Itamar Rosensweig

Yeshiva College, Fall 2020

PHI3402H

Philosophy of Law: Property and Distributive Justice

This course will cover four areas of philosophy of law: the nature of rights and duties, property theory, distributive justice, and analytic jurisprudence.

The main focus of the course is philosophy of property law, which can be divided into four sections. The first section of the course situates property debates within political philosophy. Socialists and capitalists regimes differ over their conception of private property rights. Even within liberalism, different schools of liberal thought—libertarianism, classical liberalism, and the high liberal tradition—disagree about the role and scope of private property and free markets. The high liberal tradition holds that maintaining a fair distribution of income and wealth is central to the justification of the state. Following Rawls, the high liberal tradition favors a progressive tax to redistribute wealth from the rich to the poor. Libertarians counter that such redistribution would violate private property rights and is therefore unjust. One influential way of interpreting this debate is that they disagree over whether property rights and economic liberties are basic, fundamental rights.

In the second section, we will discuss whether property is a natural right or a social convention. On the former view, property rights can exist in a state of nature, and these natural facts about property constrain the state’s ability to interfere with private property rights, including its ability to tax income, impose zoning laws, or assert its power of eminent domain. On the latter view, property rights are social conventions created by the state and the state is therefore free to specify private property rights and tax income in the manner it so chooses.

The third section takes up the justification of private property rights. Given that private property imposes substantial burdens on others (e.g., non-property owners; other people), we need to ask: what justifies private property as a normative institution? On what grounds can my property right in X constrain your freedom? We will discuss the leading justifications of private property offered by utilitarians (and the law and economics school), Locke, Kant, Hegel, Rawls and contemporary libertarians.

The fourth section analyzes the idea of property as a concept. Some theorists take property as a bundle of rights which can be divided and reconstituted in all sorts of ways. On this view, no stick in the bundle is fundamental to the nature of property. Other theorists understand the concept of property as rigidly fixed; these theorists take certain incidents as fundamental, like “the right to exclude,” “the right to
exclusive possession,” and “the right to alienate”. They also see certain incidents as inseparable from the basic idea of property, including the right to bequeath property and the right of an heir to inherit property of a relative.

In addition to property, the course will cover the nature of rights and their relationship to duties, as well as the notion of natural rights and natural duties. We will also cover some of the central questions of analytical jurisprudence, including the nature of law, legal positivism, and the relationship between law and morality. Throughout the course, we will draw parallels and contrasts between general philosophy of law and Jewish law.

Unit 1: The Three Liberalisms: Libertarianism, Classical Liberalism and the High Liberal Tradition


In Jewish Law:


[See also: b. Talmud Bava Batra 8b, Tosafot s.v. Akhfei, Ha-Me’or Bava Kamma 18b, Rashba Ketubot 49b s.v. aval, Rambam Matnot Aniyim 7:10, Ketzot Ha-Choshen 290:3, Radbaz Matnot Aniyim 7:10, Machaneh Efrayim Zekhiya 8.]

Unit 2: Property as a Natural Right and as a Social Convention


Thomas Hobbes, Leviathan (selections)

John Locke Two Treatises on Government (selections)
John Rawls, *Justice as Fairness* (selections)

In Jewish Law:

b. Talmud Bava Metzi’a 74a [Ron Kleinman, “The Power of Monetary Customs to Override the Law”]; S. Shilo, *Dina Demalkhuta Dina*; b. Talmud Bava Batra 8b (power of commercial norms and communal regulation to define and regulate property rights); b. Talmud Gittin 36b; b. Talmud Gittin 38a.

**Unit 3: Justifying Private Property**

**Utilitarian Theories of Property**


In Jewish Law:


**Lockean Theories of Property**

John Lock, *Two Treatises of Government*, ed. P. Laslett


In Jewish Law:

b. Talmud Bava Metsi’a 101a; b. Talmud Kiddushin 48b; Hiddushi R. Hayyim Ha-Levi Malveh ve-Loveh chapter 21

**Kantian Property Theory**

Immanuel Kant, *Metaphysics of Morals*, “the Doctrine of Private Right”


Hegelian Property Theory

Hegel, Philosophy or Right sections 1-71.

A.Patten Hegel’s Idea of Freedom chs. 4-5.


J. Waldron The Right to Private Property ch. 10.

In Jewish Law:

b. Talmud Bava Batra 175b, Ritva ad loc.; Rambam Nizkei Mammon 1:1; Even ha-Ezel Nizkei Mammon 1:1; R. Samson Rafel Hirsch commentary on the Torah Shemot 21:35; Shut Mishneh Halakhot 6:277; b.Talmud Bava Mets’a 12a; Rambam Matnot Aniyim 7:10; Ketzot Hachoshen 290:3; Nachalat Dovid Bava Mets’ia 10a; Meiri Bava Batra 2a

Unit 4: The Concept of Private Property


In Jewish Law:
