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Law and Property: The Best Hope for Liberty?

by Norman Barry

There is little left of the conventional protections for individualism in the modern world. Whatever theoretical virtues there may be in democracy (and there aren't many[1]), in practice it has disintegrated into a struggle among self-regarding interest groups, mediated by government, over wealth that is exclusively created by private individuals. The Constitution has proved to be little more than a parchment protection against legislative predators. Federalism, which once offered the possibility of exit from more burdensome states, has ceased to be an escape route because the U.S. Supreme Court, in upholding virtually every act of centralization since Franklin Roosevelt, has turned the states into mere agents of Washington, D.C.

The law itself seems to offer little solace. The common law, which is a product of judges' proceeding case by case, for example, in tort and contract, has ceased to be as predictable as it once was. Judges have now become creative: they don't preserve an ongoing legal order; they shift it in politically fashionable directions.

Because of this change in the common law, I began to look for the security of a written legal code (or civil law) against the arrogance of lawyers with a social mission. I was the first to admit that neither the common law nor a written code had been able to resist the intrusion of statute into the order of general (end-independent) rules in the twentieth century. But surely a code system had a slightly better chance of preserving liberty? Historically, code writers had been less influenced by interest groups. After all, the codes were not originally the product of mass democracy. There is indeed a logical difference between a code and a statute, and this is another instance of F. A. Hayek's famous distinction between "law" and "legislation." Furthermore, a code system, in principle, does not suffer from the vagaries of judge-made law. In a difficult case, the judges go back to the code rather than use their own discretion; and is that not better than having a judiciary pretending that it is "discovering the law" when it is really advancing a social agenda? Hayek himself had respect for the nineteenth-century German code.

But I soon realized that something was going wrong with my thinking. I had not understood that the common law was, in principle, acceptable if politicians left it alone. There was a close historical connection between the common law and the market economy. Contract, which was entirely judge-made law, had been an essential servant of the private property, capitalist order, and tort, which protected individuals from possible harms, had emerged independently of statute.

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Ironically, the problem in America came from the fact that it has always had a kind of code, the Constitution, superimposed on the spontaneous order of common law. This code, because it has been subject to creative interpretation, has licensed an attenuation of rights and property, which would not have occurred under pure common law. The latter had always recognized equality (it was an eighteenth-century court decision that disallowed slavery in England), so did we really need the Fourteenth Amendment, which, among other divisive things, brought us affirmative action?

Even now there is still a feature of the common law that works reasonably well precisely because it is more or less unaffected by the code (the Constitution). If we look at the common law we don't find any ringing declaration of property, yet it has quietly protected one person's possessions against damage by another. It was celebrated by Sir William Blackstone: "The . . . absolute right, inherent in every Englishman, is that of property: which consists in a free use, enjoyment and disposal of his acquisition, without any control or diminution, save only by the laws of the land."[2] By that "control," Blackstone meant the law that had emerged from judicial decision-making. The major depredations of property came later from statutes emanating from a sovereign parliament, which he acknowledged with regret. Of course, he lived in advance of mass democracy.

Still, the Blackstone approach lives on, and, as we shall see, common-law solutions to, say, externality problems (such as pollution) are quite effective. We shall compare its approach with the Napoleonic Code (1804), Article 544, which declares sonorously of property "the right to use and dispose of a thing in the most *absolute* way." But since judges have little say in its interpretation, the Code has to be altered every time some contingency occurs. Private property, despite the Gallic flourishing, turns out to dependent on myriad rules and regulations, all of which lead to increased centralization and the dominance of *public* law. The French early recognized the problem of externalities but instead of seeing the problem as soluble by judges' determining appropriate property rights, they "transferred to administrative agencies all collective interests threatened by industrial development."[3]

Law of Nuisance

In contrast, the English common law developed the law of nuisance. This was not the product of some rationalistic planner but the outcome of myriad private cases, where one person brought an action against another who had damaged his property. By not referring to a code, the judges can be pragmatic in their solution to a problem. Most important, they talk of "reasonableness" when adjudicating whether a nuisance had been committed, and their evaluation of its seriousness often encompasses the economist's notion of utility.

What was crucially important was the invention of the common-law remedy of injunctive relief. In any legal dispute a litigant could go to court with an action, say, a tort under the law of nuisance, and secure an injunction (backed by the crime of contempt of court) compelling his opponent either to desist from or to perform an action. Once granted, an injunction allows the possibility of negotiation between the parties to reach an agreement that satisfies both. Thus if two parties have a dispute about whether one has the right to cause an obnoxious smell on his own property that also adversely affected others, the court would in effect decide the property rights and issue an injunction. The loser can then buy out that right through a contractual agreement. Both parties are better off.

The injunction is essentially forward-looking or utilitarian; it looks to future well-being. Actions for damages, however, are essentially backward looking; they are concerned with correcting past wrongs.

Code law, because of its concern with physically separate property, seems to have a greater affinity with the freedom philosophy. If someone's property rights have been clearly undermined, actions for damages are appropriate. But only recently have code sys-

tems developed techniques to deal with the problems where rights are in dispute (such as in environmental issues), the very thing the injunction has always handled. Although codes have remedies for dealing with externalities, or incompatible uses, they still tend to rely on the finality of damages, or the coercion of public law with no possibility of negotiation. There is now, belatedly, a law of nuisance in France, and it is conceded by defenders of legal codes that the common-law method protects property better than the grandiose declarations of a code.[4]

The common law is pragmatic and can produce a variety of solutions. But they are not always satisfactory. In the precedent-breaking New York case *Boomer v. Atlantic Cement Co.* (1970), although the plaintiffs were victims of a nuisance (cement manufacture is unpleasant), they were denied an injunction, which would have closed the plant and eliminated hundreds of jobs. Instead, the victims were awarded damages. This overturned the traditional interpretation of nuisance, which would have called for cessation of the offending activity. Perhaps the worst aspect of the case was the award of *permanent* damages, since once they were paid the aberrant company was relieved of any duty. If *temporary* damages had been awarded, the plaintiffs could have kept coming back for more and this would have given the perpetrator an incentive to fix the problem.

A further example of the pragmatism of the common law is the defense of "coming to the nuisance." If a person has been causing a nuisance for a long time and nobody has complained, a newcomer to the area would probably lose any action he brought against the creator of the nuisance. Again, there are clear advantages to this, for many businesses would not survive a rigorous application of the law of nuisance. The doctrine is sometimes called "first come, first served," and it could be said that the original person had established the "right" to engage in the activity. Of course, there are dangers in this because the courts might be effectively granting a monopoly to the "offender." What if someone wanted to develop a residential area, which depends for its viability on the absence of noxious smells? "Coming to the nuisance" is not always an effective doctrine.

Unlike a code system, where the judge is reduced to the mechanical interpretation of the law, under common-law the judge is looking for *policy*-based solutions. But this flexibility and pragmatism must not be misinterpreted: it is not a license for the judge to make the law reflect personal whims and ideological fancies. There are restraints, such as the overriding obligation to preserve a predictable order, established expectations, and conventional legal rights. Ironically, the greatest threat to legitimate expectations and rights has occurred in that part of American law which most resembles a code—the Constitution. Here the record of property-rights protection is at best mixed and at worst bitterly disappointing.

Some Progress

Undoubtedly property owners have achieved some legal protection against government "takings" through important decisions in the past ten years. For most of the twentieth century the judiciary had been supine before voracious legislatures that gobbled up property on behalf of the "public good." Rightly or wrongly, government in the United States has always had the power to take private property, but always subject to the Fifth Amendment proviso that the power should be exercised only for "public use" and with "just compensation." All Western legal systems theoretically permit takings, implying that the property owner should not bear the full costs of a "public project."

In America the judiciary had been reasonably assiduous in abiding by the Fifth Amendment when the *physical* seizure of property occurs. But in blatant violation of the Constitution, the government never paid compensation for *regulatory* takings, that is, the prohibition through regulation on certain uses of one's land. (This is still the case in European code law.) Yet an owner surely suffers a loss if certain activities are

forbidden just as if his land had been grabbed.

For example, there is a very tenuous case for zoning law, upheld in the 1920s, that specifies what can be built and where. Presumably, the argument here is that attractive residential areas would decline if industrial development were to be allowed to continue unabated. But Houston has no zoning laws, and nobody seriously suggests that its ambience has suffered as a result. Indeed, it has always been the case that in a free, rule-governed society, private owners, worried about the preservation of their fine surroundings, have been able to protect these through restrictive covenants. Threats to rural beauty have come from unrestrained public development rather than private.

After decades of protest and formidable argument against regulatory takings, progress was made in the 1990s. In the famous *Lucas v. South Carolina Coastal Council* case (1992), David Lucas had bought two beachfront properties on a barrier island for $1 million dollars in the hope of building two houses there. But his plans were frustrated by the Council, which denied the permits under authority of beachfront-management legislation passed two years after Lucas bought the properties. This wiped out the value of Lucas's investment. He claimed this constituted a "taking" and warranted compensation. After failing to win in the state Supreme Court, Lucas went to the U.S. Supreme Court, which ruled that compensation is due under some circumstances and sent the case back to the state for determination. Eventually, the state paid Lucas $1.5 million for the properties, and later sold them to another developer.

Although the principle that investment-backed expectations should be protected was conceded, the Court's decision was narrowly drawn around the fact that Lucas had suffered virtually a total loss of use. While later cases did establish the principle that partial takings should also be compensated,[5] that position can hardly be regarded as secure, given the ease with which precedent can be overturned.

The New Threat to Liberty and Property

But while this progress was being made an even more insidious threat to property rights was emerging: the power of eminent domain began to be used not for "public use," but to maximize private interests. Considering the clarity of the Fifth Amendment's takings clause, it surely cannot be used on behalf of *private* persons, can it?

Well, it can, according to the courts, the guardians of our liberty and property. For more than 20 years legislatures have got into the habit of handing private homes and stores over to big private developers. Sometimes they declare the condemned area as "blight." But not always. The classic case was *Poletown Neighborhood Council v. City of Detroit* (1981). In this Michigan case the city, citing the need for jobs, condemned a thriving ethnic neighborhood on behalf of General Motors, which had threatened to leave the area unless it got the 450 acres, at a bargain price, for a Cadillac plant. The residents and business owners fought the takings in court—and lost.

All sorts of arcane arguments can be tricked out of the chicanery that is modern welfare economics. Maybe there was a hold-out problem (the last person could have demanded an enormous price), or the holdings were contiguous and had to be developed in one package—and, no doubt, General Motors would bring vast employment to the area. But these are specious arguments: the market would have produced a solution satisfactory to everyone involved. Nothing can hide the fact that the whole exercise was an *involuntary* transfer. That it resulted from a decision by elected representatives is no justification. Aren't law and property supposed to protect us from the rapacity of democratic institutions? □

1. See Norman Barry, "What's So Good about Democracy?" *Ideas on Liberty*, May 2003.
2. William Blackstone, *Commentaries on the Laws of England* (London: Sweet, 1844 [1768]), p. 134.
3. Quoted in Ugo Mattei, *Basic Principles of Property Law* (Westport, Conn.: Greenwood Press, 2000), p. 17.
4. Ibid., pp. 155–56.
5. See Bernard Siegan, *Property and Freedom* (New Brunswick, N.J.: Transaction Publishers, 1997), chapter 5.