
INTELLECTUAL PROPERTY

INTELLECTUAL PROPERTY AND HUMAN RIGHTS

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Human rights embody the set of principles that properly apply to all people at all times. They are rights that are not bound by specific demographic, geographic, temporal, or technological circumstances. Although there may be debate about the particular definition of rights, human rights properly understood command respect not because they are universally embraced but because they should be—as the rights that allow individuals to flourish and societies to prosper, that support progress and liberty. These rights are in service to humanity, not to any temporary political agenda.

Basics and origins of human rights

Although a growing body of treaties and international accords has taken up the banner of human rights, the notion of universal human rights is not new. In 1776, Thomas Jefferson, in the American Declaration of Independence, wrote, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.” Jefferson’s phrasing, while one of the most memorable aphorisms, tapped into an already established vein of discourse about human rights. Jefferson stood most directly on the shoulders of John Locke, whose design of government for the protection and promotion of “life, liberty, and property” was a foundation stone of the American constitutional system. Locke, in turn, built on far older religious and philosophical antecedents.

The older writings on human rights, from ancient times through the founding of the United States, consistently included among the listed rights the rights to marry, to raise a family, to safeguard one’s property, and to pursue a calling. Property often was closely linked to marriage, family, and related institutions.¹ Rights to property were conceived in many societies as part of the constellation of rights properly guaranteed to assure familial success. Over time, property rights were assimilated into individual rights, as the individual came to have identity, and to enjoy rights, independent of family.

Over time, as well, property rights developed several distinct but related strands. One strand encompasses the right to own property and to control its use and disposition. Another strand focuses on the right to work, to retain the fruits of one’s labor—in essence, to translate labor into property. A third strand addresses the rights associated with enjoyment of the benefits from contributions to scientific and intellectual advancement. All of these strands are intertwined and share common roots. All of these strands also play important roles in modern economies.

Human rights and property rights—modern charters

The identity of property rights with basic human rights continued in modern times. The original modern charter of human rights is the Universal Declaration of Human Rights, adopted by the United Nations in 1948. This remains the core of what we understand as human rights today and was expressly reaffirmed in the Millennium Declaration of the United Nations. The Universal Declaration of Human Rights specifically protects rights of property, of work, and of artistic and scientific creativity.

Article 17 of the Universal Declaration, which immediately follows the provision guaranteeing rights of marriage and family, declares: “Everyone has the right to own property alone as well as in association with others.” The second clause in Article 17 states: “No one shall arbitrarily be deprived of his property.”

Article 23 provides that “everyone has the right to work.” Article 27 guarantees the right “to enjoy the arts and to share in scientific advancement and its benefits” and also asserts that “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.”

The next major treaty concerning human rights, the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly in 1966, continues the linkage of economic advancement and human rights. Article 6 of the Covenant provides the undertaking of each signatory nation to “recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses,” and also commits nations to pursue “policies and techniques to achieve steady economic, social and cultural development and full and productive employment.”

Article 15 of the Covenant repeats the guarantee of Article 27 of the Universal Declaration, committing signatory states to recognize rights “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Additionally, Article 15 of the Covenant provides the states will take steps “necessary for the conservation, the development and the diffusion of science and culture” and will also “respect the freedom indispensable for scientific research and creative activity.”

Property rights’ fundamental importance

These rights to property, to the fruits of one’s own labor, and to the benefits from contributions to scientific advancement are part of the basic constellation of human rights in large measure because they provide the predicate

for so much of what allows us to enjoy other rights. They are, of course, important on their own.

At the most fundamental level, basic property rights are an extension of the self and of the prohibition on slavery. Ownership of one's own body implies ownership of one's own labor. (That point has been made repeatedly, starting with Thomas Aquinas, and then elaborated by Locke.) All of the other property rights protected as core human rights flow from that ground.

Together, these rights allow individuals to exercise a measure of control over their surroundings. They allow us to plan our lives with some security, not that we have full control, but that we can decide for ourselves how best to invest our energies, based on our own values and expectations.

The importance of property rights to individual self-development is related to, though different from, their contribution to societal wealth and, derivative of that, to society's capacity to promote a wide variety of other rights and interests. This relationship was first noted by Aristotle, who observed that property tended to be most productive when it was owned individually rather than collectively.²

The twentieth century offers something as close as one gets in real life to a controlled experiment on the virtues of collective versus individual ownership. The unambiguous lesson of the century is that greater individual ownership has a marked advantage over greater collective ownership in producing wealth for society.

Although that lesson appears in many forms, one need only look at the stark divergence between the communist German Democratic Republic (commonly referred to as East Germany) and the market-oriented Federal Republic of Germany (West Germany). The two Germanys were a single nation at the end of World War II, with the same population, education, and attributes on both sides. During the 40 years that they were divided, however, the two Germanys followed radically different paths. Just prior to reunification, per capita GDP in East Germany, with an economy based on Soviet-style collective ownership, was estimated at roughly one-third that of West Germany, with its western-style market economy based on private ownership.³ The difference between an economy based on private property and one based on collective ownership—that is, on the state abrogating rights to private property—was sufficient to produce three times the personal wealth in one half of Germany as in the other.

The advantage of private property over collective property traces only in part to the point Aristotle made. Aristotle's emphasis was on incentives, noting that the wider the ownership, the more one counted on the investment of others' efforts to secure the property's productive outputs; individual ownership naturally tended to induce individual investment in making the most of a property's productivity.

Another advantage of private property and of economies based on markets for private transactions is that these institutions give greater play to individual judgments about value and to individual knowledge (and, hence, expectations) about circumstances. Collective ownership and command-and-control organization of economies substitute centralized estimations of value and of the steps that will best increase value for individual decisions. The interplay of knowledge and information from many sources is a better guide to directing resources to their best uses than is the top-down direction from even the most sophisticated and beneficent planner.

In any economy in which there are numerous goods and numerous choices to be made respecting the best way to increase value for them, reliance on many individuals who can make specific decisions is likely to produce far better outcomes, better congruence between what is made and what is desired. Think of just an infinitesimal subset of the issues that arise in a modern economy: how much corn should be planted on a given parcel of land in Iowa? how many shirts should be produced in a particular factory, using what inputs, to be shipped where? should more small cars or large cars be made, with what features, and by what processes, using which suppliers? The larger and more complex an economy is, the greater the advantage of decentralized decision making. Centrally controlled decision making can never replicate the full information set that moves decisions in a decentralized economy. Further, the centralized economy inevitably will lack most of the "feedback loops" that help minimize and correct mistakes in decentralized economies based on individual ownership. Incentives and information flows work in tandem to produce greater efficiency and greater wealth in economies with strong protections of property rights.⁴

The contribution of strong property rights to economic success does not make optimal organization of the national economy a human right. The Universal Declaration of Human Rights and other treaties that can be looked to in defining human rights do not forbid socialism of any particular variety, although they do forbid arbitrary infringements on property rights that might be associated with a move toward greater socialism.

If a particular form of economic organization is not mandated, however, the relation of strong property rights to economic success does underscore another reason—beyond their contribution to individual self-fulfillment—that property rights have been seen as fundamental human rights. Although human rights are not conditioned on societal wealth, most human rights are facilitated by increased societal wealth. This is true, for example, with declared rights to remuneration consistent with "an existence worthy of human dignity" (Article 23 of the Universal Declaration), to rest and leisure (Article 24), to an adequate standard of living (Article 25), or to education (Article 26). It is true as well for rights related to health. Indeed, the basic assertion of such a right was expressly predicated on a connection to wealth:

the right was not directly to health but to “a standard of living adequate for the health and well-being of himself and of his family, including. . . medical care” (Article 25).

The connection of societal wealth to health, for example, is not simply a matter of common sense. Any number of examples or statistics can be marshaled to demonstrate the connection. Look, for instance, at the correlation of health indicators, such as life expectancy, with per capita GDP from a 209-nation sample based on World Bank data.⁵ The correlation is extremely robust and dominates other correlations, such as employment/unemployment, health expenditures per capita, number of physicians per 1,000 of population, or number of hospital beds per 1,000 of population. The fact that wealth correlates even more strongly with increased life expectancy than the various individual, identifiable factors suggests that societal wealth helps promote health in many different ways, including both the obvious ways (such as increased availability of traditional medical services) and less obvious ways that do not show up in the discrete factors that are looked to as those most likely to explain health and longevity.

Intellectual property rights as human rights

The three different strands of property rights noted above included, in addition to rights to ownership and control of property and to the fruits of one’s own labor, a right to enjoyment of the benefits from contributions to scientific and intellectual advancement. This third strand of property rights would seem to be encompassed within the first two. A right to the fruits of one’s own labor certainly implies that those who invest their energies and efforts in developing inventions or new creative works should control and profit from their innovations. And a right to ownership and control of property implies that those who contract with innovators—who purchase the rights to their innovations—should enjoy the rights associated with property ownership. That would include broadly the rights to determine how the property is used, on what terms others have access to it, and how the property is disposed of (including not only royalty terms but also decisions on when and how to license or sell rights associated with the innovation).

While rights to intellectual property (the term generally applied to the class of properties associated with innovation and creativity) are implicit in the other property rights recognized as human rights, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights both expressly grant protection to intellectual property rights. Intellectual property rights have a complex legal background with roots in tort law (misappropriation, unlawful competition), in consumer protection law (misrepresentation, fraud), and in property law. Some intellectual property rights also have coloration from the guild systems, limiting who could engage in certain activities (such as printing). The dominant legal origins for intellectual property rights, however, are property rights more generally, and the basic claims for protection of

property rights as human rights also extend to protection of intellectual property rights.

In both cases, of course, the exact contours of the rights are not definite. A right to property ownership and control does not prohibit all forms of regulation. My right to control the disposition and use of my property does not give me unlimited rights to use my home as a stockyard in the middle of a residential neighborhood or to blast loud music into the neighborhood during the night.

At the same time, there must be *some* substantive content to the protection of property rights; certain types of interference with the use and control of property must be forbidden by the safeguards given to property rights. So, for instance, a declaration that property rights are protected would be incompatible with a system that permits redefinition at the ruler’s whim of what property could be used for, who could own it, or how it could be disposed of.⁶ If the state attempted to justify these restrictions on property ownership and control as part of the baseline definition of the rights to property that one could enjoy—a definition that could be claimed to be separate from the question of how a state protected the property rights it recognized—any meaningful concept of human rights, or of substantive legal rights more generally, would reject that claim.

The contours of intellectual property rights

The optimal contours of intellectual property rights are matters of debate. Some commentators stress that intellectual property is intangible and, so, can be used by many people at once. You and I can both use the idea of making Coca-Cola by mixing certain ingredients, in contrast to us both trying to wear the same shirt simultaneously or to use a particular property for a picnic and a ballgame at the same time. In this sense, intellectual property is, to use the economists’ terminology, “non-rivalrous.” Because it is non-rivalrous, some scholars and pundits suggest that the scope of rights to intellectual property should be severely limited.⁷ After all, why do you need protection against others’ use of your property if it doesn’t diminish your ability to use it yourself?

No one disputes that there are differences between property that is non-rivalrous and more traditional types of property, but the point with respect to intellectual property is frequently overstated. For example, while many people could simultaneously use the formula for Coca-Cola to manufacture that drink, having many makers of the drink has obvious consequences for the value of the formula. For one thing, allowing unlimited numbers of Coca-Cola producers—allowing production without approval of the owner of the formula—would have an obvious impact on the ability of those who came up with the formula to profit from its success. For another thing, production unconstrained by approval from the formula’s owners would remove an important incentive to maintain its quality, consistency, and purity. While the formula’s owners have a

strong interest in maintaining its long-term value, those who are but one among many producers lack that incentive.

Both the ability to profit from an innovation and the incentive to maintain its value over the longer term are important. Let's turn first to the incentive to create and its relation to profit potential from innovation.

No one should doubt that the profit-motive is a central incentive to invest in innovation. Popular images often connect technological progress with some solitary genius' "Eureka" moment. But most major innovations are the result of enormous investment in research and development over extended periods of time.

Look, for instance, at spending by pharmaceutical companies on the development of new drugs to help prevent and combat disease. A study of American pharmaceutical companies states that these firms spent \$26 billion on research and development in 2000, an amount that equates to over \$960 million for each new drug approved for use.⁸ This figure is approximately one-third of world-wide spending on pharmaceutical research and development. Another study found that for every 5,000 drugs that appeared promising enough to pursue research in animal studies, only five would be approved for human clinical trials and only one would prove suitable for human use.⁹ Obviously, without the prospect of recouping this investment, progress on pharmaceutical innovation would grind to a halt.

Given the critical contributions of pharmaceuticals to improved health, that would be terribly unfortunate. Advances in pharmaceuticals, biologics, vaccines, and hygiene, together with improvements in transportation, communication, and agriculture, helped propel a dramatic increase in life expectancy in the twentieth century along with a remarkable decrease in infant and childhood mortality. American life expectancy rose more than fifty percent over the century, and childhood mortality in America at the end of the century was one-fifteenth its level at the century's outset.¹⁰ These changes are signal accomplishments of a society that values and rewards innovation.

Similarly, the last century saw a revolution in other fields driven by entrepreneurs' ability to reap the rewards of investment in creation of intellectual property. Personal computing, cellular telephony, and a host of other IP-intensive technologies boosted productivity and improved both safety and access of many communities—including the disabled and the geographically remote—to a host of goods and services formerly unavailable. According to the U.S. Bureau of Economic Analysis, the information-communication-technology sector (one of the heavily IP-dependent sectors) accounted for fifteen percent of U.S. economic growth in 2004, triple its share of the economy.

Certainly, the incentive to continue investing in innovation is central to economic progress. Although no one with confidence can assert that a particular set of IP

rights definitively provides the right trade-off between investment in innovation and maximum diffusion of the innovation—maximum use of the innovation—no one should doubt the importance of strong IP right protections to the initial creative successes that are essential to any vision of social advancement.

This is also true of the need to protect IP following the initial innovation. Just as the right to profit from an innovation is an indispensable spur to the investments that produce innovations, the right to control IP to protect its long-term value is indispensable as well. The lesson of the Soviet-collective system in part was that, as Aristotle saw in his own day, collective ownership diminishes incentives to maintain property and to support its productivity. That is no less true of intellectual property than of other property. Indeed, the very intangibility that advocates of greater limits on IP rights rely on for their arguments makes those rights especially fragile and makes protection of those rights especially important. That in large measure explains the special protections afforded intellectual property, in addition to those afforded the larger class of property that encompasses them, in the basic documents defining human rights.

Threats to intellectual property rights

Recently, some commentators have advocated limitations on intellectual property rights in order to protect other interests, such as economic development in less affluent nations or health in poorer populations. Those efforts should be viewed with an extraordinary degree of skepticism.

The claim that property rights should be restricted in order to promote some other interest, such as economic development, is neither new nor limited to intellectual property rights. In Zimbabwe, for example, President Robert Mugabe has blatantly violated property owners' rights, justifying his conduct by declaring it necessary to advance economic development and justice in this former colonial nation.¹¹ Yet, as discussed above, economic development is enhanced, not restrained, by recognition of property rights.

The same is true of intellectual property rights. Access to intellectual property and to goods and services embodying intellectual property facilitates economic development. Respecting intellectual property rights encourages owners of the rights and producers of goods that incorporate those rights to provide greater access to the products built on them.

The connection to health also should be seen in this light. Health, as already noted, is strongly correlated with increased societal wealth. Steps that encourage economic advancement will serve interests in health more securely for a longer time than short-run efforts to expropriate intellectual property.

Of course, there is always an opportunity to advance some other interest temporarily at the expense of property rights. Commandeering my home can lower the cost of putting up a hotel. Conscripting doctors—or even kidnapping doctors from other nations (as some nations used to impress sailors from other nations on the high seas)—to provide free services can lower the cost of medical care. Both acts would violate core protections of human rights. And both acts would undermine longer-term interests in development—and with that, undermine the advantages for societal wealth, for housing, and for health that come with protection of property rights.

Frequently, policy advocates are tempted to try and find a short-cut to some end. So, for example, unable to persuade a government to invest in adequate medical care, some people who are concerned with health issues wish to conscript pharmaceutical companies to serve poor communities without the remuneration that they otherwise would receive. It is beyond the scope of this paper to explore the full implications of such efforts, but it is clear that these are a direct assault on the human rights protected by the United Nations Declaration and International Convention. They stand in the same position as taking private property without compensation or depriving individuals of their right to the fruits of their own labor. These violations of basic human rights might seem useful to some immediate policy goal, but they contravene established law and have consequences for future behavior that no one should want.

Conclusion

Declaring basic human rights and concluding international treaties in support of such rights help frame the understood set of universally applicable freedoms to which all governments at all times should adhere. Property rights, including rights to ownership and control of property, to the fruits of one's own labor, and to enjoyment of the benefits from contributions to scientific and intellectual advancement, are included within the core set of rights protected as human rights by international law. Recent suggestions that nations are free to derogate from protection of intellectual property rights in order to secure short-term gains along policy margins of importance to some advocates run directly contrary to the understanding of human rights included in the charter documents on human rights. They are at odds with historic notions of property rights and freedom dating back to Aristotle and beyond. Those who are concerned with human rights should reject calls to impinge on them, no matter how heartfelt the plea or how attractive the cause. The causes of human advancement, of personal security, and of the rule of law that under gird the historic definition of human rights ultimately should prove more compelling than quick fixes for today's problems.

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Footnotes

¹ See, e.g., Leonard P. Liggio & Alejandro A. Chafuen, *Cultural and Religious Foundations of Private Property*, in THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS (Enrico Colombatto ed., Edward Elgar Pub. 2004).

² THE POLITICS OF ARISTOTLE 44 [1261b] (Ernest Barker ed., Oxford Univ. Press 1969).

³ Charles Wolf, Jr., *Commentary: One Korea?*, WALL ST. J., June 30, 2005 (republished: <<http://www.rand.org/commentary/063005WSJ.html>>).

⁴ The correlation of strong property rights with economic success is shown, among other places, in the statistics gathered in Gerald P. O'Driscoll et al., INDEX OF ECONOMIC FREEDOM (Heritage Found. 2002).

⁵ CYNTHIA RAMSAY, BEYOND THE PUBLIC-PRIVATE DEBATE: AN EXAMINATION OF QUALITY, ACCESS AND COST IN THE HEALTH-CARE SYSTEMS OF EIGHT COUNTRIES (Marigold Found. 2001).

⁶ See, e.g., Ronald A. Cass, *Property Rights Systems and the Rule of Law*, in THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS (Enrico Colombatto ed., Edward Elgar Pub. 2004).

⁷ See, e.g., LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Vintage Books 2002).

⁸ MERRILL MATTHEWS, JR., INST. FOR POLICY INNOVATION, FROM INCEPTION TO INGESTION: THE COST OF CREATING NEW DRUGS (Sep. 9, 2002).

⁹ Report of Joseph DiMasi, Tufts University, described in Matthews, *supra*.

¹⁰ See Bernard Guyer, et al., *Annual Summary of Vital Statistics: Trends in the Health of Americans During the 20th Century*, 106 PEDIATRICS 1307-1317 (2000).

¹¹ See Cass, *supra*.