

Prof. Cohen and I are flipping the last class. His will be here on Friday; mine will be in WCC Room 1015 at 10:20 on Mon. Dec. 2. There will be a Q&A session Fri., Dec. 13 (the day after your CivPro the exam) from 5:00-6:30, room TBA. During the reading and exam periods, I will try to answer questions that you send me by email (rspang@law.harvard.edu). I'll take your name out of the question and post your question and the answer on the course website under [Assignments and Discussion](#). There are many there now, arranged by topic. Most of them come from last couple of years. They are all good questions (I won't comment on the quality of the answers); you might want to take a look at them before sending me one. As some of you have already noticed, there's a section of the website called [Examinations](#). It contains some sample objective questions with suggested answers and four essay questions given in recent years with quite elaborate memos describing what I was looking for and what I got.

We've taken a look at some historical theories of property. Let's now take a look at some more modern ones. I realize that for some of you this theoretical material is totally new and for some of you it is old hat. The cases are all classics; they inform legal thought about property even if they are not cited. The relationship between the abstractions represented in the extracts from the theoreticians and the cases is much more problematic. I think that the abstractions are influential, even if the judges don't use them explicitly and even if they don't know where they come from. That suggests that the lawyer can be one-up on the judges if he or she knows where they come from, and particularly what some of the consequences of them might be. That doesn't mean that you ought to cite them by name either in an argument in court or on an exam. If it comes up naturally, you may, of course, make use of them in either context, but it's probably better to do so without the names. Bentham, Demsetz, Hegel, and Marx are not legal authorities. Reich, in some sense, is, but even he has to be mentioned with caution.

I. PROPERTY AND THEORY—BENTHAM, DEMSETZ, AND *SHELLEY*

1. Bentham and utilitarianism

- a. How does property begin? Property as a creature of the state.
- b. What are the consequences of Bentham's view for either Pufendorf or Locke?
- c. Morality, legality, wisdom of redistribution: distinguish property from other forms of legally protected entitlements?

Some thoughts on question 1a. Initially, Bentham seems to suggest that all property is dependent on the law. If there were no law, there would be no expectation of property. The law comes first, the expectation second. Bentham then goes on to suggest, however, that there is a certain natural expectation of property, but that this expectation is precarious, dependent on the force of the person who has the property. It is only with law that property can become secure. All of this would seem to suggest the legislator (or the judge in a common-law system) has complete power to change the law. The law giveth and the law taketh away, blest be the name of the law (cf. Job 1:21). That's a travesty of a quotation from the book of Job. Those who know the original of that quotation will also remember that that the man who said it was not in a totally happy situation.

Some thoughts on question 1b. So what is the consequence of saying this? A total, I would suggest, denial of natural law. Bentham's idea that property is the creature of the state is widely accepted today. The idea may come directly from Bentham or it may come via Holmes. "For legal purposes a right is simply the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear on those who do things said to contravene it." The problem is that this fact has caused considerable difficulty, as we have seen, in the field of constitutional interpretation. The Constitution is a document much more imbued with the spirit of Locke than it is with that of Bentham.

Some thoughts on question 1c. In the last paragraph, however, Bentham suggests that whatever the legislator's *de facto* power over the law may be, he ought to respect the expectation to

which property has given rise. Why this is so is not completely clear. Bentham goes no further than to say that protection of that expectation is essential to the happiness of society, and its disturbance produces a proportionate sum of evil. The interesting thing about Bentham's foundation of property in expectation is the fact that it really does not distinguish between property and other forms of rights. One has an expectation that one may be free from assault or that Jones will pay the \$5 which he has promised to pay. These could be the subject of legitimate expectations which the legislator ought to protect. Nonetheless, Bentham's view is fundamentally conservative.

2. Dsemsetz and utilitarianism

- a. How does property begin?
- b. Why should we want efficiency?

Some thoughts on question 2a. In Demsetz, we have another story of the origin of private property, a story which can be instructively compared to Blackstone's (p. S35) and Locke's (p. S41). Unlike Blackstone and Locke, Demsetz does not posit individual property as existing before society. Rather, society comes to the notion of individual property when it realizes that the transactions costs inherent in communal property are interfering with efficient resource allocation. The Kennedy & Michelman piece (p. S583), while not denying that this is possible, emphasizes that the efficiency of private property is contingent on the facts. It cannot be assumed *a priori* that the private solution will always be conducive to efficiency.

I would suggest, however, that we are becoming painfully aware of the number of situations in which communal property can have deleterious effects. The Montagnards apparently realized before it was too late that the beavers would be gone if they didn't change their system of communal ownership of hunting rights, and their decision to privatize them apparently worked. Let us hope that we are not too late in realizing that our treatment of the ambient atmosphere as a dumping ground has imposed externalities that could threaten our very existence on the planet.

Some thoughts on question 2b. But why would we want efficiency? If we got deeply into that we might be here until Christmas. I confine myself here to the observation that Demsetz is substituting maximization of wealth for Bentham's maximization of happiness.

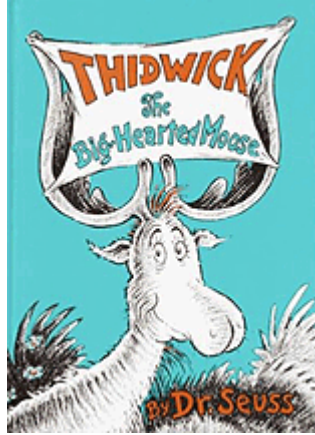
3. *Shelley v. Kramer*

- a. At a minimum this case involves the Bentham/Holmes realization that the law makes the right.
- b. How does the court get there?
 - i. *Buchanan*
 - ii. *The Civil Rights Cases*
 - iii. state action as substantive accommodation (*Moose Lodge*, p. S611)
- c. The dinner invitation
- d. *Barrows* (damages), *Barringer* (fsd), *Smith* (x.i.), *Evans* (cy pres)
- e. How would Demsetz decide *Shelley*?

II. PROPERTY AND THEORY—HEGEL AND REICH

1. Hegel

- a. How does property begin?
- b. How does Hegel justify unequal distribution of property? (Thidwick the big-hearted moose)



Some thoughts on question 2.1. Hegel's theory involves, in a way, a return to the occupation theory. His theory may be contrasted with Locke's in that Hegel justifies unequal distribution not on the ground of the benefit to society as a whole, but on the ground that people's wills are unequal. Having perceived this, we might be quite ready to say that Hegel was a fascist. Certainly German idealism has been accused of leading to fascism, and the purpose of the Note (pp. S591-92) is to suggest that Hegel's theory, when viewed as a whole, particularly in the light of his notion of the general will and of civil society, heads in a different direction. All wills are not equal, but it is the function of civil society to protect the will of the individual, and the device by which it does this is by protecting private property. While one may see how a distortion of Hegel's ideas can lead to fascism, one can also see how an application of his ideas can lead to the fourth amendment and its protection of privacy.

2. Hegel as clue to some really puzzling aspects of the takings problem.
 - a. Hamburger Heaven. A small commercial establishment is operating in an area that is now zoned residential. If the establishment is required to shut down, has there been a taking? The question is not open-and-shut, but as we saw in our discussion of non-conforming uses, there is considerable uneasiness with land-use regulation that requires changes in existing uses. Now let us suppose the same piece of land in the same area, but the commercial establishment has not been built. The zoning regulation is passed. A taking? Certainly not.
 - b. Two Cadillacs. Suppose that we finally decide that the dangers to the environment and the consumption of fuel caused by automobiles are simply too great. We've got to cut down on driving cars. In the first attempt to do so we pass a statute that says that everyone who owns two cars will turn one of them over to the government. Has there been a taking? Of course, in both the legal and the social senses. Now suppose that rather than having the second cars turned over to the government we simply impose a very heavy tax on the ownership of a second car, so heavy that the effect of the tax approximates that of requiring that it be turned in to the government. Has there been a taking? Almost certainly not, in both a legal and a social sense. Now suppose that instead of taxing second cars or having them turned in to the government a regulation is passed requiring that second cars be kept in the garage. A taking? Well, maybe. It's certainly not as clear as the other two cases. Perhaps we might want to say that where the owner has been deprived of all reasonable use of his property there has been a taking. But from the point of view of "scientific policy-making" all three situations are virtually the same. The purpose of the regulations is the same; their effects are the same. Whether or not they meet the policy-makers' criteria will not depend, normally, on the fact that appropriation

is the mechanism used in the first case, taxation in the second and regulation of use in the third.

3. *Flemming*

- a. Why is Nestor's Social Security claim not property?
 - i. Funding system
 - ii. Largesse vs. legislative institution
- b. Why was Nestor not denied due process —> = protection, special scrutiny?
- c. Hohfeld and *Flemming*

4. Reich

- a. In what way is Reich an Hegelian?
- b. What does Reich mean when he says that Social Security payments and taxicab medallions should be property?

Some thoughts on Reich. The famous article by Charles Reich made a considerable splash when it came out. The article was written in an extended reaction to *Flemming v. Nestor*, and the argument of the article was that we had to protect government grants like Social Security as property because these were essential to the self-realization of modern people. I am inclined to think that Reich should be categorized as an Hegelian. One may regard that view as paradoxical or simply perverse. Certainly Reich underplays the sheer force of will by which a person appropriates property. On the other hand, Reich and Hegel are in accord that the protection of property is a surrogate for protecting the individual him- or herself. If property is not protected, the individual is diminished because s/he has extended his/her will to include the objects are property. If the cab medallion and Social Security payments which people expect to become theirs and have extended their wills toward are taken away, the people from whom they are taken away are somehow diminished.

But if we say that Social Security payments and taxicab medallions should be property, what does that mean? Does that mean that they ought, necessarily, to be conveyable? Certainly, Reich does not talk about this matter; rather, he focuses on the constitutional protections which are accorded property. Government largesse should be regarded as property in the sense that it should not be taken away without due process of law. On the other hand, if we focus on Social Security, Reich's argument would certainly deny the paternalism which is inherent in the notion the we should not allow people to convey Social Security. By denying people the essential element of property with regard to Social Security, society is diminishing their wills. The way to make people responsible is to increase their wills by increasing their property. At this point, however, Reich and Hegel part company. Hegel is keenly aware that all are not equally capable; Reich, on the other hand, at times, seems to suggest that apparent differences in persons' capabilities are contingent. The colonel's lady and Judy O'Grady are sisters under the skin. (That's from what is perhaps the most politically incorrect poem in the English language: Rudyard Kipling, 'The Ladies'.)

The Reich article proved to be influential. In 1970 in *Goldberg v. Kelly*, 397 U.S. 254 (1970), with citations to "The New Property," the Supreme Court held that the termination of welfare payments without a hearing violated the Fourteenth Amendment's due process clause. We suggested that *Flemming* might be regarded as involving two issues: whether there had been a taking of Nestor's property and whether Nestor had been deprived of property without due process. If the meaning of the word "property" in the two phrases were the same, there would be no need to consider the second question once we had decided in answering the first that there was no property involved. Recent due process cases have tended to confirm the notion that interests which would not qualify as "property" under the takings clause may still be sufficiently like property (or "liberty") that the state cannot deprive an individual of them

without some kind of due process. The precise contours of the concept of property and that of due process are by no means clear, however. In 1976 in *Bishop v. Wood*, 426 U.S. 341 (1976) the Court held that a city employee, despite his status as a ‘permanent employee’, was not entitled to notice and hearing on the reasons for his dismissal. At least some commentators saw the case as a rejection of the very concept of the “new property.” The “new property” concept may not be robust. It is not dead. There are many cases both before and after *Bishop v. Wood* which require procedural protection to be accorded one who is being denied government benefits. There’s a fairly long note on the topic in the materials (p. S609–611).