

## CHAPTER ONE

### INTRODUCTION

PROPERTY RIGHTS have always held a central place in political and legal philosophy. As a matter of both theory and practice, rights to property are fundamental to the nature and structure of every conceivable social system. And because they are so fundamental, both the recognition of and the restraint upon property rights have an enormous effect upon the organization and operation of society. No one—not even the most anti-social or ignorant individual—can remain entirely unaware of or unaffected by the particular degree of property rights that a society countenances. Hence, it is not surprising that since the earliest times controversy has surrounded the issue. So various and frequent have been the arguments over rights to property that it might well be imagined that little could be added to the debate. Yet, surprising as it may seem, seldom have the real issues been adequately examined. So often has the controversy centered on an attempt to justify some particular mode of possession that the basic assumptions underlying the whole concept of ownership have not been analysed.

Of course, there are exceptions to this fact,<sup>1</sup> but they

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<sup>1</sup>See Lawrence C. Becker, Property Rights: Philosophic Foundations (London: Routledge & Kegan Paul, 1977).

only work to show how seldom, and often how superficial, have the philosophical inquiries into this subject been. Perhaps it is because it is always imperative that society employs some system of property rights in order to survive that the established conventions and institutions related to it receive little attention except in times of crisis. Down through history the changes in the understanding and distribution of property rights have generally resulted in social upheaval. They occurred when the status quo proved incapable of resolving the conflicts which gross inequities generated. Unfortunately, these changes have not always reflected a greater understanding of the fundamental issues.

Even today popular understanding of property rights is severely limited. The fact that ordinarily when property is spoken of, people think in terms of things rather than rights, illustrates the problem. In popular usage the word 'property' certainly denotes things, but this only highlights the confusion. Properly speaking, 'property' refers to a bundle of rights and privileges to use, possess or have access to things. But in itself there is no such 'thing' as property. There are only property rights. In the past, perhaps, there was some justification for thinking of property in terms of things since most rights to property came down to the things themselves; but in a modern society where assets are often only seen on paper, there is no excuse for such a

manner of speaking.<sup>2</sup> It is both misleading and inaccurate.

Another example of the confusion that surrounds much talk about property rights comes from the tendency to think only in terms of private property rights. It is true that many property rights are solely concerned with the exclusive privilege that one individual has over the control of some form of property. But this is not the only possibility. Certainly property rights may be private and exclusive, but it is just as likely that they are public and inclusive. Indeed, as we shall explore in greater detail later, property rights are fundamentally communal in origin, and as such private property often was the exception and not the rule.

With these two points in mind, we should remember that, henceforth, whenever we speak of 'property' here, we refer to property rights in the most extensive use of the term and not necessarily private or exclusive rights, unless so indicated. Only then may we avoid the assumptions of popular prejudice and get to the root of the matter.

Traditionally, property rights have been one of the most important types of rights. They form the central issue of distributive justice. Clearly the classical principle that "Justice is the firm and constant will to render every

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<sup>2</sup>"Any one who frees himself from the crudest materialism readily recognizes that as a legal term 'property' denotes not material things but certain rights. In the world of nature apart from more or less organized society, there are things but clearly no property rights." Morris Raphael Cohen, Law and the Social Order (New York: Harcourt Brace & World, 1933), p. 45.

man his due" immediately introduces the question, "What is a man's due?" All the major political philosophers and legal systems have attempted to answer this question by outlining theories of property rights. Likewise, jurisprudence, a daughter of justice, has always been concerned with applying principles of ethics and law to adjudicate competing claims to property. It is easy to see how important property rights are for settling just claims.

It should come as no surprise then that the very concept of property is broad in scope. Throughout history man has recognized quite divergent types of property: property in land (real estate); in moveable goods (chattle); in ideas (patents and copyrights); and even in persons (servants and slaves). Nevertheless, of all the forms of property that have received recognition in political and legal theory, one unquestionably holds primary importance: real property—that is, property in land (real estate). Historically and philosophically rights to property in land are fundamental; for they provide the practical and theoretical paradigm for all other forms of property rights.<sup>3</sup> This is not merely because agriculture and grazing formerly were the basic modes of production, as some may imagine. Rather it is

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<sup>3</sup>Two useful historical treatments of the development of the concept of private property rights are Richard Schlatter, Private Property: The History of an Idea (New York: Russell & Russell, 1975) for Western society and William B. Scott, In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century (Bloomington: Indiana University Press, 1977) for the United States.

also, and more significantly, because land is an essential element for human life.

No human activity can take place without reference to land (even the sailor and the pilot must eventually land). Moreover, fertile and well-situated plots of land have always been relatively scarce and in great demand. History amply demonstrates how quickly and eagerly newly discovered land is settled and how ferociously and repeatedly competing claims to even rather poor land have resulted in warfare. The old adage—"Buy land; they're not making any more"—is a pointed comment on the political and economic realities that men face. In fact it can readily be shown that the land tenure system and the real property rights are the basic legal and economic factors in any society.<sup>4</sup> Of necessity every society, no matter how primitive, has some system of land tenure which is based upon the concept of real property rights acknowledged by the laws, traditions, and members of the society. Otherwise, there would be no society, only a collection of individuals.

For these reasons consideration of property rights in land is an eminently practical topic for philosophical analysis. But it is also a highly interesting topic on its own, for property rights in general and property rights in

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<sup>4</sup>See F. H. Lawson, Introduction to the Law of Property (Oxford: Clarendon Press, 1958) and C. R. Noyes, The Institution of Property (New York: Longmans Green, 1936).

land specifically are subtle subjects for examination. Not only have centuries of legal and political debate made one cautious of arriving at quick judgments about the 'obvious' or 'self-evident' features of these rights, but in addition, recognition of the far-reaching consequences of acknowledging any kind of property rights makes it necessary to be especially careful about the validity of one's conclusions. Furthermore, it is clear that hidden and, perhaps, even unconscious motives of self-interest often taint discussions in this area. Sadly but surely we must admit that spurious and misleading arguments have been employed in both defending and attacking specific forms of property rights to a greater degree than is common in other subjects. Accusations of 'bad faith' have been charged against parties on each side of the question on numerous occasions. Fortunately, it is in the power of reason to separate passion from principle, and so we can hope to see our way clear of irrelevant or irrational objections and arguments. Still it is worthwhile to remember how closely mingled reason and rhetoric can become in discussions of this sort.

Since real property rights are a subdivision of property rights in general, and they are in turn a subdivision of human rights, it will be necessary to look at the broader topic of rights themselves first. Here we are confronted with a familiar situation. The literature on human rights is huge, and the issues are also heatedly

contested. Oftentimes discussions of human rights are so embedded in discussions of specific moral theories that it is difficult to separate them from the more general claims being advanced. More seriously, sufficient attention is not always given to property rights or to the implications that particular claims about human rights would have upon property rights. Not a few moral theorists have been rather shortsighted in this area. Hence, some positions are very restrictive by implication about property rights without explicitly noticing the fact, and, on the other hand, other positions openly support extensive property rights without weighing the implications carefully enough.

For these reasons it will be necessary to give some consideration to general moral issues which may at first appear only tangentially related to the issue of property. However, every careful philosophical examination requires a wide perspective, and so we are bound to begin with some propaedeutics before focusing on our central theme. It is hoped that the relationship of the parts to the whole, or better the circumference to the center, will become quickly and clearly evident.

Today there is much skepticism concerning philosophy's ability to deal effectively with problems encountered in daily life, even when the problems are profoundly philosophical in nature. A recent characterization of the situation by a Professor of Law reads: "To turn to moral philosophy these days for help in trying to decide 'what to do' is a

bit like turning to recipe books for help in a famine."<sup>5</sup> For many philosophy has become the 'superfluous science' just as economics is known as the 'dismal science.' So long as views of this sort are common, it must be one of the challenges of philosophy to show that they are wrong. Rational reflection on fundamental moral and political issues can make a difference in the world. Yet Marx was jumping the gun when he asserted: "Philosophers have tried to understand the world in various ways. The problem, however, is to change it." Unless change is based on understanding, it cannot be worthy of support. Especially in the case of rights to property where any significant change would have tremendous effect on the constitution of the social and economic orders, it is essential that understanding precedes and grounds change.

It is, nevertheless, true that much philosophical analysis stops unnecessarily short of providing practical and effective guidance on essential questions. Philosophers sometimes get so caught up in the intricacies of analysis

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<sup>5</sup>Philip Soper, "On the Relevance of Philosophy to Law: Reflections on Ackerman's Private Property and the Constitution," Columbia Law Review 79 (January 1979): 44. The book provoking his remark is an attempt to redefine the boundaries that have separated private from public property rights, see Bruce A. Ackerman, Private Property and the Constitution (New Haven: Yale University Press, 1977). Ackerman writes: "it is only after resolving certain philosophical issues that one can make sense of the constitutional question, let alone pretend to expound a correct constitutional answer. Philosophy decides cases; and hard philosophy at that...analysts must become philosophers if they wish to remain lawyers." (p. 5)



that they neglect to apply their conclusions in any meaningful way. This is not to say that every examination of philosophical concepts must result in a remedy for current problems or that the purpose of philosophy is found in political platforms. But surely there is a proper and important place for concrete applications of philosophical principles. Nowhere is this more evident than in the case of property rights,

As we have already noted, the concept of property rights has seldom remained static for any extended period of time. Throughout history it has been constantly reinterpreted and applied to meet the changing circumstances and requirements of society. Of course, an effort has been made to maintain an orderly and consistent sense of responsibility in this process of review. This has been achieved with varying degrees of success in different systems and at different times. Any examination of, say, Roman or English Common Law quickly reveals the layers and layers of varying interpretations and applications that time and necessity have wrought. But the plain fact remains: rights to property are open to new analysis and application in politics and law as much as in philosophy. That such a task is necessary should be equally clear: today there is much concern over rights to property, and yet little agreement has been reached even about the underlying rationale for a more equitable distribution of property. The various schools of thought such as Utilitarianism,

Kantian Contractualism or Lockean Liberalism are so divergent in their approaches that easy agreement is not to be expected. But certainly a fuller understanding of the issues involved can only come through renewed attempts to address the problem.<sup>6</sup>

At this point one may rightfully ask, 'What are the grounds for thinking it will be more successful in reaching greater agreement on the subject than hitherto has been attained?' It would be too arrogant to say that all the mistakes of the past have been avoided here and that finally property rights can be understood and acknowledged with absolute conviction by all. But it is believed that certain essential features of property rights are brought to light which have usually been overlooked or misunderstood. As will emerge, nothing fundamentally new is being said, though it is hoped that what is fundamental is being said anew. Some questions and difficulties will be left aside, even though they might be answered at further length. Nevertheless, there is a firm conviction that the groundwork

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<sup>6</sup>Recently a number of collections have appeared which attempt to address the problem of property rights and economic justice, see John Arthur and William H. Shaw, eds. Justice and Economic Distribution, (Englewoods Cliff, N.J.: Prentice-Hall, 1978) and Virginia Held, ed. Property, Profits and Economic Justice, (Wadsworth: Belmont, Calif., 1980). In addition two other collections offer different but complementary treatments of the legal and philosophical issues raised by property rights: Anthony Parel and Thomas Flanagan, eds. Theories of Property: Aristotle to the Present, (Waterloo, Ontario: Wilfrid Laurier University Press, 1979) and R. Pennock and John W. Chapman, eds. NOMOS XXII, Property, (New York: New York University Press, 1980).

done here will provide a just foundation for anyone wishing to continue the analysis into other areas of the question.

Not everything can be demonstrated in the course of a work so brief, and so it should be pointed out at the beginning that this examination is based on the tradition of natural rights. That is, it is undertaken with the belief that man has certain inalienable rights which are at once the source of his freedom and dignity. These rights are both political and economic in nature. Moreover, they are protected by reciprocal duties, and among them are the right to work and the duty to support oneself (and family) without undue interference or constraint by society or other individuals. Allied with this is the corollary that access to land is essential, for it guarantees the right to work, and, therefore, it is the responsibility of the political and legal orders that such access should not be limited to the fortunate few but instead spread as widely and as equitably as possible.

It is believed that this would be both economically feasible and efficient. What is more difficult is the political means by which this be attained. But if men act rationally, and politics and law respect such behavior above all, then rightful distribution of property in land can be achieved. The means by which this can be done most swiftly and surely is through a scheme of taxation that encourages useful employment of land and discourages speculative holdings.

Though all productive activity is dependant upon land for its performance, not all land is of equal value. Even within a small area, for instance, fertility varies enormously. So one individual can reap twice as much grain with the same amount of time and effort and skill as another working a less fertile site. Clearly the productivity differential is due to the quality of the sites and not to the contribution of the individuals. Or, to take an industrial instance, two factories can have widely different costs of production because they are located in different areas. One may have greater access to natural resources or community services such as transportation routes, etc. than the other. Again, equal time, effort, and skill produces different levels of productivity. The individual tenants achieve their results due to the factors dependant upon location rather than those traceable to labor or capital. Here then is a source of inequity. Neither individual created the advantages inherent in the different sites, whether we consider the farm or the factory. They are either due to natural resources or special location. In order to place the burden of taxation fairly, individuals occupying the better sites in a community should shoulder a greater proportion of the property tax. This would spread the burden justly and also encourage economic efficiency. Property taxation, based on the economic rent or site-value of land, is the political means for attaining economic freedom.

Speculation in land would be discouraged by such taxation so that the few holding the better sites would not benefit at the expense of the many. On the other hand, economic efficiency and industry would be encouraged and rewarded by the just allowance that gives every man the fruits of his labor. In other words, social redistribution of wealth would be left at a minimum, and the real forces of the 'free market' system allowed to operate. Since access to land would be assured, the Pauline prescription: "If any would not work, neither should he eat." (II Thes. 3:10) can be justly applied.

Too often schemes of taxation and redistribution of wealth are urged without proper scrutiny of the real sources of inequity. Also, the burden of taxation seldom has a direct relation to the ability to pay or the proportion of the benefits derived. Historically this has not always been so, and certainly it need not be any longer. Wealth comes from the earth and its natural resources. There is no other source for it. No matter how elaborate or sophisticated an economic system may be, the ultimate source of wealth is work on land, mixing one's labor with land to produce wealth. Such a simple fact is likely to be overlooked and its implications misunderstood. We are accustomed to thinking that more complicated economic relationships are necessary or fundamental. But whatever political or social system is present—communitistic or capitalistic—democratic or totalitarian—the irreducible fact is that the primary

economic relationship between land and labor determines the first level of the production and distribution of wealth.<sup>7</sup> No later stage can void this fact and its effects, though deliberate efforts may be made to counteract them. The simple rule is: those who control the land and those who contribute the labor will divide up the product of wealth according to their respective control and strength.

The implications of this are enormous. The stronger the control over land is, the greater will be its final reward no matter what its actual contribution to the final product may be. Mere title, backed by the force of law, will be sufficient to gain a large share of the wealth produced on any site. Something similar can be said for labor: it will receive a proportion of the final product that will reflect its leverage of control over distribution and not necessarily the measure of its contribution. Strong labor unions will obtain more than individuals, and high unemployment will generally keep wages low.

This is not the place to go into detail concerning these matters, and no doubt further argument will be

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<sup>7</sup>A survey of the enormous literature on the question of distributive justice would quickly reveal how seldom this fundamental fact is recognized. While elaborate calculi are often introduced in order to arrange for equitable allocations of benefits and burdens, the simple relationship between wealth and the control of land is generally overlooked. For example, see: Nicholas Rescher, Distributive Justice (Indianapolis: Bobbs-Merrill, 1966) with its extensive bibliography and Norman E. Bowie, Towards a New Theory of Distributive Justice (Amherst: University of Massachusetts Press, 1971).

necessary to establish these rules to everyone's satisfaction. Nevertheless, the direction of this thesis ought to be clear. As we examine specific aspects of the question, the underlying rationale of the argument will emerge, and it is believed that it really only makes explicit and undeniable what others have seen and supported at least in part.<sup>8</sup> Too often, even in philosophy, fundamentals and the quest for simplicity are forgotten in the process of extensive analysis and argumentation. And, of course, once lost they are hard to recover. Here, it is believed, certain undeniable truths about property rights to land are once again brought to light, and some of their most important implications demonstrated and discussed. Yet this does not intend to be a political tract or a polemical treatise: rather it is first and last a philosophical examination of the concept of property rights in land. Hopefully, it shall be read and understood as such.

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<sup>8</sup>See Robert V. Andelson, Imputed Rights: An Essay in Christian Social Theory (Athens, Ga.: University of Georgia Press, 1971). Unfortunately, this book is marred by some very strong strains of Calvinism which work to obscure the clear philosophical principles behind Andelson's thesis. Not surprisingly, the book has received little notice.