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Ekkehart Schlicht

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by Ekkehart Schlicht

Abstract

David HUME offers two separate lines of argument in order to establish the principles that govern ownership. The one is instrumental and seeks to understand property by looking at its contribution to individual advantage and social welfare, or "publick utility". The other is psychological. It takes the phenomena of property as arising from "imagination". The following essay discusses this parallelism.

The paper is adapted from a chapter of a book I am currently writing and illustrates the approach taken in that book.

Hume's Counterpoint. A Chapter on Property.

by Ekkehart Schlicht*

A Tension

The system of property rights is, in any society, fundamental for many kinds of economic and social transactions. These systems are largely rooted in custom, although modern societies have added separate legal systems that shape and re-shape property rights in a centralist manner, rather unrelated to custom.

The focus in this chapter is on the customary aspects of property. I shall try to explain how property is shaped by custom, and how market processes relate to this. It will be argued that the modern theory of property rights will lose much of its arbitrary nature if the presence of indispensable psychological elements is explicitly acknowledged. The clarification processes that mold custom, shape property rights in much the same manner. They render the system of rights responsive to outside influences, like economic incentives and competitive forces. At the same time, they constrain the set of feasible arrangements. In this way, a consideration of the psychological aspects of property formation will sharpen the insights that can be obtained from the approaches pursued in the new institutional economics and will help us to better understand the limits of competitive forces in shaping and redefining property rights.

This largely instrumental view of property has been repeatedly challenged by authors who stress self-developmental aspects, morality, the cultural significance and the political aspect of property.¹ The tension between moral and instrumental views of property has indeed always been with us. It shows up in public opinion as well as in learned writings. It ignites the hottest debates, but the discussion is mainly conducted by restating one's own position.²

* This is a chapter of a manuscript written during my sabbatical at the Graduate School of Management at the University of Melbourne (SCHLICHT in preparation). I thank the school for providing an outstanding research environment, and many colleagues for the kind interest they took in my work. Philip Williams and Harry Stanton made very valuable suggestions. Particular thanks go to Eric Jones who encouraged me to undertake the project of writing the book over many years, and who helped me with detailed, penetrating, and constructive criticism of this chapter. He managed to do so without frustrating me entirely; this is remarkable. The Deutsche Forschungsgemeinschaft has provided a travel grant to pursue this research.

¹ RYAN (1984), WALTZER (1983)

² RYAN (1984), in a book devoted exclusively to property, does not touch the economics of property rights and declares under the entry of "property" in the authoritative *New Palgrave*: "The least abashed intellectual heirs of the 18th and 19th-century utilitarianism are the defenders of the so-called 'economic theory of property rights'." (RYAN 1987:1031). In the subsequent – and otherwise most penetrating – entry "property rights," ALCHIAN (1987:1032) mentions that issues about social acceptability are due to misunderstanding the market process.

We may try to approach that tension in a constructive way by exploring how systems of property rights emerge, and why they carry these conflicting convictions with them. It will be argued that the conflicting convictions are brought about by the same human tendencies that contribute to the formation and stabilization of property rights in the first place.

Borrowing From HUME

The view of property that I am going to present may be understood as a rather straightforward elaboration of David HUME's chapter on property in the *Treatise of Human Nature*.³ This renders it convenient to follow HUME closely and inject, at some critical junctures of the argument, doses of "clarity".

I shall build up the argument by citing HUME extensively. These citations are not intended to document that I can cite an authority in favor of my views whom others cannot easily match. Rather, HUME's observations form an integral part of the entire argument. It is only at a very few minor points that I disagree with HUME, and I note those.

There are two reasons that induce me to couch the argument in HUME's own words. The first is, that HUME has found a way to express the central ideas I am trying to defend in a way that can hardly be surpassed in clarity and terseness, certainly not by me. He uses another wording and terminology to describe the regularities I am concerned with, and this other perspective will add another dimension. The second reason for citing HUME so extensively is the staggering fact that one of the great classical economists, the father of British associativism and grandfather of utilitarianism, could equally well pass as the father of Gestalt ideas, or the grandfather of modern cognitivism. This observation is quite unrelated to my argument, but it seems worth mentioning.⁴ Yet nobody would believe such an affirmation, and so it seems expedient to let HUME speak for himself.

HUME's Counterpoint

HUME offers two separate lines of argumentation in order to establish the principles that govern ownership. The one is instrumental and seeks to understand property by looking at its contribution to individual advantage and social welfare, or "publick utility". The other is psychological. It takes the phenomena of property as arising from "imagination". Because of this duality, HUME's chapter on property reads like a piece of music in counterpoint, with the theme introduced in the instrumental mode, and its development submerging in a psychological argument expanded and intensely elaborated in a sequence of footnotes.

³ See also KUBON-GILKE and SCHLICHT (1993)

⁴ Somebody with a narrow mind may conclude that HUME must have been inconsistent, somewhere. I prefer to leave *that* question open.

Regarding the origin of his ideas, see SMITH (1941), MOSSNER (1980), and FLEW (1986). As far as I can see, he gathered many suggestions from others (HUTCHESON, GROTIUS, MANDEVILLE, NEWTON, DESCARTES, MALEBRANCHE), but his unique contribution was to develop a comprehensive view that integrated so many various strands of thought.

HUME is quite explicit about pursuing two parallel lines of reasoning at once. He suspects that the psychological laws are of prime importance, but offers a free choice to the reader.

No questions about philosophy are more difficult, than when a number of causes present themselves for the same phenomænon, to determine which is the principal and predominant.... Thus, in the present case, there are, no doubt, motives of public interest for most of the rules, which determine property; but still I suspect, that these rules are principally fix'd by the imagination, or the more frivolous properties of our thought and conception. I shall continue to explain these causes, leaving it to the reader's choice, whether he will prefer those derived from publick utility, or those deriv'd from the imagination.⁵

His actual presentation mixes, these two lines of argumentation freely. Nor is it unrealistic to do so. Empirically and naively, both aspects seem of relevance. The "clarity" view taken here suggests indeed that both "imagination" and instrumental considerations work closely together and rely on each other. As long as they work in the same direction, there would be no need to opt for one or the other alternative, if we disregard our own preference for simplicity and discounting for the moment. By choosing to acknowledge both lines of thought *at once*, we open a possibility of understanding strains and contradictions like the tension between instrumental and moral aspects of property mentioned above. We also open the possibility of understanding why instrumental and moral considerations emerge conjointly and often reinforce each other, while working at other times in opposite directions. Regarding our overall project, the counterpoint argument integrates phenomena of property into an overall view of custom.

Stability

The starting point for HUME is instrumental. The first thing he considers is the *stability of possessions*.⁶

I first consider men in their savage and solitary condition; and suppose, that being sensible of the misery of that state, and foreseeing the advantages that would result from society, they seek each other's company, and make an offer of mutual protection and assistance. I also suppose, that they are endow'd with such sagacity as immediately to perceive, that the chief impediment to this project of society and partnership lies in the avidity and selfishness of their natural temper; to remedy which, they enter into a convention for the stability of possession, and for mutual restraint and forbearance.⁷

The hypothetical nature of this approach is defended as follows:

⁵ HUME (1740:504n).

⁶ The principles discussed in this and the subsequent sections go in part back to GROTIUS (1625), but HUME's treatment is much more penetrating.

⁷ HUME (1740:502-3)

I am sensible that this method of proceeding is not altogether natural; but besides that I here only suppose those reflexions to be form'd at once, which in fact arise insensibly and by degrees; besides this, I say, 'tis very possible, that several persons, being by different accidents separated from the societies, to which they formerly belong'd, may be oblig'd to form a new society among themselves; in which case they are entirely in the situation above-mention'd.⁸

Thus, no sovereign is necessary to enforce the stability of possessions. Property will emerge gradually and naturally because it turns out to be advantageous. We may note here that "stability" is introduced to reduce conflict. It must refer to a rule, and to rule-obedience, and rule obedience must evolve somehow.

Symmetry

Yet, the principle of stability of possession is not enough. It is too general. Property rights must be specified more closely:

Tho' the establishment of the rule, concerning the stability of possession, be not only useful, but even absolutely necessary to human society, it can never serve any purpose, while it remains in such general terms. Some method must be shewn, by which we may distinguish what particular goods are to be assign'd to each particular person, while the rest of mankind are excluded from their possession and enjoyment. Our next business, then, must be to discover the reasons which modify this general rule, and fit it to the common use and practice of the world.⁹

An obvious way would be to design a rule that maximizes utility at any instant, but this is not feasible:

'Tis obvious, that those reasons are not deriv'd from any utility or advantage, which either the *particular* person or the public may reap from his enjoyment of any *particular* goods, beyond what would result from the possession of them by any other person. 'Twere better, no doubt, that every one were possess'd of what is most suitable to him, and proper for his use: But besides, that this relation of fitness may be common to several at once, 'tis liable to so many controversies, and men are so partial and passionate in judging one of these controversies, that such a loose and uncertain rule wou'd be absolutely incompatible with peace of human society. The convention concerning the stability of possession is enter'd into, in order to cut off all occasions of discord and contention; and this end wou'd never be attain'd, were we allow'd to apply this rule differently in every particular case, according to every particular utility, which might be discover'd in such an application.¹⁰

⁸ HUME (1740:503)

⁹ HUME (1740:501-2).

¹⁰ HUME (1740:502).

An utilitarianism of this kind – an act-utilitarianism – is thus not feasible because it gives no clear guiding principle.¹¹ In order to minimize conflict, the clarity principle must be taken into account. Thus the instrumental view is modified by introducing psychological considerations.

HUME does not dwell on this problem. Instead, he jumps directly to the conclusion that the rules must be general because, as a matter of fact, justice is general.

Justice, in her decisions, never regards the fitness or unfitness of objects to particular persons, but conducts herself by more extensive views. Whether a man be generous, or a miser, he is equally well receiv'd by her, and obtains with the same facility a decision in his favor, even for what is entirely useless to him.

It follows, therefore, that the general rule, *that possessions must be stable*, is not apply'd by particular judgements, but by other general rules, which must extend to the whole society, and must be inflexible either by spite or favor.¹²

This generality is introduced as something axiomatic, without further reasoning. In the *Enquiry Concerning Human Understanding*, he simply states:

All the laws of nature, which regulate property, as well as all civil laws, are general, and regard alone some essential circumstances to the case, without taking into consideration the characters, situations, and connexions of the person concerned, or any particular consequences which may result from the determination of these laws in any particular case which offers. They deprive, without scruple, a beneficent man of all his possessions, if acquired by mistake, without a good title; in order to bestow them on a selfish miser, who has already heaped up immense stores of superfluous riches. Public utility requires that property should be regulated by general inflexible rules; and though such rules are adopted as best serve the same end of public utility, it is impossible to prevent all particular hardships, or make beneficial consequences result from every individual case. It is sufficient, if the whole plan or scheme be necessary to the support of civil society, and if the balance of good, in the main, do thereby preponderate much above that of evil. Even the general laws of the universe, though planned by infinite wisdom, cannot exclude all evil or inconvenience in every particular operation.¹³

This viewpoint has been taken up by modern “rule-utilitarianism” and “constitutional economics”.¹⁴ While act-utilitarianism would require us to maximize utility at any

¹¹ See also HUME (1740: 532) where he speaks about the “confusion” that would otherwise arise.

¹² HUME (1740:502).

¹³ HUME (1902:305-6)

¹⁴ See MACKIE (1977:136-138) for a modern philosophical account. The book by BUCHANAN and BRENNAN (1985), entitled *The Reason of Rules*, develops the position taken in “constitutional economics”. It is characteristic that it does not contain any hint about features that might distinguish a rule from a non-rule. It seems, thus, that the argument must presuppose a psychology of rule formation. See also BUCHANAN (1994) for a recent restatement, and SCHLICHT (1994) for criticism.

instant, rule-utilitarianism would require us to act at each instant according to the appropriate rule, and to select the rule that yields, on average, the highest utility among all conceivable rules.

The distinction between rule-utilitarianism and act-utilitarianism can, however, be maintained only if the “best” rule requires us on certain occasions to act in a non-maximizing manner. This would be incomprehensible from a strict utilitarian point of view, since we could design an amended rule that would be identical to the old one with the single exception of prescribing maximizing behavior in cases where the old rule did not.

As a consequence, rule-governed behavior implies either deliberate inefficiencies (that would destroy all utility-related arguments for the rule) or a rule preference.¹⁵ Such a preference would apply not to random rules, and not to the amended rule with some inefficiencies ironed out, but to true psychological rules that are clear and intelligible.

The rule “Never tell a lie” is, in this sense, preferable to the rule “Never tell a lie if it can be detected, otherwise select the best alternative” Yet the second rule is certainly better with regard to individual outcomes, if the individually best alternative is chosen, or to collective outcomes, if the collectively best alternative is chosen. To settle for the clear rule can, I maintain, only be understood with reference to some underlying rule preference. It can not, in particular, be argued that the first rule (“never tell a lie”) is “ethically” more appealing than the modified version and ought to be preferred for that reason, because the second rule may read in this case: “Never tell a lie if it can be detected, otherwise select the socially best alternative”. From a purely instrumental point of view, this rule should still be morally preferable. It is not clear, and we do not find it convincing, and this must then be the reason why it is “ethically” unappealing.

As we want to follow HUME, we must thus stipulate rule preference. Rule-governed behavior must be preferred to other types of behavior purely because it is rule-governed, “For there is a principle in human nature, which we have frequently taken notice of, that men are mightily addicted to *general rules*, and that we often carry our maxims beyond those reasons, which first induc’d us to establish them.”¹⁶

The impartiality of the rules must be presupposed very much in the same vein as symmetry can be understood as an aspect of clarity. It is a purely formal feature that cannot be derived in any useful instrumentalist way.¹⁷ Utilitarian defenses presuppose symmetry in the problem setting in order to derive symmetry in the result.¹⁸ More philosophical approaches start with assumptions about “equal citizenship” or similar symmetry assumptions, rather than derive them from more fundamental sources.

It should also be noted that this formal symmetry does not say very much about equal treatment. Slaves will not be citizens, and equality in court is very different from equality of possessions. Symmetry applies to elements of a category. It is a very

¹⁵ SCHLICHT (in preparation: Chap. 8).

¹⁶ HUME (1740:551). All emphases – here and elsewhere – in the original.

¹⁷ SCHLICHT (in preparation: Sect. 6.8).

¹⁸ e.g. SEN (1973)

formal concept, related to clarity aspects of categorization. The entire argument comes down to saying that the stability of possessions requires the implementation of clear rules. As it happens, this is also the way in which custom works. From a planning perspective, we will be interested in finding that system of rules among the feasible rules that yields the highest “public benefit”; from a positive perspective, we would inquire which rule-system among the feasible systems ultimately emerges.

Status Quo Preference

The rules that govern property must be specified more closely, however. HUME argues that the initial rule will be to maintain the status quo. He argues as follows:

For when men ... have observ'd, that the principal disturbance in society arises from those goods, which we call external, and from their looseness and easy transition from one person to another; they must seek a remedy, by putting these goods, as far as possible, on the same footing with the fixe'd and constant advantages of mind and body.¹⁹

Thus the external things – movable and immovable objects – are assimilated to our personal features. We form in this way a concept of “property”. The term still contains this double meaning.

Once this is established, the rules that govern property must be specified further:

'Tis evident, then, that their first difficulty, in this situation, after the general convention for the establishment of society, and for the constancy of possession, is, how to separate their possessions, and assign to each his particular portion, which he must for the future inalterably enjoy. This difficulty will not detain them long; but it must immediately occur to them, as the most natural expedient, that every one continue to enjoy what he is at present master of, and that property or constant possession be conjoin'd to the immediate possession.²⁰

Thus the status quo will be maintained. The reason for this relates to custom and the endowment effect:²¹

Such is the effect of custom, that it not only reconciles us to any thing we have long enjoy'd, but even gives us an affection for it, and makes us prefer it to other objects, which may be more valuable, but are less known to us. What has long lain under our eye, and has often been employ'd to our advantage, *that* we are always the most unwilling to part with; but can easily live without possessions, which we never have enjoy'd, and are not accustom'd to.

'Tis evident, therefore, that men wou'd easily acquiesce in this expedient, *that every one continue to enjoy what he is at present possess'd of*; and this is the reason, why they wou'd so naturally agree on preferring it.²²

¹⁹ HUME (1740:489)

²⁰ HUME (1740:503)

²¹ SCHLICHT (in preparation: Sect. 8.3)

This argument confounds here instrumentalist and psychological arguments. It is *because of our psychological inclination to maintain the status quo* that it is instrumentally expedient to maintain it. HUME also offers a further argument that is couched entirely in terms of good continuity and clarity:

'Tis a quality, which I have already observ'd in human nature, that when two objects appear in close relation to each other, the mind is apt to ascribe to them any additional relation, in order to compleat the union; and this inclination is so strong, as often to make us run into errors.... And as property forms a relation betwixt a person and an object, 'tis natural to found it on some preceding relation; and as property is nothing but a constant possession, secur'd by the laws of society, 'tis natural to add it to the present possession, which is a relation that resembles it. For this also has its influence. If it be natural to conjoin all sorts of relations, 'tis more so, to conjoin such relations as are resembling, and are related together.²³

There is, thus, at this level, no contradiction between the two lines of argumentation; rather, the instrumental view builds on the psychological, and both work together.

Occupation

Once the initial possessions have been determined, there is a need to cope with change:

But we may observe, that tho' the rule of the assignment of property to the present possessor be natural, and by that means useful, yet its utility extends not beyond the first formation of society; nor wou'd any thing be more pernicious, than the constant observance of it; by which restitution wou'd be excluded and every injustice wou'd be autoriz'd and rewarded. We must, therefore, seek for some other circumstance, that may give rise to property after society is once establish'd....

The possession of all eternal goods is changeable and uncertain; which is one of the most considerable impediments to the establishment of society, and is the reason why, by universal agreement, express or tacite, men restrain themselves by what we now call the rules of justice and equity. The misery of the condition, which precedes this restraint, is the cause why they submit to that remedy as quickly as possible; and this affords us any reason, why we annex the idea of property to the first possession, or to *occupation*. Men are unwilling to leave property in suspence, even for the shortest time, or open the door to violence and disorder. To which we may add, that the first possession always engages the attention most; and did they neglect it, there wou'd be no color of reason for assigning property to any succeeding possession.²⁴

²² HUME (1740:503-4), paragraph break added.

²³ HUME (1740:504-5n.)

²⁴ HUME (1740:505)

Again we find an instrumentalist and a psychological argument employed conjointly. It would obviously be inefficient to leave resources idle. The first person to find something becomes its owner. This reduces possible inefficiencies from idleness. The psychological argument relates directly to psychological salience. We should note that the efficiency argument for the occupation rule is not entirely convincing. It may produce “search externalities” if two individuals each try to be the first at the object. Random allocation would be better in this case. Further, the first occupant may actually not use an object immediately, but still establish his claim, while another may have an immediate use. To give the right to the second person in these cases would be preferable from the point of view of reducing idleness of the resource. Without a clarity requirement we should expect, thus, quite different rules to emerge for different cases, but the clarity requirement restricts such tendencies. Yet they are not entirely eliminated from practical life. Custom would induce you to offer your seat to an old lady.

Occupation works, however, sometimes in a very subtle way:

And I farther observe, that a sensible relation, without any present power, is sometimes sufficient to give a title to any object. The sight of a thing is seldom a considerable relation, and is only regarded as such, when the object is hidden, or very obscure: in which case we find, that the view alone conveys a property, according to the maxim, *that even a hole continent belongs to the nation, which first discover'd it*. 'Tis however remarkable, that both in the case of discovery and that of possession, the first discoverer and possessor must join to the relation an intention of rendering himself proprietor, otherwise the relation will not have its effect; and that because the connexion in our fancy betwixt the property and the relation is not so great, but that it requires to be help'd by such an intention.²⁵

We may state this by saying that it is the relatively clearest case that dominates, even in an unclear setting. The clearest connection between a person and an object is sharpened, and the other connections are discounted. However, it seems to me that the intention of the discoverer or possessor can assist our understanding only if it is expressed in a way which we can perceive – in a clear way. Otherwise it will not help.

The problem of occupancy is in the end entirely related to “our fancy”, up to a point where issues become really difficult to handle.

Two *Graecian* colonies, leaving their native country, in search for new seats, were inform'd that a city near them was deserted by its inhabitants. To know the truth of this report, they dispatch'd at once two messengers, one from each colony; who finding on their approach, that their information was true, began to race together with an intention to take possession of the city, each of them for his countrymen. One of these messengers, finding that he was not an equal match for the other, launch'd his spear at the gates of the city, and was so fortunate as to fix it there before the arrival of his companion. This produc'd a dispute betwixt the

²⁵ HUME (1740:507n.)

two colonies, which of them was the proprietor of the empty city; and this dispute still subsists among philosophers.²⁶

HUME comments on this as follows:

I find the dispute impossible to be decided, and that because the whole question hangs upon the fancy, which is in this case not possess'd of any precise and determinate standard, upon which it can give sentence. To make this evident, let us consider, that if these two persons had been simply members of the colonies, and not messengers or deputies, their actions wou'd not have been of any consequence; since in that case their relation to the colonies wou'd have been feeble and imperfect. Add to this, that nothing determin'd them to run to the gates rather than the walls, or any other part of the city, but that the gates, being the most obvious and remarkable part, satisfy the fancy best in taking them for the whole.... Besides we may consider, that the touch or contact of one messenger is not properly possession, no more than the piercing the gates with a spear; but only forms a relation.... Which of these relations, then, conveys a right of property, I leave to the decision of such as are wiser than myself.²⁷

Thus the rule of occupation rests on the strength of the "connection" between each colony and its messenger, and the strength of the connection between each messenger and the city. The problem would have been easier to solve if one of these chains, rather than both, were weakened. If one of the two persons had been a messenger of one colony, and the other simply a member of the other colony, but both behaved physically just as described before, HUME would probably give the town to the messenger's colony.²⁸

Prescription

Another important rule described by HUME is that long-standing possession creates property rights. This is the rule of "prescription":

But it often happens, that the title of first possession becomes obscure thro' time; and that 'tis impossible to determine many controversies, which may arise concerning it. In that case long possession or *prescription* naturally takes place, and gives a person a sufficient property in any thing he enjoys.... A man's title, that is clear and certain at present, will seem obscure and doubtful fifty years hence, even tho' the facts, on which it is founded, shou'd be prov'd with the greatest evidence and certainty. The same facts have not the same influence over so long an interval of time. And this may be receiv'd as a convincing argument for our preceding doctrine with regard to property and justice. Possession over a long tract of time conveys a title to any object. But as 'tis certain, however every thing be produc'd in time, there is nothing real, that is produc'd by time: it

²⁶ HUME (1740:507-8n.)

²⁷ HUME (1740:508n.)

²⁸ This is in direct analogy to our earlier observation that entitlements rest entirely in the cognitive domain (SCHLICHT in preparation: Sect. 2.6).

follows, that property being produc'd by time, is not any thing real in the objects, but is the offspring of the sentiments, on which alone time is found to have any influence.²⁹

HUME explains the phenomenon that long and uninterrupted possession creates property rights that supersede previous rights as follows.

Present possession is plainly a relation betwixt a person and an object; but is not sufficient to counter-balance the relation of first possession, unless the former be long and uninterrupted: In which case the relation is increas'd on the side of the present possession, by the distance. This change in the relation produces a consequent change in the property.³⁰

Thus the prescription works very much like attribution processes in general.³¹ The most salient relation is selected and strengthened, and other relations are discounted.

Accession

The rule of accession describes how the property in one object implies property rights in other related objects. We know this as the right of *usu fructus* – the right to the fruits of the property, but HUME sees this in a much more fundamental way. The right of accession is established by any kind of “relation” between a person and an object that we hold in our “imagination”, and builds on the “strength of relations”, i.e. on clarity.

We acquire the property of objects by *accession*, when they are connected in an intimate manner with objects that are already our property, and at the same time are inferior to them. Thus the fruits of our garden, the offspring of our cattle, and the work of our slaves, are all of them esteem'd our property, even before possession. Where objects are connected together in the imagination, they are apt to be put on the same footing, and are commonly suppos'd to be endow'd with the same qualities. We readily pass from one to the other, and make no difference in our judgement concerning them; especially if the latter be inferior to the former.³²

The rule of accession is entirely based on psychological propensities of man. “This source of property can never be explain'd but from the imaginations; and one may affirm, that the causes here are unmix'd.”³³ HUME sees, thus, no instrumental reasons here, but this does not exclude them. Yet some peculiarities that we find are quite easily related to psychological regularities:

... the ascribing of property to accession is nothing but an effect of the relations of ideas, and of the smooth transition of the imagination. ... The empire of Great Britain seems to draw along with it the dominion of the Orkneys, the Hebrides, the Isle of Man, and the Isle of Wight; but the

²⁹ HUME (1740:508-9)

³⁰ HUME (1740:509n.)

³¹ SCHLICHT (in preparation: Sect. 9.1)

³² HUME (1740:509)

³³ HUME (1740:509n.)

authority over these lesser islands does not naturally imply any title to *Great Britain*. In short, a small object naturally follows a great one as its accession; but a great one is never suppos'd to belong to the proprietor of a small one related to it, merely on account of that property and relation....

When we attribute to a person a property in two objects, we do not always pass from the person to one object, and from that to the other related to it. The objects being here to be consider'd as the property of the person, we are apt to join them together, and place them in the same light. Suppose therefore, a great object and a small object to be related together; if a person be strongly related to the great object, he will likewise be strongly related to both the objects, consider'd together, because he is related to the most considerable part. On the contrary, if he be only related to the small object, he will not be strongly related to both, consider'd together, since his relation lies only with the most trivial part, which is not apt to strike us in any degree, when we consider the whole. And this is the reason, why small objects become accessions to great ones, and not great to small.³⁴

The additional examples that HUME supplies relate to property in rivers and bays. Recent history provides, however, many further examples, related to the ownership of islands or uninhabited regions, like Antarctica or the North Sea. A conspicuous example of a conflict between the rules of occupation and accession is the ongoing dispute between Great Britain and Argentina over the Falkland Islands. This group of islands belongs to Great Britain by occupation, but accession would entitle the Argentine to the ownership, since the Falklands are closer to Argentina than to any other country, and are also much smaller than Argentina. Thus there were conflicting rights emerging from HUME's principles. As it happens, a war was fought over this issue.

Succession

Succession relates to the way in which property rights are allocated if the owner dies or disappears. HUME is very brief on that:

The right of *succession* is a very natural one, from the presum'd consent of the parent or near relation, and from the general interest of mankind, which requires, that men's possessions shou'd pass to those, who are dearest to them, in order to render them more industrious and frugal. Perhaps these causes are seconded by the influence of *relation*, or the association of ideas, by which we are naturally directed to consider the son after the parent's decease, and ascribe him a title to his father's possessions. Those goods must become property of some body: But *of whom* is the question. Here 'tis evident the persons children naturally present themselves to the mind; and being already connected to those

³⁴ HUME (1740:510-1n.)

possessions by means of their decease'd parent, we are apt to connect them still farther by the relation of property.³⁵

The Workings of "Imaginations"

All these arguments relate mostly to the workings of "imagination". The instrumentalist theme is largely dropped. We may of course embellish HUME's counterpoint by adding various instrumental reasons that reconfirm the principles of occupation, prescription, accession, and succession, but we shall refrain from doing so. Whatever reasons we select, however, they cannot involve case-by case optimization. They must be rule-bound, and this constrains the possibilities. This insight suffices for the moment. We shall, however, come back to the instrumental theme on a broad scale when we consider the theory of property rights below.

Let us first try to summarize HUME's arguments about the workings of "imagination" in a slightly more general fashion. HUME provides again the starting-point.

It has been observ'd above, that the mind has a natural propensity to join relations, especially resembling ones, and finds a kind of fitness and uniformity in such a union. From this propensity are deriv'd these laws of nature, *that upon the first formation of society, property always follows the present possession*; and afterwards, *that it arises from first or from long possession*. Now we may easily observe, that relation is not confin'd merely to one degree; but that from an object which is related to us, we acquire a relation to every other object which is related to it, and so on, till the thought loses the chain by too long a progress. However the relation may weaken by each remove, 'tis not immediately destroy'd; but frequently connects two objects by means of an intermediate one, which is related to both. And this principle is of such force as to give rise to the right of *accession*, and causes us to acquire the property not only of such objects as we are immediately possess'd of, but also of such as are closely connected to them.

Suppose a *German*, a *Frenchman*, and a *Spaniard* to come into a room, where there are place'd upon the table three bottles of wine, *Rhenish*, *Burgundy*, and *Port*; and suppose they shou'd fall a quarreling about the division of them; a person, who was chosen for umpire, wou'd naturally, to show his impartiality, give every one the product of his own country: And this from a principle, which, in some measure, is the source of those laws of nature, that ascribe property to occupation, prescription and accession.

In all these cases, and particularly that of accession, there is first a *natural* unity betwixt the idea of the person and that of the object, and afterwards a new and *moral* union produc'd by that right or property, which we ascribe to the person.³⁶

³⁵ HUME (1740:510-513). This passage consists of 14 lines scattered over four pages. The rest of those pages is devoted to 182 lines of footnotes in small print explaining the workings of imagination.

³⁶ HUME (1740:509-10n.)

In the terminology adopted previously, we could say that property emerges from rule perception and from our desire to establish regularity. Once these rules are established, they shape morality:

... the sense of morality in the observance of these rules follows *naturally*, and of itself; tho' 'tis certain, that it is also augmented by a new *artifice*, and that the public instructions of politicians, and the private education of parents, contribute to the giving us a sense of honour and duty in the strict regulation of our actions with regard to the properties of others.³⁷

Morality in turn affects behavior:

If morality had naturally no influence on human passions and actions, 'twere in vain to take such pains to inculcate it.³⁸

The "sense of morality" that establishes this connection, is "natural".³⁹

Thus, the argument is, , straightforward. It goes from pattern perception to action. The link is obtained by postulating a moral sense that engenders a preference to follow those rules. Thus, HUME's theory of property may be understood as a special instance of customary rule formation, as viewed in this book.

Universality

The theory of property as expounded by HUME, is intended to be universalist. Even if his idea of justice is "artificial" in a philosophical sense, he maintains that it is "natural" in the sense of being "inseparable from the species".⁴⁰ The same universalistic stance is taken in the view of custom developed in this book. Yet an obvious reaction to such universalistic positions is that it inappropriately generalizes the European experience of a few centuries to entire mankind, back to the Neanderthals, forth to an indefinite future, and comprising all cultures around the globe. This is deemed too strong a position to take. Thus, it may, be appropriate to discuss what the universalistic position entails, tailored to the issue of property.

First, universalism is not entirely absurd. The statement that humans have two arms and two legs may go undisputed. But what about rule perception, clarity, and so on? I have argued that the basic principles are culture-invariant, but that clarification processes will generate framing effects of various kinds. This will allow for infinitely many cultures.⁴¹ Now, HUME's rules of property are nearly universal, but there are exceptions. This renders it less useful to survey the anthropological literature on that topic.⁴² It is more interesting to discuss some exceptions, since these tend to reconfirm, rather than undermine, HUME's line of argument.

³⁷ HUME (1740:533-4)

³⁸ HUME (1740:457)

³⁹ HUME (1740:619)

⁴⁰ HUME (1740:484)

⁴¹ SCHLICHT (in preparation: Sects. 6.6-6.11; 10.6).

⁴² See, however, KUBON-GILKE (forthcoming), HECKER (1990), SCHMIDT (1939), BEAGLEHOLE (1931), BRAEUER (1981), REICHARD (1938:377-404), BUNZEL (1938:333-404), LIPS (1938:494-5, 514-5), NIPPOLD (1954).

Regarding occupancy, HUME has argued that “men are unwilling to leave property in suspense, even for the shortest time, or open the door to violence and disorder.”⁴³ There are however, hunters and gatherers who do not know private property in land. This seems at first sight to contradict HUME’s principle of occupancy. Yet the principle applies whenever there is a threat of violence and disorder. Such a threat would only arise from scarcity. HUME’s principle must certainly be modified, but the thrust of the argument remains unaffected.

Regarding succession, HUME has postulated that property will pass on from parents to their children because “the persons children naturally present themselves to the mind; and being already connected to those possessions by means of their deceas’d parent, we are apt to connect them still farther by the relation of property.”⁴⁴ Yet in many cultures, possessions are distributed among the clan according to customary rules. Here again HUME is wrong. Still his argument can be maintained, as those societies are characterized by loose ties between parents and offspring.⁴⁵ Further, there are cases where private belongings are destroyed, burnt or buried with the corpse. These practices can hardly be defended on the assumption that “the goods *must* become property of some body.”⁴⁶ Yet the clarity view would suggest that a ritual like the burning of the personal belongings may help to re-establish clarity in the social pattern by destroying elements that may create ambiguity.

Thus it is easy to refute some of HUME’s principles about property, although others – in particular on the stability of property, symmetry, prescription, and occupancy – may prove more reliable. It is, however, less easy to refute the underlying clarity view. This view entails the perception of patterns that induce actions to complete these patterns or improve them. As I am not in a position to prove the universality of that view, I can only hint at the psychological evidence that supports it. Another support can be obtained by looking at animal behavior. The suggestion is that traits that are shared by Englishmen, chimpanzees, lizards, and cicadas, may be fairly universal.

Property in Ethological Perspective

The first man who fenced off a plot of land and said “this is mine” was, according to ROUSSEAU, the true founder of civil society.⁴⁷ This insight is a gem in the glorious tradition of hypothetical theorizing. It sounds as if ROUSSEAU had never encountered a dog. Possessive behavior is widespread among animals and not unique to humans, and we may accordingly learn something about the foundations of possessive behavior by considering some ethological studies.

The most important form of possessive behavior amongst animals is territoriality. The usual explanation given for the phenomena of territoriality is that they have evolved because of beneficial effects on the survival of the individual and the species. If every individual defends a certain territory of its habitat against members of the same species, this secures the necessary food supply for the individual and spreads the

⁴³ HUME (1740:505)

⁴⁴ HUME (1740:510-513)

⁴⁵ KUBON-GILKE (forthcoming:)

⁴⁶ HUME (1740:512)

⁴⁷ ROUSSEAU (1754:76)

species across space in such a way as to use it most efficiently. Friendliness would be unwarranted. It would be nice if you were prepared to share your territory with a newcomer, but it would be disastrous. The food supply would not suffice to support two couples and their offspring, and all would die. In this way, benevolent individuals will be weeded out by evolution, and only the nasties survive. This explains territoriality.

There are of course many animals that do not form territories. Some fish form schools but seem to have no definite home-turf that they defend. Other animals must travel from pasture to pasture. This does not contradict the argument about territoriality outlined above. We should expect territoriality to occur only whenever it is conducive to survival. We should also note that our close relatives, the chimpanzees and the baboons, are territorial.

Let us look, however, a little closer at the phenomenon of territoriality before we relate it to phenomena of property in human societies.⁴⁸

The first observation is that the establishment of a territory may involve some fighting, but once the territory has been established, fighting will be rare. We should expect this from an evolutionary perspective. There would be no great use for the individual in having a territory that is to be defended by uninterrupted fighting, and it would be a disadvantage for the species to spoil resources in this manner. Boundaries must be accepted. There may be possibilities of revision, and processes to revise them, but boundaries lose all their meaning if they are under permanent dispute. Territoriality requires that boundaries be respected. The nasties should not be too nasty.

Thus, borders must have a direct behavioral impact, in much the same way, as customs must carry entitlements. This is the case. There is a strong "owner effect" to be observed in territorial animals, which is very closely related to the endowment effect.⁴⁹ If you put two male desert clickers on a territory owned by one of them, the owner will invariably win the fight.⁵⁰

Territories must be recognized and recognizable. Natural landmarks often serve as territory boundaries. Domestic mice prefer large nearby objects as visual clues.⁵¹ Territorial songs or scentmarks may mark territories. Ethologists *define* territories in terms of intolerance against intruders.⁵²

Yet boundaries are not always respected. An animal may seek to take possession of a high-quality territory by invading it and attacking the incumbent owner. This is usually not successful, because owners of high-quality territories are usually in better physical shape than intruders or owners of low-quality territories. This is, however, not the determining cause, at least among desert clickers: "The occupation of high-

⁴⁸ An introduction to the topic is provided by EIBL-EIBESFELD (1975:340-371)

⁴⁹ SCHLICHT (in preparation: Sect. 8.3)

⁵⁰ WANG and GREENFIELD (1991). This regularity has been observed in many other animals, too, see e.g. DAVIES (1978), RIECHERT (1978), FRANKE STEVENS (1988), SENAR et al. (1989), ENGLUND and OTTO (1991), EIBL-EIBESFELD (1975:348, Fig. 15-41)

⁵¹ MACINTOSH (1973)

⁵² EIBL-EIBESFELD (1975:344-45)

quality territories is primarily determined by early eclosion rather than by aggressive contests. Why late-eclosed males respect ownership by early-eclosed males is still an enigma.”⁵³ It appears as if the desert clickers have read HUME:

The possession of all eternal goods is changeable and uncertain; which is one of the most considerable impediments to the establishment of society, and is the reason why, by universal agreement, express or tacite, clickers restrain themselves by what we now call the rules of justice and equity. The misery of the condition, which precedes this restraint, is the cause why they submit to that remedy as quickly as possible; and this affords them any reason, why they annex the idea of property to the first possession, or to *occupation*.⁵⁴

Further, there is the possibility of enlarging one’s own territory at the neighbor’s expense. The assumption usually made is that a border dispute will be settled by a fight, and the winner will obtain ownership of the contested territory. Many biologists seem to have assumed that in an axiomatic way. Nature is, however, somewhat more complex, at least with regard to lizards.

As a lizard, you may use two strategies to enlarge your territory at your neighbor’s expense.⁵⁵ One strategy is to invade the neighbor’s territory and to chase him away if he objects. After a while, the territory will be yours. This works, however, only if you are stronger than your neighbor. If you are not, you can nevertheless succeed by sheer persistence. You may lose every fight, or may even find it advantageous to flee right away, but you return again and again. If you are persistent enough, you will become the owner. The regularity exploited here has also been described by HUME.

But it often happens, that the title of first possession becomes obscure thro’ time; and that ’tis impossible to determine many controversies, which may arise concerning it. In that case long possession or *prescription* naturally takes place, and gives a lizard a sufficient property in any thing it enjoys.⁵⁶

You may find also rather refined systems of property rights in the animal kingdom: Many male cats can use the same area, but at different, well-established times, and each is only a temporal owner of the territory – and retreats from it at other times.⁵⁷ It is also interesting that territorial species do not defend all areas they may visit against members of their own kind. Some areas are neutral and serve as commons.⁵⁸

If we turn to property in movable objects, we find also quite astonishing features in the possessive behavior of animals. Again, ownership must be recognizable and recognized. The ownership cues are quite different among different species. Proximity

⁵³ WANG and GREENFIELD (1991:586)

⁵⁴ Adapted from HUME (1740:505), with “men” replaced by “clickers”.

⁵⁵ The following draws on STAMPS and KRISHNAN (1995). The authors remark that field studies about territory formation are rare and that many existing studies assume that the winner of a fight has obtained the contested territory, instead of testing that independently.

⁵⁶ Adapted from HUME (1740:507-8), with “person” replaced by “lizard”.

⁵⁷ EIBL-EIBESFELD (1975:344)

⁵⁸ EIBL-EIBESFELD (1975:342)

of the object to its owner, as well as the possibility to take it away and move it around, are ownership cues with the macaques, for instance, that inhibit non-owners.⁵⁹ In baboons, the mere memory of proximity of the owner inhibits non-owners.⁶⁰

These observations stress three interrelated features of property in a very general way. First, property must be recognizable. Second, property must have a behavioral impact, witnessed by the owner effect. Third, property can emerge without any formal legal system.

In this way, property is tied up with the owner effect. This seems to be the core phenomenon. Individuals can develop special affinities with objects in their surroundings. These are just the “connexions in imagination” that HUME stressed so much. This is the basis for property. On that basis, property can take many forms. This may be compared to the faculty of having a language, that must precede any language, and language may take many forms.

Ethology thus establishes that animals can form special psychological ties to territories, or to things. Such property is not necessarily a social phenomenon. An animal will form its territory even if no competitors are to be feared, and Robinson may form a special tie with his walking stick, in spite of being able to find many pieces of wood that would serve the purpose just as well.⁶¹ Property without society would be an entirely private affair, driven by rule preference like habit. We need not establish that humans must form certain specific ties to specific objects, although some ethologists would argue in that direction. The mere unspecified possibility of forming them is sufficient for our purposes. The laws that underlie the formation of these ties constitute, then, the ultimate source of property. They are assumed to be universal. The clarity view is even more daring in trying to understand them as brought about by overarching clarification processes.

The Voluntary Transfer of Property

Property is, thus, not a uniquely human phenomenon. Man has, however, the possibility of transferring property rights voluntarily.⁶² This is unique to humans, although rudiments of ownership transfers may be found with apes.⁶³ Paraphrasing Adam SMITH, we need not decide whether “this propensity is one of those original principles in human nature, of which no further account can be given; or whether, as

⁵⁹ KUMMER and CORDS (1991:545-547)

⁶⁰ SIGG and FALETT (1985)

⁶¹ This aspect is usually neglected, e.g. by HUME (1740:501) and DEMSETZ (1967:104).

⁶² RYAN (1987:1029) wrongly translates the Roman *ius utendi et abutendi* as comprising the right to use and the power to dispose and takes this as defining property. This is not my usage. I consider property as a particular bundle of rights, shaped by the same regularities as other rights. This comprises various cases of attenuated property rights. Often you cannot trade with gifts, or you are not allowed to misuse property or leave it idle. On the Trobriand islands, property is related by lineage to mythical ancestors. As you cannot exchange your ancestors, you cannot exchange your property (BELL-KRANNHALS 1990:104). Even the Roman “right to use and to misuse” is too restrictive.

⁶³ ELLIS (1985:126)

seems more probable, it be the necessary consequence of the faculties of reason and speech.”⁶⁴

SMITH referred, however, to the human “propensity to truck, barter, and exchange one thing for another.”⁶⁵ Here I do not follow. This statement mixes too many aspects and creates more confusion than necessary. The problems that I see in SMITH’s wording are the following. Firstly, it would be better to talk about a “propensity to exchange ... common to all men” and drop “truck” and “barter”. Truck and barter derive from exchange, yet are not necessary aspects of exchange. We find “take it or leave it offers” in modern societies as well as in exchanges between alien tribes that share no common language (“silent trade”).⁶⁶ The “truck and barter” aspect is also unconvincing in other ways. Although it is true that “nobody ever saw a dog make a fair and deliberate exchange of one bone for another with another dog”, it is unclear why “truck and barter” should relate to fairness, apart from CANNAN’s observation that it is by no means clear what the reason could be for exchanging one bone for another.⁶⁷ Secondly, transfer of property takes place in various ways, and exchange is just a special case, that arises when one transfer is conditioned on the other. We may say that property may give rise to *quid-pro-quo* exchange, but only under certain conditions. There are societies, organized around principles of reciprocity, that rely on obligatory gift-giving without immediate equivalent returns. An equivalence is only achieved in the longer run, in a statistical sense.⁶⁸ (Markets are, thus, not more “natural”, but also not less “natural” than other forms of social coordination, in contrast to what SMITH’s statement suggests.) Modern societies maintain rudiments, like the right to hospitality. Systems of public provision fall in this category, too.

So let me follow HUME and consider the rule of “transference of property by consent.”

However useful, or even necessary, the stability of possession may be to human society, 'tis attended with very considerable inconveniences. The relation of fitness or suitableness ought never to enter into consideration, in distributing the properties of mankind; but we must govern ourselves by rules, which are more general in their application, and more free from doubt and uncertainty. Of this kind, *present* possession upon the first establishment of society; and afterwards *occupation*, *prescription*, *accession*, and *succession*. As these depend very much on chance, they must frequently prove contradictory both to men’s wants and desires; and persons and possessions must often be very ill adjusted. This is a grand inconvenience, which calls for a remedy. To apply one directly, and allow every man to seize by violence what he judges to be fit for him, would destroy society; and therefore the rules of justice seek medium betwixt a rigid stability, and this changeable and uncertain adjustment. But there is no medium better than the obvious one, that possession and property

⁶⁴ SMITH (1776:13).

⁶⁵ SMITH (1776:13).

⁶⁶ BASU et al. (1987)

⁶⁷ SMITH (1776:13).

⁶⁸ MAUSS (1924). LÉVI-STRAUSS (1949:122) aptly terms this “generalized exchange”.

shou'd always be stable, except when the proprietor consents to bestow them on some other person.⁶⁹

This sounds convincing, yet the right to transfer is far from universal, and even if such rights exist, they occasionally appear quite different from the right described by HUME. Yet the “exceptions” tend again to reconfirm, rather than invalidate, HUME’s general view.

The Theory of Property Rights

An example is given by the system of property rights found among the Zuñis, an Indian tribe in New Mexico. Consider two Zuñis, named “A” and “B”. An anthropologist reports about their property rights in land as follows.

A has let his field go out of cultivation. If B wishes to plant in it, A cannot refuse. Although it still belongs to A, it would be “mean” – and unavailing – to assert his claim so long as B is using it. It is perfectly clear to any Zuñi that B needs the field more than A. Isn’t he using it? If A presses his claim, and he has the legal right to do, B offers another field in exchange. If he has no other field he can spare, this proves that he needs this one. So A compromises by offering a field in exchange. *B now has clear title to the second field.*⁷⁰

This seems far away from any right of transfer as described by HUME. Yet the efficiency argument put forward by HUME may well apply here. The right to use uncultivated fields can certainly be defended on efficiency grounds. The same would hold true for the right to maintain the crop, otherwise those who invest in cultivation could be exploited, and investment in cultivation would be suboptimal. In so far as the plants cannot be separated from the soil, the Zuñi system seems perfectly in accord with HUME’s line of argument, although not with his result. But the Zuñi case violates one of the assumptions made by HUME, namely that property rights should disregard personal needs because this would lead to “confusion”. Yet in the Zuñi case, utility is objectified by cultivation, and so it is possible to attach general rules to cultivation. The cause is not there, and so the result does not obtain. The Zuni case thus reconfirms, rather than invalidates, HUME’s general approach while conflicting with his conclusions.

The modern theory of property rights has centered around this type of argumentation.⁷¹ The theory of the firm, to be discussed in the next chapter, draws extensively on such ideas. For the present purpose it is, however, useful to discuss still another ownership phenomenon that seems to contradict HUME’s conclusions but reconfirms his principles.

Consider communal property. This is a widespread phenomenon, but seems not be covered by Hume’s treatment.⁷² A prominent example is the “commons” in medieval

⁶⁹ HUME (1740:514)

⁷⁰ BUNZEL (1938:347)

⁷¹ The classical statement is DEMSETZ (1967). Important contributions include ALCHIAN and DEMSETZ (1972) and ALCHIAN (1984;1987).

⁷² HUME (1740:538) mentions joint property, however.

England. This was communally owned pasture. The institution of commons was widespread. It was maintained for more than 1000 years, and parts survive to the present.⁷³ At first glance, this institution seems to carry all the known inefficiencies of public property with it. In particular, one would expect overgrazing. This was, however, reduced by communal regulations that restricted usage to members of the community and allotted quotas of animals to them. So the “overgrazing” inefficiency was checked by regulation.

Communal property in grazing land had, however, considerable advantages.⁷⁴ The grazing habit of cattle is such that they stray while eating. On a small pasture, you cannot easily restrict the animal to just a small part of that small field. A large herd can, however, be kept together on a large field, and it can be kept away from parts of the pasture. This allows the grass to recuperate until the animals are allowed back for grazing. As a result, a large herd will make better usage of a large field, than a small herd could on a correspondingly small field. Further, the supervision of a herd of cattle, or a flock of sheep involves economies of scale. A communal shepherd with his dogs can easily supervise a large flock. Further, the costs of fencing off individual plots can be saved.

Other advantages relate to more intricate features. Commons formed part of the “open field system”, that involved an elaborate mode of scattered strip farming, with fallows used for grazing, and the animals fertilizing the fallows. Various complementarities between livestock and crop complicate the picture. We need not discuss this in detail. The overall argument is simply that a system of communal property rights may have efficiency advantages. In these cases, we would expect communal property to emerge.

A hypothetical story would be as follows: Starting from private property, people would transfer their rights to the community in exchange for grazing rights. They would be willing to set up such a system because everybody would benefit from it. Now, this is hypothetical. The origin of communal pastures is rather obscure. It is likely that the system emerged historically from Germanic systems of communal property, and it certainly evolved “insensibly and by degrees”.⁷⁵ It comes in many variants and shadings. We may imagine a process of continuous trial and error, incessantly re-arranging property rights, until some stable pattern emerged. Subsequent variations were reversed because they turned out to be a disadvantage, and this stabilized the system.

We may tell another hypothetical story, starting with communal property, but with advantages occurring from switching to private property. In this case, there would be a continuous pressure to privatize. The members of the community would agree gradually to allot more rights to the individuals, because this would benefit all of them. Processes of this type actually do occur. A modest example for the

⁷³ The following draws on DAHLMAN (1980). See also HOFFMANN (1975) and MCCLOSKEY (1975).

⁷⁴ I follow DAHLMAN (1980:112-13) to illustrate the property-rights argument. It is, thus, not maintained that the account given by DAHLMAN is factually correct. It seems to have the weakness of neglecting political forces that may maintain economically inefficient states. Yet it serves to nicely illustrate the way in which property rights theory proceeds. See HOFFMANN (1975) for a detailed historical account and references to the historical literature.

⁷⁵ see HOFFMANN (1975).

transformation of communal property seems to be currently under way with the Hutterites, an anabaptist group in North America.⁷⁶ The more dramatic developments of this kind – the dissolution of communal property in England, or the collapse of the communist countries – can, however, not be easily understood in this simple way, as they involve explicit political power, rather than tacit and gradual social change, and I do not want to deal with this issue here.⁷⁷ It should be noted, however, that HUME's approach seems to me to offer a fruitful way of thinking about political power. HUME analyzed the origins of government and the nature of "allegiance" as the source of political power in a most penetrating way.⁷⁸

Some Problems With Property Rights

Once property rights are transferable, there will emerge, thus, a private incentive to re-arrange them in such a way as to exhaust possible advantages. The modern contractual view takes this perspective. It sees institutions as being brought about by such a process of reshuffling property rights. Firms emerge in this manner, as do families, churches, states, and markets. The overarching view is that the various organizational forms emerge, so to speak, from institutional competition. Better institutional solutions outcompete inferior ones.⁷⁹

Yet this approach has some difficulties. The first is the *efficiency problem*. The approach cannot easily explain inefficiencies, in the sense of a waste of resources from the point of view of the members of a whole group or society. There would be no reason to expect that such arrangement could be perpetuated. There would be an incentive to change them. The benefits would outweigh the costs, and the losers could be fully compensated from the gains, leaving some surplus to be distributed. This would imply optimization instant by instant, rather than optimization by selecting appropriate rules. In other words, the approach does not take into account all

⁷⁶ PETER and WITHAKER (1981)

⁷⁷ The dissolution of communal property in pasture is part of the "enclosures" which have been discussed in the literature. It is beyond my scope to settle the controversial issues involved, but let me briefly indicate the problem. DAHLMAN (1980:188-199) interprets the political processes that actually re-defined property rights as actuated by changes in relative prices, as induced by changes in technology and demand. In other words, the system was changed by a response to purely economic incentives. This rendered enclosures profitable.

Some would argue that a political power structure can prevail in spite of emerging inefficiencies, as long as it can be maintained by the interests of those with power, and that the systems of communal property can be viewed as having been retained in this manner. In certain instances, the dissolution of communal property was much more complex than a straightforward property rights approach would suggest. Property rights were not divisible, alienable, or transferable, to begin with. Changes could be fostered by the lords if they were interested in promoting such changes, or they could be impeded by them if they saw dangers in the alternatives. The spread of markets and of long-distance trade induced them sometimes to act in ways that fostered, as unintended consequences, the further spreading of markets and the dissolution of the traditional political structure. The lords were prompted, for instance, to replace the personal services they were entitled to receive from their followers by cash rents. This process induced the dissolution of feudal bonds and the further spread of market transactions and privatization. This is the "bauble thesis" advanced by JONES (1981:85-87), following SMITH (1776:385-394). It goes far beyond the boundaries of any straightforward property rights approach.

⁷⁸ HUME (1740:534-567)

⁷⁹ ALCHIAN (1984), WILLIAMSON (1985)

the psychological forces that constrain possible rules, and therefore possible institutions.

Property rights theorists start from the assumption of the survival of the most efficient practices. The argument should carry over to all types of social arrangements, institutions, and techniques. This stands in contrast with the many pronounced inefficiencies that we observe in other cultures, as well as in our own. From a property rights perspective, we may hope to understand these apparent inefficiencies as ultimately serving some enigmatic purpose, but this seems largely a matter of unfounded faith, and it seems to be better to understand the reasons for inefficiencies, rather than to assume them away. Consider, as an illustration, the following account about the persistence of an inefficient tool:

A good example for the persistence of an unimpressive design is the Oldowan hand axe It consists of a waterworn pebble about the size of a fist, from one end of which a few chips were knocked off to produce a rough edge that could be used for hacking, mashing, scraping, grubbing for roots, and breaking bones to extract the marrow. This tool remained in use for at least two million years until the development of the Acheulian hand axe, made of flint, which gave a sharper edge.

To argue that the Oldowan hand axe persisted for so long because it was marvellously adapted is clearly absurd: as a piece of technology it was crude in the extreme, and very far from the most efficient use that could have been made of stone even at that time, as subsequent developments in the later Palaeolithic and the Neolithic showed very clearly.⁸⁰

Such "survivals of the mediocre" over millennia poses, as a matter of principle, severe problems to all theoretical approaches that put exclusive stress on instrumental considerations.⁸¹ The theory of property rights is one of them.

The second problem relates to the *unspecified set of alternatives*. Due to this difficulty, the property rights approach does not explain very much. It can make understandable why one institution is selected from a given set of feasible alternatives, but it does not say anything about the set of feasible alternatives. This renders it arbitrary. By inventing some alternatives, we may change the result of the analysis. This has not gone unnoticed. DAHLMAN, in his discussion of the open field system, is quite explicit about it.

The argument will emphatically not be that the open field system was 'the best of all possible worlds'. Since the set of 'all possible worlds' is impossible to define in any relevant manner we can only make use of a more limited notion of efficiency. The argument presented here will, therefore, only be that the open field system with its specific property rights mixture was efficient relative to the modern system of farming with

⁸⁰ HALLPIKE (1986:114). The book contains many other references of this kind.

⁸¹ I thank Eric JONES for stressing this and providing the reference.

one man, one owner, one decisionmaker; that is, relative to enclosed farms.⁸²

Analogues to the putting-out system, or the factory system, are not discussed, for instance, and it is certainly not possible to discuss all feasible alternatives. A property-rights explanation of an institution thus boils down to two assertions: That the institution can maintain itself, and that it is better than some other institutions that are also considered.

The third difficulty relates to the *relevance of property rights*. It is not clear why the specific nature of property rights should matter at all. It may be sufficient that property rights are well-specified.⁸³ Consider again the institution of the commons and compare it to a system of private property rights in tracts of the pasture. If communal use were better, with private ownership prevailing, the owners of the patches could join and decide to employ a shepherd and use the pasture together. Thus, there would be, no need to introduce communal property. Conversely, in the case of inefficiencies arising with communal property, land pieces could be rented out to individual farmers, and a kind of market socialism would emerge. Quite generally and abstractly, all regulations that can be made in the one system could be introduced in the other. Again, there is some vagueness here.

Rituals

Yet, despite these theoretical difficulties, the right to transfer property by consent has great advantages. It enables man to capture the benefits arising from comparative advantage and the division of labor. So let us return to HUME:

This rule can have no ill consequence, in occasioning war and dissensions; since the proprietor's consent, who alone is concern'd, is taken along in the alienation: And it may serve to many good purposes in adjusting property to persons. Different parts of the earth produce different commodities; and not only so, but different men both are by nature fitted for different employments, and attain greater perfection in any one, when they confine themselves to it alone. All this requires mutual exchange and commerce; for which reason the translation of property by consent is founded on a law of nature, as well as its stability without such consent.⁸⁴

In spite of all these benefits, the moral aspect causes trouble:

The property of an object, when taken for something real, without any reference to morality, or the sentiments of the mind, is a quality perfectly insensible, and even inconceivable; nor can we form any distinct notion, either of its stability or translation. This imperfection of our ideas is less sensibly felt with regard to its stability, as it engages less our attention, and is easily past over by the mind, without any scrupulous examination. But as translation of property from one person to another is a more remarkable event, the defect of our ideas becomes more sensible on that

⁸² DAHLMAN (1980:99).

⁸³ The following is a variation on COASE's (1960) ideas.

⁸⁴ HUME (1740:514)

occasion, and obliges us to turn ourselves on every side in search of some remedy.⁸⁵

This search for remedies give rise to various rituals, and lawyers and moralists help us to augment the inventory:

Now as nothing more enlivens any idea than a present impression, and a relation betwixt that impression and the idea; 'tis natural for us to seek some false light from this quarter. In order to aid the imagination in conceiving the transference of property, we take the sensible object, and actually transfer its possession to the person, on whom we wou'd bestow the property. The suppos'd resemblance of the actions, and the presence of this sensible delivery, deceive our mind, and make it fancy, that it conceives the mysterious transition of property. And that this explication of the matter is just, appears hence, that men have invented *symbolical* delivery, to satisfy the fancy, where the real one is impracticable. Thus the giving of the keys of the granary is understood to be the delivery of the corn contain'd in it: The giving of stone and earth represents the delivery of the manor. This is a kind of superstitious practice in civil laws, and in the laws of nature, resembling the *Roman catholic* superstitions in religion. As the *Roman catholics* represent the inconceivable mysteries of the *Christian* religion, and render them more present to the mind, by a taper, or habit, or grimace, which is suppos'd to resemble them; so lawyers and moralists have run into like inventions for the same reason, and have endeavour'd by those means to satisfy themselves concerning the transference of property by consent.⁸⁶

Thus, HUME returned in the end to his counterpoint. The rituals serve to establish on a "moral" level those transactions that no longer can easily be grasped by our moral sense, unless "help'd" in this way. The actions serve a purpose and are beneficial, and the rituals that underpin them, are, thus, defensible on purely utilitarian grounds. They serve a useful purpose. The often-encountered problem of explaining costly and time-consuming rituals as arising from rational behavior disappears. Rituals may well be an integral part of general economic equilibrium, reconfirming property rights.

Moral Forces

Thus, instrumentally useful transfers, splittings, and refinements of property rights need a ritual or legal underpinning to satisfy our moral sense and to generate the ownership effect in cases where it would not spontaneously occur. This may be costly, and we may loosely describe these costs as "moral costs".⁸⁷

These moral costs are "transaction costs", i.e., costs that are necessary to run and maintain a certain institution. We should include them when evaluating the efficiency of institutions. If we take these moral costs into account, we will reduce the vagueness of the property rights approach in several ways. To talk about moral costs may,

⁸⁵ HUME (1740:515)

⁸⁶ HUME (1740:515-6)

⁸⁷ KUBON-GILKE (forthcoming).

however, be misleading since the moral costs that one institution has, as compared with another one, are moral benefits for the reverse comparison. So it seems better to speak about moral forces that are shaped by property rights and rituals. So let us briefly consider how the problems that have been mentioned above are mitigated by considering these moral forces.

Regarding the *efficiency problem*, HUME has already made the point that rituals, that seem a waste of resources, may be important in establishing property rights. Thus, many apparent inefficiencies disappear. We may even understand massive and persistent inefficiencies. I shall give examples for this in the context of long-term contracting.

Regarding the *unspecified set of alternatives*, the introduction of psychological considerations restricts, in principle, the set of feasible alternatives. This would not help very much, if the set of alternatives were left unspecified. Yet our earlier ideas about rule formation stress the *principle of good continuity*. New rules and regulations built on the prevailing set of rules. Evolution takes place like learning. Thus, we need only consider the set of *local* alternatives to a given institution. These are the alternatives that can be generated by starting from the prevailing schema. This reduces the set of alternatives drastically, and correspondingly sharpens the thrust of the theoretical approach. The alternatives would involve gradual change, if new problems can be solved by adapting prevailing practice. They could also entail drastic change, if new developments require a switch to an adjacent schema of organization.⁸⁸

Regarding the *relevance of property rights*, it seems clear that those forms of organization that can do with as little ritual as possible, are preferable. In this sense, the commons are in fact communally owned, because this does not require the extra transfer of rights from the individuals to the commune and the corresponding rituals. Conversely, private plots are owned privately, because this does not require the transfer of rights from the commune to the individuals and the corresponding rituals. Further, social organization should exploit ownership effects in the most appropriate way, but this affects issues of responsibility to be discussed elsewhere.

HUME's counterpoint may in this way help to reduce ambiguities in institutional analysis. The following string of words generates that conclusion in a different way: "The allocation of property rights affects behavior; otherwise it would be irrelevant to consider them. The sources for this behavioral effect must be taken into account when we think about reshuffling property rights." The first sentence generates a hypothesis by a revealed preference argument, applied to property rights theory. The second sentence draws the conclusion.

Long-Term Contracts and Emergent Entitlements

A prominent political scientist asserts: "One can conceive of a society in which haircuts took on such central social significance that communal provision would be morally required."⁸⁹ This seems superficial and misleading. It is superficial in the

⁸⁸ See SCHLICHT (in preparation: Sect. 7.6). An hypothetical example of this type of change is discussed in SCHLICHT (1979).

⁸⁹ WALTZER (1983:88n.)

sense that one can conceive of anything if one disregards important features of reality; it is misleading because it suggests that ignorance is a sufficient reason for cultural relativism.⁹⁰ A more precise formulation would be: "We do not have a theory which would explain how social significance emerges."

Yet the topic is important. It seems that market systems generate systematic tensions in the sense that moral and instrumental considerations point in different directions. HUME'S counterpoint could help us to approach these problems in a serious way. HUME'S argument about rituals suggests that problems may emerge: Rituals exist because they help us morally to accept certain transfers of property rights. In consequence, problems would arise without these rituals. The reshuffling of property rights is not unproblematic.

We may, however, push this idea a little further. Consider the tension between prescription and the transfer of rights. It has been argued above that long uninterrupted possession creates property rights, and these may override previous ownership rights. Hence a transfer of property for long periods will create property rights that may be incompatible with the underlying legal ownership arrangements. This is precisely what has happened in the German tenancy market. The general perception of tenancy as something quite different from a simple exchange contract found articulation in an extensive tenant's protection legislation (rent control and protection against eviction). By a recent ruling of the German supreme court, the tenancy "rights" that emerged in this manner, are protected by the clause in the constitution that protects property in general. Custom overrides black-letter law.

Labor legislation abounds with examples of this kind. A worker in Germany has a right to his job in the sense that the employer cannot replace him without good reason, and the incumbent workers have a right to be considered first for filling vacancies.

It may appear that the politicizing of those markets is due to their "social" importance. This is true. The "social importance" does not derive, however, from the intrinsic importance of the transactions in question. It is just another way of stating that the market creates customary rights that contradict the formal property rights structure, and this tends to bend the law. It is not related to the importance of the commodities. Cars are in many ways as important as work and housing. The price of most cars exceeds six months' salary. Yet the car market is not controlled in a similar manner. Food is certainly as important as housing; yet the market for food is not controlled in favor of the customers.⁹¹

HUME'S counterpoint makes it possible to understand some of the moral tensions that seem systematically to emerge in market systems. These may give rise to severe inefficiencies. The tenancy market may simply be ruined by such legislation.

⁹⁰ WALTZER'S additional remark, "that it is something more than an interesting fact that no such society has ever existed" cannot be empirically founded since we do not know all societies that have existed. It must, be a statement derived from a theory covering all societies, i.e., a universalistic theory, but WALTZER rejects that. Maybe his aphorism it is chic way of avoiding serious thought, and one should not take it too seriously.

⁹¹ It is true that the market for food is strongly politicized and regulated in the European Community, but this regulation works deliberately to exploit rather than protect consumers and favor the farmers – a minuscule part of the population.

Tenanted property is actually increasingly transformed into owner-occupied property in Germany. Similarly, the establishment of property rights in jobs may create various problems for the economy as a whole (while possibly being beneficial at the firm level).⁹² Yet such a development would become unavoidable if repetitive tasks become automated and the remaining tasks involve much firm-specific knowledge. The market response would be to create contracts that tie workers to firms, for efficiency reasons. The moral tension generated by emerging entitlements would follow suit. These examples illustrate that HUME's counterpoint allows us to understand *massive* inefficiencies, like the suppression of entire markets, and it may help to understand emerging *massive* market failures.

A political response could be to invest more in rituals, or actively to create a property rights structure that creates less difficulties while maintaining efficiency. A wrong response would be, however, the moralistic one of condemning the foolishness of people, and the destructive trends of modernism. The same tendencies of human nature, that create moral problems in long-term contracting, provide the moral and behavioral foundations for the institution of property. We cannot have one without the other; or, in HUME's words: "'Tis impossible to separate the good from the ill."⁹³

⁹² This is, however, a somewhat complex issue; see SCHLICHT (forthcoming)

⁹³ HUME (1740:497)

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