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Property: Authority Without Office?

I. Introduction

In the history of political thought, the relationship between property and power has been a central preoccupation. The very nature of private property, on many accounts, is to put owners in a position of self-serving power to make decisions about matters of concern to others. In many legal systems, the vast power of owners is pervasive, as an ever greater range of resources is brought within the property regime and subjected to private power backed by the coercive power of the state. Political and legal philosophers have long puzzled over how to reconcile the nature of private property with the limits and social responsibilities upon which, at least for some accounts, property's legitimacy depends. The perennial question, then, is how best to understand the nature of property such that property's limits can also be accounted for coherently within our legal and constitutional arrangements.

Robé's book *Property, Power and Politics* provides us with a wide-ranging analysis of property. There is much that we agree with and applaud here. In this contribution we seek to situate a key aspect of his work within this larger context, and to offer a criticism of one element of his view: his rejection of an understanding of ownership as an office. In Robé's analysis, offices belong in the public sphere, where officeholders are held to account by their constituencies. We argue that Robé's rejection of the idea of ownership-as-office rests on a misunderstanding of the *legal* concept of "office." Moreover, this idea, properly understood, provides sound conceptual support for the normative aims of Robé's account: to bind property and social responsibility tightly together. Robé's project to criticize the virtually unlimited power of private owners in the contemporary world is served, not undermined, by understanding property as an office.

First, we provide a brief summary of the key elements of Robé's view of property (Part II). We then introduce a theoretical perspective on property as office as it has been developed in legal theory (Part III). Finally, we argue that this perspective fits better with Robé's stated purposes than his own rejection of it suggests and raises some questions for future discussion (Part IV).

II. Robé's Analysis of Property

Robé's understanding of property can be summarized in three aspects. First, property is a purely private power, which Robé describes as a "right of autonomy." It cannot be broken down into a "bundle of rights" or "separate incidents" (Robé, 78-81), but should be seen as an encompassing right to decide about the assets one owns. Property establishes the power of the owner as a "default rule," with regulation by the state serving as a finite series of limitations to that right (82).

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Second, this private power is granted by law, thus emanating from public authority. It is part of a constitutional setup created by the sovereign. As Robé puts it at one point: “Property rights are *not rights over things*; they are *components of a system of constitutional government* and their extent varies with the evolving consciousness of the existence of interests insufficiently taken into account by private decisions, contracts and actions involving them” (109). This is also expressed in terms of a “decentralization” of sovereign power effected by the state in granting owners property rights (75, 101, 107, 121).

Third, this power is coercive. Property systems produce inequalities of wealth, which are at the same time inequalities of power. Robé approvingly cites Legal Realist Robert Hale’s classic discussion of coercion to make the point: “It is the law of property which coerces people into working for factory owners” (70).

Against this understanding of property, Robé explicitly rejects the idea of ownership as an office in two passages. It is worth citing both, given their importance for our critique. In the first passage, Robé argues:

Whereas a public official has an obligation to perform the duties of his office, there is no legal duty to exercise one’s autonomy or to exercise it only in certain ways. In this regard, it is mistaken to consider that ownership is an “office” and that the owner is an officeholder who happens to be the present occupier of the office. It is misleading because an official in charge of an office *must* fulfil his duties in the interests of the institution to which the office belongs. The owner has no such duty. “Do whatever you want” is not a mandate and “choose whomever you want to be your successor” is not a procedure. (195)

In this passage, Robé adopts a common picture of “office” as centering on a duty to act on behalf of the institution in which the office is embedded. An officeholder is constrained by this duty. By contrast, an owner is fundamentally free to decide to use their assets in whatever way they like.² The second passage builds on this opposition:

Property grants an ability to make decisions and rules in connection with the use of property as a matter of principle which are *autonomous* from the State governmental apparatus, from the Organs of the State. Owners are not public officials, civil servants or Organs of the State. They do not hold an office. When laws reduce the autonomy of owners, their flexibility to adopt decentralized rules is being reduced. But the owners do not become governed. They are still the rule-makers as a matter of principle; they are still owners. Property *is still the same concept*: the right of decision-making *as a matter of principle* in connection with the object of property. Owners simply face an increased set of constraints, *as a matter of exception* to their prerogatives as owner as a matter of principle. (164)

Robé introduces two specifications here. First, duties may constrain what owners can do (something that we might want to deny on a superficial reading of the first passage), namely when the use of property is regulated by the state. However, this does not change the nature of ownership, but merely limits it externally. In the decision space that is left, owners are still private sovereigns. To mark the contrast, let us call the former “duty-as-constraint,” whereas office is characterized, in Robé’s view, by “duty-as-mandate.” Second, such a stronger duty, as a mandate of office, is associated with the public sphere. Only in public offices can it be found, Robé seems to suggest.

² Robé references Katz’s theory of office in Katz (2012). He also mentions the critique of Katz given by Ripstein (2017).

In what follows, we dispute Robé's characterization of office as requiring a strong duty-as-mandate and his own characterization of ownership as a position conferring plenary power ("do whatever you want"). The concept of office can accommodate positions defined primarily by duty-as-constraint. As we set out below, the concept of office can account for private as much as public offices. While we agree that power in a constitutional order is always purposive (arbitrary power is inconsistent with the rule of law), purposivity does not require a public mandate.

III. An Alternative View: Property as Office

An alternative to Robé's account, and one that he explicitly rejects in this book, is the idea of ownership-as-office. On this account, ownership is a juridical office charged with setting the agenda for a thing: the owner has the discretionary authority, within the limits of her office, to regulate the activity of others with respect to that thing.³ This account has normative and conceptual elements: conceiving of ownership as an office, bounded by its purposes, is required to avoid the "nightmare of hierarchy." In such a hierarchy, one person has the power to decide questions concerning the lives of others unilaterally and arbitrarily—in our private relations with others concerning things. While ownership decisions are inherently hierarchical, confining that decision-making power within a bounded office renders that hierarchy consistent with the project of legality, which ensures that no one is subject to the arbitrary choices of another on matters of shared concern. This account also explains conceptual features of property law which scholars and judges have struggled to explain on conventional rights-based approaches, including ownership's hierarchical structure, metastatic nature, impersonality, transferability, potential vacancy, and jurisdictional limits.⁴

In contrast to Robé's approach which conceives of limits on owners' power as external, ownership-as-office entails, in principle, internal limits that arise from its very nature as a bounded position of agenda-setting authority. This accounts, internally, for some of the limits that Robé might characterize as external: Owners who use property as a pretext for achieving purposes—like the gratification of spite, or to extract a ransom price from a neighbor, or to determine the racial composition of a neighborhood—exceed any legitimate warrant the law can legitimately confer on them, *qua* owners, to make decisions about a thing.

The internal limit on ownership-as-office, on this account, is formal (at least in the sense that some might use that term): It does not on its own generate a full social-obligation norm, nor the kind of public accountability that Robé has in mind.⁵ It does not require that the owner act in the interests of other people or even that she accommodate the interests of others in the exercise of her agenda-setting power. Indeed, on this account, the task of ownership is to *decide*, to form subjective judgments about what can be done with a thing and by whom.⁶ That bounded sphere of discretion, however, is already more constrained than the plenary power that Robé feels compelled to accept as the baseline.

There may be a further level of constraint permitted by and indeed consistent with this account of ownership. Ownership-as-office is, conceptually and normatively, consistent with the *superimposition* of entitlements and obligations as a matter of political choice. For example, a legal system can allocate rights to income, or other fruits from a thing, to its owners through a principle

³ The account articulated here is drawn from a series of earlier papers by one of us: Katz (2008; 2012; 2017; 2020a). Others have extended this account, notably Essert (2013), Ellickson (2014), and Fennell (2014).

⁴ For explanation of these elements, see Katz (2012).

⁵ For a theory introducing a social-obligation norm, see Alexander (2018).

⁶ Katz (2008; 2020a). To achieve a property regime that involves genuine sharing of decision-making authority, one would need to move from private ownership to group ownership (Al Salman 2022).

of accession. This is clearly a rational basis for allocating a right to a rationally proximate office of ownership. On a similar principle of (negative) accession, the office of ownership may also attract certain burdens, such as the obligation to clear adjacent public walks and streets, or to mitigate environmental damage. As one of us put it in past work: “These accessory rights and responsibilities are *delegated* to owners according to a *principle of accession*, which allocates benefits and burdens to the office of ownership on the basis of a norm of proximity” (Katz 2017, 306).

To the extent that such duties and responsibilities are added, then on the foundation of the formal understanding of ownership-as-office a second layer is built, which turns ownership into an office of a more substantive kind. Here the orientation toward others is more pronounced, and the owner may be understood (at least partly) as a trustee or steward for one or more specific groups of others. Such an understanding of ownership has historically been important in virtue ethics and some religious traditions. Aristotle and Aquinas, in different ways, tried to reconcile private ownership with duties to others, especially when they are in need.⁷ In the early twentieth century, the French lawyer Léon Duguit powerfully defended a theory of property as a social function. In the context of a developing industrial society, Duguit believed that the Enlightenment idea of property as a subjective right had become obsolete, replaced by the idea of property as a social function (Babie and Viven-Wilksch 2019).⁸ In contemporary property theory, the concern is to embed social responsibility within the very idea of ownership, not only to future generations but to others (“non-owners”), whose vulnerability to the decision-making power of owners they flag as a grave concern (Alexander 2018).

IV. Discussion

In confronting Robé’s rejection of the theory of ownership-as-office, we are led to three points of discussion.

First, we wonder whether this rejection is not conceptually problematic for his own understanding. Both Robé’s view and the ownership-as-office theory see property as a matter of constitutional design, in which power is decentralized to private owners. Robé has absorbed the ambitions of the Enlightenment project to strip property of its public dimensions.⁹ In his insistence that this power is lodged firmly within a constitutional order—and thus emanates from public authority—Robé can be seen as much closer to the ownership-as-office view. This view can explain how ownership in contemporary Western systems of law is “the right of decision-making as a matter of principle,” leaving discretion to the owner. But at the same time, it shows how duties towards others (what we called “duty-as-mandate” in Part II) in a second layer can be latched onto this structural basis, to the extent that a law-maker decides to do so.

Second, positioning Robé’s project more fully within this school of thought would help both to narrow and to clarify the potential for reform within the World Power System. Ownership-as-office offers a structured way of thinking about reform within property law. There are some resources—land, houses, medicine, food, water—where the owner’s agenda for the thing deprives others of the material conditions for a good life. Here a case can be made for superadded affirmative duties, which obligate owners to share resources and/or put them to a socially beneficial use (Alexander 2018, 40-41; Alexander 2009, 774; Katz 2012, 2031-32; Dagan 1999, 771-74). In the final part of his book, Robé bets the house on a reform of the accounting system. An ownership-as-office model raises the question of whether property reforms could provide at least

⁷ Alexander (2018) builds on Aristotle. For an account building on Aristotle and Aquinas, see Lametti (2003).

⁸ For discussion in the context of the ownership-as-office view, see Katz (2020b).

⁹ For an analysis by one of us of the consequences of this Enlightenment split between property and political power, see Claassen (2021).

as promising an avenue to diminish the “small-scale despotisms” that ownership leads to in the World Power System.

Third, does the potential for ownership-as-office to form part of the solution to the inequalities generated by a system of property lead to a call for more, not less, property, at least in one sense? It may be that, properly deployed, a system of property is best seen as a vehicle for containing power within an office that can be regulated and to which duties can be added. And yet a major force driving wealth disparity is securitization: the creation of rights in relation to property rights in the form of shares, derivatives, and so on. These are areas where entitlements have slipped beyond property and the confines of office: they are merely *in personam* rights (Katz 2019). Rights like these are the product of contract law and legislation,¹⁰ and may assume some property-like characteristics: they are valuable and transferable and enforceable against others. But they do not form a fixed and particular position of authority within a constitutional order, with attendant constraints and accountability. With each layer of private right behind property rights, the wealth of nations moves outside the framework the sovereign has set down—transformed into a world of deeply private ordering. In that sphere, there is no reconciliation of power with legality, let alone equality. If this diagnosis is convincing, then these rights need to be brought into the remit of property regulation. Again, property is part of the solution.

V. Conclusion

We have benefited greatly from considering Robé’s analysis in *Property, Power and Politics*, and hope these remarks will serve as a stimulus for further debate on where the problems in the contemporary power system lie, which types of analyses are most suitable to address them, and which directions for reform may be most suitable to tackle them.

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¹⁰ For example, the 2006 Ontario *Securities Transfer Act* deems entitlements to be “property.”

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