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Semantic Legal Ordering: Property and Its Social Effects

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What is property, what are its social effects, and what is the role of law in relation to property and its social effects? These are questions that have been asked, albeit in differing ways, by generations of social theorists, including the generation that established the academic discipline of sociology. The premise behind this essay is that these questions should be posed and addressed once again, in light of fundamental changes that are taking place in global societies and economies.

The primary objectives of this essay will be to (1) conceptually reassemble prominent theories of property, clustering them in a way that may shed new light on certain common elements, and (2) offer a preliminary sketch for a theoretical perspective that might combine these common elements. Once these theoretical perspectives have been offered, the essay will conclude with a brief discussion of property's social effects. Drawing on legal and political thought with roots in antiquity, the essay will point to the "paradox of property": the argument that property is simultaneously a fundamental threat to organized social groups, and often a necessary corollary to the existence of such groups.

I. Theories of Property

In order to understand and explain the social effects of property, it is first necessary to understand what property is. Jurists and social theorists have made repeated efforts to elaborate defined criteria for identifying property, thereby enabling an understanding of its social attributes and effects. Here it is proposed that these theories can be seen as clustering around two poles: (1) organized social closure theories, and (2) collective representation theories.

A. Organized Social Closure Theories

Organized social closure theories all start from the basic insight that an essential criterion of property is exclusivity. Add to this insight the colourful Hobbesian (1994 [1651]) argument that human beings acting in isolation could never achieve exclusivity that is durable or stable, and one has assembled the basic ingredients for an organized social closure theory. The causal intuition is that a group of individuals must cooperate in closing off access to an object or resource, thereby enabling exclusivity. In the language of contemporary institutionalist economics, a "common-pool resource" or "public good" is transformed into a "private good" through the collective action of a social group, which uses its collective possessory power to (1) protect the good against appropriation from outsiders, and (2) articulate and enforce rules concerning derivative possession, use and/or production and sale (see Barzel 1997; Ostrom 1990). Only social groups have the collective power, enabled by organized cooperation, to create exclusivity. Once a social group has created exclusivity, derivative "rights" may be articulated and allocated to individuals, to sub-groups, or to the collectivity as a whole. However, without the implicit or explicit exercise of collective power by the social group, any "rights" of exclusive access, possession, use, production or sale will be entirely illusory.

In Chapter 1 of *Economy and Society*, Max Weber (1978) articulated the organized social closure theory with characteristic directness and perspicuity. Contrasting open and closed social relationships – behaviour of a plurality of social actors where the action of each is oriented, in its meaningful content, to the behaviour of others – Weber identified the differential criterion as the degree to which certain "advantages" are effectively "monopolized" by the existing participants to the relationship. Where advantages are monopolized by existing participants, and where certain advantages are monopolized by individuals or sub-groups *within* the larger social relationship, Weber argued that property rights ("appropriated rights") have emerged. Within the larger category of appropriated rights, Weber identified "ownership" (*Eigentum*) with hereditary transfer across generations. Regardless of whether ownership is enabled within the closed social relationship, however,

appropriated rights may exist. Where the latter exist, they are dependent upon a degree of closure against outsiders and against other insiders. Thus it is social closure by an organized social group that enables the exclusivity characteristic of property.

Organized social closure theories have an ancient legacy, drawing force from centuries of scholarly reflection on Greco-Roman legal and political forms. The Roman historical ideal for socio-political governance was the republic: the *res publica* or “public thing.” In Roman law, the word *res* was used to designate “things” in their legal relation to human beings, i.e. things as potential objects of property or other socio-relational “obligations” governed by law. Thus the republic was *literally* “the property of the public” (Cicero 1928, at I:XXV). In their mythical reflections on the origins of political communities and their laws, Greco-Roman authors established archetypal forms for reflection on the origin of societies generally. In reflecting on the forms they saw as prototypical (“natural”) for enduring social relationships, these authors reflected on the establishment of forms for obligations and powers between persons in relation to proprietary objects (including human beings). In doing so, the Greco-Roman authors established a “natural law” tradition for considering the origins and legitimacy of property relations *beyond the context of positive law*. This natural law tradition for reflection on the origins and legitimacy of property “rights” and obligations contained, in implicit form, the basic elements of an organized social closure theory.

The clearest cases of implicit organized social closure theory in early Greco-Roman tradition are seen in narratives addressing the origins and legitimacy of (1) a delineated, proprietary “share” in landed territory, and (2) privileged membership in the “association of citizens,” i.e. citizenship. These narratives reflected on a mythical transition from a period of primitive civilization, military insecurity, and small populations without settled abodes to increased social cooperation establishing military security, agricultural development, and permanently settled populations (see, e.g., Thucydides 1998, Book I; Plato 1926, Book III). The establishment of permanently settled populations on bounded territory was described as occurring in a process analogous to the establishment of colonies: territorial boundaries were purportedly established through the building of walls with attendant religious ceremonies, and individual allotments of land were purportedly granted by enlightened lawgivers to male heads-of-households. Citizenship privileges were conceived as being originally re-

stricted to elite male household-heads, their sons and male heirs, with occasional extension through legal alliances effectuated by treaty, forced marriage, or other means. In Plato’s *Laws* (Books III and V; see also Morrow 1993), this foundational moment is described in language that combines elements of myth, comparative political history, and prescription for the ideal political community, whereas in Cicero’s *Republic* (Book II) it is described as the actual history of Rome. Regardless of historicity, this foundational mythology relating to the establishment of closed political communities, with proprietary “rights” established for a subset of privileged citizens, contains the basic elements of an organized social closure theory of property.

For Imperial Rome, which governed a vast array of peoples with initially-diverse citizenship ties, the natural law tradition proved useful in establishing a universal law that could fill gaps in positive law and govern legal transactions between people whose formal legal status placed them under different positive laws. By the Second Century A.D., the natural law tradition had been partially interwoven with the positive law for Roman citizens. The interweaving of a “law of all peoples” (*ius gentium*) and citizen law (*ius civile*) is evident from the first section of *The Institutes of Gaius* (~150 A.D.), a Second Century legal textbook that inscribed foundational principles of Roman law for future generations of jurists. In the Byzantine Emperor Justinian’s Sixth Century A.D. edition of these *Institutes*, the “law of nature” and the “law of all peoples” are formally equated with one another (I.2) and given their foundation in “justice” (*iustitia*), the supreme principal of which is stated to be “the constant and perpetual will to render to each one his own right (*ius suum*)” (I.1).

With respect to property law, an early and clear example of interwoven natural law and citizen law is seen in forms of acquisition, especially the form of “occupation” (*occupatio*): the first taking of a “thing of no one” (*res nullius*), along with certain related forms. While this form of acquisition was not based on labour, the prototypical examples (fishing, hunting, finding an abandoned treasure, seizure from an enemy in war) all involved physical exertion and control in relation to a thing. Difficult cases, which had generated debate among classical juristic schools, involved the labour of one person to create something new from raw materials belonging to another person. Already in the Sixth Century A.D., labour was used as a justification for deciding certain of these difficult cases in favour of the person who had expended effort in making something

new from the raw materials (Justinian II.1; cf. Gaius II.65-II.79).

Reflecting back upon the natural law tradition – a tradition that had been given new vitality beginning around the Twelfth Century with the rediscovery of Justinian’s codified Roman law, the founding of the great medieval law schools, and the establishment of ecclesiastical Canon law on the basis of Roman law – European jurists drew on it in formulating a law of “nations” and between nations. In laying the foundations for international law, Hugo Grotius (1949 [1625]) drew extensively on the natural law tradition, describing an evolutionary transition from common property to private property, basing the latter in organized social closure, either explicitly derived from agreement or implicitly based on mutual recognition of the right of occupation. While he did not acknowledge its basis in Roman law, or in a social-closure-based right of acquisition by occupation, John Locke (1998 [1689]) drew on this same tradition in articulating his natural law theory of property, the complement to his labour theory of value.

Explanation and normative justification are interwoven in the natural law tradition, as in the economic science built substantially upon this tradition (see Schumpeter (1954) on the natural law foundations of economic analysis). And, in this tradition, the prominent explanations of social and proprietary origins are theories of organized social closure. In the Marxist tradition of political economy, while the normative justification for private property is stripped away, the institution is also explained as a result of organized social closure, with the capitalist “class” (the “owners of capital”) substituted for “the association of citizens” as the enclosing collectivity (see Marx 1967 [1887]; Marx 1988 [1844]).

B. Collective Representation Theories

The same Greco-Roman and natural law traditions containing an incipient organized social closure theory inspired Emile Durkheim’s collective representation theory of property. This theory is explicated in a series of lectures given by Durkheim, published in English under the title *Professional Ethics and Civic Morals* (1957). Reacting against individualistic natural law theories, especially the argument that individual labour provides the origin and justification for individual property, Durkheim articulated an alternative theory of property that focused on its social and ideational (“intellectual”) aspects, tracing their origins to *religious ideas* reflected in the Greco-Roman tradition.

Returning to exclusivity as the defining criterion of property, Durkheim argued that this exclusivity can only be enabled by the collective power of a social group. In making this argument, he articulated an organized social closure theory. However, for him the more important question was why social groups came to regard exclusivity as a relation between an individual and a thing that should be protected and upheld. In contemporary terms, it might be said that Durkheim was asking a “sociology of knowledge” question about proprietary exclusivity: what are the causes that explain the emergence and persistence of a set of ideas within a social group, a set of ideas that stamp exclusive possession and use with morality and legitimacy, thereby enabling individuals (and corporate bodies) to exercise exclusive power over things and to gain profit through the exercise of that power?

Drawing on his investigations of Polynesian societies and the work of his teacher, Fustel de Coulanges, Durkheim argued that this set of ideas originated in the ancient setting-apart of sacred things, things that by virtue of their dedication to a deity are “taboo”: not to be touched, consumed, or used by individuals. Just as ancient societies regarded certain things as being set-apart and sacred, he argued, so certain persons were regarded as holding a status that set them apart, such that by virtue of their sacred priestly office they alone might touch, consume, and use sacred things. In this way a “moral community” was established between persons and things: the consecration of things as sacred set inviolable boundaries around them, and consecrated them for the exclusive possession, use, and consumption by certain individuals.

Drawing on the Greco-Roman narrative tradition as a case study in the establishment of landed property, Durkheim followed Coulanges in focusing on the religious rituals and beliefs depicted in these narratives. The basic conception described is one in which landed territory is originally regarded as being sacred (and therefore untouchable), with the sacred character capable of being concentrated into boundaries through the use of specific religious rituals. In this way, the same sacred status that originally excluded the individual (the male household-head) can be transformed to his benefit through its concentration in boundaries that exclude all others excepting him and his household-members. The bond between the household-head and his landed estate is given a sacred and moral status, which the community respects and enforces because the community shares the religious set of ideas that have stamped the relationship with its sacred status.

Regarding the worship of powerful deities as the disguised worship of society's power, Durkheim argued that the decline of religious belief merely transfers sacred status from the divine to the social collectivity. Thus the individual's exclusive right to possess, use and profit from property is protected by collective social power rooted in collectively-held ideas, even with the decline of religious belief. What was originally religious becomes secularly moral and juridical, but it still carries the echoes of religious dogma. This is seen, according to Durkheim, in the remains of ritualistic formalism that long persisted in contract law, the primary juridical vehicle (aside from inheritance) for transferring property, and for conceiving social relationships in terms of reciprocal rights and obligations.

The argument that property originated in primitive religious ideas strikes the contemporary reader as being somewhat strange, especially in light of property's modern, economic character. Moreover, Coulanges' scholarly work (which Durkheim cited and relied upon) has been negatively judged for its uncritical reliance on classical texts, and for its polemical agenda against socialism, which is seen as contributing to his treatment of individual property as a "primordial" and universal institution (Momigliano and Humphreys 1980). Nevertheless, even the severest critics recognize Coulanges' influence on anthropological literature. In directing attention to deeply-rooted, collectively-held conceptions of social relationships and "things," as these are reflected in the written sources of Greco-Roman political economy and law, Durkheim and Coulanges pointed to the need to explain the social force of these shared conceptions. From Marcel Mauss' famous study of *The Gift* (1990) to contemporary examinations of Roman legal categories and semantics (e.g. Pottage and Mundy 2004), anthropologists and cultural theorists have continued to return to this explanatory problem.

C. Semantic Legal Ordering

Organized social closure theories address the type of social *structure* that is necessary for property to exist, while collective representation theories address the types of socially-shared *conceptions* that are necessary. Viewed from this perspective, the two theories can readily be seen as complementary: organized social closure and proprietary conceptions must come together in order for property to emerge or change. In fact, while authors identified here with one or the other theory have tended to emphasize either the structural or conceptual aspect more, both elements have typically been present in their theoretical expo-

sitions. If it is accepted that organized social closure and proprietary conception must be brought together in order to explain why property emerges or undergoes transformation, the sociological query can be focused on *how* these structural and conceptual "ingredients" are brought together. The argument to be sketched here is that a focus on the education and social role of "jurists" in performing tasks of "semantic legal ordering" may be helpful in answering this question.

Leaving aside the issue of religious influence, it remains true that legal science has retained a profoundly "dogmatic" character. Lawyers – whether trained from Roman law *Institutes*, European codes, or Anglo-American common law principles inductively-derived from case-law precedents – are taught to reason from written texts by deduction and analogy, drawing on certain fundamental conceptual categories, including property, contract, and the corporation. Drawing fine classificatory distinctions, and creatively interpreting the "facts" of a transaction or dispute in relation to such classificatory distinctions, are central elements of the juristic art. Jurists are taught to think and work within formalities: documentary, substantive, and procedural "forms and formulas" that are relied upon to bring order, reliability, and clarity to dispute-resolution, legislation, and the effectuation of economic transactions. While addressing an issue posed in the present, lawyers are always looking back toward the forms and formulas transcribed in writing from the past, whether from case-law precedents, legislation, codified principles rooted in Roman law, or the "natural law" tradition based on Roman law that has guided juristic thinking when faced with gaps, rigidities, or inequities in positive law. For this reason, the forms and formulas that jurists draw upon in articulating solutions to particular social problems have remained remarkably stable over time.

The sociological importance of juristic thinking lies in the historical fact that foundational documents formally establishing social groups and their legal structures (national constitutions, corporate charters, codes of civil and criminal law, contracts of debt, exchange, partnership, merger and acquisition) are drafted, debated, sealed and delivered by jurists. For this reason, the forms and formulas that jurists have been taught to use in conceptualizing and describing the social group (e.g. as a corporate body or a contractual partnership), as well as the "rights" and obligations of its members, are transcribed into the meaningful "order" toward which individuals within the social group orient themselves in relation to one another (Weber 1978). Jurists

engage in a “semantic legal ordering” that gives meaningful form to the exercise of power by the social group in relation to the individual, thus enabling individuals to form stable expectations as to the directions in which their agency and interest (Swedberg 2005) can be directed, and the ways in which that agency and interest will be met with the formal exercise of coercive social power (Weber 1978). In the case of agency and interest directed toward “things,” the legal category of property supplies a semantic form that enables individuals and groups to form expectations concerning the extent to which they can take and retain possession, use, consume, and profit from things.

Jurists contribute to the organizational aspect of social closure, and to the collective ideas that individuals within social groups draw upon to conceptualize and justify proprietary exclusivity. By focusing on the role of jurists in historical and modern societies, organized social closure theory and collective representation theory can perhaps be synthesized.

II. Conclusion: The Paradox of Property

Having briefly sketched a synthetic theory for explaining what property is and how it emerges, what remains is to briefly discuss property’s social effects. Returning once again to the archetypal Greco-Roman tradition, what emerges from that tradition is “the paradox of property”: that property is simultaneously necessary to the existence and development of the social group, and a fundamental threat to the social group.

Reflecting back on their mythical origins, Greek and Roman social theorists viewed their history in terms of repeated conflicts over proprietary wealth and citizenship rights. When these conflicts boiled up into crisis, archetypal lawgivers would enter the scene, restructuring proprietary and citizenship “shares” to bring about resolution and enable greater numbers of (free and male) members to benefit from investment in the collective social power represented by the republic or polis (e.g. Aristotle 1984; Cicero 1928; Plutarch 2001.) Regardless of historicity, this Greco-Roman tradition points to the paradoxical effects of exclusive, proprietary “rights”. Such rights constitute inequalities within the social group, which can produce vicious conflicts posing an existential threat to the group. At the same time, a wise structuring of such rights, along with transparency as to their content, can ideally produce a shared sense of investment in the security, stability, and development of the social group.

If the social group is organized around enclosed, proprietary rights (corporate, communal, or individual), property and the social group are corollaries: one implies the existence of the other. Nevertheless, the eternal hope is that a wise structuring of proprietary shares within the social group can enable property to be an engine of shared investment and stable growth, rather than instability and conflict.

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