

The Philosophical Concept of Property

PHILOSOPHERS GENERALLY PERCEIVE property to be an instrument for pursuing fundamental values. Some philosophers of property have concentrated on its ability to advance values such as utility, justice, self-expression, and social evolution. These traditions of thought have influenced the law. This appendix introduces the reader to four of these traditions and relates them to the economic analysis of property.

1. Utilitarianism

Utilitarians measure the value of a good or an act by the net pleasure or satisfaction that it creates. For utilitarians, the purpose of the institution of property is to maximize the total pleasure or satisfaction obtained from material and other resources. Bentham thus defines property as an expectation of utility: “Property is nothing but a basis of expectation; the expectation of deriving advantages from a thing, which we are said to possess, in consequence of the relation in which we stand toward it.”²⁸ The objective of maximizing total utility constitutes a standard against which property rules can be evaluated. In our examples at the beginning of the chapter, each of the disputes could be resolved on utilitarian grounds by establishing a legal rule that seeks to maximize the sum of utilities or pleasure of society as a whole.

The utilitarian approach makes a person’s claim to property tentative. It can be taken from him in principle if the beneficiaries of the expropriation gain more in utility than the owner loses. Suppose, for example, that a young son is living with his aged parents in their home. On utilitarian grounds, the young son may be excused for throwing the parents out of the home if their loss in utility from being dispossessed is less than his gain in utility from having them out of the house. Critics of utilitarianism have often wondered whether the theory makes ownership too tentative. Isn’t ownership more than an expectation? Do we really think that a person could be rightfully deprived of his property just because the loss is more than offset by the gain to others?

This objection to the utilitarian theory of property applies with equal force to the conventional economic theory that holds that the purpose of property is to maximize wealth. Isn’t ownership more than a right to a stream of income? Do we really think

²⁸ JEREMY BENTHAM, *THEORY OF LEGISLATION: PRINCIPLES OF THE CODE* 111–113 (Hildreth ed. 1931).

that a person could be rightfully deprived of her property just because the loss of wealth is more than offset by the gain in wealth to others?

2. Distributive Justice

Another philosophical approach to property law emphasizes property law's ability to achieve distributive justice, rather than pleasure or satisfaction. Aristotle, for example, held that a conception of distributive justice is implicit in various forms of social organization. For Aristotle, the principle of justice is different for different societies, but it is appropriate for each type of society to promote its own conception of distributive justice through its constitution and laws, including its notion of property rights. He argued that a democracy will favor an equal distribution of wealth, whereas an aristocracy (the form preferred by Aristotle) will favor the distribution of wealth according to the virtues of various classes. In Aristotle's conception, it is just that aristocrats receive an unequal share of wealth because they use it for more worthy ends than do others.

From the Aristotelian conception of democratic equality we might infer a policy of redistributive justice whereby the valuable assets of society are periodically redistributed so as to achieve a roughly equal distribution of that property. In general, this sort of redistribution would favor the poor and penalize the wealthy. On the other hand, from the Aristotelian justification of aristocratic inequality we might infer the polar-opposite policy of redistributive justice whereby the assets of society would be periodically redistributed to the aristocrats. To the extent that the aristocracy and the wealthy are the same group, this redistribution of property would favor the rich and penalize the poor. In either case, these notions of distributive justice make property claims as tentative as they were under utilitarianism and, therefore, open to the same criticisms.

There is another school of philosophical thought relating to distributive justice and property that emphasizes a just *process* for defining and enforcing property rights rather than a just *outcome* or end result in the distribution of wealth from property.²⁹ According to one version of this theory, any distribution of wealth is just provided that it starts from a just initial distribution of resources and achieves the final distribution by voluntary exchange. In practice, this means that the process of voluntary market exchange is just and that ownership claims are most justly established and enforced in an unfettered market in which there is free and perfect competition. In Nozick's memorable rephrasing of Marx, "From each as he chooses; to each as he is chosen." Whatever distribution of wealth results from this just process is also just. Thus, according to this theory, redistributing property to dilute the effects of competition is unjust.

Several criticisms have been made of this notion of distributive justice. The most telling criticism is that the competitive process can lead to a multitude of distributive outcomes, from one in which each individual has an equal share to one in which one individual has 99 percent of the property and everyone else divides up the remaining 1 percent. All of the outcomes are efficient. But clearly not all of them are equitable or just. The notion of the competitive process as distributive justice is not a sufficient

²⁹ The most forceful modern statement of this view is in R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

guide to designing rules of property law. At a minimum, there must be an additional, independent standard by which to appraise various initial endowments of property.

3. Liberty and Self-Expression

Besides utility and distributive justice, another value that may underlie property law is liberty. Private property is a precondition for markets, and markets are a decentralized mechanism for allocating resources. Most markets can, and do, operate without extensive government interference or supervision. The practical alternative to markets in the modern economy is some form of government planning. Government planning involves centralizing power over economic matters in the hands of state officials. Control over economic life provides officials with leverage that can be used to control other aspects of life, whereas private property creates a zone of discretion within which individuals are not accountable to government officials. Private property has thus been viewed by some philosophers as a bulwark against the dictatorial authority of governments.³⁰ It has been argued, for example, that capitalism was deliberately invented to thwart absolutism by depriving the king of economic power. The U.S. Constitution was probably drafted with this idea in mind.

Another connection between property and liberty focuses on individual self-expression. Hegel stressed the idea that people, through their works, transform nature into an expression of personality, and, by doing so, perfect the natural world. A painter takes materials in no particular order and rearranges them into a work of art. By investing personality in work, the artist transforms natural objects and makes them the artist's own. It is difficult to imagine a system of property law that did not recognize this fact. Thus, to encourage self-expression, the state needs to recognize the creators' rights of ownership over their creations. Notice that this proposition extends beyond art to most of the works of humans.

4. Conservatism and the Origins of Property

The philosophical theories discussed so far tend to regard the institution of property as serving ultimate values, such as utility, distributive justice, or liberty. Another philosophical tradition focuses not on the purposes of property but on its origins. To illustrate, in medieval times there were many encumbrances and restrictions on the use and sale of real estate. The common law of private property emerged from feudalism and acquired its modern character by chipping away at these encumbrances on the marketability of real property. Political conservatives like Burke and Hayek idealize forms of social order that, like the common law of property, evolve over time in much the same manner as the myriad species of life. Like organisms, social forms are, in this view, subject to the rules of natural selection. The conservative philosophers condemn institutions imposed on us by planners, engineers, politicians, and other societal decision makers for much the same reasons that environmentalists condemn actions that interfere with an area's environment.

³⁰ This is a theme in *THE FEDERALIST PAPERS* (1786) and in the work of Friedrich Hayek (see, for example, *The CONSTITUTION OF LIBERTY* (1972)).