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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



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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

Samuel Freeman, “Capitalism in the Classical and High Liberal Traditions” in *Liberalism and Distributive Justice* (2018).

Michael Huemer “Is Wealth Redistribution a Rights Violation?” *Routledge Handbook of Libertarianism* (2017)

In Jewish Law:

Aaron Levine, “Income Redistribution” in Levine, *Free Enterprise and Jewish Law* (1980).

Aaron Levine, “Social Welfare in Jewish Law” in Levine, *Economics and Jewish Law* (1987).

[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

Anna Stilz, “Property Rights: Natural or Conventional” in the *Routledge Handbook of Libertarianism* (2017).

L. Murphy and T. Nagel, *The Myth of Ownership: Taxes and Justice* (2002).

Thomas Hobbes, *Leviathan* (selections)

John Locke *Two Treatises on Government* (selections)



John Rawls, *A Theory of Justice* (selections)

John Rawls, *Justice as Fairness* (selections)

In Jewish Law:

b. Talmud Bava Metsi'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

Jeremy Bentham, "The Utilitarian Theory of Property," in Bentham, *Theory of Legislation* (1871)

"Utilitarian Property Theories" in G. Alexander and E. Penavler, *An Introduction to Property Theory* (2012)

H. Demsetz, "Toward a Theory of Property Rights," *Am. Econ. Rev.* 57 (1967)

Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85 (1972)

In Jewish Law:

Aaron Levine, "Efficiency as Treated in Jewish Law" in Levine, *Economics and Jewish law* (1987)

Lockean Theories of Property

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

Jeremy Waldron, *The Right to Private Property* (1988) (selections)

Robert Nozick, *Anarchy State and Utopia* (1974) (selections)

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"



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Arthur Ripstein, "Private Right II: Property" in Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (2009).

Rafeeq Hasan "The Provisionality of Property Rights in Kant's *Doctrine of Right*" *Canadian Journal of Philosophy* 48 (2018).

Mary Gregor, "Kant's Theory of Property" *Rev. Metaphysics* 41 (1988).

B. Sharon Byrd and Joachim Hruschka, "The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property in His *Doctrine of Right*" *The University of Toronto Law Journal* 56 (2006).

Hegelian Property Theory

Hegel, *Philosophy of Right* sections 1-71.

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

M. Radin, "Property and Personhood," *Stanford Law Review* 34 (1982).

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 Metsi'a 12a; Rambam Matnot Aniyim 7:10; Ketzot Hachoshen 290:3; *Nachalat Dovid* Bava Metsi'a 10a; Meiri Bava Batra 2a

Unit 4: The Concept of Private Property

Jeremy Waldron, "What is Private Property?" 5 *Oxford Journal of Legal Studies* 313 (1985).

A.M. Honore, "Ownership," in A. G. Guest, ed., *Oxford Essays in Jurisprudence* 107 (1961).

Thomas Merrill, "Property and the Right to Exclude," 77 *Nebraska Law Review* 730 (1998).

Larissa Katz, "Exclusion and Exclusivity in Property Law," 58 *University of Toronto Law Journal* (2008).

Thomas C. Grey, "The Disintegration of Property," in *Nomos XXII: Property*, ed. J. Pennock and J. Chapman (1980).



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In Jewish Law:

J. D. Bleich, "The Metaphysics of Property Interests in Jewish Law: An Analysis of Kinyan" in Bleich, *The Philosophical Quest: of Philosophy, Ethics, Law and Halakhah* (2013)

Property as a Bundle of Rights in Jewish Law: b.Talmud Bava Kamma 29b, 3b, Tosafot 3b s.v. *u-mammonkha*, Rashba 2a s.v. *she-darkan*, Tosafot Bava Kama 56b s.v. *Peshita*; *Pitchei Choshen* Ishut Chapter 8; b.Talmud Bava Batra 175b, Ritva Kiddushin 13b; b.Talmud Kiddushin 48b; b. Talmud Bava Metsi'a 82a [Haym Soloveitchik, "Pawnbroking" in Soloveitchik, *Collected Essays 1*]; b. Talmud Bava Kamma 20a-b; *Shut Minchat Asher* no. 105,106