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Of Focal Meanings and Compensating Juries - New Property Erodes New Liberty

Douglas W. Kmiec

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Several factors make it difficult to comment on the two well-researched, exhaustive papers on "Liberty: The Concept and its Constitutional Context" and "Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury," which as originally presented for comment had been one paper entitled by Professors Terrell and Butler as "The New Liberty." First, notwithstanding their early protestations to the contrary, their ultimate publication of two papers, illustrates that the original jointly authored draft was, in fact, two papers presented — somewhat uneasily — as one. In this regard, a "fly specking" property teacher like myself could have spent, had the ultimate division of efforts not surfaced, the better part of these pages wondering how to reconcile such things as Professor Terrell's startling observation early on that the quantity of liberty has not changed

* Professor of Law and Director, Thos. J. White Center on Law & Government, University of Notre Dame.

1. This comment was invited in relation to a February 20, 1984 draft of the principal papers by Professors Terrell and Butler, which draft as of that date was a single paper entitled "The New Liberty: Philosophical and Historical Perspectives on a Fundamental Constitutional Value" [hereinafter The New Liberty]. The New Liberty was similar to what appears here except for the noticeable diminution in the number of cited references to Professor Charles Reich, and his article, The New Property, 73 YALE L.J. 733 (1964) and the rather dramatic expansion of Professor Butler's submission. Much of the criticism I direct at Professor Terrell's and Butler's new liberty theory originates with the belief that Reich's conception of the new property is ethically unsupportable and largely inconsistent with any acceptable notion of liberty.

Noting that Professors Terrell and Butler cited Professor Reich in the first ten footnotes of The New Liberty, but delete substantially all references to him in their revised versions, perhaps indicates that they too have discovered the error of their Reichian ways.

By the way, the reader should not assume that I object to the authors publishing different papers than that which was presented for comment. Afterall, Congress enacts laws this way all the time. In truth I am delighted that the evolving principal papers have finally appeared in published form, since now I may go on with my life's work.

P.S., Dear, I will be home for dinner. (emphasis in the original)
greatly over time, with Professor Butler's call for expanded jury compensation for individuals "disproportionately inconvenienced" by society in view of "the erosion of protection for economic liberties under the United States Constitution." Perhaps, even more perplexing is Terrell's insistence upon discovering liberty's "focal meaning," in comparison to Butler's advocacy of a procedural device which leaves the concept largely undefined.

Yet even these, and many other, differences between our

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2. This express assertion appears to be deleted in what appears here; however, Professor Terrell's original statement was:

If [it were possible to total the combined value of various characteristics of liberty] "there would then be the possibility that if this Herculean task were performed, the 'total' liberty enjoyed by the citizens of the United States during the life of the Constitution would be found to have varied remarkably little. This is due to the interrelationship of three factors we have noted earlier: (1) the concept of liberty in its most general sense involves the availability of choices in several domains of life we have previously identified, and not just the more familiar 'political' arena; (2) liberty is implicated by all infringements on our choices, whether or not the source of those limitations is government; and (3) protections from infringements afforded by the state through legal penalties having increased in certain important respects over time. While the range of unencumbered choices in the economic arena have diminished sharply over the last two centuries due to government regulation, the range of unencumbered options in other areas of life have correspondingly increased.

*The New Liberty* supra note 1 at 46-47;

That Professor Terrell still relishes the notion that the new liberty, premised upon government largess and activity, can somehow approximate old liberty, either in its negative or political sense or that derived from legitimately acquired and possessed private property is indicated in his published paper, see *Terrell, Liberty: The Concept and Its Constitutional Context, 1 Notre Dame J. L. Ethics & Pub. Pol'y. 545, at 587 (1985)* [hereinafter, *Terrell*]. In this regard, Terrell states:

Just as Reich's property was government-related, consisting of various forms of largess such as licenses, subsidies, and welfare payments, so too our new liberty is a centralized and politicized concept. Again, however, this can be viewed as primarily negative or primarily positive: the former if one focuses on the dramatically expanded role of government in creating constraints on our actions; the latter if one emphasizes the creation by government of new opportunities for individual choice in the augmented protections offered by government of both old and new arrays of alternative behavior.

*Id.* at 591-592.

principal authors are overshadowed by an ambiguity of purpose shared by them — namely, to what end is liberty being defined. In this regard, it occurs to me that an undertaking such as this may have as its intent either to more precisely define the term’s meaning in an historical context or to justify liberty as a fundamental value against a soundly conceived ethical structure. Neither of these purposes seem to have attracted our authors.

Specifically, very little is said about what the Framers of our republic believed about a concept proudly incorporated into the Declaration of Independence, the Constitution, and expansively treated in the Federalist Papers. It may be true, as Professor Terrell suggests, that few scholars have seriously undertaken their definitional exercise, but a great many have examined the ideological origins of our founding. Unfortunately, except for Professor Bernard Siegan’s excellent, but specialized, examination of the historical underpinnings of our economic liberties, there is a scholarly aching for a modern synthesis of historical thought on the subject of liberty generally.

Of course, knowing what the Framers said about liberty may be less important than an analytical exercise which concludes that their musings were correct in an ethical sense. After all, we forget at our peril Lord Acton’s admonition that freedom or liberty “is not the power of doing what we like, but the right of being able to do what we ought.” Thus, if the Framers are right that liberty is an essential or fundamental value, we cannot merely take their word for it for such would amount to little more than constitutional positivism. Rather, there must be a concerted and rigorous attempt to base the libertarian features of the Constitution upon a value system, which if not universally acclaimed, is at least, consistent and subject to as little contradiction as possible.

4. Terrell supra note 2 at 546-549 & n. 9.
5. See generally, C. Becker, The Declaration of Independence (1922); E. Corwin, The “Higher Law” Background of American Constitutional Law (1955); B. Bailyn, The Ideological Origins of the American Revolution (1967) to mention but a few of the books which consider the ideology of the founding fathers, and hence directly or indirectly, the concept of liberty.
7. Cf. Butler supra note 3. It is hard to describe 181 pages and 654 footnotes as a synthesis. Some might call this effort a book. Perhaps, only Fred Rodell could appreciate Professor Butler’s understatement that these are his “reflections.” Id. at 595.
Such an ethical exploration, and ultimate moral grounding, not only provides legitimacy to everyday law, but also, a method of analysis and guidance for those frequent occasions when positive law—be it constitution, statute or custom—is found to be insufficient to the task at hand.

If neither history nor ethics is the province of our authors, what is? Sadly, I must conclude that a significant portion of the good efforts of these two fine scholars has been devoted to a thoughtful rationalization for what was in the 1960s, and remains 20 years later, little more than a cleverly written, but unsatisfactory and inadequate, excuse for the welfare state. I refer, of course, to Charles Reich's article, "The New Property," which our principal authors admit is partially the inspiration for their own work concerning, in Professor Terrell's words, the "'new liberty' that complements the 'new property'" created by government.

Professors Terrell and Butler appear to uncritically accept Reich's thesis, including the notion that government encroachments upon private property were precipitated by "abuses of property rights by certain segments of society, primarily powerful private corporations." While Reich's confusion on this point might be excusable given his inhabitance of the arid regions of New Haven on the brink of the Great Society, it is greatly disturbing emanating from two denizens of the crystalline law and economics environment and in view of the predominant and well-regarded scholarship of those associated with our authors' institution, and many lesser mortals as well. To implicitly or explicitly approve of Reich's conception of private property as a source of wrongful power and oppression of tenants and employees by nefariously large corporations not only indulges the wrong-headed belief that liberty or power for all can somehow be increased by taking it from some, but also ignores both the overwhelming economic research demonstrating the capacity of corporations to enhance individual wealth and the increasing recognition

10. The New Liberty supra note 1 at 2, citing Reich, The New Property, 73 YALE L.J. at 783-785.
11. One doesn't have to look much farther than Adam Smith for verification of this proposition. Smith states:

   Every colonist gets more land than he can possibly cultivate. He has no rent and scarce any taxes to pay. No landlord shares with him in his produce, and the share of the sovereign is commonly but a trifle. He has every motive to render as great as possible a
by social philosophers and theologians that “the large business corporation is a mediating structure which draws great strength from the values nurtured in the Judeo-Christian tradition.”

In short, having amassed considerable evidence that the Great Society has greatly failed all of us, but especially its powerless and propertyless intended beneficiaries, there is little reason to lavish our best academic talent supporting, or rationalizing if you will, a perverse conception of property which is best left yellowing in the pages of old law journals.

This is not meant to suggest that the intellectual inquiry made by Professors Terrell and Butler was not elegantly conducted. Quite the contrary, much value can be extracted from it. Produce, which is thus to be almost entirely his own. But his land is commonly so extensive, that with all his own industry, and with all the industry of other people whom he can get to employ, he can seldom make it produce the tenth part of what it is capable of producing. He is eager, therefore, to collect labourers from all quarters, and to reward them with the most liberal wages. But those liberal wages, joined to the plenty and cheapness of land, soon make those laborers leave him, in order to become landlords themselves, and to reward, with equal liberality, other labourers who soon leave them for the same reason that they left their first master. The liberal reward of labor encourages marriage. The children, during the tender years of infancy, are well fed and properly taken care of, and when they are grown-up, the value of their labor greatly overpays their maintenance. When arrived at their maturity, the high price of labor, and the low price of land, enable them to establish themselves in the same manner as their fathers did before them.


For an elaboration of the same point within a Christian perspective, see M. Novak, Toward a Theology of the Corporation (1981). There are of course, many formal studies of the corporation which illustrate, among other things, its ability to maximize wealth by minimizing transaction costs. See e.g., Williamson, The Modern Corporation: Origins, Evolution, Attributes,” 19 J. of Econ. Lit. 1537 (1981) and numerous references cited at pages 1565-1568.

12. Madden, The Role of the Corporation: A Business Perspective 2 Catholicism in Crisis 13, 16 (Feb., 1984). Of course describing the corporation as a mediating structure in society does not require that the fundamental nature of that structure be transformed into a democratic (rather than an entrepreneurial) entity. On the importance of not applying political analogies too strictly to corporate functions, such as management selection, see Manne, The “Higher Criticism” of the Modern Corporation, 62 Colum. L. Rev. 399, 407-13 (1962).

13. For excellent discussions for the inability of political mechanisms to provide economic advancement see T. Sowell, Markets and Minorities (1981) and W. Williams, The State Against Blacks (1982).
from their efforts by retracing their path from Reich's unsupported premise to their own equally dubious conclusions. In particular, Professor Terrell's careful construction of "focal meaning" properly challenges Westen's overstatement that terms like "liberty" and "equality" are meaningless. After all, there is great advantage to being able to separate descriptive from normative elements, insofar as the result of that task will be to later reduce and direct one's justificatory efforts to solely the normative. Importantly, in accomplishing this task, Professor Terrell steers clear of the intrepid fact/value dichotomy which has unnecessarily diminished the ability of many legal philosophers since David Hume to make rational deductions from the is to the ought.

However, it is not always clear what Professor Terrell's "data base" for determining focal meaning incorporates. Take, for example, his studious footnote warning to the reader to not compare separate elements of the focal meaning set, but only to make comparisons to the set as a whole. Failure to grasp this point, says Terrell, leads to great conceptual difficulty for "those who believe liberty can only be achieved within the context of an unregulated market . . . ." With or without this early sleight-of-hand, however, there most certainly will be conceptual problems for readers like myself who take little solace in the idea that our modern freedoms are "positivistic" and "state-created," which is a conclusion which Terrell ultimately embraces.

Nevertheless, the great achievement hidden by our authors' libertarian pessimism is the crucial fact that concepts like liberty must take their eventual meaning from human action. This should not be a point lightly passed over since it implicitly rejects the view that either there are no moral truths or if there are, they are undiscoverable. This epistemological skepticism has dominated modern times, notwithstanding the fact that it stands in direct opposition to the Aristolean and Thomistic natural law traditions as well as the

16. Terrell supra note 2 at n. 19.
17. Id.
18. Id. at 592.
influential, powerful writing of John Locke. Acceptance of modern skepticism leads directly to legal positivism and the existence of a state equally capable of tyranny or benevolence, subject only to the whim and caprice of sovereign force.

Curiously, the skepticism of the modern era has had one notable salutory effect—that is, the search for a more acceptable justificatory base than mere assertion and the happy discovery of economic analysis as it informs the law. In this regard, the pursuit of efficiency or wealth maximization as an organizing legal principle is certainly to be preferred over the helter-skelter predilections of appellate judges. This is particularly true given the frequency in which libertarian and efficiency interests coincide.

Nevertheless, our principal authors do recognize, as have others, that the promotion of desirable economic consequences still falls short of firmly establishing the necessary premises for any moral conclusion. As the authors “ordinary observer” or “data base” approach reveals, those premises are more likely to come from the interaction of individuals within the real world, rather than the subtle meanderings of abstract theory which more readily falls prey to contradiction. As in other areas, however, Professors Terrell and Butler part company on exactly how the necessary metaphysical observations are to be made.

Professor Terrell’s approach is to focus on the exercise of rational choice as it informs us with respect to distinct and meaningful alternatives pertaining to our individual “life plan.” At first blush, one is struck not only by the similarity


20. The concept of the Ordinary Observer in its most elaborate articulation can be found in B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977). In this regard, Ackerman suggests that judges and other legal participants can be broken down into roughly two groups: ordinary observers or scientific policymakers. The policymaker believes that the legal system is organized around the principles of a comprehensive view; the observer believes the legal system should vindicate the practices and expectations of dominant social institutions. “Scientific” and “ordinary” refer to the legal language: the scientist believes that legal language consists of technical concepts set in relation to one another; the ordinary analyst requires that legal language be perceived in relation to the talk of nonlawyers.

of this idea to the important work of Robert Nozick\textsuperscript{22} cited in the paper, but also to modern interpretations of St. Thomas's main natural law precept that "the perfection, the completion, the good in the sense of ultimate end, is to be pursued and whatever is incompatible with that end is to be avoided."\textsuperscript{28} Like Terrell and Nozick, Aquinas looks to human reason to form and direct human action.

This comparison should not be taken too far, as my appointment within the walls of America's scholastic citadel\textsuperscript{24} is wont to do, for Professor Terrell's definition of liberty is qualified in ways unacceptable to natural law scholars. Specifically, Terrell's conception of "meaningfulness" is not (at least at the outer edge of the focal case) individually, but collectively, determined. Even the most stringent scholastic interpretations of natural law which trace all human action to a causal dependence upon a pre-determined Divine Order fully permit individual free choice in the working out of that Order.\textsuperscript{25}

In contrast, to proclaim, as Terrell does, that what is meaningful will be determined from the standpoint of the reasonable man\textsuperscript{26} does not preclude, by the author's own admission, "a large number of constraints imposed by government."\textsuperscript{27} These include, of course, constraints which take no justification from the author's important and obviously acceptable limitation that individual liberty not include "foreseeable and proximate harm to the liberty of others."\textsuperscript{28} Moreover, to say that somehow these curtailments of individual freedom are made up to us by the presence of a sliding-scale of penalties for other right violations which are collectively acknowledged under the due process clause\textsuperscript{29} says noth-

\textsuperscript{22} R. NOZICK, \textsc{Anarchy, State and Utopia} (1974).
\textsuperscript{23} McInerny, \textit{The Principles of Natural Law}, 25 \textit{Am. J. of Juris.} 1, 3-4 (1980), relying and citing of course \textit{AQUINAS, SUMMA Theologica}.
\textsuperscript{24} The Notre Dame Law School has long been dominated by the Natural Law tradition. In 1947, the Law School organized the natural law institute, which holds, among other things, annual convocations and publishes \textit{American Journal of Jurisprudence} (formerly \textsc{The Natural Law Forum}).
\textsuperscript{26} Terrell \textit{supra} note 2 at 556 & n.23.
\textsuperscript{27} \textit{Id.} at 572.
\textsuperscript{28} \textit{Id.} at 554.
\textsuperscript{29} \textit{Id.} at 578-587.
ing to the demoralized individual and not much more to the rest of us who may have survived government intrusion this time, but can scarcely hope to enjoy such sanctity indefinitely. Further, to suggest that governments today are less immune from suit and are more likely to have to defend themselves against novel civil rights claims ignores both the present difficulty of successfully prosecuting such claims (because the state defines what constitutes a deprivation of civil rights) and the fact that any prospective monetary remedy is typically collected from everyone, including the wronged individual. Thus, the speculation that our "total liberty" has varied remarkably little over the lifespan of our nation seems not only difficult to prove as the authors once admitted, but also downright silly.

Up to this point, I have been addressing the problems with Professor Terrell’s definition from the standpoint of deprivations of liberty. It is worth mentioning, however, that his conception is also flawed because it permits too much liberty by including constraints which are intellectually premised upon the concept of positive freedom. In this regard, the authors reject the well-developed distinction between being at liberty to do something from the power to actually do it.

30. The New Liberty supra note 1 at n. 96. Again, this assertion was part of Professor Terrell’s original claim that the quantum of liberty has not significantly varied. Apparently, having muted (but not abandoned) this position in the published paper (see Terrell supra note 2 at 587) it is no longer necessary to argue that increased governmental liability for civil rights claims is a form of liberty.

31. See Kmiec, Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego, 57 Ind. L.J. 45 (1982). Landowners faced with inhospitable court decisions which limited their regulatory taking remedies to invalidation, rather than compensation, have turned to the civil rights acts, and in particular 42 U.S.C. §1983, for compensatory relief. While the Section 1983 does authorize an award of damages, the landowner must still prove a denial or deprivation of right under color of state law, and such deprivation (like regulatory takings generally) are extremely difficult to prove under a Supreme Court standard which requires an overly harsh showing of economic nonviability as a prerequisite to any remedy.

32. See The New Liberty supra note 1 at 47.


34. Professor Terrell states: “I . . . reject this position [or notion of negative liberty], however, on the basis that it would make the central case of liberty far too narrow, and it would accomplish this by an implicit appeal to some normative agenda, not by reference to the manner in which the term is in fact used.” Terrell supra note 2 at 568 & n.46. Here again, Professor Terrell seems to be nurturing the false notion of a fact/value dichot-
and apparently Professor Terrell finds it expedient to reconcile the "utopian" ideals of capitalism with socialism. Thus, our author concludes that all types and degrees of constraint are potentially relevant, including those which originate with no more than "monetary cost or moral suasion." The difficulty with this aspect of the Terrell approach becomes obvious once it is recognized that defining the right to liberty to include some right to overcome, say, monetary cost necessary entails some coerced redistribution of resources. Moreover, such redistribution may actually be more expansive than that envisaged by egalitarians like John Rawls, since the latter urges wealth redistribution from the perspective of the least advantaged in society; whereas, Terrell's meaningfulness criteria would seemingly permit redistribution in response to constraints felt by a much larger audience. Needless to say, disparities in wealth and power ought not be blithely overlooked; however, their forced rectification undercuts the liberty of both donor and donee (in the sense of increased and unwarranted dependence) and certainly merits the donor nothing from the vantagepoint of Christian charity.

In addition, there is the problematic assertion that political liberty is not a concept accepted by ordinary observers. That statement seems somewhat counter-factual given the predominance of political—that is, negative liberties in Supreme Court jurisprudence and the highly visible activities of organizations such as the American Civil Liberties Union. Moreover, even if the statement were true, doesn't it reveal that Terrell's ordinary observer has a normative perspective or agenda?

35. See e.g., Karl Marx: Selected Writings 79 (D. McLellan ed. 1977).
36. Terrell supra note 2 at 571.
37. Id. at 571-572.
39. Consider the wisdom of Pope Pius XI in his encyclical Quadragesimo Anno (1931):

Those who wish to be apostles amongst the socialists should preach the Christian truth whole and entire, openly and sincerely, without any connivance with error. If they wish in truth to be heralds of the gospel, let their endeavor be to convince socialists that their demands, in so far as they are just, are defended much more cogently by the principles of Christian faith, and are promoted much more efficaciously by the power of Christian charity . . . .

[We] pronounce as follows: whether socialism be considered as a doctrine, or as a historical fact, or as a movement, if it really remains socialism, it cannot be brought into the harmony with the dogmas of the Catholic church, even after it has yielded truth and justice in the points we have mentioned; the reason being that it conceives human society in a way utterly alien to Christian truth.

According to Christian doctrine, man, endowed with a social na-
How far, then, Terrell's conceptualizations take him from his first motivations to define liberty in terms of a real world, human life plan. His theory also wanders a considerable distance from neo-Kantian efforts like Nozick's to define liberty in terms of generalized principles of human reason. Under Nozick's entitlement theory one may exercise liberty with respect to legitimately acquired property, but not otherwise. Thus, if one possesses property from "natural necessity" as in the case of one's self or from investment in unclaimed resources or because of a gift or voluntary sale or in compensation for some past wrong, legitimate exercises of liberty become possible. The legitimacy, of course, is traceable to the generic consistency of these entitlements, such that one's willingness to extend them to others also precludes their denial by others to oneself. With these necessary conditions originating from human action binding from the start (on pain of contradiction), there is little need for the elabo-

ture, is placed here on earth in order that he may spend his life in society, and under an authority ordained by God, that he may develop and to evolve the full all of his faculties to the praise and glory of his Creator; and that, by fulfilling faithfully the duties of his station, he may obtain temporal and internal happiness. Socialism, on the contrary, entirely ignorant of or unconcerned about this sublime end both of individuals and society, affirms that living in communities was instituted merely for the sake of advantages which it brings to mankind.

Goods are produced more efficiently by a suitable distribution of labor than by the scattered efforts of individuals. Hence the socialists argue that economic production, of which they see only the material side, must necessarily be carried on collectively, and that because of this necessity men must surrender and submit themselves wholly to society with a view to the production of wealth. Indeed, the possession of the greatest possible amount of temporal goods is esteemed so highly that man's higher goods, not excepting liberty, must, they claim, be subordinated and even sacrificed to the exigencies of efficient production. They affirm that the loss of human dignity, which results from the socialized methods of production, will be easily compensated for by the abundance of goods produced in common accruing to the individual who can turn them at his will to the comforts and culture of life. Society, therefore, as the Socialist conceives it, is, on the one hand, impossible and unthinkable without the use of compulsion of the most excessive kind: on the other it fosters a false liberty, since in such a scheme no place is found for true social authority, which is not based on temporal and material advantages, but descends from God alone, the Creator and last end of all things.


rate specification of harms or nonharms. However, there is also no justification based in reason or human action for the welfare state, the "new property or liberty" or any other euphemism by which one's liberty and property are taken by force or fraud.

In all of this, I have said very little about Professor Butler's intriguing proposal to extend a jury-determined inverse condemnation remedy for all plaintiffs who feel they have been deprived of property (in the extended Lockean sense) without just compensation. As a strong advocate in my own work of compensation for regulatory takings, I must confess that Butler's idea appears facially attractive. In addition, to the extent that the jury could represent the cumulative wisdom of man's natural inclination toward liberty, this procedural mechanism might actually yield a greater quantum of liberty than Terrell's more abstract conceptualization which, as suggested earlier, both permits and requires considerable state involvement. In this regard, Professor Butler suggests that his own attraction to the jury stems in part from its propensity to be less deferential to state pronouncements than the judiciary.

Making the jury the embodiment of liberty, however, is problematic. First and foremost, the jury represents a collective rather than an individual assessment of rights. Professor Butler is well aware of this, but he assumes that the era of substantively well-defined notions of individual liberty and property must be conclusively presumed dead since 1937. Consequently and pragmatically (rather than on principle, I might add), Butler urges us to accept a "middle ground" whereby twelve good men and true would apply some contemporary community understanding of liberty. This somewhat ad hoc application of the Constitution, he analogizes to Professor Robert Ellickson's proposal to regulate land use pursuant to a "neighborliness" standard.

While the Butler and Ellickson concepts do bear some similarity, there is significant divergence. Notably, while Ellickson does make provision for public nuisance boards for widespread harms, the general thrust of his ground-break-

42. Butler supra note 3 at 595 & n.1.
44. Id. at 775.
ing article concerns the strengthening of private, not publicly imposed, land use restrictions. Moreover, Ellickson is quite clear that his overriding goal is economic efficiency by minimizing the sum of nuisance, prevention and administrative costs. It may be reasonably speculated that Professor Ellickson might seek to define a concept such as liberty on an intellectual field encompassing more than efficiency considerations. In respect to this, the objections proffered by Professor Epstein are quite apt—namely, the application of a “neighborliness” notion to noninvasive conduct, well within say Nozick’s entitlement theory discussed earlier, would inevitably be unprincipled and unjustified under any articulated ethical system premised on either natural law or human reason.

Butler’s response to Epstein’s point of principle is quite lame. Specifically, to assert—probably correctly—that either judges or legislatures would make an even bigger mess of administering a manipulable, contemporary community standard of liberty is hardly a ringing endorsement. Butler anticipates that the legislative handling of his standard would easily lead to the “tyranny of the majority.” Why he fails to see that the jury would likely amount to no more than a petty tyranny is unclear. The pre-emption of such tyrannical impositions by even democratic “fair play”-oriented majoritarian bodies like legislatures, but juries as well, is precisely the function served by the individual guarantees of the Bill of Rights. Ronald Dworkin and even Charles Reich, who

45. In fairness to Professor Ellickson, he does consider whether or not current zoning practice is equitable. Id. at 699. However, Professor Ellickson’s discussion defines equity, not in terms of ethical values, such as those implicated by fundamental concepts like liberty, but rather in terms of efficiency. Thus, Professor Ellickson suggests that it would not be unfair to leave regulatory losses uncompensated if “the efficiency of the government program that caused the loss is transparently obvious, the administrative costs of compensation are high, and the losses suffered are small and widespread.” Id. at 700-701.


47. In The New Liberty, Professor Butler made the point more directly, stating that: “Legislators would push Posnerian judges aside, and the great welfare economic’s nightmare would be upon us. The manipulable standard of neighborliness would lead to the ‘tyranny of the majority,’ since there are no ‘antecedent or natural rights’ which the legal system is bound to respect—so long as their assertion may plausibly be viewed as unneighborly.” The New Liberty supra note 1 at 131. Of course, this precise criticism applies to juries as well, even though Professor Butler somewhat inexplicably believes they would be “non-tyrannic”.

48. Professor Dworkin states:
must bear considerable guilt for leading our principal authors astray, recognize as much.

It should be mentioned that Professor Butler properly makes no claim to legitimacy based upon the jury's majoritarian character. As others have demonstrated, majoritarian bodies of whatever size seldom reach or articulate majoritarian outcomes. The reasons for this are many and somewhat complicated, but they include the recognition that only individuals—not groups—have well-ordered goals and preferences which are complete, connected and consistent. Relatedly, various paradoxical voting patterns which reflect the sequence of issue consideration, rather than the merits of an issue, also distort the quality of collective determination. Kalven and Zeisel found that jury outcomes, for example, depend more on the initial vote than rational deliberation. In short, employing a term like "the public interest" or "neighborliness" or Professor Butler's equivalent, is largely a vacuous exercise since it accomplishes little more than disguising the private interests it actually represents. More importantly, even if the jury perfectly reflected community norms, of course, that says nothing about the normative character of its conclusions. History is replete with ex-

The Constitutional theory on which our government rests is not a simple majoritarian theory. The Constitution, and particularly the Bill of Rights is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.


52. Kalven and Zeisel state that:

The jury tends to decide in the end whichever way the initial majority lies. The result is that a sentiment need be spread only so widely among the public as to produce enough representatives on the jury to yield the initial majority. On this view the study can be thought of as a study of the sentiments that will lead to initial majorities . . . As a corollary, the deliberation process although rich in human interest and color appears not to be at the heart of the jury decisionmaking. Rather, deliberation is the root by which small group pressures produce consensus out of the initial majority.

amples of men, both well intentioned and bad, who, with the full embrace of the majority freely take the lives and property of other men.

Professor Butler further tries to justify his "jury-centric" common law of liberty by suggesting that even Professor Epstein would concede some role to the government to limit non-invasive conduct. True, Epstein does, but only where the constrained party limited his own non-invasive conduct by special covenant or prior contractual obligation. By transposition, Professor Butler implies all individuals have given up some of their intangible liberty to noninvasive conduct pursuant to the implied terms of the social contract.

To say that the analogy is imperfect is to understate the matter. First, the so-called social contract, even in its inception within a representative democracy, is but a mere fiction compared to an actual private contract or covenant. Second, to the extent that a social contract is recognized, it is more from practical necessity than voluntary consent. Those who would choose not to associate are forced to by the simple fact that they must either accept the state's rule or leave. Either way, liberty is violated since the state has no legitimate basis for putting one to that choice. Even the practical necessity of the social contract can be challenged as Professor Nozick has illustrated in his account of the evolution of the minimal state buttressed by private protective associations.

Assuming, however, that the practical necessity of the state's existence is stipulated by the reasonable man, it can hardly be assumed that this prudent person would yield up to the state power to limit non-invasive conduct. More fundamentally, as Roger Pilon has forcefully argued, the reasonable man has no legitimate basis to confer such power upon the state because in the state of nature, he had no such authority himself. Thus, the scope of the police power would

54. Id. at n.39.
56. This point is put nicely by Dr. Roger Pilon when he speaks of the "legitimate scope" of police power. In Pilon's words, "For if the police power has it origins in the enforcement rights of the individual, than that power, if it is to be exercised legitimately, can be no more broad than those original rights. Setting aside the consent problem, that is, the State can do no more by right than any individual could rightly do in a state of nature." Pilon, Property Rights, Takings, and a Free Society, 6 Harv. J. of L. & Pub. Pol. 165, 187 (1983).
properly be limited to the collective exercise of that authority which every individual has by entitlement—namely, the right to defend oneself and one's property from invasive conduct. While this may sound like a foreign concept to the disciples of Charles Reich who view the police power as a device for pursuing a vast array of social goals, it is an idea of much currency. Most specifically, a recent Presidential Commission on Housing recommended that the police power in the land use context be limited to the promotion of "vital and pressing governmental interests." Upon close examination, such vital interests, in the wisdom of this distinguished Commission, would be largely confined to matters which ensure the health and safety of individuals. If a Presidential Commission in the glare of intensive public political pressure is willing to preserve liberty by keeping government in bounds, I see little reason to accept an academic "middle ground" which does considerably less.

The need to return substantive meaning to liberty, rather than emptying it into the hands of the jury, is further underscored by modern assessments of jury performance. Perhaps the most expansive empirical consideration of jury practice was that of Professors Kalven and Zeisel, although many others have considered the institution's costs and benefits. In this regard, Professor Butler's treatment, while containing ample historical comment, is nevertheless a somewhat lop-sided advocacy of the jury's benefits. Specifically, Butler stresses the detachment of the jury from the sovereign, its willingness and capacity to do equity, and greater liberality toward awarding compensation. All of these factors are obviously related and might be referred to generally as the jur

57. REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING, STATE AND LOCAL HOUSING REGULATIONS, 199-201 (1982).
60. See generally, Sunderland, Verdicts, General and Special 29 YALE L. J. 253 (1920); Wigmore, The Program for the Trial of a Jury Trial 12 J. AM. JUD. SOC. 166 (1929); GREEN, JUDGE AND JURY (1930); FRANK, COURTS ON TRIAL (1929); Curtis, The Trial Judge and the Jury 5 VAN. L. REV. 150 (1952); Wyzanski, The Trial Judges Freedom and Responsibility 65 HARV. L. REV. 1281 (1952) and Broeder, The Functions of the Jury: Facts or Fictions 21 U. CHI. L. REV. 386 (1954).
power to make specific exceptions from general principles of law.

Does this jury-exception power exist in reality? The empirically-based conclusions of Kalzen and Zeisel suggest perhaps not. Specifically, they found that juries agree with judges in more than three-fourths of the studied cases. Moreover, their examination was unable to discern any particular direction to jury outcomes. In this regard, Kalven and Zeisel speculate that the vast agreement between judge and jury and the lack of a consistent preference for either plaintiffs or defendants is probably traceable to an accepted, moral consensus which both judge and jury share. This hardly seems to confirm Butler’s assumption that the libertarian inclinations of the jury will produce the equitable departures from the general inconvenience of the law that he anticipates. Indeed, if Kalven and Zeisel are to be believed, it is hard, or in their terms “probabilistic” to anticipate any particular outcome since jury make-up is so dissimilar from case to case.

Given Professor Butler’s analogies to the taking issue in land use law, it is difficult to understand how he retains such an abundance of confidence in the jury’s ability to “play fair.” The judicial digests and casebooks are laden with decisions in which a landowner is left remediless in the face of community demands for scenic views, minimum lot and house sizes, abundant park land, and a host of other amenities the community wants but refuses to pay for. Professor Butler rightly suggests that these redistributionist atrocities are largely sanctioned by judges, not juries, but this ignores the common man origin of these regulatory burdens in planning commissions and their subsequent administrative ap-

62. Kalven and Zeisel state that “The extensive agreement between judge and jury indicates that there is in our society at this time a widespread consensus of the values embodied in the law. As a result, the jury drawn at random from the public does not often have representatives of a dissenting view.” Id. at 495-496.
63. Again, Kalven and Zeisel comment: “The consequence of the fact that no two juries are alike is that statements about trends in jury decision making are probabilistic at best.” Id. at 496.
proval by zoning boards of adjustment. Anyone who has ever had the misfortune of attending these neighborhood land use inquisitions knows full well that Professor Butler has greatly overestimated the likelihood that jurors could be disinterested arbiters of the social contract. Of course, to believers in "the new liberty"—that is, the subordination of the interests of individuals, families, churches and markets in expanding the economic pie to the collective interest in carving it up—this type of "rent seeking" behavior and manipulation of the regulatory process is to be welcomed as just another source of "meaningfulness." 

Even if we were to grant Professor Butler the equitable advantages he sees in the jury, it is clear that the expanded use of the institution as the sole or principal protection for individual liberty has significant costs. At the outset, the jury-centric protection afforded the wronged individual is necessa-

65. Professor Butler puts far too much stock in the intuitive notion that "there but for the grace of God go I."

66. Professor Terrell states: "Moreover, in a generally successful regulated economy the gains from remaining an individualist and aloof from government entanglement are outweighed by the cost of doing so." Terrell supra note 2 at 593.

However, the costs of obtaining a rent from a governmental institution frequently exceed the benefit available. See Tullock, Rent Seeking in Lexeconomics 165 (G. Sirkin ed 1981). From a societal point of view, rent seeking is also quite costly. Professor Sirkin points out that four kinds of cost may be incurred.

First, there is the cost of creating the rent; the threats, restriction and regulations must be established and administered. Second, there is the cost to society of the misallocation of resources that results from restrictions on the free movement of resources and from the inefficiency of allocative decisions made by rent seeker compared to decisions made by a competitive market. Third, there is the cost of rent avoidance, that is, the cost of resources paid by rent payers in an effort to reduce their rent payment. Fourth, there is the cost of rent seeking.

A rent seeking society rewards unproductive activity at the expense of productive activity. The structure of rewards is distorted to provide the greatest inducement to efforts and talents that have nothing to do with innovation, cost saving, allocative efficiency, or any other aspect of productive success. The growth of rent seeking, by twisting the structure of rewards, turns the steering wheel of society in a most costly direction.

Rent seeking, rent avoidance, the decay of the rule of law, the growth of corruption are then part of the total cost, material and spiritual, of the movement from the market to the nonmarket economy.

rily after the fact, and given the dilatory nature of the civil litigation process greatly delayed. Moreover, the jury system generally has long been criticized for exacerbating an already too expensive judicial process. In this regard, liberty, once part of one's birthright, would likely soon become the province of the affluent. To deny this fact is to close one's eyes to the realities of trial practice, where the abuse of process and discovery has become an accepted means for vindicating the interests of the well-represented and the well-healed. In the end, the effect of jury-determined liberty may be the denial of even negative or political liberty to those priced out of the court system. Of course, recognizing this as the deprivation of "distinct and meaningful alternatives," Professor Terrell might rectify this imbalance with court-appointed liberty counsel financed from the public purse. Thus, the welfare state would ever blossom, spending other people's resources on problems it, itself, has created.

Even if one focuses only upon those who can withstand the costs of the jury, the very nature of the ad hoc granting of exceptions ensures disparate and unequal treatment. Again, modern day land use practice supplies an apt analogy in the form of the zoning board of adjustment where decisions are more the result of a standardless lottery, rather than any coherent application of "moral sense." The dissimilarity of treatment of similar cases is certain to raise repeated claims of denial of equal protection which, whether legally successful or not, would symbolize an increased citizen disenchantment with a legal system, which at its fundamental core, has been deprived of its content and rendered lawless.

Having proceeded at some length now to dispute and disassemble the Terrell and Butler proposals, the reader may view my comments as suggesting that either or both have a largely statist orientation. Knowing both to be fine scholars and serious critics themselves of libertarian curtailment, that conclusion would be entirely erroneous. No, both of our principal authors, I believe, sought to justify the liberty that "is," not what "ought to be." I suspect they have done so in the pragmatic belief that the legal and analytic structures


they propose would actually enhance and unencumber the scarce liberty of an increasingly collectivized society. My purpose in these comments, then, was not to challenge the good faith or demonstrated erudition of Professors Terrell and Butler, but to suggest that their good faith, having been infused or infected with Reichian notions, was greatly misplaced.

Reich's pessimism, cited at one point by Terrell and Butler, that "there can be no retreat from the public interest state" is, as a matter of principle, simply wrong. It is wrong for a reason which Reich, himself, acknowledges—namely, that liberty takes its meaning from property and "property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner." While recognizing this, and Locke's expansive view of property as including every interest of "life, liberty and estate," Reich and our principal authors all too easily abandon the traditional concept in favor of new property. By its collective definition, this new property is simply inadequate to the task of ensuring individual liberty. Its inadequacy stems in large measure from its substantive illegitimacy having been neither created nor voluntarily acquired, but stolen. As has already been shown, the theft of redistribution can find no justification in natural law or human reason, and at best emanates from no more than the primitive needs or wants of those who at any given moment possess the force and coercion of state authority.

Professor Butler is surely right in noting that Hohfeldian conceptualizations of property facilitated its initial breakdown and transformation from private to public. Yet, Hohfeld's descriptive propositions need not be, and were never intended to be, an excuse for maintaining a conception of property which is indeed totally at odds with human action—that is, with the tangible, physically observable fact of prior possession as not only the root of title, but also the source and definition of our liberty. It may now be out of fashion to emphasize the "thingness" of property, but emphasis on the tangible is important to keep legal philosophy

70. Id. at 771.
72. This point was originally made in The New Liberty supra note 1 at 128, citing W. Hohfeld, Fundamental Legal Conceptions (1923).
in the real world where there are no contradictions, rather than in our minds, where theories such as the new property and the new liberty yield confusion and endless redistribution, and thereby erode our fundamental values.