

DEBATE on property rights

A further reply to Professor Pascal Salin

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I thank Professor Salin for this further reply and more in general for this stimulating and lively debate. Given the depth of the subjects discussed and our enthusiastic interest in them, I fear that this debate could go on indefinitely. Therefore, in order not to take advantage of his precious time and of his kindness more than I already did, in this brief, final comment I will try to discuss what I think are some of the main points on which Professor Salin and I disagree.

I will discuss only the points on which we disagree because I believe that, on a more general level, Professor Salin and I agree on the same vision according to which, in a free society, coercion of some by others should be reduced as much as possible. What we may disagree on are some of the general criteria on which it is based the “as much as possible” part, and this disagreement may imply a disagreement on our idea of liberty. However, even if our disagreement may regard a fundamental concept, I don’t believe that our difference of opinion on that concept is fundamental: we both link the concept of liberty to the absence of coercion of some by others; only, we may do it in a somewhat different way.

The point that emerged as the main point of disagreement between us regards the existence of legitimate rights that could be in competition with legitimate property rights. Professor Salin denies that these legitimate competing rights may exist and therefore that a balance between them and legitimate property rights may ever have to be found. On the other hand, I claim that in some cases such competing legitimate rights may exist and therefore that, in those cases, the maximum possible reduction of coercion of some by others may require that that balance is found (which would imply an inevitable recourse to arbitrariness, however the minimum possible). In particular, Professor Salin claims that, if Mr. Marconi legitimately owns and uses all TV and radio frequencies in his country, there are no other legitimate rights that can compete with his legitimate property rights on those frequencies; whereas I claim that these competing legitimate rights may exist: for example my right, as citizen of that country, that, in it, the rule of law is not exposed to a major threat (as, in circumstances which are different and more complex than those of the simple example of Mr. Marconi, is happening now in Italy).

This apparent disagreement may be based on a very particular question, namely the relation between exposure of others to risk and principles of justice. Is it legitimate to expose others to a risk? Obviously, there is no general answer to this question. If I drive my own car on a highway at 100 km/h, I do expose others to a risk of death; and so do I if, on the same highway, I drive at 1000 km/h a new powerful car that I built and legitimately own. However, I would not be surprised if, in the latter case, exposure to a risk was *discovered* to be illegitimate and, in the former, legitimate. For that particular highway, in this particular moment of our history and of our technological and infrastructural development, somewhere between 100 km/h and 1000 km/h lies the border between legitimacy and illegitimacy of an exposure of others to a risk.

Professor Salin makes a “distinction between legitimate property rights and legitimate actions”: for example, if Marc can combine his work, resources and capabilities to build a weapon, a) he has a property right on that weapon and b) because of this property right, as long as he does not use this weapon against others (or, more precisely, as long as he does not use this weapon in an illegitimate way), he should be allowed to own it.

Now, I completely agree on this distinction, as long as in the term “action” one includes exposure of others to a risk (and therefore by “illegitimate action”, illegitimate exposure of others to a risk). In fact, the very possession of a weapon *by itself* may expose others to a threat as well as to a risk. Owning a knife exposes others to a risk, and so does owning, without using it, a home-made, rudimental atomic bomb (in both cases, for example, accidents could happen). As in the case of the highway, between owning a knife and a home-made, rudimental atomic bomb, exists the border between legitimacy and illegitimacy of an exposure of others to a risk.

In a free society, in my opinion, this border is not set by rational logic, by majority vote, or by opinion, but rather by common-sense, by tradition and by trial-and-error (spontaneous selection of successful uses and conventions); and it is the work of the lawyers, that is of the discoverers of the law, to discover what is the pre-existing border between legitimate and illegitimate exposure to a risk.

More in general, such an exposure is a negative externality that, *in some cases*, may be illegitimate and therefore may have to be balanced against legitimate property rights (in this case, those of the builder of the rudimental atomic bomb).

Does this mean that negative externalities are *always* illegitimate? Of course not: some negative externalities will never be illegitimate, however big they are, for clear reasons based on principle (the fact that Claire is much richer than Michelle may produce a negative externality for Michelle in the form of envy; but, of course, this negative externality is not illegitimate, however big is Claire’s wealth and/or Michelle’s envy: on the contrary, it would be illegitimate an action that satisfied Michelle’s envy). Other externalities, such as exposure of others to a risk, may become illegitimate after a certain point (examples of the car, of the rudimental atomic bomb and, in my opinion, of the radio frequencies). When Professor Salin states that “I cannot agree with Mr. Birindelli when he states that ‘Illegitimate actions are those which produce damage to others, and the law of a free society is that which forbids this kind of actions’” he forgets to mention that the sentence he quotes was preceded by the following one: “Not all actions that produce damage to

others, of course, are illegitimate”. In other terms, he forgets to mention that I totally agree with him when he states that a position according to which *any* negative externality ought to be forbidden (therefore a position *opposite* to the one I defended in my previous comment) “is not acceptable and ... is not consistent with the principles of a free society. Therefore, one should rather say that ‘Illegitimate actions are those which produce illegitimate damage to others, namely those which are not respectful of legitimate rights”.

Going back to Mr. Marconi’s example, it is true, as Professor Salin states, that “if one owns all frequencies at a given time, for instance on air waves, there is an inducement for others to develop new techniques, for instance cable-TV. This is precisely the role of competition, defined as freedom of entry ... : It is a force of innovation. In fact, we do see it right now : Plurality of information is offered through the internet web”. However, the risks to which it may be illegitimate to expose others may be those relative to the damage that can be done before these alternative technologies become an effective alternative (a tyranny could be established in between).

In conclusion, I believe that Professor Salin and I may have a different idea of liberty: his idea, as he clarified in the interview, is based on “legitimate property rights” (intended in the widest sense). My idea is based on “legitimate principles”, which coincides with the former in most cases but not necessarily in all cases. Again, even though this difference of opinion regards a fundamental concept, the difference itself, however remarkable, is not fundamental, in the sense that both Professor Salin’s and my definition fall, I believe, in different areas of the same tradition of classical liberalism and of negative liberty.