

DISTRIBUTIVE JUSTICE AND PROPERTY RIGHTS: A CRITICAL ANALYSIS

by Alan F. Zundel

Institute for Ethics and Policy Studies
Department of Political Science, University of Nevada, Las Vegas

Prepared for the *Faces of Justice: Defining Justice in a Complex World* Conference
Grand Canyon University, October 23-25, 2003

ABSTRACT: Ethical beliefs commonly held in the United States about property rights are subjected to critical analysis, in order to draw out logical inferences for a theory of distributive justice. The particular focus is on the grounds for the private ownership of property, and for the right of capital owners to have control over productive enterprises. The paper argues that, under scrutiny, these beliefs support government efforts to make ownership of productive property more widespread, and to facilitate alternative corporate forms giving labor more control over the enterprises that they work in.

1. Introduction

Inequality of wealth and income within the United States and around the world is vast and has been growing for decades. Many people question on the face of it how this situation could possibly be just, but others reply that the proper focus is not outcomes but processes; if economic processes are just, then the outcomes, however unequal, must be just. Aiding those at the bottom of the economic spectrum thus may be a matter of charity, but not of justice.

With the global spread of market capitalism and the economic, political and cultural influence of the United States, the question of distributive justice is inevitably directed at the economic processes of the U.S. If the U.S. is to hold itself out as a model for the world to follow, is it a just model? To answer this question we must apply a theory of distributive justice to the U.S. economic system.

This paper proposes to develop such a theory by subjecting ethical beliefs commonly held in the U.S. to critical scrutiny. The particular focus is on the grounds for the private ownership of property, and for the right of capital owners to have control over productive enterprises. The paper argues that, under critical scrutiny, these beliefs would find the U.S.

economic system to be in need of policy reforms to be just. In particular, they would support government efforts to make ownership of productive property more widespread, and to facilitate alternative corporate forms giving labor more control over the enterprises that they work in.

2. A Word on Method

There are multiple ethical theories current in contemporary intellectual life (for example, utilitarianism, rights theory, virtue theory, and natural law), and in tackling the question of distributive justice the analyst is obliged to confront this thicket before proceeding. My position is briefly described in this section, while a fuller explanation may be found elsewhere.¹

I follow Alasdair MacIntyre in judging that the Enlightenment project of establishing a system of ethics on first principles self-evident to any rational person has failed, as no consensus on such first principles has been achieved after a couple hundred years of trying.² Even so, as rational beings in search of principles to guide our decisions, inevitably we continue to hold and aspire to follow ethical beliefs. Therefore my starting point for building a rational ethical theory is the beliefs we profess and deliberately establish as practice rather than some elusive self-evident first principles. These beliefs may be critically examined in order to work them into a more logically coherent form.

The method is borrowed from Aristotle.³ He typically proceeds by proposing commonly held beliefs and then critically examines them, drawing conclusions where he finds them to be rationally defensible. It is somewhat similar to John Rawls' concept of "reflexive equilibrium," where Rawls moves between theory and practice, with the aim of critiquing each in the light of the other.⁴ Here I am moving between common beliefs and more developed theory, using the beliefs as the starting point for the theory and the theory to refine the beliefs.

¹ Over coffee perhaps? Give me a call.

² Alasdair MacIntyre, *After Virtue* (Notre Dame, 1979).

³ Aristotle, *The Nichomachean Ethics*. I have adopted Aristotle's method but not his conclusions; that is, I am not presenting an Aristotelian theory of distributive justice. Aristotle started from beliefs current in his own culture, at least some of which would be foreign to us.

⁴ John Rawls, *A Theory of Justice* (Harvard University Press, revised ed., 1999). Commentators at first took Rawls to be establishing his theory on neo-Kantian first principles, but Rawls later claimed to be working from beliefs about fairness commonly held in our society. See Michael Sandel "The Procedural Republic and the Unencumbered Self," *Political Theory* (1984), and John Rawls, "Justice as Fairness: Political, Not Metaphysical," *Philosophy and Public Affairs*, 14, 3 (1985). Rawls theory is impressive, but I—like several other critics—depart from him in his treatment of personal characteristics such as initiative and intelligence as social property; this violates a very deeply held belief in our society about the role of desert in distributive justice.

3. Property and Democratic Government

Clearly there is a set of basic beliefs regarding economic arrangements that are widely and deeply held in the United States: that private ownership of property and market exchange of goods and services are good, and capital owners have the right to control the productive enterprises they invest in. These beliefs are not absolute—we accept some role for government intervention in property rights, markets, and business decisions—but they are fundamental. I use them as the starting point for my analysis.

How is the private ownership of property justified? I believe there are two types of justification common in the U.S.:

- private property supports democratic government, and
- a labor theory of property rights (“I earned it; it’s mine”).

I examine the first justification in this section, and the second in the following section.

During the Cold War years it was common in the U.S. to associate the private ownership of productive property with democracy and socialized ownership with political oppression; the argument was based on the idea that control of productive property is an essential form of power. If ownership is concentrated in the hands of the government, power will likewise be concentrated, but if ownership is spread throughout society, power will likewise be dispersed. This argument was not new; earlier in U.S. history the same contrast was made between oppressive European political systems, where land was concentrated in the hands of a privileged political class, and the political freedom of America, where land ownership was widely dispersed.⁵ Property gives power; the right of private ownership is meant to spread productive property and thus power, while an erosion of property rights threatens a potentially dangerous growth of government power. This justification for the private ownership of property, then, is that it protects citizens from oppression.

The rise of the business corporation posed a dilemma for this traditional American belief: when productive property is privately owned yet that ownership becomes highly concentrated, citizens can be in danger of oppression from a different direction. Not only are they at the mercy of giant corporations as employees and consumers, but government may side with the

⁵ Alan F. Zundel, *Declarations of Dependency: The Civic Republican Tradition in U.S. Poverty Policy* (SUNY Press, 2000).

corporations in an alliance against them. Twentieth century political life in the U.S. has been characterized by tension between the egalitarian power of the vote and the inegalitarian power of corporate capital in controlling the government, as well as competition between those who see big government and those who see big business as the greatest threat to the common citizen.

A possible solution in harmony with the American tradition would be to broaden corporate ownership the way we once tried to broaden land ownership, for example by making stock ownership more widespread among the general public, thus giving citizens more direct power over corporations (rather than the indirect power of government regulation) as well as giving them financial assets allowing more independence from control by others.⁶ An immediate objection would be that this can be accomplished on a large scale only by redistributing property, eroding the very property rights we aim to protect. Yet if ownership of private property is highly concentrated, our first justification for defending private property rights (that it disperses power) has been weakened; is there some other reason to object to redistribution? A more pertinent objection comes from the second justification for private ownership.

4. The Labor Theory of Property Rights

This justification may be stated simply: “I earned it; it’s mine.” That is, when your actions create value, you have a property right in that value. The English philosopher John Locke proposed a labor theory of property that was well known to the American founders and is still familiar.⁷ According to Locke, natural resources are owned by no one until someone “mixes” their labor with them, as by cultivating land or gathering food in a forest. Such acts create a natural right of property evident to any rational person, one of the preeminent rights (along with life and liberty) that government has a duty to respect and protect. Locke’s theory perhaps has some intuitive appeal, but there are problems with it. As many modern libertarians still hold a belief in natural property rights (that is, a right to property that exists independent of government recognition), it is worth digressing a bit to examine these problems.

One problem is how the right to mix labor with natural resources may be assigned when

⁶ This solution was proposed by Louis O. Kelso, whose political thinking is unjustly neglected due to its association with his unorthodox economic theories. See Louis O. Kelso and Mortimer J. Adler, *The Capitalist Manifesto* (Random House, 1958). For my assessment of Kelso’s ideas, see Alan Zundel, “Kelso’s Binary Economy as Social Ethics,” *Journal of Socio-Economics*, 29, 6 (2000)

⁷ John Locke, *Second Treatise of Government*, Ch. 5.

more than one person would like the opportunity to do so. That is, two people show up in the same field wanting to plow the land and build a farm there—which one has the right to do so? Locke does not tell us, but the answer seems evident to at least this fairly rational person: such opportunities are determined by rules set by a political community, not by a hypothetical law of nature. Historically land has not been open to settlement by whoever shows up first; rather, access to land and other natural resources has been controlled by political power. The early European immigrants to the North American colonies did not just start settling wherever they chose to; the right to settle somewhere was granted by the governments who claimed control over the territory, such as the kings of England and Spain or their assignees. After the American Revolution access to the frontier was controlled by the U.S. Congress, which sometimes auctioned off land to speculators, sometimes granted it to business interests such as mining and timber companies, and sometimes set the conditions under which homesteaders could claim title, but only occasionally passed title to squatters who mixed their labor with the land before seeking political permission.⁸

A further problem is that political control over land has most often been established not by laboring on it but by force of arms, displacing earlier inhabitants. Some parts of the U.S. could be argued to have been unpopulated when the titles to land were first established, but in other parts indigenous peoples had been mixing labor with the natural resources for centuries. The chain of title for property here, as elsewhere in the world, often leads back not to an act of labor, but an act of violence. Of course a defender of Locke's theory might say that how property rights were actually determined does not indicate how they *ought* to be determined. But in a world where most property is already claimed by someone, how does his labor theory of property help us sort out whether the current owners have legitimate title? If it cannot do that, what good is it?⁹

Even more problematic for Lockean theory, many of the acts of labor that first mixed with natural resources were by the hands of slaves, servants or employees. On that point, Locke assumes that work done for you by your servant establishes *your* right to the property that the

⁸ Zundel, *Declarations of Dependency*.

⁹ Of course, its main function may be as a legitimating mythology for property rights.

servant works on.¹⁰ The problem here should be obvious. If the labor that is mixed with the property gives ownership, it would seem that the laborer has the right to the property, not the master. Locke's assumption is that the master has a right to the servant's labor, but does not explain how such a right could come to be.¹¹

Whatever the intuitive appeal of Locke's theory of a right to property established by labor, it does not hold up very well to critical scrutiny. In U.S. history our practice has been to assign the right of first title to real property on public policy grounds, in particular to achieve the aims of economic development¹² and dispersal of political power through the dispersal of property ownership—the latter aim is of course the justification for private property discussed in the previous section.

However, there is a more persuasive version of a labor right of property, one that has been widely accepted for a long time. It is this that I would argue underlies the intuitive appeal of Locke's theory: the idea that our labor is our property, so we have a right to whatever we earn through it. Our labor may not give us a right to the resources we mix it with, as Locke contended, but it gives us a right to whatever we earn in exchange for it (and the things we buy with that pay). To most people this is a moral right that government should respect, closer to a natural law than what Locke proposed. I would argue that this belief is also what feeds the resistance to redistribution. Taking away property from some to give to others, in order to insure the wide dispersal of political power, would violate the right of people to keep property that they earned through their own labor—and, more importantly, violate justice by giving the property to others who have *not* earned it.¹³ Here the problem of ownership when Locke's servant mixes labor with natural resources dissolves: laborers are entitled to their wages, not to the property they have worked on. But it raises a different problem: how to determine what our labor

¹⁰ "...the Turfs my Servant has cut...become my *Property*..." Locke, *Second Treatise*, Ch. 5, §28 (emphasis in original).

¹¹ Locke does mention that if you delay taking the life of someone you have a right to kill, you have a right to their service as a slave in return (*Second Treatise*, Ch. 4). But I doubt if many servants had actually become so because they had violated the laws of nature and thus deserved to be killed.

¹² The aim of economic development raises the possibility that private property can be justified on the grounds of economic efficiency, but I don't think this is the reason that most people believe private property is a good thing. Just ask yourself how many people would be willing to give up the right to private property if it could be demonstrated that an alternative economic system would be more efficient.

¹³ The second part of the sentence is more important because people are generally willing to have some of their property taken for various public purposes (that is, they acknowledge the obligation to pay taxes), but a large number of people draw the line at taking their property for redistribution to others.

rightfully earns, that is, what is a just wage? The U.S. belief that market exchange is the best way to set prices now takes center stage, in the case of labor subject to a caveat that the price not fall below some level necessary to sustain a decent life.¹⁴ Aside from situations violating that caveat, is a market price for labor just?

A common answer is that because market exchange is voluntary, we can presume that the price is fair or the parties would not have entered into the exchange. But the presumption that a voluntarily agreed upon price is necessarily fair is doubtful. Imagine a scenario in which you negotiate your salary with an employer, and then later discover that the employer would have been willing to pay you \$10,000 a year more than you agreed to—say for example they hired another person for a similar position with similar credentials for \$10,000 a year more than they are paying you. I would bet that many, if not most people would feel that they had been treated unfairly. People do not engage in market exchanges because they believe they are fair (they may or may not believe that about any particular exchange), but because they believe they will come out ahead in the exchange. This is due to the difference between “subjective value”—what something is worth to you—and “objective value”—what the market price is. We agree to an employment contract because my labor is worth more to you (subjective value) than the money you agree to pay me (objective value), and the money you agree to pay me (objective value) is worth more to me than other opportunities to use my labor (subjective value). Market exchanges, in other words, create greater utility or human happiness because people exchange things with other people who value those things more than they do.

But suppose we had a theoretically ideal market, in which supply and demand are in perfect equilibrium such that subjective values and objective value are the same, and therefore there would be no gap between what an employer is willing to pay and an employee is willing to accept. (This is impossible in the real world, although we can be nearer or farther from the ideal, with a gap that is narrower or wider.) Would then the price of labor, or anything else, be a just price? I would argue yes, the reason being that neither party to the exchange would gain utility at the expense of the other;¹⁵ for that, I believe, is where the sense of an unfair exchange arises.

¹⁴ This is, of course, the justification for minimum wage and living wage laws. For a discussion of the ethical principles used to justify living wage laws, see Alan F. Zundel, “The Futility of Empirical Policy Analysis Without Normative Policy Analysis: The Case of the Living Wage,” *Public Integrity*, 4, 2 (2002).

¹⁵ Actually, if subjective and objective values were exactly the same, people would have no reason to make an exchange.

The nub of the real world problem is this: how is the utility created by the exchange to be fairly apportioned between the parties to the exchange? More concretely, if I am willing to work for at least \$40,000 a year, and you are willing to pay me at most \$50,000 a year, any salary agreement between \$40,000 and \$50,000 will make us both happier, so where, between the two figures, is the just price for my labor? The most plausible answer would be \$45,000—splitting the utility created by the exchange equally between the two parties, \$5,000 for each.¹⁶ If both parties had full information about the subjective values of the other, this, I would argue, is the agreement they would make.

In sum, market exchanges are just when both parties gain equally from the utility created by the exchange, which is what the parties would agree to if they both had full information about the subjective value of the other. This condition of course rarely holds because people disguise their subjective values to obtain an advantage in negotiations. In the case of the price of labor, the managers of a productive enterprise are usually in a superior informational position due to knowledge about general market conditions in the industry, pay scales within the enterprise, profitability, and so forth, information that workers often do not have. It can be assumed, then, that managers use this information to estimate the subjective value of workers for wages, and withhold information to hide their own subjective value for the workers' labor, gaining an advantage in negotiating they will use to the advantage of the capital owners they are accountable to.¹⁷ Workers therefore are less likely to receive the just price for their labor, which gives us reason to question the justice of the common belief in the right of capital owners to control productive enterprises.

5. The Position of Capital Owners in the Business Corporation

The norm in the U.S. is for productive enterprises to be controlled in the name of the capital owners and hire workers for pay. It is just as conceivable that productive enterprises could be controlled in the name of the workers and hire capital for pay (that is, borrow capital and pay interest on it)—workers' cooperatives do exactly that. In the latter case, the

¹⁶ This assumes that we both get the same utility, or happiness, from \$5,000, which may not be true, but it is, I think, as close as we can come to an equal division of the utility gains of the exchange.

¹⁷ Of course, managers often use their informational advantage for their own benefit rather than for the benefit of the capital owners they are supposed to be accountable to. This may be another reason to prefer worker-controlled enterprises: it could be easier for workers than it is for capital investors to keep an eye on the managers.

informational disadvantage of workers in negotiations over pay would disappear, creating better conditions for the just compensation of labor. Would this create a disadvantage for capital providers in negotiating for the compensation of capital investment? Less so than the current disadvantage of workers, I would argue, because it is much easier to move capital to take advantage of a better deal than it is to move labor. It is also conceivable, and in fact has been done elsewhere,¹⁸ that workers could be represented alongside capital owners on the board of a productive enterprise, each with equal access to the same information. With alternative organizational forms available, what are the grounds for a right of capital owners to have exclusive control over productive enterprises?

Some people might believe that those who own productive property have some kind of inherent right to control those who work with that property, but it is hard to see what this right could be based on. As human beings jointly participating in a mutually advantageous endeavor, joint control by both capital owners and workers would seem more defensible than control of one over the other.¹⁹ A belief in the inherent right of capital owners to control workers would seem a hang-over from earlier times, when the working classes were regarded as less rational than the owning classes; the employer-employee relationship, after all, is the direct legal descendent of the master-servant relationship of Locke's less democratic era.

A defender of control by the capital owners might claim that this arrangement is more efficient or results in better management of the enterprise, on the assumption that otherwise workers' cooperatives or some other organizational form would have become more prevalent. Whether these claims are true or not, they are not arguments that the capital owners have a *right* to control the enterprise, and so are not relevant to our examination of distributive justice.

I believe that the most plausible basis for a right of capital owners to control productive enterprises is the right of personal liberty. Under the principle of freedom of association, derived from the right of personal liberty, capital investors have the freedom to join together in a business organized the way they want, and under the principle of freedom of contract, also derived from the right of personal liberty, they can make employment agreements with workers

¹⁸ For example Germany's model of "co-determination."

¹⁹ For an argument against control by capital owners in favor of workers' control, see David Ellerman, "The Democratic Firm: An Argument Based on Jurisprudence," *Journal of Business Ethics*, 21 (1999). For my response to his argument, see: Alan F. Zundel, "Ordinary Jurisprudence and the Democratic Firm: A Response to David Ellerman," *Journal of Business Ethics*, 35 (2002).

willing to accept the capital owners' control over the enterprise.

Of course, the right of personal liberty also implies that workers are free to set up workers' cooperatives, or to negotiate for joint control of an enterprise alongside the capital owners in return for their participation in it. Public policy, therefore, should make it as equally feasible for these alternative organizational forms to be established as it is to establish a traditional capital-controlled enterprise, or even, on the grounds that the alternatives would be more likely to pay a just price for labor, to give preference to such alternative organizational forms. There is an extensive system of legal and institutional support for the creation and maintenance of corporate forms based on capital owners' control, but very little of such support for alternative organizational forms. For example, it is more difficult to set up a workers' cooperative than a traditional capital-controlled corporation, because state laws do not provide a template for organizing such an entity the way they provide a template for joint-stock companies. As another example, labor unions are legally restricted to bargaining over pay and terms of employment, and thus cannot negotiate for more control over other business decisions. All such laws presenting special obstacles to more worker-controlled enterprises should be subject to scrutiny and possibly reformed.

6. Conclusions

Theories of distributive justice often start from the premise that human equality or human needs should be the foundational concerns, but in the United States beliefs tend to emphasize the rightness of institutional arrangements, however unequal the outcome. This paper has subjected a set of such beliefs to critical analysis, in order to draw out logical inferences for a theory of distributive justice.

It has found that the grounds for a right of private property support a wide distribution of ownership in productive property, but not the redistribution of property. As the ownership of productive property is highly concentrated, non-redistributive means for broadening ownership (such as encouraging savings or employee stock ownership plans) are needed to achieve greater justice.

It has found that the grounds for the fairness of market prices require an equal sharing of the utility gained by exchanges, and therefore the ability of workers to gain information needed for negotiations over pay should be improved.

It has found that the grounds for the right of capital owners to control productive enterprises also support the right of workers to control or share control of productive enterprises, and so public policy should at a minimum remove obstacles to the creation of more worker-controlled enterprises, and perhaps take more positive action to encourage such organizations.

In summary, the paper has argued that, under scrutiny, beliefs commonly held in the U.S. would support government efforts to make ownership of productive property more widespread, and to facilitate alternative corporate forms giving labor more control over the enterprises that they work in.