Must We Have the Right to Waste?
(forthcoming in *New Essays in the Legal and Philosophical Theory of Property*, Steven Munzer, ed. (Cambridge University Press), reprinted with the permission of Cambridge University Press)

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USC Olin Research Paper No. 00-16

RESEARCH PAPER SERIES

Sponsored by the John M. Olin Foundation

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1. INTRODUCTION

Anglo-American law has long since gotten to the point where an owner can pretty much do whatever she wants with her property, right down to the limiting case of using it all up. Indeed, even if there are things an owner cannot do with her property - "absolute" ownership having ceased meaning "absolute," if ever it did[1] - she probably can waste it. The jus abutendi, or the "right of destroying or injuring [one's property] if one likes," as Roscoe Pound put the matter in 1939, or, equivalently, the affirmative right "to consume, waste or destroy the whole or part of [one's property]," as A. M. Honore! phrased it in 1961, has long been recognized as one of the basic rights in property's "bundle of rights."[2] William Blackstone stated the case bluntly two centuries ago: "[I]f a man be the absolute tenant in fee-simple . . . he may commit whatever waste his own indiscretion may prompt him to, without being impeachable or accountable for it to anyone."[3]

On even a moment's reflection, however, this right to waste is as puzzling - or ought to be - as it is entrenched. Anglo-American society has never liked waste, in moral or in consequential terms, as Blackstone's language in announcing the right to waste ("his own

indiscretion") itself suggests. There are good reasons, sounding in a reasonable social contractarian moral and political theory, for this disdain: Private waste imposes social harms. Where then did the right to waste come from? Why do we still have it to this day - indeed, why is it so taken for granted that we never seem to question it? More importantly, must we have it, as a descriptive matter? Should we continue to have it, as a normative one?

I explore these typically unexplored questions in this chapter and argue against the continuance of the jus abutendi. The argument proceeds in four basic steps.

One, the right to waste emerged as part of an absolute conception of ownership developed largely in the context of an agrarian economy, where waste referred to the dissipation or destruction of a permanent physical asset, paradigmatically land. The right was seen as a necessary and non-problematic, because self-limiting, aspect of the absolute conception of ownership, which was itself desired for other reasons, such as wealth-maximization.

Two, there is another conception of "waste" besides the dissipatory one, a conception long present in ordinary moral language and intuition. This is the idea of waste as the relatively nonurgent expenditure of scarce resources, paradigmatically time or money.

Three, as fungible capital has replaced land as the chief carrier of social value, waste

in this second sense has become the more important threat to the collective welfare of a reasonable society. Nonurgent waste is socially harmful from a political liberal point of view, and is not as constrained by self-interest as dissipatory waste is.

Four, it is possible to use the tax system, specifically a progressive cash-flow consumption tax, to affect a revised conception of ownership modeled after a life estate form of ownership. Under this new conception, property owners no longer have an unequivocal right to waste; the tax system exerts a general levy on high-end, nonurgent expenditures.

My principal aim in this intellectual journey is to get readers to rethink conceptions of property ownership and in particular the wisdom and necessity of having a general, affirmative right to "consume, waste, or destroy" all of what one owns. I also aim at an important but long neglected intellectual synthesis: the joining together of our normative theories about tax and property.

2. TWO CONCEPTIONS OF OWNERSHIP

A. The jus abutendi is a byproduct of an absolute conception of property ownership that was itself desired - as the right to private property was itself initially desired - in large part to prevent waste. Aristotle saw early on in the Western political tradition, in direct response to Plato, that private property was needed to ensure that property be cared for properly, or

at least not wasted.[4] A similar movement repeated itself when forms of property ownership moved from diverse and often limited term interests, in the period of feudal tenancies, toward absolute ownership, a move clarified by Blackstone and confirmed by Honore!.

Time is a necessary element in these competing conceptions of ownership. Without some sense of time, a claim of ownership means little. The child who insists that a toy she is grasping is "mine" is right, up to a point. An early step in developing a conception of property is to establish that there is anything at all that can endure through time; a necessary later step is to address the question of for how long. Much of Anglo-American property law concerns the question of ownership in time: what the "terms" of various possible "estates" are.

The fee simple absolute is the largest possible estate; its holder owns the property indefinitely. A fee simple absolute stands in contrast to a life estate, which terminates on the death of the measuring life, typically belonging to the beneficial owner or user of the property. (A life estate is a paradigm for a limited term interest, but it is by no means the only or even the most common one. A mortgagee or leaseholder, for two very important examples, also has a limited term and is thus constrained not to waste the underlying property.) Property held under a life estate passes over to the successor or future interest, typically a "remainder," on the death of the measuring life.

I shall use this vocabulary to compare and contrast two conceptions of ownership, an absolute and a life estate one. The absolute conception, though long checked in some of its present-oriented powers, has also long dominated our thinking about the concept of ownership through time.[5] There is on the other hand no generally invoked life estate conception of ownership. I aim to establish that such an understanding of ownership is in fact an attractive one.

B. Consider the six incidents of ownership as listed, in somewhat typical fashion, by Pound:

(1) the jus possidendi or right of possessing;

(2) the jus prohibendi or right of excluding others;

(3) the jus disponendi or right of disposition or alienation;

(4) the jus utendi or right of using;

(5) the jus fruendi or right of enjoying the fruits or profits; and

6) the jus abutendi, or right of destroying or injuring if one likes.[6]

These rights are a modern distillation of ones brought down from Roman law -

although where, exactly, the jus abutendi came from is a matter of some dispute.[7] Most of the six rights readily extend to a life estate owner, or to any other present interest of limited duration. A life estate holder can possess the property (1), exclude others from it (2), dispose of her life estate (3), use the property (4), and enjoy its fruits or profits (5). One can think of these as the present-oriented rights of ownership, for they use or affect the present interest.

A fee simple absolute adds but two powers to the life estate. One is the power to direct where the property is to go on the termination of the life estate: that is, a jus disponendi (3) as to the remainder, or future, interest. Two is the jus abutendi or right of waste (6). We could add a third difference - the right to sell or alienate the entire estate in fee simple absolute. But although the ability to sell the whole property is of immense practical importance, it is entailed in the rights set out above. One can sell what one has. A life estate owner already has the jus disponendi as to her life estate.[8] What she lacks is the right of disposition as to the remainder, which, when combined with what it is that she does have, would give her a right of disposing of the whole.

This all follows from the fact that the fee simple absolute owner owns the remainder interest, but the life estate holder does not. The jus disponendi as to the whole and the jus abutendi are rights that affect the remainder interest as well as the present one - thus one can think of them as the future-oriented rights of ownership. Under a life estate conception of

ownership, the property holder cannot waste the property or direct where the remainder is to go. Later, in Section 2.E, we shall see that it is possible to engraft a power to direct the disposition of the remainder onto a life estate conception, tantamount to subtracting the right to waste from an absolute conception of ownership.

C. These same ideas come into play in the language of trusts. Imagine that a benefactor, Ann, has placed a stock of valuable property into a testamentary trust, with a life estate to her surviving husband, Bob, remainder to her daughter Cynthia. Bob has the right to the "fruits" or income of the trust - he has the jus fruendi - but not to the res or capital itself.

To tie the trust discussion together with Pound's vocabulary, what this should mean is that the right to capital generates the same rights as owning the remainder interest - for this is precisely what Bob does not have; it belongs to Cynthia. Honore! describes the "right to capital," which he sees as one of the incidents of "ownership," as follows:

> The right to the capital consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it; clearly it has an important economic aspect. The latter liberty need not be regarded as unrestricted; but a

> general provision requiring things to be conserved in the public interest, so far as not consumed by use in the ordinary way, would perhaps be inconsistent with the liberal idea of ownership.[9]

Honore!'s language illuminates that a general right to capital consists of two more specific rights or powers: the "power to alienate the thing," precisely analogous to Pound's jus disponendi as to the whole, and the "liberty to consume, waste or destroy the whole or part of it," precisely analogous to Pound's jus abutendi.

Pound's and Honore!'s formulations thus lead to the same place. An absolute owner has both a full jus disponendi and the jus abutendi, meaning that she can transfer or destroy the capital of the trust, whereas a life estate owner has neither right. Honore!'s phrasing of the right to capital is helpful, however, because it focuses further attention on the puzzling right to waste. Honore! notes that the liberty to "consume, waste or destroy . . . need not be regarded as unrestricted." He also comments that a general provision limiting the jus abutendi by a public interest requirement "would perhaps be inconsistent with the liberal idea of ownership" (emphasis supplied). Honore! thus senses that the jus abutendi stands on very different ethical footing from the jus disponendi, and his language in supporting a right to waste is tentative and equivocal. But he puzzles over the impracticability of any "general provision requiring things

to be conserved in the public interest, so far as not consumed by use in the ordinary way. . . ".

Honore! does not dwell on this puzzle for long, however, because he sees an easy way out. In the next words after the above-quoted language, Honore! makes clear that he sees the jus abutendi as being fairly inconsequential:

> Most people do not wilfully destroy permanent assets; hence the power of alienation is the more important aspect of the owner's right to the capital of the thing owned. This comprises the power to alienate during life or on death, by way of sale, mortgage, gift or other mode, to alienate part of the thing and partially to alienate it.[10]

This is the predominant view of the right to waste: it's not important, because the fact of waste is not important. The contemporary libertarian legal scholar Richard Epstein has recently used much the same line of reasoning. Epstein argues in a naturalistic way, pointing out, as Honore! did before him, that most people do not destroy assets:

> [L]and is necessarily permanent, and the improvements on it generally have an expected life beyond the present owner.

> These assets will be passed on, unless we think it likely that persons in the present will take great pleasure in destroying what they have created. This last risk seems quite small . . . . Regulatory intervention at common law has never been concerned with people who want to destroy what they own; rather it has been to restrict the period of time during which assets could be tied up in trust.[11]

The jus abutendi thus stands as an embarrassment, to Blackstone, Honore!, Epstein, and to us. Blackstone condemns it in moral terms; Honore! finesses it, because he sees the right to waste as an inconsequential, perhaps difficult to remove, and in any event inevitable ancillary of the important jus disponendi; and Epstein essentially follows suit - he sees no problem of waste, because he denies the prevalence of it.

D. An absolute conception of ownership differs from a life estate conception in its jus disponendi as to the remainder and its jus abutendi. The latter is an unattractive feature of a social property regime. The attraction of an absolute conception can thus be expected to lie in its unfettered jus disponendi.

There are indeed good collective reasons for having a full jus disponendi, lying in what

Honore! saw as "the economic aspect." As economists since at least Adam Smith have noted, the right to alienate property is efficient. There are two aspects to this greater efficiency. The first is allocative or asset-specific. Free alienability furthers the flow of resources to their highest and best use and users. Under limited term interests, however, selling is hazardous and complicated and so less selling occurs: imagine purchasing a life estate from its holder and wondering about the condition of his health, centrally relevant to the value of the term interest. This de facto restraint on trade is more or less per se inefficient.

The second aspect of the greater efficiency of a full jus disponendi involves time. As Harold Demsetz noted in an oft-cited 1967 article, a property owner who owns property indefinitely will optimally maximize its value over and in time, rather than exploit it for short term gain.[12] If a farmer only owned land until her death, in contrast, she would have a perverse incentive to maximize its produce over the course of her lifetime alone, ignoring longer term provision for the quality of the soil and so forth. This sets the tragedy of the commons in temporal terms: the absence of absolute private property rights can lead to a destructive tyranny of the present. Granting the farmer a jus disponendi as to the whole not only allows her to sell the farm more readily (allocative efficiency), it also gives her the right incentive to care for the property used in the best way, even if this way entails some near term sense of restraint (temporal efficiency).

The temporal efficiency of the jus disponendi takes into account a human tendency to be concerned with one's heirs - to have what David Hume described as "confined generosity."[13] With the brilliant simplicity of free market mechanisms, this intergenerational altruism need not be complete or even especially pervasive. If a particular farm owner cared only about her own or her own generation's consumption, for example, the optimal path for her to follow would be to sell the farm to someone prepared to optimize over time. Even if she did not value the remainder for itself, as long as she could sell the entire estate she could do so to someone else who did value the remainder - and so indirectly act for the long term. The spendthrift farmer would receive the greater value generated by someone else's intergenerational altruism, and still get to maximize her own lifetime pleasure. The general effect of optimizing over time thus depends on some, but not total, concern for future generations, plus free alienability.[14]

The movement towards an unfettered jus disponendi - as, indeed, the movement towards private property itself - was therefore antiwaste. "Waste" in the classical legal sense was precisely concerned with temporal inefficiency. Absent effective monitoring mechanisms, limited term owners could be expected to try to favor the present over the future by wasting the property. An attractive solution to the problem of waste was to move to an absolute conception of ownership, jus abutendi and all, and trust in the basic rational self interest of

human nature to prevent the fact of waste. By giving owners an absolute right of disposition, the law curtailed any compelling reason to exercise the concomitant right to waste.

E. Is it possible to start with a life estate, add in the attractive features of a fee simple absolute, but stop short of granting a jus abutendi? It turns out that by granting a life estate three doctrinal mechanisms, all widely used in modern trust practice, we get close to just this goal.

One, we can give the life estate holder broad managerial powers over the specific assets of the trust. This is akin to making Bob the trustee of Ann's testamentary trust, as is in fact common for surviving spouses. This first modification deals with the problem of allocative or asset-specific inefficiency. Suppose the trust corpus consisted of a farm. Bob doesn't know much about farming and has little interest in learning. Under modern trust practice, Bob, as trustee, could sell the farm and reinvest its value in whatever he deems appropriate: a mix of stocks and bonds, say. Bob is limited by fiduciary duty to invest in a way that doesn't "cheat" on the remainder interest - he couldn't buy exclusively "junk bonds," for example, risking principal to increase interest, a rule that actually implements an antiwaste norm.[15] But Bob is free to make broad decisions over the best allocation of resources, provided that he acts with some solicitude for the future - that he respects the absence of his right to waste, that is.

Two, we can give the life estate holder limited powers of invasion into the corpus or principal of the trust. Once again, current trust law and practice sanctions just such devices.[16] Rights to get at value otherwise belonging to the remainder would be limited to certain specified purposes, like the reasonable needs of health, education, support, or maintenance of the income beneficiary. The limited power to invade corpus can be seen as a refinement of what is meant by "waste": using the trust res for serious medical needs is not necessarily an exercise of the jus abutendi, as opposed to utendi. Spelling out in greater detail the terms and conditions of the power of invasion would lead into a consideration of objective urgency: one would have to somehow come to distinguish needs from wants and so forth, topics I shall touch on only briefly here.

Three, we can add a "power of appointment" to the life estate.[17] A power of appointment gives its holder the right to designate the heirs - a sort of jus disponendi as to the remainder. The right of disposition isn't unlimited, however, for there is no effective way to sell or transfer the remainder in the present tense - a person holding a life estate with a power of appointment is constrained to maintain the existence of a remainder. The power is only a testamentary one. Such powers of appointment are often used, in practice, to preserve flexibility as to where the remainder passes on the life estate holder's death. If Ann insisted on the remainder going to her children, but left the terms, proportions, and conditions up to

Bob, this would be a "limited" power of appointment; if the power were fully open, it would be a "general" one. The power of appointment allows Bob to make prudent decisions about the varying needs of the children at a later date than Ann's death, while giving Ann assurance, at the moment of trust creation, that Bob will not squander the entire trust on his own selfish wants. It thus addresses some of the concerns over temporal inefficiency, while accommodating a human desire to choose or direct one's own heirs.

Consider now what Bob has. He has a life estate with full managerial powers to direct the sale and investment of the trust res; he can enjoy the "fruits" or income of the trust and he also has a limited power to invade corpus for urgent personal needs; he has a power of appointment to direct where the remainder is to go on his death. This all moves us to a conception of a property owner as a general fiduciary as to part of his property - the capital part. Bob has the use of the property during his life and most of the other rights of full ownership. He can use the capital and thus deplete the remainder for urgent needs. What he does not have - just about all that he does not now have - is the jus abutendi. He cannot waste the property. While he retains the power to direct where the remainder is to go, he must reasonably insure that there is a remainder to go somewhere, absent extraordinary circumstances.

These collective powers are what I mean as the life estate conception of ownership.

They consist of all of the rights of the absolute conception save the jus abutendi; the life estate holder cannot "consume, waste or destroy" all of "his" property, because he is constrained to leave a remainder. Later we will come to see that a properly designed tax system can make just such a conception of ownership practicable.

3. WASTE

A. I have argued that in the evolution of the common law of property, an absolute conception of ownership with an unfettered jus disponendi appeared to be a better constraint on temporal inefficiency or waste than any direct legal restriction on the jus abutendi. This becomes more evident when one considers the historical problems with laws against waste.

The common law doctrine of waste - more properly a doctrine against waste - concerns the temporally inefficient situation of a present owner's neglecting the interests of some future owner.[18] The doctrine can only come into play under a life estate or other limited term interest where there is a specific, named future interest to assert it. A life estate holder is constrained not to - whereas an absolute holder has an unequivocal right to - commit waste. Under the ancient and particular legal doctrine of waste, however, only certain forms of future interest holders could assert the right.[19] Other limitations plagued the doctrine, as the law was unable or unwilling to engage in frequent, particular disputes between "neighbors in time" over

the proper management of property. The legal literature for example draws distinctions between "permissive" and "affirmative" waste, that tend to turn on the form of wasteful action taken.[20] These distinctions are not germane to an objective, reasonable social interest in waste. Nor, for that matter, and relatedly, are they of much interest to future interest holders: a person inheriting a dilapidated farm is apt to be unconcerned with whether or not acts of omission or commission have led to its state.

The common law against waste was asset-specific, nearly exclusively concerned with land. The general matter of squandering wealth could in theory be met with a more general law against waste, one that would apply without a specific party in interest to assert it. But herein lay a rub. A general social doctrine of waste was virtually incomprehensible to Blackstone and his peers. Blackstone clearly thought it was a moral problem to waste property. "Though the waste is undoubtedly damnum," Blackstone wrote, referring to waste that a fee simple absolute holder might commit, "it is damnum absque injuria"[21] - a moral wrong without legal redress. Honore! likewise had paused over the practicalities of a general law against waste. Society was thus prepared to concede an unlimited jus abutendi both because it considered the factual problem of waste limited and any direct theoretical solution to it impracticable.

B. It is time to mark more clearly a distinction between two conceptions of waste.

One is the idea of waste as dissipation: the pure loss of value, with none but some possibly perverse - to an Anglo-American at least - pleasure in the loss. Think of letting the farm go to seed or burning down the house. Such "dissipatory" waste represents no tangible good to anyone; the value disappears into the ether.

The legal and property scholars who have discussed waste - and tolerated the general right to it - have meant it in this dissipatory sense. Blackstone first defines waste in Book II of his Commentaries as follows:

> Waste, vastum, is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail.[22]

When Blackstone picks up the topic of waste again in Book III, dealing with real property, he first mentions that waste is "destruction in lands and tenements" and goes on to elaborate:

> [W]aste is a spoil and destruction of the estate, either in houses, woods, or lands; by demolishing not the temporary profits only, but the very substance of the thing; thereby

> rendering it wild and desolate; which the common law expresses very significantly by the word vastum . . .[23]

The focus on dissipatory waste led legal scholars to conclude that the problem of waste is a self-limiting one, at least once absolute ownership was established. Why would anyone literally throw value away? It is not necessarily so - the fact that dissipatory waste is not common in our culture is more a matter of social and economic institutions, including, importantly, custom and mores, than any kind of necessity - but we can nonetheless concur with Honore!'s view that "most people do not wilfully destroy permanent assets."

A second conception of waste, however, refers to nonurgent, frivolous, or excessive consumption - poor choices of how to spend time or value.[24] Such nonurgent waste does not destroy property but rather moves it into other hands - think of selling the farm for a sack of beans. We might therefore expect that a capitalist society be more concerned with dissipatory than with nonurgent waste, and would even use different terms for the two; this might indeed explain the law's exclusive concern with the former conception of waste. Yet ordinary moral discourse and etymological senses of the word "waste" from mideval times down forward have not drawn this sharp distinction.[25] The two senses often blend together in ordinary discourse; we talk of foolish choices of how to spend value as if the spendthrift were indeed "throwing money away." Whereas dissipatory waste might be seen as only a metaphor for

nonurgent waste - foolishly spending money is like throwing it away - the two senses have become much more closely linked than that.[26]

I wish to be clear about what is intended from these matters of definition. Legal theory invariably refers to dissipatory waste. Life estate holders, tenants, mortgagees and others have legal duties not to waste specific assets in this dissipatory sense. But dissipatory waste is rare in practice, constrained in large part by an absolute conception of ownership and self-interest. Only if one would rather destroy a thing than sell it and consume its value would an absolute owner willingly commit dissipatory waste. Nonurgent waste, however, presents much different challenges and concerns. Most importantly, the very absolute conception of ownership that makes dissipatory waste less likely makes nonurgent waste more so. If one can do whatever she wants with "her" property, than many individuals will indeed be irresistibly tempted to spend it all on their own wants, however nonurgent these be from a collective perspective. In sum, the two conceptions of waste are connected because each is enabled de jure by the jus abutendi. But the two conceptions stand apart because the right to waste is de facto rare relative to dissipatory waste, but not rare relative to nonurgent waste. People most certainly do "consume, waste or destroy" all or large portions of their capital.

Ultimately, the argument for bringing this second conception of waste into the legal and philosophical analyses of property rights is a normative, not an analytic one. I believe that

ordinary moral discourse is right when it comes to "waste": a reasonable society should be concerned with nonurgent waste. We also can and should develop legal constraints against it. This is not a matter of definitions. The argument must rise or fall on the strength of the normative concerns motivating it, as set out in the balance of this essay.

C. The conception of waste as nonurgent expenditure relates to a philosophic vocabulary developed by Thomas Scanlon and used in a related fashion by John Rawls.[27] To a thorough-going utilitarian, value is simply and strictly a matter of subjective preferences, perhaps corrected for factual errors. Comprehensive ethical utilitarians have little use for a conception of waste as nonurgent consumption; one man's waste is another's need.[28]

Scanlon points out that in ordinary moral discourse, however, we do not act like simple hedonic utilitarians: we do not, that is, accept at face value a person's subjective statement of worth. Rather, we make resource to some objective measure of inter-personal value, which Scanlon calls "urgency." We classify different sorts of desires: preferences for medical expenditures, for example, strike us as more urgent - up to at least a fairly high quantum - than preferences for different types of gourmet cuisines, regardless of the subjective intensity of the preference in the soul of its holder. Scanlon does not mean "objective" here to relate to some foundational truth claim; he means merely to get outside of the language of subjective preferences and hedonic utility. He explicitly leaves open the grounding for the

objectivity - either in some "naturalist" or "conventional" understanding.[29]

Rawls uses a similar understanding of objective values to develop the important concept of "primary goods," which stands at the core of his social contractarian response to utilitarianism:

> The thought behind the introduction of primary goods is to find a practicable public basis of interpersonal comparisons based on objective features of citizens' social circumstances open to view, all this given the background of reasonable pluralism.[30]

There is no reason to engage here in any complex project of political philosophic taxonomy. We need not specify precisely what goods are or are not "urgent." The ultimate practical instantiation of a law against waste in the tax system can - and I believe should - rest on rather crude classifications of urgency, turning more on the level or degree of private use than on the kind. Scanlon after all begs off the task of defining what, exactly, is "urgent," and Rawls similarly leaves the precise content of primary goods to be spelled out by others acting within fair epistemic procedures.

The important point is that we have a way to - and do - talk about things in a

vocabulary of urgency. This is both a matter of kind and of degree. We see some goods - food, clothing, minimal shelter and medical supplies, education - as being basic and essential. Others we see as less important, and even - at some quantum or point - not urgent at all. We have long used the word "waste" in ordinary moral discourse to get at this latter category. It is a waste, say, to spend money on a lesser urgent need while allowing more pressing matters to wait, or to buy one more luxury car or fur coat when one has garages and closets full enough as is.

D. A third conception of waste involves nonuse - the failure beneficially to use one's time, talents, or resources. This conception of waste is especially salient in regard to human capital, an increasingly important repository of value: a mind is a terrible thing to waste, as the saying goes.

I do not here draw on this idea of waste as nonuse. The nonuse of a material resource is constrained in much the same way as dissipatory waste is, namely by its being self-harming. Consider money. Burning cash or stashing it under one's mattress are both self-harming acts; spending it all on a grand binge, in acts of nonurgent waste, may not be. This is the essence of the social, objective problem with nonurgent waste: one cannot count on the invisible hand of subjective self-interested action to serve the collective good, as one plausibly can, on balance, when it comes to the dissipation or nonuse of potentially productive physical assets

or money. The subjective and reasonable objective interests diverge when it comes to nonurgent waste.

Insofar as human capital is concerned, a doctrine against wasteful nonuse would also push the theory to violate norms of political liberty. Taken to a certain limit, after all, an antiwaste norm becomes a wealth-maximizing one: any failure to optimize value is a waste, in some sense. But it is important not to push the theory this far. In particular as to human capital, compelling an individual to devote her talents to the accumulation of social value sets material wealth as a kind of summum bonum and is an illegitimate intrusion of the state into individual pursuits of different comprehensive conceptions of the good. (This is not to say that some requirement that able-bodied adult citizens must work if at all possible as a condition of receiving state support - workfare, in short - is illegitimate; I express no opinion here on this difficult set of questions.[31]) But once an individual has exercised her talents in a social market, and has received money or some other carrier of social value in recompense, it is within the legitimate powers of society to determine what it is she can or cannot do with her property or, equivalently, what of the material is "her" property in the first instance. A doctrine against the nonurgent use of social resources does this, as part of the social delineation of property rights.

E. The chief repository of property value has moved since the eighteenth century from real to intangible property, paradigmatically money. The capital stock writ large is now

the most important carrier of social value, at least putting aside human capital, which presents its own distinct difficulties alluded to above. The concern with dissipatory waste has remained subdued - people don't generally burn money any more than they destroy land. But a social concern with nonurgent waste has, or should have, increased. People do waste money, even as they do not generally misuse land, in this nonurgent sense.

There have been periodic attempts throughout Anglo-American history to curb excessive luxury spending by so-called sumptuary taxes and laws.[32] These laws have been specific ones that face the problems of identifying particular offensive goods, item by item; they do not address the more general problem of nonurgent expenditure. Such sumptuary laws have invariably failed and been repealed.

It is therefore not surprising that, with an affirmative jus abutendi and without effective legal sanctions against nonurgent waste, we find moral condemnations against luxurious living and excessive consumption, as in the writings of Smith, Hume, and Benjamin Franklin in the eighteenth century, and Thorstein Veblen in the nineteenth.[33] A concern with opposing excessive consumption is understandable and pragmatic. Since savings is nonconsumption, society can only have a capital stock if some of its members do not consume all that they can. In particular, there has to be some way to keep the rich from spending all that they might on themselves - from not wasting "their" capital.

There is reason to believe that cultural values have helped matters in capitalist democracies. Keynes, in a passage cited with approval by Rawls, saw that a frugal aristocracy was critical to England's power and success throughout the nineteenth century. In Rawls's text:

> Keynes remarks, for example, that the immense accumulations of capital built up before the First World War could never have come about in a society in which wealth was equally divided. Society in the nineteenth century, he says, was arranged so as to place the increased income in the hands of those least likely to consume it. The new rich were not brought up to large expenditures and preferred to the enjoyments of immediate consumption the power which investment gave.[34]

Rawls is troubled by this state of affairs, understandably enough, although he does not deny the facts of the matter. This is as we would expect of a political liberal theorist - at least one who has not seen the possibilities of a general social law against waste. Rawls proceeds:

> If the rich had spent their new wealth on themselves, such a

> regime would have been rejected as intolerable. Certainly there are more efficient and just ways of raising the level of well-being and culture than that Keynes describes. It is only in special circumstances, including the frugality of the capitalist class as opposed to the self-indulgence of the aristocracy, that a society should obtain investment funds by endowing the rich with more than they feel they can decently spend on themselves.[35]

Rawls here sees the "frugality of the capitalist class" as a fortuity. He is reluctant to grant the "rich more than they can decently spend on themselves" out of the obvious fear that this frugality will soon turn into the "self-indulgence of the aristocracy." These comments presume a jus abutendi - the absence of a law against waste. Such a law would and will ensure that the capitalist class remain frugal.

This is thus a central paradox of capitalist society. The common law of property grants absolute ownership, in part to give individuals the incentive to amass and care for large stores of capital, which in turn serve the collective good. But in giving individuals this absolute power, society has also given the wealthy the right to waste that capital, which would not generally serve the public good. The result is a delicate and fragile balance. Society must

continue to hope for the frugality and not the self-indulgence of its affluent members, with none but the tools of moral approbation to help realize the hope. How might a reasonable society better encourage the accumulation of capital on the one hand while discouraging its waste on the other? Society can respond with a general law against waste by using the tax system. But first let us canvass why this task is so important.

4. THE POLITICAL LIBERAL PROBLEMS OF WASTE

A. Waste in both its dissipatory and nonurgent senses has been frowned on throughout Anglo-American history. But what, exactly, is wrong with waste from a political or moral point of view?

On the one hand, there is something obvious and irreducible in ordinary moral discourse's condemnation of waste - everybody knows that waste is bad, this is in fact largely what the word means. But in moving this ordinary moral insight into legal and political contexts, we encounter certain conceptual difficulties. On closer inspection, however, many of these difficulties turn out to be artifacts of the way we have grown accustomed to thinking about property rights.

If we begin with the premise that private property is absolute, there seems to be nothing politically wrong with waste in either of its senses. Indeed, it is the very question -

What's wrong with waste? - that seems odd. Waste might be a bad thing, of course - prudence counsels against it, and we try to dissuade our friends and loved ones from engaging in it - but it would, ultimately, be none of our official public business. A social concern with waste would be meddlesome, paternalistic, envious. It's your property, after all, and you can do whatever you want with it, "without being impeachable or accountable for it to anyone," as Blackstone had put it.

But why should we begin with the premise that the private-ness of property is absolute? This only begs all of the most important questions. It is after all part of the task of a reasonable society to come up with fair conceptions of property rights in the first instance. Indeed, a compelling argument for the absoluteness of private property is that this is wealth-maximizing or - in my preferred vocabulary - antiwaste. The "absoluteness" of private property derives its justice from other, independent goals - the social, collective good justifies and grounds the private right, not vice versa.

We have grown accustomed to a certain priority of thought in thinking about property. We first determine what property is private, up-front. Then - and only then - we feel compelled by conceptions of liberty to leave private parties alone, at least absent some strong, over-riding public interest. We must in these lights first justify specific, particular social intrusions or limitations on property, for these forever threaten to be "takings" of private

property, as opposed to refinements of what private property means in the first place, or society's enforcing the terms of its tacit agreement that property can only stay private, provided, say, that it is not wasted.[36]

We do not have to decide matters this way. We can change the time at which decisions over what is public and private are made - we can effect a fundamental shift in the timing of our thinking of property. Rather than decide up-front what is private, we can hold back and keep our judgments in abeyance until the moment of ultimate private preclusive use. Here the parallel to environmental regulation or common law nuisance is strong: the law has long imposed reasonable restrictions on the use of nominally private property in the name of the greater public good. We can understand these restrictions as holding that the property ceases to be private - or the rights of the private owner are no longer "absolute" - when, as, and if a proscribed use is attempted. In this light, curtailing the right to waste is tantamount to maintaining that the nonurgent waste of capital is a harmful public use: squandering money on baubles is like failing to replenish the soil, or polluting waterways. It is only at the moment of the attempted conversion of capital into private preclusive use that we can distinguish between utendi et abutendi, use and abuse. Until then, we can view one's claim on "private" wealth, accumulated from work or savings, provisionally, as held in a kind of trust, part public, part private.

Having seen that the question of what's wrong with waste cannot be finessed from the start - we do not lack the right or ability to ask it - we need to get a better handle on what is indeed wrong with waste in its nonurgent sense. There are at least four problems that a reasonable, pluralist, political liberal society might see with such waste.

B. One, nonurgent waste distorts the allocation of resources. Capital is directed towards the social production of less important goods, viewed objectively. Now someone might object at this point that consumption per se is good - and so it is, as Keynes, among others, taught us.[37] But savings is good, too. And savings is nonconsumption. All wealth is either spent, which spending we can call consumption, or not, which nonspending we can call savings. Once we have made a social determination over the appropriate social level of capital - as economists and political theorists constantly press us to do - we have, axiomatically, made a decision about the appropriate social level of nonconsumption.

This way of putting the matter underscores that there is a posterior question of what nonconsumption we want. All consumption stimulates the economy, but we need some nonconsumption as well. We might reasonably conclude that the consumption of sports cars and fur coats is less important a stimulation than, say, the manufacture of middle-class coats and cars; conversely, we might conclude that the best consumption not to happen in order to fund the common capital stock is the consumption of the wealthy, and not that of the lower

economic classes. A revised conception of property would look to the distribution of goods and resources in the consumption or use "space" of social resources, to employ a metaphor used by Amartya Sen and others.[38]

One might also object at this point that a social determination over the relative urgency of consumer expenditures is moralistic. This vocabulary, however, turns out to be unhelpful and misplaced, especially when the tax system is put into play - as modern life has definitely put it. Decisions over what, whom, and when to tax are unavoidably moral. This does not mean that we should invoke particular comprehensive moral doctrines, such as the religious ones that have typically condemned luxurious living in the past; indeed, the general norms of political liberalism preclude us from doing precisely that.[39] But we cannot escape the fact of the matter that decisions over the boundaries of private property are moral ones, and tax is the principal social instrument for marking these boundaries.

An income tax maps up with an absolute conception in the timing of its decisions over ownership. The moral judgments involved in setting tax rates under the current income tax structure occur up-front, by and large, as money is earned, rather than on the back-end, as money is used. This choice of timing does not make these decisions any more or less "moralistic" - they simply involve moral judgments of entitlement based on work and savings. I believe that this is mistaken. In any event it is arbitrary. An income tax makes judgments

about how much an individual ought to share with the public - on what is private and what is public - based on in-flows. A more sensible tax system, I shall argue, makes such decisions at the time of use or spending. But the structure of the argument - its inherent "moralism" - need not be fundamentally different.[40]

There is also some reason to believe that the rich are too few, and spend too little, seriously to affect the distribution of resources. A thorough-going consequentialism would look askance at this first argument against waste as nonurgent consumption. The contemporary economic historian Stanley Lebergott makes this argument,[41] and there are fairly compelling reasons to believe that, in the aggregate, it is correct as a description of the status quo. There are nonetheless several reasons that a concern about the allocation of resources is not idle.

A major reason according to Lebergott that the wealthy do not significantly distort the allocation of resources by their consumption is that they save a great deal - both in terms of a percentage of their available wealth and in terms of the aggregate capital stock. But this savings behavior of the wealthy is a good thing, and one that a reasonable society will want to preserve. It is not so much that the rich do or do not distort the allocation of resources as that they <u>could</u>, under an absolute conception of ownership with its right to waste. A reasonable society will want to take steps to ensure that its wealthiest citizens not suddenly

disgorge all of their wealth and engage in high-end consumption - that they do not, that is, exercise a right to waste.

There are also some reasons to fear that inequalities of wealth are growing worse, more acute, with at least the possibility of greater disparities in spending leading to a greater distortion in the allocation of resources than any we have yet witnessed. There is thus reason to fear that a social consensus against high-end consumption and in favor of thrift and inter-generational altruism is - or could be - breaking down.[42] These gloomy predictions may not come true: historic fears of outbreaks of "luxury fever" have generally not come to pass. But a reasonable society will want to stand its guard against the very possibility.

C. The second problem with waste is that it depletes the capital stock. This point is of course connected to the first - all four arguments against nonurgent waste are integrally connected. The capital stock can be seen as a public good - it helps the entire society, in a nonrival, nonexclusive fashion.[43] Capital has important intergenerational effects, which is the way that Rawls and other political theorists have tended to view the matter. But there is more to it than that. Capital also keeps down interest rates, which under typical economic conditions inures to the benefits of laborers, students, and middle-class consumers. A reasonable society will want to have some capital stock, which means, necessarily, that it must have some nonconsumption.

This second point against nonurgent waste is thus the flip-side of the first. Spending by the rich might be relatively frowned on because it directly distorts the allocation of resources. But it also, at the same time, represents the failure to not-consume - a failure to save - that affects the body politic through its impact on the common pool of capital. A revised conception of ownership would hold that those fortunate few who can produce more than they can prudently use on their own needs have an obligation to save for others - either directly, on their own, or in the form of paying a toll to society for their greater, and less urgent, private expenditures. That toll is the price for waste or nonurgent consumption. It shall be collected by the tax system.

D. Three, nonurgent waste, by stipulation, lacks urgency in Scanlon's vocabulary. In and of itself, this might be of no concern to the state. There is no reason to care about the urgency of private actions, as a general matter; liberalism gives us the freedom to make our own even foolish choices with what to do with our lives. But modern states have very large tax requirements. Since society must tax something, it is perfectly reasonable to look to the least urgent expenditures to bear the greatest weight.

This may, again, strike some as illiberal. But this objection is simply a habit of mind. Looking to the relative urgency of consumption is no less liberal, and considerably more sensible, than looking to the relative "entitlement" of earnings as a metric for deciding on the

appropriate degrees of progressivity in the tax system. Indeed, many of the arguments typically made at the moment of earnings sound in conceptions of urgency - "equal sacrifice" or "diminishing marginal utility of money income," for two quick examples.[44] These matters are better raised at the moment of ultimate spending.

E. Four, and finally, nonurgent expenditure incites envy and, left unchecked, can represent an offense to the important primary good of the social bases of self-respect. Excessive spending by the wealthy raises the cost of "appearing in public without shame," as Adam Smith put the matter.[45] High-end consumption validates a system of values that has the rich and powerful set the tone for society - it shows material goods to be a kind of summum bonum.

A reasonable political liberal society cannot take a stand on whether or not the acquisition and public display of material goods represents part of the best conception of the good. But a political liberal theory will also not be neutral as to its effects on conceptions of the good, and in particular it cannot ignore the effects that some behaviors have on all or most members of society. The problem with nonurgent waste in this light is that it sets a value system that is unattainable for most, who cannot afford waste in any of its senses, and trivializes their own accomplishments. If we allow luxuries to set the measure of success, we let disappointment and a lack of self-respect run rampant throughout society.

The general argument against nonurgent waste, and the particular tax system proposal that implements it, extend beyond what Veblen referred to as "conspicuous consumption." Public displays of wealth, against which sumptuary laws have been enacted in the past, do indeed pose distinct harms from less conspicuous forms of high-end consumption. Nonetheless, the case against nonurgent waste is cumulative, and the harms in terms of resource allocation, depletion of the capital stock, and inurgency extend beyond the more particular case of the ostentatious display of wealth. Further, there is a social harm in knowing that private wealth can buy better goods, however removed from social view these may be. These harms plausibly go to the social bases of self respect as well.

These concerns with nonurgent expenditure are not narrowly consequential ones. In particular, they do not turn on the size of the capital stock per se. The general law against waste effected through the tax system is actually agnostic as to the overall level of social capital accumulation; the greater concern is with what persons in society ought to be doing the social saving. Holding the level of the aggregate capital stock constant, if we allow the wealthy to deplete this stock by their high-end consumption, then we must expect the less wealthy classes to save more. The question is not one of how much savings, but of from where the savings should come. The answer given by the general approach outlined here is that it is the wealthy who should be held accountable for society's capital stock needs.

5. TAX AS A GENERAL LAW AGAINST WASTE

A. The modern legal attitude towards a law against waste, from Blackstone through Honore! and Epstein, has revolved around two thoughts: one, that a liberal society does not need such a law because the problem of waste is self-limiting, and, two, that it would be impossibly difficult to design such a law in any event. The first prong of this view collapses once we move the problem from dissipatory to nonurgent waste. Nonurgent waste is not nearly as self-limiting as dissipatory waste, and, especially as property has moved towards intangible, fungible capital, poses potentially severe problems to a reasonable society. We must face head on the practical question not faced by the earlier view.

Here we face another puzzle of property theory. Legal and political theory of property, at least since John Stuart Mill, has rarely taken on questions of the tax system, with the limited exception of libertarian arguments against tax in toto.[46] This is no doubt due in no small part to the dizzying complexity of modern tax systems. But the neglect, while understandable, cannot be excused. Tax is large and coercive. It has far more of a say in what is "public" and what "private" than any laws regarding regulatory takings or rent control, say. Tax is fundamentally connected to our conceptions of property, whether we like it or not. It also turns out that a readily available tax system provides a rather simple mechanism for effecting a general law of waste.

B. This is not the occasion to get too technical. I have written extensively on consumption taxes elsewhere, drawing on a literature begun in modern times by Nicholas Kaldor and carried on by many economists and legal academics. I shall only sketch ideas here.[47]

Suppose that we adopted a postpaid consumption tax and a progressive rate structure. This is analogous to proposals actually advanced in the United States and elsewhere, of which there are important precursors in the scholarly literature.[48] My preferred plan would make some modifications, particularly in the treatment of debt and in the abolition of the estate tax. It thus calls for a progressive consumption-without-estate tax. This calls for some amplification.

A postpaid consumption tax differs from an income tax principally in allowing unlimited deductions for savings. Under the celebrated Haig-Simons definition, simplified:

Income equals Consumption plus Savings.[49]

This is no more than an accounting identity or tautology; it tells us simply enough that all money (Income) is either spent (Consumption) or not (Savings). Rearranging terms, we see that:

Consumption equals Income minus Savings.

Any tax system that systematically exempts savings is a consumption tax. This is because savings is nonconsumption; consumption, nonsavings. Tax all but savings and we tax consumption, all consumption, and only consumption.

The proposal for a consistent consumption tax is not, in fact, a major doctrinal departure from the status quo; current law already exempts most forms of savings.[50] To implement a more consistent consumption tax, we need take only three major steps:

- Allow unlimited deductions for contributions to savings accounts, such as qualified pension plans under current tax law, while continuing to tax withdrawals from such accounts;

- Include net borrowing as taxable "income"; and

- Repeal the gift and estate tax.

That's it. Taxpayers would list all of their sources of income and borrowing on a tax form, much like the dreaded 1040 now filled out every April 15 in the United States. They would then subtract any amounts contributed into their savings accounts, which I shall call here - to make points clearer - "Trust Accounts." Taxpayers then add in any withdrawals from

their Trust Accounts. Following the basic logic of the Haig-Simons definition, these simple steps isolate out money available for and in fact used on consumption for tax.

C. Let us call this plan the Modest Proposal. It includes all cash available for spending as Income, and then subtracts out net Savings to arrive at actual Consumption.

For those not familiar with tax policy, the Modest Proposal may sound strange. It is not. To understand it better, compare it to a sales tax, the most commonly thought of form of postpaid consumption tax. The Modest Proposal is in essence a progressive national sales tax. Under a sales tax, savings are not taxed. Withdrawals from a savings account used to fund current consumption are taxed. So, too, borrowing used to fund consumption is taxed. When you buy store goods on a credit card, you don't get out of paying the sales tax on account of the fact that you are spending someone else's money. On the other hand, borrowing used to fund savings is not taxed. Under a consistent sales tax, there is also no tax on gifts or bequests - heirs are taxed, just like anyone else, when and as they spend their money in commercial transactions.

All of these points obtain as well under the Modest Proposal. Money contributed into Trust Accounts would not yet have been taxed, and would thus have no tax "basis."[51] These accounts would be treated just as current U.S. law treats qualified pension plans or individual

retirement accounts (IRAs), only without any contribution limits. Under the Modest Proposal, these amounts could be transferred at any time, on life or on death, without tax. Such transfers maintain value in the common stock of social resources and so do no harm, in and of themselves, to the reasonable society - they do not waste capital. The heir would take her part of the Trust Account with no basis. She would be taxed, when, if, and as she withdrew money and consumed it, all under a progressive rate schedule. It is the spending by the heir - and not her mere receipt of capital - that warrants the collection of the public's share.

The Modest Proposal rests on the simple, consistent principle of taxing people as they spend, not as they earn or save. The tax rate depends on the general level of spending. All this fits into a revised conception of ownership, one shorn of the right to waste. As long as a wealthholder does not deplete "her" capital, she is preserving a remainder and so is not engaging in waste. If, when, and as she spends, questions arise. At this point, the tax system implements a general law against waste by its progressive levy on expenditures.

D. To be sure, this is not a precise matter - the law against waste effected through the Modest Proposal is not as Draconian as the actual, particular doctrine of waste that obtained in Blackstone's time. But this particular and ad hoc doctrine proved limited and unattractive for a variety of reasons, including that the severity of its penalties - among them forfeiture of the property plus potential treble damages[52] - made courts reluctant to trigger it.

The Modest Proposal more simply exerts a greater "toll" in the form of a tax for the less urgent use of property. It does not confiscate, in part because it is necessary, as under all real world tax systems, to make reasonable concessions to private incentives. But the Modest Proposal in fact represents a far more consistent, pervasive law against waste than any we have ever had or even imagined possible.

A different social logic obtains under a postpaid consumption tax than under an income tax. Taxes fall on spenders, not workers or savers. The rates can thus both be higher and society can continue to differentiate among levels of the wealthy, without fear of any direct deterrent falling on work or savings.[53] There is no need to be precise here; mine is not a task in economic modeling. But a sensible rate structure under the Modest Proposal for a family of four might look something like the following:

Consumption	**Tax Rate**
$0 - 20,000	0%
$20,000-100,000	15%
$100,000 - 200,000	30%
$200,000 - 500,000	40%
$500,000 - 1,000,000	50%
$1,000,000 - 5,000,000	60%
over $5,000,000	70%

Table 1: Modest Proposal Tax Rates

This hypothetical rate structure is more progressive than the one that obtains under present law. It is roughly revenue-neutral: the expansion of the lower tax brackets, elimination of capital gains and estate taxes should be offset by the higher rates at higher brackets and by the important inclusion of consumption out of borrowing in the tax base.[54] The plan also allows for higher rates to take effect at higher levels, without the argument that we are directly deterring the socially productive activities of work and savings. It is spending in excess of five million dollars a year - not earnings - that justifies and receives the highest tax rate. This is a different matter altogether, and one that a reasonable society can support.

E. The tax rates of the Modest Proposal implement objective social judgments over urgency as a matter of degree. But there is nothing inconsistent with further modifying the plan by allowing deductions, exclusions, or credits for certain expenditures as a matter of kind. There is no reason, for example, not to consider medical, educational, and charitable use deductions from the tax. The question for the reasonable society is whether such uses reflect a different degree of urgency than other uses, and thus should be subject to a lower, or no, social charge. There are complicated questions here, of distinguishing needs from wants and so forth, and of considering the impact on the wider society of allowing and perhaps even

encouraging private expenditures for medical and educational luxuries. Various ceilings or limitations may be called for in the name of fairness. I do not mean to minimize the difficulties or importance of these discussions over the classification of kinds of uses. My point is simply the more limited one that these are questions for political liberal reason, nicely framed by the structure of the proposal. There is nothing wrong - and a good deal right - with asking them.

Note that the Modest Proposal is not a classic sumptuary tax. There are several reasons, of an economic, consequential, and a moral sort, for this. Sumptuary taxes are specific taxes, and thus distort the price system. The Modest Proposal is a general tax. It is concerned with the general level and not the particular type of private consumption. It preserves a liberal commitment to neutrality. It is not overly intrusive or judgmental.[55]

F. What is it that the Modest Proposal and the idea of a progressive consumption tax has in connection with a life estate conception of property and the right to waste?

Consider again what a life estate owner such as Bob has under the modified life estate form of ownership set out in Section 2.E above. The wealthy citizen under the Modest Proposal has all of these rights. She can direct the investments of assets within her Trust Account, subject to reasonable social regulations designed to prevent either the waste or the

political abuse of the power of capital. She can enjoy the fruit or income of the Trust Account under the lower tax rates available for moderate levels of spending. Given an appropriate scheme of deductions, credits, and so forth, she can invade the corpus of the Trust Account at lower tax rates for urgent needs, such as medical, educational, or charitable uses. She can also direct, through a form of general power, where the Trust Account is to go on her death. The only right she does not have is the jus abutendi; she cannot "consume, waste or destroy" all of her Account, or she will face a large tax bill. She is constrained, in other words, either to leave a remainder to her designated heirs or to pay over a large portion of "her" capital to society for its collective preservation. Suppose, for example, that a taxpayer were fortunate enough to amass a Trust Account of $100 Million. If she were to attempt to spend this all at once, on her own nonurgent wants, the government would claim nearly $70 Million as the public's share. We can understand that large levy as a charge for nonurgent waste.

6. SOME OBJECTIONS

A. Questions of course arise. One set of objections to the general law against waste and its Modest Proposal is that it ignores or inadequately deals with the power of money. Capitalists will be able to build up large stocks of value tax-free in their Trust Accounts. Such

concentrated wealth brings pleasure and power, critics contend, that a reasonable society must take steps to control. This logic has led most proponents of a consumption tax, including Rawls, to tack on a wealth or wealth transfer tax in their recommended comprehensive tax systems.

The objections from concentrated wealth cling to the idea of an absolute conception of ownership - they rest, that is, on a view of property as absolutely owned by private parties with the right to waste it. Thus the objectors fear the misuse of the vast sums of wealth that can be stored up within the Trust Accounts. But under a revised conception of ownership - one without the right to waste - the Trust Accounts are not, in any narrow or complete sense, "private." A trust holder acts as a trustee of the capital component of "his" wealth. The Modest Proposal checks what he can do with his money. If he tries to use it too quickly, in too large amounts, the government will step forth to claim its share, which will be larger on account of the nonurgency of the intended use. The excessive private use of capital is waste and we tax it accordingly.

The ability to curtail the large-scale private expenditure of resources creates a considerable advantage for the Modest Proposal. Objections to the proposal on the grounds that it ignores the power or pleasure of the rich tend to come from defenders of the status quo. But it is the current tax system, with its porous income-plus-estate tax, that ought to disappoint

political liberal theory. Under present conditions, wealthy people can and do indeed spend large sums of money on themselves in short periods of time with utter impunity from tax. One noticeable and disturbing trend lies in individuals spending vast sums of money to finance their own personal political campaigns. H. Ross Perot, for example, spent $60 Million of his own money running for U.S. president in 1992. Under the income-plus-estate tax, Perot paid no taxes on account of this largesse; indeed, he saved his family over $30 Million in estate taxes - present consumption being the surest way to avoid that particular tax. Under the Modest Proposal, in order to spend $60 Million on himself, Perot would have had to pay nearly $140 million to the collective fisc.

B. A parallel objection looks to the power that wealth-holders might have by virtue of investment decisions and control over the Trust Accounts. Once again, however, the objection sits poorly with a revised conception of ownership, one without a right to waste. Under the Modest Proposal, savers will be hemmed in by a general fiduciary duty much like the prudent investor rule that any trustee must follow. Society need not micro-manage or engage in overly specific regulation of Trust Account holders. A sensible diversification rule - the kinds of policies already in place for regulating large endowments, banks, and mutual funds, as well as pension plan and IRA investments - is quite sufficient. This further implements an antiwaste norm.

The reasonable society can control and contain the power of the capitalist class to influence policy and politics via its expenditure decisions - in fact, the Modest Proposal gives us a means of serving this reasonable political end that modern institutional theory otherwise altogether lacks. Once again, we can understand this feature as following from the systematic decision to monitor the use of resources - to abrogate the private right to waste. Under the Modest Proposal and a life estate conception of ownership, the wealthy cannot be motivated by narrow decadent pleasures nor by a quest for illegitimate power. They must be motivated, instead, by a sense of "natural duty," a pride in their accomplishments, a desire to provide a fund for the urgent needs of their family and their posterity, and to do well by us all. They must, that is, serve as allies, not enemies, to the reasonably pluralist society of which they are members.

C. A final version of the standard liberal objection relates to the social problem of iteration over time. A plausible interpretation of the relevant aspects of Rawls's theory and the political liberal project is this. The task of justice as fairness - of the reasonable society - is to set up the fair terms and conditions of background justice. Once these are in place, in part to avoid the problems of placing an overly restrictive moral psychology or sense of individual duty on its citizens, a reasonable society will sit back and allow citizens to engage in trade, transactions, and the voluntary contributions to cooperative enterprises. But the net

result of these voluntary transactions, when repeated over time, can easily undermine the original fairness of the basic structure.[56] Thus the reasonable society must somehow, sometime, step in to address the problems of iteration. This logic forms the core of the social contractarian response to libertarian or "patterned" arguments for the justice of a minimal government state with little or no redistribution.[57]

Accepting all of that, the precise question is when and how to address the problem of iteration. Although there is some equivocation over this point in Rawls,[58] it would appear as if his preferred answer is to do so once a generation, following a certain "lifetime" approach also found in the tax policy literature.[59] The idea is to allow intragenerational wealth inequalities to build up under the general scheme of things but to check the intergenerational transmission of these inequalities by means of some progressive inheritance or accessions tax.[60] This reasoning is compelling as an a priori manner.

In practice, however, the idea of leaving the correction of the problem of iteration in the hands of some intergenerational tax is flawed for several reasons. First, the current astonishing degrees of private one-generation wealth accumulation suggest that there is indeed a need to address the problem of iteration within lifetimes as well. Second, the holding of capital, in and of itself, is not and need not be the central harm to be addressed by a corrective to the problem of iteration. Rather it is the private consumption - and not the mere possession

- of wealth that is the relevant harm.[61] Any estate or inheritance tax, in contrast, falls on unspent wealth - on capital, that is.

These two points lead to a third, namely that the revised conception of ownership with its Modest Proposal is the best practical alternative for addressing the problem of iteration, both intra- and intergenerationally. Within lifetimes, unlike the flawed status quo, the Modest Proposal stands ready to charge a toll for large amounts of private consumption, now identified as the relevant social harm. Across generations, the Modest Proposal stands ready to allow capital to remain "private" albeit regulated, but it continues to monitor private preclusive use - once again much better than the flawed status quo does. Put in other but equivalent terms, the revised conception of ownership and the Modest Proposal allow the "problem" of iteration to persist, within or across generations, until and unless there is some actual harm inflicted on the wider society, in the form of the mismanagement or excessive private preclusive use of capital. The problem of iteration, far from militating against the Modest Proposal and life estate conception of ownership, thus argues for them.

D. So much can be said for the Modest Proposal as a normative tax system. But we have also seen that the Modest Proposal can be understood as implementing a revised conception of ownership, which we have seen differs from an absolute conception only in curtailing the jus abutendi. What's illiberal about that? Society has long attempted to rein in

the possibility of waste; it has simply lacked a coherent theoretical and practical apparatus to do so.

Put in simple terms, the response to the objection that the Modest Proposal is illiberal can come down to the simple question: Must we have the right to waste? The revised conception of ownership answers this question decisively in the negative. We can be a perfectly reasonable society without giving any of our members the right to consume, waste, or destroy everything they can, with any claim of legitimacy whatsoever, get their hands on.

Notes

*. I thank Scott Altman, Robert Ellickson, Richard Epstein, Jim Krier, Steve Munzer, Seana Shriffin and many anonymous readers for helpful advice, and Negin Mirmirani and Tim Lan for excellent research assistance. Many of the ideas in this chapter are developed in greater length in my manuscript presently titled A New Understanding of Property, (Chicago: University of Chicago Press, forthcoming).

1. See Carol M. Rose, "Canons of Property Talk, or, Blackstone's Anxiety," Yale Law Journal, 108 (1998): 601-32. See also Duncan Kennedy, "The Structure of Blackstone's Commentaries," Buffalo Law Review, 28 (1979): 205-382; Albert W. Alschuler, "Rediscovering Blackstone," University of Pennsylvania Law Review, 145 (1996): 1-56; Robert P. Burns, "Blackstone's Theory of the 'Absolute' Rights of Property," University of Cincinnati Law Review, 54 (1985): 67-86.

2. Roscoe Pound, "The Law of Property and Recent Juristic Thought," American Bar Association Journal, 25 (1939): 993-8, at 997; A. M. Honore!, "Ownership" in A.G. Guest, ed., Oxford Essays in Jurisprudence, (Oxford: Clarendon University Press, 1961). See also J. E. Penner, "The `Bundle of Rights' Picture of Property," UCLA Law Review, 43 (1996): 711-820.

3. William Blackstone, Commentaries on the Laws of England, at Book III, chapter 14; see also Book III, chapter 18.

4. Aristotle, Politics, Book II, Sections 5-6.

5. Rose, "Canons of Property Talk."

6. Pound, "The Law of Property."

7. See generally Barry Nicholas, An Introduction to Roman Law, (Oxford: Clarendon University Press 1962) p. 154 ("[t]hus, the commentators adapted the definition of usufruct by adding to the rights of use and enjoyment the right of abuse - ius utendi fruendi abutendi. The adaptation is a little forced, since 'abuse' has to include alienation, but it is also, in its emphasis on the plenitude of enjoyment conferred by ownership, misleading.").

8. See e.g. White v. Brown, 559 S.W.2d 938 (Tenn. 1977). See also cases such as Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985) (tenants must have reasonable right to assign their term interest in a lease).

9. Honore!, "Ownership," at 107.

10. Id.

11. Richard Epstein, "Justice Across the Generations," in Peter Laslett and James S. Fishkin, eds., Justice Between Age Groups and Generations, (New Haven: Yale University Press,

1992) (footnotes omitted) at 102.

12. Harold Demsetz, "Toward A Theory of Property Rights," American Economic Review, Papers and Proceedings, 57 (1967): 347-359; Rose, "Canons of Property Talk," comments critically on Demsetz's "just-so story," but also notes its significant influence.

13. David Hume, A Treatise of Human Nature, (L.A. Selby-Bigge ed., 2d ed. Oxford: Clarendon University Press 1978 (1740)) p. 499.

14. See generally Robert J. Barro, "Are Government Bonds Net Wealth?," Journal of Political Economy, 82 (1974): 1095-1117 (seminal paper using "overlapping generations model").

15. See Uniform Principal and Income Act (Revised 1961) § 2; Simon Gardner, An Introduction to the Law of Trusts, (New York: Oxford University Press, 1990) pp. 113-27.

16. See, e.g. 26 U.S.C.A. ("I.R.C.") § 2041(b)(1)(A).

17. See generally I.R.C. § 2041.

18. See Richard A. Posner, Economic Analysis of Law, Third Edition, (Boston: Little, Brown, 1986) pp. 64-5.

19. Blackstone, Commentaries at Book III, chapter14 and Book II, chapter 18.

20. Id at Book II, chapter 18; see also Jesse Dukiminier and James E. Krier, Property, Fourth Edition (New York: Aspen Law & Business, 1998) pp. 224-25.

21. Blackstone, Commentaries at Book II, chapter 14.

22. Id. at Book II, chapter 18.

23. Id. at Book II, chapter 14.

24. Money presents an interesting case. One could, of course, literally burn money, thus engaging in dissipatory waste. In a complete monetary equilibrium, an absolute destruction of money would have a deflationary effect on the remaining money supply - other money would increase in its relative value. Whether this would completely offset the loss of value associated with the initial destruction of cash is a complex question of practical economics not considered here. All dissipatory waste will have pricing effects as well, that lessen - but would not normally eliminate - the loss of value to society. The issue of greater concern to the essay in regard to money is nonurgent waste.

25. I discuss the etymology and related points in my book manuscript. I am much indebted to Ruth L. Harris, "The Meanings of 'Waste' in Old English and Middle English," unpublished Ph.D. dissertation, University of Washington, 1989.

26. Thorstein Veblen uses the term "waste" to describe the conspicuous consumption of the

"pecuniary class," choosing the term precisely because ordinary moral discourse uses it: "It is here called 'waste' because the expenditure does not serve human life or human well-being on the whole." Thorstein Veblen, The Theory of the Leisure Class (New York: Funk & Wagnalls, 1899) p. 76. See also J. Peter Grace, chairman, War on Waste: President's Private Sector Survey on Cost Control, (New York: MacMillan, 1984).

27. See Veblen, The Theory of the Leisure Class. I discuss Veblen's conception of waste in Edward J. McCaffery, "The Tyranny of Money (Book Review)," Michigan Law Review, (forthcoming 2000). See also T. M. Scanlon, "Preference and Urgency," Journal of Philosophy, 82 (1975): 655-69; John Rawls, A Theory of Justice (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1971).

28. Veblen, The Theory of the Leisure Class, explicitly makes this point but proceeds to use the term "waste" to get at ordinary moral understandings in any event.

29. Scanlon, "Preference and Urgency."

30. John Rawls, Political Liberalism, (New York: Columbia University Press, 1993, 1996 (paper)) p. 181.

31. See Edward J. McCaffery, "The Burdens of Benefits," Villanova Law Review, 44 (1999): 445-93, and sources cited therein for some relevant considerations.

32. See Alan Hunt, Governance of the Consuming Passions: A History of Sumptuary Law, (New York: St. Martin's, 1996); Robert H. Frank, Luxury Fever: Why Money Fails to Satisfy in an Era of Excess, (New York: The Free Press, 1999) pp. 199-201.

33. I discuss many of the sources in my book manuscript. See generally Stephen Innes, Creating the Commonwealth: The Economic Culture of Puritan New England, (New York: W. W. Norton, 1995); Barry Shain, The Myth of Individualism: The Protestant Origins of American Political Thought, (Princeton: Princeton University Press, 1994); Albert O. Hirschman, The Passions and the Interests: Political Arguments for Capitalism Before its Triumph, (Princeton: Princeton University Press, 1977, 1997(paper)).

34. John Rawls, A Theory of Justice, pp. 298-99, citing John Maynard Keynes, The Economic Consequences of the Peace, (London: Macmillan, 1919).

35. John Rawls, A Theory of Justice, p. 299.

36. See generally the work of Richard Epstein, perhaps especially his book Takings: Private Property and the Power of Eminent Domain, (Cambridge Massachusetts: Harvard University Press, 1985). On the idea that property rights assume a certain baseline of what is and is not "private,""property," or a "right" in the first place, see Duncan Kennedy and Frank Michelman, "Are Property and Contract Efficient?," Hofstra Law Review, 8 (1980): 711-80. See also Honore!, "Ownership," at 144-45.

37. John Maynard Keynes, A General Theory of Employment, Interest, and Money (San Diego: Harcourt, 1936).

38. Amartya Sen, On Economic Inequality (New York: Oxford University Press, 1997).

39. See John Rawls, Political Liberalism, Lecture VI; John Rawls, "The Idea of Public Reason Revisited," University of Chicago Law Review, 64 (1997): 765-807, reprinted in Samuel Freeman, editor, John Rawls, Collected Papers, (Cambridge, Massachusetts: Harvard University Press, 1999). See also Edward J. McCaffery, "The Tyranny of Money."

40. I have repeatedly attempted to make this point, most forcefully in Edward J. McCaffery, "Being the Best We Can Be (A Reply to My Critics)," Tax Law Review, 51 (1996): 615-37, at 631-32.

41. Stanley Lebergott, Pursuing Happiness, (Princeton: Princeton University Press, 1993).

42. Robert Frank argues for this trend in Luxury Fever, though nothing of any great import in my argument turns on whether or not luxurious spending is increasing.

43. See Hal Varian, Microeconomic Analysis, 3rd Edition, (New York: W.W. Norton & Co, 1992) pp. 414-31 (discussion of "public goods.").

44. For representative arguments in favor of progressivity in income tax rates, see e.g. Walter J. Blum & Harry Kalven, Jr., "The Uneasy Case for Progressive Taxation," University of

Chicago Law Review, 19 (1952): 417-520; Joseph Bankman & Thomas Griffith, "Social Welfare and the Rate Structure: A New Look at Progressive Taxation," California Law Review, 75 (1987): 1905-67; Marjorie E. Kornhauser, "The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction," Michigan Law Review, 86 (1987): 465-523.

45. Amartya K. Sen, Inequality Reexamined, (Cambridge Massachusetts: Harvard University Press, 1992) pp. 114-16.

46. Robert Nozick, Anarchy, State & Utopia, (New York: Basic Books, 1977 (paper)).

47. For fuller discussion, see Nicholas Kaldor, An Expenditure Tax, (London: George Allen & Unwin, 1955); William D. Andrews, "A Consumption-Type or Cash-Flow Personal Income Tax," Harvard Law Review, 87 (1974): 1113-88; U.S. Department of the Treasury, Blueprints for Basic Tax Reform, (Washington, D.C.: GPO, 1977). For my own views see Edward J. McCaffery, "The Uneasy Case for Wealth Transfer Taxation," Yale Law Journal, 104 (1994): 283-365; "The Political Liberal Case against the Estate Tax," Philosophy & Public Affairs, 23 (1994): 281-312; "Being the Best We Can Be (A Reply to my Critics)"; "The Missing Links in Tax Reform," Chapman University Law Review, 2 (1999): 233-52; "Real Tax Reform: The Case for a Progressive Consumption Tax," The Boston Review, December 1999/January 2000, 46-48.

48. See generally Laurence S. Seidman, The USA Tax: A Progressive Consumption Tax, (Cambridge, Massachusetts: MIT Press, 1997) (describing and critiquing the USA Tax Plan). See also Joel Slemrod and Jon Bakija, Taxing Ourselves: A Citizen's Guide to the Great Debate over Tax Reform, (Cambridge, Massachusetts: MIT Press, 1996) at 203-208; Alvin C. Warren Jr., "The Proposal for an `Unlimited Savings Allowance'", Tax Notes, (Aug. 28, 1995), reprinted in Selected Readings on Tax Policy: 25 Years of Tax Notes, Charles Davenport, ed., (Arlington, Virginia: Tax Analysts, 1997) 114-119. See also U.S. Treasury Department, Blueprints.

49. Henry Simons, Personal Income Taxation, (Chicago: University of Chicago Press, 1938)

50. See Edward J. McCaffery, "Tax Policy under a Hybrid Income-Consumption Tax," Texas Law Review, 70 (1992): 1145-1218; "Real Tax Reform: The Case for a Progressive Consumption Tax.".

51. "Basis" refers to already-taxed dollars. If, for example, a taxpayer purchases corporate stock for $100 that she has left after tax on her earnings, she has basis of $100 in the stock. In contrast, pension plans or other tax-deferred savings accounts have no basis in them, because this value has never been taxed.

52. Blackstone, Commentaries at Book III, chapter 14.

53. All taxes create disincentives. The Modest Proposal will deter from working those whose only motive for additional labor is the ability to engage in high-end consumption. There are good reasons to believe that this concern will not amount to much - and that, to the extent the disincentive binds, it is a normatively appropriate one. See Edward J. McCaffery, "The Uneasy Case for Wealth Transfer Taxation," at 353-56.

54. See Edward J. McCaffery, "The Tyranny of Money."

55. Robert Frank, Luxury Fever.

56. John Rawls, Political Liberalism, Lecture VII.

57. Id.

58. Cf. Rawls, A Theory of Justice, pp. 277-280 (advocating proportionate consumption plus accessions tax) with Political Liberalism, pp. 268, 283 (suggesting possibility of progressive income taxation).

59. See e.g. Henry J. Aaron & Harvey Galper, "A Tax on Consumption, Gifts, and Bequests," in Joseph A. Pechman, ed., Options for Tax Reform, (Washington D.C.: Brookings Institute Press, 1984) p. 106 (advocating once-per-lifetime model for taxation).

60. See John Rawls, A Theory of Justice, pp. 279-80.

61. This is an idea I have frequently tried to communicate. See e.g. "Political Liberal Case";

"Being the Best We Can Be." Deborah Weiss seems to be one of the first authors to fully understand and appreciate this idea, and I am grateful for her comments. See Deborah M. Weiss, "Liberal Estate Tax Policy," Tax Law Review, 51 (1996) 403-17 (1996).

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94-15 Pablo Spiller and Matthew L. Spitzer, *Where is the Sin in Sincere? Sophisticated Manipulation of Sincere Judicial Voters (with applications to other voting environments)*, 11 J. LAW, ECON. & ORGAN. 32 (1995).

94-16 Christopher D. Stone, *What to Do About Biodiversity: Property Rights, Public Goods and the Earth's Biological Riches*, 68 SO. CAL. L. REV. 577 (1995).

94-17 Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 UNIV. PENN. L. REV. 933 (1995).