

1-2005

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Recommended Citation

Andrei Marmor, "On The Right to Private Property and Entitlement to One's Income," 18 *Canadian Journal of Law and Jurisprudence* (2005)

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On The Right to Private Property and Entitlement to One's Income

Andrei Marmor

In their book on the justice of income tax, *The Myth of Ownership*, Liam Murphy and Thomas Nagel argue that people do not have a right to their pre-tax income.¹ This, they say, is the basic conviction that determines their approach to the entire book. There are two main paragraphs in which they purport to explain this conviction, and in this essay I want to discuss the difference between these two formulations. I will label them as the 'first quotation' and the 'second quotation' respectively. The first runs as follows:

The conviction that determines our approach to all more specific questions is that there are no property rights antecedent to the tax structure. Property rights are the product of a set of laws and conventions, of which the tax system forms part. Pretax income, in particular, has no independent moral significance. It does not define something to which the taxpayer has a prepolitical or natural right, and which the government expropriates from the individual in levying taxes on it.²

In the next paragraph on the very same page, the following formulation is offered:

People do have a right to their income, but its moral force depends on the background of procedures and institutions against which they have acquired that income—procedures that are fair only if they include taxation to support various forms of equality of opportunity, public goods, distributive justice, and so forth. Since income gives rise to clear moral entitlement only if the system under which it is earned, including taxes, is fair, entitlement to income cannot be used as an assumption to evaluate the fairness of the tax system.³

Let me say from the outset that I fully agree with the argument of the second quotation. Nor is it my main purpose here to argue that the content of the first quotation is misguided. (Part of it is, as I will explain at the end, but not necessarily the main part.) My main purpose here is to point out the fact that there are two very different philosophical insights at stake here, and that we may gain a much better sense of the debate if we disentangle them.

In the first quotation, Murphy and Nagel seem to be making a very familiar yet highly contested point about the nature of the right to private property: Namely, that the right to private property is *not a natural right*. They do not say whether or not they think that there are other rights which may be 'natural'. However, even if there are some rights which may be deemed natural in a traditional sense, the

I am indebted to Scott Altman, David Enoch, Marshall Cohen, and Ed McCaffery for comments on previous drafts.

1. Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002).

2. *Ibid.* at 74.

3. *Ibid.*

right to private property is not one of them. ‘Property rights are the product of a set of laws and conventions’, they say. This would seem to deny precisely what Locke in his famous argument on the origins of the right to private property strove to establish, viz., that it is a prepolitical natural right (at least under certain conditions).

Now consider the second quotation. Here there is no question about the naturalness of the right to private property. Instead, the claim is that people’s right to their income (whatever that right is), can only be justified if it forms part of an entire system of norms and institutions which yield morally acceptable distributional procedures and outcomes. In other words, the claim here is that an entitlement of the kind under consideration is just, or fair, only if it forms part of a fair system. I will argue that this is quite right, even if the content of the first quotation is wrong. In other words, I will argue that the conclusion about the nature of the right to private property is neither necessary nor sufficient to establish the validity of the moral argument that is espoused in the second quotation.

As a first step, we must clarify what is it that philosophers mean when they claim that a right to *X* is a *natural right*, and what would be the meaning of denying this. There are at least two, partly overlapping, possibilities:

1. A natural right is the kind of right people can acquire in a hypothetical ‘state of nature’.
2. A natural right is a right people have in virtue of being human beings, or persons, or moral agents.⁴

Let me explain each one of these ideas in turn. Following Locke’s famous argument, the first option is the traditional meaning of a natural right that is associated with the right to private property. Locke’s argument is open to various interpretations, but at least a few points are clear enough. As a first step, we try to envisage a *state of nature* that is meant to capture the idea of the world without political organizations, that is, without a state and a legal system. At the second stage, we ask ourselves whether people in that hypothetical state of nature would have certain rights. The point of Locke’s ‘mixing of labor’ argument, I take it, is to answer *this* question in the affirmative with respect to the right to private property. Thus, to the extent that something like Locke’s argument succeeds, a right to private property would be a natural right in the sense that it is the kind of right people could acquire in a state of nature. Obviously, a lot depends here on how we characterize the hypothetical state of nature. But this is not the point I want to focus on. Rather, for our purposes, the question should be a different one: what is the moral significance of the conclusion? Why would it matter that a certain right, say to private property, can be acquired in this hypothetical state of nature, and other rights, for example, the right to due process of law, cannot? It is not difficult to surmise what Locke’s answer is: Locke assumed that if he can establish the “natural” aspect of the right to private property, namely, that it is the kind of right people may acquire in a state

4. This conception of a natural right roughly accords with the traditional Marxist distinction between human rights and civil rights. Human rights are those people have in virtue of being human beings, and civil rights are those people have in virtue of being subjects of a political entity.

of nature, then it follows that the state, once established, as it were, must respect the right and protect it. But this move is actually a *non sequitur*. Even if there is a certain right that people can acquire in the state of nature, once a state is established, the right may be lost or superseded by other concerns. Suppose, for example, that in a state of nature people would have the right to defend themselves by, *inter alia*, punishing anyone who transgresses their rights. Surely, such a right to punish must be rescinded with the establishment of a state that maintains a legal system.

There is an obvious response to this point: it may be admitted that the establishment of a state may, indeed, transform the nature of the relevant natural right, but the state must nevertheless protect the interest that grounds the right in question. Even if people should lose their right to punish with the establishment of a state, that is only because the role of punishment is now undertaken by the state, thus protecting the same interest by other, presumably more efficient, means. This is quite right. But it does not undermine the simple point that at a political stage, as opposed to a state of nature, individual people no longer have a right to punish. It is at least possible, then, that a similar fate befalls the right to private property. Perhaps the interests and other moral concerns that ground the right to private property in a state of nature are better protected by the state in other forms, that is, without upholding an individual right to private property.

I am not suggesting that this is necessarily the case. But it is a possibility one must consider, and the fact that such a possibility exists quite simply proves that even if people, as individuals, have a right to *x* in a state of nature, it does not necessarily follow that the state, once established, must recognize an individual right to *x*. Since it is quite clear (and was clear to Locke himself⁵) that the conditions which may give rise to the right to private property in the state of nature do not obtain at the political stage, it remains a bit of a puzzle why so much attention has been paid to Locke's 'mixing of labor' argument. In any case, the naturalness of the right to private property has no clear implications with respect to the nature and scope of the right to private property in the political society. Perhaps the argument can show that there are certain human concerns that the state must attend to and protect, but the question of whether these concerns must be protected in the form of an individual right to private property is clearly underdetermined by the natural right argument.

The second interpretation of the idea of a natural right seems more promising in this respect. There are certain rights, it can be argued, that people have just in virtue of being humans, or persons, or moral agents, or such. (Obvious examples of such rights would include, for instance, the right to life and perhaps the right to a minimal level of subsistence; the right not to be subject to humiliation, torture, etc.; perhaps the right to freedom of conscience; and so on.) The existence of such rights, therefore, does not depend on the existence of a state or a legal system. Furthermore, it is plausible to maintain that if there is a certain right that people

5. There is a clear indication in the text that Locke was aware of this difficulty in his argument, since he was at pains to show that at the political stage, there is an additional argument for the right to private property that Locke attributed to a form of tacit consent, associated with the introduction of money.

have just in virtue of being, say, human beings, then the state must recognize the right and protect it.

Arguably, the Hegelian argument about the right to private property is a natural right conception in this second sense. Hegel has argued that the ownership of property is essential for a minimal level of human flourishing and that it is essential for the healthy development of personhood and personal freedom.⁶ It seems possible to interpret this type of argument as the kind of claim which maintains that the right to own property is a right people ought to have just in virtue of being humans or persons. Even if one accepts this Hegelian reasoning, however, nothing follows from it about the extent of property one should own, or about the ways in which property rights may be gained, transferred, or lost. The Hegelian argument is rather abstract, and it only shows that people ought to be allowed to own some private property. Perhaps it, or another similar argument, can also show that there is a certain *minimal* level of ownership that is essential for human flourishing, and thus the state should provide for each and every individual a minimal amount of goods to own, so to speak. But again, no details about the scope of the right to private property can follow from the Hegelian argument.

Let me pull these two points together. If the right to private property is deemed a natural right in the Lockean sense, then it is far from clear that such a natural right must be recognized and protected by the state. If, on the other hand, the right to private property is deemed natural in the sense that it is the kind of right people have just in virtue of being humans, or persons, or such, then the right in question is far too abstract to yield any conclusions about its desired scope in any particular political state.

If this is correct, then it becomes very unclear what is to be gained by denying that the right to private property is a natural right. Recall that Murphy and Nagel want to substantiate the conclusion that people do not have a right to their pre-tax income. Since they do not want to deny that individuals do have a right to own property, there is nothing in their argument to suggest that they would object to the Hegelian conception of the right to private property.⁷ Thus, they need not deny that the right to private property is a natural right in this second sense. If it is the Lockean sense of the natural right thesis that they wish to deny, then the move is moot since there is nothing in the Lockean argument that could possibly support a denial of the Murphy/Nagel conclusion.

In one sense, however, this last point is not accurate. There is a crucial *part* of Locke's argument that may be very relevant to the dispute here, but it is not the natural right to private property. One crucial premise in Locke's 'mixing of labor' argument is the moral thesis that people have a natural right to the fruits of their labor, which is supposed to be derived from the idea of self-ownership. As Locke

6. G.W.F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: University Press, 1952). For an excellent account of Hegel's argument, see J. Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at ch. 10.

7. In fact they actually indicate an acceptance of the Hegelian line of thought. (See *supra* note 1 at 45.) Furthermore, the Hegelian argument is compatible with the thesis that the right to private property is a product of laws and conventions.

put it: 'every man has a property in his own person [Therefore, the] labor of his body and the work of his hands, we may say, are properly his.'⁸

Evidently, it is *this* premise of Locke's argument that Murphy and Nagel strive to undercut, and that is precisely the point of their normative thesis in the second quotation. They claim that even if people have a right to the fruits of their labor, the moral force and scope of such a right cannot be determined in isolation from the entire distributive system which prevails in the society at large. I think that they are quite right about this.

Consider Locke's premise again: understood literally, the moral point of it is almost too silly to be taken seriously. Surely, from the fact (if we generously grant that it is a moral fact) that I own my hand, it does not follow that I own everything that I do or transform with it. (If I use my hand to rub your head, does it mean that I can come to own your head, or that I have any justified claim to it?) As has been pointed out before, Locke's moral intuition here can only be understood in terms of an entitlement people may have to the fruits of their labor, if the latter is understood in terms of the *added value* of their product or the impact of their labor.⁹ But the problem for Locke, and contemporary libertarians who followed him, is that the very idea of the added value of labor makes *moral* sense only against the background of a system of norms and practices which guarantees *fair* bargaining and fair pricing. Libertarians take it for granted that there is an objective measure for the added value of labor that is simply the price that could be earned on it in an ideally free market. But this can only make moral sense if we also assume that the conditions of a free market, *ipso facto*, are fair, and there is very little reason to make such an assumption or take it for granted.¹⁰ In any case, Murphy and Nagel are quite right to maintain that whatever one's views about fairness are, it is the fairness of the entire system that necessarily conditions the specifics of one's entitlement to the fruits of one's labor, since it is only on the background of the entire system that we can determine what the added value of one's labor, morally speaking, is.

My conclusion is this: In order to establish the normative argument, Nagel and Murphy need not deny that the right to private property is a natural right. There is nothing to be gained for their argument by insisting that the right to private property is not a natural right. Nor do they have to deny the moral intuition that people have a right to the fruits of their labor. On the contrary: The plausibility of their normative argument in the second quotation relies on the premise that people do have a right to the added value of their labor. The argument maintains, and rightly so I think, that there is no possible conception, morally speaking, of what such an

8. John Locke, *Second Treatise of Government*, ed. by C.B. Macpherson (Indianapolis, IN: Hackett Publishing, 1980) at sec. 27.

9. That is how Marx also understood, and actually subscribed, to this moral insight. Thus, his famous doctrine is put forward about the surplus value of labor that the capitalist steals from the workers. It is also how Nozick understood Locke's premise. See his *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 175.

10. In fact, the libertarian position is even more dubious: not only that it must hold that the pricing of an ideally free market is necessarily fair, but libertarianism must also hold that any other alternative system that may attach different pricing to the added value of labor is necessarily not fair.

added value is, independent of the system of legal and social norms that constitute the terms of fair bargaining, just pricing, and so on. In other words, people can only have a right to a *fair assessment* of the added value of their labor, and the latter cannot make any sense independent of the entire system of norms prevailing in the relevant society.¹¹

Nagel and Murphy might argue that I have missed a crucial element in their argument in the first quotation. The reason for denying that the right to private property is a natural right, they could claim, resides in the following idea: people cannot have a property right in their pre-tax income because property rights are essentially defined by legal norms and conventions, and the latter must comprise elements of taxation. As they put it: 'Property rights are the product of a set of laws and conventions, of which the tax system forms part.' (I take it that they mean 'necessarily forms part'.) I think that this is not a convincing argument, and for two reasons. First, libertarians need not insist that people's right to their pre-tax income is necessarily a *property* right. Instead, they could claim that it is their natural right to the fruits of their labor, which is a moral claim that perhaps underlies the natural right to property but is not identical with it. In other words, even if the right to private property is basically artificial, people may still have a right to the fruits of their labor. As I have argued above, the real disagreement is about the conditions which can determine what the fruits of one's labor, morally speaking, are.

Secondly, even if we accept the premise of Murphy and Nagel's argument that the right to private property is entirely artificial, constituted by legal norms and conventions, it seems to me groundless to claim that such norms must necessarily include the institution of taxation. It is not difficult to envisage a state that has a well-developed system of private property that does not impose any taxes whatsoever. The state may, for instance, finance its operations and the maintenance of its legal system by controlling some of the country's natural resources (e.g. oil, or diamonds, or such). Perhaps this is not a viable option for most countries, or perhaps this is not an efficient or a fair system of financing a state, but I do not see any conceptual link between a legal system of private property and a system of taxation. To the extent that such a link exists, it is entirely contingent. So this argument fails. But as I have tried to argue above, the main normative argument in the second quotation is valid, regardless of the non-naturalness of the right to private property.

11. The Marxist argument is very instructive here: since Marx believed that it is inherently wrong for some people to own the means of production, he was able to claim that the capitalist actually steals the surplus value of the laborer's work and therefore free market pricing of labor is necessarily unjust. I am not suggesting that Marx expressed himself in these moral terms. But there is a moral argument here that, even if wrong, is not necessarily absurd.