

Has the Right of Private Property a Basis in Law?

Bruce G. Sebill

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Bruce G. Sebill, *Has the Right of Private Property a Basis in Law?*, 9 Marq. L. Rev. 11 (1924).
Available at: <http://scholarship.law.marquette.edu/mulr/vol9/iss1/2>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

HAS THE RIGHT OF PRIVATE PROPERTY A BASIS IN LAW?

BY BRUCE G. SEBILLE*

ADDRESSING as I do through this publication those whose minds have been trained to form judgments in conformity to the dictates of reason, I am saved the necessity of confining myself to the limits imposed by tradition and custom in the discussion of the question that forms the subject matter of this article.

Governments are creatures of law, and the ills by which they are afflicted are occasioned by the defects in those laws by which governments are instituted and to which they owe their existence.

To-day, we as a democracy are faced by the disconcerting realization that with each year the number of our legislative enactments increase enormously in number and that in spite of this legislative activity, crimes multiply and our dockets become more crowded with civil controversies. Dissatisfaction and unrest pervades the nation and while some citizens point out new evils that in their estimation merit governmental attention, others organize hooded bands in the attempt to enforce laws already made.

That the cause of this lamentable condition is of paramount interest to the legal mind, cannot be doubted. The fate of men and of governments is determined by law. The law makes man's birth a sin or a virtue: his life a curse or a blessing: his death a tragedy or a welcome release. Indeed, it can as well be said of the law as Pope has said of ambition: "It can destroy or save, and makes a patriot as it makes a knave."

We will direct our attention then, to this thing we call law, this arbiter of man's destiny. We will attempt to ascertain whether or not the principle of private property is in consonance with the principles of law. The question is purely legal and we must not permit our judgment to be influenced by a contemplation of the results that we might feel convinced would attend a general negative answer to the query. The question is one of legality, not of expediency.

Blackstone has given two definitions of the law. One holds it to be a "rule of action prescribed by a superior which the inferior is bound to obey," and the other described law as being "that which commands what is right and forbids what is wrong." So far as I am informed these definitions have been universally accepted and have met with none

* Of the California Bar.

but favorable criticism. I am convinced, however, that the first definition must be rejected as being entirely inaccurate and fallacious. By it, law is made dependent solely upon a force or power sufficiently strong to exact compliance of a weaker subject. It deprives law of a moral or ethical value and enunciates the discredited theory that "might makes right." °If we accept it we must relinquish the supposition that man has the capacity of making his own laws. Man has never yet made a law, nor can he ever make one that cannot be broken, and since by the definition we are considering, an inability to break the law is made one of its essential elements, there never has been a man made law and there never can be. By violating a rule of action the offender proves his ability to disobey, and by doing so he proves that the rule of action he violated was not a law. In fact, this definition presents the impossible situation in which there would be no law unto the lawbreaker.

It is equally impossible to accept the other definition propounded by Blackstone as having the same meaning as the world has so generally attributed to it. There are but few who will take issue with the assertion that right and wrong are positive and definite opposites.

There are those who contend that everything is relative and uncertain and that because of the absolute unknowableness of everything there is neither right nor wrong. Those who adhere to this purely philosophical principle are so few in number, however, that in a discussion of this nature their theory cannot be given the consideration it doubtless deserves.

The conviction is entertained by the majority of people, however, that that is right which is in accordance with law, and that that is wrong which is in violation of law. And if this be so, to what does the second definition given, bring us? If, in order to be law a rule of action must either command what is right or forbid what is wrong, there can be no possibility of law until right and wrong have been absolutely and definitely established. On the other hand, right and wrong cannot be known until laws have been promulgated to serve as a standard and criterion of moral and ethical values. By this definition not only is man made law an impossibility, but by it moral and ethical values are abolished and man is made an animal without the capacity for being virtuous or otherwise.

Definitions are always unsatisfactory. Reason and experience convince us that man is not a law unto himself and that he cannot determine his own destiny. As much as we may prate of our capacity of self-determination the fact remains that there is a repository of original law above and beyond man. He could legislate until the end of time in an attempt to alter the course of celestial bodies or change the manner or methods of animal and vegetable reproduction, but the planets would

not falter in their orbits nor would the eternal periodicity of reproduction be momentarily disrupted.

The very best that man can do is to make his changeful and transitory rules conform to the pattern of those immutable laws made for him, and worst he can do is to presume to attempt a deviation from those laws.

History is too replete with instances of attempts on the part of both governments and individuals to disregard the dictates of nature in their legislative activities to permit of doubt as to the inadvisability of the procedure. Insofar as governments have as their object and pursue as their purpose the protection of natural rights, they prosper. Insofar as they attempt the protection of unnatural rights, they end in failure.

Space does not permit of concrete examples in substantiation of this statement. The observation of the individual sufficiently proves its truth.

We have then to classify this right of private property. We must ascertain whether or not it is in harmony with other rights the validity of which is undoubted. We must investigate its nature and elements in order that we may be enabled to determine whether or not this supposed prerogative harmonizes with the natural forces to which we are subjected; and surely it merits our attention, this "right of private property," for upon it, polities of stupendous magnitude have been founded. To its substantiation by far the greatest part of the laws of contemporary governments have been devoted. In its protection man expends his vitality and involves himself in turmoil and dissention, and as a sacrifice to this legal Moloch, he lays his mangled corpse upon the battlefields of the world.

Is it not possible that the sacrifice necessitated by this extremely doubtful and altogether too exacting privilege evidences it to be in conflict with the eternal scheme of things? Is it not barely possible that in the failure we have encountered in our determined attempts to retain this privilege inviolate, we have been given evident proof that we are futilely opposing ourselves to omnipotent force?

It will be admitted that one of the most potent dictates of natural law is that of self-preservation, and it has not been the cessation of the operation of this law that has made civilization possible, but a more intelligent and broader application of it.

Reconstructing in imagination the distant epoch of the past when as a hunter man stalked his prey through the tangled undergrowth of tropical jungles, we find that even in that remote period, man had ceased to conduct himself as an individual and conformed his actions to the interests of the group. Armed only with the crude weapons his limited intelligence had conceived he was unable to successfully combat the

claws and fangs of his brute opponents, and only in concert with his fellows was he enabled to bring his prey to bay and make the kill.

Undoubtedly the limited and unsocial application of the law of self-preservation produced unnumbered attempts on the part of individuals to reduce the carcasses of slain animals to exclusive possession, for meat meant food, and food meant life. There has begun to be felt, however, by the members of those primal tribes, the consciousness that only by common possession of common necessities could continued existence be enjoyed by the whole. Experience having convinced them that he who was strong and independent to-day might be and frequently was, through a multiplicity of causes, made weak and dependent to-morrow, they began to fear the uncertain and transitory strength and prowess of the individual and through the agency of the tribe they sought to make the naturally precarious existence of the collective group, more certain. By making the interest of one the interest of all, they eliminated internal dissension and strife and in being permitted to present a united front to the adverse forces of nature, and to devote their collective energies to the task of obtaining from nature the benefits of which they were in need, our progenitors complied with a law that was "prescribed by a superior which the inferior was bound to obey."

The forces that oppose man in the task of living have never ceased to be exerted and though civilization has refined the methods employed in that task, it has not availed to mitigate the pressing necessity of the struggle. It is evident that any arbitrary rules of conduct that tend to hamper or impede man in the basic task of his existence are contrary to every intent of nature and must eventually end in disastrous failure. Reason convinces us that there is a final goal toward which humanity constantly progresses, an ultimate object of human existence. That is lawful which attends this progress. That is unlawful which attempts to impede it.

In the mysterious obscurity of pre-historic ages, a half human creature gnawing the bones of his kill in the protecting darkness of a cave, then the tribe, then the federation of tribes quickly succeeded by the nation, now the faltering steps towards a league of nations, and very soon the world nation.

So it has been with industry and commerce. At first the individual artisan with his home as a workshop, then the group of apprentices gathered to assist him, then the factory, then the trust, now the monopoly and soon ownership by the collective mass. The trend is inevitable. It has been ordained by law.

The constituent element of the universe cannot be divided for they form an indissoluble whole that is not susceptible to arbitrary separation. In stubborn resistance to the eternal scheme man has attempted

to parcel out to individuals that upon which the whole must depend for life, and the attempt has resulted in dissention, strife and discord. The purpose of true law is harmony, and the perfection of social intercourse is "peace, happiness and prosperity."

We have been taught that the law is consistent, and yet, were someone to propose that an individual or group of individuals be given the possession and control of the air and sunshine, and that a price be charged for their further enjoyment, the proposal would arouse our humor rather than our concern. But where, in consistency, is a legal distinction to be drawn between the benefits conferred by the earth and the elements above it. The existence of man is dependent upon all of the elements in all of their multitudinous unions. If by legislation we declare the earth to be subject to individual possession, then so is the air and the sunlight and the water of the oceans. This brings us to the disconcerting realization that the only reason we freely enjoy even the air we breathe, is due, not to the theory of our law or the principles underlying it, but solely to the inability of man to reduce it to possession.

It will be said that in this age as in all previous ages, the law of the survival of the fittest prevails and that the individual endowed by nature with the astuteness and acumen requisite to the acquisition of property is, by immutable decree, justified and protected in that acquisition and ownership.

If then, an individual is favored by nature with a capacity to appropriate to himself more of nature's benefits than is another, why then is he in need of the countenance and support of man made laws? If such a man is made superior by nature why is he forced to rely upon the consent of his fellows as evidenced in their laws for not only the privilege of acquiring but of retaining a disproportionate share of natural and manufactured products?

The fallacy of the proposition is apparent. The superiority or "fitness" of the individual in a modern social state is determined solely by the character of the laws by which that state is governed and not by the faculties or characteristics with which he is endowed by nature.

If then in his primal state the right of private property was derogatory to man's interests, and if in modern politics he finds that right to be desirable, it is because the governments instituted by man have created unnatural conditions. If in the crude beginnings of a social state as exemplified in the tribe, man's social nature permitted him to enjoy the products of his labor in common with his fellows who aided in their production then in their frenzied efforts to institute and maintain the right of private property, modern governments give indisputable proof that man's social consciousness is decaying and that with each generation our vaunted progress is bringing us nearer the status of the brute.

Political and social theorists are engaged in the attempt to ascertain the causes that contribute to the moral turpitude that characterizes contemporary civilization. Why fraud, misrepresentation, robbery, murder and the unnumbered other crimes that threaten continued social intercourse? Why the growing dissatisfaction and discontent with government that is beginning to be too plainly evidenced to be longer disregarded? The cause is to be found in the inconsistency of which we are guilty in granting to some the privilege of employing their mentalities in the acquisition of material benefits and in depriving others of the privilege of utilizing physical force to obtain the same ends. Mental and physical powers are both conferred by nature. If we permit the acquisition of private property to continue as a criterion of "fitness" and make existence dependent upon its possession, then those endowed with physical power will insist upon using it in order to survive. We have, however, made the show of force a crime, and in many instances an obedience to the laws of God has become a violation of the laws of man. By this inconsistency man's decrees have not conformed to the economy of nature and if the opposition continues, chaos shall result.

I shall be accused of engaging in destructive criticism. I am guilty of the charge but not guilty of an offense. The question has been that of the legality of the right of private property. I have attempted nothing more.

It matters little what our politics may be, for I repeat that in a purely legal inquiry, expediency cannot be considered. The right of private property is opposed to law, and being so the efforts of individuals or of governments to sustain it must prove futile.