Introduction

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Never in the history of Western political theory has property been ignored. Among classical and medieval thinkers, Plato, Aristotle, and Aquinas all had something to say about property. In the modern period, Grotius, Pufendorf, Filmer, Locke, Hume, Rousseau, Kant, Hegel, Marx, Bentham, and Mill all assigned property a central place in their speculations on human values and society.

The twentieth century saw some remarkable contributions to thinking about property. Especially notable are essays by individuals who were or are professionally situated in schools of law rather than in departments of philosophy, politics, or economics. The work of Wesley Newcomb Hohfeld and A. M. Honoré, for example, exerted great influence on how philosophers as well as lawyers understand the concept of property.[1] Robert Lee Hale, an academic lawyer as well as an economist, formulated a view on property, its distribution, coercion, and the modern state that has formed a major tributary of critical legal studies.[2] Economists as well as lawyers played a major role in other segments of contemporary writing on property. For instance, R. H. Coase's essays illuminated the law of nuisance and the nature of the business firm, and Berle and Means's treatment of the separation of ownership from control in the modern corporation continues to reverberate in the literature on corporate governance.[3]

1 See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. Walter W. Cook and foreword by Arthur L. Corbin (Westport, Conn.: Greenwood Press, 1978 [1919]); A. M. Honoré, "Ownership," in A. G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961), pp. 107–47. The influence of Hohfeld on academic lawyers is especially evident in the American Law Institute, *Restatement of the Law of Property* (St. Paul, Minn.: American Law Institute Publishers, 1944).

2 See, for example, Robert L. Hale, "Bargaining, Duress, and Economic Liberty," *Columbia Law Review*, 43 (1943): 603–28; Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly*, 38 (1923): 470–94.

3 See R. H. Coase, "The Problem of Social Cost," *Journal of Law & Economics*, 3 (1960): 1–44;

Philosophers have hardly been absent from twentieth-century contributions. John Rawls and Robert Nozick have each left a significant mark. Although Rawls has written little that specifically addresses property, his two principles of justice have important implications for property and its distribution. His first principle applies to "basic liberties," which include "the right to hold (personal) property."[4] The first part of his second principle requires that the social institutions concerning other kinds of property, such as the means of production, be structured so that any social and economic inequalities are "to the greatest benefit of the least advantaged."[5] Later writers have explored tensions between the two principles as applied to property and criticized Rawls's views from the perspective of a broad theory directed specifically to property, and Rawls has modified some aspects of his earlier views.[6] If Rawls offers an egalitarian political philosophy, Nozick provides a libertarian alternative. Nozick's sole book on political philosophy contains not only a critique of Rawls on justice but also, and more importantly, a dazzlingly clever historical-entitlement theory of justice.[7] Pretty much single-handedly, Nozick gave academic respectability to libertarianism and influenced a new generation of libertarian thinkers.[8] He also played a large role in reviving interest in Locke's views on property.

It is chiefly in the last three decades that theoretical writing on property has displayed the variety, rigor, and insight equal to that of, say, philosophical work on criminal law and constitutional law. Much recent writing is self-consciously interdisciplinary. The penetration of neoclassical economics into schools of law has advanced clear, useful thinking about property, as the abiding influence of Guido Calabresi and A. Douglas Melamed makes plain.[9] The absorption of Locke, Hegel, and the legal realists by philosophers, political theorists, and academic lawyers has reworked older speculation in the light of

R. H. Coase, "The Nature of the Firm," *Economica,* 4 (1937 (n.s.)): 386–405; Adolf A. Berle, Jr. and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Commerce Clearing House, 1932).

4 John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 61. Rawls gives a full statement of both principles, including priority rules, on pp. 302–03.

5 Ibid., p. 302.

6 See, for example, Norman Daniels, "Equal Liberty and Unequal Worth of Liberty," in Norman Daniels, ed., *Reading Rawls: Critical Studies of A Theory of Justice* (Oxford: Basil Blackwell, 1975), pp. 253–81; J. W. Harris, *Property and Justice* (Oxford, Clarendon Press, 1996), pp. 258–62; Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), pp. 233–41. For adjustments to his earlier theory, see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996 [1993]) (paperback ed. with new introduction), especially pp. 298, 338–39.

7 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 149–231.

8 See, for example, Loren E. Lomasky, *Persons, Rights, and the Moral Community* (New York and Oxford: Oxford University Press, 1987), Ch. 6.

9 Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral," *Harvard Law Review,* 85 (1972): 1089–128.

new problems and new techniques.[10] At the same time, work that integrates political theory and a deep understanding of property law has continued.[11]

Given this embarrassment of riches, a major contributor to the resurgence of interest in the theory of property has intimated, perhaps tongue in cheek, that there may be a surfeit, if not of property, at least of writing about it.[12] I hope that this is not so. At all events, I have a stake in its not being true. Thus, I need to explain why the essays in this volume advance the ball.

In "Property, Honesty, and Normative Resilience," Jeremy Waldron poses the following question: What is the relation between property and honesty? An appealing, if overly quick, answer is that to be honest (in a broad sense of integrity and upright conduct) is to respect the rules of property law. Thus, stealing would be dishonest because it violates rules of property. Yet this answer leads one to push the inquiry more deeply, for some might question whether stealing is dishonest in *all* legal systems. Perhaps some legal systems are so egregiously unjust that in them stealing is neither dishonest nor otherwise wrong.

Waldron breaks new ground in suggesting that the key to a deeper and more satisfactory answer lies in a phenomenon that he calls normative resilience. This phenomenon rests on a distinction between two types of judgments. Type 1 judgments concern the justification of an institution. Type 2 judgments concern individual conduct in relation to that institution. Waldron then defines normative resilience as the phenomenon whereby judgments of type 2, although they are predicated upon the institution, nevertheless remain unaffected by judgments of type 1 that are adverse to the institution.

Two central theses advanced in his paper are the following. First, *property* is a normatively resilient institution. For example, someone could make the type 1 judgment, "The property system in El Salvador is unjust," and still make the type 2 judgment, "It was dishonest of the poor villager to take the landowner's car." Waldron reminds us, though, that resilience and normative force can be matters of degree. Thus, if a property system is *egregiously* unjust, then perhaps taking someone's car is "not really dishonest." The second thesis is that the more normatively resilient an institution is, the more harm it may do if it is unjust, and so the heavier is the burden that must be discharged in its initial justification. As applied to the specific case of property, the second thesis

10 In a vast literature, see, for example, Seyla Benhabib, *Natural Right and Hegel: An Essay in Modern Political Philosophy* (Ann Arbor, Mich. and London: University Microfilms International, 1978) (Yale Univ. Ph.D. dissertation, May 1977); G. A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995); Margaret Jane Radin, *Contested Commodities* (Cambridge, Mass. and London: Harvard University Press, 1996); Joseph William Singer, "The Reliance Interest in Property," *Stanford Law Review,* 40 (1988): 611–751; Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988).

11 See, for example, Harris, *Property and Justice.*

12 See Lawrence C. Becker, "Too Much Property," *Philosophy & Public Affairs,* 21 (1992): 196–206.

would have the following corollary: If property is an especially normatively resilient institution, then the initial burden of justifying it is quite heavy.

If Waldron is right that institutions of property law are generally highly normatively resilient, then it becomes more important than ever to make sure that institutions of property are justified. He explores some explanations of the phenomenon of normative resilience, and here focuses on the theories of David Hume and Jeremy Bentham. Waldron also pursues some further implications of the normative resilience of property.

In "Property as Social Relations," I aim to bridge a gap between two groups of thinkers who write about the legal and political theory of property. The first group consists of some legal realists and some critical legal scholars who, along with a few others, understand property relations as a set of social relations. This group includes Felix S. Cohen, Robert L. Hale, Duncan Kennedy, and Joseph William Singer. It also includes the Canadian political theorists C. B. Macpherson and Jennifer Nedelsky. The second group consists of just about everyone else. Libertarians, traditional Marxists, and analytic philosophers of whatever political persuasion say almost nothing about social-relations theorists. I think that we need more cross-talk. So, as an academic lawyer whose philosophical training comes from the Anglo-American analytic tradition, I try to offer a critical and constructive discussion of various social-relations views.

It is not easy, however, to say what a social-relations theory of property *is,* for thinkers in the first group differ significantly among themselves. Yet the following themes are central, though perhaps not indispensable, to most of the views offered by the first group: an emphasis on coercion or the exercise of power by those who have property against those who lack it, or at least do not have much of it; the presence of the state as a nonneutral party, because it specifies and enforces property rights; the self as a nonindividualistic entity that arises from social relations; and the idea that property rights grow out of social relations that are highly contextualized.

I argue that social-relations theories contain both insights and flaws. The insights include an awareness of the many ways in which market forces, the distribution of income and wealth, and especially government regulation affect all who engage in commercial transactions. A salient flaw is that no theory examined shows which social relations are, or help to constitute, property. In addition, social-relations theories frequently rest on flawed accounts of coercion, power, and freedom. They often adopt as well unsatisfactory positions on autonomy and the self.

My argument unfolds not as a dry assault on one proposition after another ascribed to social-relations thinkers, but from a careful consideration of their texts. This way Cohen and Hale, Kennedy and Singer, Macpherson and Nedelsky get to speak in their own words, not mine. There is also a political dimension to my argument. Contemporary social-relations theorists are associated almost entirely with the radical left. I endeavor to show that there is less

distance between them and Rawlsian political liberals than either group has imagined.

So far as I am aware, this essay is the first effort by someone outside social-relations approaches to property to examine their writings as a more or less coherent and distinctive set of views about property. To be sure, my inquiry is incomplete.[13] And social-relations thinkers may not appreciate the problems I seek to put on their agenda at the end of my essay. Yet I shall have achieved one of my main aims if others pursue the mutual engagement of quite different approaches to property.

It is a commonplace to think of property as something that one may use during life and then upon death transmit it by will or intestate succession to others. The next two essays explore the living and dead sides of property – waste and inheritance – respectively.

As long as one lives, may one use one's property *ad libitum* – even to the point of frittering it away or destroying it? Edward J. McCaffery addresses this question in "Must We Have the Right to Waste?" He begins by observing that Anglo-American law has long permitted owners to do pretty much whatever they want with their property, right down to the limiting case of using it all up or wasting it. He calls this broad permission the *jus abutendi*. Thinkers as different as Blackstone, Pound, and Honoré have taken this right to waste to be one of the salient rights in the "bundle of rights" that has come to symbolize property.

On reflection, McCaffery suggests, this affirmative right to waste is – or ought to be – as puzzling as it is entrenched. He traces the evolution of the right and lays bare its connections to an absolute, or nearly absolute, conception of ownership developed largely in the context of an agrarian society and real property. McCaffery then canvasses what is wrong with waste from the point of view of political liberalism. His subject takes on especial importance because value has moved away from land and into intangible, fungible units of value, paradigmatically money. A concern with wasting the family farm has now become, or should become, a concern with depleting large stores of nominally private capital. McCaffery concludes by proposing a revised conception of ownership with a practical law against waste, one that features a progressive consumption tax as its instantiation of an antiwaste norm.

One of the novel features of McCaffery's argument against the continuance of the *jus abutendi* is the way that it brings taxation to center stage in our thinking about property. In exploring different conceptions of waste, he makes a specific case against waste in the sense of the relatively nonurgent

13 For example, space did not allow me to consider Benhabib, *Natural Right and Hegel;* Carol C. Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (Cambridge: Cambridge University Press, 1988); Richard Dien Winfield, *The Just Economy* (London: Routledge, 1988); Ross Zucker, *Democratic Distributive Justice* (Cambridge: Cambridge University Press, 2001).

expenditure of resources – a conception different from the law's customary sense of destruction or dissipatory waste. McCaffery would put in place a progressive cash-flow consumption tax to reduce such nonurgent spending. A far-reaching intellectual and practical consequence of his essay is to presage a substantially trimmed conception of property, which he calls a life-estate conception of ownership.

J. W. Harris considers the other side of the coin: inheritance. In "Inheritance and the Justice Tribunal," he sets up an intriguing problem. His Justice Tribunal sits in an imaginary country that resembles modern Western societies, except that there is no law of testation or intestate succession. Disputes about what should happen to a person's resources upon death are submitted to the Tribunal. Anyone may apply. The Tribunal is directed to consider any principled argument. It may assume that the justifications it gives would support decisions in a class of disputes similar to the present one. Beyond that, no kind of argument is ruled out by statute or precedent.

The case considered in Harris's essay is that of Mrs. Jones, a rich widow, who has recently died. The following submit claims to all or part of her resources: (1) her daughter, a childless woman married to a wealthy man; (2) a penniless artist patronized by Mrs. Jones; (3) an acquaintance whom Mrs. Jones promised would inherit her property; (4) a neighbor who rendered Mrs. Jones valuable help without pay; (5) the spokesperson for workers at a factory owned by Mrs. Jones that is in danger of failing; and (6) an official from the Treasury.

Three judges on the Justice Tribunal render opinions on the distribution of the estate of Mrs. Jones: Libertarian, C.J., Communitarian, J., and Egalitarian, J. Unsurprisingly, the judges disagree, and their opinions illustrate strikingly different approaches to inheritance. The opinions provide material for Harris's reflections on the case in the balance of his essay. He deals at length with two main concerns.

One is "the historical-entitlement deficit" that infects the opinion of Libertarian, C.J. Harris claims that, from the perspective of a pure historical-entitlement theory, the state is barred from first occupancy of ownerless resources. He also argues that such theories give no account of how resources, made ownerless on a death, could in practice be subject to first occupancy by private persons – especially if the resources consist of intangible items like bank accounts and shares in corporations. Here Harris offers critical assessments of the views of Richard A. Epstein and Hillel Steiner.

The other main concern is "the egalitarian crunch" that affects in different ways the opinions of Communitarian, J., and Egalitarian, J. These judges are radically at odds about which, if any, of the obligations of decedents should be taken into account when their resources are distributed. Harris uses these opinions as a jumping-off place to examine recent philosophical work on inheritance, especially that of D. W. Haslett.

Harris's essay not only is a splendid vehicle for getting students to think about inheritance but also carries a powerful message regarding the best way to think about it. He argues that single-principle or single-track approaches to inheritance are bound to fail. The stereotypical visions of the three judges show as much. The antidote to such overly simple ways of thinking, about property generally and inheritance in particular, is to recognize that one needs a mix of property-specific reasons of justice to solve problems of institutional design.

The last two essays in this volume deal with intellectual property. Seana Valentine Shiffrin uses a philosophical microscope to draw some unexpected conclusions about Lockean approaches to the subject. William Fisher employs a wide-angle legal and economic lens to give a broad picture of the current terrain of thinking about intellectual property.

In "Lockean Arguments for Private Intellectual Property," Shiffrin challenges the popular conception that Lockean justificatory foundations provide strong support for robust, private intellectual property rights. She argues that the nature of intellectual works makes them less, rather than more, susceptible to Lockean justifications for private appropriation.

As a matter of interpretation, Shiffrin explores a theory that she regards as *Lockean* but not necessarily *Locke's* own views. Those views may not be recoverable, and even if they are they may not be the philosophically soundest way of developing his core ideas. Shiffrin takes Locke's texts seriously. But she tries to construct the most promising arguments that jibe with his main ideas and motivations, and relegates to a lower place his less central views and remarks. Because her chief interest is philosophical, she deemphasizes some features of the seventeenth-century background and the ideological and theological commitments of some present-day interpreters of Locke.

She develops a Lockean theory of property that emphasizes his starting point of the initial common ownership of resources as a concrete expression of the equal standing of, and community relationship among, all people. Departures from the system of common ownership are justified, Locke argues, when private appropriation is necessary to make full, effective use of the property. While this may be true of material resources whose use depends upon exclusive use or whose effective management depends on exclusive control, it is not true of most intellectual products. They may be used simultaneously by more than one person. Furthermore, their value is usually enhanced, rather than diminished, through free, nonexclusive, shared, common use. She concludes there is a Lockean presumption *against* natural, private rights over intellectual property.

A salient contribution of Shiffrin's essay is its identification of three different possible understandings of the intellectual commons. First, the commons embraces all intellectual products; authors discover and take products out of the commons, but neither create nor refine them. Second, the commons includes only the materials – such as ideas, values, and literary and musical

themes – for intellectual products; authors not only discover these materials but express them and their interconnections in publicly accessible and indeed sometimes unique ways. Third, the commons is void of intellectual products; authors invent them. Shiffrin dissects the strengths and weaknesses of each of these understandings. She also takes note of the plausible hybrid view that the best characterization of the commons pivots on the type of intellectual product under discussion.

In "Theories of Intellectual Property," Fisher examines four theories that currently dominate scholarship concerning the law governing copyrights, patents, trademarks, and trade secrets. Utilitarian theorists attempt to balance optimally the power of these laws to stimulate creativity and their concomitant tendency to curtail public enjoyment of the creations they induce. Labor theorists advocate adjustments of these laws that will properly reward artists and inventors for their intellectual labors, without worsening the positions of other people. Personality theorists justify these laws either on the ground that they shield from appropriation or modification artifacts through which authors and artists have expressed their "wills," or on the ground that they create social and economic conditions conducive to creative intellectual activity, which in turn is important to human flourishing. Finally, social-planning theorists see in these laws opportunities to foster a just and attractive culture, including a rich democratic discourse.

Fisher argues that the content and prominence of the four theories derives from a combination of three circumstances: (1) their correspondence to lines of argument that have long figured in constitutional provisions, case reports, and preambles to legislation; (2) the influence of analogous divisions within contemporary political philosophy; and (3) the popularity of comparable perspectives among legal scholars concerned with property rights in land.

He then explores gaps, conflicts, and ambiguities in the four theories. The utilitarian approach is hobbled, Fisher suggests, by the lack of information necessary to make it operational, the impracticability of simultaneously stimulating optimal amounts of intellectual creativity and optimal levels of engagement in other forms of socially valuable work, and the incompatibility of the measures necessary to reduce various types of wastefully rivalrous inventive activity. Labor theorists, in Fisher's judgment, have trouble convincingly connecting their claims to Locke's original theory of property rights, defining morally worthy "intellectual labor," identifying "the commons" from which intellectual laborers must be able to derive their raw materials, interpreting the famous Lockean "proviso," dealing with the equally notorious problem of proportionality between labor and reward, and deriving plausible recommendations for doctrinal reform from their analyses. Personality theory is hampered, Fisher thinks, by the divergence of the many different ways in which property rights in general and intellectual-property rights in particular might conduce to human flourishing, by the thinness of the conceptions of selfhood

on which the theory depends, and by unresolved debates among its principal practitioners. These debates concern such issues as how much control is legitimately exercised by creators over their creations once they have been transferred to others; whether creators' rights may be legitimately alienated; and how to specify the scope of defensible privacy interests. Lastly, Fisher contends that social-planning theorists have comparable difficulties formulating a vision of a just and attractive culture and then extracting from that vision determinate recommendations concerning the ideal shape of legal rules governing the creation and use of art, music, and inventions.

Yet Fisher's vision is neither nihilistic nor unremittingly skeptical, for the final section of his essay shows that, despite these formidable difficulties, the theories are valuable for at least two reasons. First, they have proved useful in identifying nonobvious solutions to specific doctrinal problems, such as the proper scope of the "right of publicity" and the legitimacy of price discrimination in the marketing of intellectual products. Second, they help foster socially and politically valuable conversations among the various institutions responsible for the shaping of intellectual property law.

No single theme unites these essays, nor does any single political commitment animate them, but their variety and vitality make clear that much of interest resides in contemporary thinking about property.

1

Property, Honesty, and Normative Resilience

JEREMY WALDRON

I. Introduction

What is the relation between property and honesty? Fairly straightforward, one would think. In times past, "honesty" was used often as a general term for virtue or honor, encompassing chastity, generosity, and decorum. But according to the *Oxford English Dictionary,* its prevailing modern meaning is "[u]prightness of disposition and conduct; integrity, truthfulness, straightforwardness: the quality opposed to lying, cheating, or stealing."[1] So, if stealing is one of the things to which the quality denoted by "honesty" is characteristically opposed, then to that extent "property" and "honesty" are correlative terms. To steal is to take somebody's property – that is, an object that, under the rules of property, he has the right to possess – with the intention of permanently depriving him of it (what lawyers call the *animus furandi*). To be disposed not to steal means that one is disposed not to violate the rules of property in this way. To be honest – in this sense of honesty – is to respect the rules of property.

But respect *which* rules of property? The *existing* rules in society, currently in force – however unjust or oppressive? Or the rules of property in so far as they are regarded as fair? "Honesty" also has the meaning of "fairness and straightforwardness of conduct."[2] Does it pull us in two directions here? Is the man who violates an unjust property right with the intention of permanently depriving an undeserving "proprietor" of some goods he "owns" dishonest? Is this even a marginal case for the concept of dishonesty? Or do "honest" and "dishonest" go unequivocally with the positive law of property (leaving it perhaps a further question whether dishonesty is always a vice or always wrong, all things considered)?

Earlier versions of this paper were presented at conferences in Los Angeles and Wellington. I am grateful to Stephen Munzer and Maurice Goldsmith for their comments on those occasions.

1 "Honesty," I.3.d., *Oxford English Dictionary* (Internet Edition).

2 "Honesty," 2.a., *Webster's Ninth New Collegiate Dictionary* (Springfield: Merriam Webster, 1991), p. 579.