I. PROPERTY AND THEORY—HEGEL AND REICH CLEANUP

1. The poet and the Hegelian personality theory of property:

"Some thirty inches from my nose
The frontier of my Person goes,
And all the untilled air between
Is private pagus or demesne.
Stranger, unless with bedroom eyes
I beckon you to fraternize,
Beware of rudely crossing it:
I have no gun, but I can spit."

W. H. Auden "Birth of Architecture"

2. *Flemming v. Nestor* – Justice Black's dissent. Property for purposes of the takings clause vs. property for purposes of the due process clause.

3. Some thoughts on 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?

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 might 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).

II. PROPERTY AND THEORY—MARX

1. Marx

a. What’s the argument of the *Communist Manifesto*?

b. To what extent is Marx an Hegelian?

The Communist Manifesto is, of course, not a justification of property, at least on its face, but rather one of the most violent attacks on property that has ever been launched. Despite the violence of its rhetoric, however, the excerpt is quite tightly reasoned. Fundamental to the argument is the factual assumption concerning the class struggle. If this is not true, then the rest does not follow. On the other hand, if this is true, then a great deal of Marx’s argument can be fitted into quite traditional thought. Marx does not argue that a person should not have property in the product of his or her labor; quite to the contrary, he states that his proposal is designed to achieve just that. He does not deny that the function of society is to protect the will of the individual; indeed, it is precisely because he wishes to protect the will of the proletariat, à la Hegel, that he argues for the abolition of the property of the bourgeoisie. While Marx focuses much more on the general will than on the individual will and would put productive property (as opposed to property for personal use) at the direct command of the general will rather than of the individual will, his arguments can be fitted into a basically Hegelian framework. There is, of course, considerable irony in this. Marx hated Hegel.

c. Where do Demsetz and Marx disagree?

Where do Demsetz and Marx disagree? This question is not as easy as it seems. Demsetz is not arguing for individualism, at least not expressly, while Marx is arguing for collectivism. Demsetz is arguing, perhaps with reference to Locke, that the maximum benefit from the resources which are at society’s disposal comes from private rather than collective ownership of property. Marx’s basic objection is to the present unequal distribution of resources. Demsetz assumes some kind of allocation of resource and then argues that an efficient use of those resources will result from placing them in private hands. It is at least possible to argue that they are not disagreeing about the ends but about the means. It is certainly possible to argue that the disagreements between the proponents of neo-classical economics and those of either Marxists or Hegelians are not really addressed to the same point. Put simplistically Demsetz simply assumes an initial allocation of resources and argues that private property is the best way to obtain an efficient allocation of those resources, while Marx is railing at the initial allocation, on the ground that it has had the effect of reducing many people to peonage.

2. *Shack*

a. What is the *ratio decidendi*?

b. How is it supported?

c. The constitutional penumbra

d. How different from *Shelley*?

e. What would Marx think about this?

f. How about Hegel?

3. *PruneYard* (1980)

a. The constitutional penumbra of *Shack* (1971): *Marsh* (1946) (company town sufficiently like a state that it could not exclude a Jehovah's Witness from passing out literature on the street), *Logan Valley* (1968) (constitutional right to picket in the shopping center), *Tanner* (1972) (no constitutional right to pass out anti Vietnam-war literature in a shopping center), *Hudgens* (1976) (overrules *Logan Valley*)

b. Key language in sec. IV, recognizes the essentiality of the right to exclude but subjects it to a balancing test citing *Armstrong* and *Kaiser Aetna*

c. Hence, the physical invasion is not determinative here – Why not?

d. Besides the state defines property

e. Also no due process challenge – *Nebbia*

f. Concurrences

i. Core vs. penumbra — Marshall

ii. Owners' right not to speak — Powell — the awkward situation of Fred Sahadi

iii. Shopping centers only, no federal right — White

III. PROPERTY AND THEORY—SUMMARY

1. The 'Kantian' view of 'scientific policy-making' vs. the utilitarian view

2. The utilitarian tradition and *Flemming*? *Shelley*? *Shack*?

3. The Hegelian tradition and *Flemming*, *Shelley*, and *Shack.*

Obviously, it would take longer than we've got adequately to develop the themes in these materials even for the limited purpose of showing how some of these ideas may affect the legal system at some remove, but we ought to try to say something.

In many, though not all ways, Hegel, Reich and Marx offer variants on what we earlier called the 'Kantian view' of scientific policy-making. (There are those who would deny that this has anything to do with Kant; the means/ends distinction being one that is confined to private morality.) By contrast, Bentham and Demsetz offer variants on what we called the 'utilitarian view' of scientific policy-making. We noted that when we applied these forms of policy-making to the takings problem, we frequently came up with the same result. When the Supreme Court in a relatively recent takings case (*Kaiser Aetna*) talks about privacy and investment-based expectations in the same breath, I think it is reflecting two potentially conflicting traditions, but they didn't conflict in the case before it.

How would Demsetz react to *Flemming*? I suggest that Demsetz à la Bentham would protect Nestor's Social Security interest. It is inefficient to have Social Security continually subject to community reassessment. It is only if there is security of payment, if the worker is assured that he will obtain Social Security if he works, that labor resources can migrate to their highest and best use. How would Demsetz react to *Shelley*? He might suggest that we should enforce the bargain already made in order to give security to transactions. The problem is that there are two bargains here, the one that the landowner made with his neighbors and the one that he made with Shelley. So for Demsetz that's a hard case. In *Shack* he might argue the same way.

Enforce the bargains between Tedesco and his migrant workers which gives Tedesco the privilege of excluding visitors from their premises. To the argument that migrants are a disadvantaged group in society, he would reply that that is an allocation question and should be solved by redistribution of wealth to them. Granted the allocation of resources, however, the privately-made bargain is the more efficient one.

One doesn't have to be as much of a fan of the market as is Demsetz in order to remain within the utilitarian tradition. It is quite possible to say that the frustration of expectations that comes about with redistribution is outweighed by the benefits that accrue when it is done, at least when it is done well.

Nonetheless, the Hegelian tradition does give us, I think, a better sense of what is troubling about all three cases. We have already suggested that a modern neo-Hegelian, Charles Reich, found the *Flemming* case very disturbing. Even if one takes the expression of the collective will found in the denial of Nestor's Social Security benefits as entitled to considerable respect, one must be struck by how devastating to Nestor the deprival of Social Security benefits must have been. It takes very little to say that he had extended his will toward those benefits and that depriving him of them makes him less of a person than he was before. Thus, in this case Hegel and Bentham might well arrive at the same results, though for different reasons. *Shelley* is a bit more difficult for the Hegelian because we are dealing with a conflict of wills, that of Shelley and that of his neighbors. Our suggestion, however, that the property value really attached to Shelley and not to his neighbors allows us to say that the decision is a correct one from an Hegelian point of view. The most difficult case from an Hegelian viewpoint is *Shack*. Here we have a stark conflict between the will of Tedesco and the wills of the migrants. We cannot dimish the will of Tedesco in order to benefit that of the migrants and still be consistent with the pure Hegelian tradition. We can, however, suggest that there is a difference between property for security and property for power. We will protect the first and not the second, at least not the second when it is being used to crush the wills of others. That's the suggestion that Peggy Radin made some time ago, and it seems to be followed up by Jeremy Waldron who is perhaps the most recent leading theorist of property.