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Das Eigentum als eine Bedingung der Freiheit

Property as a Condition of Liberty

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I. Die naturrechtliche Sicht des Eigentums
The Natural Law View of Property

II. Rechtliche und politische Aspekte
Legal and Political Aspects

Common Law Application of the Philosophy of Property: Where the Rubber Meets the Road

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Introduction

Jeremy Bentham asserted that "property and law are born together, and die together. Before laws were made, there was no property."[1] Perhaps what Bentham meant is that property was not worth two pence absent a rule of law to enforce one's right in that property against the force or claim of another. But what is most interesting about Bentham's statement is that without a claim to private property, and the unique English/American system of creating and enforcing law, we would have no recorded common law analyzing and determining rights in property, whether absolute or relative. Cases decided at common law, arising out of a shared tradition, common sense, generally accepted moral and social principles and, perhaps most importantly, distinct and real facts, consistently and concretely test the breadth of philosophical ideals. Put another way, the razor of the common law shaves and shapes the theories of the philosopher.

There is no shortage of philosophical views on the nature of property. Some suggest that if one properly obtains it, one has a moral right to private property[2] making private ownership a cornerstone on which fundamental freedoms stand.[3] Others go so far as to suggest that the innate desire to own freely, and to the exclusion of others, is deep seated in man's nature,[4] so much so that man

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[1] Jeremy Bentham, *Anarchical Fallacies,* republished in *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man,* edited by Jeremy Waldron (New York: Methuen, 1987), pp. 46, 53.

[2] See e.g., John Locke, *Two Treatises on Government*, edited by Ian Shapiro (New Haven: Yale University Press, 2003), pp. 111–112; Robert Nozick., *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), pp. 150–153.

[3] D. Benjamin Barros, "Property and Freedom," *New York University Journal of Law & Liberty*, vol 4:1 (2009), pp. 36–69.

[4] Robert Ardrey, *The Territorial Imperative: A Personal Inquiry into the Animal Origins of Property and Nations* (New York: Athenaeum, 1966): "[O]ur attachment for property is of an ancient biological order," p. 103.

cannot be completely and truly human without it.[5] Most philosophers who subscribe to this school of thought would likely conclude that wrapped up in property rights are the rights to privacy, security, self-sufficiency and self-determination.

Other philosophers deny that man has a moral right to own, use or exclude others from property, but nonetheless champion property rights for social, economic and political reasons. Most of this group would agree with Hobbes and Bentham that there really is no natural right to private ownership *per se;* rather, rights are created by the sovereign state and/or civil law to provide stability and economic advantage.[6] Equal opportunity for private property encourages a politically stable society and discourages upheaval and revolution because, as de Tocqueville puts it, it constantly increases the "number of eager and restless small property-owners ... [M]en whose comfortable existence is equally far from wealth and poverty set immense value on their possessions. As they are still very close to poverty, they see its privations in detail and are afraid of them; nothing but a scanty fortune, the cynosure of all their hopes and fears, keeps them therefrom."[7]

Still others, from Plato and extending down through Marx and his disciples to the present day, advance the view that collective ownership and central distribution and control best promotes the common interest and inhibits social divisiveness. As Thomas More stated in *Utopia*, "the wise man did easily foresee this to be the one and only way to the wealth of a commonalty, if equality of all things should be brought in and established, which I think is not possible to be observed where every man's goods be proper and peculiar to himself."[8] More counseled that "no equal and just distribution of things can be made, nor that perfect wealth shall ever be among men, unless [private ownership of things] be exiled and banished."[9] Marx taught that society might be required to suffer through some years of modified private ownership, but only as a step on the

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[5] "[T]he instinct of ownership is fundamental in man's nature." William James, *The Varieties of Religious Experience: A Study in Human Nature*, edited by Martin E. Marty (New York and London: Penguin Books, 1982), p. 315.

[6] See e.g., M. Olson, *Power and Prosperity* (New York: Basic Books, 2000): "There is no private property without government – individuals may have possessions, the way a dog possesses a bone, but there is private property only if the society protects and defends a private right to that possession against other private parties and against the government as well." p. 196.

[7] Alexis de Toqueville, *Democracy in America* ,edited by J. P. Mayer, translated by George Lawrence (Garden City, New York: Doubleday, 1969), p. 636.

[8] Thomas More, *Utopia* (New York: Barnes & Noble, 2005), p. 54.

[9] Ibid., p. 55.

path to collective ownership which is the ideal to be sought and the outcome to be achieved.[10]

The ultimate point appears to be that at the bottom of any system of property is a sincere and fervent desire on the part of the philosopher to get at the essence of what it means to be human and how that is best accomplished for the individual and/or the society in which one lives. Unlike philosophy, however, the law is very little concerned with the essence of property itself and very much occupied with social order and justice; the law is constrained by practical application and this, perhaps, makes all the difference.

I. Common Law

The common law is based on judicial decisions which, in turn, are founded on social customs and traditions evolved over time as interpreted and enforced by independent judges. Common law courts typically base their decisions on prior judicial pronouncements not legislative enactments. Judges rely on decisions made in actual controversies to guide them in applying the law. The primary benefits that flow from common law are a high level of certainty, uniformity and predictability in application, combined with flexibility to deal with changes arising from unanticipated controversies.

At common law, rights accrued to those who possess or own property, whether real property which consists of land and any structures built upon the land or personal property which includes all other tangible and intangible items. These rights which run to the possessor and owner are often referred to as a "bundle of rights" because property can be used, owned, or transferred in varied ways for different purposes, many of which actions impact the rights of others. One may possess property without owning it and one may own property without possessing it. Both the possessor of property and the owner of property have rights with regard to the property and they are substantially the same.[11] Further, possession can divest ownership under certain conditions. In the law the relationships of persons to each other on the one hand, and to the particular property on the other, give rise to relative rights both between the persons themselves as well as between the individual and the property. It would be very unusual for the law to find that one has an absolute right, at all times and under all conditions, to the entire "bundle" of rights that accompany property.

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[10] Karl Marx, *Theories of Surplus Value* (London: Lawrence and Wishart, 1972).

[11] The fact that the common law protected possession when the possessor was not also an owner greatly exercised the German philosophic mind. Oliver Wendell Holmes, Jr., *The Common Law and Other Writings* (Omaha: Legal Classics Library, 1982), pp. 206, 246.

II. Philosophical Principles and the Common Law

Let us now look at eight of the decisions of the common law in light of certain philosophical principles.

1.

> Property draws a boundary between public and private power by creating zones within which the majority has to yield to the owner.[12]
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> Private property is merely a creation of the sovereign state and that it has always been that the state ultimately decides who can and who cannot exercise ownership rights with regard to property.[13]

One benefit of property, according to Charles Reich, is that it draws a boundary between public and private power and creates zones where the majority has to yield to the owner. Within these zones individuals are allowed to choose and act as they see fit regardless of how those actions may be perceived by others. Individuals may go to these zones of private property to be free from the outside world. D. Benjamin Barros sees property in this context "as giving the property owner a degree of freedom to withdraw, or exit, from the community."[14] Thomas Hobbes, on the other hand, sees no such moral right. It is the State that decides who can exercise ownership rights, and what the State decides trumps any "natural" claim. Let us consider an early American case that causes one to ponder these principles.

When the American continent was discovered by the European nations, each nation made claims to the land discovered. The nations agreed that the conquered peoples were the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion. Notwithstanding that, the European nations also applied the fundamental principle that discovery gave exclusive title to the discovering nation by virtue of conquest. Humanity demanded and a wise policy required, however, that the rights of the conquered to property should remain unimpaired and that the new subjects should be governed as equitably as the old. After the United States obtained by treaty and acquisition property from Great Britain and Spain it stepped into the shoes of these nations and claimed the right to the land by discov-

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[12] Charles A. Reich, "The New Property," 73 EAL L.J. 733, 771 (1964).

[13] Thomas Hobbes, *De Cive*: *The English Version*, edited by Howard Warrender (Oxford: Clarendon Press, 1983), esp., Chap VI, no.15 (pp. 100–102) and "Epistle Dedicatory", no. 9–10 (pp. 26–27).

[14] Barros, "Property and Freedom," p. 47.

ery and, by extension, conquest. These principles greatly impacted property rights in the New World, as illustrated below.

On October 18, 1775 the Chiefs of the Piankeshaws jointly representing, acting for and duly authorized by that nation, executed a deed in favor of Thomas Johnson and others to a large tract of land primarily lying in what is now Illinois. The Piankeshaw Indians had occupied this land for many years and were recognized as its owners by the Piankeshaws and the colonists. $31,000 was paid and delivered at the time of the execution of the deed and that amount was accepted by the Piankeshaw Indians and divided among themselves. It is undisputed that the transaction was open, public, and fair, that translators were on hand and that the deed fully and accurately recorded the nature of the transaction. Johnson and the others who acquired the land, however, never took actual possession of it, initially because they were prevented by the American Revolutionary War. Following the war, they petitioned newly formed Congress continuously from 1781 to 1816 to acknowledge and confirm their title to those lands under the deeds in question, without success. On July 20, 1818 the United States conveyed by land grant the property set forth in Johnson's deed to William M'Intosh. Johnson brought an action to eject M'Intosh from the land he owned (or so he thought) and the case made its way to the United States Supreme Court.[15]

In considering the question, the Supreme Court found that the United States had an exclusive right to extinguish the Indians' right of occupancy either by purchase or by conquest. The Supreme Court acknowledged that title by conquest is normally limited by humanitarian concerns and that conquered peoples are normally assimilated into the society of the victorious nation retaining title to their property.[16] It held, however, that the Indians did not fall under the general rule, despite the fact that they occupied, possessed, and used the land for many years. It stated:

> the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and high spirited as they were fierce ... That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule ... was unavoidable.[17]

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[15] *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

[16] Ibid., p. 589.

[17] Ibid., pp. 590–591.

The court was mindful how "extravagant" the pretense of converting the "discovery" of an inhabited country into conquest appeared.[18] This was particularly true given that there was never any claim of conquest made prior to the time of sale and all parties recognized the Indians as the true owners with the right to alienate the land as evidenced by the deed itself. But the court did not waiver from its holding that the Indians were merely occupants of the property and had no right to transfer title to anyone.

In *Johnson,* the state, in the form of its law court, ultimately decided that the Indians could not exercise ownership rights with regard to the property they had possessed from time immemorial, even though the law had been followed in every aspect of its transfer. Johnson's deed was worthless. This seemingly runs counter to the Lockean "first occupancy" theory of natural property rights and smacks more of Hobbes's view that we only have those rights the sovereign allows us.

2.

> Though the Earth ... be common to all Men yet every Man has a property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his labour with, and joyned to with something that is his own, and thereby makes it his property.[19]

In what is commonly referred to as Locke's first occupancy theory, where he combines property in the state of nature and the moral significance of man adding his labor to it, we see a moral justification for private property against all who come after.[20] For Locke, the right to private property arises in the state of nature because, although all property is initially commonly owned, an individual obtains a moral right to claim the property by mixing her labor with the object.[21] By doing so, the individual not only fulfills her fundamental duty of self preservation but also increases the value of the resources she works on for the indirect benefit of others. This classic individualism, notes Friedrich Hayek, "first fully developed during the Renaissance [and] has since grown and spread into what we know as Western civilization ... the recognition that [man's] own views and tastes are supreme in his own sphere, however narrowly that may be circumscribed, and the belief that it is desirable that men should develop their

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[18] Ibid., p. 591.

[19] Locke, *Two Treatises,* p. 112, n.1.

[20] Ibid.

[21] Barros, p. 40, n.30.

own individual gifts and bents."[22] Locke's moral justification for property rights would appear to be the most philosophically sound[23] and one would expect the common law courts, descending from this tradition, to agree. Let us consider a few cases.

In *Ghen v. Rich*, 8 F. 159 (Mass. 1881), Mr. Ghen, an industrious whale hunter in Provincetown, shot and killed a fin back whale. Unfortunately, the whale immediately sank and was carried away by the tide leaving him without his treasure. A man named Ellis happened upon the whale washed up on shore 17 miles from where it was killed. Now at that time it was customary, upon finding a whale kill, to send notice out so that the person who actually did the deed would get the spoils. But Ellis was more enterprising. He advertised for the whale's sale and he sold it to Mr. Rich. Rich in turn sold the blubber and the oil. Eventually, Ghen heard through the grapevine that the whale had been found and he sent a boat to claim it, only to find that he was too late. Ghen sued Rich for the value of the whale. Rich did not know that Ghen had killed the whale and he had paid fair price for it. Ellis did not know Ghen killed the whale either, and worked hard to get the whale to market. Ghen, on the other hand, claimed that it was his kill and he had occupancy rights to the whale, even though he never possessed it. The court agreed with Ghen, holding that "if the fisherman does all that is possible to make the animal his own, that would seem to be sufficient."[24] Under these types of circumstances the whale became the property of the captor, not the finder. This ruling appears to be inconsistent with Locke's first occupancy theory: how could Ghen take the whale "out of nature" as his own to the exclusion of others when he never possessed it? This is, in fact, an exception in the common law.

The common law generally holds that pursuit of a wild animal does not vest any rights to the animal, even if the animal is wounded by the pursuer. One does not achieve occupancy until one achieves actual corporal possession: only when "firm possession [is] established by the taker" is the right of property clear.[25] A good illustration of this is *Pierson v. Post*.[26] There, Post and his hounds happened upon a fox in the wild, and chased the fox through the woods. Just as they were about to kill their prey, Pierson appeared, killed the fox directly in front of Post and carried it off for his own. Naturally upset, Post

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[22] Friedrich Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 2007), p. 68.

[23] See: Hans-Hermann Hoppe, *The Economics and Ethics of Private Property*, 2nd ed. (Auburn, Alabama: Ludwig von Mises Institute, 2006), pp. 340–344 [http://mises.org/books/economicsethics.pdf; accessed 12 Dec 2012].

[24] *Ghen*, 8 F. at 162.

[25] *Bartlett v. Budd*, 1 Low. 223 (1868).

[26] 2 Am. Dec. 264 (N.Y. 1805).

brought suit against Pierson claiming that it was his fox. The trial court agreed with Post, as perhaps we all would. However, on appeal the verdict was reversed. However discourteous or unkind the conduct of Pierson towards Post may have been, his act produced no injury or damage for which a legal remedy could be applied. At common law, a property right in a wild animal is acquired by "occupancy only and mere pursuit of a wild animal does not vest any rights to the animal." Here is a case where Post's "first occupancy" was never achieved, despite the labor of his body. Pierson, on the other hand, did little but gained all. To show how difficult these decisions are for judges trying to balance real world problems with settled principles, one need only read Judge Livingston's colorful dissent in the case.[27]

We will consider one more case, this time involving what some would say is an interference with property rights, but whose rights?[28] Keeble owned land that included a pond. Ever enterprising, Keeble set about to lure and catch wildfowl by installing decoys in and around his pond. His neighbor Hickeringill took exception to this, apparently because wildfowl previously attracted to Hickeringill's land now preferred to visit Keeble's pond. So Hickeringill took it upon himself to discharge guns near Keeble's pond to hinder the ducks from coming to the pond. This effort proved successful, much to the dismay of Keeble who sued for damages. Keeble prevailed. The English court found that a landowner may use his pond for his trade of attracting, catching and using wildfowl and one who hinders another in his trade in a malicious manner is liable for damages. The court expressly noted that Hickeringill was certainly within his rights if he set up a competing pond or other attraction to lure and catch wildfowl himself; he apparently overstepped the line when he tried to scare the ducks away. Both men labored in nature: one to attract and the other to divert; one had the right and the other had none.

In each of the above cases, the underlying principle concerned Locke's "first occupancy" theory to some extent. Common law courts recognized the principle as the basis for initial discussion, but veered from it as needed to do justice,

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[27] Judge Livingston ruefully noted: "who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, '*sub jove frigido*,' or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever *Justinian* may have thought of the matter, it must be recollected that his code was compiled many hundred years ago ... In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, 'with hounds and dogs to find, start, pursue, hunt, and chase,' these animals, and that, too, without any other motive than the preservation of *Roman* poultry ..." *Pierson v. Post,* 2 Am. Dec. 264 (N.Y. 1805).

[28] *Keeble v. Hickeringill*, 103 Eng. Rep. 1127 (Q.B. 1707).

create a reliable precedent which balanced the competing interests and to promote social harmony.

3.

> When private property rights are protected, people get ahead by selling productive services in exchange for income.[29]
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> Law ... says [to man]: Labor, and I assure to you the fruits of your labor – that natural and sufficient recompense which without me you cannot preserve; I will ensure it by arresting the hand which may seek to ravish it from you.[30]

Let us now look at a case[31] where a company spends not insubstantial sums of money to design and manufacture patterns for the fashion industry. Yet, as soon as those new designs come out its competitors copy them, undercut the manufacturer's prices and substantially hamper its sales and profitability. What would the common law say about that situation – will it ensure to the manufacturer the fruits of its labor? Will it arrest the hand that may seek to ravish it?

In 1928, Doris Silk manufactured and designed patterns for the fashion industry. The corporation spent large sums on research, design and development and made most of its profits from the relatively few designs that turned out to be popular each year. It was impractical to patent the many new designs, because it was expensive and many did not sell. The designs were impossible to copyright. Always on the lookout for an opportunity, its competitor Cheney Brothers waited to see which design was popular, copied it at the beginning of the season, undercut Doris Silk's prices and made a killing. Accordingly, it got the benefit of the ingenuity and investment of capital made by Doris Silk. Doris complained and said it wanted protection for its designs, at least during the first season in which such designs were introduced. Otherwise innovation would be hampered and people would be unwilling to invest the capital necessary to bring new items to market.

The court was very sympathetic to Doris Silk's predicament, and took a dim view of Cheney's unethical business practices. However, it found itself constrained by the common law rule which is that a person's property is limited to the chattels that embody his invention. Otherwise, intangible rights might arise and necessarily impact the rights of others in their chattels. Doris Silk found itself without any protection of any sort for its pains; at common law others may

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[29] James Gwartney, "Private Property, Freedom and the West," *The Intercollegiate Review* 20:3 (Spring/Summer 1985), p. 43.

[30] Jeremy Bentham, *The Theory of Legislation*, translated from the French of Etienne Dumont by R. Hildreth (London: Trübner, 1871), p. 110.

[31] *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (S.D.N.Y. 1929).

imitate inventions at their pleasure, and gain the benefit from the sale of the knock-offs. Cheney Brothers did not interfere with any of Doris Silk's products, it merely copied the designs, which was well within its rights. The common law, at least as applied here, did not assure to Doris Silk recompense for its labor.

Said the court in closing: "[t]rue, it would seem as though [Doris Silk] had suffered a grievance for which there should be remedy ... It seems a lame answer in such a case to turn the injured party out of court, but there are larger issues than his redress. Judges have only a limited power to amend the law ..."[32] In this case, the court showed the judicial restraint and reliance on precedent which is a hallmark of the traditional common law. Although it was faced with a clearly unjust outcome (in its view), it called out for a legislative solution not a judicial one.

Philosophy is theoretical; the common law is practical and constrained by facts of particular concrete situations. Sometimes it does not have the power to grant justice, even in a compelling case. Doris Silk created products for sale through investment of capital and ingenuity but the law was unable to protect its rights in the fruits of it labor. But as the court said, the law is concerned with issues larger than a litigant's redress, and when it involves a principle at variance with the common law, it is best done by the legislature.

4.

> A person owns himself when he has control over his own body and is entitled to make use of his own body without owing any account or any contribution to anyone else and must be allowed to profit from his own mental and bodily resources.[33]

Echoing Locke, G.A. Cohen argues that a foundational element to private property is that a person owns himself and, therefore, has a right to profit from his own mental and physical processes. After all, the most fundamental of rights to property would seem to be one's right to his own body. This is consistent with the understanding of property as it developed in the common law. But is it always the case?

In *Moore v. Regents of the University of California,*[34] Moore sought treatment for leukemia at the Medical Center of UCLA owned by the Regents. Moore's condition was life threatening and his spleen was removed. What Re-

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[32] Ibid., 35 F.2d at 281.

[33] See: G. A. Cohen, *Self-ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), pp. 68–71.

[34] 793 P.2d 479 (Cal. 1990), *cert denied,* 499 U.S. 936 (1991).

gents knew in advance, but did not tell Moore, was that his cells were unique and had significant scientific and commercial value. After the operation, Regents retained Moore's spleen without his permission or consent and for seven years tested, sampled, and otherwise used Moore's blood, tissue, and other fluids for research from which a cell line was established. Regents obtained a patent, the commercial value of which was estimated in the billions. Understandably upset when he found out about it, Moore sued Regents for conversion, alleging that his blood and bodily substances were his "tangible personal property." But the court disagreed. It found that Moore had neither title nor possession of the "property" and therefore could not maintain an act for conversion. We scratch our heads and wonder how this could be. After all, it was Moore's spleen that was taken out of his body and if one does not possess one's spleen, one must wonder if one possesses anything. In fact, this was the line of reasoning the dissent followed.[35] As to the patent rights, the majority found that Regents had developed a particular line of Lymphokines that are the same molecular structure in every human being and therefore they are not unique to Moore. Further, California law limited a patient's control over excised cells and restricted their use and required their eventual destruction, thus limiting many rights one might ordinarily find attached to property. The court concluded that Moore had no expectation of continued ownership in his excised cells and, at several points, it suggested that a removed body part, by its nature, may never constitute "property" for purposes of a conversion action.[36] While Moore was permitted to maintain an action for breach of fiduciary duty and informed consent, he had no action for conversion.

In *Moore,* the court, primarily for policy reasons, did not agree that a person must be allowed to profit from his own mental and bodily resources. At the same time, the court did not leave Moore without potential recovery by allowing him to proceed with other claims. This and similar cases test the principle that one has a property right in, and is free to do what one wishes with, one's body and mind, and need not account to anyone for that activity.

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[35] The dissent stated: "it is also clear, under traditional common law principles, that this right of a patient to control the future use of his organ is protected by the law of conversion. As a general matter, the tort of conversion protects an individual not only against improper interference with the right of possession of his property but also against unauthorized use of his property or improper interference with his right to control the use of his property." 793 P.2d at 502.

[36] Ibid., pp. 489–491.

5.

> The first element of property rights in particular things is that they are rights that are good against the world, wholly without the consent of any other individuals. Unless that condition were satisfied, it would not be possible to create and secure entitlements in land, structures, equipment, or indeed any form of personal property. No individual could claim to be owner of him or herself, so that no one would be in a position to bargain with everyone else to secure their own bodily protection or the ownership of external things that they acquire in all legal systems by taking first possession of otherwise unowned objects.[37]

The West has always protected possessors of property who do not own it for many different reasons. Indeed, one who possesses land he does not own has a right superior to all others except than the owner. The common law policies for this are many and include the need to maintain peace and order, to give effect to the expectations of a person who has asserted a right in a thing until another person comes along with a better right, to protect ownership, as possession makes it easier for an owner to prove title and to achieve economic efficiency in settling claims and encouraging full use of resources. How does this square with the principle that the first element of property rights is that they are good against the world? And exactly what constitutes a property right? or example, if I purchase a house and land in fee simple, do I own everything transferred within the house and on the land?

In 1938, Peel bought a large home but never moved in. In 1940 it was requisitioned by the military in England during World War II. During the war, Hannah was stationed in the house, during which time he discovered a brooch in a room being used as a sick bay. It was in an obscure place, covered with dirt and unclaimed. Ever dutiful, Hannah gave it to the police. A couple of years later, the original owner never having been found, the police gave it to Peel as owner of the property where the jewelry was found. Peel sold it for a substantial sum. Hannah found out about the sale and took objection to Peel getting the benefit of his find so he sued Peel. Hannah claimed to have a right as founder superior to Peel as owner of the freehold on which it was found. Peel scoffed at the claim; he owned the house and had possession and control of everything within it. Therefore, he argued, the brooch was his.

The court struggled with the case because the common law had a split in authority as to who had superior title: the finder or the owner of the property on which it was found (assuming the owner of the personal item did not also own

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[37] Richard Epstein, "Property Rights and the Rule of Law, Classical Liberalism Confronts the Modern Administrative State," Hoover Institution Task Force on Property Rights, (6/29/09), p. 7 [http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website__academics__colloquia__legal_political_and_social_philosophy/documents/documents/ecm_pro_062726.pdf], accessed 10 Dec 2012.

the home). One line of cases found that a landowner possessed everything on the land from which he intends to exclude others while another line of cases held that a landowner possesses only those things over which he has control. The court concluded that an owner possesses everything attached to or under his land but does not necessarily possess everything that it unattached on the surface of his land.[38] Therefore, the court found that Hannah was the rightful owner of the brooch, despite the fact that Peel owned the home in which it was found.[39]

This ruling by the honorable English bench notwithstanding, let us consider the case of Mr. Ganter who purchased a dresser for $30 consigned by the Kapiloffs for sale at a used furniture store. Ganter took it home and cleaned it out and in doing so found some old magazines and newspapers as well as some old stamps. He did not pay much attention to them, thinking that they were junk; fortuitously, however, he did not throw them out. A friend urged him sometime later to have the stamps appraised, which he did in 1982 and was quite surprised at his substantial find. The stamps were consigned for sale and they were advertised for sale at a price of $150,400. Who should suddenly appear but the Kapiloffs who saw the advertisement, claimed to own the stamps and demanded their return. Somehow, the Kapiloffs had left these valuable items in the dresser when they had consigned it for sale and forgot all about them. Mr. Ganter vigorously opposed the claim. After all, it was his dresser now, he had bought it at a used furniture store, and anything in the dresser was his. He refused to return the stamps.

The common law has long held that one who finds lost personal property holds it against all the world *except* the rightful owner. Ganter had the right to exercise ownership rights in the stamps against the whole world except against the Kapiloffs, who proved themselves to be the true owners. Once the Kapiloffs made claim on the stamps, and convinced the court that they owned but lost them, Ganter's property rights in the stamps ceased. Further, once Ganter failed to return the stamps he put himself in danger of being liable for converting private property as well as larceny.[40] If the court concluded the stamps had been abandoned, the outcome would likely have been different, since one who abandons property no longer possesses an ownership interest in it.

Both of these cases test the definition of "unowned." Are the rights of a finder of lost personal property in the house of another superior to the rights of

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[38] *Hannah v. Peel*, K.B. 509 (1945).

[39] But see, *McAvoy v. Medina*, 93 Mass. (11 Allen) 548 (1866), where in a rather obscure opinion, the Court held that as to a pocket book left on a barber's table, the barber had a better right than the finder, the distinction apparently being that the item was found in a public place of business not a private home.

[40] *Ganter v. Kapiloff*, 516 A.2d 611 (Md. 1986).

the owner of the house in objects found on his property? Apparently so, even though the property owner has superior rights to the space wherein the object was found. It seems a court could just as easily find that the object was not "unowned" precisely because it was in home of another, and the original owner of the object was nowhere to be found after a diligent search. But at common law the rights of the finder must always give way to the true owner because personal property is not "unowned" simply because it is lost and not presently possessed by the owner.

6.

> The only set of rules that achieves the goal of protecting private property rights is one that requires of all persons that they forbear from interfering with the property rights of any other person.[41]

It is key, according to Richard Epstein, that the bundle of property rights which accrue to an owner be defined in ways that allow them to be known and observed by all others even where no personal communication is possible. Further, it is absolutely critical that a set of rules be developed that requires all persons to forbear from interfering with the property right of others. But is this always the way of the common law, at least insofar as it relates to real property? Let us consider adverse possession, a creature of the common law, which allows one to obtain fee simple title to property against all, including the true owner, simply by acting as if one were the true owner for a period of time. At common law, productive use and protection of private property were paramount and if an owner failed to take action to evict trespassers, it was better for the trespasser, who used the property, to own it. In short, interference by trespass is implicitly encouraged and, if unopposed over time, converts an unlawful use into fee simple ownership.

In 1946 Gorski entered land under a contract to purchase.[42] The land was conveyed to Gorski and her husband in 1952. During those six years Gorski's son improved the property. One such improvement encroached upon Mannillo's land. Over 20 years later, Mannillo filed a complaint seeking an injunction against the trespass, to which Gorski responded that he had obtained title to the property by adverse possession. Mannillo countered that Gorski could not have obtained title adversely because he (Gorski) never even knew he was trespassing and therefore did not intend to acquire title. The New Jersey Supreme Court sided with Gorski. It stressed that the very nature of the act of entry and possession is an assertion of one's title to the property and denial of title in the

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[41] Epstein, p. 8, n.53.

[42] *Mannillo v. Gorski,* 255 A.2d 258 (N.J. 1969).

owner. It does not matter if the adverse possessor is mistaken, the result is the same: the owner is ousted from possession and if she fails to attempt to recover possession within the required time, the trespasser becomes the owner in fee simple.[43] Gorski divested Mannillo of title precisely by interfering with Mannillo's property rights for an extended period, even though he never intended to do so.

The same holds true even if the trespass only involves a limited use of another's property. Hester and Sawyers were neighbors who owned adjoining parcels of land. Sawyers used a road (the "old road") that crossed a portion of Hester's land with Hester's permission. The old road was Sawyers's only access to his property. Due to a fence later constructed on the eastern portion of the land, Sawyers could not use the old road for which he had permission from Hester. Ever enterprising, Sawyers built a new road, this one entirely on Hester's property and this time without Hester's consent. Sawyers went merrily along, maintained and used the new road for over ten years, until Hester asked Sawyers to change the road to interfere less with his property. Sawyers agreed and began grading a new road. But Hester was not happy with the second new road either and built a fence blocking all access. Upset, Sawyers tore down the fence Hester had erected. Hester went to court to get Sawyers off his property. Sawyers claimed that he had acquired the right in perpetuity to use the new road. Hester responded that he had granted permission to Sawyers so Sawyers was never trespassing on his land and could not, therefore, obtain title by adverse possession. The court sided with Sawyers holding that Sawyers had acquired title by prescription to that portion of the new road that he had used for over ten years. While Sawyers had permission to use the old road, and could never gain title by prescription once he had permission to that, he never had permission to build the new road. Sawyers kept the new road graded and in repair and used it continuously for over ten years. By doing so he obtained title to it. Once again, the common law encouraged and rewarded interference with property rights as a matter of public policy. It is more important to society that property be productively used and cared for than one's natural right to possess property be affirmed.

[43] This is the majority rule. A minority of courts require intent to establish adverse possession based on precedent peculiar to that jurisdiction. See e.g., *Van Valkenburgh v. Lutz*, 106 N.E.2d 28 (N.Y. 1952).

7.

Private ownership encourages individuals to develop and employ resources in a manner that is most advantageous to others.[44]

It has been suggested by many libertarian philosophers that among other things, private ownership encourages individuals to develop and employ resources in a manner most advantageous to others.[45] In free market economies, where property rights are recognized, allocation of resources is made on a decentralized basis by numerous market actors, with diversified goals and objectives yet with one common motive: to maximize profits from productive use of resources. Contrast this with a socialist market based on collective property rights and it can be readily seen that individuals acting in a socialist market have no incentive whatsoever to maximize profits or to act efficiently. Often their motivations will be completely separated from the economic question of determining the most efficient and appropriate allocation of market resources. For example, if all have equal permission to use a common piece of land, but no duty to preserve any particular piece of it, none has an incentive to plant crops or care for the land or pay for the cost to do so. Conversely, when common land is taken private, separated and distributed to individuals, each of whom has the exclusive right to use and control the activities on the land, it will likely be productively used.

But let us consider this premise a bit more closely. The common law is replete with evidence that the ownership of private property often encourages individuals to develop and employ resources in a way that is most advantageous to the owner and *not* to others. As far back as the reign of Queen Elizabeth, for example, the law recognized the natural inclination of market participants to increase profits by privately restraining trade and eliminating competition. For that reason, any contract in general restraint of trade was void as being contrary to public policy, regardless of its apparent economic benefit.[46] No shortage of fact patterns emerge in the common law illustrating man's ingenuity to use private property in a manner most advantageous to *himself* and to the detriment of others. Horizontal restraints of trade, vertical restraints of trade, price fixing, boycotts, and combinations to destroy competition, monopolize, or corner the market all increase in a free market. Any one of these is arguably economically and socially disadvantageous to others and often, if not always, deprives an-

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[44] Gwartney, p. 43, n.45.

[45] Ibid. See also: Garrett Hardin, "The Tragedy of the Commons," *Science,* 162 (1968):1243–1248.

[46] See *Mogul Steamship Co. v. McGregor*, 23 Q.B. 598, 617.

other of his free use of private property.[47] And these were often done on a small scale among minor merchants in inconsequential towns throughout England, and not always on the scale of the Standard Oil Trust.

At common law, the general principle was that any contract that restrains trade was unlawful unless shown to have been made upon adequate consideration and upon circumstances both reasonable and useful. It was generally acknowledged in the law that the public interest is superior to private, and that all restraints on trade are injurious to the public in some degree. That did not make them any the less common.

A paradigm for this is the case of *Keeler v. Taylor*.[48] There, Keeler agreed to instruct Taylor in the art of making platform scales and to employ him in that business at a set wage. In turn, Taylor agreed that he would pay Keeler $50 for each and every scale he thereafter made for any person other than Keeler, or which should be made from information Taylor imparted to others. Keeler did not want Taylor to take the know-how imparted to him by Keeler and compete with him. This arrangement was held to be an unreasonable restriction upon Taylor's labor, and therefore void, as against the public interest. This case is but one of thousands of cases at common law illustrating this type of market action.

Another example is *Morris Run Coal Company v. Barclay Coal*.[49] In that case, certain mining companies combined by private contract to control the entire production in two large mining regions. As a result, the cartel controlled the price and supply over vast markets, causing an increase in price and decreased competition. It is fairly obvious that in cases such as this, private ownership encourages the employment of resources to benefit the owner and his confederates, and few others. Indeed, the collective activities among private market participants in the manner described above is not far different from the centralization of decision making in a communal property system because it limits the ability of individuals to freely make resource distribution and acquisition decisions.[50]

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[47] According to Ludwig von Mises, while it is generally true that a market economy produces the highest possible standard of living, this will not happen if any firm succeeds in securing monopoly prices for its goods, and the market cannot itself produce the goods of law and order. Hoppe, *Economics and Ethics,* iPad version.

[48] *Keeler v. Taylor*, 3 P.F. Smith 467 (1866).

[49] *Morris Run Coal Co.*, 68 Pa. 173, 1871 WL 10919 (1871).

[50] While most economists hold this view, some argue that on the free market no price can be identified as monopolistic or competitive. Hoppe, *Economics and Ethics,* iPad version. Further, the state can never "correct" such perceived economic inefficiency in a free market. See, e.g., Murray Rothbard, *Man, Economy, and State* (Los Angeles: Nash, 1972), p. 887. "[T]he view [that free-market action must be brought back into optimality

8.

> The difficulties with the modern approach to the rule of law are only aggravated by the light regard paid to traditional property rights in the new legal order ... [T]he incidents of ownership were accounted for in the private law setting. Any government that respected these equally could only strip any of those rights away for some definable reason that involved either the prevention of nuisances or the provision ... of compensation.[51]

Professor Epstein rightly states that private property rights are not absolute, regardless of origin, and the common law always recognized this. The law of nuisance in particular affords no rigid rule to be applied in all instances. It is an equitable doctrine with remarkable elasticity that undertakes to require only that which is fair and reasonable under all the circumstances.[52] A good example of this in action is *Spur Industries, Inc. v. Del E. Webb Development Co.*[53] There, Spur Industries owned and operated a cattle feedlot for many years far from any housing developments. As Arizona became more populous, Del decided to develop a housing sub-division down the road from the cattle feedlot, including retirement villages. There was demand for Del's housing units and the sub-division began to spread in the direction of the feedlot. That is when the problems began. Not surprisingly, the homes closest to the feed lot enjoyed the characteristic noxious odors and flies that frequent such establishments. Del began to suffer reduced sales of those homes closest to the cattle yard, which it did not take kindly to. So it brought suit to enjoin Spur Industries from conducting its business claiming it was a public nuisance. Del argued that housing was important and persons who live in their houses should not suffer from the sights, sounds, and smell of a cattle yard. Spur argued that it owned and operated the business long before Del came to town, that it had set up far from any residential dwellings and it should be allowed to continue to own and operate its property as it always had done.

The Supreme Court of Arizona reluctantly agreed with Del. In Arizona, anything that constitutes a breeding ground for flies and is injurious to the public health is a public nuisance. The feedlot fell within this ambit. Further, a business becomes a public nuisance by being carried on at a place where the health and convenience of populous neighborhood begins to be affected. There was no

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by corrective State action] completely misconceives the way in which economic science asserts that free-market action is *ever* optimal. It is optimal, not from the standpoint of the personal ethical view of an economist, but from the standpoint of the free, voluntary actions of all participants and in satisfying the freely expressed needs of the consumers. Government interference, therefore, will necessarily and always move *away* from such an optimum."

[51] Epstein, p. 25, n.53.

[52] *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 488 (1914).

[53] 494 P.2d 700 (Ariz. 1972).

question that the owners of the homes closest to the feed lot were affected by its operation. Accordingly, Spur was required to shut down its business and move, not because of any wrongdoing on its part, but "because of a proper and legitimate regard of the courts for the rights and interests of the public."[54] Del, on the other hand, was entitled to relief, "not because it was blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City."[55] The court stressed that it did not "legally or equitably follow, however, that [Del] being entitled to the injunction, is then free of any liability to Spur."[56] Because it had brought people to the nuisance by building the homes, Del was required to indemnify Spur for the reasonable expense of moving or shutting down its business. In this case, the common law stripped away private rights to protect the public, but required just compensation in a private setting. This may not have been a philosophically sound decision but it certainly was a practical one.

Conclusion

It is plain from the above discussion that in many respects the common law shares common ground with western philosophical principles. Indeed, the basic premise of private property rights is enshrined in the common law. But such rights are not absolute and the law will not hesitate to deviate from a strictly theoretical principle when delivering justice, even when it means leaving comfortable ground and forging ahead into uncharted territory. Unlike philosophers, common law judges must adhere to tradition while ever dealing with practical contingencies and real complainants, such as Mr. Ghen who lost his whale, Mr. Post whose fox was purloined, Mr. Johnson who was divested of title to a vast tract of land and Doris Industries, whose designs were copied. Even though philosophical principles guide the application of justice in concrete cases, concrete application in the service of tangible justice proves often to be both the material out of which philosophical theories are born, and their measure. And so, while philosophical principles juxtaposed to common law decisions may be logically sound and theoretically tenable, the most pressing question should be: are they capable of practical application and, if so, to what extent? The answer to that question is best found in the common law. The common law, without a critical awareness of its philosophical mandate and thus its ideal purpose, would be left to poke haphazardly after "just" verdicts, making a farce of "rational" human society. But we have seen, on the other hand, that abstract phi-

[54] Ibid., p. 708.
[55] Ibid.
[56] Ibid.

losophical investigation, if it does not carefully attend to its roots in the concrete business of human society, is just as apt to render justice laughable by positing ideals which are ideally sound but quite simply foreign to human coexistence as it really is. No philosophy is prepared a priori to deal justly with ambiguously stolen foxes, stealthily pilfered whales, and reeking cattle, in the complex context of a deeply interconnected societal network.

Summary

Any system of philosophy necessarily deals with the essence of property and man's interaction with it. While there generally seems to be a sincere and fervent desire on the part of the philosopher to explore human activity vis-à-vis the material world so as to better understand who and what we are, quite often these explorations result in idealistic conclusions which are not susceptible to practical implementation. Unlike philosophy the common law is very little concerned with the ideal and very much occupied with social order and justice. Based, as it is, on judicial decisions which, in turn, are founded on social customs and traditions evolved over time as interpreted and enforced by independent judges, there is a necessary flexibility to the common law which, at times, moves away from the ideal and more toward the practical. To illustrate this phenomenon, this paper looks at certain common law decisions decided at a specific time in a specific place in light of philosophical principles which deal with the same or similar question. It becomes readily apparent that, while the common law shares common ground with western philosophical principles, private property rights are not absolute and the law will not hesitate to deviate from a strictly theoretical principle when delivering justice.

Zusammenfassung

Jedes philosophische System befasst sich notwendigerweise mit dem Wesen des Eigentums und wie der Mensch damit umgeht. Es ist verständlich, wenn vonseiten der Philosophen ein aufrichtiges und brennendes Interesse besteht, das Handeln des Menschen in die materielle Welt hinein zu erforschen, um besser zu begreifen, wer und was wir sind. Häufig verbleiben diese Überlegungen in einem idealistischen Bereich, ohne große Bedeutung für das praktische Verhalten. Anders als die Philosophie befasst sich die Rechtswissenschaft weniger mit der idealen Welt und sehr viel mehr mit dem Recht und der gesellschaftlichen Ordnung. Sie beruht auf rechtlichen Urteilen, die wiederum auf soziale Sitten und Traditionen, die sich im Lauf der Zeit entwickelt haben, zurückreichen und von unabhängigen Richtern interpretiert und angewandt werden. Das Rechtssystem erhält dadurch eine notwendige Flexibilität, die bisweilen vom Ideal abweicht und mehr den Erfordernissen der Praxis entspricht. Um dieses Phänomen zu erklären, werden Gerichtsurteile herangezogen, die unter bestimmten Voraussetzungen im Licht der philosophischen Prinzipien gefällt werden, die dieselben oder ähnliche Sachverhalte betreffen. Es wird deutlich, dass das common law eine gemeinsame Wurzel mit den philosophischen Prinzipien der westlichen Welt besitzt, dass aber die Privateigentumsrechte nicht absolut sind und deshalb die Rechtsprechung nicht zögert, von den theoretischen Prinzipien abzuweichen, wenn es die Gerechtigkeit verlangt.

III. Wirtschaftliche Aspekte
Economic Aspects