon means to reach these goals, and can exercise this capacity without manipulation by others), and an agent is able to act freely (i.e. has the capacities necessary to act upon his choices about goals and means, and can exercise this capacity without coercion by others).

Three things are noteworthy about this concept. First, it is a threshold concept: we can have more or less agency in each of these four aspects just mentioned. The requirement of justice is that each person has a sufficient level of agency. It is hard to determine in general where the threshold should be put. Specification of thresholds should be “local” in two respects: it will depend on the different areas of life in which we exercise agency, and it will depend (to some extent) on the specific culture at stake (see also Section 6). Second, this means that the threshold of agency used here is not necessarily minimal and the concept is not necessarily “thin” (in the sense in which a very poor and desperate person still exercises some agency). A minimum level can be minimal or quite generous. Third, capability justice is about equality of capabilities to agency. So once a threshold is set, everyone has an equal right to that threshold (but not to an equal amount: there can be differences above the threshold).

While I cannot fully explain and argue for this concept of agency here, the rough idea is familiar enough. A similar concept of agency or personhood also lies at the basis of other important human rights theories (Griffin 2008; Gewirth 1978). There are also links but equally important differences with other concepts of agency used by authors in the capability literature, such as Amartya Sen’s concepts of agency freedom and achievement (Sen 1992, 56 ff), Ingrid Robeyns and David Crocker’s analysis of the links between agency and capability (Crocker and Robeyns 2010), Jay Drydyk’s concept of durable empowerment (Drydyk 2008), Sabine Alkire’s study of concepts of agency (Alkire 2008), and Nussbaum’s concept of practical reason (Nussbaum 2000, 2006). I ask the reader to accept this move for the sake of argument in this paper (or else to keep in mind his/her favored normative criterion for selecting capabilities and consider whether analogous conclusions about property would follow from that criterion).

Once we have such an organizing concept of agency, we can ask the next question: which capabilities are necessary to realize a basic (adequate, sufficient) level of agency, thus defined? To make this question tractable, let us distinguish three sets of capabilities (roughly familiar from currently existing lists of human rights):

1. Civil and political capabilities: opportunities for free speech, free association, free exercise of religion, political participation, and so forth.
2. Capability to hold property: the opportunity for holding objects, including their use, management, transfer, and so forth.
3. Subsistence capabilities: opportunities for nourishment, shelter, clothing and basic healthcare.

In this paper I will simply assume that civil/political and subsistence capabilities can be characterized as basic capabilities to agency. Property rights are normally treated as one of the socio-economic rights, but it is useful to distinguish them from the other socio-

economic rights (here summarized as “subsistence capabilities”), since the latter directly and uncontroversially define basic conditions of agency (Shue 1996).<sup>7</sup> For property this is much more controversial. The contribution of property to basic agency is that which needs to be justified for it to qualify as a basic capability. I will focus on three different arguments to that extent, which I will call the “direct argument,” the “indirect argument,” and the “labor argument.” Each of these has a long lineage in property theory (associated with the Hegelian, the utilitarian, and the Lockean tradition, respectively). In this section I start with the first two of these arguments.

The direct argument is that having private property is justified to the extent that it is necessary for being able to function as an agent, in both components. With respect to freedom, the basic idea is that every action has some material basis. When we walk on the street, we use the pavement; when we write, we use pencil and paper; when we travel, we use a car or bicycle; and so forth. These material objects are subject to some system of ownership. When all these objects would be communally owned, we would need the permission of all others to carry out any action. Private property, then, is necessary to have a sphere of action in which we can use objects without constantly having to ask such permission (Waldron 1988, 295).<sup>8</sup> With respect to autonomy, the idea is that private property guarantees independence. To be able to make judgments about how to lead one’s life that are not manipulated by others, we need to be economically independent from these others. Otherwise it will be hard not to conform our opinions, decisions and plans to the wishes of those on whom we are dependent (Waldron 1988, 300). In both aspects, then, private property provides the material basis for exercising individual agency independent from the community of which one is a part. It is a matter of having control over one’s life. Thus, Nussbaum’s categorizing of the capability to property as part of the capability of “control over one’s environment” is supported by an important strand in the property rights literature.

Jeremy Waldron has forcefully argued that this argument has egalitarian implications. If liberty and autonomy are important, they are important for everyone alike. Each citizen should be guaranteed the amount of property necessary for such freedom and autonomy. It is inconsistent to defend this justification for private property but restrict its scope to the mere eligibility to hold property. The direct argument is an argument for actually having some property (Waldron 1988, 408–415). Note that this does not help us answer the question of which holdings should be held by whom. This is a severe limitation. It gives, in Lawrence Becker’s terminology, a general justification of property (telling us why there should be a system of private property), not a specific justification (telling us how individuals can legitimately acquire property) (Becker 1977, 3). The argument leaves open whether it would be allowed or required that governments hand out property to some citizens, or whether that would be contradicting their sense of agency (Waldron 1988, 420). The only point is that persons should come to hold some amount of property, in whatever way.

The direct argument is accepted, in one version or another, by most property theorists in the liberal tradition (Gewirth 1996, 173; Munzer 1990, 90–98; Christman 1994, 167; Lomasky 1987, 120). An agency-based CTJ should also endorse this argument. To be able to function as an agent, every individual should have a capability to hold property to the extent that this is necessary for one’s basic freedom and autonomy. This leaves open how much exactly is needed in this regard, in three respects. First, it is open to dispute how much property is necessary for freedom and autonomy (here one can imagine both absolute and relative considerations playing a role). Second, it is open to whether a property holder must have all the traditional incidents of property. For example, John Christman has argued that the link between autonomy and use rights is

much stronger than the link between autonomy and transfer rights (Christman 1994). Third, private ownership can also limit one's liberty, as G. A. Cohen has rightfully argued (Cohen 1995, 57). While the solution to that is partly a more egalitarian distribution of property, another part of it is to withdraw some things from private ownership and keep them open to use for all. In a fuller analysis, these matters need to be worked out.

The indirect argument is that having a system of private property is justified to the extent that it gives us the most efficient system for attainment of all the other basic capabilities. This argument justifies a basic capability for private property; not through its direct contribution to agency, but through its contribution to all the other capabilities necessary for agency. This indirect argument is structurally similar to a utilitarian argument for private property. Both concentrate on the output of the economic processes that is made possible under a specific property system, in order to see which property system is best overall. The indirect argument presented here differs because it replaces maximal utility with the realization of a capability set as its end-goal. Note that this kind of argument relies on a contingent empirical link between these goals and the performance of the economic system. If a system of collective property would best realize a given capability set, then the argument would endorse such a system. The indirect argument then justifies private property only if the market—as the economic system based upon transfers of private property—proves the most efficient system for the realization of a set of basic capabilities. This condition may be absent in quite a number of circumstances, since efficient allocation presupposes the absence of market failures and these failures are ubiquitous in real-world markets. The scope of the indirect argument, then, is restricted to those goods for which the market system is (comparatively) most efficient. For example, if it turns out that allowing private property in food maximizes food yield, but that providing healthcare through a system of public provision maximizes health, then private property in food, but not healthcare, should be allowed. Determining the appropriate scope of efficient markets along these lines may require extensive analytical and empirical investigations.<sup>9</sup>

All of these matters cannot be decided unless we know which capabilities are to be counted as basic. This will also determine whether the indirect argument has egalitarian or libertarian implications. The indirect argument will lead to egalitarian conclusions if amongst the basic capabilities there is a subset of subsistence capabilities. Satisfaction of these capabilities strongly depends on the availability of material conditions. If a private property system is better able than alternative property systems to generate the resources necessary to realize these capabilities, then it will be justified on that basis. The indirect argument then has egalitarian implications; unlike the direct argument, however, this is not because each citizen should herself have a right to some amount of private property, but because (and to the extent that we accept that) each citizen has an equal right to subsistence capabilities.<sup>10</sup> Moreover, the acknowledgment of subsistence rights does not mean that private property rights need to be set aside in favor of states providing subsistence resources directly. The egalitarian duty here is only to take care that subsistence capabilities are realized for everyone, which may also be the case in a (regulated) market setting.<sup>11</sup>

In conclusion, both the direct and the indirect argument give a basis for the justification of a capability to hold property as one of the basic capabilities that should form an entitlement for citizens in political communities. This capability is egalitarian: everyone has an interest in having some property to establish a private sphere of control and independence, and everyone should benefit from a property system that helps realize one's subsistence capabilities. As both arguments attest, however, it remains quite wide open how much and for which (types of) goods. These arguments provide the starting point, not the endpoint, for a full analysis of the scope of private property in a CTJ. Without much more detailed work on the relation between property and agency and between property and other (subsistence)

capabilities, we cannot show how extensive the system of private property should be. This work I cannot do here (this work also needs to be sensitive to differences between cultures—see Section 6). Instead, I will now complete the general discussion by bringing in the third influential argument in the general literature on property, the labor argument.

#### 4. The Libertarian Version of the Labor Argument

The labor argument is generally held to lead to libertarian conclusions—this argument is therefore a special challenge to the connection between egalitarianism and the CTJ. In this section I discuss whether a CTJ should endorse such an argument.

In its simplest form, the labor argument holds that everyone who has worked upon an object should have a right of private property in that object. This argument is different from the other two arguments because it is the only one that provides a so-called “particular” justification of property: a justification of who should own what (Becker 1977, 23). The previous arguments established conclusions in favor of some system of private property, but left open how to determine who actually gets what. The labor argument points to the activity of laboring as central to the acquisition of private property. As we have seen, the right to property includes the right to alienate (transfer) one’s property. Thus, under such a system anyone can come to acquire property through exchanges or gifts. However, this presupposes the legitimate ownership of those who transfer their property to me, and so on. At some point, property has to be established through something other than an exchange or a gift. Most objects have to be produced (created) before they can be exchanged or given away. Here the labor argument comes in.

The most influential version of the labor argument is libertarian. This version defends a strong idea of self-ownership and links this with world-ownership. Individuals, in the libertarian view, have a moral right to control over their own bodies and the activities they undertake with their bodies: “we maintain a special authority to direct our own activity – a claim against others that, all else equal, they not undertake to subvert this control” (Gaus and Lomasky 1990, 485–486). This right extends to the fruits of one’s productive activity (labor):

If Mort believes that he has reason to claim special authority with respect to his own body, he is unlikely to accede to a decision procedure in which everyone has an equal say concerning the disposition of the food that Mort has foraged or raised for the sustenance of the body that is his. (Gaus and Lomasky 1990, 489)

The libertarian labor argument rests invariably on these two steps: the defense of self-ownership, and the defense of world-ownership on the basis of self-ownership.

We should not be led by the predominance of the libertarian version of the labor argument to believe that the labor argument is inherently libertarian. What makes it libertarian is the absence of any constraints upon acquisition through labor. The most famous constraint is Locke’s famous proviso that acquisition through labor needs to leave “enough, and as good” for others (Locke 2003, 112). Some have argued that, properly interpreted, the proviso would justify severe restrictions on labor acquisition.<sup>12</sup> This would lead the argument in the direction of a more egalitarian scheme. Ignoring or downplaying these constraints, as libertarian theories typically do, free labor acquisition inevitably translates into (potentially heavy) inequalities in property, given natural differences in (marketable) talents. So what arguments do libertarians have for their version of the labor argument?

The first one is an argument by analogy. Property contributes to our freedom as much as civil and political liberties do. Gerald Gaus and Loren Lomasky make explicit this analogy

between civil and political liberties on the one hand and property rights on the other. They argue that any (claim) right entails a duty, and thus a restriction on the part of others. For example, with respect to freedom of speech: “Mort’s rightful liberty to utter (and publish and promulgate) blasphemous theses entails an absence of liberty on the part of the disapproving cleric to censor Mort or cast him in prison as punishment for the offense he causes” (Gaus and Lomasky 1990, 487). As a consequence of this symmetry, Gaus and Lomasky hold that the justification is the same for the freedom of speech (and other civil liberties) and the right to property. One’s strong (agency) interest in having property justifies a basic right, which entails duties on the part of others not to interfere with one’s property.

The problem with this argument is that it overlooks a crucial way in which property is different from other basic liberties. If one person exercises his capability to hold property by laboring and thereby acquiring, say, a piece of land, then he worsens the position of other potential holders of that piece of land. Potential property owners compete for scarce resources. Those exercising their freedom of speech, association, religion, and so forth, do not compete in the same way. If I worship my God, this does not diminish your opportunities to do the same thing.<sup>13</sup> The duty on the part of others not to interfere with these freedoms, then, is not as easily established for the competing property holder as for the censor. The censor has no right to interfere, because Mort’s freedom of speech protects a basic interest of Mort *and* its exercise does not diminish similar opportunities for others. The potential property holder who sees his opportunities diminished because somebody else acquires property in a piece of land, however, may claim that the argument for property as a basic right (because of our agency interest in holding property) is insufficient to establish a right to uninhibited acquisition of unowned objects, given the fact that this necessarily diminishes his opportunities.

The upshot is that a collective decision needs to be made that reconciles every potential property holder’s interest in acquiring scarce objects. To establish this conclusion, we do not have to dispute the postulate of self-ownership. Rather, the point is that self-ownership does not automatically lead to full rights to the products of one’s own labor. My argument up to this point does not imply anything about the content of this collective decision. It is still open to a libertarian to reply that the collective decision should be to implement a first-come, first-served right to labor acquisition. The function of my rebuttal so far is to shift the terrain of dispute: any simple appeal to a symmetry between civil and political rights and property rights will not do. This opens the door to an egalitarian interpretation of the labor argument, but does not itself establish the case for such an interpretation. This will be the task of the next section.

A second argument for the libertarian version of the labor argument is that the objects of the world should be treated as unowned. This argument can be understood as a way to save the argument by analogy. If the world is initially unowned, then the proposition that a first acquirer harms others by depriving them of opportunities for acquisition becomes much less defensible. For example, Jan Narveson argues that a first acquirer does not harm others, because one can only acquire a thing in the “evident absence of others making competing claims by their presence at the time” (Narveson 2010, 110). Indeed, if we think the world is originally unowned, then:

the only argument ... [for constraints on acquisition] must appeal to opportunity costs: that is, our pioneer’s appropriation of resources that others might have been able to appropriate themselves at some future time. But what is the basis of their appeal to such costs? If they want some of what might lie out there, why don’t *they* go and seek them? Why should these armchair explorers be thought to have a claim in advance? (Narveson 2001, 87)

From this perspective, the move to the necessity of a collective decision presumes common ownership of the world, a presumption that the libertarian cannot accept.

It is tempting to engage extensively in the dispute about which of these assumptions (common ownership or absence of ownership) characterizes the initial situation. But we should remember that this dispute only arises in the context of initial acquisition arguments. There are two problems with such arguments. One is that (for the most part) we do not live in a world of unowned objects. In the present world, the objects upon which we labor are, for the most part, already owned by others. This severely limits the applicability of these arguments. For to make them applicable to today's property relations, we would have to determine which first acquisitions were legitimate. This is impossible—we simply do not have the resources to trace the long chain of acquisitions for violations and rectify them so as to bring the distribution of property in line with initial acquisitions (Christman 1994, 63).

A more fundamental problem is in the methodology implicit in these arguments. A CTJ is a moral theory that aims to justify a set of pre-political entitlements that deserve political recognition by being translated into law through the establishment of a political community. Such theories are sometimes called natural rights theories. The label “natural” evokes the idea of a state of nature, in which individuals have these entitlements but lack the secure possession of them against violations by others. The transition to a civil society serves the purpose of securing these entitlements. It is a matter of exchanging one's natural freedom for a more secure legal freedom. Most libertarian theories also rely on acknowledging a set of natural rights, and then argue that these should become legal rights in a civil society (for example, Nozick 1974; Narveson 2001).

The difference, we see here, is that libertarians do not take the social contract as a hypothetical thought experiment (i.e. to see which social arrangements can be accepted through an impartial and fair consideration of the interests of all those concerned), but instead as an historical account of a really-existing state of nature that gives way to civil society. As a consequence, there is no need for consent or contract in the libertarian version of the state of nature. We see this clearly in Narveson's rejection of the idea that an initial acquirer has to justify his acquisition towards others. The relation between the acquirer and the (unowned) thing is primary here, while in the hypothetical version of the contract the relation between persons is primary. The latter seems to me much more credible. Property rights are first and foremost relations between people, about objects. This relational character is true for all rights: all of them are meant to arrange the interactions between people. Somehow this tends to be obscured in the case of property, because the object of this right is a material thing (most often). However, just as for other rights, property rights need interpersonal justification, in the sense offered by the hypothetical version of the social contract. The CTJ also follows such a method of justification.<sup>14</sup> A CTJ should think about pre-political property claims generated by laboring upon objects in contractualist terms. These claims should be honored only when they are part of a system of property rights that, in Scanlon's phrase, none of the participants in the system can reasonably reject (Scanlon 1998; Barry 1995).

In conclusion, we need a justification in which the various (agency-related) interests in holding property are fairly balanced. As part of that exercise, the question is still open as to whether labor provides an argument that one should be able to keep the objects upon which one labored. It is to this question that I now turn.

## 5. Working for Subsistence

The intuitive appeal of the libertarian version of the labor argument, within and outside the context of initial acquisition, rests on the idea that there is a strong link between labor and

agency. Many actions for their success require the use of objects (all actions do, if we take into account the use of the piece of land on which we stand). This was part of the direct argument. However, in many cases these objects are not only the precondition, but also the outcome of our actions. Many actions have as their result the transformation or creation of objects. In these cases, the exercise of one's agency is a form of labor. The claim is that since agents set themselves the purpose of this transformation or creation, then when they succeed, the resulting objects should belong to them. In the words of Alan Gewirth:

Since it is by A's own efforts that X is produced or made available [ . . . ] and since A's direct purpose in so producing is to have X as her own things either as a use value or an exchange value, to say that A does not have a property right in X would be to say that A's purpose in so acting may rightly be frustrated. But this, when generalized, would be an attack on the whole purposiveness of human action and hence on human agency itself. (Gewirth 1996, 183–184)

Much hinges on how we understand this link between agency and labor. A libertarian interpretation of this link is that we need to recognize a property right through laboring because a person, in acting, has the purpose of possessing the product ("as a use value or an exchange value," as Gewirth says). But this cannot be right, because mere wishes are never a good reason to accept rights. I may have the wish that, expressed in an article in the newspaper, the current government should resign. This does not give me any right that the government should do so. Even if the wish to keep what I created may be (phenomenologically) very strong, and even if this desire is widespread in the whole human species, this still is not an argument that these wishes should be honored by others. The problem remains that these others see their opportunities diminished.

So the psychologically primitive "wish to keep what one has made" cannot itself constitute a sound argument for labor as a ground for property acquisition. But it does put us on the track of a sound argument, when we think about why people generally have this wish. The answer I would suggest is: to survive, to make a living. A valid claim is present when one has labored to sustain one's own subsistence. To the extent that laboring is a key means to one's subsistence, there is a clearly recognizable agency interest in keeping the fruits of one's labor.<sup>15</sup> The specific purpose for which one labors, then, is an interest in sustaining one's agency in the future. This justification means that one accepts that sustaining one's agency through one's own labor is a legitimate (even privileged) means to sustain one's agency (compared with, for example, being sustained by a family member or the government). Given the agency interest in control and independence (see Section 3), the ability to provide for oneself and not be dependent for one's livelihood on others is a key capability. We need not condemn situations where some are able to live from others' fortunes, if this is a matter of choice for both parties; nor need we condemn situations where people receive government support because they lack capacities to labor. But we should certainly make space for those who wish and are able to maintain their own lives (and agency) through their own work.<sup>16</sup>

This justification for the labor argument transforms its form as well. It leads us to an egalitarian labor argument. If the ability to provide for oneself is a basic capability for some, it is a basic capability for all. This means that individuals should have a basic capability to work. Opportunities (jobs) should be available so that all those who want to work can find a place in the economic life of society to do so. One consequence of the labor argument is that it recognizes that the personal suffering (feelings of uselessness, of being excluded, etc.) that often comes from being unemployed in present-day societies indicates that a basic capability for agency has not been met (even where it is well compensated for financially by

social benefits). Guaranteeing such work opportunities may require—depending on economic circumstances—redistributing funds (or working hours) from those who already have work to make sure that these jobs are created. To the extent that this is necessary, the capability has egalitarian implications.<sup>17</sup>

Two final remarks about this capability are in order. First, libertarian arguments tend to assume the existence of free and autonomous agents who are able to labor and claim the fruits of their labor. However, the CTJ recognizes that agency is, in important respects, socially constituted. It requires a great many others for a person to become a full agent who can maintain herself through her own work. In my version, this requires the development of capacities to set oneself goals and select means to these goals, and capacities to realize one's goals. These capacities have to be nurtured by parents, family, friends, teachers, doctors, nurses and many others; and this not only at the start of life, but through a lifetime. Nussbaum's distinction between "basic" (i.e. innate) and "internal" (i.e. developed) capabilities is very helpful here (Nussbaum 2000, 84). Developing and sustaining the capabilities for agency requires not only the labor power of others, but also (as for any form of labor) the use of scarce resources. Any agent claiming a right to labor acquisition of property can only do so by presupposing a right to the social use of property so far as necessary to develop and sustain his agency. Given the symmetry of these kinds of claims, he must also accept that this does not just apply to his own agency but to that of all others as well. The most common form that this takes is taxation for the provision of public goods that sustain citizens' agency.

Second, even when such general conditions for agency development are met, some may not be able to sustain themselves through their own labor; for example, because of physical or mental impairments. In these cases, the right to subsistence imposes a duty on others (either individually or collectively through private or public institutions) to sustain these others. This leaves open the question of to what extent such support is due only when there is a proven incapacity to sustain oneself through one's own work; that is, the question of whether welfare assistance is conditional on willingness to work. Put differently, the argument so far leaves open whether there is not only a right to (a capability to) work, but also an obligation to work. Of course, no one who can sustain himself through other means can be obligated to work. The obligation only applies to those who claim support on behalf of their right to subsistence. The question is about the conditions pertaining to the invocation of the right to subsistence itself. This issue is debated in the context of controversies over basic income, workfare, working parents, inheritance taxation, wealth taxation, and so forth. I must leave these matters open here, as the subject for a separate investigation.

## 6. Conclusion

With this egalitarian version of the labor argument in place, we may now make explicit the relations between all three arguments. I have reached a complex justification for a basic capability to hold property, which can be summarized as follows. All three arguments provide justifications for accepting a right to hold private property, by pointing to different links between agency and property. The labor argument provides the starting point for thinking about how private property can be acquired: through one's own labor. In addition to labor, property can be acquired through transfer (itself part of the bundle of property rights): exchanges and gifts. But there are at least three restrictions upon one's right to acquire property through one's labor: restrictions in the labor argument itself, to the extent necessary to effectuate the right to opportunities to work for all citizens; restrictions from the direct argument; the right of all to have some minimal amount of property necessary for control and independence;

and restrictions from the indirect argument, to the extent necessary to guarantee others' subsistence capabilities.

All in all, a basic capability to hold private property derives considerable support from the links between agency and property. Moreover, I have shown how the problem of property cannot be considered independent from what we believe about other basic capabilities (most notably, subsistence capabilities and a basic capability to work). Also, I have at all steps of the argument given considerable attention to the question of whether arguments for property have egalitarian implications—since I think that the customary interpretation of the CTJ as egalitarian is much too quick, and does not take seriously the possibility of a libertarian interpretation of the CTJ. Finally, I have stressed the interdependence of the content of the property question and the question of one's method of justification. Some form of contractualism is at the basis of rejecting the libertarians' initial acquisition arguments.

Throughout the paper, I have stressed at several points how this justification leaves open the question of how much private property needs to be allowed, and for which objects. Thus, where the exact line between private and other (communal) forms of property needs to be drawn remains an open question. This is important for those who may worry that the justification of private property should be left to different cultures to decide. I share Nussbaum's general point that philosophers may construct arguments for a list of universally valid basic capabilities (Claassen 2011). In this paper I have argued that the links between agency and property are sufficiently strong to defend an individual's right to hold private property on such a list of basic capabilities.<sup>18</sup> But we may also agree with Nussbaum that any list of basic capabilities is formulated at a rather high level of abstraction, and therefore leaves a large degree of specification to different cultures. Here this means that specific cultures may legitimately restrict the scope of private property to some extent, where they judge this necessary to uphold strongly held local values, to adapt to specific socio-economic or geographic circumstances, to honor historical sensibilities about access to objects, and so forth. However, if the argument about agency here is accepted then there remains a core right to private property that may not be violated by these local specifications.

Together, I hope these reflections provide a fruitful contribution to Freeman's tall order mentioned in the Introduction, the project of working out the institutional implications of accepting the realization of basic capabilities as the aim of a just society.

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### **Notes**

1. I use this term to direct attention to the fact that I discuss the capability approach exclusively as a theory of justice, not in its wider manifestations (e.g. as a quality of life indicator). I use it to capture the common convictions of those defending the capability metric in the justice debate, Nussbaum being the most prominent but not the only one. For example, see Anderson (1999) and Wolff and De-Shalit (2007).
2. Thus, I do not think that the capability approach needs to remain incomplete in the sense noted by Freeman. I do think that a theory which fully delivers Freeman's order must go beyond the elements we now find in

- capability theories; in this sense, the core concepts and arguments in capability theorizing will then be a “mere” module in a larger theory. Such a theory may continue to be identified as a “capability theory” because realizing basic capabilities is at the heart of the enterprise, and because this core normative commitment influences and constrains (even where it does not fully determine) what commitments can be made about socio-economic institutions.
3. I do not claim nothing has been done. Capability theorists have explored the normative implications of adopting the capability metric in contexts such as healthcare (Venkatapuram 2011), labor markets (Deakin and Browne 2003), sustainable development (Lessmann and Rauschmayer 2013) and other issues. This is all fairly recent work. This paper should be seen as contributing to this emerging literature.
  4. Even a libertarian government hence has some positive duties (to protect, not merely to deprive), as is explained by Shue. The distinction with an egalitarian government is not whether to acknowledge only negative or also positive duties, but which positive duties to acknowledge.
  5. While Honoré’s classification is widely used, it has of course been subject to controversy. I do not claim we have to accept all his incidents as belonging to a capability to hold property. I merely claim here that property can be analyzed in terms of some list of incidents.
  6. Important critiques of Nussbaum’s perfectionism by others include (Nelson 2008) and (Carter 2013). See also Elizabeth Anderson’s capability theory, which starts off from the idea that the goal of a just society “is not to make everyone happy but to secure the conditions of everyone’s freedom” (Anderson 1999, 329). Obviously Nussbaum’s idea of flourishing is more complex than “happiness,” but the opposition between a substantive conception of the good life and a more minimal view of human freedom to determine one’s own conception of the good life is clear enough. As Nelson and Carter argue in detail, Nussbaum’s reply that everyone can choose his own functionings from the capability set is insufficient to put to rest the doubts about her use of such a substantive view of the good.
  7. It is contested whether everyone should have a human right to subsistence, but this is so not because of doubts that these subsistence conditions are necessary for agency, but because of doubts about the existence of correlative positive duties by others to help guarantee subsistence. I have to leave this debate out of consideration here.
  8. This argument does not imply that everything needs to be owned; it can acknowledge that some things are still unowned (water in the ocean, the air we breathe). It only relies on the claim that many things on which our lives depend are actually subject to some system of ownership, and that for those things some measure of private property is necessary for control over one’s life. Note that the discussion of absence of ownership in Section 4 hereafter has a different focus, because it is about absence of ownership in an “initial situation” (whether hypothetically or historically interpreted).
  9. Analyses of market efficiency in the economic literature normally rely on utility information (preference satisfaction), not on capability information. These analyses will only be relevant to the present argument when these two types of information converge on the same conclusions.
  10. These matters are sometimes confused in arguments that talk about the redistribution of income and wealth. We always need to ask why income and wealth need to be redistributed. The reason may be that they are needed to satisfy subsistence needs or that they are needed for agents to create a sphere of private action. These are different arguments, which imply different tests for redistribution.
  11. In focusing on subsistence capabilities, I leave outside of consideration the contributions of a property system to civil and political capabilities. This should also be fully taken into consideration. For example, there may well be grave threats from a concentration of private property to the integrity of the political process.
  12. This has led many contemporary authors to defend a revised version of the labor argument (see, for example, Munzer 1990, 266–291; Gewirth 1996, 182–188; Becker 1977, 48–56). In such arguments, constraints are placed upon labor acquisition and the labor argument is presented as one that needs to be balanced against other arguments for property (thus also diminishing its libertarian implications).
  13. Lomasky himself admirably explains the difference in (Lomasky 1987, 116–117). I do not know what has caused his change of mind. Note that Gaus and Lomasky, at the end of their article, acknowledge the need for a social determination of the conditions of property acquisition through labor, without however arguing for a specific social arrangement.
  14. Presenting CTJ as a social contract theory may raise suspicions since Nussbaum has so fiercely criticized Rawls’s contract theory and insisted that her CTJ is an “outcome-oriented” not a “procedural” approach (Nussbaum 2006, 82). But on closer inspection, the difference seems overstated. Nussbaum protests against certain specific elements in Rawlsian contractarianism (the Kantian conception of the person, the assumptions of rough equality and mutual benefits, etc.). In the end, she says that her CTJ comes very close to a Scanlonian contractualism that asks which moral claims could not reasonably be rejected (Nussbaum 2006, 147–153).
  15. I leave open the interesting question of what to think about labor that does not contribute to one’s subsistence. One may imagine that, in developed countries at least, part of most people’s labor is “luxury labor”. This raises

- the question of whether or not to define the concept of subsistence as relative to a socially determined (upwardly adjusted) standard of living.
16. This requires that we can actually determine what property each deserves on the basis of her labor. In modern societies, with an extensive division of labor, our actions are intertwined with countless others in complex organizations and networks of labor. The argument here presupposes that it is nonetheless possible to reasonably determine each one's "added-value" to the end-products to which one contributes (as inevitably needs to happen when wage levels are determined).
  17. I bracket several important questions, *inter alia*: the legitimacy of wage labor compared with self-employment, and whether a system with communal means of production and communal wages would also be able to satisfy the individual agency interests in property and work discussed here.
  18. This argument would derive additional support from an empirical investigation showing that all cultures (not only western ones) have an important concept of private property. Becker, after an elaborate discussion of the available evidence, concludes that "extensive systems of private property appear to be universal" (Becker 1980, 212). Nonetheless, such empirical support is not strictly necessary, for the fact that a culture does not recognize private property could also be a sign that it does not sufficiently value the type of individual agency defended here.

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### About the Author

**Rutger Claassen** is Associate Professor of Ethics & Political Philosophy at the Department of Philosophy of Utrecht University, Utrecht, the Netherlands. He holds MA degrees in Law and Philosophy, and obtained his PhD in 2008 for a dissertation about the moral limits of markets. He has published in journals such as *Economics and Philosophy*, *Inquiry*, *Law and Philosophy*, *Journal of Social Philosophy*, and *Politics, Philosophy and Economics*. His research interests include socio-economic justice (especially the capability approach), economic and ethical theories about regulating and limiting markets; and conceptions of freedom and autonomy, and the limits of state interventions in private life. For more information, a full CV and some downloads, please see online: <http://www.rutgerclaassen.nl/?lang=en> (English available).