

PROPERTY AND NECESSITY

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There must be some form of divine interaction or spontaneous coordination between Tom Bethell and myself because as I look back at my notes, I notice that the first words I had written in them were “property and imperialism.” I wrote them because I was going to talk about, and indeed will still talk about, how to understand our system of private property. In exploring my topic I have a central query: Why once you start out with a good idea that seems to be rather small, quite against your will it continues to grow and to expand until it seems to take over the entire universe, leaving no room for anything else? One of the casualties of this comprehensive conception of property is the undifferentiated sense of “justice” itself. In many ways I think one of our essential inquiries is why, with a full understanding of a system of property, there may be no place left over for any independent conception of justice. So, Tom Bethell and I start from the same place, but I daresay we end intellectually in rather different places. He strives for justice, while I seek to avoid its ostensible commands. But surely part of our differences must be verbal, because politically we come together again in yet another one of these odd twists and reversals that political thinkers and lawyers only can begin to understand.

Property. The initial question is: What is this wonderful idea of private property and why does it matter? To deal with that inquiry, we must address two distinct questions, one that I am going to systematically avoid for the moment and the other that I will try to explicate. The question that I am going to try to avoid is: How are property rights acquired? The general, decentralized, individualistic answer that I usually light upon is the first-possession rule and all of its strengths and limitations.¹ What I want to talk about is the second half of the problem: What do you acquire when you acquire a bundle of property rights in a particular thing?

Much of the modern discussion of property rights has implicitly degraded the intrinsic intellectual unity associated with the

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1. See Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

conception of property by arguing that property is a bundle of rights²; it is a bundle of sticks. By using that metaphor, you get the impression that these sticks have been hastily thrown together, that they are not all quite the same length, and that it is almost a matter of random chance that they stand next to one another. I suggest that the bundle of rights normally associated with the concept of property, far from being randomly and fortuitously put together, actually coheres and forms the basis of huge portions of the terrain of the ordinary common law.

Let me first mention what the particular sticks in the bundle are; then I will indicate to you exactly what the function of each of the sticks is; and finally I will invite you to speculate on what would happen if we decided to reconfigure our property bundles by removing some sticks from them. The standard definitions of property—and these have very broad applications whether one considers legal jargon, constitutional discourse, or the Oxford dictionary—tend to endow the owner of a particular thing with three rights: possession, use, and disposition.³ It looks like a very nice kind of bundle.

The first stick says, in effect, that you can exclude everybody else in the world from doing something with your property. The stick has the negative impulse. If we stopped with possession, we would have a system of property rights that worked up to a grand blockade. I could stop everybody else from doing something with the property that I owned, but there would be nothing else that I could do with the property myself. The world would remain a tundra, in which I could keep my own place on the barren square of the checkerboard. To fill in the gaps, a system of use rights is associated with property. Now more than blockade is at stake; you get production as well—a vast improvement.

If you just stop with a system that contains only the right to exclude and the right to use, then you have to ask the following question: What happens if its value in use to somebody else is greater than its value in use to you? Is there any particular way in which we could arrange for some kind of transaction to shift the use from one person to another? Generally speaking, gains from trade are made possible in both a social and an economic

2. See Grey, *The Disintegration of Property*, in 22 NOMOS: PROPERTY 69 (1980).

3. See 12 OXFORD ENGLISH DICTIONARY 639 (2d ed. 1989) (“the right, especially the exclusive right, to the possession, use, or disposal of anything”).

sense only if we include in our property definition the right of disposition. By right of disposition, I mean essentially the ability to sell, mortgage, lease, and pledge various kinds of property—so long as the owner can find a willing buyer, mortgagee, and so on. By incorporating disposition into the system of property, whatever endowment of rights were originally created can be corrected, modified, combined, or disaggregated time and time again through a series of voluntary transactions.

If possession, use, and disposition turn out to be the ideal bundle of property rights, then you could run a system in which these rights start out and remain well defined: Their boundaries are identifiable, and voluntary transactions take place between people who are in a position to sell and people who are in a position to buy. This system would necessarily have a self-generating capacity with each successive exchange or transfer. These private, decentralized, voluntary transactions, enforced by a night-watchman state, would generate more by way of gains than it would produce by way of losses. Through repetitive interaction, we would move to higher and higher levels of social satisfaction, to higher and higher levels of private gratification without once, I might add, ever introducing an idea of justice to moderate or to override the various transactions that originate from this particular base.

One way to understand the power of property from this perspective is to see, in rather striking terms, how the different branches of substantive law are developed as we move incident by incident through the law of property. If you start with the first of these incidents, exclusive possession, it becomes instantly clear that property is not an individual conception, but is at root a social conception. The social conception is fairly and accurately portrayed, not by what it is I can do with the thing in question, but by who it is that I am entitled to exclude by virtue of my right. Possession becomes exclusive possession against the rest of the world; and the entire law of trespass to land or chattels is essentially designed to vindicate exclusivity of individual possession.

The next question asks, having vindicated possession, can you also vindicate use? The relevant body of common-law doctrine turns out to be, in rather crude form, the law of nuisance, which is usually defined as the ability of an individual owner to protect himself against nontrespassory invasions of his prop-

erty that impose various kinds of—and I will use the words with caution and explicate them later—“unreasonable interferences” with the owner’s uses.⁴ The tort of nuisance that we generally see coming out of the private law is essentially the common-law response against strangers who interfere with the use of property.

Turning next to disposition, it is one of the most difficult incidents of property to protect. It is, of course, of enormous importance because the entire difference between value in exchange on the one hand and value in use on the other can only be protected and realized if the system of rights insures that voluntary exchanges can take place not only at the will of the contracting parties, which is the office of the law of contract, but also without interference by third parties, which again is the office of the law of tort.

The common law developed simultaneously in two directions to protect the disposition of property. These two directions are of fairly ancient origin even though they have many modern ramifications. The first path is the tort of interference with advantageous relations, which is captured in the old case of *Tarleton v. McGawley*,⁵ where I wish to trade with the African natives and a rival trader fires his cannon between me and the natives and then departs. Even though he has committed no trespass upon my property, I can recover my lost expectation from trade as against interference by force.

The second tort, normally associated with protecting disposition of property, is the less spectacular but still very important tort of defamation. Many people have been troubled by the fact that defamation seems to deal with intangibles and yet was introduced very early into the law. I think that if you understand the structure of property rights, you will see why defamation was an early visitor to the common-law camp. Defamation does not protect “reputation” in the abstract; it protects advantageous relationships against interference by *mis*representation. The proper definition is the common-law one, which says that if I make a false statement about a defendant to a third party to induce the third party to stop trading with the defendant, the

4. See, e.g., RESTATEMENT (SECOND) OF TORTS § 821D (1977) (“A private nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land.”).

5. Peake’s N.P. 270, 170 Eng. Rep. 153 (K.B. 1793).

defendant can bring an action to recover for the loss of that particular transaction.⁶ The general prohibition against force and fraud normally associated with libertarian property theory accounts very nicely for the law of defamation.

Necessity. This very big sketch allows you to account for huge portions of the standard common-law doctrines simply by isolating the incidents of ownership as they are each protected against interferences by the force or fraud of third parties. There is one enormous weakness, however, in this particular body of law: holdouts. The second half of the common-law project of property is to figure out what is wrong with this basic model when it poses an effort to define a *complete* state of affairs between private individuals. Let me just describe a few cases that mark the thin edge of the wedge and that leave people very uneasy about the imperial aspirations of the system of property rights that I have just described.

I will begin with trespass. Suppose that you are on a public right-of-way, which is blocked by a heavy snow storm; the only way that you can get around the blockade is to walk tiptoe on somebody's land. Under these circumstances, are we going to describe that particular entrance as tortious? More to the point, are we going to allow the owner of the property to block you from entering the land?⁷ If you look closely at the law of property, the various doctrines of necessity, which allow the "trespass" to take place, are as old as the doctrine of exclusive ownership itself. It seems to me that we have to find an explanation for why the exception develops, and at so early a time.

If you look at the law of nuisance, you find the same thing. Categorically, any form of interference, however small, by way of noise, stench, smell, pollution, and the like, seems to be a tort on the physical invasion model. If you take the standard, hard-line libertarian model, you should have the right to an injunction whenever someone invades one of your rights. Size of loss should go to damages, not liability. Historically, however, we discover exceptions back in the Nineteenth Century, written no less by the hand of Baron Bramwell, the sternest and archest

6. See, e.g., *Story v. Challends*, 8 C. & P. 234, 173 Eng. Rep. 475 (1873) (special damage found when third party did not deal with plaintiff because defendant reported that the plaintiff was an unprincipled man and borrowed money without repaying it).

7. See *Ploof v. Putnam*, 81 Vt. 471, 474-75, 71 A. 188, 189 (1908) ("A traveller on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity.").

libertarian who ever sat on any court. He was the judge who developed the live-and-let-live exception⁸ to the nuisance law, from which the locality rule quickly followed.⁹ Again, if you look to the law of defamation, there is a mysterious body of privilege, for example, to obtain references about somebody who has not given consent to the transaction, and to act upon them, even though they may be false and misrepresent the true state of affairs.¹⁰

The question, therefore, is not how you explain the basic principles but how you make that system of property rules cohere with a system of exceptions based upon strong, if varied, perceptions of necessity. In this particular area the great modern advances in the economics of transaction costs show the unity of our trespass, nuisance, and defamation cases. The basic area of property works best in circumstances where exclusive rights given to individuals by virtue of decentralized first possession rules create opportunities for bargains to take place with a minimum of confusion and strategic behavior. Under certain localized circumstances, however, conferring these absolute rights to exclude does not advance competition in ordinary markets, but rather it creates bilateral monopoly, holdout problems, and transaction-cost obstacles of one sort or another. At common law it is just these various situations in which there is a systematic, intuitive willingness to back off the comprehensive ideal of property in favor of a system that is a little bit frayed at the edges. In essence, and if applied systematically, the system, with the necessity exception, works to the advantage of all individuals who are required to relinquish some of the property rights that they possess.

Once we understand this point, then private property in the

8. See *Bramford v. Turnley*, 3 B. & S. 67, 83, 122 Eng. Rep. 27, 33 (Ex. 1862) ("Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without submitting those who do them to an action.").

9. See, e.g., *Cambell v. Seaman*, 63 N.Y. 568, 577 (1876) ("A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable, and a nuisance.").

10. See *Smith v. Thomas*, 2 Bing. N.C. 372, 381, 132 Eng. Rep. 146, 150 (1835) ("The publication is alleged to have taken place in the course of a confidential communication between one tradesman and another, as to the solvency of a third person, whom the inquirer was about to trust. If such communications are not protected by the law from the danger of vexatious litigation in cases where they turn out to be incorrect in fact, the stability of men engaged in trade and commerce would be exposed to the greatest hazard, for no man would answer an inquiry as to the insolvency of another.").

common-law, libertarian mode becomes a first approximation for a much more complicated state of affairs. To be minutely technical for a moment, virtually every one of the common-law exceptions that I have given can be defended on the ground that it produces a distribution of rights that is equal or superior to the one that it displaced, in the sense that *ex ante* there are no losers from the transactions in question. If so, then you are able to explain why you need not believe in a system of hard libertarian property rights without committing yourself either to making interpersonal comparisons of utility or to massive systems of government intervention.

What is striking is the following dilemma. When I work in takings and eminent domain,¹¹ I conceive of that enterprise as taking this two-layered conception of property and going public with it, to ask what happens when the interactions are not between two people at the side of the road, or two people who are noisy, or people who are giving references to prospective employees. Instead our focus is massive systems of regulation having to do with air pollution, fisheries, oil and gas, bankruptcy, labor relations, and taxation. I would urge that the same model of intellectual development that takes place within private law should provide the proper mode of analysis for the public-law systems that come to supplement or replace the common law.

When you look at the way in which the Supreme Court, for example, talks about property, it is no accident that in its constitutional effort to prop up a very large welfare state, it eviscerates the common-law institution of property incident by incident, so that the right to exclusive possession can be easily overridden in many cases on fairly feeble, often very poorly articulated, police-power justifications. The idea that you may use your property to the limit, save only the live-and-let-live exceptions,¹² is now replaced by a law of zoning which says that so long as "we the people" allow you to do anything, we can prohibit you from doing everything else with respect to the property. If you look at various kinds of cases having to do with rights of disposition, whether you are talking about prohibi-

11. See R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

12. See *Bramford v. Turnley*, 3 B. & S. 67, 83, 122 Eng. Rep. 27, 33 (Ex. 1862).

tions against the sale of eagle feathers,¹³ rent control,¹⁴ price controls,¹⁵ wage controls¹⁶ and so forth, you will discover that the right of disposition is constantly and systematically compromised. The reason for disarray in our public law is that we have destroyed the intellectual foundations for government, by making it the destroyer, not the protector, of a modified system of property rights. What we need desperately today is to recognize that the grand idea of property and its principled necessity limitations provide the best guide for dealing with the complex modern issues that dominate our collective agenda today.

13. *See Andrus v. Allard*, 444 U.S. 51 (1979) (prohibition of sale of lawfully acquired eagle feathers does not effect a taking in violation of the Fifth Amendment).

14. *See, e.g., Cromwell Associates v. Mayor of Newark*, 211 N.J. Super. 462, 511 A.2d 1273 (1985).

15. *See Nebbia v. New York*, 291 U.S. 502 (1933) (Constitution does not prohibit a state from setting a minimum price for milk).

16. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (state law setting minimum wages for female workers was a reasonable regulation that did not contravene the Constitution).