



The MEANING *of* PROPERTY

*Freedom, Community, and the
Legal Imagination*

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Author of For Common Things and A Tolerable Anarchy

THE MEANING OF PROPERTY

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INTRODUCTION: BLACKSTONE'S SOCIABILITY

The phrases are almost Shakespearean in their familiarity. Like Hamlet's dithering and Mark Antony's evasive call for insurrection, they belong to the canon of the imagination: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."¹ That, of course, is William Blackstone, the muse of the common law, setting out on his treatment of "property, in general." Blackstone's is the canonical image of classical liberal property: the power, good against all the world, to exclude others from a resource, to determine the uses to which it shall be put, and to transfer it, by sale or otherwise. In fact, it was Blackstone's image of "the right of property,"² as much as the institution itself, that seized the imagination, for ownership in practice has always been hedged around with duties to neighbors, obedience to government, and limits from custom. Blackstone brought his own picture into question as soon as he set it out, noting, "Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title."³

Why should a piece of land belong to you rather than me? Why should my father's owning a precious jewel, oceanside estate, or copyright in his father's novel mean he has the power to transmit it to me at his death, extending "despotic dominion" from beyond the grave?⁴ What was the source of the claim that, as if by magic, distinguished ownership from theft, occupation from trespass, good use from pillage? Blackstone's countrymen were already using these distinctions to claim—or usurp—"new" continents from their aboriginal inhabitants. Soon Pierre Proudhon would examine the same distinctions and reject them, concluding that *property* was just another word for theft.

With such questions in mind, Blackstone proposed to “examine more deeply the rudiments and grounds” of ownership.⁵ He then delivered a little-read tour de force. Blackstone “anticipated,” as we in the present condescendingly say, the major lines of argument that preoccupy property scholars to this day.

Economics-influenced students of property follow Ronald Coase in approaching the institution as a means of reducing “transaction costs” by enabling people to identify the owners of those things they most desire, or find most offensive, and propose an exchange to acquire them or put them out of business. So Blackstone wrote, with property rights clearly marked out, it “was found, that what became inconvenient or useless to one man was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor.”⁶ Blackstone also saw how property can encourage owners to announce their claims unambiguously, providing information to others and further reducing transaction costs: he characterized original acquisition of property not as the exercise of a natural right but as a man’s “declaration that he intends to appropriate the thing to his own use,” information on which others could rely.⁷ He used this information rationale to sidestep hoary disputes between followers of Hugo Grotius and those of John Locke, who advanced competing natural-law grounds for the power to acquire property by occupation.⁸

Economists also understand ownership as motivating improvement by ensuring that owners can keep the benefits of their effort and innovation. So Blackstone observed that without ownership, “no man would be at the trouble to provide” so much as basic clothing and shelter, “if, so soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other.”⁹ Indeed, without “a separate property in lands . . . the world must have continued a forest, and men have been mere animals of prey.”¹⁰ (While this argument would later end up almost verbatim in the Supreme Court’s approval of the expropriation of Native American lands by Europeans, Blackstone denounced “invaders” for “seizing on countries already peopled, and driving out or massacring the innocent and defenseless natives.”)¹¹

Nor did Blackstone neglect other “grounds and rudiments” of property rights.¹² His evocation of “sole and despotic dominion” captures the kernel of libertarians’ view of ownership as a bulwark against interference by others and by the state.¹³ Blackstone also described ownership as “ennobling . . . the human species” by creating new opportunities both to master and to contemplate the world,¹⁴ an argument with traces of both the “personhood” claims associated with Margaret Jane Radin and the “civilizing” thesis that Carol M. Rose has argued links early-modern property thought to today’s discourse on the political economy of development and democracy.¹⁵

History sometimes tosses up this kind of synoptic anticipation, particularly

when a good mind has the great fortune to come early in a tradition-to-be, surveying the field and noting in passing the major alternatives. (Witness the often-heard remark that all of Western philosophy is a footnote to Plato, or to Plato and Aristotle.) My concern here, however, is not with how unoriginal the past manages to make the present look. It is, rather, with what Blackstone did with his own past. His “grounds and rudiments” do display strong utilitarian themes and chords of libertarian and personhood rationales for ownership, but systematic normative theory is not his game. He tells a story about how and why property came to be. Even as sympathetic a reader as Rose is somewhat nonplussed by this approach, referring to Blackstone’s “pseudo-history,”¹⁶ “concocted history,”¹⁷ and “just-so story”¹⁸ as she surveys his arguments.

But Blackstone does not seem to have intended his history as a whimsical vessel for more serious normative arguments. He gave an account of humanity’s passage from hunting and gathering through herding and agriculture to the complex commercial life of his own time. That story was peppered with classical and biblical instances, which Blackstone treated as documentary evidence, and, just as important, with examples of old ways of life that were still practiced among American aboriginal peoples, who, on the geographic margins of the world, he believed lingered somewhere near the beginning of historical progress. It was, moreover, a story with a clear causal sequence. Societies adopted property rights as their needs required, needs defined by scarcity and the functional characteristics of the resources that people exploited to overcome that scarcity. Property in land arose when population growth rendered gathering and herding infeasible and only agriculture could ensure the needed food supply—requiring, in turn, that farmers enjoy the security of “dominion.”

The radicalism of Blackstone’s account, and the way in which it seems to have been not at all casual, was this: property came first among institutions, and all else followed. Blackstone wrote: “Necessity begat property; and, in order to ensure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, governments, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labor, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.”¹⁹ This is not simply the argument that property creates an economic surplus which sustains civilization. It is far stronger than the argument that property reinforces social stability, making laws and customs more secure. It is a picture of the whole web of social institutions, including sovereignty, law, and organized religion, as the children of property.

Understanding how Blackstone came to this narrative helps us see how he con-

ceived of what Rose regards as an essential gap in his story: how self-interested people manage to create institutions such as property that require reciprocal restraint on self-interest—particularly in the absence of explicit law or strong government. As Rose puts it, there is “a kind of mystery of ‘niceness’ and trust at the center of economic transactions.”²⁰ A story in which property comes first really puts something else first: sociability, a human propensity to form attachments and cooperative relationships outside and preceding formal legal structures. Whether such sociability existed, and if so how strong and reliable it was, were questions that obsessed jurists and philosophers of the eighteenth and nineteenth centuries. Property came to figure centrally in one answer to these questions: natural human sociability was strong enough to account for the origins of society and to explain the nature and purpose of social life. Human coexistence, in this account, came to be seen as an originally and essentially economic phenomenon, a cooperative venture of mutual benefit to all its members, producing civilization, prosperity, and liberty out of the pre-political transactions of, not exactly *homo economicus*, but social man. As we shall see, this theory filled a yawning gap in the self-understanding of European societies torn by religious wars and shaken by encounters with the human diversity of new continents. It also formed the worldview, what I call the legal imagination, in which our ideas about property’s purposes and limits took shape.

In this book I locate today’s theories of property within these origins. In that light, I argue for a way of understanding the relations among the purposes property is now thought to serve. Legal thinking about the purposes of property is fractured, but it is not formless, and appreciating the relations among its values can help us to deepen our understanding of the institution. I approach those values as aspects of a single master value, which was at the heart of the theory just sketched and which that theory served in good part to articulate and vindicate as both the normative and the practical keystone of social life: human freedom. Freedom is itself a plural value, of course, and locating its plurality within property thought is a major part of my aim.

By illuminating the relations among values already recognized but not, perhaps, completely understood, we can move toward integrating those values more fully with one another. The integration I argue for has its model in the vision of social life that Blackstone saw property as both setting in motion and sustaining. For modern property theorists, as for Blackstone, this form of social life centers on markets and liberal society, the sort premised on the individuality of its members and the chosen character of their projects and commitments. Indeed, *property* in this book means, unless otherwise stated, liberal property, the kind that is intimately tied to markets and liberal society. Arguments about the excellences

and demerits of property are often also about the value and limits of markets and liberal society because our conception and practice of property are deeply linked to these, and those debates are part of larger debates. Understanding a legal institution within that context of social practices is part of the reason for referring not just to law but to legal imagination, the image of common life in which the law is set.

I follow the early-modern originators of the liberal theory of property—and, for that matter, today's economic theorists—in treating its scope broadly, as one that defines and allocates rights in scarce and valued resources. This approach implies, for instance, treating human labor power—now firmly ensconced in the law of labor and employment—as part of the concern of property law, a classification that would have seemed obvious to theorists and jurists of the eighteenth and even the nineteenth century. This scope expresses the ambition to treat property as a centerpiece of political economy at large, part of a picture of economic life that is attentive to both the functional virtues of property and the qualitative values it carries.

Defining and allocating property rights is a way of making a choice among possible markets. Some—though hardly all—of the conventional analyses of property rights examine how they work once they are fully defined and allocated, or, alternatively, how their definitions may be adjusted at the margins, either formally by judicial interpretation or informally by social norms. I approach the question of institutional design instead as an aspect of political choice, addressing larger-grained and more open-ended questions about who shall have what, and on what terms. As we shall see, that choice is the one the freedom-promoting tradition in property arose to guide, exemplarily in the work of Adam Smith. By understanding liberal property as an answer to that question, we can focus on how to address contemporary choices about defining and allocating property rights by way of the same tradition of values.

Property, in ways the most familiar of our major legal institutions, took its modern form as the centerpiece of a new way of understanding society: as a semi-voluntary, semi-spontaneous order of mutual benefit that people brought about to overcome brute material necessity and make themselves and others freer. Appreciating the novelty and radicalism of that vision can contribute to historical interpretation but also to today's legal and political judgment. An institution that we now often regard as intrinsically conservative is no inert inheritance but the achievement of a frequently radical tradition of imagination and reform that has perennially sought new ways to integrate with social order the multiple dimensions of human freedom. Properly inheriting that tradition means carrying it forward in the same spirit.

Part One



ORIGINS

PROPERTY AND THE LEGAL IMAGINATION

At its origin in the thought of eighteenth-century jurists and reformers, classical liberal property was imagined as having two unique and extraordinary virtues. Both were triumphs of integration, in which property appeared able to channel the sweeping and disruptive ideas and values that were then ushering in a new world, guiding them from conflict to mutual reinforcement. First, property bridged two epochal innovations: the recognition that cooperation among reasonably self-interested individuals could spontaneously produce complex and mutually beneficial social practices and institutions, and the discovery that collective action through the power of the state could remake the social world. Both innovations are foundational in modern life, and they are in obvious tension. Spontaneous social order can make the state seem merely intrusive, incidental, or nugatory. State action can inhibit, even obliterate, spontaneous order. Property promised to be what one nineteenth-century enthusiast called the perfect reconciliation of individual freedom and social order, a legal institution, defined and enforced by the state, in which spontaneous order could freely proceed and perpetually reinvent itself.

Second, property promised to integrate the most important qualities of personal freedom, the signal value of the modern world. For a person to be free means at least these things: first, the person is free from direct interference in decision making, whether from the state or from other individuals, by virtue of some guaranteed immunity from their intrusions. Second, in making decisions, the person enjoys a reasonably rich set of acceptable alternatives and is not forced simply to choose between one bad situation and another horrible one. Third, the individual has the psychological capacity to define and pursue the interests, projects, and commitments that guide those choices, without crippling

self-doubt, self-loathing, or other impediments to clear and consistent judgment. While each aspect of freedom falls along a spectrum, obtaining more or less in any case, all are necessary: someone who lacked one could not make use of the other two. As these values became universal demands and the standard of modern legitimacy, property emerged as the keystone institution of a social order whose advocates believed it could integrate them—that is, make them not just compatible but mutually reinforcing in the institution's ordinary operation.

These ideas were at the center of vast developments afoot in the social imagination of the time. As Charles Taylor has argued, the eighteenth century ushered in the rise of “an appreciation of the way in which human life is designed so as to produce mutual benefit,” a vision in which “humans are engaged in an exchange of services” and “one could begin to see political society itself through a quasi-economic metaphor.”¹ This idea gradually replaced long-standing visions of society as the expression of a hierarchical natural law, in which social orders reflected a structure of complementary superiority and subordination.² In early modern thought the economic view of society stood as the main rival of a different alternative to the traditional view, a theory of naked hierarchy and command that stressed not so much the goodness of traditional political order as the grim consequences of life without it.³

Two innovations particularly marked the economic view. The first was the idea that social life arose from the constructive efforts of individuals and groups. The *normative and practical order of society* did not simply precede and frame individual activity; it also arose from that activity. In an ideal-typical sense there were two ways of conceiving of this development. One, which Hugo Grotius substantially initiated and John Locke perfected, portrayed individuals as bearing natural rights akin to legal rights, which they combined in contractual fashion to produce political society.⁴ The other, which Samuel Pufendorf set in motion and Adam Smith completed, made less use of the tinker-toy apparatus of natural rights and instead portrayed humans as naturally social and self-interested beings whose activity produced society incrementally, without the unique origin of a social contract.⁵ Despite their conceptual differences, these versions of social order tended to run together and complement each other. They share a deep methodological individualism and are both based in the conviction that such a picture of the individual can underlie an account of society.⁶ By this logic, each contributed to the economic image of society as an interest-driven system of mutual benefit.

The second innovation was often in some tension with the first, and remains so today. This is the idea that the institutions in which mutual benefit occurs arise not just from the aggregation of bottom-up activity but also from collective

action guided by political and institutional vision. The history of social life is therefore not simply a narrative of explanation, along the lines of natural history, it is also a story of collective choice, and the central place of choice in past developments implies a choice of futures now. Taylor argues that this dual quality means that the “modern grasp of society is ineradicably bi-focal,” seeing on the one hand individuals as acting within contexts of mutual benefit and on the other politics as choosing and creating these contexts.⁷ This duality, in turn, reflects the fact that “freedom as a central good is over-determined in the modern moral order: it is . . . one of the central properties of the humans who consent to and thus constitute society; and it is inscribed in their condition as the artificers who build their own social world, as against being born into one which already has its own ‘normal’ form.”⁸ Integrating the two sides of this duality, defining a mutually supportive relation between state power and private ordering, was the first extraordinary promise of classical liberal property.

These images of how social life arose and maintained itself were intimately connected with new ideas of what mattered most to human beings: their autonomous projects and judgments, their legitimate self-interest, their capacity for self-responsibility, and their power to contribute to the commonweal even as they pursued their own ends, which were arguably selfish and indisputably self-regarding. These features combined in the novel image of the free person, whose liberty, interests, and duties were not incidents of social status but the very premises of existence—not society’s fruits but its elemental ingredients and building blocks. It was for such a person that freedom’s three dimensions—choice without interference, a rich set of alternatives, and the subjective capacity to identify and pursue interests and projects—became the signal values of modern life. It was through the economic image of society that they came to be understood first as possible, then as inevitable sources of order and criteria of legitimacy in social life. In this new vision, property was the keystone institution.

These ideas form one of the major concepts of this book, a *social imaginary*. A social imaginary, as Taylor describes it, is “that largely unstructured and inarticulate understanding of our whole situation, within which particular features of our world show up for us in the sense they have.”⁹ This understanding is “both factual and ‘normative’; that is, we have a sense of how things usually go, but this is interwoven with an idea of how they ought to go.”¹⁰ It is, in other words, an often implicit and widespread idea of how the world works and of what features of it are most important—and important in what ways—which “makes possible common practices, and a widely shared sense of legitimacy.”¹¹ Because the motivation of this book is to offer an understanding of how the legal institution of property and its moral and political associations arose within a broader view of