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ON THE BLINDING CLARITY OF PROPERTY RIGHTS: SEVEN FRAGMENTS OF REDUCTIONISM IN THE THEORY OF PROPERTY

ABSTRACT
This paper presents a historical commentary on arguments in theory of property that reinforce the vision of strong and clear property rights dominant in developmental policy today. Building upon the article from Duncan Kennedy in 2013 that analyses this vision, this paper tackles additional issues in emergence of the vision. In doing that the paper relies on broadly genealogical approach to focus on a binary opposition that has been present in the theory of property almost since its historical establishment in Western thought. This methodology allows us to conceptualize the problem in more substantive terms than Kennedy does and show how radical shift is necessary to overcome the problems that the vision entails.

KEYWORDS
property, economic development, exclusion, rights

I

Let's try to imagine two worlds.[1]

In one of those worlds we find the individual confused as to what resource she is entitled to use. It is equally unclear to her in what way she is entitled to use it. There are many legal limitations and her ownership is weak and unstable. Furthermore, others also seem to be entitled to the same resource in this weak manner. For this reason, it is hard for the individual to determine where the other's entitlement stops and hers begins. As a consequence, the individual living in this world is confused with regards to her duties and obligations in relation to the resource. As she is not the sole owner and her entitlement is limited, she certainly is not the only one obliged to care about the resource, or at least to care about the whole of the resource. Finally, if the individual has a need for a different resource than the one she is entitled to, she will be powerless to do anything about it. It will be very hard for her to change the one for the other, as her entitlement is a weak one and others entitled to the same resource would have to agree to the transfer. As the saying goes, what belongs to everybody, belongs to nobody.

1 This paper is a byproduct of the research on relation between commons and law-and-economics conducted under supervision and in cooperation with prof. Ugo Mattei.

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Turning to the other world we are confronted with a completely different reality. In it, the individual is the sole owner of the resource and her entitlement is strong. It is easy for her to determine what resources she is entitled to and in what way she is entitled to use them. In truth, to the extent that she is not limiting other's use of their resources by using the resource she owns – she is not doing anything wrong. Clearly, with such a strong entitlement, duties come hand in hand. The individual is obliged to take care of the resource, not to spoil it in any way. In rare cases she might be obliged to give it up to the sovereign if its' use is necessary for a common benefit. Besides the obligation, the individual has a reason to care for the resource in every possible way, as she would be the one to suffer a loss of utility from its' destruction. Finally, if the individual has no direct need to consume the resource she is entitled to, she will always have two ways to deal with this situation. As the sole and full owner of the resource she will be in the position to sell it to an interested party. Or, which is even better, she will be in the position to extract in a sustainable way the use values of the resource and sell them.

Looking at these two contrasting pictures a rhetorical question comes to mind: "Who would not want to live in the better world?"

Clearly, the persuasive power of this argument lies in its obviousness and its appeal to the common sense. As consequence, the imagination of these two contrasting worlds has defined our way of thinking in many diverse fields. How should we deal with externalities that result from the interaction of economic actors? How should deal with state owned companies? How should we compare different historical property regimes? How should we interpret the malfunctions of non-market arrangements or hybrid markets? Finally, if markets exist but do not lead to desirable outcomes what could be the cause for that? In all of these cases the reality appears to be at odds with the ideal world of strong and clear property rights. The contrast between the two worlds has an analytical purpose, but that is not all. The analysis is followed by the prescription. If reality is disagreeable it has to be changed and the vision of clear and strong property rights is there to lead us in the right direction.

For almost half of a century this vision has been implicit in the dominant view on economic development (Kennedy 2011), it has been the foundation of *International Property Rights Index* (internet), it has played a central role in the renowned *Doing Business Reports* (internet) and it has been the topic of multiple studies (Kennedy 2011).

Duncan Kennedy (2011) was the first to explicitly treat this vision of clear and strong property rights in a critical manner. He argued that it serves as both an analytical and historical claim. (Kennedy 2011: 3) In his view, the vision of clarity and strength of property rights is a false one as we can observe that very different property arrangements have led to economic growth (Kennedy 2011: 5). Additionally what seemed to be clear and strong ones at least from standpoint of some social actors also lead to stagnation and crisis. Finally, Kennedy showed that this vision moves the attention away from crucial issues of choices among different social interests involved in different modes of property entitlements, distributions of resources and related developmental paths (Kennedy 2011: 7).

Kennedy argued that the vision is founded upon a number of lay conceptions about property (Kennedy 2011: 7). These represent property in its ideal form as

something that can be distinguished as a system of private ordering from public regulation, has irrelevant distributive effects, is not concerned with issues of social justice. Finally, if the goal underlining the vision is to set an economy on the right path by facilitating growth, it can easily lead in turn to exclusion of alternative developmental paths (Kennedy 2011: 10). The fact that each of these claims has been clearly contradicted in legal scholarship leads us to the obvious question of how has it come to develop and establish itself in such a dominant fashion.

Kennedy made some comments on the history of the vision of clear and strong property rights (Kennedy 2011). I will argue that this vision has deeper and stronger roots than might be expected if one takes into account that only in the last half of the century it has become explicitly present and pervasive in issues of economic policy. I will try to show that a more thorough and conceptually powerful historical account can and should be made. The vision of clear and strong property rights has been developing throughout the history of Western thought in a quite particular manner.

An account of this development clarifies how a preference for strong property rights could become so commonsensical. Following up on the description at the outset of this paper, I want to argue that in its essence this contrast of two worlds operates as a binary opposition. A classic form of a binary opposition is the presence-absence dichotomy (see e.g. Derrida 1976). As it is well known, in much of Western thought, distinguishing between presence and absence, viewed as polar opposites, has played a fundamental role (Macsey and Donato 1970: 254). In addition, according to post-structuralist criticisms, presence occupies a position of dominance in Western thought over its' opposite, absence, that is conceived as pure lack of that what can be present. As binary oppositions are such a fundamental trait of Western thought, it stands to reason that they also characterize the domain of property. What makes the case of interpreting this vision as based on binary oppositions compelling is the explicit reference to clarity and strength, features largely developed during the Enlightenment. The issue is closely linked to all those that are in focus nowadays in the treatment of the contrasts to clarity and strength, i.e. non-conformity, ambivalence and weakness related to gender, race etc. Thus, the ability to acknowledge the binary opposition in the foundation of the vision of clear and strong property rights should allow us to approach property with fresh eyes.

As it will be shown in the following sections, it allows us to see that because of the logic of the binary opposition, strong and clear property rights are understood as the presence, or put simply the only coherent way for property to exist. Everything that does not fit the vision is left out and interpreted as absence, that is, as if it is not a system of property rights at all (Royle 2000). Secondly, as in case of any binary opposition, we have the opportunity to trace its genesis in history. The history in question is at the same time the history of thought and of our legal systems. Engaging with this history should allow us to substitute the commonsensical appearance with a historical specific reality (Royle 2000). Finally, the fact that we are dealing with a binary opposition implies operation of reduction and erasure (of really existing diversity) that is foundational for the vision. Our ability to grasp this erasure should allow us to see what property in reality is, what has been ignored in thinking about it and excluded in law making (Royle 2000).

For the present purposes I want to comment on a number of fragments from the history of thought that has led to the emergence of the vision of strong and clear property rights. The goal of the exercise will be to show how these discourses spanning across centuries all fall under the operation of reduction and erasure of property understood in any way other than strong and clear exclusive rights of the individual agent. Even though sphere of property law in all times included many other arrangements, reflections about property have in an equally pervasive manner ignored this multiplicity. As it has become quite usual today in the discourse on clear and strong property rights, any absence or limitation to this arrangement is taken to be the directed against property *itself* and is unconditionally condemned.

Before we begin two caveats are in order. First of all, this commentary is not intended to be exhaustive with regards to any of the bodies of thought that it approaches. Due to the overarching goal, these will really be treated as fragments. The expectation that will hopefully be justified is that even as only fragments they will be enough to reconstruct the foundational character of the opposition. Secondly, as the other mentioned dimensions of this subject are inseparable I will touch upon the legal history and the legal reality that has been excluded in thought and marginalized in practice but this will be only occasional.

II

1

It is unclear where one should start with the history of this binary opposition. As we have seen, it has been engraved in the proverbs spanning across cultures and traditions. According to most historians, if we exclude different examples of Aristotelian tradition, the first explicit milestone can be found in the reflections of William Blackstone who equates property and possession.

The importance of William Blackstone in history of law is incontestable. In his highly influential *Commentaries on the Laws of England* (1765–1769) he has given us the best-known natural-law definition of private property as the "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." Narrative in the foundation of Blackstone's account of property has at least two peculiar traits. Mattei and Capra (2015) show that this narrative is a cartesian one in the broad sense[2] and that it relies on the fundamental distinction between physical (res extensa) and mental (res cogitans). Thus, as Hohfeld (1913) famously noted, Blackstone's discussion of property relies heavily on the distinction between corporeal and incorporeal.

> ...An hereditament... includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixed... Hereditaments, then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses, such as may be seen and handled by

2 This should not be confused with actual work of Decartes but only interpred as part of tradition that in many ways simplified his work. Thanks to Mark Losoncz for this insight.

> the body; incorporeal are not the objects of sensation, can neither be seen nor handled; are creatures of the mind, and exist only in contemplation. (Blackstone 1830)

Further on, Blackstone struggles to apply Cartesian narrative to property and define the specificity of incorporeal: "An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within, the same" (Blackstone 1830).

As Hohfeld (1913) notices, there is inextricable confusion between the physical or "corporeal" objects and the corresponding legal interests, all of which latter must necessarily be "incorporeal." The second related trait of the narrative that we find in Blackstone is the identification of property with physical possession. Hohfeld (1913) admits that "Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional." Even with all the difficulty that comes with the ambiguity, the fixation on the relation to the physical in conceiving property in this narrative not only survives historically but also becomes dominant. The famous Locke's reflection that we shall turn to shortly, identifies its fundamental trait in the act of appropriation through physical contact. This can be termed as the physical metaphor in property. It is important to notice that this dominance is not present only in theory but also in legal practice. As Hohfeld (1913) notices, in Wilson v. Ward Lumber Co it is stated that "The term 'property', as commonly used denotes any external object over which the right of property is exercised" and at the same time that "property ... in a determinate object, is composed of certain constituent elements, to wit: The unrestricted right of use, enjoyment, and disposal, of that object."

In this manner, the philosophical Cartesian narrative in a particular historical moment in the western culture comes to shape how we think of property and consequentially how this field of law develops. Property in this manner becomes defined by the existence of a single cogito that through its spatial existence appropriates other physical entities. Property is understood on the basis of possession and the impossibility of two things occupying the same space at the same time determinant for possession becomes determinant for property, and exclusion is taken to be essential. A multiplicity that has property in the same thing is by consequence a contradiction. It can only be understood as lack of property. At the same time, the ambivalence between property as the physical thing or a non-physical claim stays unresolved. Blackstone's original Cartesianism and physical metaphor had become the conceptual determinant of law.

2

Here we skip on a more exhaustive commentary on property in the natural law theories of Pufendorf, Grotius and others. We will focus directly on Locke, but this is not to say that mentioned theories are less important. Locke presented his famous natural law account of property in the section *Of Property* in *the Treatise*. There Locke ([1690] 1991: 286) commenced his argument by claiming that "God... has given the Earth to the Children of Men, given it to mankind in common."

The use of the phrase "in common" certainly catches attention in the context of our inquiry. Some interpreters understand Locke's argument as referring to common ownership while others take it to mean simply the absence of ownership, or open access property. "That which is common is not ownership" (Valcke 1989: 957). Before dealing with that issue let us first take look how Locke's argument developed.

In the next step, Locke explicitly relied upon the concept of natural rights. In his theory, these generally range from the broad and abstract, to the narrow and materialistic. Among the former are the rights to one's own life and liberty. The latter relate to rights to produce not only useful consumer goods but also to any concomitant producer-good. The main example of a producer-good was improved land, as explained in section 27 of Locke's *Second Treatise* ([1690] 1991: 287):

> Though the earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then, he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, hath by this labour something annexed to it, that excludes the common right of other men.

Finally, in the section 27 of the *Treatise*, Locke amplifies and qualifies his theory of appropriation, or creation of property, as follows, "For this labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, *at least where there is enough, and as good left in common for others"* This clause is recognized in the literature as Lockean "proviso" and it somewhat obscured his general argument, and much has subsequently been written in attempts to fully understand it. As it is well known, this statement lead to a lot of controversy among interpreters as some put more accent on Locke's account of appropriation and took him to be a proto libertarian thinker while others relied on proviso and understood him to be a kind of socialist.[3]

What is important in the context of our inquiry both when we think of the opening claim of things being held in common and the proviso is that Locke reserves the concept of property for the result of the act of appropriation. This is the main focus of his explanation. Proviso and the initial commonality of things provide the context within which property emerges. They are not an object of explanation. It is within the context defined by them that Locke explains how property emerges. Thus the property in question is the exclusive property of an agent against all others, that is precisely in the foundation of the vision of clear and strong property rights. It is only the existence of this this type of property rights, taken to be property rights as such that has to be explained and justified, while the context that was there before them is not considered as an institutional creation with its own rules and ways of operating.

Additionally, Locke's case relates to the well-known concept in liberal theory of government: the maximum liberty of the individual. In this approach, one of main duties of government is to protect property rights. Property rights are central as they are the medium through which the individual practices her liberty. The

3 See for example the work of James Tully and Robert Nozick.

dominant negative-liberty-based (Berlin 1969) liberalism implies that to allow for the maximum practice of liberty is to allow the individual to act in any way it desires on the condition that this does not make any limitation of freedom of others. According to the definition, negative liberty is the absence of obstacles, barriers or constraints. In this sense, property is equated to the legal institute that delineates the object and allows the individual to act in this unconstrained manner. This is related to the strength that the property rights should have. Similarly, to the case of Blackstone, the property that is limited appears to be no property at all.

3

A more exhaustive comment would certainly include an account of utilitarian revolt against natural law arguments on property. Due to the limited space and the need to focus only on the essential milestones, we will not go in that direction. Instead we will now turn to the economic theories that dealt with property.

Beginning with economists we should note that most of them do not even consider property explicitly – this is particularly problematic as the economic relations they analyse can only exist inasmuch they are legally articulated. And as many of them are concerned with exchange they are especially dependent on how property is articulated. This may as well be the most destructive outcome of the reductionism in the basis of the vision of clear and strong property rights. Here we will consider only those economists that did recognize the decisive role of property for the economic relations

First among them is certainly Adam Smith. Smith, one of the fathers of economics considered himself as a moral philosopher writing from a Lockean point of view. In his "Lecture on Justice," Smith (1896) made one important distinction that departed from Locke's reasoning: he confined natural rights to the rights to liberty and life, whereas the right to property was an acquired right depending on the current disposition of society. "The rights which a man has to the preservation of his body and reputation from injury are called natural..." (Smith 1896: 401). Smith's separation of natural rights from the rights to property are further expressed in the following quotation from his Glasgow lectures:

> The origin of natural rights is quite evident. That a person has a right to have his body free from injury, and his liberty free from infringement unless there be a proper cause, nobody doubts. But acquired rights such as property require more explanation. Property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government. (Smith 1896: 401)

Smith spent quite a lot of energy in arguing why the inequality that follows property is justified and this is something of interest for our inquiry.

Before going into that we should consider that Smith's argument that almost explicitly argues for clear and strong property rights. Importantly, even though he assigned right to property the status of acquired right, he famously condemned all legislation that interfered with free individual trading. Such freedom to trade affected the incentive to create and maintain property. Because of the existence of continuous markets, prices were being kept reasonably stable and thus incentives

to further property accumulation, were emerging. Accumulation of property as capital, in turn, was encouraging further divisions of labour that is, specializations and these were resulting in sustained technological progress. This argument directly treated property as the foundation of trade and Smith showed consciousness of the legal foundation of the economic reality that is rare among economists that followed. At the same time, we can see that this recognition of the role of property implied also a reduction in its understanding. Property that is foundational for exchange is the property of the sole owner with power to transfer the good. It was this type of property that Smith as a Lockean considered. Any other type of property that could have been relevant for economic reflection is absent from his account. This relates to the issue between property and inequality. It is precisely the property of sole owner with power to sell that implies unequal relations. On the other hand, any type of property that at the same time implies many owners with different rights to the resource creates at least a limited sphere where the distinction is not between more or less but between different ways of relating to the resource.

4

A caesura in the historical development of the vision of strong and clear property rights occurred when Smith begun to explicitly refer to its beneficial economic role. As the vision played an essential role in conceiving the economic mechanism that leads to desirable outcomes, the rising importance of this economic mechanism was paralleled by the rising importance of the vision itself. One of the most illustrative cases of this is the thought of Ludwig Von Mises. Within the socialist calculus debate Mises defended the superiority of market mechanism on the basis of its relation to property. Peter Boettke provides a very clear account on the essential role that property plays in the Austrian economists' position in the debate:

> Mises does present four arguments which include: (1) private property and incentives, (2) monetary prices and the economizing role they play, (3) profit and loss accounting, and (4) political environment. In a fundamental sense, all of these arguments are derivative of an argument for private property. Without private property, there can be no advanced economic process... Mises had to explain how private property engenders incentives which motivate individuals to husband resources efficiently... [and] that the real problem was one of calculation within the dynamic world of change, in which the lure of pure profit and the penalty of loss would serve a vital error detection and correction role in the economic process... [and] finally... that the suppression of private property leads to political control over individual decisions and thus the eventual suppression of political liberties to the concerns of the collective... On the other hand, the private property market economy is able to solve each of [these]... economic issues, and constitutional democracy does seek to guarantee individual rights, and protect against the tyranny of majority.

It is important to notice that in explaining their understanding of what property is Austrian economists referred to spontaneity and nature. As Hodgson shows, Von Mises (1981: 27) considered property as "purely a physical relationship of man to the goods, independent of social relations between men or of a legal order" and his defence of property, exchange and markets does not promote a clearly-defined socio-economic system. This in turn led to somewhat simplified concept of

exchange economy as according to Hodgson (2010: 42) exchange is defined simply as an action.

Here we can observe how in a context that is no longer encumbered by issues of natural law, Von Mises still gives a naturalist account of property. Again, similarly to natural law theories, this implies that one type of property arrangement, that concerning one actor, tight of exclusion and power of transfer is isolated as the only property arrangement possible.

The other great economist participating in the calculus debate was Friedrich Hayek. Hayek was not explicitly naturalist when it came to property. Among many arguments related to property that he makes, maybe the most useful for our purposes is Hayek's identification private property as the fundament of modern civilization:

> Modern civilization, which enables us to maintain four billion people in this world, was made possible by the institution of private property. It's only thanks to this institution that we achieved an extensive order far exceeding anybody's knowledge, and if we destroy that moral basis, which consists in the recognition of private property, I think it will destroy the sources which nourish present day mankind and create a catastrophe of starvation beyond anything mankind has yet experienced (Hayek, internet).

The point of Hayek's discourse revolves around the point that private property is the only institution that allows sustained coordination and progress. Additionally, as he made clear in the calculus debate, the exclusive type of property right belonging to the individual is based upon the right measure of responsibility and knowledge. It makes the owner responsible for his activity, incentivized to utilize the property to his benefit with knowledge that he posses. This account marginalizes all the other property arrangements as leading to lack of clarity about responsibilities and lack of incentives to act with economic interest.[4]

5

If we can recapitulate previous accounts of property in economics as being essentially interested in how the exclusive property belonging to the individual, regarded as baseline property arrangement, couples with market exchange that it allows for, the following economic arguments go a step further. These link clear and strong property rights to a functional economic system and take a look at cases within this system where the same logic can be extended to deal with remaining problems and disfunctionalities. There are two dominant strands in which this has been done: one related to the tragedy of commons and the other to property and externality in law-and-economics.

Hayek's argument is strongly reminiscent of the tragedy of commons. The latter is certainly one of the most prominent articulations of the vision of clear and strong property rights. Two of the most famous tragedy-of-commons arguments

4 It is important to notice here the argument made by professor Hodgson on the fact that the socialist opponents of Austrian economists in the debate were not any better in conceptualizing property. Their positions stemmed from the early ones arguing for abolition of property to the later ones leaning on neoclassical economics and neglecting the issue of property completely.

were made by Garret Hardin (1968) and Harold Demsetz (1974). While Hardin pictures commons as a lack of any kind of property and in this manner adopts the implication of the vision that the strong and clear property rights are the only true property rights, Demsetz apparently recognizes the communal ownership:

> Suppose that land is communally owned. Every person has the right to hunt, till, or mine the land. This form of ownership fails to concentrate the cost associated with any person's exercise of his communal rights on that person. If a person seeks to maximize the value of his communal rights, he will tend to overhunt and overwork the land because some of the costs of his doing so are borne by others. The stock of game and the richness of the soil will be diminished too quickly... If a single person owns the land, he will attempt to maximize its present value by taking into account alternative future time streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately-owned land rights... The land ownership example confronts us immediately with a great disadvantage of communal property. The effects of a person's activities on his neighbours and on subsequent generations will not be taken into account fully. Communal property results in great externalities. The full costs of the activities of an owner of a communal property right are not borne directly by him, nor can they be called to his attention easily by the willingness of others to pay him an appropriate sum... (Demsetz 1974)

Demsetz identifies the division of the commons into private property as a key tool for overcoming the inefficiencies generated by pervasive externalities. "[P]rivate ownership of land," he says, "will internalize many of the external costs associated with communal ownership." This is because the private owner "can generally count on realizing the rewards associated with husbanding game and increasing the fertility of his land." Because the owner's wealth is now tied to the skill with which she cares for her property, she has the incentive to use the resources on that property as efficiently as possible. In this manner commons that splits the property rights among multiple actors, implies lack of clarity. It allows for illusion in accounting of activities of users. Only the sole proprietor that does not share property can account for its use in the adequate manner.

It should be clear by now that tragedy of commons is the exemplary case for the clear and strong property rights vision. The starkness of the argument is probably more visible in Hardin's version according to which there seems to be nothing out there before exclusionary individual rights are established. On the other hand, Demsetz' version clarifies a further important point. Even if some other arrangement is recognized as property formally, what seems to be implied is that it lacks the necessary conditions for it to be a right with economic role. The economic role of the property rights comes only with the exclusive individual rights being put in place.

6

The most famous application of the economic rationale to the object of property and externality is the one provided by Ronald Coase. It came to be epitomized by George Stigler (1987) as the Coase theorem. Coase develops this argument referring to a variety of other legal solutions to externalities like tax, liability, or damage. Indeed, the theorem draws its significance from the fact that it can be utilized in a very general context of policy and regulation.

Let us take the known example of farmer and the cattle rancher live in vicinity to each other. Coase intends to tackle the problem of externality and thus we suppose that their productive activities interfere. The farmer grows corn on some of his land and leaves some of it uncultivated. The rancher runs cattle over all of her land. The boundary between the ranch and the farm is clear, but there is no fence. Thus, from time to time, the cattle wander onto the farmer's property and damage the corn. There is a harm suffered because of the interference of productive activities.

The damage could be reduced in a number of ways: by building a fence, continually supervising the cattle, keeping fewer cattle, or growing less corn. Each of the ways of reducing damage is costly.

There are two possible patterns of dealing with the harm. The rancher and the farmer could bargain with each other to decide who should bear the cost of the damage. Alternatively, the hard law could intervene from the outset and assign liability for the damages. If the case is presented before the law, Coase argues that the main relevant issue that is to be considered with the achievement of a valid decision is the possibility of bargaining between parties.

There are two specific rules the law could adopt, both relying on introducing a responsibility for the damage:

1. The farmer is responsible for keeping the cattle off his property, and he must pay for the damages when they get in (a regime we could call „ranchers' rights" or „open range"), or
2. The rancher is responsible for keeping the cattle on her property, and she must pay for the damage when they get out („farmers' rights" or „closed range"). (Cooter and Ulen 2012)

Under the first rule, the farmer would have no legal recourse against the damage done by his neighbour's cattle. To reduce the damage, the farmer would have to grow less corn or fence his cornfields. Under the second rule, the rancher must build a fence to keep the cattle on her property. If the cattle escape, the law could ascertain the facts, determine the monetary value of the damage, and make the rancher pay the farmer.

At this point Coase introduces *monetary values* relevant for the parties. For this, monetary evaluation of harm by the parties has to be determined. Coase ([1960] 2009: 3) proposes that in all of the cases of interference of rights it is an imperative to begin by *treating rights as productive factors*. This pertains to the introduction of parties as utility-maximizing agents with budgetary constraints and production functions. For example, suppose that when the problem of efficiency is introduced, it is concluded with absolute certainty that:

> efficiency requires the farmer to build a fence around his cornfields, rather than the rancher to build a fence around her ranch. (Cooter and Ulen 2012)

This is followed up by a further consideration of outcomes under different legal decisions. Both legal rules (ranchers' and farmers' rights) are considered with appropriate monetary values and it is concluded that looking at legal rules as a judge would, with focus on the question of who is responsible for the damage, the first rule seems to be more efficient than the second rule, which saves.

At this point Coase presents his famous argument. According to Coase, this efficiency is only apparent. By bargaining to an agreement, rather than following the law non-cooperatively, the rancher and the farmer can save the amount that is saved in the most efficient scenario. That is, if the parties can bargain successfully with each other, the efficient outcome will be achieved, *regardless of the ruling of law.* Cooperation leads to the fence being built around the farmer's cornfields, despite the fact that the second legal rule (farmers' rights) was controlling. Thus Coase concludes that the greater efficiency of the first legal rule is apparent, not real. In view of the cooperative surplus, parties will start from their threat values and try to settle in the manner that allows them to reach more desirable outcome. For each of the parties, appropriation of any part of the surplus makes the bargaining worthwhile. The following argument is at the same time a proof of the priority of the bargaining/transaction cost consideration for dealing with cases of interference of rights.

Coase used the term "transaction cost" to consider the possible obstacles to the depicted process. If the inherent costs of bargaining between the parties were to pass the supposed threshold of bargaining surplus, this would imply that there is nothing to be gained from cooperation.

This type of analysis led to the articulation of the famous Coase theorem:

> *When transaction costs are zero, an efficient use of resources results from private bargaining, regardless of the legal assignment of property rights.*

The theorem points out towards an invariance. Its most important achievement is that it synthetizes two disciplines and two problems: externality, a problem usually treated by economists and property rights—i.e., law. Its proposition suggested an effort to use property rights to solve problems of externalities in a variety of situations. This became an important proposal fundamental to law and economics but also to economics and law as distinct disciplines.

Essentially the theorem points out that externalities are something that private parties can deal with if the conditions necessary for bargaining to take place are present (Kennedy 1998: 4). This was a highly counter-intuitive conclusion at the time, as externalities were understood to be costs incurred privately but paid externally. Coase pointed out that the reciprocal relation between the parties that appears as if one is harming the other can become object of their own negotiation.

What is crucial in the consideration of Coase within the genesis of the vision of clear and strong property rights is the idea of the spontaneity of bargaining. In Coase's view the liability defined and allocated by the court will immediately be taken up by the bargaining process. Within this process the actors will treat it as property and they will reallocate it on the basis of their evaluations. This process is only possible as the court has defined the right that was contested between parties as a strong right with clear definition of its limits. Lack of clarity and strength of property rights is by definition implying rise in transaction costs. As we have seen Coase does recognize that this type of cases will take place, but the point is to understand that at that point the issue is already framed and economic analysis is inherently inclined to further one type of property arrangement while not even noticing its' possible alternatives.

7

Tragedy of commons and Coasean analysis of externalities were quite influential as lessons on how to do economics with explicit focus on property rights. Among many strands that adopted these lessons, the approach that came to be known as economic analysis of property rights is among the most pertaining and most recognized. This will be the last case that we will treat even though when we get closer to the present times the explicit connection to the vision of clear and strong property rights seems to be ever more pervasive.

When it comes to EAPR proponents, maybe the most controversial and visible aspect of the approach is its' habit of defining pre-legal facts independent of any normativity as rights. This relates to the point previously made about Demsetz who can be taken as forbearer of the EAPR approach. Alchian (1965) for example, defined private property rights in terms of assignments of the ability to choose the use of goods (without affecting the property of other persons). Later Alchian (1977: 238) defined these rights in relation to 'the probability that [owner's] decision about demarcated uses of the resource will determine the use'. In the same vein, Barzel (1997: 394) defined property as "an individual's net valuation, in expected terms, of the ability to directly consume the services of the asset, or to consume it indirectly through exchange." As he underlines "[the] key word is ability: the definition is concerned not with what people are legally entitled to do but with what they believe they can do." Barzel is also famous for his distinction between *economic* and *legal* property rights. According to him (Barzel 1997: 3) the term 'property rights' carries two distinct meanings in the economic literature: "One . . . is essentially the ability to enjoy a piece of property. The other, much more prevalent and much older, is essentially what the state assigns to a person. He decides to designate the first 'economic property rights' and the second 'legal (property) rights'." Later he goes on to explain that "economic rights are the end (that is, what people ultimately seek), whereas legal rights are the means to achieve the end. Legal rights play a primarily supporting role..." Finally, Allen (2014: 4) claims that in his view "Following others, economic property rights are defined as the ability to freely exercise a choice."

Hodgson (2015a: 11) rightly notices this general intuition can be interpreted to stem out from the standpoint adopted by property rights economists according to whom the 'structure of property rights' refers primarily to a set of constraints upon, and incentives and disincentives for, specific individual behaviours. This diagnosis rings a bell in the argument put forward recently by Di Robillant and Syed (forthcoming) that a deeper issue in L&E approach to property has to do with the habit of omitting of the legal-architectural issues (what property is) related to property law and rushing into substantial issues (how property emerges and what incentive structure it implies) that involve cost analysis.

Hodgson's criticism of this way of approaching property is maybe best summarized in the following passage:

> When [some of EAPR authors] referred to property they reduced it simply to the fact of possession or control. Likewise, when [others among them] refer to 'economic rights' they simply mean possession or control. My objection to these accounts is illustrated by the case of a thief who manages to steal an item and retain control of it. According to [the former] this would become the thief's 'property'. According to

> [the latter], the thief would have established an 'economic right' to the stolen goods. (Hodgson 2015b: 736)

In a way the approach perused by EAPR authors summarizes many of the important points present in previous cases. First of all, it reminds explicitly of Blackstone with its substitution of property with possession. The abstract relational character of property as legal arrangement can easily be marginalized by the simplicity of possession as an individual physical fact. Secondly, the argument has a clear naturalist connotation as actors involved seem to behave according to innate principles described as utility maximisation for the present purpose. Finally, EAPR case takes the Coasean intuition of putting theoretical priority on pre-legal reality in approaching legal institutions a step further when instead of bargaining it introduces the cases of robbery and others.

III

The cases of economic arguments for strong and clear property rights imply that only if these exist a beneficial cooperation between different actors is possible. The paradoxical nature of the underlying argument that has reached the status of common sense is that the strength and clarity of the property rights in reality consists of clearest possible delineation of the subject and the strongest right to exclude others. What makes the argument paradoxical is that intuitively one would think that cooperation is linked to inclusion and not exclusion. It is precisely this possibility that is being erased by the presented arguments.

In the context of tragedy of commons, the potential of inclusion beyond the scope of clear and strong property rights was the object of study of Elinor Ostrom. Still Ostrom's understanding of the legal and proprietary side of the commons relies on the bundle of rights conception that we will comment upon shortly. At this point though it is important to notice that Ostrom doesn't consider proprety arrangements in their substantial differences but stays on the level of providing comments how commons can lead to non tragic outcomes within appropriate legal frames. On the other hand, in the analysis of externalities after Coase, even less was done. While the so called heterodoxical Coaseans noted that sometimes transaction costs are indeed high, this was never a reason enough to consider inclusion as a possibility to deal with externalities. One strand of Coaseans considered public ownership and facilitation of bargaining while the other, spearheaded by Guido Calabresi considered inalienability. In both cases cooperation within a common property regime that relies on the well-defined inclusion of multiple participants with developed models of participator decision making was not seriously considered.

One possible understanding that could stem from the previous exposition of the vision of clear and strong property rights as based in the idea of individual exclusive owner is that all that has to be done to combat it is to summon the bundle of rights theory. In relation to the points made previously we should be reminded that both Ostrom, Coase and Calabresi adopt this theory. The theory is vaguely connected to arguments put forward by Wesley Hohfeld, but as contemporary interpreters (di Robilant and Syed) point out thing can become difficult when we try to coherently present an account of bundle of rights theory in relation to his

approach. On the other hand, very explicit and clear theorization of property as bundle of right can and is usually related to the work of Tony Honoré. Let us take a moment here to consider it. Honoré explicitly articulates what he defines as full ownership. It consists of the following bundle of rights:

1) Right of Use: Alf has a right to use X, that is,
   (a) Alf has a liberty to use X, and
   (b) Alf has a claim on others to refrain from use of X.
(2) Right of Exclusion (or possession): Others may use X if and only if Alf consents, that is,
   (a) If Alf consents others have a liberty to use X;
   (b) If Alf does not consent others have a duty not to use X.
(3) Right to Compensation: If someone damages or uses X without Alf's consent, then Alf has a right to compensation from that person.
(4) Rights to Destroy, Waste, or Modify: Alf has a liberty to destroy X, waste it, or change it.
(5) Right to Income: Alf has a claim to the financial benefits of forgoing his own use of X and letting someone else use it.
(6) Absence of Term: Alf's rights over X are of indefinite duration.
(7) Liability to Execution: X may be taken away from Alf for repayment of a debt.
(8) Power of Transfer: Alf may permanently transfer (1)–(7) to specific persons by consent.

Having the previous point in mind it is quite easy to recognize some implicit presuppositions of Blackstone and Locke explicitly stated by Honoré. Looking at this list, two things are of particular importance. First according to Honoré, subtraction or even a limiting definition of any of the rights from the bundle makes the property become less than a full one. In this way Honoré dismisses the possibility that it would be a different type of property, and solely on the basis it being less it is deed not to be property in its full form of existence. Secondly, as we can see, Honoré's bundle presupposes that property is something that belongs to a singular actor, Alf. The idea of there being multiple interrelated actors with sharing the mentioned rights is out of the picture. To the amount that this is the case, we can conclude that even Honoré's type of bundle of rights theory complicates the issue of property by distinguishing among different elements that form a property arrangement, it still does not break away from the idea of exclusive individual ownership as paradigmatic case of property. Consequently, the fact that certain authors rely on bundle of rights conception does not amount to proving that they escape the vision of strong and clear property rights.

To conclude one can ask a question that should have become obvious by now: What about legal reality of property? Does it recognize inclusion and commons? The answer is the positive one but it deserves a number additional clarifications about further investigation. These will have to serve instead of a more final conclusion.

Firstly, the legal reality of inclusionary property arrangements is a diverse one. From the commons fisheries and forestries described by Ostrom, worker managed

factories and citizen managed water systems, community land trusts and P2P networks and right to roam, the alternative to strong and clear property rights is diverse field. Inclusion can be a defined and conditional one, or it can just be a lack of exclusion as in cases of open access. The number of included and the activity of the included can be defined or they can be unspecified. Finally, the participatory decision making that is underlying this type of property arrangement can be of very different kinds. It is important to understand that this reality exists and develops on the margins of a legal field dominated by the vision of strong and clear property rights. It develops in places where the dominant model is so explicitly unsuccessful, inapplicable or there is no interest of actors to propose its application. Accordingly, its diversity is related to the specific context of the resource and the actors connected to it.

Secondly, in thinking about the reality of proprietary relations once we free ourselves from the false binarity, a general conclusion can be made. The point is that there is no property with big ''P''. Instead there are different arrangements and combinations, among which none is more property than any other. Different bundles can be designed following logic of the relations established, and none of the is better than others as such. The value judgment should always have made comparing different ones with the attention to the context of the specific resource.

Thirdly once, we understand that there is no clarifying and strengthening, we can become open to innovating and starting over in design and allocation of property rights. As Kennedy (2011) rightly points out historically this starting over has happened many times over and new property arrangements are constantly emerging. At the same time, this dynamic is interconnected with visions that assert themselves as dominant. The vision of property treated as essentially exclusionary right in the hands of the individual has made visible impact and has at the same time been reinforced by social legal processes on the ground. In fact, the only way for this commentary to be complete is to have coupled with an account of social context that surrounds the intellectual production of reflections we witnessed. The period from Blackstone to Smith is determined by the primary enclosure of commons, while the socialist calculus debate is related to property transformations before and during Cold war and finally, the accounts of Hardin, Demsetz, Coase and EAPR authors precedes and parallels the so called new enclosures. There has already been a lot of work on this context and this connection, but an encompassing account relating it to the issue of property and the vision that has dominated this field is certainly still lacking.

Finally, even if we try to think in narrower economic terms about property, we should not allow ourselves to be constrained by the usual imperative as transactions cannot be distorted by change in property rights because these only occur in the shadow of law. Need to take the economic impact of property arrangements is certainly a crucial one. As Kennedy notice this is especially true in the contemporary world as the complexity of property rights parallels the rise of general social complexity in the ever more interconnected network of actors. The need for a more reflected practice of property management in societies only becomes more pressing as the simple commonsensical recopies like that of clear and strong property rights are shown to be unsuccessful in accruing the promised results. At the

same time, previous pages should have made even more cautious than we already might have been, as this type of recipe is shown to be routed much deeper in our thinking than we have previously recognized. As many cases of post-structuralist accounts have shown, escaping strong pattern of binary opposition proves to be much more difficult than it might seem. Still the fact that today's society is slowly discovering ways to incorporate non-conformity and weakness towards achieving its' end should motivate us to push further in the case of property.

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Aleksandar Stojanović

O zaslepljujućoj jasnoći svojinskih prava: sedam fragmenata o redukcionizmu u teoriji svojine

Apstrakt

Ovaj članak se sastoji od istorijskog komentara na argumente u teoriji svojine koji osnažuju viziju jakih i jasnih svojinskih prava, koja je dominantna u savremenom razvojnom polisiju. Nadovezujući se na članak Dankana Kenedija iz 2013. koji je izneo prvu analizu ove vizije, ovaj članak se bavi nizom dodatnih pitanja koja se tiču njenog nastanka. Da bi postigao ovaj cilj, u članku se oslanjam na genealoški pristup u širem smislu koji je usredsređen na binarnu opoziju prisutnu u teoriji svojine od njenih istorijskih početaka u Zapadnoj misli. Ova metodologija omogućava da se problem konceptualizuje na supstantivniji način nego što je to učinjeno od strane Kenedija i da se pokaže kakav radikalan iskorak je potreban da bi se prevazišli problemi koje pomenuta vizija nosi sa sobom.

Ključne reči: svojina, ekonomski razvoj, isključivanje, prava