

## **Chapter 18**

### **Property and Business**

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[10644]

Property rights define the economy. Economic exchange lies at the core of commercial activity. We trade real property and we exchange manufactured objects, services, intellectual goods, and other things. These forms of exchange are organized around, and made possible by, the parties' property rights. These rights specify our prior holdings, the forms of exchange into which we can enter, and they protect what we might get out of the exchange. They define and protect the consumer's purchase, the producer's income, and the exchange itself. And a settled system of property determines when economic activity creates problematic externalities, what might be the appropriate scope of regulation, what are the limits of acceptable tax policy, and so on.

Any theory of business ethics must, therefore, contend with the idea of property. If business itself is organized around property, a theory of how business ought to be done will presuppose a certain view of property rights. While all (must) accept that a system of private property exists, not all will agree on the moral qualities of that system. Whereas some shareholder theorists have suggested, famously, that businesses ought to maximize their profits in accordance to what their private possessions allow, stakeholder theorists have challenged this view by pointing out that the moral demands on businesses go beyond what a private property economy allows. The

viability of these, and other, theories of business ethics will depend in part on their fit with the best theories of property.

This chapter gives an overview of the main foundational theories of property. As I will show, there are two major *families* of justification for property (with each family, of course, having many different members). After laying out those two families and their potential problems, I will then consider some of the issues that reside in intellectual property, turning subsequently to explore one way in which a theory of business ethics may either be in tension or fit with such a justification of property. In particular, I will look at the tensions that stakeholder theory, on at least one version of that theory, might create.

### **Forms of Ownership**

Before we turn to the justifications of property, however, we should begin to reflect on what property is. What's the nature of property, and private property in particular?

Property rights are complex. Even a relatively simple form of ownership such as the possession of a car can be violated or negated in a variety of ways. Your car can be stolen or damaged, you can be prevented from using it, you can be prohibited from selling it or giving it away, your car can be wrongfully expropriated by the government, and so on. Each of these violates or negates your property rights. But they affect your ownership in very different ways.

We can put this in more technical terms, using the Hohfeldian analysis of rights (Hohfeld 1919).<sup>1</sup> When someone steals or damages your car, they thereby deny your *claim-right* to exclude them from your possessions. When you are wrongfully prevented from using your car, this denies your *liberty* to use what you own. When the law prohibits a sale, it thereby denies your *power* to transfer your rightful possessions to others. And when the government wrongfully expropriates you, it thereby violates your *immunity* against having your rights unilaterally altered or extinguished.

Systems of private property standardly afford owners all these elements of ownership. However, this analysis masks a still greater complexity. Property rights confer different kinds of liberties, claims, powers, and immunities on owners. We can have rights to possess, use, or manage our property, rights to the income we can garner using it, rights to the capital that the property represents, and so on (Honore 1961). These rights will involve several kinds of Hohfeldian incidents. The right to possess, for example, will typically involve both the claim-right to exclude and the immunity against expropriation. A right to the income one can make using property will typically involve the power to (temporarily) transfer the property to others, or the right to use the property, in exchange for payment, as well as other rights protecting this power (such as, again, the claim-right to exclude and the immunity against having these rights annulled).

There is great variation among different legal regimes in how rights to property are organized. The law can recognize, alter, or abridge various claim-rights, liberties, powers, and immunities with respect to different parts and aspects of ownership. One might thus have the liberty to grow

crops on one's land, but lack the liberty to build a structure without a permit. An owner may have a claim that others not trespass on his property, but also be subject to an easement which gives others the liberty to walk across the property in designated places. One may have the power to transfer, but not be immune from government expropriation through eminent domain. One can be a partial or shared owner, as a shareholder in a firm. One can be a conditional owner, as the holder of a mortgage-backed security. The list goes on.

Some philosophers have concluded from this complexity that there is no "core" to property rights. Instead, it is said, property rights are like a bundle of sticks, with each stick representing one of these many possible incidents. But the bundle can be put together in many different ways, and none of the sticks is really essential. As long as the bundle is recognizable as a property right, any one incident (or stick) may be present or absent. (Grey 1980)

Others have challenged this thought. Some say that, while no particular incident is essential, at least the presence of certain incidents requires the presence of others (Attas 2006). Others maintain a stronger view and say that some incidents really are the "core" of property. Perhaps, for example, the right to exclude is practically unavoidable if property rights are to function as they should (Schmidtz 2011). As John Locke famously writes in section 138 of *The Second Treatise*: "I have truly no *Property* in that, which another can by right take from me, when he pleases, against my consent." (Locke 1988 [1698])

This dispute (regarding the bundle versus core theories) matters for the broader moral relevance of property rights, including for theories of business ethics. To the extent that property lacks a

common core, it will be more difficult to argue that a policy, legal regime, or moral theory is in conflict with it. After all, as long as the theory does not altogether negate rights of possession, there will be some form of property with which it is consistent. And one form is as good as any. On the other hand, if Locke is right that property rights must empower owners to exclude others, such objections can have real force.

It is important here to distinguish between two questions. One question is whether the presence of any particular incident is necessary for any given *right* to qualify as a property right. Another, and quite independent, question is whether the presence of any particular incident is necessary for a *system* to qualify as a system of property rights.

With respect to the first question, it may well be plausible that no particular incident is necessary for a given right to qualify as a property right. Rights of ownership may be composed and decomposed in myriad ways. One reason for a specific configuration of a property right is government regulation. Private ownership of nature preserves, for example, is typically heavily curtailed to prevent forms of use, exploitation, and change of the land. Another reason is private contract. Suppose you take out a mortgage with a bank to buy a house. The bank can transform the mortgage loan into collateralized debt obligations, making a number of entities the shared owner of your house in the event of your nonpayment. All of these effectively unpack what was once a thick bundle of incidents into several separate sticks.

Answering this first question in the negative, however, does not mean we must answer the second in the negative as well. For it is possible that any recognizable property *system* must have

certain general or recurrent features, even if the rights within that system need not all share those features.

As we will see below, it is very plausible that for a system of property to be acceptable or justified, it will have to contain a number of regularly occurring features. But even at the conceptual level, it is true that any recognizable system of property will have certain regularly occurring features. The rights with which we began are good initial candidates. A society that generally abolishes or even heavily curtails people's rights to exclude others, to use their possessions, and their powers to enter into economic exchange, has not just changed one form of property into another. It will have effectively abolished it altogether. And, by extension, a theory of business ethics that seriously undercuts the ability of owners to exclusively hold and determine the use of their possessions will be in clear tension with private property as well. In this sense, the features of use, exclusion, and exchange form the "core" of property.

### **Two Kinds of Justification**

This point about the rights to use, exclude, and transfer is conceptual in nature. It claims only that an economic system recognizable as a system of property will generally contain these rights. It leaves open, of course, whether or not there should be such a system. This latter question is one of justification.

Roughly speaking, justifications of property rights can be grouped into two kinds. The first offers a justification that moves from persons to property, so to speak. Here we begin by identifying

something of moral importance about owners or their connection to the particular thing that is owned, and we end up with a view about why their property rights should be respected. The second kind moves in the opposite direction. Here, the justification begins with something of importance about rights of ownership and tries to deduce the morally important status of individuals as owners from this.

### *From Person to Property*

Arguments that adopt the first approach attempt to ground rights of ownership in some morally important fact or feature about the owner. On this view, a justified system of property consists of rights that ought to be respected because they directly represent morally relevant facts about owners.

No doubt this is highly abstract. Consider, then, the most famous version of this argument. In chapter V of *The Second Treatise*, Locke argues that property rights come about as the result of people working on things that were previously unowned (Locke 1988 [1698]). Suppose there is a piece of land which no one has appropriated yet, and you clear it, till it, and plant some crops. The result, Locke argued, is that you not only own the crops you produce, but the land as well. By laboring, you appropriate.

There is considerable controversy about precisely why Locke thought that laboring constitutes appropriation. Most commentators focus heavily on section 27, where Locke writes that laboring involves the “mixing” of something one already owns (one’s labor) with something unowned

(the land), thereby pulling the unowned into the sphere of what is owned. This is probably the most straightforward version of the from-person-to-property approach. It sees appropriation as quite literally the extension of the (already owned) self into the (previously unowned) external world.

On this reading, the Lockean view is that we ought to respect property because it represents previously performed labor. If you steal a car you are taking someone's work without consent. If you prevent them from using their car, you are denying them the ability to enjoy what they worked for. If you block exchange you prohibit free and equal persons from disposing of their labor as they please. In each case, to violate a property right means violating (the extension of) a person's rights over her person.

Other arguments for property take a similar form. Compare G.W. F. Hegel's view that the ultimate foundation of property lies not in the respect for mixed labor, but the recognition of others' free wills. (Hegel 1967 [1821]) Hegel saw property rights as protecting the physical imprint an autonomous will makes on the external world – the objective manifestation of subjects. When we plan, say, to cultivate some land, carrying out that plan requires changes to the world. Property rights, on this Hegelian view, protect the physical manifestation of our wills in the external world. As such, they make our freely chosen plans practically possible.

On Hegel's view, to violate someone's property rights, then, is to interfere with their autonomous plans, and thus their ability to live freely by their own will. Contrary to Locke, who saw property as the extension of our physical selves, Hegel sees property as the extension of our

mental selves. Instead of connecting property with labor, he connects it with our will or autonomy.

Both Locke and Hegel adopt a person-to-property approach in that they see the moral significance of property rights as directly based in some morally significant fact about individual owners. The justification of property rights, in other words, derives from normatively significant features of the persons who do or can possess them. For Locke, property rights protect our labor from being taken away by others. For Hegel, property rights protect our will from being interfered with by others.

Theories that take this approach have many attractions. One advantage is that they promise a very solid foundation for property rights. The rights over our bodies, labor, and the exercise of our autonomy or free will are all widely accepted. Given the controversial nature of disputes that invoke property rights – such as disputes over taxation, economic regulation, or the moral limits of for-profit enterprise – such a solid grounding is more than welcome.

Another advantage is that these views offer a clear mechanism for distinguishing legitimate from illegitimate forms of property. Suppose person P holds object O and we wish to know if P is justified in claiming O as his property. All we need to do is find out whether P mixed his labor or will with O, or whether O was legitimately transferred to P by someone else who had a rightful claim to O. If the answer is yes, then P has a right to O. If not, then P's claim to O is void.<sup>2</sup>

Unfortunately, the person-to-property approach also suffers from some well-known and recurring problems. For one, views of this kind seem poorly suited to justifying anything close to what we would intuitively recognize as at least potentially legitimate holdings. That is, the theory will fail to recognize as legitimate numerous cases in which there really does seem to be a genuine property right. And it may identify cases as involving genuine property rights where there really seem to be none. Put more precisely, the kinds of property-grounding facts or features on which this approach relies seem to be neither necessary nor sufficient for genuine property rights.

Consider these in turn. First, there are numerous examples where real property rights seem to exist, yet there is no direct connection to the owner's labor, will, or what have you. One example is the filing of a patent by a pharmaceutical corporation that has created a certain chemical compound. These bring about a property right, but it seems quite beside the point to say that this represents the corporation's mixing its labor with or extending its free will into the external world. After all, the point of the patent is to protect the idea or invention more than some particular physical object.<sup>3</sup>

Of course the friend of the person-to-property approach might insist here that patents ought to be abolished anyway. But many other standard cases of ownership suffer from the same problems. Imagine, for instance, a system of acquisition by which people become owners by submitting a deed application to a local registry. Or consider something like a finders-keepers rule according to which those who happen upon an object or resource become the owner, such as through "telepossession", the appropriation of sunken treasure through the use of remote video cameras.<sup>4</sup>

There seems to be no meaningful way in which these cases involve the mixing of labor or the extending of a free will.<sup>5</sup>

Second, just as the person-to-property connection is not necessary for genuine property rights to exist, it also not sufficient. Consider again Locke's suggestion of labor-mixing. As Robert Nozick (generally a follower of Locke) has famously pointed out, it cannot be true that mixing what one owns with what is unowned leads to the unowned becoming owned. Nozick's example involves pouring a can of tomato juice into the ocean. Even if I own the tomato juice, and even though the ocean belongs to nobody, I lose the tomato juice – I do not gain the ocean. Examples like this abound. You might spill some paint on a rock, you might dump waste in a forest, you might go for a hike and leave your backpack on a log. In such cases (good or bad), we seem to introduce things that are owned into things that are unowned. Yet, contrary to what Locke's labor mixing-argument would seem to imply, the result is not the extension of ownership, but its loss.

The problem these cases pose for person-to-property approaches is that they seem incapable of offering a *principled* distinction between instances of appropriation and instances of waste, abandonment, or loss. As far as labor-mixing (or Hegelian will-extending) is concerned, appropriation, spillage, and abandonment all look the same. But this simply is not a plausible conclusion.

The point that these problems raise is a general one. Property rights can exist in the presence or absence of morally significant facts about owners. And people can possess these significant facts

with or without enjoying property rights. The person-to-property approach thus fails to line up correctly its justifying account with the actual property rights that need justification.

The stories I have recounted here are, of course, vast simplifications of the actual arguments offered by Locke and Hegel. And other versions of these stories can be told, too. Some of these will no doubt be more plausible than the ones I have just told. A Hegelian might say, for instance, that since the exercise of our autonomy or free will requires interaction with the physical and social world, the point of property is to enable or guarantee to us that ability. A Lockean might point out that property rights matter not just because of particular laboring acts, but because they protect and encourage the kind of productive activity that labor represents.

Such variations certainly fit the spirit of these arguments, and I agree they are more plausible. There may even be grounds for interpreting Hegel's and Locke's own views along these lines. But note that these stories involve a crucial *reversal* of the direction of justification. For these reconstructions no longer attempt to show that all justified property rights directly represent a connection with the owner. Instead, they aim to show that a system of property in general does something that is morally important. The rights of individual owners are morally significant because the system as a whole has morally significant features. This is the second approach to justifying property.

*From Property to Person*

Arguments that adopt this second approach typically take as their starting point the function or purpose fulfilled by a system of property rights. The conclusions they derive about the moral standing of individual property holders are defended as best fitting this function. On this more systemic view, then, property rights are primarily seen as things that are meant to solve a problem. The moral significance of property rights follows from the ways in which they solve those problems. As such, this approach reasons from ideas about the system of property as such to the rights of individuals.

We can illustrate this second approach by drawing an analogy, perhaps more familiar to students of business ethics, from the law and economics literature. One standard defense of shareholders' property rights in corporations argues that a number of potential problems that can plague firms are best (or most efficiently) solved by creating a relation of fiduciary care to shareholders (Hansmann 1996). Here, too, the justification of ownership is supposed to follow from an argument about the social desirability of its function.<sup>6</sup>

This approach traces back to at least David Hume. For Hume, the system of property overcomes two important problems. First, we naturally find ourselves in a condition of "moderate scarcity". That is, while there is (or can be) enough for all of us to survive and even live prosperously, there is not enough for all of us to just get whatever we want. Second, when dealing with this scarcity, we do not care for other people quite as much as we care for ourselves. Our capacity for altruism is limited.

In a world without property rights, these two problems are very severe indeed. When the world's resources are available in common, one person's gain necessarily means another person's loss. When I take a bushel of wheat from the commons, what is available to you has decreased. And if the commons do not produce enough for all of us to be satisfied, and we all look out for ourselves first, we are facing a toxic situation. Every person's attempts at providing for his or her own needs threatens the like ability of others.

This kind of zero-sum world is something we have reason to avoid. Commonly held resources tend to suffer from collective action problems, sometimes called the "tragedy of the commons" (Hardin 1968). The tragedy is that, while each person has reason to keep the commonly held resource intact, each has an incentive to overuse the resource. Our combined actions thus predictably lead to the destruction of the resource. The logic of the problem is similar to that of a prisoners' dilemma (only worse because of the increased number of players). Because no individual has the ability to exclude others from the resource, no individual has control over how the resource is used overall. The resulting uncertainty about the total use of the resource creates incentives for each individual to maximize his use of the resource, thereby leading, predictably, to the destruction of that resource.

Let's make this concrete. Think about your options as someone who shares access to the resource. One option is to restrict your use to a level that would help preserve the resource for later. Of course this means forgoing some benefit now, but that may be worth it since preserving things can offer a lot of benefits later. But this is very dangerous. For others may not similarly

restrict their use, leading to the resource being depleted anyway. And that would be a terrible outcome as you lose both the future benefits and the benefits you are thinking of forgoing.

So here is your other option. You can avoid this terrible outcome by maximizing your own use of the resource. Probably this will not matter much anyway. If others end up restricting their use, your overuse will likely not destroy the resource. And if others do not restrict their use, at least you got yours. It seems, then, that your choice is pretty clear – whatever the others might do, you should use as much of the resource as possible.

The tragedy of the commons is that everyone is in this position. Everyone is incentivized to overuse a commonly held resource. As a result, commonly held resources – and the livelihood they might represent for users – tend to be depleted, mismanaged, or otherwise destroyed. The situation is such that if each does what is good for him or her, the outcome will be bad for everyone. Individually rational behavior leads to collectively irrational outcomes.

Frequently, environmental problems are a result of tragedies of the commons. David Schmidtz (1994) discusses a case involving the unregulated fishing of coral reefs in the Philippine and Tongan Islands. Because each fisherman has an incentive to overfish, and cannot reduce their own fishing with the assurance that others will do the same, they all end up overfishing. The result is the destruction of the reef and the fishermen's livelihood it represents. The same dynamic contributes to other problems, such as the cutting down of rainforests, or humanity's inability to reduce carbon emissions. (For discussion of these problems and the role property can play in solving them, see Schmidtz and Willott, 2008)

The key function of property rights (and, for Hume, justice more generally) is to avoid this kind of world of rival and zero-sum interactions and to create a world where our interactions are mutually beneficial or positive-sum in nature. Systems of property avoid the zero-sum world, and therefore the tragedy of the commons, because they allow individuals to use and exclude others from their possessions. Since each person has the right to use only his or her discrete part of the world, one person's rightful use no longer reduces what is available to others.

Suppose, then, that the resource in question is a forest whose trees are used for lumber. If the forest is commonly owned, individual users have reason to cut down so many trees as to destroy the forest. But if they split up the forest into discrete parcels, each owner can control how many trees are cut down on his or her lot. Consequently, it makes sense for them to cut down only so many trees as are renewable over time.

Second, property rights foster mutually beneficial interactions. Since we need people's permission to use what is theirs, they will typically allow such use only if they think it in their interest. If you want some of my lumber, I might ask for some of your wheat in return. As a result, your use of my land no longer diminishes but enhances my ability to provide for my needs. Property systems thus encourage positive-sum or mutually beneficial interactions.

Of course, property rights need not be unique in this sense. Other solutions to tragedies of the commons can be imagined, and some have actually worked in practice too. Because fish that travel great distances cannot be confined within an owner's lot, it is hard to see how assigning

property rights over the oceans, say, might help to avoid overfishing. And sometimes it can make sense for communities to want to manage certain resources together.

That being said, cases in which these alternative solutions succeed are more exception than rule. Successful collective resource management is rare and fragile (Ostrom 1990). And most resources do not swim away like fish. What is more, even if they do, property systems can develop sophisticated responses.<sup>7</sup> There is no sense in claiming that property is the only solution humanity might invent to the tragedy of the commons. But there is little more sense in denying that it is by far the most effective response that has proven to be useful in a widespread way.

From the point of view of a moral justification for property, the following two points matter most. First, systems of private property contain far greater economic promise than their rivals. They promise, that is, to do more than just maintain the stock of resources. Because owners know that they may be able to reap the full benefits of their holdings, ownership incentivizes them to invest time and money and increase the resource's total productivity, for example by removing the underbrush, fighting common diseases, protecting one's lot against potential poachers who might cut trees at unsustainable rates, and so on.

The first argument for private property, then, is that it avoids a world in which all or most of our resources are subject to tragedies of the commons, and replaces it with one in which exclusionary rights lead to productive benefits. Life under an economic system characterized by property thus promises standards of living that are vastly superior to life under non-property systems.

Second, a much less commonly recognized justification offered by these arguments is more theoretical in nature. When people's livelihoods depend on what they can extract from commonly held resources, the achievement of their goals, ambitions, even their very survival come to be in conflict. To use again the example above, because person A's cutting down of trees to sell for lumber means there is less for B to cut down, A's livelihood necessarily comes at the expense of B's, and vice versa.

When social relations are zero-sum in this way, conflict looms. The threat of conflict is not simply an immediate hazard of physical confrontation (although, at the limit, fighting does loom) but a more philosophical sense of conflict—including fundamental disagreements over values, aims, and desires—that threatens the very possibility of justice. Though not much of a defender of property, John Rawls famously emphasized that a just society is a cooperative venture for mutual advantage (Rawls 1999 [1971]: ch. 2, sec. 14), a place in which our ends become mutually reinforcing rather than rival. Leaving resources in common possession pushes us in quite the opposite direction.<sup>8</sup>

Property rights thus help create the conditions of justice by dividing the social world into discrete parcels. As a result, A's use of the resources available to A does not reduce the resources available to B. Stronger still, since if A wants to use B's resources, A will need to secure B's permission, such use will require terms that B considers in his interest to accept. The effect is that A's interaction with B will be to their mutual advantage.

Here, then, we find the second version of the property-to-persons argument. Individual owners can rightfully insist on their property rights because these rights are essential components of a harmonious and just social order. Because owners are authorized to make decisions about their several possessions, property rights express the moral demand that people must enter into such mutually acceptable relations.

This second property-to-person argument, then, adds something crucial to the first. The justification of property lies not only in the avoidance of tragedies of the commons, but in *how* property systems avoid them.

Note, finally, that while these arguments cannot conceive of property as an *extension* of the person, they can capture at least part of the intuition that ownership is a deeply personal affair. For our holdings represent personal projects, sacrifices, and decisions. We put time, effort, and ideas in our work, all of which is represented by the money we make. The numbers on our 401(k) slip may look like mere numbers, but they represent past sacrifices and future plans or goals. Whenever property rights are infringed, whether it be by other people or the government, we are directly affected in intimate and personal ways. In this sense, then, there is an immediate connection between respecting people, their work, and their choices, and respecting their possessions.

### **The Conventionalist Objection**

Both the person-to-property and the property-to-person approaches aim to show that property rights are among our basic moral rights. On either view, property rights pose genuine moral demands similar to other important moral rights, such as rights over our bodies, our rights to freedom of action, belief, and speech.<sup>9</sup>

The very idea that property rights are fully fledged moral rights has been subjected to several critiques. Some of these, such as Marxist critiques, seek to reject property altogether, or even object to the very idea that people might possess rights. (Marx 1978 [1844]) The worry behind these arguments is that rights in general, and property in particular, put people in antagonistic relations to one another, relations that are inimical to our living together in justice and harmony.

Less radical critiques accept that property might play an important role in society, but reject their moral foundations. According to these arguments, property rights are not among our basic moral rights, but mere conventions or legal creations. And as such, they are more malleable. They can be altered, interpreted, determined, taken away, reallocated, and strongly curtailed by the law without moral problem. Because this challenge sees property rights as mere conventions or legal creations, I label it the conventionalism-charge. (See e.g. Murphy and Nagel 2004; Donaldson and Preston 1995)

The upshot of the conventionalist objection is best understood in terms of a point about the order of justification. Suppose we ask what justice requires for the distribution of material goods in society. A number of things will go into answering that question. For instance, one might want the distribution to be consistent with everyone having good opportunities in life, with everyone

having enough to avoid living in desperate circumstances, with some kind of equality obtaining, and with people being free to choose their occupations.

Let us call these the “inputs” of distributive justice, the basic ingredients that go into bringing together a full view of what justice might demand. The two approaches to justifying property discussed above see people’s property rights as figuring among these inputs. That is, if achieving a just distribution is a question of people’s opportunities, living standards, or equality, it is also a question of respecting people’s property. Property, we might say, is among the premises in a longer argument about distributive justice.

The conventionalist objection seeks to reverse this order. It sees property rights as mere legal or conventional allocations, the justice of which depends on how they conform to the (different) inputs of justice. Those inputs express the demands of justice – they are the premises in the argument – and property is what we end up with once those principles are correctly applied – it is what rolls out of such an argument. However, the objection goes, because property rights function as the conclusion of a logically prior (and independent) argument about distributive justice, they themselves cannot be invoked to protest against policies of taxation, redistribution, and the like. To do so would be to make a simple mistake.

The conventionalist objection is more often asserted than defended. But its intuitive appeal is not hard to see. Any introduction to property law shows just how complicated and sophisticated the legal rules of property can – and need to – get. And this sophistication is hard to imagine without an equally complicated, sophisticated, and detailed legal system or state. Thus, the charge goes,

property is something created by the law, not something pre-existing that it must protect and enforce.

This objection can be made more precise in slightly different ways. The lesson against person-to-property arguments, for example, is said to be that these justifications are radically incomplete. There is simply no way, it seems, in which we can derive such complicated and detailed views about property from arguments about individuals' mixing their labor, extending their free wills, and so on. As a result, these arguments cannot support actual property rights. (See e.g. Fried 2004; Railton 1985.)

Similarly, and contrary to property-to-person arguments, the charge holds that the benefits of property are really the result of a well-functioning state. Without a state, we lack the detailed solutions and enforcement needed to avoid tragedies of the commons, resolve conflicts, and promote productivity. But if the state is itself central to property rights fulfilling their function in the first place, then those rights cannot be coherently claimed against that legal system. Property, again, is a mere convention. (Murphy and Nagel 2004)

Despite their initial appeal, the conventionalism charge is deeply problematic. While it is plausible that the philosophical arguments above are insufficient by themselves to settle all potential property disputes, this does not defeat them as justifications for property rights. These are philosophical theories, and were never intended to resolve all practical problems with which the law deals. Asking them to do so would surely be asking too much of philosophical theories. Instead, their point is to identify moral boundaries within which a just legal system can specify,

interpret, and settle our property rights. These theories aim to identify a scheme of justification within which a legal system can appeal to concrete facts to make particular judgments and evolve legal principles implementing the general scheme of justification.<sup>10</sup>

This feature is not unique to property. Consider other standard liberal rights, such as our rights to free movement, free speech, privacy, and more. The precise contours of these rights, too, are not derivable from their philosophical justifications. Different legal systems can protect, say, the right to free speech in different ways without injustice. This version of the conventionalism charge thus seems to prove too much. It threatens not only property rights, but liberal rights in general. (As such, it is closer to the more radical and less plausible Marxist objections.)

The upshot is that the conventionalism charge can simply be conceded as harmless, if not irrelevant. The (obvious) fact that property rights need specification does not threaten their status as important moral rights. It is one thing to say that a legal system backed up by a state is necessary to specify property rights with the kind of detail that we need in practice. It is quite another to say that property rights are entirely a creation of the law or state. Even if the former claim is true – and it is an empirical matter whether it is true – the latter is not.

### **Intellectual Property**

The discussion above has focused largely on ownership in tangible objects, such as land, resources, companies, and the like. However, ownership of non-tangible things is becoming increasingly important. Some of the largest and most valuable parts of the economy are

organized around the existence and enforcement of patents and copyrights. Pharmaceutical companies, the entertainment industry, and technological firms all heavily rely on the enforcement of these rights.

The basic problem such forms of intellectual property are supposed to solve is not hard to see. Most economically valuable ideas and applications are not easy to find. In order to develop, say, a new kind of medication, large amounts of time, energy, and resources need to be invested. However, once developed, the recipe and application of this new medication are easily copied by others.

This creates a double-edged sword. On the one hand, since the marginal cost of applying and reapplying the idea behind the medication is virtually zero, it can be very cheap to produce it in large quantities. In this sense, the low cost of copying ideas is a boon, for it makes new medication potentially available to lots of people at a very low price.

On the other hand, this also creates a problem of free-riding. If the marginal cost of producing the medicine is very low, the price of the medication in a competitive market will be very low as well. And this may make it impossible to recoup the (often significant) investment in researching and developing the idea. As a result, companies will rationally avoid investing in the research and development of new medication. Better to wait for others to come up with innovations, and then copy them at low cost. Since all companies are in this position, few new kinds of medication will be developed.

Intellectual property rights, on their most popular defense, can strike an appropriate balance between these two effects. By awarding to owners a temporary right to preclude others from freely copying and using the idea, they achieve two things. First, they end the collective action problem by creating an artificial monopoly for their creators. As monopolists, the holders of intellectual property are in a position to demand higher prices in the market. Higher prices enable them to recoup their investment and incentivizes the necessary research, development, and creative activity. Second, when the intellectual property expires, the idea becomes publicly available for commercial exploitation, thus enabling the availability of these goods at very low prices under competitive conditions. The combination of these virtues will lead, so this defense goes, to more and more ideas becoming freely available over time.

This argument is both similar to and subtly different from the argument that property rights serve to avoid the tragedy of the commons. The argument is subtly different because those previous arguments concerned the potential overuse of already existing resources. Property rights are defended to overcome the scarcity of these resources. By contrast, the present argument concerns the creation of new resources. Here scarcity is artificially created by protecting the ideas from being copied.

Nevertheless, the motivation behind the two arguments is similar. Property in ideas, just as property in tangible objects, aims at preventing the socially destructive use of valuable resources, and increasing the stock of useful goods available to mankind. Whereas in the former case, the problem concerns the overuse of already existing goods, in the latter case the problem concerns a kind of overuse that makes the creation of the resource less likely.

Intellectual property rights are highly controversial (as evidenced in a recent collection of essays, Mossoff, 2013). One controversy concerns the practical use of these rights, and in particular their duration. When the Copyright Act was first enacted in the United States, the duration of copyright was fourteen years. Now, in some cases copyright protection can last over a century. The reasons behind these extensions are often said to be less about the recouping of investments, and more about companies' lobbying Congress to keep in place their most profitable copyrights.

Other concerns about intellectual property rights focus on particular kinds of ideas. Consider new kinds of medication that could, if made cheaply, save millions of people's lives. Is there not something perverse about large pharmaceutical companies charging high prices for these products when the marginal cost of production is very low? Perhaps, then, we should exclude things like life-saving medicine from the scope of patents.<sup>11</sup>

On its face, however, the proposal to allow patents for all but the most important ideas is potentially disastrous. If the free-riding problem is real, and the free availability of ideas discourages the investment of resources into their development, then this proposal will lead to the production of all but the most important things. And this, of course, is precisely the opposite of what we want. Even if there is something distasteful about artificially inflating the price of this kind of medication – as there surely is – the alternative is far worse. (Compare Rosenberg 2004)

It is worth noting here that this line of reasoning has far-ranging implications for how we think about property rights. For the concern that there is something bad about excluding people from potentially life-saving resources is not unique to the case of patents. In fact, it is a perfectly general feature of systems of property. All such systems, we saw, allow people to exclude others from the things they possess, and at times the burdens for non-owners of being excluded can be great.

It is important to avoid posing a false dilemma here. We are not faced with a choice of absolute rights to exclude non-owners from our property come what may, or the abolition of the system of property altogether. It is possible, for instance, to support a system of property while admitting that there can be circumstances in which those rights may be justifiably infringed. Consider an example. Suppose that your life is in danger, and you are in immediate need of medical attention. And suppose that the only way you can make it to the hospital is to walk across my land. Even though you may not be able to ask me for permission – indeed, even if I were to explicitly tell you no – it is clearly permissible for you to cross my land.

But if my property rights cannot in general stand in the way of your survival, then the case for patents to life-saving ideas would seem to be similarly imperiled. After all, if we can infringe property rights in one case to save a life, why not also in the other? We live – tragically – in a world in which there are quite literally always people whose lives could be saved if only the requisite resources were available. So why not exempt life-saving medication from the patent system?

This challenge raises a question about the proper place and scope of exceptions. On the one hand, it seems true that the very benefits that justify property rights in the first place require a rule of exclusion. On the other hand, there do seem to be cases where exigent circumstances can justify exceptions to this rule. How far can those exceptions reach before they overthrow the rule and, with it, the entire practice?

The first step towards a solution is to realize that if the practice as a whole is to survive, we cannot violate the rule for every possible exception. We can, and should, recognize exceptions when important things like people's lives are at stake, but only if such recognition is consistent with upholding the more general rule of respect for property that makes saving lives possible in the first place. This means that we cannot simply generalize the truth that property can give way to emergencies into the falsehood that property rights cannot apply to potentially life-saving goods.

Note, moreover, that nothing in this argument precludes companies or philanthropists using their property rights in order to help people – or even it being morally desirable or required that they use their property in such ways. Just as I can – and, if I reasonably can, then I should – agree to let you cross my land to get to the hospital, so too wealthy parties can – and, if they reasonably can, should – make patent-protected medication cheaply available. And indeed, there are examples where companies do just this. Since 1987, Merck & Co Inc. has produced and distributed over 2 billion treatments of the river blindness drug Mectizan around the world without charge.

A third and final challenge to intellectual property rights also focuses on potentially life-saving medication, but focuses on a different problem. This objection, offered by Thomas Pogge (2002: Ch. 9), holds that the patent system does not encourage the right kind of innovations. Since patents encourage the production of medication because of the artificially high prices these will command, the system incentivizes the production of medication for which the most purchasing power exists. The system will thus likely be very good at producing, say, new kinds of skin cream that helps rich Westerners avoid wrinkles, but bad at manufacturing the kinds of medicine that would cure diseases that affect only the poorest. That is, while the patent system may well lead to a greater total stock of goods, it may also fail to bring about the right kinds of goods.

Pogge has proposed an alternative regime for producing life-saving medicine, what he calls a Health Impact Fund. The idea is to create a central fund out of which large awards could be paid to companies that have a measurable impact on public health. Such a regime, Pogge argues, would better encourage the production of medicine aimed at helping the poor. Indeed, because companies get paid not just for inventing new kinds of medication, but for the impact these have on public health, the Fund might improve the delivery of medication too.

One problem of Pogge's proposal, Nobel-laureate Angus Deaton (2015: Ch. 7) points out, is that it is very difficult to disentangle what precisely caused improvements in public health. When improvements occur, they are usually the result of the interaction of many different factors, making it hard to know which caused what. This is doubly true in very poor countries where statistical measuring techniques are poor as well. As a result, a Health Impact Fund might not be very good at matching its awards with products that genuinely improve public health.

Another problem is analogous to the problems with patents identified by Pogge. While patents incentivize companies to serve people in proportion to their aggregate purchasing power, a Health Impact Fund would encourage companies to be seen or measured to have an impact. But to be seen to have an effect is not the same as actually having a real impact. So where the patent system might incentivize the development of luxury products, the Health Impact Fund creates a different problem. It incentivizes companies to introduce their products in places where health improvements are already imminent for other reasons, to manipulate statistics and other measuring tools, and other ways of capturing the prize.

### **Concluding Remarks: Business and Property**

Property rights are central to questions about business ethics. They constrain how we can ethically run our own businesses, as well as treat the businesses of others. We must make sure not to defraud, deceive, pollute, steal, or damage the possessions of others. And within those limits, we must leave others free to run their businesses as they choose. The laws and regulations for which businesses can ethically lobby must be consistent with property rights and their justification.

There are differences in the degree to which theories of business ethics fit this idea of property. At its most extreme, one might hold in the tradition of E. Merrick Dodd (1932) that control of a corporation, say ought not to lie with the shareholders but with society at large. On such a view, corporations are closer to public institutions that ought to be subject to standards of providing

common benefits than private possessions that owners can use for their own gain. If, at the other extreme, we follow Milton Friedman's famous thought that the terms of business ethics are largely set by the terms of private property, we might indeed say that "there is one and only one social responsibility of business—to ... increase its profits so long as it stays within the rules of the game" (Friedman 2002: 133).

On other views, the relation will be more complicated. Consider the following version of stakeholder theory, which aims "to broaden management's vision of its roles and responsibilities to include interests and claims of non-stockholding groups". (Mitchell et al. 1997: 855). On this view, companies morally ought to take into consideration the interests of all the "groups and individuals who benefit from or are harmed by, and whose rights are violated or respected by, corporate actions" (Freeman 1998: 129).

The suggestion, here, is that managers have moral obligations take into account the interests of a variety of groups that surround the firm. But consider the incentives that this creates. These will include:

- (a) An incentive to be *among* those who have a stake in how the firm acts,
- (b) An incentive to *maximize* the extent of one's stake,
- (c) An incentive to *prevent others* from having or developing a stake in how the firm acts, and

(d) An incentive to *minimize* the extent of the stakes of others.

The rationale behind these incentives is the same throughout. The extent to which one stands to gain from the way businesses operate depends on the size of one's proportional stake. One gains more, that is, the larger the numerator and the smaller the denominator of one's share of the total stake in the business's operations. At the limit, the point at which one's interests are served *best*, the proportional size of one's stake will be 1.

The incentives above mirror the different ways one can move in this direction. One can increase the numerator by, first, making sure one is counted among the stakeholders. Once you are counted, the business in question will have to serve your interests. Second, one can increase this by maximizing the interests one has in how the business operates. The larger your stake, the more you stand to gain from the business' decisions. One can decrease the denominator in two analogous ways. First, one can limit the ability of others to become among the stakeholders. Fewer stakeholders means fewer claimants to the business' pie. And second, one can work to make others' stakes as small as possible. With others' receiving smaller slices, more of the pie is left for one to gain.

A theory of business ethics that creates these incentives need not explicitly *deny* that individuals are the owners of private, and thus exclusive property. It can grant this while claiming, for instance, that the owners of said property ought to use stakeholder theory as their guide for action. Nevertheless, there is an undeniable tension between the two ideas. For the dynamic

created by stakeholder theory precisely reproduces the tragedy of the commons-situation discussed above. And this tragedy was the very reason for defending property rights on the property-to-person approach.

Stakeholder theory thus threatens to undo the very solution property rights were supposed to provide. It encourages behavior that renders our ends zero-sum or rival once again. Your gain comes at my expense, and my gain means you must lose. It follows that the more a firm's decisions become a matter of weighing the interests of various stakeholders, the more those holders' stakes come to stand in conflict. This is to make everybody's business everybody's business. And when everybody's business is everybody's business, tragedies of the commons arise.<sup>12</sup>

None of this is to say, of course, that it is wrong for businesses to take the interests of stakeholders into account. As said above, part of the point of property is to empower owners to decide how they want to use their possessions, and they can – and sometimes should – exercise their rights for the benefit of others. There is a place in our lives for rights and duties, and there is a place for virtue and plain old decency. But we must not lose sight of the place of these demands. The ethics of business cannot override or undercut the central motivation of the kind of property rights on which companies, exchange, and productivity are based in the first place.

### **Essential Readings**

The most important treatment of property rights remains chapter V of John Locke's *Second Treatise of Government* (1988 [1698]). A great overview and critical discussion of arguments in favor of private property rights remains Waldron, *The Right to Private Property* (1988). The locus classicus for the "tragedy of the commons" is Garrett Hardin's essay, "The Tragedy of the Commons" (1968). For discussion on the person-to-property and the property-to-person types of justification, see my discussion in "What Counts as Original Appropriation?" (2009). For a key modern discussion that takes the property-to-person approach, see David Schmidtz, "The Institution of Property" (1994).

For further reading in this volume on whether stakeholder theory is compatible with business ownership, see chapter 13, "What is Business?" For a consideration of the moral scope of stakeholder thinking, see chapter 11, "Stakeholder Thinking." On property and its relation to the forms of the corporation see chapter 14, "The Corporation: Genesis, Identity, Agency" and chapter 15, "Alternative Business Organizations and Social Enterprise." For a discussion of market and non-market responses to environmental problems, see chapter 22, "Business, Nature, and Environmental Sustainability." On freedom of contract in employment relations, see chapter 28, "Employee Ethics and Rights." On Mahatma Gandhi's conception of property, see chapter 36, "Business Ethics in South Asia: Gandhian Trusteeship and its Relevance for the Twenty-First Century." On the social and moral effects of collectivization, including the idea of a "property deficit," see chapter 39, "Business Ethics in Transition: Communism to Commerce in Central Europe and Russia." On the relevance of property to the development of business in Africa, see chapter 37, "Business Ethics in Africa."

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<sup>1</sup> Hohfeld proposed an analytical understanding of rights as relations between parties. On this analysis, one party's liberty-right (sometimes called a privilege) to something entails the absence of a claim-right in another to the same thing. A claim-right to something, further, entails a duty for another party to that thing. (Consequently, a party's liberty-right to do something entails that the same party does not have a duty not to do it.) Third, a power-right denotes a party's ability to change a juridical or moral relation in some party. When one party has a power, this entails a liability for some party (a liability to have their juridical or moral position changed by the power-holder). Finally, an immunity-right protects one against the use of a power. When one has an immunity, some party has a disability (i.e. the absence of a power to change the immunity-holder's juridical or moral relation).

<sup>2</sup> Alexei Marcoux has suggested to me that early stakeholder-theoretic criticisms of equity owners' claims to management's fiduciary care might be interpreted as person-to-property arguments in negative form. That is, they deny that shareholders in a corporation possess the morally relevant features that would justify a property right in the firm being managed in their interests because (for example) they lack a morally substantial relationship to the success of the firm.

<sup>3</sup> This sets aside even more vexing questions about whether corporations can possess the kind of morally significant free will that gives this argument its punch.

<sup>4</sup> See *Columbus-American Discovery Group Inc. v. Atlantic Mutual Ins. Co.*, 1992 (974, F. 2d 450-4th Cir 1992)

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<sup>5</sup> Perhaps a hard-nosed friend of the person-to-property approach might insist that these kinds of ownership, too, should be abolished. But this just seems silly. If we are going to accept a robust system of property rights at all, there is little point in restricting it to only those for which there is a direct connection with labor, the will, or what have you.

<sup>6</sup> Thanks to Alexei Marcoux for pointing this out to me.

<sup>7</sup> Compare the way the common law treats questions about who owns a wild animal killed in a hunt: the person who pursues the animal by giving chase or the person who killed and carried it away when it happened by him? The classic case here is *Pierson v. Post* (3 Cai. R. 175, 2 Am. Dec. 264; N.Y. 1805), decided on appeal in favor of Pierson, the person who killed the fox pursued by Post. Or consider the related question about who owns gas that is extracted from a field spanning multiple people's properties. Here, the party who captures the gas is considered the owner. In both cases, the justification that's offered for the rule takes a clear property-to-person form, namely the socially beneficial use of natural resources. For related discussion, see Rose (1996).

<sup>8</sup> Thus Hume emphasized that even though property rights mean that I cannot just take what I want or need, "it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me" (Hume (1978 [1739]), book III, part II, sec. II)

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9 Hume, of course, thought that there was an important difference between rights over our persons and rights over our possessions. The latter were “conventional” in the sense that they come into existence only after a certain man-made practice is in place, the former “natural” in that they require no such thing. This distinction is often confused for the view that our property rights are somehow less secure than our other rights. Nothing of the kind follows from Hume’s argument. (See Hume, (Hume (1978 [1739]), book III)

<sup>10</sup> Thanks to Alexei Marcoux for helpfully putting the point this way.

<sup>11</sup> While he did not put his point in terms of the patent system, the idea here is analogous to a famous argument by Peter Singer. In his discussion of the moral significance of famines around the world, Singer argued that if we can save a person’s life without giving up something of moral significance, then we ought to do it. This means that relatively rich people (people like you and me, that is) ought to give away what we own up to the point that saving another life no longer justifies the sacrifice we are about to make. At the limit, this might endanger property rights as well. As Singer put it: “the prevention of the starvation of millions of people outside our society must be considered at least as pressing as the upholding of property norms within our society” (Singer 1972, p. 237).

<sup>12</sup> Sometimes stakeholder theorists argue that the demands on business are limited because the business cannot be required to trade them off against each other. (Freeman, 2009, p. 66) But this does not remove the problem, as we face a kind of arms race to get one’s stake as large as

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possible as quickly as possible. The result is the same: wastefully maximized demands, dependencies, and zero-sum interaction.