

Property as a Condition of Liberty

Jude P. Dougherty

Attitudes with respect to the acquisition, use, and protection of property are but a manifestation of an unexpressed philosophy of human nature. It goes without saying that absent personal property, be it real, intellectual, or monetary, one's scope of action is limited or nonexistent. But there is a deeper aspect to the holding of property that begs to be acknowledged. Ownership is closely tied to one's personal identity. A person is often known by his holdings, by the land that he owns, by the real estate or personal wealth that he has accumulated, and by the use he makes of it. Ownership is often an expression of taste and aspiration, of preferences tied to one's character. Property gives one a sense of independence and enables one to act in a multiplicity of ways otherwise impossible. Recreation, travel, the expansion of social contacts, the support of social and political activity, and the furtherance of one's education become possible. Absent appropriate financial resources, personal acumen is truncated.

If the advantages of property are so evident, how account, in Western societies, for public acquiescence to the myriad

government takings, from taxation to currency debasement, that effectively limit personal property and its use? The answer in part is that affirmations of the necessity of personal property usually carry with them an acknowledgment that, from a moral point of view, property carries with it certain obligations to the other. Given that an individual flourishes only within a community, it is universally recognized that a reciprocal relationship is created thereby, one that entails personal responsibility to the whole. This is the moral basis of taxation that goes beyond ordinary public services, for example, roads, utilities, and public parks, to alleviate the lot of the poor or the unfortunate. The concepts "social justice" and "social market economy" build on this moral mandate, as does public policy that seeks to implement objectives demanded in their name.

Discussions of the rights and duties of property owners date to antiquity. Property is so bound to considerations of human nature that the ancients still speak to us across the ages. Aristotle in his criticism of Plato's communal society recognized

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that private property, from an economic point of view, is more highly productive than communal ownership. Goods owned in common by a large number of people, Aristotle saw, will receive little attention since people will mainly pursue their own self-interest to the neglect of obligations they can pass off to others. Plato had argued that communal ownership—or the leveling of property generally—would be conducive to peace since no one would then be envious of the other. Aristotle responds to the contrary, noting that, in general, living together and sharing in common all that matters is difficult, and most of all with regard to property.¹ To impose communal property on society, he says, would be to disregard the record of human experience. In any communal effort, human nature being what it is, some people are likely to work less than others and yet claim the same entitlement as those who work harder. Such a situation, Aristotle held, can lead only to discontent and fractional conflict. Aristotle also advances a moral consideration: only private property enables one to practice the virtues of benevolence and philanthropy. Communal ownership would abolish that opportunity.

Plato and Aristotle apart, the most famous treatise on property from antiquity is that of Cicero, who begins with the observation that there is no such thing as private ownership established by nature. “Property becomes private either through long occupancy (as in the case of those who long ago settled in unoccupied territory) or through conquest (as in the case of those who took it in war), or by due process of law, bargain, or purchase, or by allotment. . . . Therefore, inasmuch as in each case some of those things which by nature had been common property became the property of individuals, each one should retain possession of that which has

fallen to his lot; and if anyone appropriates to himself anything beyond that, he will be violating the laws of human society.”² Property, however acquired, Cicero notes, is increased largely by wisdom, industry, and thrift and rightly belongs to its holder. Yet, says Cicero, as Plato reminds us, we are not born to ourselves alone. Our country and our friends make claims upon us. Fellowship requires that we help one another. “In this direction we ought to follow Nature as our guide, to contribute to the general good by an interchange of acts of kindness, by giving and receiving, and thus by our skill, our industry, and our talents to cement human society more closely together, man to man.”³

Assistance to others must be rationally grounded, he continues. “For many people often do favors impulsively for everybody without discrimination, prompted by a morbid sort of benevolence or by a sudden impulse of the heart, shifting as the wind. Such acts of generosity are not to be so highly esteemed as those which are performed with judgment, deliberation, and mature consideration.”⁴

“The man in an administrative office, however, must make it his first care that everyone shall have what belongs to him and that private citizens suffer no invasion of their property rights by act of the state.”⁵ “For . . . it is the peculiar function of the state and the city to guarantee to every man the free and undisturbed control of his own particular property.”⁶ Cicero speaks of destroyed harmony when property is taken away from one party and given to another or when officials intervene to cancel debt.

Although he speaks of the obligations of property holders, Cicero is clear that that need does not create entitlement. Even so, he says, “let it [property] be made available for the use of as many as possible (if

they are worthy) and be at the service of generosity and beneficence rather than sensuality and excess.”⁷ “Acquire, use, enjoy, and dispose, but rationally” is his time-transcending advice. Cicero’s concept of “deserving poor” will be adopted by St. Jerome and St. Augustine and other Fathers of the Church when they speak of obligation in charity. They commonly affirm that charity to be efficacious cannot be mindless.

Ancient theories of property cannot effortlessly serve as a guide to the formation of law affecting property rights today, especially intellectual property, in our age of undreamt of technological innovation. Even contemporary statutory law is hard pressed to resolve disputes over intellectual property rights. Yet abstract discussions, ancient or contemporary, are not without consequence.

The idea that private property is at the root of political and economic evil is the well-known cornerstone of theories advanced by Marx and Engels. In *The Communist Manifesto*, Marx and Engels proclaim that the basis of communism as a theory may be summed up in a single sentence: abolition of private property.⁸ The declared aim of Marx is the nationalization of economic assets for the common good. In a communist society, he tells us, everyone is to contribute according to his abilities and receive according to his needs. From this principle, the regulation of production is a *conditio sine qua non*.

John Stuart Mill, perhaps equally as influential as Marx, infused his brand of liberalism with the same socialist goal by stressing the overriding importance of the equitable distribution of productive wealth. Many of our contemporary intellectuals find in Mill the moral authority for legislation that curtails the right of ownership for the common good.⁹

Among the twentieth-century authors who treat property exclusively in moral terms, the most influential is undoubtedly John Rawls. In *A Theory of Justice*, Rawls delineates what he believes to be the principles of a well-ordered society based on “fairness.”¹⁰ Rawls proposes to reform or abolish laws and institutions, no matter how efficient and well arranged if they are “unjust.” For Rawls, the essence of injustice is inequality. His ideal is perfect egalitarianism, a principle of equality that he applies not only to material goods but also to intelligence and inborn skills. The advantages afforded to the genetically favored ought not bring the fortunate possessor any special benefits. Why? Because they are unearned.¹¹ From Rawls’s moral perspective, the allocation of talents and abilities must be regarded as “arbitrary.” Talents should be viewed as “a common asset,” and their possessors should profit from them “only on terms that improve the situation of those who have lost out.” This principle was contested in an academic debate occasioned by the U.S. Supreme Court’s consideration and subsequent ruling in *Eldred v. Ashcroft*.¹² The Court was asked to rule on the constitutionality of the Copyright Extension Act of 1998, which extended the limits of copyright beyond, it was contended, the constitutional specification of a limited time. The Court’s ruling is a matter of record, and it is not our intent to review that ruling but to address the question: Does the larger society or community that may benefit from the productivity of an author or inventor have a just claim to the fruits of his labor? Rawls would say yes.

Marx himself might have been shocked, as Rawls goes far beyond even the most radical of communist theorists in wishing to socialize natural talents by denying to the talented the benefits their talents bring

them. Rawls rejects “equality of opportunity” as inherently unfair, since it means that the less gifted or less industrious will be left behind. Efficiency must be sacrificed in the name of equality.

It is to be noted that entitlements to what one has earned or otherwise legally acquired have a completely different status in *A Theory of Justice* than do freedom of speech, freedom of religion, freedom of association, due process of law, and the right to vote and hold office. Property rights are excluded from protection. Economically significant property rights are valued not as conducive to liberty but as indispensable features of an economic system that must be maintained for the benefit of all. Reliance on contract, salary agreements, and the payment of interest and dividends is economically essential, but its only moral justification is the good of the whole, not an individual’s entitlement to what he has earned or otherwise acquired. What the individual is entitled to is determined by the overall system. Individual property rights are merely the consequence, not the foundation, of a just economic system.

Rawls, of course, is not the first in the history of political theory to take this extreme view. He acknowledges the influence of Rousseau and Hobbes, but his social view of property is more akin to that of Pierre Joseph Proudhon. In his famous treatise *What Is Property?* Proudhon answers his own question with the memorable declaration “Property is theft.” Proudhon reasoned, as Rawls was to reason more than a century later, “All capital, whether material or mental, being the result of collective labor, is in consequence, collective property.”¹³

But is it realistic to speak of the distribution of talents and the fruit of sometimes extraordinary individual or cooperative

effort as a common asset? How far should distribution go? In *The Law of Peoples*, Rawls proposes the extension of his principles of justice to the Society of Peoples under the Law of Peoples. “The Law of Peoples,” he writes, “is an extension of the liberal conception of justice for a domestic regime to a Society of Peoples.”¹⁴ It is not the intent of this brief presentation to offer a detailed critique of Rawls but to suggest that a seemingly benevolent theory of justice, viewed in terms of its consequence, can lead us to utopian ideals far removed from reality. In advancing his theory of justice, Rawls ignores psychological, political, and economic realities as well as recorded history and the findings of anthropologists.

Without explicitly addressing Rawls, the French political theorist Pierre Manent meets Rawls’s concept of a global “Society of Peoples” head on. In *Democracy without Nations: The Fate of Self-Government in Europe*, Manent argues that the democratic nation is the irreplaceable political context for human action, the instrument of self-government, the locus for deliberation, and the administration of justice.¹⁵ He shows that after Maastricht, the European Union’s bureaucratic contrivances have become more and more artificial, detached from the national political bodies that formed the union, and have taken on a life of their own. Instead of increasing self-governance, Europe’s new instruments of governance shackle it ever more with each passing day, promising an indefinite extension that no one wills and no one knows how to stop. In Manent’s judgment, Europe’s governing classes, without explicitly saying so, hope to create a homogeneous and limitless human world. In fact, he continues, given its intellectual climate, what distinguishes Europeans from one another cannot be evaluated or even publicly named. The European value that seems to trump

all others is “openness to the other,” a universal political creed that relegates to the private sphere religious belief and cultural identity. “We [Europeans] do not possess any particular existence,” Manent writes. “We do not want to possess any shape, manner or form, a distinctive character of our own, one that would necessarily be particular.”¹⁶ To parry the threat of self-destruction, Manent is convinced that nothing is more important than to get a grip on our centuries-old development and that means first of all that we must become fully aware of the original Christian character of our nations.

Ideas advanced within the academic sector are clearly not without consequence in the social and political order. The effect of ideologically induced welfare programs adopted in the West in the 1930s and post-World War II period are now being felt on both sides of the Atlantic. All such programs required immense monetary outlays that could be attained only through taxation of one form or another. The cultural historian Richard Pipes, in his authoritative study *Property and Freedom*, dramatically shows how modern democratic governments have become giant mechanisms for the redistribution of private assets to the disadvantage of personal freedom.¹⁷ He shows that the United States, for example, in its desire to alleviate the lot of the poor has gone beyond that goal in its quest to “abolish poverty itself.” In the pursuit of the latter objective, policy has moved from a guarantee of equality of opportunity to equality of results. Pipes dates this transformation to President Lyndon Johnson, whom he regards as the principal architect of the postwar welfare state in the United States. In an address at Howard University, June 1965, Johnson asserted, “Freedom is not enough . . . we seek not just freedom but opportunity . . . not just equality as

a right and a theory but as a fact and as a result.”¹⁸ Pipes comments, “It is doubtful that either Johnson and his speech writers or the public at large had any inkling of what a break with the Western tradition these words represented. Social equality can be attained, if at all, only by coercion, that is at the expense of liberty. It necessarily requires the violation of property rights of those citizens who possess more wealth or enjoy higher societal status than the majority. Once the elimination of poverty becomes a state objective, the state is bound to treat property not as a fundamental right, which is its supreme obligation to protect, but as an obstacle to social justice.”¹⁹ Pipes goes on to point out that “liberty is by its nature inegalitarian, because living creatures differ in strength, intelligence, ambition, courage, perseverance and all else that makes for success.”²⁰

Economic historians tell us that those countries that have provided the firmest guarantees of economic independence, especially property rights, are virtually without exception the richest. For most economic historians, the determinant of economic growth lies in the legal institutions that ensure to enterprising individuals the fruits of their labors. European history suggests that the rise of the West to the position of global economic preeminence lies in the institution of private property.²¹

Romantic appeals to the common good, such as those of Mill and Rawls, may be fruitful under some conditions, but absent a sense of community, they are dangerous. As Richard Pipes reminds us, when one appeals to a common good separate from and superior to the private goods of individuals, the function of government (be it that of a legislative, an executive, or a judiciary body) becomes one of conflict management. Given our litigious society, opposing parties are likely to press

for state-awarded privileges, bargaining and negotiating for advantage. Under such conditions, the state is not likely to represent a common will, but rather it becomes the object of adversarial wills. Thus positioned, the state serves not by defining goals that members of society ought collectively to pursue but by removing obstacles to goods privately defined. The common good becomes the result of negotiations between private political actors. Such a situation can only lead to social and economic disaster. A compliant or weak judiciary is apt to rule in the light of a supposed common good against an individual claimant, perhaps settling the dispute but undermining other fundamental rights.

The issue before us remains: What claim does society have on the individual? Ancient notions of human nature are the foundation of the common-law tradition assumed in the English-speaking world, a tradition that informed the documents associated with the American Founding. The U.S. Constitution took it for granted that the right to private property is a

condition of liberty. It was taken as evident that property rights adhere not only to the individual alone but also to the individual in his collective arrangements. If a man is entitled to the fruit of his labor, a corporation is entitled to the fruit of its investment. Apart from the judgment rendered by the Supreme Court in *Eldred v. Ashcroft*,²² cited above, one is brought to the conclusion that article 1, section 8 of the U.S. Constitution had it right when it declared its purpose “to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.” The Constitution provides a prudential balance between the protection of property rights and social claims. There may always be a tension between property rights and reasonable communal benefit. Resolution in the practical order cannot avoid an appeal to an undergirding philosophy of human nature. The conflict may ultimately be between the commonsense philosophy of Aristotle and the Stoics and the Enlightenment age of Kant and Mill.

- 1 Aristotle, *Politics*, 2263, a 15–16.
- 2 Marcus Tullius Cicero, *On Duties*, trans. Walter Miller (Cambridge, MA: Harvard University Press, 1997), 1.21.
- 3 *Ibid.*, 1.22.
- 4 *Ibid.*, 1.49.
- 5 *Ibid.*, 2.73.
- 6 *Ibid.*, 2.78.
- 7 *Ibid.*, 1.92.
- 8 Karl Marx and Friedrich Engels, *The Communist Manifesto* (New York: International Publishers, 1935), 42–43.
- 9 John Stuart Mill, *Principles of Political Economy* (Oxford: Oxford University Press, 1994), see chaps. 1, 2.
- 10 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).
- 11 *Ibid.*, 101–2.
- 12 *Eldred v. Ashcroft*, 537 U.S. 186 (2003).
- 13 Pierre Joseph Proudhon, *Qu'est-ce que la Propriété?*, trans. Benjamin B. R. Tucker as *What Is Property?* (New York: H. Fertig, 1966), 147.
- 14 John Rawls, *The Law of Peoples: With the Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 1999), 9.
- 15 Pierre Manent, *Democracy without Nations?: The Fate of Self-Government in Europe*, trans. from the French by Paul Seaton (Wilmington, DE: ISI Books, 2009).
- 16 *Ibid.*, 66.
- 17 Richard Pipes, *Property and Freedom* (New York: Alfred A. Knopf, 1999).
- 18 As quoted by Pipes, 229.
- 19 *Ibid.*, 229.
- 20 *Ibid.*, 283.
- 21 See Douglas North and E.P. Thomas, *The Rise of the Western World* (Cambridge, MA: Cambridge University Press, 1973). Also Douglas North, *Structure and Change in Economic History* (New York: Norton, 1981) and Tom Bethel, *The Noblest Triumph* (New York: St. Martin's Press, 1998).
- 22 *Eldred v. Ashcroft*, 537 U.S. 186 (2003).