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PROPERTY

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THE MORAL BASIS OF PROPERTY RIGHTS

LAWRENCE C. BECKER*

The work of the philosopher consists in assembling reminders for a particular purpose.

—Ludwig Wittgenstein, *Philosophical Investigations*, 127

The justification of property rights entails three kinds of problems. One is the problem of general justification: Why should there be any property rights at all—ever? Another is the problem of specific justification: Given that there should be property rights of some kind, what kind(s) should there be? What sorts of things should be owned, and in what ways? The third is the problem of particular justification: Given that a specific kind of property is justifiable, who, in particular, should have title to existing pieces of it?

Important conceptual (and to that extent philosophical) issues are embedded in each of the justificatory problems. For example, fitting the wide variety of types of property rights to existing social, economic, and political conditions is part of the problem of specific justification. And the concepts of native title, prescription, and adverse possession figure prominently in the problem of particular justification.

But it is general justification that seems most obviously and purely philosophical, and so it is not surprising to find the bulk of philosophi-

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cal work on property devoted to things like the labor theory of property acquisition, the justification of a system of private as opposed to public ownership (or the other way around), and the connections between rights to liberty and rights to property. The thought is that until one knows whether — and how — property rights in general can be justified, one is not likely to get very far with problems of specific and particular justification.

The controlling idea of this paper, however, is that although philosophical work on property rights may correctly *begin* with questions of general justification, it cannot end there. To ignore, or at any rate slight, the conceptual problems of specific and particular justification is indefensible. That means, I fear, that philosophical work on property — taken as a whole — is indefensibly narrow. What I want to do here is to contribute to its broadening.

In particular, I want to develop an admittedly artificial but useful distinction — one between the moral basis of property rights and the moral arguments for them.¹ The moral basis, as I conceive it, is a set of facts about the human condition: facts about human needs, propensities, and behavior from which (together with judgments about values, duties, and virtues) moral arguments for and against property rights can be built up. It is from just such facts, or what they supposed to be facts, that traditional theorists built up their accounts of property.² They talked about acquisitiveness, greed, envy, the need for security, the existence of surplus value, the consequences of alienated labor. From such considerations, not only did they draw arguments for and against the general justifiability of property rights, they also often tried to sketch in a few details about what specific sorts of property rights there should be — whether there should be private property in land, for example, or an unrestricted right to transmit one's property to others by means of a will.

One cannot simply rely on traditional accounts of the moral basis of property, however. In the first place, much of the anthropological, sociological, and psychological data in such accounts are now regarded as erroneous — or at any rate, too speculative to be very useful. And at least as far as I know, the last systematic attempt to get an overview of such materials, for the purpose of thinking about property rights, was a book published in 1931.³ Much has happened in the intervening years to render that book inadequate. Second, as already noted, the interest of philosophers has been predominantly with general justification, and a few Hobbesian commonplaces⁴

about the human condition will usually suffice to ground such a justification. So even the traditional accounts—which give much more prominence to these matters than do current accounts—tend to rely on a terribly impoverished analysis of the moral basis of property.

It is time to begin the process of enriching these considerations, to make a start at taking them beyond the commonplaces used for general justification to the point where they will be of some use in theorizing about specific and particular justification. The eventual philosophical aim of this enterprise (if you will pardon the paraphrase of Epicurus⁵) is to answer the question of which forms of property, if any, can be said to be natural and necessary; which natural but not necessary; and which neither natural nor necessary but merely the product of extravagant invention.

To do this, one must summarize material from sociology, ethology, economic anthropology, theories of social organization, comparative economics, and social psychology. (Modern economic theory—both developmental theory and “impact” theory—is of course also crucial, as is modern political theory. Happily, I am able, here, to leave those materials to others.) Since I am not expert in any of these fields, what I have to say about them should be carefully examined for the sorts of errors characteristic of amateurs. My justification for taking on this task rather than leaving it to the relevant experts is threefold. First, as I have indicated, it needs to be done. Second, assembling the relevant materials into a form suited to a discussion of property rights is essentially a conceptual (and to that extent philosophical) problem. So I am not entirely outside the realm of my professional competence. Third, these matters need to be put into a form useful to political philosophers. The 1931 book mentioned earlier was virtually ignored by lawyers, philosophers, and political scientists, as evidenced both by the paucity of references to it and by the substance of philosophical work on property rights. The latter, my own included, when it makes reference to human behavior at all, tends to rely on the same old commonplaces found in seventeenth-, eighteenth-, and nineteenth-century writers. As I hope to show, the moral basis of property rights includes much more than that.

THE CONCEPT OF OWNERSHIP⁶

Property rights, as I will deal with them here, are the rights of ownership. In every case, to have a property right in a thing is to have

a bundle of rights that defines a form of ownership. Many futile debates (e.g., over the existence of "primitive communism") have owed their existence to a failure to be clear about the varieties of ownership—thus the varieties of property rights. So I want to pay careful attention to definitional matters.

A. M. Honoré has given an analysis of the concept of full ownership⁷ that with some modifications, provides a very clear overview of the varieties of property rights. I have found his analysis—or rather, my version of it—to be an adequate tool for analyzing every description of ownership I have come across, from tribal life through feudal society to modern industrial states. The definition of the elements of ownership that he identifies will vary from society to society, as will the varieties of ownership that are recognized. But ownership is always, as far as I can tell, analyzable in the terms he proposes. I shall therefore apply his analysis to "primitive" and archaic societies as well as to modern ones.⁸

The Elements of Ownership

Honoré identifies eleven elements of the notion of ownership. Each of the elements is capable of variation, both in its definition and in the range of things to which it applies. Full ownership is the concatenation of all the eleven elements, in whatever way they may be defined.

The number eleven is not sacred, however. As Honoré is careful to point out, it is possible to combine or split some of the elements into others. The test of success in what he has done is not the discovery of immutable atoms of the concept of ownership, but rather the ability of the analysis to advance understanding. Accordingly, because I find it helpful to do so, I have split one of his elements into three, and propose to use the following list of thirteen:

1) *The right (claim)⁹ to possess*—that is, to exclusive physical control of the thing. Where the thing is noncorporeal, possession may be understood metamorphically.

2) *The right (liberty) to use*—that is, to personal enjoyment of the benefits of the thing (other than those of management and income.)

3) *The right (power) to manage*—that is, to decide how and by whom a thing shall be used.

4) *The right (claim) to the income*—that is, to the benefits derived from foregoing personal use of a thing, and allowing others to use it.

5) *The right (liberty) to consume or destroy*¹⁰—that is, to annihilate the thing.

6) *The right (liberty) to modify*—that is, to effect changes less extensive than annihilation.

7) *The right (power) to alienate*—that is, to carry out *inter vivos* transfers by exchange or gift, and to abandon ownership.

8) *The right (power) to transmit*—that is, to devise or bequeath the thing.

9) *The right (claim) to security*—that is, to immunity from expropriation.

10) *The absence of term*—that is, the indeterminate length of one's ownership rights.

11) *The prohibition of harmful use*—that is, one's duty to forbear from using the thing in ways harmful to oneself or others.

12) *Liability to execution*—that is, liability to having the thing taken away as payment for a debt.

13) *Residuary rules*¹¹—that is, the rules governing the reversion to another, if any, of ownership rights which have expired or been abandoned. This category includes rules as various as those for determining the reversion of rights upon the expiration of leases, for determining the heirs in cases where the power to devise or bequeath does not exist, for determining the disposition of property left by intestate deaths, and for determining the disposition of abandoned property.

As should be readily apparent, the first nine elements are rights of various sorts, and the remaining four elements are rather different—essentially defining limitations (or the absence of them) on the rights. Each of the elements is capable of a variety of definitions. The prohibition of harmful use may shade into a requirement of productive use; the right to income may be subject to taxation; security may be limited by eminent domain; and so on. Full ownership—that is, the concatenation of all these elements—therefore has as many different varieties as there are different definitions of the elements.

Varieties of Ownership

More important, many varieties of ownership, and thus of property rights, do not reach the level of full ownership. A trust fund, for example, can be one's property even though one does not have the right to manage it, consume the capital, or bequeath the income to others. This point is crucial in the reading of both law and economic

anthropology, where one finds varieties of ownership quite foreign to our ordinary notions.

How minimal a set of these elements can count as a variety of ownership in law need not trouble us long. (The notion of a moral property right is more complicated, and I shall not deal with it here.) For property rights in law we may argue as follows: the final four elements are not rights at all and so obviously cannot stand alone as a variety of property rights. The right to security seems similarly parasitic on other elements: Immunity from expropriation of what *right?* is always a question that must be answered in applying this element. So it too cannot stand alone. But I suggest that any of the remaining eight rights (possession, use, management, income, consumption or destruction, modification, alienation, and transmission) *can* stand as a variety of *legal* ownership when it is supplemented by some version of the right to security. That is, I suggest (on the bases of nothing stronger than my understanding of English) that if anyone holds even one of these eight rights plus security—and therefore any bundle of rights that includes one of the eight plus security—then it makes sense to say that that person has a property right. (I assume that any of these rights that is *not* secured—that is, that is subject to expropriation by the state at any time, by any process, for any reason—would *not* count as a private property right.) No doubt the thought of a person having the right to consume or destroy but not to possess is strange. But it is not necessarily a contradiction; and surely it constitutes what could reasonably be called a property right. Similarly for the others.

The varieties of property rights, then, consist of any set of the thirteen elements that includes at least one of the first eight plus security. There are 4,080 such combinations.¹² Full ownership, as I have said, is the concatenation of all the elements. Full *exclusive* ownership is full ownership, by an individual or a group, in cases where no other individual or group has any form of ownership in the same thing.

With these definitional matters out of the way, I want to turn to a final preliminary: a summary of the moral arguments for property at the level of general justification.

THE GENERAL JUSTIFICATION OF PROPERTY RIGHTS

At the outset of this chapter, I urged a distinction between the moral basis of property and the moral arguments for it. I want now

to review the moral arguments (at the level of general justification) as a preface to what I have to say about the moral basis. This is necessary not only because the moral basis contributes to the general justification of property but also because the problems raised by the general justifications—what I call the “coordination problem” and the “compatibility requirement” (see below)—partly define the ways in which the moral basis is relevant to the process of specific and particular justification. And one of the aims of this paper is the broadening of philosophical discussion to include more work on specific and particular justification.

It should be noted that throughout what follows I am speaking of the justification of an institution of *private* property—even when the modifier “private” is not used. When I speak of public ownership, I will always use an appropriate adjective.

The Plurality of General Justifications.

I have argued in *Property Rights*¹³ that there are at least four sound and independent lines of general justification for private property.

The first may be called the Locke-Mill version of the labor theory. It is essentially a “why not?” argument, asserting that when labor produces something that would otherwise not have existed, and when that labor is beyond what morality requires of the laborer, and when others suffer no loss from being excluded from enjoying the fruits of the labor, then property rights for the laborer (in the fruits of the labor) can be justified.

The second line of general justification may be called the labor-desert version of the labor theory. It holds that when labor produces something of value to others—something beyond what morality requires the laborers to produce—then the laborer deserves some benefit for it. Sometimes the only (or most) appropriate benefit is a property right in the things produced (or in something else of value). When this is the case, property rights can be justified.

The third line of general justification consists of a complex of considerations of utility, framed in terms either of economic efficiency or of political and social stability. All of these considerations are directed to the task of showing that a system of property rights is necessary for human happiness. This is essentially Hume’s argument, complicated by the later developments of utilitarianism and economic theory.

The final line of general justification may be called the argument from political liberty. It assumes (as does the utility argument) that

some measure of acquisitiveness among humans is inevitable and goes on to assert that effective prohibition of all acquisitive activity would require a comprehensive and continuous abridgment of people's liberties that is at best unjustifiable. Further, it holds that the acquisitive activities which must be permitted in a just society will require regulation, lest each person's acquisitive acts interfere with others' liberties. It concludes that a system of property rights is a justifiable way of regulating acquisitions so as to preserve liberty.

Each of these four lines of general justification is both complemented and limited by the others. The labor-desert argument, for example, justifies property rights only when the laborer produces something of value to *others*—for only then can a laborer be said to deserve a benefit (from others). The remaining arguments complement this, however, by justifying ownership in cases where it results in no loss to others (the Locke-Mill version of the labor theory), where ownership has utility, or where it must be permitted to preserve liberty.

On the other hand, there are clearly cases in which considerations of utility conflict with those of liberty, or desert-for-labor. In those cases the arguments limit, rather than complement, each other. Conflicts among the arguments are "limiting" in the sense that they confine the justificatory adequacy of each argument to cases in which it either faces no opposition or faces opposition of demonstrably inferior strength. A "justification" of property rights, as the term is used here, requires an "all-things-considered" argument. One cannot accurately assert that the labor theory "justifies" anything if the results it yields are contradicted by a utility argument of equal weight.

The general justifications for property are also limited, in the same way, by some standard *antiproperty* arguments. Just as it is possible to show that in general a system of private ownership has utility, so too it is possible to show that some systems of ownership, in some social circumstances, lead to social *instability*—to a net *disutility*. Further, it can be shown that some systems of private ownership tend to produce and perpetuate unjustifiable socioeconomic inequalities. Such antiproperty considerations limit the effectiveness of the general justifications of property rights every bit as much (in principle) as conflicts among the proproperty arguments do.

The Coordination Problem.

This plurality of general justifications—and the existence of antiproperty arguments—yields what I call the coordination problem for

the theory of property rights. Conflicts must be managed. When considerations of liberty require or permit property rights while utility forbids them, or when some version of the labor theory justifies property while the antiproperty argument from socioeconomic inequality does the opposite, then a decision has to be made about which set of considerations will be controlling. Are we to have, at bottom, a utilitarian theory? Or a libertarian theory? Or a labor theory? Or are we to take an essentially antiproperty position and hold that only in the absence of antiproperty objections can property rights be justified?

It is my contention that none of the "dominance solutions" is acceptable for the general theory of property rights. This is so because the four lines of property argument—as well as the standard antiproperty ones—are all *independent* and of *presumptively equal weight*. They are independent in the sense that, though they have some assumptions in common, none is reducible to any other. They are, in my view, of presumptively equal weight because, although it may be demonstrable that in *some* circumstances one should be subordinated to another,¹⁴ I can find no justificatory strategy that yields the conclusion that, in general, any one of the lines of argument ought to have priority over the others. It is therefore not warranted to start with a utilitarian theory of property, a libertarian one, or an egalitarian antiproperty position and then compromise it from time to time with other considerations. It is rather necessary to begin with the recognition of the irreducible plurality of pro- and antiproperty arguments, and the (rebuttable) presumption that the arguments are of equal weight. The "coordination problem" will then be to define the ways in which the arguments act on each other, to complement or to limit, and to identify the circumstances in which, and the way in which, conflicts among the arguments can be resolved.

The Compatibility Requirement.

The solution to the coordination problem is a prerequisite to work on specific and particular justification because such arguments must be compatible with the *general* justifications as coordinated. That is, the specific sorts of ownership one hopes to justify, as well as the particular instances of it, cannot (on pain of logical inconsistency) violate whatever restrictions on *all* forms and instances of ownership are imposed by the general justifications of property. If, for example, utility and egalitarian arguments combine—in the absence of opposition from the labor theory and libertarian arguments—to prohibit the

transmissibility of significant amounts of wealth by bequest, then one will obviously not be able to give a successful defense of current inheritance laws or any instance of their operation.

Summary

To summarize, then, this severely compressed overview of the problem of giving a general justification of property rights: Of the three levels of justificatory problems, those having to do with general justification clearly have logical priority. The specific forms of property one will be able to justify, and the particular instances of ownership one will be able to justify, will be limited by the restrictions and requirements placed on all ownership by general justifications. Further, there are at least four independent and sound lines of general justification, plus some standard antiproperty arguments, all of which are of presumptively equal weight. Each of these arguments both complements and limits the others. Thus, the general theory of property¹⁵ must both solve the coordination problem and define the compatibility requirement. That is, the general theory of property rights must provide a way of resolving conflicts among (general) pro- and antiproperty arguments, and it must spell out in detail the restrictions these arguments place on specific and particular justification.

It is with the coordination problem and the compatibility requirement that I think the moral basis of property can be of most use. Assumptions about the human condition are embedded in each of the general justifications for property, and from those assumptions, together with certain formal properties of the arguments (e.g., their presumptively equal weight), one can derive some guidance for problems of specific and particular justification.¹⁶ But as I mentioned at the outset, the elements of the human condition appealed to by the general justifications are (intentionally) minimal—the Hobbesean commonplaces. A much richer set of considerations is needed if we are ever to get beyond the rather vacuous pronouncements on inheritance law, private property in land, native title, and so forth, so common in political philosophy. (We need to know, for example, something about the variety of property arrangements that have served various societies well, and under what social circumstances they broke down or changed. We need to know such things just in order to apply the utility argument—and the antiproperty arguments—to questions of specific and particular justification.)

THE MORAL BASIS OF PROPERTY

I turn now, then, to the the central topic of this paper—the set of considerations about the human condition I have called the moral basis of property. What I shall do is present a brief summary of some of these considerations (but by no means all of them), draw some preliminary conclusions, and indicate some directions for future study.

A bit needs to be said about methodology, however. The material from the social sciences presented below is, of course, description and theory about what human beings *actually* do and what institutions *actually* exist or have existed. It is not directly about what people *ought* to do or about what institutions *ought* to exist. It can, however, enter into moral argument in an important way if the following assumptions are made:

First, I take it to be true by definition that a finite moral argument cannot provide a justification for every one of its premises (without being circular). One part of the problem of avoiding moral skepticism can thus be defined as putting a nonarbitrary stop to the process of (noncircular) reason giving. An argument that goes on forever, in an infinite regress of reason giving, is forever unsatisfactory because it is forever incomplete. An argument that is circular, or that is truncated arbitrarily, is no argument at all.

Second, I shall assume that an acceptable strategy for putting a nonarbitrary stop to reason giving is to shift the burden of proof to the skeptic by showing that the “starting point” for a given justification, though unsupported by argument, is nonetheless not an arbitrary assumption. It may be nonarbitrary if, for example, an alternative is literally inconceivable. (It is in this sense that people have claimed that the law of contradiction is not an arbitrary assumption.) Or the starting point may be nonarbitrary because (again, perhaps, like the law of contradiction) it is not a thing that one ever *does* “assume,” in the usual sense of the term; that is, it may fail to be an arbitrary assumption simply because it is not, in fact, an assumption at all. Such starting points are not in principle incontestable, but they do shift the burden of proof onto the skeptic: if they have not been arbitrarily chosen (a fortiori, because they have not been chosen at all), and if there is no reason to *reject* them, then their use in argument cannot be unjustifiable. At worst it could only be a matter of indifference.

The use I wish to make of the elements of the moral basis of property is that of a nonarbitrary starting point for argument. If in fact

certain sorts of property rights are universally recognized, for example, I shall assume that—in the absence of countervailing arguments—they need no justification.¹⁷ The nature and scope of this justificatory strategy should become clearer in what follows.

The Universality of Property Rights

From roughly the middle of the sixteenth century through the first quarter of the twentieth century it was commonly believed among Western property theorists that in many primitive societies the concept of ownership was wholly unknown. Such primitive communism, as it was called, was characterized by common possession and use of valuables rather than by anything corresponding to our notions of individual, joint, or even common ownership.¹⁸

Naturally enough, writers found conflicting uses for such information. Some saw property-free society as an ideal to be reached. Others saw it as an early stage in socioeconomic evolution that we were well rid of.¹⁹ In any case, the notion of primitive communism persisted in academic debate well into this century.²⁰

Careful study of the anthropological evidence, however, beginning perhaps with Rivers²¹ and Malinowski,²² and culminating in the development of economic anthropology in the 1930s and 1940s,²³ has set the record straight. More quickly than legal scholars²⁴ (though without very much conceptual precision) anthropologists recognized that the notion of ownership was very complex. They saw that property rights were typically complexes of use rights, possessory rights, rights to income, management, alienability, and so on—many varieties of which looked very little like what earlier writers apparently had in mind when they thought of ownership. (Apparently these earlier writers were using only something like the notion of full exclusive ownership. If they read a report of a society in which no individual or group had exclusive use of, say, the fishing canoes, they concluded that those canoes were not “owned.” They drew similar conclusions when they found other elements of the notion of full ownership missing.)²⁵ In any case, an appreciation of the varieties of property rights that fall short of full ownership forces a radical reevaluation of the anthropological evidence. It becomes clear that ownership can be divided, not only in the sense of joint and common tenancies, but in the sense that different people can hold different sorts of property rights in the same thing. Someone who holds a right to the possession

and use of a piece of land may be said to have (partial) ownership of it, even though the rights to income are held in common by the society as a whole.

When property rights are seen in this light, and together with the wealth of detailed ethnographic studies now available, it is easy to show that private property rights of some sort exist everywhere.²⁶ Indeed, it is possible to argue that they are a *necessary* feature of social organization. To quote Irving Hallowell:

If the core of property as a social institution lies in a complex system of recognized rights and duties with reference to the control of valuable objects, and if the roles of the participating individuals are linked by this means with basic economic processes, and if, besides, all these processes of social interaction are validated by traditional beliefs, attitudes, and values, and sanctioned in custom and law, it is apparent that we are dealing with an institution extremely fundamental to the structure of human societies as going concerns. For . . . property rights are institutionalized means of defining *who* may control various classes of valuable objects for a variety of present and future purposes and the *conditions* under which this power may be exercised. Since valuable objects in all human societies must include, at the minimum, some objects of material culture that are employed to transform the raw materials of the physical environment into consumable goods, there must be socially recognized provisions for handling the control of such elementary capital goods as well as the distribution and consumption of the goods that are produced. Consequently, property rights are . . . an integral part of the economic organization of any society.²⁷

It does not follow, however, that any specific system of property rights is necessary for social organization, even once a set of general social circumstances is specified. Indeed, the variety of systems that will work in any given set of circumstances is impressive. Here again, the "earlier" writers were quite mistaken, this time, for example, in things like tracing the origin of property in land solely to the rise of agriculture. In fact, property in land—common, joint, and individual—occurs in many hunting and gathering societies, whereas in others it does not.²⁸ Increasing scarcity may cause a movement toward private property arrangements,²⁹ but then again it may not.³⁰

In the West, until the late nineteenth century a movement toward full private ownership corresponded with the demise of feudalism, the rise of capitalism, and industrialization.³¹ But the movement has reversed since.³² And industrialization in the Soviet Union has been accomplished with quite a different property system.

The correlation of specific systems of property rights with the other elements of social organization³³—as well as with the environments in which societies find themselves—would be of obvious importance. And perhaps some useful generalizations can be drawn. I cannot do it, however. Every attempt I have made is refuted by a counterexample actually observed in the field. The data indicate that, although property rights exist everywhere, what is necessary about them is just *that some exist*. It appears that many specific systems of ownership are compatible with any set of environmental conditions and social structures.

Territoriality, Acquisitiveness, and Egoism

The argument given above for the necessity of property rights (and thus the explanation for their universality) was sociological. I want to turn now to some issues in sociobiology, ethology, and social psychology.

If existing human beings are necessarily territorial, acquisitive, and egoistic (whether for reasons of genetics, psychology, or sociology), then much seems to follow for the theory of property rights. The liberty to pursue egoistic goals, and the liberty to acquire and keep both territory and other valuables, will be seen as fundamental human needs. Such needs create a powerful presumption in favor of the justifiability of social institutions (e.g., systems of private property rights) that satisfy those needs.

Not all (proposed) human needs create such a presumption, of course. If there are dispositions toward altruism, toward sharing, toward cooperation, and toward the achievement of intimacy in social relationships, then the liberties to act out those dispositions will also be fundamental needs—needs that may create presumptions in favor of social institutions that conflict with private property.

Property theory in our century is remarkable for its avoidance of these issues.³⁴ But the avoidance is in part justifiable. The current data on territoriality, egoism, altruism, individual distance, cooperativeness, acquisitiveness, and the like seem to be of very little con-

structive use. The data have significant destructive uses, of course. Early attempts to prove the existence of an acquisitive instinct in humans (whether from the supposed existence of primitive communism or the supposed prevalence of collecting behavior in children) have been debunked.³⁵ The Social Darwinists' evolutionary argument for the primacy of egoism and selfishness has been exploded.³⁶ And incautious interpretations of ethological material, to the effect that territoriality, aggression, and dominance structures have a preponderant role in human behavior have had to be revised.³⁷

But constructive guidance for property theory, drawn from these materials, is very thin. Part of this is due to their lack of specific applicability to property rights, and part of it is due to their equivocal results. To explain:

The work on territoriality and individual distance is fascinating,³⁸ but its applicability to any specific form of property rights is highly questionable. Territoriality, to the extent that it is a human species characteristic, is clearly as much a group phenomenon (whether of family, clan, tribe, or nation) as it is an individual one. And the "territorial imperative" for individuals—which is what would be related to private property rights—is clearly satisfiable in so many ways as to provide little or no foundation for argument. If a fixed term, inalienable, untransmissible lease on an apartment will satisfy it as well as full ownership of a house (and I know of no evidence to suggest the contrary), then the territorial imperative gives virtually no commands to a property theorist. Similarly, the work on individual distance, although giving support to arguments for very minimal rights to privacy and freedom from trespass of one's personal boundaries, also gives no guidance to property theorists. There is much cultural and individual variation in the distances demanded by people—whether for intimate encounters, casual conversations, or living arrangements. It thus hardly seems possible to use such data in arguments for or against specific forms of property.

The equivocal nature of these materials with respect to property rights issues is another problem. Humans demand private spaces and set various sorts of interpersonal distances for carrying on social relationships, but they also seek the sort of conviviality and intimacy that depends on ignoring (while not violating) personal boundaries.³⁹ If humans are instinctually aggressive and violent, they are also instinctually loving. The ethological evidence is equally strong for each.⁴⁰ If egoism and selfishness are genotypic traits now—due to their evolu-

tionary adaptiveness—then so are cooperation and altruism. Evolutionary theory supports the existence of both sorts of traits.⁴¹

In short, the sociobiological materials on the sorts of species characteristics of interests to property theorists are not (now) of much use. The work in these fields should be watched, however, for the *possibility* of a significant contribution to property arguments is there. And the contribution made, if it ever is, could push property theory either way: toward an extension of full private ownership or toward the reverse.

Reciprocity

Of much more immediate use than the material from sociobiology is some sociological work in exchange theory—the attempt to give a general account of the social function of exchanges of goods and services.

The obvious place (for modern westerner) to start in trying to understand exchange is with a narrow economic assumption: that exchanges of goods and services are to be understood in terms of the perceived self-maximization of economic value on the part of each participant. But this does not take one very far in explaining anthropological data such as the potlatch⁴² and the Kula exchange.⁴³ In fact, exchange in very many primitive societies has an aspect that initially puzzled Western observers: the requirement of reciprocity (and the consequent lack of any significant economic profit for the participants).

Some elements of reciprocal exchanges could be understood along standard economic lines, of course. Malinowski describes the ritualized exchanges of fish for garden produce between coastal tribes and inland tribes in the Trobriand Islands as an obvious economic necessity.⁴⁴ Rates of exchange exist; money, too, in some primitive societies. And examples of the profit motive, greed, sharp business practice, and theft are plentiful. But the institution of the obligatory exchange of gifts of equal value is widespread enough—and central enough to the structure of those societies in which it has a prominent place—that it struck some observers as an important thing to study. And the topic has more than historic interest. Reciprocal exchanges pervade modern societies as well. Some are ritual—for example, the giving of Christmas gifts. Others are embedded in etiquette—for example, returning dinner invitations.

There are two competing approaches to social exchange theory.⁴⁵ One, traceable to Durkheim, has a collectivist character. "Social facts" are primary, and social exchange is seen primarily as a function of social structure. This approach emphasizes what has been called *generalized* exchange—transactions in which people do not get reciprocity directly from the individual(s) to whom they give but depend instead on complex social processes to produce the reciprocal benefit. An example is what Peter Ekeh calls *chain generalized exchange*—a series of transactions in which A gives to B; B gives to C . . . and Z gives to A.⁴⁶ Such exchanges are taken to be expressions of more fundamental social structures and processes. That is, it is supposed that the social *structures* (kinship or whatever) come first, and generalized exchange grows up as a way of preserving, enhancing, and symbolizing them.⁴⁷

The other approach to social exchange theory is more individualistic. It begins with face-to-face transactions and argues that social structures are at least in part functions of such transactions. Peter Blau's work in exchange theory is an example of this approach, and it deserves attention from property theorists for reasons I shall shortly mention.⁴⁸

In outline, Blau's account is as follows: (1) Begin with what he calls the forces of social attraction, defined as whatever may cause people to seek contact with each other. In Maslovian terms, these forces may be survival needs, security needs, or self-needs. (2) Action in accord with such forces stimulates reciprocal exchange transactions. To get what one wants from others (without force or fraud), one ordinarily has to provide something of comparable value to those others. (3) As long as the exchange is reciprocal (i.e., of roughly equal valuables), social equilibrium is maintained. (4) But just as surely as the forces of social attraction stimulate exchange, so too exchange stimulates status and power differentiation. Some people will find themselves at a disadvantage in exchanges and will have to rely on force or fraud in place of reciprocity, or they will have to reciprocate by substituting deference or subservience for, say, material goods. (5) Those who find themselves at a considerable advantage in exchanges, with the resultant benefits of power and status, will try to institutionalize and legitimate those advantages. (6) Those who are at a disadvantage will resist the institutionalization and legitimation of status and power differentials. (7) The resultant dialectic between the advantaged and disadvantaged explains a good deal, Blau thinks, about *all* social in-

stitutions, however simple or complex, however central or peripheral to the social order. And it all rests on the notion of reciprocity.

This is not the place to discuss the details and scope of Blau's views or to assess the opposing "collectivist" accounts of social exchange. It is enough for present purposes to point out that, however incomplete this account may be, the processes it describes are indisputably pervasive in, and central to, human life as we know it. The relevance of this material to the moral arguments for and against property should be clear. To the extent that a specific system of property rights tends to produce and perpetuate inequalities of power and status that make reciprocity among members of a social order difficult or impossible, and to the degree that such lack of ability to reciprocate is unjustifiable (whether for reasons of fairness or reasons of utility), then one will have powerful support for the antiproperty arguments from inequality and disutility.

The Labor Principle

I turn back, now, from sociological theory to anthropological data—specifically, to data relating to laborers' entitlements to property. The practice of assigning to some laborers at least some of the rights of ownership in the things they produce appears to be a universal one.⁴⁹ I shall call the basis of this practice the labor *principle*—to distinguish it from the moral argument for property which I have called the labor "theory."

The labor principle, however, if it is to characterize a universal social practice, must be stated in a highly qualified way. For example, one must state it so as to take account of the fact that in many cultures whole groups of people (e.g., children, women, slaves) are systematically excluded from holding some sorts of property. Their labor is thus not always recognized with property rights, even in a society that grants others nearly full ownership over the things they produce. Further, it is often the case (in primitive societies and thoroughly socialistic ones as well) that laborers obtain only very limited sets of ownership rights for their efforts, for example, the right to distribute the meat from a kill, perhaps reserving the hide, sinews, and choicest portions of meat for oneself, but otherwise taking a share equal to that of people who did not make the kill themselves.⁵⁰ It is only a very restricted form of the labor principle, then, that can be said to be universal.

Even so, the universality is impressive. If one looks only at personal articles (clothing, personal adornments, household implements, toys) and at rather simple productive goods (e.g., spears, hoes, axes), and if one then looks at actual practices rather than whatever formal legal or moral code may exist, the labor principle can be stated in a much less qualified way. It seems that all recorded societies (for which we have such data) recognize *in practice* laborers' entitlements to purely personal articles and simple productive goods the laborers have produced.

The reason(s) for the universality of the labor principle have not been systematically explored by modern social science.⁵¹ People make remarks indicating that they think the reasons are obvious⁵² and then mention the sense of "psychological appropriation" of a thing that accompanies producing it.⁵³ The thing becomes "identified" with its maker, not only in the maker's mind, but in the minds of those who have seen it made. But remarks, however intuitively clear, are one thing; sound social psychology is another. It would be illuminating for property theorists to have the benefit of a defensible psychological theory explicitly relating the labor principle to something like Maslow's hierarchy of needs. If it were then possible to relate forms and levels of need satisfaction to social development, one might have quite a powerful basis for moral argument at the levels of specific and particular justification.

In any case, for whatever reasons, the labor principle describes a social practice that is a fixture of human society. Its scope is often limited by the systematic exclusion of some groups from full citizenship in the social order. The entitlements it gives are often limited to very restricted forms of ownership—or to ownership over a very restricted range of things. But for the purposes of moral argument, it seems fair to conclude that the burden of proof is on those who would restrict or limit it, not on those who would act in accord with it.

Property and the Right to Use

A rather different, and striking finding in the anthropological and historical data on property rights concerns the extent to which owners' use rights are typically restricted. In some primitive societies, for example, the people who own major means of production like canoes have an obligation to keep them in use.⁵⁴ An owner may refuse to take the canoe out himself, but he must allow others to do so on

demand. Similarly in some agricultural societies: fallow land can be used for gardening by anyone, even without getting the owner's permission.⁵⁵ In Europe, as late as Grotius, one finds references to an analogous principle of "innocent use" with respect to land.⁵⁶ (The origin and scope of the principle is somewhat obscure, but it seems to have come down from archaic law and to have prohibited owners from taking legal action against trespassers as long as they were in no way interfering with the owners' use of the land.) Of course in our own case one of the thorniest conceptual and political questions about property concerns the extent to which the government can compromise an owner's use rights (e.g., by zoning regulations) without running afoul of the constitutional prohibition of the taking of property without compensation.

In short, it is safe to say that use rights are everywhere among the most restricted of the rights that make up the notion of full ownership. Indeed, even in Honoré's *list* of the elements of full ownership (see above, pages 190-91), one such general restriction is included: the prohibition of harmful use. As Honoré points out, although in some legal systems "no harmful use" may mean no more than "no active use of a thing to do physical injury to people," in other legal systems it includes a prohibition of economic and/or aesthetic injury, and in still others shades into a requirement for productive use.⁵⁷ What is true in this regard of developed legal systems (Honoré's frame of reference) seems clearly true of societies in general, developed or not.

It is not possible, however, to correlate restrictions on use rights in any *simple* way with things like scarcity, or political, social, and economic development. One might think, for example, that the more urgent the social need for something that is privately owned, necessarily the more severely would the owner's use rights be restricted. Some societies provide evidence of this.⁵⁸ But other societies—even some exhibiting a considerable degree of cooperativeness—have in fact dealt with scarcity by making owners' use rights *more* exclusive rather than less exclusive.⁵⁹

Similarly for social, political, and economic development. One might think that as social, political, or economic roles and structures become more specialized, and the members of society more complexly interdependent, use rights would necessarily be compromised. But the growth of Anglo-American property law since feudal times defies a straightforward analysis of this type. A movement *toward* full owner-

ship coincided with increasing complexity until the late nineteenth century.⁶⁰

Even if no "simple" correlations can be found, however, there is one striking observation of some importance for property theory. Beginning with the "static" fact of the typically restricted character of use rights, and then looking for "dynamic" correlations with changing social structures, convinces one that *in practice*, use rights have always been vulnerable to significant and more or less continuous redefinition. Their vulnerability appears nearly as great, in fact, as that of the right to income (which is nearly always subject to taxation). Our current problems with land-use policy and environmental law are not aberrations in this regard. The fragility of use rights (relative to most other property rights) is the rule, not the exception.

Property and Rights to Transfer

If use rights are often heavily restricted, rights to transfer property are sometimes altogether absent. In many primitive societies, as well as feudal societies in the Western tradition, property in land passed only by fixed rules of inheritance; owners could not transmit it by will.⁶¹ Further, in feudal societies *inter vivos* transfers of land at first required permission of the lord. In some primitive societies, such transfers were forbidden altogether. In short, free alienability of property, and the power to dispose of one's holdings through a will, are rather recent accretions to the notion of ownership—neither natural nor necessary to human society *per se*.

This point can be made more intelligible by a brief excursion into comparative economics, specifically into the work of Karl Polanyi and his followers.⁶² Polanyi maintained that modern economic theory is an inadequate tool for understanding the economics of primitive and archaic societies; indeed, inadequate for handling very much of anything that existed prior to the seventeenth century. This is so, he held, because modern economic theory, whether socialist or capitalist, is essentially the theory of market exchange, and market economies are an aberration in human history. It is not that *markets* were unknown in primitive, archaic, and feudal societies, but simply that it is inaccurate to characterize their economic systems as market economies (and thus inappropriate to analyze their systems solely in terms of the theory of market exchange as developed by modern economists).

Polanyi identified three fundamental forms of economic ex-

change.⁶³ One is *reciprocity*, in which an individual, household, or tribe exchanges goods with others out of mutual social obligations based on friendship, kinship, or some status hierarchy. These exchanges in fact create and maintain a stable supply of goods and services, but they are embedded in underlying social institutions (e.g., kinship structures) that have much broader functions. They are characterized by the absence of profit (hence the name "reciprocity") and lack the familiar supply-and-demand dynamics. Modern economic theory is largely inapplicable to such transactions.

A second fundamental form of economic transaction, according to Polanyi, is *redistribution*, in which producers turn over their goods and/or labor power to some central authority where it is pooled with others and then redistributed. Here the exchange from producer to authority is a product of political or religious obligations, and the redistribution is based on anything from recognized moral, political, or religious principles to the whim of the authority. Again, Polanyi implies, the analytical tools of modern economic theory are largely beside the point.

The third form of economic transaction is *market exchange*. It is this form of exchange—in which individuals or groups offer goods or services to anyone willing and able to pay an acceptable price—with which modern economic theory is designed to deal.

Polanyi acknowledges that all three fundamental forms of economic exchange have existed in all societies of record. But he argues that economic systems as a whole must be classified by reference to which form of exchange is the dominant one, how it dominates the others, and how it is supplemented with the other two types. Helen Codere,⁶⁴ following Polanyi, thus characterizes systems in which reciprocity predominates as *social economies* (because exchanges come predominantly out of the task of fulfilling broader social obligations). Systems in which redistribution predominates are called *political economies*—to bring out the fact that exchanges occur primarily in fulfillment of political obligations. Systems in which market exchange predominates are *market economies*.

Polanyi's contestable historical and normative claims (e.g., that market economies are a recent and rather deplorable aberration in human history) need not concern us here. What is important for present purposes is, first, the fact that his analytical framework fits the available data on primitive, archaic, and modern economies. There are at least these three fundamental forms of economic ex-

change, and recorded economic systems do tend to be dominated by one sort or another, with the remaining ones in subsidiary roles.⁶⁵

The second thing of importance here is the light Polanyi's analysis sheds on the "naturalness" of different forms of ownership—specifically, but by no means exclusively, on the very restricted rights found in many primitive and archaic societies. In this light it is clear, for one thing, that a general argument for the utility of free alienability and transmissibility can be sound only if one assumes the existence of a market economy—or at any rate, only insofar as one assumes a movement toward market exchange of the relevant goods. Social and political economies may require very different arrangements.

It is thus quite unlikely that any general theory of property will include *unrestricted* rights to transfer, for it has long been admitted that the labor theory does not support them,⁶⁶ and I see no way to make the argument from political liberty carry the whole burden of justification (at least in the fact of opposition from the utility argument and nonsupport from the labor theory). The justification, of rights to transfer must therefore take place at the level of specific justification, and the central, *general* truth about such justifications is that they will be controlled by what sort of economy one is faced with.

Some Other Areas of Research

The considerations I have advanced are by no means exhaustive of the moral basis of property, of course. They are intended to reopen an old field, not to enclose it. But some tentative conclusions for property theory can be drawn from them. Before doing that, however, I want to make a few remarks about some areas of research I have not yet mentioned, areas whose results I suspect will one day be very important parts of the moral basis of property rights.

Personality Theory

It has sometimes been remarked that property is necessary for the full development of personality. I say "remarked" rather than "argued" because aside from Beaglehole's criticism of the notion,⁶⁷ I have not been able to find a significant and sustained argument on the subject. What one *can* find is a scattering of remarks, such as Aristotle's contention that property is connected to the development of the virtue of generosity,⁶⁸ and Hegel's suggestion that property acqui-

sition is something natural to the exercise of human freedom and will.⁶⁹ Some work in modern personality theory seems tantalizingly close to such concerns (e.g., on territoriality and "spacing" behavior), but I know of no serious attempt to relate it to property theory.

The result is that when one turns to what is perhaps the most obvious source of data for the moral basis of property—that is; personality theory—one finds very little help. Putting aside Freudian speculation about anal retentiveness and its relations to miserliness, kleptomania, and collecting behavior, it is hard to find material of more than simply suggestive value.

Part of this is no doubt due to the constraints of experimental science. Ways of testing territoriality and spacing behavior virtually suggest themselves. Property rights, however, are evidently much more difficult to deal with.

Even so, one would think that personality theorists could make a direct and significant contribution to property theory. The study of "agency" surely has relevance to the normative problems of liberty. And the development of personality may in fact involve the psychological appropriation of things. I hope that we will see some work of this sort in personality theory soon.

The Theory of Political Development

The results of work in comparative politics—particularly systems and functional analysis—may one day have an important impact on property theory. At present, the results seem too general to be of much use, but I shall indicate briefly where I think the future importance may lie.

Some theorists⁷⁰ have proposed the thesis that the development of political systems from traditional forms (e.g., patriarchy, patrimony, feudalism) through historical bureaucratic empires to modern democratic and authoritarian forms is characterized most fundamentally by ever increasing role and structure specialization, substructure autonomy, and "secularization" of the political culture. If this is so, *and* if the future direction of development can be predicted, then it may be possible to argue for the functional necessity of certain forms of property.

It is of course possible to make functional arguments concerning the *current* situation, but in the absence of defensible judgments about the probable course of development, they are rather weak. They

are vulnerable to the standard normative challenges to preserving the status quo. If other sorts of systems have worked, and are morally better, then why preserve this one?

So the interesting material will come, I think, from the theory of political development. But as I say, the results so far seem to be too general to be of much use for property theory.

Obligations to Future Generations

One final remark before I turn to some conclusions. Work from economics, psychology, ecology, and other sources that bears on the questions of saving and/or providing for future generations will clearly have an important impact on the specific justification of property rights. I refer here not to work that is in itself normative (i.e., that constitutes an argument for or against obligations to future generations), but rather to work that is part of the basis for such normative arguments. What constitutes an economically efficient savings principle, for example? What, if any, foundation does personality theory supply for various versions of the right to transmit? These and other questions, which need answers for other reasons as well, also need answers for the purposes of property theory.

Economic Theory

This is, of course, already addressing the problems of specific justification directly. Arguments about the impact of various property systems on production, or on the economy as a whole, are numerous and illuminating. Hypotheses about the connections between property arrangements and economic development—or socioeconomic institutions—have also been advanced. No philosophical account of the moral basis of property can be complete without taking these matters into consideration.⁷¹

CONCLUSIONS

Perhaps enough has been said, for present purposes, about the substance of what I have called the moral basis of property—enough to indicate its importance to property theory. I want to conclude by drawing some tentative conclusions from the material just presented, conclusions that illustrate the sort of contribution such considera-

tions can make to the general theory of property rights.

Most of the conclusions to follow are in the forms of *rebuttable presumptions*. Considerations drawn from the moral basis of property do not establish normative judgments either directly or conclusively. Rather, they help to establish principles upon which it is reasonable to act in the absence of countervailing evidence. (I shall make no comment here on what would count as countervailing evidence or on the likelihood of its being found.)

The Necessity of Property

The leading conclusion from this survey of the moral basis of property is undoubtedly a presumption in favor of the conclusion that an extensive system of private ownership is a necessary feature of human societies. This conclusion is drawn directly from reflection on the fact that ownership has many varieties, and that, once the wide variety in forms of ownership is recognized, extensive systems of private property appear to be universal. The burden of proof is thus surely on anyone who holds that a propertyless society—whatever that might mean—is a possibility.⁷²

The significance of this presumption is questionable, however. It gives no guidance on the issue of what sort of things (beyond the consumables necessary for survival) should be privately owned and in what way. Further, the varieties of ownership cover such a wide range—from the mere right to use to full ownership—that it is questionable whether the bare presumption in favor of *some* extensive system of ownership advances moral argument at all.

The Possibility of Plurality

Combined with some other conclusions, however, the presumption in favor of the necessity of property begins to look stronger. For one thing, it is clear from the anthropological and historical evidence that there must be a presumption in favor of the “naturalness” and functional adequacy of a wide range of sorts of property systems—even given very similar social and environmental circumstances. Arguments for the functional necessity of a specific sort of property system, no matter how severe the environment or well defined the social conditions, are thus highly unlikely to succeed. One is likely to be able to find examples of similar societies, in similar circumstances,

that managed very well with quite a different system of property rights.

The Presumption Against Full, Exclusive Ownership

However, this general rule, is subject to exceptions. A presumption against full, exclusive ownership of anything other than items produced or purchased solely with one's labor is derivable from the (apparent) absence of such a practice in human history. Private ownership of things other than the products of purely personal labor seems always to be either less than full or less than exclusive.

The Vulnerability of Use Rights

Further, use rights are properly vulnerable to continuous redefinition. The recognition of rights by a social order has the character of a promise—a guarantee that mere utility for an individual or for the social order as a whole will not justify interference with the right holders' liberties, justify a change in their powers and immunities, or justify a change in the duties of others. But promises can be conditional. Just as we all understand that the government's promise to secure to us the right to our income is subject to the condition that taxes may be levied, so too the promise of the right to use must usually be understood as subject to conditions. One such condition (always present, though defined in widely divergent ways) is the prohibition of harmful use. But the virtual ubiquity with which use rights are subject to other conditions (e.g., the possibility of rezoning) shifts the burden of proof to those who wish to establish a stronger sort of use right.

The Labor Principle

A strong presumption in favor of securing to laborers some fairly extensive property rights over the fruits of their labor is clear. This too is a universal practice that puts the onus of proof on its opponents.

The Possibility of Reciprocity

In potential conflict with the labor principle, however, is support from exchange theory for the contention that the antiproperty arguments from inequality and disutility must be weighted very heavily in

specific justification. The functional importance of maintaining the capacity for reciprocal exchanges among all members of a society and the role property rights obviously can play in this task, enhance the importance of those antiproperty arguments.

The Nature of Property Theory

Undoubtedly other conclusions could be drawn from the material here presented, but I shall content myself with one final remark. The problems of specific justification reveal themselves here as *doubly* subordinate. They are, of course, subordinate to the results of general justification through what I have called the compatibility requirement—that is, the requirement that specific forms of property must be compatible with the requirements placed on all ownership by the general justifications of property rights. But the evidence from the theory of economic systems suggests that specific justification is subordinate in yet another way—subordinate to prior normative decisions about the fundamental nature of the economic system. The type of economic system one wants to maintain (whether a social, political, or market economy, for example), will obviously be a decisive factor in many aspects of specific justification. (Free alienability, for instance, is required by market exchange). The possibility of getting a prior justification of specific forms of property which would then determine decisions about the fundamental nature of the economic system seems so remote as to be negligible. I have elsewhere⁷³ carefully considered the inventory of arguments for property rights, and I find no glimmering of an argument that could be that powerful *at the level of specific justification*. It seems more than likely, then, that progress with specific justification will be helped not simply by the considerations I have labeled the moral basis of property; it will *depend* on such considerations—particularly those drawn from comparative economics and politics.

NOTES

1. A remark on my use of the term "moral." By a moral argument I mean an "all-things-considered" argument—one not limited to considerations of prudence alone or duty alone or utility alone, but one that includes all such considerations (as well as any others that are relevant). Secondly, of course, a subsidiary argument, taken *as a part* of such an "all-things-considered" approach will often be referred to

as a moral argument. Whether the concept of morality implicit in this usage is a defensible one in terms of ordinary and/or philosophical language does not concern me here. (I have argued elsewhere that it is. See "The Finality of Moral Judgments," *Philosophical Review* 82 [1973], pp. 364-71.) All-things-considered arguments, at any rate, are what moral philosophy must ultimately concern itself with. The moral basis of property, then, consists of all those facts about the human condition that are relevant to an all-things-considered argument for or against property rights.

2. By "traditional theorists" I mean those writers on property who lived and wrote before the emergence of modern social anthropology in the first decades of the twentieth century.
3. Ernest Beaglehole, *Property: A Study in Social Psychology* (London: George Allen & Unwin, 1931).
4. E.g., the scarcity of goods; the limited generosity and altruism of humans; and their relative equality. See Thomas Hobbes, *Leviathan*, chaps XIV and XV; and the elegant summary by H. L. A. Hart in *The Concept of Law* (Oxford: Clarendon, 1961), pp. 189ff.
5. Epicurus, *Principal Doctrines* XXIX. His remark there concerns desires, not property.
6. I have covered these matters in more detail in chapter 2 of *Property Rights: Philosophic Foundations* (London and Boston: Routledge & Kegan Paul, 1977). In some respects I think the brief treatment here is superior to the one in the book. Here, for example, I have improved the list of elements.
7. A. M. Honoré, "Ownership," in A. G. Guest, ed., *Oxford Essays in Jurisprudence, First Series* (Oxford: Clarendon, 1961), pp. 107-47.
8. Throughout this paper I shall use "modern society" to refer to postmedieval societies of a large scale, whether industrialized or not. "Archaic societies" refers to those of ancient Greece Rome, Egypt, the large-scale ancient societies of the Near and Far East, and comparable societies in the Americas (e.g., the Incas) and Africa (e.g., Dahomey). "Primitive" is a term of convenience, and one that has had an ugly history. But the alternatives anthropologists have proposed (e.g., preliterate, nonliterate, peasant, small scale, and so on) are all equally misleading as attempts to refer to that group of small-scale, nonindustrialized, mostly nonliterate, mostly non-money-economy societies to which I want to refer. I trust the imprecision and (unintended) derogatory connotations of "primitive" will be offset by the usefulness it has by reason of familiarity.
9. I shall use the Hohfeldian categories of rights, somewhat renamed. "Claim rights" entail the existence, for specifiable others, of definable duties with respect to the right holder. "Liberty rights" entail only the absence of claim rights against the right holder. "Power rights" correlate with liabilities in others; "immunity rights" correlate with disabilities. For W. N. Hohfeld's presentation of the distinctions, see his *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

10. This right (consumption and/or destruction) plus the next two (modification and alienation) are all grouped together by Honoré under the heading, "the right to the capital." In *Property Rights*, I followed his usage, but I have since come to believe that it is advantageous to split up the category. One has read, for example, of a tribe in which certain timbers for the building of huts may not be modified by the owner even though they (apparently) may be alienated.
11. I have here retained Honoré's title for the element but have changed the exposition. See his in "Ownership," *op. cit.*, pp. 126-28.
12. There are $2^8 - 1$ (i.e., 255) combinations of the first 8 elements. Each of these may either stand alone with the right to security or be combined with any subset of the remaining 4 elements. There are thus 2^4 (i.e., 16) variations possible on each of the 255 combinations ($16 \times 255 = 4,080$). This number should not be taken too seriously, of course. There is some arbitrariness in dividing ownership into 13 (or 11, 9, or 15) elements. And each element may be defined in various ways as well. The important point is simply that there are *very many* varieties of ownership no matter how the concept is cut up.
13. The substance of this section is a summary of chaps. 3 through 9 of my *Property Rights*.
14. Rawls says, for example, that he claims priority for liberty only in the case of modern industrial societies. See *A Theory of Justice* (Cambridge: Harvard Univ. Press, 1971), pp. 541-48.
15. The general theory of property includes, but is not limited to, the general justification of property rights. The general theory also includes work on the coordination problem, the compatibility requirement, and whatever can be said "in general" about specific and particular justification.
16. See my attempt in chap. 9 of *Property Rights*.
17. I have argued at length for the general applicability of this method of justification to the problems of moral skepticism in *On Justifying Moral Judgments* (London and New York: Routledge & Kegan Paul and Humanities Press, 1973).
18. See, for example, the relevant discussion in Ch. Letourneau, *Property: Its Origin and Development* (New York: Charles Scribner's Sons, 1896).
19. See *ibid* for a combination of the two.
20. For an attempt to rebut the modern anthropologists' interpretation of the evidence, see William Seagle, *The Quest for Law* (New York: Knopf, 1941), chap. 5, pp 50-57.
21. W.H.R. Rivers *The Todas* (London: Macmillan, 1906).
22. Bronislaw Malinowski, *Crime and Custom in Savage Society* (New York: Harcourt, Brace, 1926).
23. Particularly the work of Raymond Firth and Melville Herskovits.
24. For a fairly late legal account that is conceptually unsophisticated in comparison with the anthropologists working at the same time, see A.S. Diamond, *Primitive Law* (London: Longmans, Green, 1935), Chap. 24, pp. 260-76.

- 25 Both Seagle, *The Quest for Law*, and Diamond, *Primitive Law*, perpetuate this mistake.
26. See the excellent summary of the data in Melville J. Herskovits, *Economic Anthropology* (New York: Knopf, 1952), with the "universality conclusion" on pp. 326-29. Herskovits's theses about the economic functions of property are highly contestable. He does not, for example, take account of Karl Polanyi's work (see references, n. 62, below). But his summary of the raw data is admirable.
27. A. Irving Hallowell, "The Nature and Function of Property as a Social Institution," *Journal of Legal and Political Sociology* I: 115-38 (1943), and reprinted as chap. 12 of his *Culture and Experience* (Philadelphia: Univ. of Pennsylvania Press, 1955), pp. 236-49. The quotation here is from pp. 246-47 of the reprint.
28. Herskovits, op. cit., chaps. 15 and 16.
29. See Raymond Firth, *Social Change in Tikopia* (London: George Allen & Unwin, 1959), p. 159.
30. Herskovits, op. cit., reference to the Eskimos on p. 372.
31. For an excellent summary of these matters, beginning with English feudal law, see Thomas F. Bergin and Paul G. Haskell, *Preface to Estates in Land and Future Interests* (Brooklyn: Foundation, 1966).
32. Witness the growth of land use and planning law, the income tax, antitrust law, inheritance taxes, and so forth.
33. "Other elements of social organization" here include kinship and marriage structures, legislative and judicial processes, and the like. What counts as a necessary element of social organization is a matter of some debate. But it is enough for my purposes to take just those that are universal (as far as we know) in societies that have survived for several generations.
34. By "property theory" I mean attempts to justify or disjustify property rights—whether at the general, specific or particular level. I do not include attempts to explain or describe the existence of various property rights. Some of the descriptive and explanatory material does involve itself with these issues. See Ernest Beaglehole, op. cit.
35. See Beaglehole, op. cit., parts II and III.
36. In the latter part of the nineteenth century, in fact. See P. Kropotkin, *Mutual Aid, A Factor of Evolution* (New York: Knopf, 1922). Originally published in the 1890s as a series of articles.
37. See Edward O. Wilson, *Sociobiology* (Cambridge: Harvard Univ. Press, 1975), chaps. 11 and 12.
38. See *ibid.*, chap. 12, for a summary of the animal data; and Edward Hall, *The Hidden Dimension* (New York: Anchor Books, 1969), for the material on individual distance as applied to humans.
39. See Abraham Maslow, *Motivation and Personality* (New York: Harper, 1954).
40. See Irenäus Eibl-Eibesfeldt, *Love and Hate: The Natural History of Behavior Patterns* (New York: Holt, Rinehart & Winston, 1971).
41. See Robert L. Trivers, "The Evolution of Reciprocal Altruism," *Quarterly Review of Biology* 46, no. 4 (1971), pp. 37-57; and the

- summary in Wilson, *op. cit.*, chap. 5.
42. "Potlatch" is the name given to a practice—common among some tribes of American Indians in the Pacific Northwest—of large-scale ceremonial distribution of goods. The recipients were obligated to take gifts and give something even greater in return at a potlatch of their own. See Philip Drucker, "The Potlatch," in George Dalton, ed., *Tribal and Peasant Economies: Readings in Economic Anthropology* (Garden City, N.Y.: Natural History Press, 1967), pp. 481–93. This article is reprinted from Drucker's *Cultures of the North Pacific Coast* (Chandler, 1965), pp. 55–66.
 43. The Kula exchange, an intricate, obligatory passing of gifts among the Trobriand Islanders, is described by Malinowski in "Kula: The Circulating Exchange of Valuables in the Archipelagoes of Eastern New Guinea," first published in *Man*, no. 51 (1920), pp. 97–105, and reprinted in Dalton, ed., *Tribal and Peasant Economies*, pp. 171–184.
 44. *Ibid.*
 45. Here I am relying on Peter Ekeh, *Social Exchange Theory: The Two Traditions* (Cambridge: Harvard Univ. Press, 1974). For an argument to the effect that reciprocity (the basis of Blau's theory of exchange as summarized below) is a universal moral demand, see Alvin W. Gouldner, "The Norm of Reciprocity: A Preliminary Statement," *American Sociological Review* 25 (1960), pp. 161–78.
 46. The Kula exchange is like this. Other types of generalized exchange identified by Ekeh are two forms of what he calls "net" (as in network) generalized exchange. One is focused on individuals: in a series of transactions, ABCD give to E; ABCE give to D; ABDE give to C; ACDE give to B; and BCDE give to A. Think of farmers helping each other in turn at harvest time. The other form of net generalized exchange is focused on groups. Again in a series of transactions, A gives to BCD; B gives to ACD; C gives to ABD; and D gives to ABC. (Think of each member of a bridge club entertaining the whole group.) In each case, just as in chain generalized exchange and in "restricted" or "mutual" exchange between two parties, reciprocity can be achieved. See Ekeh, *op. cit.*, pp. 51–54.
 47. Although "collectivist" exchange theory is not as clear to me as I would like, and consequently I feel uneasy about commenting on it further, its proponents do not appear to deny that what they call "restricted" exchange—that is, mutual exchange between two parties, whether groups or individuals—does function in the way described by "individualist" theorists (below).
 48. See Peter M. Blau, *Exchange and Power in Social Life* (New York: John Wiley, 1967).
 49. Herskovits, *op. cit.*, pp. 372ff.
 50. See Herskovits, *op. cit.*, chap. 17.
 51. I can find no specific references to such work, for example, in the past forty-five years of *The International Index of Social Science Periodicals*.

52. E.g., Herkovits, op. cit., p. 380.
53. Beaglehole, op. cit., p. 300.
54. See Malinowski, *Argonauts of the Western Pacific* (London: George Routledge and Sons, 1922).
55. Firth, op. cit., p. 159.
56. Hugo Grotius, *De jure belli ac paci*, translation of the 1646 edition by F. W. Kelsey and others (Oxford: Clarendon, 1926), II, II, XI.
57. One should not suppose that it is only rights to the means of production that are typically limited in this way. Nuisance law in developed societies, and less formal prohibitions in primitive societies, show that use rights over even the most personal sorts of property are restricted.
58. Herskovits, op. cit., references to the Eskimos.
59. Firth, op. cit., p. 159.
60. See, for illustrative material, Bergin and Haskell, op. cit.
61. For a review of the practices of primitive societies, see Beaglehole, op. cit., pp. 244-47. Bergin and Haskell, op. cit., contains material on English feudal law.
62. The most convenient source for the material presented here is George Dalton, ed., *Primitive, Archaic and Modern Economies: Essays of Karl Polanyi* (New York: Anchor Books, 1968). Dalton provides a lucid introduction and bibliography. For some of the empirical support for Polanyi's analytical framework— as well as much of the theoretical material itself—see Karl Polanyi, Conrad M. Arensberg, and Henry W. Pearson, eds., *Trade and Market in the Early Empires* (New York: The Free Press, 1957).
63. Economic exchange means the exchange of material goods (or money) and productive services. It should not be confused with *social* exchange, which is sometimes treated as all exchange other than economic, but which in my view is better regarded simply as exchange per se—of which economic exchange is a part. The reason I favor the latter course is that otherwise economic exchange tends to be identified too closely with market exchange, much to the confusion of all.
64. Helen Codere, "Exchange and Display," *International Encyclopedia of the Social Sciences* (1968).
65. For one who reads extensively in economic anthropology first, as I did, Polanyi's analysis is both revelatory and utterly convincing. The work of Durkheim, Rivers, Malinowski, Mauss, Firth, Herskovits, and others is beautifully synthesized by it. The general outline of Polanyi's position is perfectly consistent with their *data* (though not always with their speculations about their significance), and makes sense of them in a way that the anthropologists themselves do not. The same is true of the criticism of Polanyi (and followers) which I have read: it does not challenge the usefulness of the analytical framework. It challenges the polemical character of the presentation and the claim that modern market analysis is largely inapplicable to primitive and archaic societies. See, for example, Edward E. LeClair, "Economic Theory and

- Economic Anthropology," *American Anthropologist* 64 (1962), pp. 1179, 1203.
66. See Becker, *Property Rights*, chap. 4.
 67. Beaglehole, *op. cit.*, part III.
 68. Aristotle, *Politics* at 1263b.
 69. G. W. F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: Clarendon, 1942), pp. 37-41.
 70. Specifically, Gabriel A. Almond and G. Bingham Powell, Jr., *Comparative Politics: A Developmental Approach* (Boston: Little, Brown, 1966).
 71. For a useful overview of some of these matters, see Frederic L. Pryor, *Property and Industrial Organization in Communist and Capitalist Nations* (Bloomington: Indiana Univ. Press, 1973), chap. 9, pp. 336-74.
 72. It might be wondered whether this method of argument—from the existence of a universal practice to a normative presumption in favor of it—has embarrassing results with respect to male supremacy. It does not. If it can be shown that the social position of women has everywhere, in every society of record, been inferior to that of men, then there is indeed a rebuttable presumption in favor of such practices. But I take it as settled that any such presumption has long since been destroyed (e.g., by reference to existing and historic social circumstances that make the subordination of women dysfunctional, and by reference to the injustices done to individuals by such practices). And of course it is far from clear that male supremacy is a universal practice. As has been pointed out even by one who is basically unsympathetic to modern feminism, the data on the position of women in primitive and historic cultures are largely unreliable. See E. E. Evans-Pritchard, *The Position of Women in Primitive Societies and Other Essays in Social Anthropology* (New York: The Free Press, 1965), pp. 37-58, at pp. 38-43.
 73. Becker, *Property Rights*.