NATURAL RIGHTS AND PROPERTY RIGHTS

ELLEN FRANKEL PAUL*

The proposition that I wish to explore here is that property rights are most secure when grounded in a natural rights foundation. Deducing a philosophical defense of property rights in the ten minutes provided to me would be impossible, but I have attempted it elsewhere, in a book entitled *Property Rights and Eminent Domain*.[1] What I propose to do now is something far less ambitious—to discuss an example that is intended to illustrate why a natural rights approach to property ought to be appealing to those who appreciate the importance of property to individual liberty. I will try to show how this rights approach is superior to two other philosophical stances that enjoy much currency today: utilitarianism and Paretianism.

Of course, in the present company, this example could be drawn from nowhere else but an actual case. The case I have in mind is *Moore v. Regents of the University of California*, decided by the California Court of Appeals for the Second District in July, 1988.[2] As the court stated, Mr. Moore's appeal raised "fundamental questions concerning a patient's right to the control of his or her own body."[3]

In 1976 Mr. Moore sought treatment at the University of California-Los Angeles Medical Center for a condition diagnosed as hairy-cell leukemia. His spleen was removed. Two researchers at the center had determined, prior to the removal of the diseased organ, that Mr. Moore's cells had unique properties,

* Professor of Political Science, Deputy Director of the Social Philosophy and Policy Center, Bowling Green State University.

1. E. PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (1987). Such a defense has as its core the concept of self-ownership; that is, that each person has the exclusive right to the use, enjoyment, and disposition of his own body. What follows from this is that he may exclude others from directing the uses to which his body will be put or from appropriating parts of his body. From this principle, I would generate a nearly inviolate right to possess, use, dispose of, and exclude others from both the personal and real property that one has "created" by transforming, and hence giving value to, what was previously unowned. I say "nearly inviolate" because it would be limited by the traditional "sic utere" doctrine: Property may not be used in a way that deprives others of the use of their property. This defense is, on the whole, a Lockean project. It attempts to provide philosophical defenses for portions of Locke's argument that he attributed to God and to replace certain moves he makes that seem simply indefensible.

2. 202 Cal. App. 3d 1230, 249 Cal. Rptr. 494 (1988).

3. *Id.* at 1235, 249 Cal. Rptr. at 498.

and they arranged to have the spleen delivered to them. From his spleen these researchers developed, using the techniques of genetic engineering, a cell line "capable of producing pharmaceutical products of enormous therapeutic and commercial value."[4] The regents, Dr. Gold, and his assistant Ms. Quann then patented this cell-line and methods for producing drugs from it.[5] In addition, they contracted with two biotechnology companies to commercially exploit this patent, for which they received generous remuneration.[6] Mr. Moore cited the defendant's statement that by the year 1990, the commercial potential of these products would be approximately $3 billion. Further, he claimed that, without informing him of their purposes, the appellees continued to extract tissue samples from him—including blood, blood serum, skin, bone marrow aspirate, and sperm—for almost seven years. These extractions were represented to him as being for his own welfare.[7]

The trial court rejected Mr. Moore's complaint and sustained a demurrer by the defendants.[8] The trial court's position was that Mr. Moore had failed to state a legitimate cause of action for conversion.[9] They found spurious his contention that his tissues and the cell lines derived from them constituted his personal property. The court of appeals, however, thought otherwise.[10] The majority eventually answered in the affirmative a question it posed for itself at the outset: "whether the commercial exploitation of a patient's cells by medical care providers, without the patient's consent, gives rise to an action for damages."[11]

The court reached this conclusion on implicitly natural rights

4. *Id.* at 1236, 249 Cal. Rptr. at 498.

5. *See id.*

6. *See id.* at 1236, 249 Cal. Rptr. at 498.

7. *See id.*

8. *See id.* at 1241, 249 Cal. Rptr. at 501.

9. *See id.*, 249 Cal. Rptr. at 502.

10. *See id.*

11. *Id.* at 1235, 249 Cal. Rptr. at 498. The plaintiff's complaint actually raised several causes of action, but the courts took the remaining causes as dependant on the first, for conversion. The causes of action were for the following: (1) conversion; (2) lack of informed consent; (3) breach of fiduciary duty; (4) fraud and deceit; (5) unjust enrichment; (6) quasi-contract; (7) breach of implied covenant of good faith and fair dealing; (6) intentional infliction of emotional distress; (9) negligent misrepresentation; (10) interference with prospective advantageous economic relationships; (11) slander of title; (12) accounting; and (13) declaratory relief. *See id.* at 1236, 249 Cal. Rptr. at 498-99.

grounds.[12] Surely, if the decision had been written 200 years ago, the court would have explicitly articulated a natural rights or natural law approach, and the matter would have been settled with little fuss. As this court was sitting in 1988, after a good half-century of "bundle of sticks" thinking about property rights, no such explicit approach would have been conceivable. Instead, the court pondered whether it should "give the patient that right."[13] A natural law jurist would have sought to "find" the law. The difference is subtle but important.

As the court stated, conversion is a strict liability tort, dependent neither on the knowledge nor the intent of the defendant.[14] To state a cause of action for conversion, the plaintiff must allege (1) that he owned or had a right to possess the property at the time of conversion; (2) that the defendant did convert his property by a wrongful act; and (3) that the plaintiff suffered damages thereby. The conversion occurs "without the owner's consent and without lawful justification."[15] The court concluded that, indeed, the plaintiff had stated a cause of action for conversion.[16]

The court's reasoning in reaching this conclusion is a bit of a muddle from a philosophical perspective. It does resonate with phrases that our Founders would have found congenial, such as, "there is a dramatic difference between having property rights in one's own body and being the property of another."[17] Yet, in the very next sentences, it treats the issue of property and one's own body as one that could have been, but was not, settled by the legislature and upon which some future legislature might deign to speak.[18] Given this legislative lacuna, however, the court did proceed to determine the issue much in the manner that a natural rights jurist would have proceeded: by defining the term "property," reasoning by analogy from things that the law definitely does consider property to this

12. *See id.* at 1246, 249 Cal. Rptr. at 505. ("The rights of dominion over one's own body, and the interests one has therein, are recognized in many cases. These rights and interests are so akin to property interests that it would be a subterfuge to call them something else.").

13. *Id.* at 1251, 249 Cal. Rptr. at 508-09.

14. *See id.* at 1244, 249 Cal. Rptr. at 503 (quoting Poggi v. Scott, 167 Cal. 372, 373, 139 P. 815, 816 (1914)).

15. *Id.*

16. *See id.* at 1244, 249 Cal. Rptr. at 502.

17. *Id.* at 1244, 249 Cal. Rptr. at 504.

18. *See id.*

novel issue of cell lines, and by citing cases that deal with the ownership of bodily wastes,[19] body parts,[20] and the right to refuse medical care.[21]

From the cases examined, the court concluded that, indeed, the right of dominion over one's body, the right to exclude others from using it, and the right to dispose of it have been legally recognized.[22] Even though these rights may be subject to limitations, and the court mentioned public health as one limiting rationale, the limits do not negate the property right in one's own person.[23] The court found ironic the defendants' claim that they could have property in Mr. Moore's cells but he could not.[24] They also found suspect the utilitarian claims by the California Regents that if Mr. Moore's right were recognized, medical research and public health would suffer.[25] Fundamental rights, said the court, cannot be overridden "absent lawful authority."[26] While a pure natural rights jurist would have said something even more emphatic, that fundamental rights cannot be overridden even by legislatures, the majority went about as far as a contemporary court could have.

A natural rights approach, then, recognizes a property right in one's own person. In this case, such a recognition leads directly to the conclusion that if Mr. Moore can prove at trial that he did not consent to the use to which the defendants put his bodily substances, then he should prevail on the conversion complaint. Extending such reasoning, it is easy to see how a rights jurist might apply such reasoning to zoning or urban renewal via eminent domain. The taking for urban renewal would be seen as a violation of the owner's property rights, an illegitimate taking from A to enrich B. Zoning would be seen as an illegitimate limitation on an owner's right to use his property as he sees fit.

Now, how might a utilitarian jurist view *Moore*? It just so happens that the dissenting judge in *Moore* employed precisely

19. *See* Venner v. State, 30 Md. App. 599, 354 A.2d 483 (1976).

20. *See* Georgia Lions Eye Bank, Inc. v. Lavant, 255 Ga. 60, 335 S.E.2d 127 (1986); Tillman v. Detroit Receiving Hosp., 138 Mich. App. 683, 360 N.W.2d 275 (1984).

21. *See* Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914).

22. *See Moore*, 202 Cal. App. 3d 1230, 249 Cal. Rptr. 494.

23. *See id.* at 1248-49, 249 Cal. Rptr. at 506-07.

24. *See id.* at 1249, 249 Cal. Rptr. at 507.

25. *See id.* at 1251, 249 Cal. Rptr. at 508.

26. *Id.*

such reasoning and reached the conclusion that the plaintiff had not stated a cause of action for conversion.[27] He argued that discarded body parts and substances are not property. Even if they were, Mr. Moore had abandoned them and therefore could not have suffered any damage from the defendant's research and commercialization of his diseased organ.[28] But what most influenced the dissent was a sense that if body fluids and parts are recognized as property, a market for them will arise. Women will sell their fetuses, and others will sell their vital organs. Medical research will suffer, and shops trafficking in "used body parts" will proliferate. For good measure, he waved the AIDS banner: If patients have the right to forbid use of their discarded tissues or hold out for the highest bidder, then research to fight this killer will be stymied.[29] The legislature ought to resolve these issues by balancing "the vital competing interests of the patient, the health care provider, the commercial research laboratory, and the public at large."[30]

Utilitarians love to balance competing interests, maximize social welfare, and lump together the incommensurable interests of individuals to arrive at the common good. What they abhor is the notion of fundamental rights of individuals that trump considerations of expediency or the supposed "public good." For a utilitarian, *Moore* would be easily dispatched. Great public benefit arises from scientific research derived from the discarded body parts. Thus, Mr. Moore has no claim on conversion; because he has no property right, there was no illegitimate taking of property and, hence, no damages.[31]

Here we have a vivid example of natural rights and utilitarianism leading to diametrically opposite conclusions on a fundamental property issue: self-ownership.

Where might a Paretian stand on the issue raised by *Moore*? Paretian formulations have proliferated in recent years. The original idea was to provide an efficiency standard for govern-

27. *See id.* at 1261, 249 Cal. Rptr. at 540 (George, J., dissenting).

28. *See id.* at 1262, 1265, 249 Cal. Rptr. at 535, 537 (George, J., dissenting).

29. *See id.* at 1272, 249 Cal. Rptr. at 539 (George, J., dissenting).

30. *Id.* at 1273, 249 Cal. Rptr. at 540 (George, J., dissenting).

31. It is perfectly conceivable that an analyst using utilitarian principles might reach an opposite conclusion. The argument would assert that the social benefit lies in protecting property in one's own person as a general rule (if he is a rule utilitarian) or even that in this case the harm to Mr. Moore might outweigh the social benefit (although it is difficult to see how this might be made out). This just demonstrates the elusiveness and subjectivity of utilitarianism.

ment policymaking, particularly welfare policy, that would avoid utilitarianism's disregard for individuals in agglomerating the "greatest good for the greatest number." A rearrangement of resources is considered Pareto-superior to the status quo if no one is harmed by the change and at least one person is better off. A newer version of this standard that has gained adherents, including Richard Posner, is Kaldor-Hicks. This standard avoids the rigor of Paretianism by defining a reallocation of resources as efficient if it enables the gainers to compensate the losers, whether or not they actually do so.

It is clear that on any of these Paretian standards, Mr. Moore would fare rather poorly. To begin with, many people will be better off as a result of the pharmaceuticals developed from Mr. Moore's cell line, including the researchers themselves, the university, and the drug companies, to say nothing of patients whose lives will be enhanced or even saved. Was anyone harmed? Mr. Moore's spleen was diseased, and he wanted it removed—no harm there. Was he made worse off by the follow-up extractions of bodily substances? Presumably there was some therapeutic benefit from the procedures in detecting whether any cancer cells had migrated to other organs of his body. Even if he had been harmed, however, Kaldor-Hicks comes to the rescue, for he could have been compensated for any slight harm with still a huge surplus left over for the gainers. Of course, compensation need not even be paid to him to meet the Kaldor-Hicks standard.

What we have, then, is the failure of two competitors to natural rights, utilitarianism and Paretianism, to protect something as fundamental to the defense of property rights as the right to use, dispose of, and exclude others from one's own body. Does this not make one hunger for a good, solid, philosophical defense of natural rights?