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Property Law

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Philosophical thought about the law of property covers two types of issues. First, there are analytical issues about the meaning and use of the most important concepts in property law, such as "private property," "ownership," and "thing." The second type of issue is normative or justificatory. The law of property involves individuals having the right to make decisions about the use of resources – the land and the material wealth of a country – without necessarily consulting the interests and wishes of others in society who might be affected. So what in general justifies giving people rights of this kind? And specifically, what principles justify the allocation of particular resources to particular owners? The two sets of issues are of course connected: the point of sharpening our analytical understanding of concepts like "ownership" is to clarify what is actually at stake when questions of justification are raised.

Analytical Issues

Any attempt to define terms such as "private property" and "ownership" runs the risk of either oversimplifying the complexities of property law or losing any sense of the broader issues in a maze of technical detail. Some jurists have argued, indeed, that these terms are indefinable and largely dispensable (see Grey, 1980). They say that calling someone the "owner" of a resource does not convey any exact information about the rights that person (or others) may have in relation to that resource: a corporate owner is not the same as an individual owner; the owner of intellectual property has a different array of rights than the owner of an automobile; and even with regard to one and the same resource, the rights (and duties) of a landlord who owes nothing on his or her property might be quite different from those of a mortgagor who lives on his or her own estate.

If one is patient, however, it is possible to build up a reasonably clear conceptual map of the area, which respects both the technician's sensitivity to legal detail and the philosopher's need for a set of well-understood "ideal types" to serve as the focus of justificatory debate (see Waldron, 1986, pp. 26–61).

The objects of property

Let us start with some ontology. The law of property is about *things*, and our relationships with one another with respect to the use and control of things. What sorts of things? Material things, certainly, such as apples and automobiles, but property has never confined itself to tangible objects. Real estate provides an interesting example. A mobile home is a thing, and so is the plot of land on which it sits. In the eyes of the law, however, the land is not a tangible object. It is tempting to identify the land as the soil and rocks on which the mobile home sits; but take away any amount of soil and rock and the land remains. The land is more like the region of space or the portion of the earth's surface at which the soil, the rock, and indeed the mobile home are located. A different kind of intangibility is involved with intellectual property. My Madonna CD is a different material object from your Madonna cassette. But they contain the same songs, and the songs themselves – the tunes and the lyrics – may be regarded as things for which there can be property rights, just as much as for apples and automobiles.

A third sort of intangibility involves the "reification" of legal relationships themselves. If Jennifer owes Sarah 50 pounds but Sarah despairs of collecting the debt, Sarah may accept a payment of 30 pounds from Bronwen, a specialist debt collector, in return for which Bronwen acquires the right to recover the 50 pounds from Jennifer (if she can get it). It seems natural to say that Sarah has sold the debt to Bronwen and that, therefore, the debt was a thing that Sarah owned and had the right to dispose of even before Bronwen entered the picture. The legal term for this sort of thing is "chose-in-action." (More complex choses-in-action include checks and shares in a company.) It may be helpful, for some purposes, to regard choses-in-action as an appropriate subject matter for property law, but in general they do not raise important issues in the philosophy of property in the way that land, intellectual property, and material chattels do. A composition, a plot of land, and an automobile are things that exist independently of the law and about which the law is required to make certain decisions, settle certain disputes, and so on. By contrast, a chose-in-action exists only because the law has *already* settled certain disputes in a particular way. The philosophical issues raised by a chose-in-action are thus better regarded as issues in the law of contracts or corporate law, not issues in the law of property.

The ontological differences between material chattels, land, and intellectual property can have an important bearing on questions of justification. In some ways, there is a stronger case for private property in intellectual objects than for private property in land. An original tune that I have composed is, in a sense, nothing but a product of my will and intellect. Apart from my creativity, the song might never have come into existence, and those who complain about the profits I derive from my copyright must concede that they would have been no worse off if I had never composed the tune and thus never acquired a right in it at all. A piece of land, by contrast, is sheer nature rather than human product or invention. Or, if we define it as a region in space, land is simply what is *given* in advance of any individual's activity; it is part of the given framework for human life and action.

Other contrasts between intellectual and nonintellectual property seem to work in the opposite direction. There is not the same *necessity* for property restrictions in regard to intellectual objects, if those objects are to be usable, as there is in regard to pieces of

land or material objects like chairs. When you are using a sports field for a cricket match, I cannot use it to play football; and two people can seldom sit on the same chair without catastrophic results. But if I perform or record a tune that another has composed, I am not precluding or interfering with the composer's or anyone else's use of it. Songs are not crowdable like chairs or plots of land, and they do not wear out with use. I *may* be interfering with the songwriter profiting from his or her composition, but that begs the question of property. Profiting is simply the exploitation of the right that the property of the tune would confer, namely, the right to exclude others from using the tune if they will not pay the songwriter for the privilege.

Types of property systems

As we address the issues of justification posed by property rights in different types of objects, it is important to understand the main institutional alternatives to a system of private ownership. We should begin with the distinction between "property" and "private property." The distinction is one of genus and species. The generic concept – property – may be used to refer to *any* system of rules governing people's access to and their use and control of things, whether tangible or intangible, natural or manufactured. According to David Hume, we may say that property rules are needed for any class of things about which there are likely to be conflicts concerning access, use, and control, particularly things that are scarce relative to the demands that human desires are likely to place upon them (Hume, [1739] 1888, pp. 484–98). Disagreements about who is to use or control such objects are likely to be serious because resource use matters to people, for their livelihood as well as their enjoyment. Thus any society with an interest in avoiding violent conflict will need a system of rules for pre-empting disagreements of this kind. The importance of such rules can hardly be overestimated, for their job is to provide a legal framework for the economy of the society in question. Without them, planning, cooperation, production, and exchange are virtually impossible, or possible only in the fearful and truncated forms that we see in "black markets" where nothing can be counted on. Jurists often cite these necessities as the basis of a case for *private* property, but, so far, all they establish is the need for property rules. As we proceed with our analysis, we must bear in mind that certain human societies have existed for millennia, satisfying the needs and wants of all their members, without private property or anything like it in land or the other major resources of economic life.

"Property," I said, is a generic term. There are three broad species of property arrangement: common property, collective (or state) property, and private property. In a *common property* arrangement, resources are governed by rules whose point is to make them available for use by all or any members of the society. A tract of common land, for example, may be used by everyone in a community for grazing cattle or gathering food. A public park may be open to all for picnics, sports, or recreation. The aim of any restrictions on use is simply to secure fair access for all and to prevent anyone from using the common resources in a way that would preclude their use or access by others.

Collective property is quite a different idea. In a system of collective property, resources are not left open to all comers. Rather, the community as a whole determines how

resources are to be used; these determinations are made on the basis of the social interest through the society's mechanisms of collective decision making. Now what this amounts to will depend in part on the communal institutions that exist in particular societies. It may involve anything from a leisurely debate among the elders of a tribe to a bureaucratic decision implementing a Soviet-style "five-year plan." (In modern societies, collective property amounts in effect to state property, and is often referred to as socialism.) It depends also on the dominant conception of the social interest – for example, whether this is conceived as an equal interest in the welfare of all, or the greatest happiness of the majority, or the promotion of some future goal such as national glory, cultural splendor, or rapid industrialization.

Private property is an alternative to both collective property and common property. In a private property arrangement, rules of property are organized around the idea that contested resources are to be regarded as separate objects, each assigned to the decisional authority of some particular individual (or family or firm). The person to whom a given object is assigned by the principles of private property (for example, the person who found it or made it) has control over the object: it is for her to decide what should be done with the object. In exercising this authority, she is not understood to be acting as an agent or official of the society. Instead, we say that the resource is *her property*; it *belongs* to her; she is its *owner*; it is as much *hers* as her arms and legs, kidneys, and corneas. In deciding how the thing is to be used, she may act on her own initiative as a private person without giving anyone else an explanation, or she may enter into cooperative arrangements with others, for their benefit or her own profit, just as she likes. What is more, her right to decide as she pleases applies whether or not others are affected by her decision. If Jennifer owns a steel factory, it is *for her* to decide (in her own interest) whether to close the plant or to keep it operating, even though a decision to close may have the gravest impact on her employees and the prosperity of the local community.

Though private property is a system of individual decision making, it is still a system of social rules in the following sense. Owners are not required to rely on their own strength to vindicate their right to make decisions about the objects assigned to them: any attempt by others to thwart or resist the owner's decision will be met with the combined force of the society as a whole. If Jennifer's employees occupy the steel factory to keep it operating despite her wishes, she can call the police and have them evicted; she does not have to do this, or even pay for it, herself.

Sometimes we talk about these alternative types of property arrangement – common, collective, and private property – as though they were alternative ways of organizing whole societies. We say the former Soviet Union was a socialist society because the economically most significant resources were governed by collective property rules, whereas in the United States most economically significant resources are governed by private property rules. In fact, in every modern society there are resources governed by common property rules (for example, streets and parks), resources governed by collective property rules (such as military bases and artillery pieces), and resources governed by private property rules (toothbrushes and bicycles). Even among economically significant resources (agricultural land, minerals, railroads, industrial plants), we find in most countries a mix of private ownership and state ownership, with the balance between the two types of arrangement being a matter of continuing political debate.

In addition, there are variations in the degrees of freedom that private owners have over the resources assigned to them. Obviously, an owner's freedom is limited by background rules of conduct: I may not use my gun to kill another person. But these are not strictly property rules. More to the point are things like zoning restrictions and historic preservation laws, which amount, in effect, to the imposition on the private owner of a collective decision about certain aspects of the use of a given resource. The owner of a building in a historic district may be told, for example, that it can be used as a shop, a home, or a hotel, or left empty if the owner likes, but it may not be knocked down and replaced with a postmodern skyscraper. Or, in the case of Jennifer's steel factory, the owner may find that she is required by law not to close her plant without giving her employees and the local authorities 90 days' notice. Private ownership, then, is a matter of degree. In the examples just given, we may still want to say that the historic building and the steel factory were private property; but if too many other areas of decision about their use were also controlled by public agencies, we would be more inclined to say that the resources in question were in reality subject to a collective property arrangement (with the "owner" functioning as a steward of society's decisions).

Ownership: a bundle of rights

Let us now focus more closely on private property. Analyzed technically, an individual's right to make decisions about the use of a thing has two elements. First, as we have just seen, it implies the absence of any obligation to use or refrain from using the object in any particular way. The owner may decide as he or she pleases, and the owner is at liberty to put his or her decision into effect by occupying, using, modifying, or perhaps even consuming or destroying the object. Second, private property implies that other people do not have this liberty: they *do* have an obligation – an obligation to the owner – to refrain from occupying, using, modifying, consuming, or destroying the object. Other people can use the object with the owner's permission; but what this means is that it is up to the owner to decide whether or not to exclude others from the enjoyment of the object.

The owners may give other people permission to use their property. They may lend their automobiles, rent their houses, or grant right of way over their land. The effect of their exercise of these powers is sometimes to create other (relatively limited) property interests in these objects, so that the various liberties, rights, and powers of ownership are divided up among several people. Thus the law of private property deals with things such as bailments, leases, and easements, as well as ownership itself.

More strikingly, the owners are legally empowered to transfer the whole bundle of their rights in the objects they own (including the power of transfer) to somebody else – as a gift, or by way of sale if they insist on receiving something in return, or as a legacy after death. Once the owner does this, the transferee is in the position of owner; the transferor no longer has any legally recognized interest in the object. With this power of transfer, the system of private property becomes self-perpetuating (which is not, of course, the same as self-enforcing). After an initial assignment of objects to owners, there is no further need for the community or the state to concern itself with distributive questions. Objects will circulate as the whims and decisions of individual owners and

their successive transferees dictate. (The exception is inheritance, which provides a set of default rules in case an owner dies without leaving instructions as to who should take over the property; but even these are usually modeled on the arrangements that testators are normally expected to make.) The result may be that resources are widely distributed or concentrated in a very few hands; some individuals may own a lot, whereas others own next to nothing. It is part of the logic of private property that no one has the responsibility to concern themselves with the big picture, so far as the distribution of resources is concerned. Society simply pledges itself to enforce the rights of exclusion that ownership involves, wherever they happen to be. As we shall see, philosophers disagree as to whether this is an advantage or an indictment of the system of private property.

These, then, are the most striking incidents of ownership: the liberty of use, the right to exclude, and the various powers of transfer. Other jurists have listed many more (see especially, Honore, 1961), including constitutional immunities against expropriation (such as that laid down in the Fifth Amendment to the US Constitution) and the owner's liability to have judgments (for example, for debt) executed by forced sale of the object. Obviously the formulation and level of detail in this analysis are in part a matter of taste, and in part a matter of what is taken to be most importantly at issue in any normative debate about the institution.

The Need for Justification

Justificatory issues arise because the laws and institutions we have are not features of the natural world like gravity, but are human creations, set up and sustained by human decisions. We are not stuck with the arrangements we have inherited: acting collectively and politically, we can choose to change them if we like, either wholesale or in detail. Normative argument is what takes place when we think together about how to guide and evaluate such choices.

Every social institution requires justification if only because the energy and resources needed to sustain it could be used in some other way. Private property, however, falls into a special class of institutions that require justification not only because there are opportunity costs involved in their operation, but because they operate in a way that seems – on the face of it – morally objectionable. In this regard, private property is like the institution of punishment. We require a justification for punishment not just because the money spent on prisons could be spent on education, but because punishment involves the deliberate infliction of death, pain, or deprivation on human beings. Such actions are indefensible unless they serve some morally compelling point, and we want to be told what that morally compelling point actually is.

Similarly, we look for a justification of private property, because it deprives the community of control over resources that may be important to the well-being of its members, and because it characteristically requires us to throw social force behind the exclusion of many members of our society from each and every use of the resources they need in order to live. I said earlier that one effect of recognizing individual powers of transfer is that resources may gradually come to be distributed in a way that leaves a few with a lot, a lot with a very little, and a considerable number with nothing at all. Private

property involves a pledge by society that it will continue to use its moral and physical authority to uphold the rights of owners, even against those who have no employment, no food to eat, no home to go to, and no land to stand on from which they are not at any time liable to be evicted. That legal authority and social force are held hostage in this way to an arbitrarily determined distribution of individual control over land and other resources is sufficient to raise a presumption against private property. To call for a justification is a way of asking whether anything can be adduced to rebut that presumption.

It may be thought that the justificatory issue is nowadays moot, with the collapse of "actually existing socialism" in Central and Eastern Europe and the former Soviet Union. What are we seeing there, if not the belated recognition (by the erstwhile proponents of collective ownership) that markets and private property are necessary after all – and private property in businesses, factories, minerals, agricultural land, and the means of production generally, not just the private ownership of apartments, toothbrushes, and the occasional smoky automobile?

With this happening in the heartland of Marxism–Leninism, it is easy to conclude that collective property has been thoroughly discredited, and the problem of justifying *private* property solved by default, as it were. The issue can now be firmly handed over to the philosophers, as something with which practical people need no longer concern themselves. The philosophers will continue to play with it of course – but in the same way that they tease each other with questions about the reality of the external world, or whether the sun will rise tomorrow.

It would be wrong to dismiss the issue in this way. Consider an analogy: suppose that as the result of some worldwide "retributive revolution," all the countries that had abolished capital punishment since the 1940s were to reinstate it. Would that lessen any of the concerns that people in the United States currently have about capital punishment in their society – the weakening of the taboo against killing, the danger of executing the innocent, racial disparities in the administration of the death penalty, the barbarism of popular fascination with its grisly details, and so on? It might make us less sanguine about the prospects for reform, but it would not lessen the need to examine whether this was an institution with which we were entitled to live comfortably, from a moral point of view.

Anyway, the point of discussing the justification of an institution is not only to contemplate its abolition. Often we need to justify in order to understand and to operate the institution intelligently. Again, an analogy with punishment might help. In criminal law, we study issues about *mens rea* and strict liability; the distinction between justification, excuse, and mitigation; the use (or overuse) of the insanity defense; and the similarities between felony homicide and deliberate murder. It is hard to see how any of that can be done without asking questions about the *point* of the criminal sanction. Without some philosophical account of punishment and individual responsibility, the doctrines and principles of the criminal law are apt to seem like a mysterious language with a formal grammar but no real meaning of its own.

Similarly, in thinking about property, there are a number of issues that make little sense unless debated with an awareness of the point of property rules (or specifically, rules of *private* property). Some of these issues are technical. The rule against perpetuities, for example, the technicalities of the registration of land titles, the limits on testa-

mentary freedom – all these would be like an arcane and unintelligible code, to be learned at best by rote, unless some attempt were made to connect them with the point of throwing social authority behind individual control or individual disposition of control over resources.

The same is true of less technical, more substantive issues. The Fifth Amendment to the US Constitution requires that private property not be taken for public use without just compensation. It is pretty evident that this right prohibits the government from simply seizing or confiscating someone's land (for use, say, as a firing range or an airport). But think of an example we used earlier: what if the state simply places some restriction on the use of one's land? Sarah is told that she may not erect a postmodern office building on her property, because it will compromise the historical aesthetics of the neighborhood. Does this amount to a taking for which she should be compensated under the Fifth Amendment? Certainly Sarah has suffered a loss (she may have bought the land purely with the intention of developing it). On the other hand, it is fatuous to pretend that there is a taking whenever any restriction is imposed. I may not drive my car at a speed of 100 miles per hour, but I am still the owner of the car.

I do not think it is possible to answer this question by staring at the words "property" and "taking." Certainly, it is impossible to address the constitutional issue intelligently (as opposed to learning by rote the answers that successive courts have offered) without some sense of *why* private property is regarded as sufficiently important to be given this sort of constitutional protection. Is it protected because we distrust the capacity of the state and its agencies to make collective decisions about resource use? Or is it protected only because we want to place limits on the burdens that any individual may be expected to bear for the sake of the public good? It may make a considerable difference to our interpretation of the takings clause, as well as other legally enshrined doctrines of property law, what we think are the ultimate purposes and values that private ownership is supposed to serve.

Justificatory Theories

We turn now to the theories of justification that have actually been proposed. At this point, jurisprudence reaches out to political philosophy and to the debates about property in which thinkers like Plato and Aristotle; Grotius and Pufendorf; Hobbes and Locke; Hume, Smith, and Rousseau; Hegel and Marx; Bentham and Mill; and Nozick and Rawls have participated.

An institution such as private property requires justification in two regards. First, we need to justify the general idea of having things under the control of private individuals. Second, we must justify the principles by which some come to be the owners of particular resources while others do not. In principle, the same argument can perform both tasks, for some general justifying aims are nothing more than compelling distributive principles writ large. Robert Nozick, for example, justified private property purely on the ground that certain things belong intrinsically to certain individuals, and that we must set up our social institutions to respect those particular rights, whether or not the institution as a whole serves any broader social ends. "Things come into the world," he wrote, "already attached to people having entitlements over them" (Nozick, 1974,

p. 160). His most persuasive example was body parts. We do not need a general social justification for the rule that my kidneys belong to me. They just do, and any acceptable theory of property had better respect that fact. But it is doubtful whether this particularist approach can be extended to land or other external objects. The best-known attempt is that of John Locke ([1690] 1988, pp. 285–302), but, as we shall see, even Locke found it necessary to complement his theory of particular entitlements with more general considerations of social utility.

General justifying aims

The most common form of justificatory argument is that people are better off when a given class of resources is governed by a private property regime than by any alternative system. Under private property, it is said, the resources will be more wisely used, or used to satisfy a wider (and perhaps more varied) set of wants than under any alternative system, so that the overall enjoyment that humans derive from a given stock of resources will be increased.

The most persuasive argument of this kind is sometimes referred to as "the tragedy of the commons" (Hardin, 1968). If everyone is entitled to use a given piece of land, then no one has much of an incentive to see that crops are planted or that the land is not overused. Or if anyone does take on this responsibility, they themselves are likely to bear all the costs of doing so (the costs of planting or the costs of their own self-restraint), while the benefits (if there are any) will accrue to all subsequent users. In many cases, there are unlikely to be any benefits, since one individual's planning or restraint will be futile unless the others cooperate. Instead, under common property, each commoner has an incentive to get as much as possible from the land as quickly as possible, since the benefits of doing this are in the short term concentrated and ensured, while the long-term benefits of self-restraint are uncertain and diffused. However, if a piece of hitherto common land is divided into parcels and each parcel is assigned to a particular individual who can control what happens there, then planning and self-restraint will have an opportunity to assert themselves. For now, the person who bears the cost of restraint is in a position to reap all the benefits, so that if people are rational and if restraint (or some other form of forward-looking activity) is in fact cost-effective, there will be an overall increase in the amount of utility derived.

Arguments of this sort are familiar and important, but like all utilitarian arguments, they need to be treated with caution. In most private property systems, there are some individuals who own little or nothing, and who are entirely at the mercy of others. So when it is said that "people" are better off under private property arrangements, we have to ask: "Which people? Everyone? The majority? Or just a small class of owners whose prosperity is so great as to offset the consequent immiseration of the others in an aggregative utilitarian calculus?"

John Locke hazarded the suggestion that everyone would be better off. Comparing England, whose commons were swiftly being enclosed by private owners, to pre-colonial America, where the natives continued to enjoy universal common access to land, Locke speculated that "a King of a large and fruitful Territory there [that is, in America] feeds, lodges, and is clad worse than a day Labourer in England" (Locke, [1690] 1988, p. 297). The laborer may not own anything, but his standard of living

is higher on account of the employment prospects that are offered in a prosperous privatized economy. Alternatively, the more optimistic of the utilitarians cast their justifications in the language of what we would now call "Pareto-improvement." Maybe the privatization of previously common land does not benefit everybody, but it benefits some and it leaves others no worse off than they were before. Now this is hardly a reason for the latter group to support or endorse such a change, but it indicates that they have little ground for complaint. The homelessness and immiseration of the poor, on this account, is not a result of private property; it is simply the natural predicament of mankind from which a few energetic appropriators have managed to extricate themselves.

So far, we have considered the utilitarian case for private property over common property. The case for private property over collective property has more to do with markets than with the need for responsibility and self-restraint in resource use (though it must be said that the environmental record of socialist societies is turning out to have been much, much worse than that of their capitalist competitors). The argument for markets is that, in a complex society, there are innumerable decisions to be made about the allocation of particular resources to particular production processes. Is a given ton of coal better used to generate electricity that will in turn be used to refine aluminum for manufacturing cooking pots or aircraft, or to produce steel that can be used to build railway trucks, which may in turn be used to transport either cattle feed or bauxite from one place to another? In most economies, there are hundreds of thousands of distinct factors of production, and it has proven impossible for efficient decisions about their allocation to be made by central agencies acting in the name of the community and charged with overseeing the economy as a whole. In actually existing socialist societies, central planning turned out to be a way of ensuring rather than preventing economic paralysis, inefficiency, and waste.

In market economies, by contrast, decisions like these are made on a decentralized basis by thousands of individuals and firms responding to price signals, each seeking to maximize profits from the use of the productive resources under its control. Some have speculated that there could be markets without private property, but this too seems hopeless. Unless individual managers in a market economy are motivated directly by considerations of personal profit in their investment and allocation decisions – or unless they are responsible to others who are motivated on that basis – they cannot be expected to respond efficiently to prices. This sort of motivation can be expected only if the resources in question are *theirs*, so that the loss is theirs when a market signal is missed and the gain is theirs when a profitable allocation is secured.

I said earlier that a utilitarian defense of private property is in trouble unless it can show that everyone is better off under a private property system, or at least that no one is worse off. Now, a society in which all citizens derive significant advantages from the privatization of the economy is perhaps not an impossible ideal. But in every private property system with which we are familiar, there is a class of people, often many thousands, who own little or nothing and who are arguably much worse off under that system than they would be under, say, a socialist alternative. A justificatory theory cannot simply ignore their predicament, if only because it is in part their predicament that poses the justificatory issue in the first place. A hard-line utilitarian may insist that the advantages to those who enjoy private ownership simply outweigh the costs to those who suffer. That is, the utilitarian may defend private property using purely

aggregative measures of output and prosperity. Philosophically, however, this sort of hard line is quite disreputable (Rawls, 1971, pp. 22–33; Nozick, 1974, pp. 32–3): if we take the individual rather than a notional entity like "the social good" as the focal point of moral justification, then there ought to be something we can say to *each* individual about why the institution we are defending is worthy of his or her support. Otherwise, it is not at all clear why the individual should be expected to observe the institution's rules and requirements (except that we have the power and the numbers to compel the person to do so).

Maybe the utilitarian argument can be supplemented with an argument about desert in order to show that there is justice when some people enjoy the fruits of private property but others languish in poverty. Locke took this line too: God gave the world, he said, "to the use of the Industrious and Rational... not to the fancy or covetousness of the quarrelsome and contentious" (Locke, [1690] 1988, p. 291). If private property involves the wiser and more efficient use of resources, it is because someone has exercised virtues of prudence, industry, and self-restraint. People who languish in poverty, on this account, do so largely because of their idleness, profligacy, or want of initiative. Now, theories like this are easily discredited if they purport to justify the actual distribution of wealth under an existing private property economy (Nozick, 1974, pp. 158–9; Hayek, 1976). But there is a more modest position that desert theorists can adopt: namely, that private property alone offers a system in which idleness is not rewarded at the expense of industry, a system in which those who take on the burdens of prudence and productivity can expect to reap some reward for their virtue, which distinguishes them from those who did not make any such effort.

One can come at the issue of virtue also from a slightly different direction. Instead of (or as well as) rewarding the owner for the virtue that he or she displays, we might count it as a point in favor of private property that it offers people the opportunity to acquire and exercise such virtues. Owning property, in Hegel's words, helps the individual to "supersede the mere subjectivity of personality" (Hegel, [1821] 1991, p. 73). In plain English, it gives people the opportunity to make concrete the plans and schemes that would otherwise just buzz around inside their heads, and to take responsibility for their intentions as the material they are working on – a home, a canvas, or a car – registers the impact of the decisions they have made (Waldron, 1986, pp. 343–89; cf. Munzer, 1990, pp. 120–47). In the civic republican tradition, the virtue argument was associated with the noble independence and self-sufficiency of the yeoman farmer. Owing nothing to anything besides his own industry, neither so rich as to be able to buy another nor poor enough to be bought, the individual proprietor in a republic of virtue could be relied on to act as a good citizen, using in public affairs the virtues of prudence, independence, resolution, and good husbandry that he necessarily relied on in running his private estate. If most economic resources are owned in common or controlled collectively for everyone's benefit, there is no guarantee that citizens' conditions of life will be such as to promote republican virtue. On the contrary, citizens may behave either as passive beneficiaries of the state or irresponsible participants in a tragedy of the commons. If a generation or two grow up with that characteristic, then the integrity of the whole society is in danger. These arguments about virtue are, of course, quite sensitive to the distribution of property (Waldron, 1986, pp. 323–42). As T. H. Green observed, a person who owns nothing in a capitalist society "might as well,

in respect of the ethical purposes which the possession of property should serve, be denied rights of property altogether" (Green, 1941, p. 219).

To complete this overview of the general justifications of private property, we must consider the relationship between property and liberty. Societies with private property are often described as free societies. Part of what this means is surely that owners are free to use their property as they please; they are not bound by social or political decisions. (And correlatively, the role of government in economic decision making is minimized.) But that cannot be all that is meant, for – as we saw in our analytical discussion – it would be equally apposite to describe private property as a system of *unfreedom*, since it necessarily involves the social exclusion of people from resources that others own.

Two other things are implied by the libertarian characterization. The first is a point about independence: a person who owns a significant amount of private property – a home, say, and a source of income – has less to fear from the opinion and coercion of others than the citizen of a society in which some other form of property predominates. The former inhabits, in a fairly literal sense, the "private sphere" that liberals have always treasured for individuals – a realm of action in which citizens need answer to no one but themselves. But like the virtue argument, this version of the libertarian case is sensitive to distribution: for those who own nothing in a private property economy would seem to be as unfree – by this argument – as anyone would be in a socialist society.

That last point may be too quick, however, for there are other indirect ways in which private property contributes to freedom. Milton Friedman (1962) argued that political liberty is enhanced in a society where the means of intellectual and political production (printing presses, photocopying machines, computers) are controlled by a number of private individuals, firms, and corporations – even if that number is not very large. In a capitalist society, a dissident has the choice of dealing with several people (other than state officials) if he wants to get his message across, and many of those people are prepared to make their media available simply on the basis of money, without regard to the message. In a socialist society, by contrast, those who are politically active either have to persuade state agencies to disseminate their views or risk underground publication. More generally, Friedman argued, a private property society offers those who own nothing a greater variety of ways in which to earn a living – a larger menu of masters, if you like – than they would be offered in a socialist society. In these ways, private property for some may make a positive contribution to freedom – or at least an enhancement of choice – for everyone.

Particular distributive arguments

Assume now, for the sake of argument, that private property is in general a good institution for a society to have. Whether because it maximizes utility, facilitates markets, cultivates virtue, rewards desert, or provides a congenial environment for the growth of liberty, we think it is a good idea for resources to be under the control of individuals who will have to live with the effects of the decisions that they make about the resources. The question now is which individuals are to have control of which resources. How – that is, by what principles – is this to be determined?

The task of justifying a distribution of private property is an important one. In our analytic discussion, we saw that once a private property system is established, with particular resources assigned to particular individuals, no further distributive intervention is required for the system to operate. Even though needs change, people die, and one generation is succeeded by another, the institution of private property can largely run under its own steam, so far as distribution is concerned. But the results may not be attractive. In some cases, the concentration of resources in the hands of a few individuals, firms, or families may be so extreme that the authorities will feel compelled to intervene in the name of justice and undertake some large-scale redistribution. This has happened historically in a number of countries – in New Zealand in the second half of the nineteenth century, in Mexico at the turn of the twentieth century, and more recently in the Philippines. Countries that undertake land reform are in effect approaching the distributive question anew, attempting to establish an assignment of resources to individuals that is justified in the light of the present requirements of their society.

Even in countries where there is no such reshuffling of entitlements, distributive arguments may still play a part in people's thinking about the ways in which property rights should be regulated, and the ways in which they fit into the overall structure of social and economic institutions. Most developed countries have progressive income and wealth taxes, and provide income support and basic services to their poorest citizens on the basis of that taxation. These schemes are not usually conceived as ways of redistributing property, but they may nevertheless be informed by a sense of how far the existing system is from a just distribution or of what the basic principles underlying property distribution ought to be.

I emphasize this because there is a well-known argument in "law and economics" purporting to show that questions of initial distribution are uninteresting. Imagine that a wheat field beside a railroad is continually being set on fire by sparks from passing trains. It becomes clear that either wheat can be grown on this land or trains can run across it, but not both. A theorem due to Ronald Coase (1960) holds that an efficient outcome may be reached by the wheat grower and the railroad, irrespective of whether the former is initially assigned the right not to have his wheat set on fire. If running trains is more profitable there than wheat growing, the railroad will be in a position to pay the farmer damages for the loss of his crop and still make a profit if the farmer has the right to sue; and if the farmer does not have the right to sue, he will be unable to pay the railroad enough out of his profits to persuade them to stop running their trains and damaging his crops. The same applies, *mutatis mutandis*, if wheat growing turns out to be the more profitable activity: the initial assignment of rights makes no difference. But the Coase theorem shows only that the distributive question is uninteresting from the point of view of efficiency (and even then only under highly idealized assumptions about transaction costs). Coase and his followers concede that the initial assignment of rights will make a big difference as to how much wealth *each party* ends up with in the efficient allocation, and they can hardly deny that this is likely to matter more to the parties themselves than the issue of efficiency. In general, Law and Economics professors have made no attempt to show why we should be preoccupied with efficiency to the exclusion of all else, or why the law should take no interest in what has traditionally been regarded as its *raison d'être* – namely justice.

Among the philosophers who discuss principles for assigning resources to particular private owners, some embrace the inherent arbitrariness of the initial assignment, while others insist that unless the initial assignment is morally justified, the subsequent operation of the property system cannot be. Of the latter group – that is, of those who insist that the initial assignment must be morally justified – some maintain that the initial distribution of private property ought to be the subject of collective decision by the whole society, while others argue that morally respectable entitlements can be established by the unilateral actions of individuals. I shall call these three approaches Humean, Rousseauian, and Lockean after their three most famous proponents.

The Humean approach

In the Humean approach, we start from an assumption that since time immemorial, people have been grabbing and fighting over resources, and that the distribution of *de facto* possession at any given time is likely to be arbitrary, driven by force, cunning, and luck. It is possible that this predatory grabbing and fighting (some aspects of which will be physical, others ideological) will continue back and forth indefinitely. But it is also possible that the situation may settle down into some sort of stable equilibrium in which almost all of those in possession of significant resources find that the marginal costs of further predatory activity are equal to their marginal gains. Under these conditions, something like a "peace dividend" may be available. Maybe everyone can gain, in terms of the diminution of conflict, the stabilizing of social relationships and the prospects for market exchange by an agreement not to fight any more over possessions.

> I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. (Hume, [1739] 1888, p. 490)

Such a resolution, if it lasts, may amount over time to a ratification of *de facto* holdings as *de jure* property.

The Humean approach, which finds a modern counterpart in the work of James Buchanan (1975), provides an account of initial distribution that is congenial to the spirit of modern economics. It makes no use of any assumptions about human nature except those used in rational choice theory, and it is accordingly quite modest in its moral claims. On the Humean account, the stability of the emergent distribution has nothing to do with its justice or moral respectability. It may be equal or unequal, fair or unfair (by some distributive standard), but the parties will already know that they cannot hope for a much better distribution by pitching their own strength yet again against that of others. We should not concern ourselves, Hume argued, with the distributive features of the possessory regime that emerges from the era of conflict. The aim should be to ratify any distribution that seems salient – that is, any distribution support for which promises to move us away from squabbling about who should own what, and towards the benefits promised by an orderly marketplace.

As an account of the genesis of property, Hume's theory has the advantage over its main rivals of acknowledging that the early eras of human history are eras of conflict

largely unregulated by principle and opaque to later moral inquiry. In our thinking about property, Hume does not require us to delve into history to ascertain who did what to whom, and what would have happened if they had not. Once a settled pattern of possession emerges, we can simply draw an arbitrary line and say, "Property entitlements start from *here.*" The model has important normative consequences for the present as well. Those who are tempted to question or disrupt an existing distribution of property must recognize that far from ushering in a new era of justice, their best efforts are likely to inaugurate an era of conflict in which all bets are off and in which virtually no planning or cooperation is possible. The importance of establishing stable property relationships on this account is not that it does justice, but that it provides people with a fixed and mutually acknowledged basis on which the rest of social life can be built.

The weakness of the Humean approach is, of course, the obverse of its strength. As we saw in our discussion of the Coase theorem, distributive justice matters to the law and it matters to us. We would not be happy with a Humean convention ratifying slavery or cannibalism, but, for all that, Hume showed it may well be a feature of the equilibrium emerging from the age of conflict that some people are in possession of others' bodies. And if this pattern of possession really was stable, all would gain – the slaves as well as their masters – from its ratification as property, but we would still oppose it on grounds of justice. What this shows is that even if Hume was right that the sentiment of justice is built up out of a convention to respect one another's *de facto* possessions, that sentiment once established can take on a life of its own, so that it can subsequently be turned against the distribution that engendered it.

The Rousseauian approach

In the Humean model, the peace dividend is secured by mutual forbearance: I agree to respect what you have managed to hang on to, and you agree to respect what I have managed to hang on to. An alternative is to set up a public authority or state to enforce mutual forbearance. But if the state we set up is powerful enough to enforce a *de facto* distribution, it is probably powerful enough to move resources from one individual to another in accordance with its own ideas about justice (that is, those of its constituents and officials).

Indeed, the power of the state may be matched by a general moral sentiment: people acting together are entitled to establish a new distribution on the basis of broad principles of justice that reflect each person's status as an equal partner in a society. They may insist, for example, that the resources of the earth were originally given to everyone, so that no one can rightfully be displaced by any individual's appropriation without his or her own consent. Or they may insist, along lines suggested by Immanuel Kant, that the unilateral actions of an appropriator cannot create the obligations that private property rights assume, obligations that people simply would not have apart from the appropriation. Only a will that is "omnilateral" can do this, according to Kant – only the "collective general (common) and powerful will" associated with public law-giving (Kant, [1797] 1991, pp. 77, 84).

This position is associated most closely with the normative theory of Jean-Jacques Rousseau. Even if individuals are in possession of resources when society is set up,

Rousseau argued that, as an inherent part of the social contract, we must alienate our particular possessions to the general will of the community, which alone is capable of determining a distribution that provides a genuine basis of mutual respect (Rousseau, [1762] 1973, pp. 173–81). Of course, such submission seems to us terribly risky. But the risk may not seem so great if we consider that the alternative is certain individuals maintaining dominion over resources and hence power over others in a way that is simply unchecked by moral principle.

We must remember too that the Rousseauian model is a highly idealized one. The idea is not that everyone – rich and poor – should simply turn over their possessions to whatever band of robbers or vanguard party parades itself as the government. It is rather that the idea of a legitimate set of property rights is inseparable from the notion of a genuine social union in which people address the issue of resources together as free and equal individuals.

What this actually yields in the way of an assignment of resources to individuals is a matter of the distributive principles that survive the test (actual or hypothetical) of ratification by the general will. In fact, most of those who adopt the Rousseauian approach envisage some sort of rough equality of private property.

But it is here that the model runs into its greatest difficulty. If an *initial* set of holdings is to be assessed on the basis of a distributive principle (say, equality), then *any* set of holdings may be assessed on that basis. After all, there is surely no justification for applying the Rousseauian criteria at t_1, which would not also be a justification for applying it again at any subsequent time t_n. But if we are distributing private property rights at t_1, and if as one expects, they include powers of transfer, then as Robert Nozick (1974, pp. 162–4) has argued, any favored distribution is likely to be transformed into a distribution at t_2 *un*favored by the egalitarian principle, as a result of voluntary activities like gift giving, bequest, market exchange, and so on. To maintain a distributive pattern of the sort that Rousseauian principles envisage, "one must either continually interfere to stop people transferring resources as they wish to, or continually (or periodically) interfere to take from some persons resources that others for some reason chose to transfer to them" (Nozick, 1974, p. 163). Quite apart from the insult to freedom, the results of this constant application and reapplication of moral criteria might undermine market processes and, as Hume put it, "reduce society to the most extreme indigence; and instead of preventing want and beggary in a few, render it unavoidable to the whole community" (Hume, [1777] 1902, p. 194).

John Rawls, who may be regarded as a modern exponent of the Rousseauian approach, maintains that the problem can be solved by insisting that the principles of justice ratified by a notional Rousseauian union are to be applied not to individual distributive shares, but to the assessment and choice of institutions that, it is understood, once chosen are to run under their own steam and by their own logic. "A distribution," Rawls writes, "cannot be judged in isolation from the system of which it is the outcome or from what individuals have done in good faith in the light of established expectations" (Rawls, 1971, p. 88). But it remains to be seen whether this highly abstract specification can be converted into a way of thinking about and evaluating the actual operation of concrete property arrangements.

The Lockean approach

In the Rousseauian model, the initial allocation of resources to individual owners is done by society as a whole, on the premise that something that affects everyone requires the consent of all. The Lockean approach rejects this as silly and impracticable: "If such a consent as that was necessary, Man had starved, notwithstanding the Planty God had given him" (Locke, [1690] 1988, p. 288). We come to consciousness, he argued, in a world evidently supplied with the necessities of life, and there cannot be anything wrong with a person simply taking possession of some of this and using it. What is more, if a person begins to use some piece of land or other natural resource, there does seem to be something obviously wrong with others trying to interfere or take it from her, unless somehow her appropriation has gravely prejudiced their subsistence. We do not seem to need any collective or "omnilateral" decision to establish the appropriator's entitlement to some sort of respect for the right that she has established.

In its simplest form, the theory of unilateral acquisition presents itself to us as first occupancy theory: the first person to occupy a piece of land gets to be its owner or, more generally, the first person to act as though he or she is the owner of something actually becomes its owner, so far as the morality of his or anyone else's actions are concerned. The traditional argument for this has been that second and subsequent occupants necessarily prejudice the interests of someone who came earlier, whereas the first occupant does not. But that will not do. Even if there is no earlier occupant-appropriator, there may still be others whose interests are affected by the first occupant – namely, those who had previously enjoyed the resource in common but who now find themselves barred by the first occupant's putative entitlement from using or enjoying it at all.

John Locke's theory is widely regarded as the most interesting of the philosophical discussions of property, in large part because it represents an honest attempt to deal with this difficulty. The starting point of Locke's analysis is that God gave the world to men in common, so that the unilateral introduction of private entitlements is acknowledged from the outset to represent something of a moral problem.

How did Locke propose to solve the problem? First, he made it manageable by emphasizing that when private property was invented, there was actually more than enough for everyone to make an appropriation. It was only the invention of money, he said, which led to the introduction of larger individual possessions whereby some came to own a lot and others little or nothing; and he argued – not altogether convincingly – that since money was rooted in human convention, that phase of distribution was governed by justificatory considerations of (what I have called) a Rousseauian kind: "Since Gold and Silver … has its value only from the Consent of Men … it is plain, that Men have agreed to disproportionate and unequal Possession of the Earth" (Locke, [1690] 1988, pp. 301–2).

The chief significance of this argument is that it represents Locke's awareness of the limits of a theory of unilateral appropriation. A similar awareness is evidenced even in his discussion of the origin of property, where we find his theory of individual appropriation complemented throughout by what I referred to earlier as a general justificatory theory. Though Locke insisted, as much as any theorist of first occupancy, that a

person who takes resources from the wilderness normally acquires a title to them, he was always at pains to add that this is also a good thing from the social point of view, because it rewards industry and promotes the general welfare. Unilateral appropriation never has to stand nakedly on its own in Locke's theory, as it does in the view of his more recent followers, most notably Robert Nozick (1974).

In the end, though, it is the argument about unilateral appropriation that has captured the philosophical imagination. And it is indispensable to Locke's case because it provides the prototype of the individualized rights that the general arguments support and that consent will later ratify. Locke's contribution is to connect unilateral appropriation with the idea of self-ownership:

> Though the Earth ... be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men. (Locke, [1690] 1988, pp. 287–8)

That something I have worked on embodies a part of me is a common enough sentiment. Locke connected this sentiment with the sense of self-possession that characterized the emerging liberal individual, in a way that also made a convincing economic as well as moralistic case for unilateral appropriation. Since most of what we value in external things is not given by nature but is the result of labor, it not so strange, as Locke put it, "that the Property of labour should be able to over-ballance the Community of Land":

> Though the things of Nature are given in common, yet Man (by being Master of himself, and Proprietor of his own Person, and the Actions or Labour of it) has still in himself the great Foundation of Property; and that which made up the great part of what he applyed to the Support or Comfort of his being, when Invention and the Arts had improved the conveniencies of Life, was perfectly his own, and did not belong in common to others. (Locke, [1690] 1988, pp. 296–9)

The part of Locke's theory that has aroused perhaps the most skepticism in jurisprudence is not the theory of unilateral acquisition, but something that seems to follow from it – namely, that there can be rights of private property prior to the institution of systems of positive law. Lockean property is established in the state of nature, and even though later inequality is ratified by consent, the consent in question has nothing to do with the social contract or the invention of government. Accordingly, when positive law does come into existence, it finds a set of individual entitlements already in existence, and a bunch of prickly citizens who are willing to fight for the proposition that the task of government is to protect their property rights, not to reconstitute or redistribute them. So conversely, those who believe that government should have more Rousseauian power over property than this often predicate their argument on the claim that property rights are unthinkable without law.

In fact, the Lockean view is not disposed of so easily. First of all, Locke's state of nature is not an asocial one, only apolitical. Locke took the plausible view that all sorts of moral relationships can exist in a dense web of social interaction, without the specific support of the state or positive law. But if this is accepted as a general proposition, why would property relationships be an exception? People may certainly cultivate land whether there is positive law or not, and the idea that others are incapable without law of forming, sharing, or acting on the view that it is wrong to interfere with or appropriate the products of another's labor seems very implausible. Similarly, we do not seem to need the aid of legal system to explain the existence of exchange and markets. As far as we can tell, trade between the inhabitants of different regions antedates the existence of determinate legal institutions by several millennia.

What is true is that law makes an immense contribution to a property system and that in the complex circumstances of modern life, property without law – where the rules rely on nothing more robust than shared moral consciousness – is likely to be riddled with disputes and misunderstandings. But Locke recognized this point. That, after all, was the purpose of entering the social contract – to provide mechanisms for settling details, enforcing rights, adjudicating disputes that did not exist in the state of nature. But it does not follow from the fact that we need these mechanisms – and that only a legal system can supply them – that our thoughts and sentiments about mine and thine, and property and distributive justice, are purely the product of positive law.

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