Property and its Enemies[1]

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I. Exclusion

Ownership is a relation between an owner and the thing owned, such that the owner is at liberty to use it, to concede specific rights in it to others, and to alienate it, as well as to exclude access to it by others except with his consent. Full ownership and these liberties are mutually entailed. Exclusion is inherent in ownership; without separation of the owner from non-owners, property is empty of meaning. Where everybody 'owns' a thing, nobody owns it.

The thing owned is normally an asset (and sometimes another's liability). It may be a tangible or intangible good, or a claim upon a good (e.g. a right to the future delivery of the good, or the right to an income stream). Henceforth, I will use the term 'resource' to denote all variants of it.

The owner may be an individual, a corporation, a public body or a collectivity lacking legal personality. Much confusion surrounds the use of the word 'private property'. All property is private in the sense that the very concept implies closure, exclusion. To speak of 'private property' is analytic in the manner of 'wet water'. In this essential respect, 'public' property is no different. We are not supposed to travel on the state-owned railways without a ticket, nor to borrow the locomotive for the children to play with, even if we are paid-up members of the public in question, though if we are, we have some distant interest in the railways' profits or losses. Publicly owned goods behave much as so-called private property does, except when they function as 'public goods' (e.g. the street, the meteorological service, the crown jewels, the off-patent molecule),—but then they altogether cease to be property. 'Common ownership', too, lends itself to confusion, for it may refer either to a relation where each member of a defined group uses as much of the common as intensely as he wishes (e.g. fishing grounds, grazing land), or to one where the share of each is defined (e.g. medieval

[1] A three-part essay of the author, under the same title, treating the subject somewhat differently, has been published in August-September 2003 online in the 'Library of Economics and Liberty' of Liberty Fund.

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two-field village agriculture, modem partnerships), and it is best to make clear which is the intended meaning.

Exclusion, that is the denial of access to owned resources except with the owner's consent, has consequences that are perhaps evident but it can do no harm to spell them out. Where people's talents, capacities as well as their preferences differ—as they do in every real society—exclusion engenders exchanges in the first place, production for exchange in the second. Regardless of the distribution of property, exclusion powerfully forces the allocation of resources to converge toward the most efficient pattern. Can Pareto-optimality be far away? Though it may not be reached, it is hard to conceive of a different, non-exclusive social order that would be likely to bring it closer. However, these tested and tried verities do not stop humanity from being bitterly at odds over property and a large part of opinion from heartily hating it.

Atavistic instincts tell us the difference between 'mine' and 'thine'. The practice of respect for one another's property seems to be as old as human society itself, though it did not always cut across ethnic boundaries. Game theory can show that under plausible assumptions adherence to the practice is a rational 'best response' of everyone to everyone else, (i.e. a 'Nash equilibrium'). However, under incomplete information and poor understanding of the likely long-term outcome, means-to-ends rationality itself may incite to revolt against 'mine' and 'thine'. Getting something for nothing is more attractive than paying for it, and taking a short cut beats scruples over trespass. Exclusion is *prima facie* a violation of certain, albeit crude and gross notions about freedom, equality and—why not?—justice. Though it is not wholly useless to show that these notions are crude and gross, it will hardly stop them from remaining virulent as crude and gross things are apt to do.

They are wind in the sails of the sophisticated enemies of property who construct theories in which ethics is enlisted to impregnate ownership with guilt. Some imply that property cannot be legitimate at all ('property is theft'), most others conclude that it is in society's gift and its distribution ought to be at the sole discretion of society's collective choice that some are entitled to impose upon others ('property is myth'). The resulting advocacy of ceaseless redistribution may run in terms of stocks (wealth) or flows (income), but this is mainly a matter of convenience and does not impinge on the fundamental argument.

The present essay takes a critical look at some typical theories of the enemies of property. Happily, the critique of the enemies also leads us to recall that impeccable standard of reference, the work of

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Hume—a moment of respite from the usually less lucid reasoning of those in the opposite camp who blithely ignore him.

II. 'Enough and as good left for others'

As luck would have it, the philosopher who has probably had the greatest influence on Anglo-American ethical theorizing about property is Locke[2]. Ironically, he had set out to demonstrate the legitimacy of first appropriation[3], made it conditional upon his famous proviso that enough and as good must be left for others, was confident that the proviso could be satisfied with the greatest of ease, but since it could not be, he unwittingly left ownership illegitimate and burdened with a moral debt. Having declared that 'God has given the earth to the children of man', '...given it to mankind in common' (V.24), it seemed to follow that somebody's taking a resource out of this universal pool could be a cause for justified concern for everybody else. Yet 'there must of necessity be a means to appropriate (the fruits)' to 'a private dominion exclusive of the rest of mankind' (V.25). Hence the proviso; no one need feel harmed if after removal of a resource from the common pool enough and as good is left for him or her.

Now that all known resources are 'privately' owned, the existence of millions of propertyless persons is *prima facie* proof that at some point in the past, the proviso ceased to be satisfied. Consequently, the most recent first appropriation was illegitimate, and backward induction shows that so was the second most recent one and the one before that and the one before that, back to the very first. Nozick[4] (176) proves this neatly. Strangely (coming from his 1974 self) he argues that while the Lockean proviso cannot be satisfied as such, some kind of proviso is morally necessary. He finds that a weaker one could be met. He, and many other defenders of the capitalist order; point to its prodigious capacity to generate wealth, and conclude that today's propertyless are on the whole no less well off than if they had been left (some) property when resources could be had for the taking.

[2] John Locke, *The Second Treatise of Civil Government*, 1690

[3] Various authors use first appropriation, first acquisition and first occupation to denote the initial exclusion of a resource. This is a crucial moment in property theory; if first appropriation was legitimate, all subsequent acquisitions resulting from saving, exchange, gift or bequest are also legitimate inasmuch as they represent voluntary transactions.

[4] Robert Nozick, *Anarchy, State, Utopia*, (New York: Basic Books, 1974).

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This kind of compensation test will not do. The point of becoming an owner may or may not be merely the securing of an income, and earning the same or higher income from paid employment may or may not be equivalent, or even commensurate, with it. In a book teeming with specious or baffling assertions, Cohen[5] correctly dismisses this attempt of saving the Lockean proviso by watering it down.

Now it may be objected that the proposition that God has given the earth to mankind in common is just a verbal flourish, empty of real content, for resources that everybody owns are exactly as if they were unowned. If so, the ostensible ground for setting up the Lockean proviso proves to be a gaping hole. If a resource is really unowned, no one is harmed by someone taking exclusive possession of it, and there is no call for a proviso safeguarding those who are thus excluded.

However, property may yet turn out to be illegitimate, for the Lockean proviso could be thought morally necessary even if Locke had clearly recognized that resources were initially unowned—which is how Nozick (174) reads him.

The passage of an unowned resource into someone's ownership opens up two putative sources of loss to others: loss of use, and loss of opportunity. Loss of use occurs when others who, for example, used to hunt or graze their herd on the unowned land, now find themselves excluded from it. One view about this is that since they had done nothing to appropriate the land for themselves while they could, they have no claim against the new owner who has done so. The other view is that compensation for loss of use is due. It is an open question whether compensation is at all possible; did the periodic issue of free beef to reservation Indians compensate them for the lost buffalo hunts? Clearly, it is not the quantities of meat involved in the loss that decide the adequacy of the compensation. The issue has no obvious resolution and it is just as well that its importance diminishes as history trudges on.

Loss of opportunity, on the other hand, would remain a major problem if it were a genuine one. We shall have to see whether it is. The argument runs along these lines:

> The world divides into two parts, the known and the unknown. All resources in the known part are now owned, and enough and as good has not been left for the propertyless. The owners have in fact pre-empted the opportunities that would otherwise have been available to the propertyless. Perhaps it was inevitable that some people go short, but why these particular ones? (Cohen

[5] Gerald A. Cohen, *Self-Ownership, Freedom and Equality*, (Cambridge: CUP, 1995).

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notes with indignation that accepting this would mean accepting that first come, first served. One wonders why first come, first served should be an object of indignation); However, there is still the unknown part of the world to consider. If it is not too unlike the known part, it is likely to contain resources, hence opportunities to discover them. Maybe the fatal proviso, violated in the known world, can yet be satisfied in the unknown one?

However, it seems plausible to suppose that over large numbers, each discovery diminishes the average probability of an at least equivalent one left waiting, if only because the easiest discoveries are likely to be made first. A better way of expressing this idea of search yielding diminishing returns is to say that the finding cost of resources as a proportion of their value increases in the long run. There was a time when the individual prospector or wildcatter had a good chance of getting rich, with finding costs per ounce of gold or barrel of oil not exceeding a few cents. More importantly, inventions of very great commercial value were often made by lone inventors at the cost of a few man-years or less. Today, finding costs for sub-surface resources may run to a quarter or more of their value, and the lone inventor has almost disappeared in the shadow of great research laboratories manned by battalions of scientists. Freak strokes of genius and lucky strikes are no doubt always possible, but their share in resource discovery is surely declining while average finding cost keeps rising. Edison having discovered the light bulb, everybody else has lost the opportunity to discover it. There will be a next-best opportunity, and one after that, but 'enough and as good' for all will not be satisfied for all that.

Has Locke's proviso really condemned ownership to plain illegitimacy, a fact of life with dubious moral status? I believe the answer ultimately depends on whether we accept the claim that if someone had an opportunity he did not take and someone else took it, the latter owes a debt to the former if the remaining opportunities are less valuable. This, rather than the sheer drying up of the last remaining opportunity, is how in a generalized case Locke's proviso is violated. The claim that there is such a debt is entirely arbitrary It can be argued for; but like other arbitrary claims[6] that contest the

[6] A similarly arbitrary claim is made by Cohen (op. cit., 83–4) to the effect that (from a moral point of view) all resources are jointly owned; no one can take out 'his' share without the consent of everybody else; and the joint holding should be managed by democratic consensus. One may note that the late lamented Soviet Union had been striving to meet this claim. A select few thinkers are still regretting that historical contingencies have prevented full realization of the project.

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validity of title on grounds other than evidence of a stronger title, it cannot compel conviction.

III. 'The Myth Of Ownership'

The root principle that gives ethical coherence to the origins of the rule system governing ownership is 'finders keepers', a special case of the more general coordinating principle of 'first come first served'. Both are conventions in the strict meaning of the term, a fact of some importance to which I will revert presently. As opposed to the Lockean proviso which implies that the finder of a resource deprives the rest of mankind of the opportunity of finding it, and owes a debt to them unless equally good opportunities subsist, 'finders keepers' entails that though others might have found the resource, it is the finder who did and he is not, for that reason, under any obligation to the non-finders.

Many 'enemies of property' prefer to regard it as a creature of the political authority in society and have little interest in its extra-political legitimacy. Some choose to call the belief in such legitimacy a mere 'myth'.[7]

However, the 'myth' is more than just a sense of when it is the case that a thing of value is 'mine' or 'thine' and what prohibitions and what liberties constitute the meaning of these terms. It is also an explanation, a theory based on rational choice of behaviour 'strategies', of why these terms have come to mean what they do. The theory is that of Hume[8]. It identifies the mechanism of conventions as a determinant of group behaviour, and as such anticipates what is today the last word in academic thinking about non-imposed social order.

Hume dismisses in a footnote (505) Locke's somewhat futile idea of 'mixing' one's labour with an external resource to appropriate it, and pays no attention to 'enough and as good left for others'. For him, initial exclusion is a matter of fact, it happens by 'first occupation'. At that point, society is formed by the 'first assignment' to the 'present possessor'. The morality of these steps is not at issue.

[7] E.g. John Christman, *The Myth Of Property: Toward An Egalitarian Theory Of Ownership*, (Oxford: OUP, 1995). Liam Murphy and Thomas Nagel, *The Myth Of Ownership: Taxes And Justice*, (New York: OUP, 2002). In like vein but under a more innocuous title, cf. Jeremy Waldron, *The Right To Private Property*. (Oxford: The Clarendon Press, 1988).

[8] David Hume, *A Treatise Of Human Nature*, 2nd edn, (Oxford: OUP, 1739/1978), Bk. III.

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From then on, voluntary transactions, sale, gift and bequest serve as the instruments of the 'transference by consent' and the distribution of property. He makes it very explicit that consent is sufficient warrant: 'fitness and suitableness ought never to enter into the distributing of the properties of mankind' (514). Any further testing of the distribution for ethical and efficiency desiderata would be out of place. It suffices that it results from the exercise of the owners' freedoms. As such, the distribution of property is the expression of justice.

Hume's genius and originality come into play from this point onward. For, as he engagingly puts it, 'social disturbance' mainly arises from 'the looseness and easy transition' of goods people covet (489). How, then, to explain the 'stability of possession' and hence of order? The standard answer handed down by Hobbes and repeated ever since, is that the state enforces the law, and this indeed is why it is indispensable. Hume instead finds in this situation the elements that give rise to a spontaneous convention. Behaviour about one another's property can be coordinated upon several alternative equilibria. One, mutual respect, has prosperity as its payoff, another, mutual disrespect, theft, violence and extortion, produces a 'solitary and forlorn condition' (489). Nearly everyone expects nearly everyone else to respect property, hence the superior equilibrium of mutual respect will take hold. Being an equilibrium, it will be self-enforcing. Hume does not explicitly deal with the deterrence of deviation, but it is not inconsistent with his theory of this convention that punishing the deviants is part of the tacitly agreed behaviour. As a matter of empirical fact, this was the case until enforcement by the state gradually crowded out conventional enforcement. With the hindsight of modern game theory, all this is straightforward enough. In the 18th century, it was way ahead of its time and it was and has largely remained ignored.

From the existence of the convention, Hume deduces that ownership does not depend on the will of the state but, together with the binding force of promises, is logically prior to it. Rules will emerge before there is a special rule-maker and enforcer. In his words that can never be quoted often enough, '...the stability of possession, its translation by consent, and the performance of promises. These are … antecedent to government' (514).

However, contradicting Hume head-on while betraying no awareness of it, Murphy and Nagel state: '… there are no property rights antecedent to the tax system' (74). Their book runs in terms of flows of income rather than stocks of resources, but this does not impinge on essentials. In most respects it is a run-of-the-mill work

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about 'distributive' justice and tax policy, no better and no worse than dozens of similar ones written in the American 'liberal' tradition on the unspoken assumption that social choice is not only *de facto*, but also morally entitled to choose its own scope and everything it chooses within it is chosen justly. In one respect, however, Murphy and Nagel stand out: it is in their curious attempt to turn the concept of convention into a weapon against property, and to interpret convention in such a way that would justify whichever way society, and more directly the legislator, chooses to distribute it.

The attempt opens with the puzzling declaration that property is a 'legal convention' (8). 'Legal', whatever else it may be thought to mean, must also mean 'in accordance with the law'. Law is by definition a product of conscious decisions by duly constituted authority. This is true both for statute law and for the judge-made law which rests on precedent. Since the law is the same for everyone, a single decision by the legislature or the judiciary is decisive throughout the jurisdiction. The decision is enforced by the coercive apparatus of the state. In nearly complete contrast, a convention is by definition a spontaneously emerging behavioural regularity that spreads and solidifies. It is not a matter of any authority's decision. Nor is it explicit agreement, though some conventions can be interpreted as tacit contracts. Some conventions are self-enforcing in the most straightforward sense, others incorporate their own internal enforcement rules as part of the equilibrium strategy (e.g. 'punish the deviant, and do not deviate, for you may be punished'). Neither type depends on an external enforcing apparatus maintained by taxation.

A 'legal convention', then, is a contradiction in terms unless one or both words are taken in a loose, free-and-easy manner. One wonders whether such usage serves the authors well. Their primary concern seems to be to convey that pretax income is just a bookkeeping fiction, it is not anything real; what is really yours is detemined by the 'legal convention'. In plain language, we would just say that there are laws requiring government to protect property from all except from itself, and other laws empowering it to take property (by way of income and other taxation) to finance expenditure that yet other laws direct it to incur Barring the most improbable fluke, taxation is redistributive in the raising of revenue, in the spending of it, or probably both, and this is true whether redistribution is a deliberate objective or not. It is a truism that post-tax incomes are a function of these laws and of many other things. Indeed, we may add that so do pre-tax incomes as well. Yet it does not follow that income and property would not belong to anyone in

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particular if these laws did not exist. Nor does it follow that calling the arrangement a 'legal convention' establishes its legitimacy.

There is a suggestion throughout that if the tax laws are equitable, properly evaluated and create the right (and not wrong!) balance between freedom, 'distributive' justice (a pleonasm?), economic efficiency, equality and anything else, they will be consensual and provide the 'framework … all find morally comfortable' (42).

Lest this moral comfort be troubled by foolish notions of property, the 'myth of ownership' must be dispelled. What people have in mind when they say 'mine' and 'thine'; the tacit convention Hume has identified and that makes property 'antecedent to government', is an 'illusion … that arises whenever the conventions governing a practice are so pervasive and so deeply buried that they become invisible… (and) seem natural although we know they are highly arbitrary' (74). But we know nothing of the sort.

A little knowledge is often worse than none. There is indeed a class of conventions that are 'arbitrary' (though the word is hardly right) in the sense that an alternative convention was potentially available that could have solved the coordination problem on hand equally well. 'All drive on the left' coordinates traffic no worse than all 'drive on the right' would do, and the reason why one establishes itself rather than the other may be called arbitrary, (or more precisely, unrelated to the convention's merits). But some of the most fundamental spontaneous conventions do not belong to this class. The convention of not killing peaceful strangers has no equivalent in a convention to kill them. The latter is less efficient and has indeed proved to be (evolutionally) unstable, for it has disappeared in most parts of the world. The same is true of the other conventions against torts. Everywhere, the tortfeasor is a deviant who breaches the established convention. Nowhere and never has such conduct passed for the norm, for a potential alternative.

Closer to the Humean convention of 'stable possession' that we are invited to regard as an illusion, there is nothing 'arbitrary' about 'first come, first served'. 'Last come, first served', or some similar behaviour pattern, would be less efficient and could hardly have established itself. 'Finders share it all round' could not have taken the place of 'finders keepers'.

The 'legal convention' Murphy and Nagel put forward is not a convention even in a broad, let alone in a technical sense, since it entails fiscal decisions made by some and imposed on others, and its enforcement is not undertaken spontaneously. However it makes little odds what it is. For if 'mere conventoins' are really arbitrary,

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then the 'legal' one is arbitrary, too, and is no better a source of legitimacy than the Humean one. If conventions; at least those relevant to property, are not arbitrary, then ownership is not a 'myth'.

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