

A theory of property

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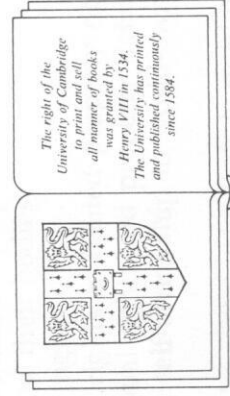
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vate property. The evaluative inquiry is a reminder that, although any philosophical theory requires some abstract arguments, the only actual phenomenon for investigation is property in concrete social situations.

1.2 A SOLUTION

This book will argue that if justification and evaluation are the central problems of the theory of property, their solution lies in a pluralist theory that consists of three main principles and an account of how those principles are related. The theory is "pluralist" in that it contains several irreducible principles that sometimes conflict; when conflicts occur, priority rules can resolve some, but not all, conflicts.¹ The principles are a principle of utility and efficiency, a principle of justice and equality, and a principle of desert based on labor. Although these principles may not be the only principles that make up a satisfactory moral, political, and legal theory of property, they are by far the most important. The theory proposed here justifies some private property and some public property. When the principles are fully specified, and when sufficient empirical evidence is gathered about the situations in which one is to apply them, the theory illuminates many practical problems and thus serves to evaluate property institutions.

Although the content of the three principles will not be fully clear until the arguments for them are given, it will be useful to sketch them here and indicate how each rests on a particular conception of persons. A satisfactory theory of property, this book argues, should include some principle that recognizes the moral import of actions that affect persons' happiness, welfare, preference-satisfaction, or the like.

¹ This variety of pluralism, sometimes called "intuitionism," is defended in Stephen R. Munzer, "Intuition and Security in Moral Philosophy," *Michigan Law Review*, 82 (1984): 740-54; J. O. Urmson, "A Defence of Intuitionism," *Proceedings of the Aristotelian Society*, 75 (1974-75): 111-19. See also Thomas Nagel, "The Fragmentation of Value," in his *Mortal Questions* (Cambridge: Cambridge University Press, 1979), pp. 128-41.

Suppose that, in order to have a particular candidate for discussion, one selects preference-satisfaction. Then such a principle would rest on one conception of the equal moral worth of persons – namely, that assuming equal strength, the preferences of each person count equally with the preferences of others. This formulation helps to clarify some relations between “utility” and “efficiency.” Both of these words, as used here, involve the satisfaction of the preferences of individuals, but only utility assumes that one can make interpersonal comparisons of preference-satisfaction.

The combined principle of utility and efficiency is as follows: Property rights should be allocated so as (1) to maximize utility regarding the use, possession, transfer, and so on of things, and (2) to maximize efficiency regarding the use, possession, transfer, and so on of things. In this principle, the first clause has priority over the second in the following sense: If it is possible to rank alternatives in terms of both utility and efficiency, then one should use the ranking supplied by utility. If, however, it is possible to rank alternatives in terms of either utility or efficiency but not both, then one should use whichever ranking is available. This combined principle is possible because utility and efficiency have in common the concept of individual preference-satisfaction. The principle is not redundant because utility, but not efficiency, presupposes that interpersonal comparisons of preference-satisfaction are possible. As a result, utility supplies both ordinal and interpersonally comparable rankings of alternatives, whereas efficiency supplies only ordinal rankings.

A satisfactory theory should, moreover, include some principle that recognizes the rights of persons. Such a principle would also rest on a conception of the equal moral worth of persons. The conception would differ, however, from the utilitarian conception of equal worth as equal counting, for the latter upholds sacrificing the individual utility of some in order to promote overall utility. Any such sacrifice ignores or undervalues the separateness of persons – that is, the idea that persons have rights not to have certain of their interests traded for overall utility.

One can formulate the principle of justice and equality in this way: Unequal property holdings are justifiable if (1) everyone has a minimum amount of property and (2) the inequalities do not undermine a fully human life in society. It recognizes, where feasible, rights to minimal property and to a fully human life in society. This principle is a standard of justice in that it regulates morally how benefits and burdens are to be shared among persons. Its minimum involves the things needed by almost everyone for a decent life. The principle is also a standard of equality in that it requires showing, in the event that persons have different property holdings, why the difference is morally and politically proper. In this principle, the first clause is concerned with the provision of a minimum and the second clause with the narrowing of inequalities even if a minimum is satisfied.

Finally, a satisfactory theory should include some principle of desert or entitlement. Such a principle rests on a conception of persons as agents who, by their actions in the world, are responsible for changes in the world and deserve or are entitled to something as a result. Whereas the first two principles emphasize, in different ways, the equal worth of persons, this final principle emphasizes their differences in merit.

A labor theory of property is the obvious source of such a principle, but at present no agreement exists on how such a principle should be formulated. This book argues that a qualified desert version is the best candidate. A labor-desert principle would maintain that there is a qualified justification for private-property rights because of a person's work. This justification of property rights for the laborer is qualified by the rights of others, limitations on the process of acquisition, post-acquisition changes in situation, restrictions on transfer, general scarcity, and the nature of work as a social activity. The principle sums up how labor and desert, with their traditional emphasis on the individual, can be transferred into a modern social context.

So much for a brief statement of the three principles that make up the theory of property advocated in this book. As

§ 1.1 intimates,² it is not enough to present only abstract arguments for these principles. Rather, it is essential to be keenly aware of the psychological, social, and economic context to which the arguments apply. And to develop that awareness it is vital to understand how persons and their bodies relate to the world of things. Only if the groundwork is laid well will arguments for the theory itself be convincing.

As a result, this book has the following structure. Part I, on "Property Rights and Personal Rights," explains the concept of property and investigates some of the rights that persons have in their bodies. It argues that some body rights are property rights and others are personal rights. It also identifies the problem of moving from body rights to rights to other things in the world. Part II, entitled "From Individuals to Social Context," shows how property rights in external things begin with individual persons and their actions in the world and eventually affect everyone in society. It elaborates an account of property, personality, and virtue; and, though it rejects Marx's critique of property and alienation, it replaces it with a better understanding of alienation and exploitation as they relate to property. This phase of the book, taken as a whole, forms a psychological, social, and partly normative background theory of property in a contemporary society. Part III, on "Justification and Distributive Equity," argues for the three principles sketched above. It uses the background theory to shed light on the nature of work in a modern economy and on the notions of a minimum of property and a fully human life in society. It also discusses relations and conflicts among the three principles and shows how they form an integrated theory. Finally, Part IV, called "Applications," develops the practical consequences of the theory. It examines three problems in detail: business enterprise in capitalist and socialist economies, the justifiability and taxation of gifts and bequests, and government takings of private property.

2 Cross-references are given by numbers for chapter and section separated by a period. Thus, "§ 1.1" refers to Chapter 1, Section 1.

The picture of property rights that emerges, then, locates their justification in a carefully constructed pluralist scheme that knits together utilitarian considerations, considerations of justice of a roughly Kantian or Rawlsian kind, and considerations of desert of a thoroughly un-Rawlsian kind. This scheme is informed by a broad-ranging discussion that distinguishes property rights from other rights, relates property to character and independence, and takes up Hegelian and Marxian anxieties about alienation under capitalism, with limited enthusiasm for their philosophical idiom but with great sympathy for the light they shed on work and welfare in a capitalist economy. This pluralist scheme justifies some public property but not unfettered private ownership. It does uphold a constrained system of private property – whether under a modified capitalism or some form of socialism. At a practical level, the scheme emphasizes workers' rights within business corporations, favors substantial transfer taxes on large gifts and bequests, and supports sensible government regulation of private property.

Why should anyone be interested in this theory? There are two reasons. First, it is, as an intellectual construction, the soundest and most nearly satisfactory theory of property available. Too many theorists attempt to reduce too much to a single perspective. Thus, Locke appeals to labor; Bentham rests his case on utility; Marx protests the evils of alienation. Each of these thinkers, through the intensity of his partial vision, contributes much to thinking about property, but at the same time obscures the validity of other perspectives. The theory proposed here, in contrast, shows how to accommodate competing points of view. And, more successfully than other pluralist accounts, it shows how to combine these perspectives into a coherent framework, not on an ad hoc basis or as a tedious compromise, but on a principled basis.

Second, the theory helps, as a practical guide, to reform and improve existing institutions of property. "By their fruits you shall know them" is an important test. Thus, although this study has the scholarly paraphernalia of an academic

book and has a low temperature of argument, at bottom it springs from the desire to make our institutions of property better than they now are. The desire is not enough. Action should follow, or else the desire and the theory are lifeless.³

The theory also has limitations, two of which are sufficiently broad and important to mention now. One is that the theory, at least as elaborated here, applies to the property institutions of individual nations rather than to the international system or the global economy. The reason is simply that it is a tall enough order to say something helpful about property rights in particular countries. To limit the theory in this way is by no means to imply that wealthy countries are without obligation to help poor countries or that international justice is unimportant. On the contrary, it is very important, but it is also beyond what this book can treat satisfactorily.⁴

The other limitation pertains to the cross-cultural application of the theory. The three principles themselves, though directed to property, are otherwise fairly broad. Still, reasons exist to stop short of any grandiose claim that the theory is a talisman for all societies – whatever their histories, economies, and cultures may be. Such a claim raises philosophical problems of “relativism” that are too complicated to treat here.⁵ Furthermore, some elements of the background theory in Part II of the book – for instance, the importance of control, privacy, and individuality, and the discussion of “localized” virtues – pose hazards for cross-cultural application. Last, and not least, are limits to my knowledge of other societies and their property institutions. So this book will

3 This thought, if you like, is a secular version of James 2:15–17.

4 Recent works that grapple with these issues include Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979); Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980).

5 See, for example, Jack W. Meiland and Michael Krausz, eds., *Relativism: Cognitive and Moral* (Notre Dame: University of Notre Dame Press, 1982).

rest with the claim, not grandiose but hardly immodest, that its theory of property applies at least to mature Western societies and in particular to the United States.

1.3 FOUNDATIONS

This study might be attacked in various ways. Though repelling specialized criticisms can wait for later chapters, at least one general attack merits consideration here, for it questions the very foundations of the enterprise. The pluralism of the theory sketched in § 1.2 will be unsatisfying to those who crave theories that rest on a single principle or at least on one supreme principle. Some philosophers may see in the trio of principles only the academic lawyer's penchant for ransacking every available cupboard for a multi-course banquet of arguments, with little thought given to the integrity of the meal.

This is not a work of meta-ethics, but it does subscribe to a mixed-value, or pluralist, theory of morality. It holds, further, that consequences are relevant, but not decisive, in justifying principles and in limiting their scope and resolving conflicts among them. Any such position provokes thorny questions. How does one constrain the force of consequences once their relevance is admitted? How does one rank principles if consequences are not decisive? It is part of the human condition and the current state of moral theory that these questions lack unimpeachable answers.

It may be objected that to rest a theory of property on such foundations as these is to place it on sand. It is to fall into “intuitionism.” This word has several meanings. Its meaning in the objection is that ultimate reliance is placed on “intuitions” – which different thinkers variously call moral opinions, feelings, or considered judgments. Such intuitions vary from one person to the next, and no hope exists of getting agreement. Thus a work of moral and political theory founded on them can be no more than the personal recommenda-

tion of its author. It can carry no weight for anyone whose intuitions are different.

This book does indeed accept a version of intuitionism, but to do so is not objectionable. It does not suppose that there is some psychological faculty that intuits moral truths, or even that there necessarily is something that people can correctly regard as objective moral truth. Nor does it rely straightforwardly on "intuitions" in the sense of mere moral opinions or feelings. Rather, it accepts intuitions only after they have been subjected to some procedure for eliminating those that are apt to depend on bias, prejudice, class associations, or poor empirical information. John Rawls's technique of reflective equilibrium is one, but not the only, such procedure.⁶ In the strategy of this book, Parts I and II lay the groundwork for a partial account of property, human nature, and society that frees some judgments about property from distortion. Part III makes use of this groundwork in constructing arguments of justification. The principles arrived at and the resolution of conflicts among them are best appreciated in contexts of application, which is the business of Part IV. Thus, the way in which the work as a whole hangs together is a start on eliminating unreliable intuitions.

It may be retorted that, even if moral and political philosophy can be done in this way, it is better to do it without relying on intuitions of moral substance. R. M. Hare offers a forceful expression of this view.⁷ He contends that "substantive" intuitions are appropriate only at what he calls the intuitive level of moral thinking. They are not defensible at the critical level, which relies only on "linguistic" intuitions about moral words and concepts. He argues that critical moral thinking endorses utilitarianism. Specifically, it recommends a form of preference-utilitarianism that is act-utilitarian or highly specific rule-utilitarian at the critical

level, and supports prima facie principles for use, in a general rule-utilitarian fashion, at the intuitive level.

This retort is unsuccessful for two reasons that will be given briefly here.⁸ One is that even utilitarianism in the spare version advocated by Hare relies on a substantive intuition of its own – namely, that probable effects on preference-satisfaction are relevant features of actions. Such effects are certainly relevant. But it does not follow that only such effects are relevant. In any event, their relevance does not rest on linguistic intuitions and logico-linguistic methods alone. In general, it seems impossible to construct a moral theory with any content that is free from intuitions of moral substance.

The other reason is that considered moral judgments or intuitions, cleansed by some suitable procedure, are sounder and surer guides to action than might otherwise be thought. Indeed, sometimes people will justifiably have greater confidence in such moral intuitions than in the capacity of, say, Hare's utilitarianism to handle a given case properly. His utilitarianism must, at the critical level, count equally all preferences of equal strength, no matter what their content. To argue critically that a preference should be changed can be a risky business. Such an argument must rely on complicated human reasoning, which, as all know, often proves faulty. It must sometimes embrace the hazards of trying to understand people very different from oneself. And it can require laborious empirical investigations. The investigations would be needed to ascertain existing preferences and their strengths, the satisfaction that would result from a new set of preferences, and the cost of moving from one to the other.

The upshot is that the most adequate foundations for a theory of property are pluralist. They include, as Chapter 11

6 See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), pp. 20–21, 48–51, 120, 432, 434, 579. For further discussion, see § 11.3 below.

7 R. M. Hare, *Moral Thinking: Its Levels, Method, and Point* (Oxford: Clarendon Press, 1981).

8 For a detailed examination, see Munzer, "Intuition and Security in Moral Philosophy." See also Stephen R. Munzer, "Persons and Consequences: Observations on Fried's *Right and Wrong*," *Michigan Law Review*, 77 (1979): 421–45.

makes clear, a number of considered moral judgments or intuitions that, for all that can be told, are irreducible and can conflict. This is not to say that all moral and political reasoning is a matter of making intuitions consistent. Nor does it show by itself that the three justificatory principles advanced here are the right ones, or the only right ones. The book invites those who disagree to improve on it.

Part I

Property rights and personal rights

1.1. The basic moral principles

1.2. The right to personal liberty

1.3. The right to property

1.4. The right to personal privacy

Chapter 2

Understanding property

2.1 POPULAR AND SOPHISTICATED CONCEPTIONS OF PROPERTY

Consider how different the world would be if it contained no property. It is logically possible that it could contain all the artifacts that it now does. It could have houses and automobiles, factories and tools. Yet if it did, no one would stand in relation to those artifacts as people do to property. Persons might possess artifacts in the sense of having physical contact with or control over them. But they would have no right to exclude others and no normative power to transfer artifacts to others. Persons would also lack any such right or normative power over things that are not artifacts. They would have no property in land or plants or minerals. Furthermore, no other entity would stand in relation to things as people now do to property. States, cities, tribes, corporations, and partnerships would have no property.

If one turns from what is logically possible to what is causally and socially plausible, the no-property world seems even more different from the world as it is. Perhaps people would make simple artifacts such as knives and huts. But it seems unlikely that they would create such things as automobiles and factories, for these things require great capital investment and cooperative activity. People would probably

Thomas C. Grey, Steven Shiffrin, and Jonathan D. Varat provided helpful comments on various portions of Part I.

not make the necessary sacrifices unless they could be confident of substantial control over the use and disposition of these things – which would require property rights. Nor would people be likely to engage in some kinds of farming, mining, and animal husbandry unless they had property rights in the fruits of their activities. Again, business corporations and partnerships are economic arrangements, and without property their existence is improbable.

These contrasts between the no-property world and the actual world suggest two different ways of understanding property. One is the popular conception of property. It views property as *things*. For the most part, property is tangible things – land, houses, automobiles, tools, factories. But it also includes intangible things – copyrights, patents, and trademarks. Many of these things would not exist in a no-property world. The other way of understanding property is the sophisticated conception. One might almost call it the legal conception, for it is very common among lawyers. It understands property as *relations*. More precisely, property consists in certain relations, usually legal relations, among persons or other entities with respect to things. A metaphorical way of stating the sophisticated conception is that property is a bundle of “sticks.” It is often added that one should be clear about which “stick” in the bundle one is talking about. One should distinguish the normative power to exclude, for example, from the normative power to transfer. These relations, or “sticks,” would not exist in a no-property world.

The first order of business is to sharpen the understanding of property, for otherwise the arguments of this book will be less precise than they can be. It is sometimes asserted that only the sophisticated conception of property is useful in any serious analysis. The assertion is overstated, for § 4.4 shows that it is sometimes justifiable and important to think of property as things. Yet this claim does not make the sophisticated conception unimportant. The next two sections elaborate that conception. Though they are not very original, they are useful in clarifying one’s ideas at the outset. Readers with little interest in conceptual analysis will find that most of this

book is fully intelligible without elaborate conceptual preparation; they may wish to skim this chapter now and return to it later as the need arises.

One can state the payoff of the chapter as follows. Earlier thinkers confronting the question, What is property?, answer it in different ways. Some hold that property is things; others maintain that it is relations between persons and things, or relations among persons with respect to things; yet others claim that it is a basis of expectations with respect to things; and a few believe that “property” has so many fragmented uses that any overarching normative theory of property is impossible. The position defended here differs from each of these but also retains some elements from all of them except the last. It is perfectly sound to think of property both as things (the popular conception) and as relations among persons or other entities with respect to things (the sophisticated conception) – provided that the context makes clear which conception is meant. Moreover, one can think of property in this way and preserve a role for expectations. Finally, understanding property in this complex way enables one to rebut the claim that “property” has “disintegrated” and so to keep alive the possibility of a general moral, political, and legal theory of property.

2.2 HOHFELD’S VOCABULARY AND ITS LIMITATIONS

If the law views property as relations among persons with respect to things, which relations are involved? A start on an answer lies in Hohfeld’s *Fundamental Legal Conceptions*.¹ Writers sometimes refer to the Hohfeldian analysis of property. The reference is misleading. For a reason that will be given at the end of this section, it is more accurate to think of

¹ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. Walter W. Cook and foreword Arthur L. Corbin (Westport, Conn.: Greenwood Press, 1978 [1919]). The ideas were present in Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *Yale Law Journal*, 23 (1913): 16–59, and in some of Hohfeld’s earlier articles.