1990

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BOOK REVIEW

WEALTH AND PROPERTY


Reviewed by Thomas W. Merrill*

Professor Stephen Munzer’s study of property rights¹ is an ambitious work. Drawing on sources as diverse as Hohfeld, Hegel, Locke, civic republicanism, Marx, the classic utilitarians, and Rawls, he seeks to develop a “pluralist” theory of property, one that synthesizes a variety of philosophical perspectives into a single “basic theory” that can be used to assess and promote the reform of different property systems. Like most attempts to achieve a grand philosophical synthesis, however, this one ultimately fails. The most obvious problem is that Munzer’s basic theory is too vague and unwieldy to generate determinate answers to the kinds of controversies that concern legislatures and courts. A less obvious but more fundamental problem is that, although the book begins by discussing property rights, it ends as a dissertation on the distribution of wealth. In the final analysis, his basic theory is a prescription not for determining the rights persons have in specific property but for achieving distributive justice.

Notwithstanding these shortcomings, the book has many admirable qualities and will repay careful study by those concerned with either the theory of property or distributive justice, or both.

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Whatever one thinks of Munzer's particular proposals, the strands he unravels and weaves back together encompass the greater part of the intellectual tradition associated with the institution of property, and he has something new and often penetrating to say on almost every score. Thus, his study makes valuable contributions to subjects as varied as Hohfeld's vocabulary for analyzing legal concepts, whether property rights exist in body parts, whether the personality theory of property is correctly based on the "incorporation" of external things into the body or "projection" of the individual onto the external world, theories of the relationship between property and moral character espoused by Plato, Aristotle, Kant, and Adam Smith, and Marx's theory of alienation. That he advances these insights in a clear style almost wholly free of jargon lends further value to his enterprise.

The book is divided into four parts. The first is devoted to explicating the concept of property. Munzer adopts a thoroughgoing nominalism here, endorsing the view that property consists of a bundle of interests, and that no single interest or group of interests is indispensable to the bundle. The second part surveys a variety of perspectives on property, ranging from Hegelian personality theory to Marx's theory of alienation. Although Munzer attempts to use these chapters as building blocks leading up to the basic theory, the connection between these chapters and the basic theory is often hard to grasp. These vignettes contain interesting observations, but they add significantly to the book's length and make the main argument more diffuse and complicated than it probably needs to be.

Part three presents the core of the book, Munzer's "basic theory" of property. In successive chapters, Munzer explicates three dominant traditions associated with the theory of property rights—utility and efficiency, justice and equality, and desert based on labor. A final chapter in this part argues that the three traditions

2. Id. at 17-22.
3. Id. at 37-58.
4. Id. at 63-67.
5. Id. at 67-70.
6. Id. at 125-38.
7. Id. at 157-69.
8. Although the prose is largely jargon-free, Munzer occasionally succumbs to a certain academic pretentiousness, as in the footnote that announces: "This chapter takes no position on whether, if there were only one human being in the world, that individual could form the concept of a person." Id. at 72 n.14.
9. Id. at 191-226.
10. Id. at 227-53.
11. Id. at 254-91.
are often compatible, and to the extent they diverge, that "intuitionism" can supply a rank ordering telling us which tradition takes precedence in any given context. Although few fixed principles emerge, Munzer tells us that "the prerequisites of a decent and fully human life in society generally take precedence over maximizing preference-satisfaction." In other words, equality is the dominant goal. Part four then seeks to apply the basic theory to three specific problem areas: the theory of business corporations, gratuitous transfers, and government takings.

The book's most apparent failing is the indeterminacy of the basic theory. This comes through most clearly at the level of specific applications. In keeping with the style of much modern legal study, Munzer rarely mentions actual cases. Near the end of the book, however, he attempts to demonstrate the practical value of the basic theory by applying it to a recent takings case, Nollan v. California Coastal Commission. The Nollans had sought a permit to remodel their beachfront house, but the California Coastal Commission refused to grant it unless they agreed to give up an easement allowing the public to cross the beach in front of their dwelling. On the key issue—whether California should have to pay just compensation for exacting the easement—Munzer claims the basic theory tells us it should not:

The state, through the Coastal Commission, is engaging in corrective action in a situation of partial conformity. [That is, California has not achieved a distribution of property consistent with Munzer's basic theory.] It is attempting to make known the existence of and to ensure full access to public beaches in circumstances where increased private building blocks the view of public beaches below.

This explanation advances two points. The first, that the Commission has engaged in "corrective action," is a mere assertion. Munzer never details why making the Nollans donate a public easement, rather than making the state of California pay for it, would move toward a more just distribution of property. Second, Munzer posits a causal connection of sorts between enlarged structures that obscure the view of a beach and the need for a lateral easement to

12. *Id.* at 297-310.
13. *Id.* at 253.
14. *Id.* at 317-79.
15. *Id.* at 380-418.
16. *Id.* at 419-69.
promote pedestrian traffic on the beach. This point, however, is derived not from the basic theory, but from Justice Brennan's dissent. In the end, then, the basic theory tells us nothing about Nollan we could not already learn by reading the dissenting opinion of a Supreme Court Justice.

Unfortunately, matters do not improve when we consider big picture issues. Munzer tells us that "the basic theory does not either embrace a modified [i.e., welfare state] capitalism and reject socialism, or embrace socialism and reject a modified capitalism." In other words, Munzer's theory of property provides no basis for preferring a regime based on private property to a regime based on state-owned property. He anticipates that "[i]t will distress or annoy some readers" that "so much ink lead[s] to apparent fence straddling." He is right. If the basic theory produces such tepid results with respect to the most basic questions of social organization, then by necessity we must look elsewhere in order to develop a comprehensive theory of the proper role of property in society. Yet this is precisely what A Theory of Property purports to offer us.

The indeterminate nature of the basic theory is no doubt due in part to Munzer's particular intellectual temperament. He is a borrower, drawing from an eclectic range of sources that, if they do not cancel each other out, at least require substantial qualification of any distinct point of view. And he is a compromiser, tending to find something of value in each point of view, and always looking for the golden mean. This impulse toward moderation, while probably a virtue in judges and practicing lawyers, is of more questionable value in a theorist. It leads to a blurring of distinctions, and a tendency to push the discussion toward ever greater levels of abstraction in search of the formula that will allow opposites to embrace.

Moreover, while such a compromise may succeed in splitting the difference between competing viewpoints, it does not necessarily result in a coherent theory. The key compromise endorsed by Munzer—one he views as running across both capitalist and socialist systems—is that between the maintenance of an unequal distribution of property, as required by the principle of efficiency and desert based on labor, and the press for greater equality in the distribution of property, as demanded by the maximization of utility and the principle of justice and equality. Munzer resolves this tension by imagining that all social systems can be calibrated according to

19. Id. at 468 (citing Nollan, 483 U.S. at 845 (Brennan, J., dissenting)).
20. Id. at 378.
21. Id.
their relative degree of equality, where distributional shares are largely a function of some system of taxing the rich and transferring to the poor. The key choice for the social theorist is therefore to select the point on the continuum where the optimal degree of equality is reached. That point, of course, is never defined with precision, but one gets the sense that Munzer would prefer considerably more redistribution than currently occurs in the American political-economic system.

Munzer never confronts the possibility, however, that in the context of today’s increasingly interdependent and technological world, the ultimate choice may not lie along a continuum but rather may be dichotomous in nature. In fact, the decisive choice may be exactly the one Munzer refuses to make: between a system founded on private property or a system based on state ownership. Consider, first, a system based on private property. Munzer assumes that such a system can reach the appropriate degree of equality, while maintaining its essentially capitalist character, simply by turning the knob on the tax-and-transfer machine until the principles of justice and equality, which require a “fully human life in society” for everyone, have been achieved. But in a highly advanced economy where labor and capital are freely transferable, the tax-and-transfer solution may reach its outer limit before it arrives at Munzer’s desired outcome. Specifically, such an economy may yield a vastly disparate pretax distribution of income, providing large returns to persons who possess specialized knowledge and skills and small returns to those who do not. These disparities in pretax income may be so large that rates of taxation cannot be raised high enough to wipe them out, at least not without first triggering a flight of labor or capital to other jurisdictions.

On the other hand, consider the situation today in a system based on socialist property. Such a regime may be able to achieve Munzer’s required degree of equality, but only at the cost of such massive inefficiency and disincentives to productive effort that virtually no one enjoys a “fully human life.” If the socialist regime decides to combine state ownership of the means of production with a policy permitting even limited free exchange of property in one’s own labor, as East Germany did for a period before it collapsed, then its most valued resources quickly drain away. The other obvious option for socialist countries is the “Tiananmen Square” solution, which I trust Munzer would not endorse as a means of

22. *Id.* at 247.
achieving his desired distributional mean, although oddly he never directly says so.\textsuperscript{23}

The point is not so much that these ruminations about whether Munzer's ideal society is achievable are necessarily correct—although recent events in the communist world suggest they are. Rather, it is simply that Munzer never confronts the possibility that the relevant options may not represent a continuous function—from less to more egalitarian—but rather may be discontinuous: either private property with substantial inequality or socialism with insufficient total wealth to meet society's aspirations.

Munzer's unwillingness to confront the choice between private property and state-owned property is, however, symptomatic of more than his penchant for compromise. It is also quite consistent with what is probably the oddest feature of the book: what begins as a treatise on property—understood to mean the rights of persons in specific resources—ends up as a disquisition on distributive justice—understood to refer to the proper distribution of claims on society's total resources. Indeed, the question of just distribution so dominates the third and fourth parts of the book that one could argue Munzer has in fact written two books. The first, which comprises the early chapters about the definition of property and the various building blocks ostensibly leading up to the basic theory, is indeed addressed to "property," in the sense of institutional arrangements that permit particular individuals to possess, transfer, and exclude others from specific material resources (although Munzer offers no general theory about these matters). The second, which comprises the basic theory and its applications, is really not about property but about "wealth," in particular, the proper institutional arrangements for establishing relative shares of claims on society's total resources.

In making this point, I do not mean to suggest that the theory of property is or ought to be divorced from considerations of dis-

\textsuperscript{23} Munzer states that under the basic theory of property "liberty is derivative rather than basic." \textit{Id.} at 246; \textit{see also id.} at 287. What this means, apparently, is that some liberty will emerge as a result of the application of the principles of efficiency (which emphasize transferability and the exercise of choice in the satisfaction of preferences) and desert based on labor. But the promotion of liberty is not itself a fundamental pillar on which the basic theory is grounded. This devaluation of the role of liberty, like other moves in the book, helps to bring socialism up on a par with private property systems. Generally speaking, there is a strong contingent relationship between maintenance of private property and political and personal liberty. \textit{See, e.g.,} M. FRIEDMAN, \textsc{Capitalism and Freedom} 7-21 (1962). Thus, it is necessary to de-emphasize liberty as a value in order to maintain a position of neutrality between private property and socialist property.
tributive justice. Quite the contrary, the two are clearly interrelated. Nevertheless, I think it is seriously misleading to suggest that the theory of property reduces to a theory about the distribution of wealth. Perhaps the greatest irony of *A Theory of Property* is that such an avowedly pluralist book should end up sounding such a unidimensional note.

The unrelenting focus on wealth distribution that dominates the last half of the book results in some startling omissions from the basic theory. Probably the most glaring is the absence of any serious discussion about how a system of private property *generates* wealth. The story is a familiar one dating back at least to Blackstone:24 if a designated individual or group (the "owner") can exclude the rest of the world from using or interfering with a resource, then the owner will have a greater incentive to husband the value of that resource. If in addition the owner has the power to transfer the resource or its fruits to others, then, by a process of exchange, resources will come into the hands of those who have the aptitude to enhance their value the most. Munzer refers to this familiar story only in the most oblique fashion, by describing an exchange between Frank Michelman and Harold Demsetz in which Michelman argued that you cannot prove the superior efficiency of a system of private property by a priori logic.25 Munzer seems to agree that, since the efficiency enhancing qualities of private property cannot be logically proven, efficiency concerns should not count for much in a general theory of property. But a standard of deductive proof cannot possibly be the relevant benchmark for a theory of property; if it were, his own basic theory, as well as every other social theory, would have to be judged an immediate failure.

This oblique passage aside, the capacity of different property regimes to generate wealth goes almost unmentioned. The omission gives the book a curiously dated quality, in light of the dramatic upheaval in the socialist world that occurred in 1989 and 1990 (when I assume *A Theory of Property* was in the final stages of preparation). Munzer may be forgiven for failing to anticipate the collapse of world communism and the rush toward "privatization" and "decentralization" in almost all European nations founded on the principles of state ownership of property. But the superiority of

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capitalism as an engine of economic growth was clearly evident before then. One can understand why, given his egalitarian proclivities, Munzer would disparage an unalloyed system of private property on the ground that it produces an unequal distribution of wealth. But why does Munzer fail to give private property due recognition for superior performance in the generation of wealth?

One possibility, not terribly charitable, is that Munzer wants to stack the deck in favor of those systems that he imagines are more redistributive. A more likely thesis, however, is that Munzer is simply not very interested in ascertaining the virtues of and justifications for a system of private property, for the very reason that he is focused almost exclusively on distributive justice. This is evidenced by the fact that immediately after the short discussion of the possible efficiency-enhancing qualities of private property, he launches off into a discussion of how utility and efficiency justify redistribution of property.26

The shift from property to wealth also dominates the concluding part of the book, in which Munzer applies his basic theory to business corporations, gratuitous transfers, and takings. For example, the chapter on gratuitous transfers (primarily transfers upon death but also inter vivos gifts) argues as follows. First, Munzer reviews economic literature tending to show that inequalities in wealth in Britain and the United States are to a very large extent a product of inheritance.27 Next, he argues that the three principles of the basic theory support a reduction in these inequalities through progressive taxation of inheritances.28 Then he puts forward a rather specific plan for accomplishing this aim: a lifetime progressive tax on transferees.29 In keeping with his penchant for compromise, the plan turns out to be something considerably less than outright abolition of inheritances: the first $100,000 is exempt from all tax, as are all marital transfers, and the rate caps out at 65% after $1,000,000.30 Finally, he addresses various objections to his proposal based on “adverse impacts” such as reduced incentives to save, but finds them all unpersuasive (the government can always “subsidize investment in private enterprise”).31

26. Id. at 212–14.
27. Id. at 380–95.
28. Id. at 395–402.
29. Id. at 406–07.
30. Id.
31. Id. at 415.
In this treatment Munzer again focuses entirely on fungible wealth rather than on specific property. The subject of the disposition of property upon death is treated exclusively as a matter of determining the relative distribution of society’s general resources. Yet, the question of how specific assets are disposed of upon the death of their owner is by no means peripheral to an understanding of property as an institution. Sometimes particular items will have significance for family members far beyond their monetary value to outsiders. And even if no special subjective value is involved, as one generation succeeds another there is a pressing need to establish continuity of control over productive assets—whether it be a closely held corporation, an apartment building, or a family farm—and to provide incentives for cooperative behavior by both elderly owners and their prospective heirs. Yet Munzer does not consider how legal institutions should be designed to ensure that specific assets are transferred from one generation to the next.

Also missing from the picture is any reflection on the role gratuitous transfers play in the production, as opposed to distribution, of wealth. It is a commonplace that accumulated private wealth has performed a vital role in the cultural and educational life of the nation, through the creation of private foundations and universities. Munzer obliquely acknowledges this by proposing an exemption from his 65% tax for bequests to charitable organizations. But if accumulated private wealth has helped foster intellectual and artistic activity, why shouldn’t accumulated private wealth also perform an analogous role in providing seed money for entrepreneurial undertakings? Considerations of this nature, which should be highly germane in assessing a proposal to impose steep taxes on large inheritances, are not discussed.

In the end, A Theory of Property disappoints, because it promises more than it delivers—or rather, promises something different than it delivers. There is nothing wrong with writing a theory of distributive justice that attempts to synthesize the utilitarian, Kantian, and Lockean traditions. But such a theory cannot resolve many real-world issues about property rights. And such a theory, although clearly related to a general theory of property, does not comprise one.

33. S. MUNZER, supra note 1, at 411–12.