

Scarcity, private property rights and social norms

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I

Robbins' definition of economics as 'the science which studies human behaviour as a relation between ends and scarce means which have alternative uses' was, and continues to be, controversial.¹ Whether or not modern economists accept Robbins' definition of economics, however, they take 'scarcity' for granted. Although it is easy to think of scarcity as a natural fact of life, it wasn't until the latter part of the nineteenth century that economists systematically developed the concept of generalised scarcity, according to which, if prices reflect marginal social costs and benefits (as in a perfectly competitive model without externalities), all positively-priced goods are scarce, with zero-priced goods as non-scarce and negatively-priced goods as 'bads'. Older ways of thinking about scarcity in terms of specific scarcities or local shortages had noted that goods in relatively short supply would experience a rise in price or would have a high price relative to goods not in short supply, whereas according to the understanding of generalised scarcity all positively-priced goods are scarce, not only those whose price has risen or is high relative to other goods.² The analytic development of the concept of generalised scarcity, according to which the function of prices in reflecting or measuring relative scarcities was to allocate goods and resources according to a criterion of allocative efficiency, was a mark of the development of a specifically modern form of economics. It was a development that was also conducive to a view of economic agents as rational maximisers subject to constraints.

Associated with this development of the concept of generalised scarcity there has also been a long tradition of inquiry into the relation between property rights, notions of scarcity, and prices. It has long been recognised that markets presuppose property rights in traded goods and services, and that private property can generate incentives that are conducive to economic effort. There was an extensive debate within the natural law tradition about the relation between property and economics, and philosophers such as Hume recognised that private property relations presuppose scarcity. In the twentieth century economists analysed the efficiency implications of

¹ L. Robbins, *An Essay on the Nature and Significance of Economic Science*, Macmillan, 2nd edn., p. 16.

² V. Brown, 'Value and property in the history of economic thought: an analysis of the emergence of scarcity', *Oeconomia* (1987), no. 7, série P.E. de la revue *Économies et Sociétés*, pp. 85-112.

private property in the presence of externalities by showing how it can internalize those externalities. For example the development of the property rights paradigm involved working through the implications for the allocation of resources of different property rights regimes and their transactions costs, and it emphasised the efficiency gains from the extension of private property rights in internalising externalities.

The conception of generalised scarcity and its relevance for analysis of markets, property rights and externalities has been given added impetus for us now in the twenty-first century with the recognition of global warming and the realisation that the environment constitutes one huge externality for economic activity. In some respects it might seem as though the problem of scarcity is being overcome by increasing affluence; or at least this might be thought to be partially true for parts of the developed world. In other parts of the world the problems of old-fashioned scarcity – as brute shortages – are as endemic as ever. From an environmental point of view, however, we could say that globally the problem of scarcity is worsening: we can no longer regard the global commons – the air, the biosphere, the oceans, the great forests – as a free good in an economic sense, and the environmental externalities of ordinary everyday economic activities are cumulative in a way that are potentially threatening for life systems on this planet as we know it. When Robbins remarked that ‘nature is niggardly’,³ he made it clear that it is so only in relation to the human demands made upon nature. As human demands upon the resources of the planet continue to increase it is arguable that this kind of ‘global scarcity’ is increasing too, and this has raised again in an acute form questions about the mix of private, collective and state provision and/or regulation of goods, services and economic activities subject to externalities.

This brief overview of some basic background assumptions about the interconnections between scarcity and private property is intended to highlight the centrality of such assumptions for economics and their increasing significance in the twenty-first century. What I shall attempt to do in this paper is to raise some questions about the conception of private property rights that underpins such assumptions and then to consider some possible implications of this for economic analysis.

³ Robbins, *Essay*, p. 13.

II

What is meant by a private property right? This is subject to debate by legal philosophers. One approach suggested by Jeremy Waldron is to differentiate between the abstract concept of property as a socially sanctioned and protected system of rules for the allocation of access to material (and immaterial) resources, and the particular conceptions of property and private property in terms of specific bundles of rights in different societies.⁴ The core right for this bundle of rights, however, is agreed to be that of an 'exclusive right' to the use and enjoyment of the resource in question. In the terminology of Wesley Newcomb Hohfeld, this core right is a 'claim-right'.⁵ A claim-right is a right not for the right-holder to perform some action but a right that some other person performs or forbears some action, so that the other person is under a duty to do that thing. For this reason a claim-right is sometimes called a passive rather than an active right. As Hohfeld argued, X's claim-right that Y perform ϕ is logically correlative to Y's duty to X to perform ϕ , such that the action specified by the claim-right is the action of the duty-holder not of the right holder. An example of this would be the case where X is Y's creditor: X's claim-right that Y repay a loan entails Y's duty to repay the loan to X. It is for this reason that it is sometimes said that it is meaningless to talk of rights without specifying the correlative duties: it's not just that a right should be or needs to be accompanied by a duty, but rather that to talk of X's right logically entails that someone has a corresponding duty to X.

Thus, to summarise, if the essential element of a private property right is a claim-right then X's property-right in some item, *P*, essentially includes X's claim-right that Y has a duty not to interfere with X's use and enjoyment of *P*. According to this view a private property right is conceptualised in terms of the correlative duty that it imposes on others not to interfere, so that the protection of private property is given by that correlative duty.

⁴ Jeremy Waldron (1998) *The Right to Private Property*, Clarendon Press: Oxford, esp. ch. 2

⁵ W.N. Hohfeld (1923) 'Some fundamental legal conceptions as applied in judicial reasoning' in W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Essays*, (ed) W.W. Cook, Yale University Press: New Haven; first published *Yale Law Journal*, 1913.

This correlative feature of the claim-right that supports the notion of private property may also be illustrated by Hohfeld's scheme of rights which is defined in terms of mutual relations of correlativity and negation. According to Hohfeld there are two (first-order) rights: a claim-right and a privilege (sometimes termed a liberty).⁶ A privilege is the absence of a duty. I have a privilege to take breakfast in the morning because there is no duty on me not to do so. Similarly my right to walk along the Strand in London is a privilege in the sense that I have no duty not to do so. I may therefore do anything that I have no duty not to do. Whereas a claim-right is directly protected by the correlative duty, there is no direct protection for a privilege. Others don't have a duty not to stop me from walking down the Strand, but my doing so is protected – or ringfenced – by duties that others do have, not to obstruct the way or offer force against me, and so on. The logical relation between a claim-right and a privilege is given according to mutual relations of correlativity and negation, analytic relations that define Hohfeld's scheme:

Hohfeld's scheme of legal relations: claim-right and privilege/liberty

Right (claim-right)	Privilege / liberty (no duty)
Duty	No-right

The vertical relations in this table are correlative relations: that is, claim-right and duty are correlative terms and so are privilege and no-right (a Hohfeldian neologism). The diagonal relations in the table are relations of negation or opposition: that is, a duty is the negation of a privilege (no duty) and a no-right is the negation of a claim-right.

This analysis of a claim-right and the conception of a private property right as comprising a claim-right held against others has been enormously influential, not only for legal analysis but also for political philosophy. Although Hohfeld's scheme has

⁶ The second-order rights are powers and immunities.

been subject to criticism there have also been influential and comprehensive defences of its analytical coherence and importance.⁷ I don't think it's an exaggeration to say that it is the reigning orthodoxy in legal and political analyses of rights including private property rights.

There are a number of important implications, it seems to me, of this conception of a private property right. This conception of private property underlies the notion that property rights are comprised of relations between individual agents. It thus sustains the argument that private property is a natural right, since as property rights are relations between individual agents they are independent of the formation of political society. Such rights might be more secure within political society since the power of the state can be used to enforce the correlative duties, although the state is then also seen as a potential source of invasion of property rights which must be guarded against, but property rights themselves can be established in a state of nature and so are more fundamental in some sense than the institution of the state and political relations. This in brief is the natural rights tradition that is taken to derive from John Locke's *Second Treatise of Government*, although it is a moot point as to whether this leaves out crucial elements of Locke's own account. This conception of private property therefore sustains the argument that relations between individuals are more fundamental than the institution of a political or social framework, and so it provides a theoretical foundation for forms of methodological individualism which render the social context for individual action as secondary or perhaps even irrelevant for analysing individual action. Although it is accepted that in practice agents do live within a social context – there must be more than one agent for a correlative rights relation to be relevant – the social, cultural or political quality of such context is held to be of scant significance. This conception also sustains the notion of property rights as the expression of autonomous agency, such that in exercising their property rights individuals are expressing something essential about the autonomous nature of human agency rather than its sociality or political embeddedness. It thus also sustains the perception that any social or political requirements that are actually made with respect to the use of property are strictly speaking 'external' restrictions on it, invasions on or infringements of the use of property and hence potentially a threat to or a diminution

⁷ See for example the debate in M.H. Kramer, N.E. Simmonds and H. Steiner (1998) *A Debate over Rights*, Oxford University Press.

of the exercise of independent agency. And finally, it treats property as intrinsically independent of wider normative context. Although property is necessary for society's functioning, society itself and the wider normative frameworks that are constitutive of it thus function rather like money in a perfectly competitive model: although in one sense they are recognised as practically necessary, theoretically they turn out to be redundant.

I would like to question this conception of private property rights and to trace some possible implications of an alternative approach to conceptualising private property.

III

Elsewhere I have challenged the analytic coherence of Hohfeld's scheme of legal relations.⁸ Although the shining virtue of Hohfeld's scheme is meant to be its analytical rigour in introducing conceptual order into the messy language of rights, I have argued that it is liable to the criticism that it conflates two different senses of negation or contradiction: the negation of someone's having a right (whether X does or doesn't have a right) and a negation of the right that someone has (whether what X has is a right or a no-right). Following through this critical analysis leads to a greater array of rights, I argue, since, as each negation can be understood in two different senses, there are four rights, not two.⁹ A further implication is that Hohfeld's interlinked logical scheme of correlativity and negation no longer holds. Extending the scheme in this way, however, is fruitful for debates about rights, I argue, because it enlarges the conceptual resources available for analysing rights, liberties and duties. It also brings academic discussion of rights more in line with ordinary rights talk for which the notion of a protected active right is central.

For the purpose of this paper I'd like to concentrate on just one of these additional rights, a directly protected 'permission' or a 'liberty-right' to do something.¹⁰ As noted above, it is a curious feature of Hohfeld's scheme that there are no active rights

⁸ V. Brown (2005) 'Rights, liberties and duties: reformulating Hohfeld's scheme of legal relations?', in *Current Legal Problems*, vol. 58, (eds) J. Holder and C. O'Conneide, Oxford University Press, pp. 343-67.

⁹ Again, ignoring second-order rights.

¹⁰ Strictly a 'general' liberty-right to differentiate it from a correlative liberty-right.

which have direct protection in not relying on the duties that other agents have. In Hohfeld's scheme the active rights (to do something) are the privileges, but these are not directly protected. Claim-rights are directly protected (by the correlative duty), but the right is not that X may do something; the right is that others have a duty not to interfere with X's doing something. The permission or liberty-right that I identify is however both protected and an active right: X's permission or liberty-right to do something is protected by the fact that X's action is expressly permitted, and it is an active right in the sense that what is permitted, the content of the right, is X's action.

The relevance of all this to the question of private property is that I'd like to suggest that this notion of an active permission or liberty-right functions better as a conception of a private property right than a claim-right does. Part of my argument is that this is the concept of a private property right that John Locke uses in his argument in the *Second Treatise of Government*.¹¹ Scholars have tended to interpret Locke's concept of property in the state of nature in terms of a claim-right because they have accepted that Hohfeld's scheme provides the only rigorous conceptual framework for interpreting property rights: as a property right must be protected it can't be a privilege so it must be a claim-right. In fact, though, this has led to considerable difficulties of interpretation, with scholars debating whether rights or their correlative duties are more fundamental for Locke's theory.¹² A difficulty here is how to take account of the religious (Christian) dimensions of Lock's *Second Treatise*. Although Locke's arguments have been secularised in the appropriation of his writings for a later liberal tradition, his arguments in the *Second Treatise* are reliant upon God's generosity in providing the material means of mankind's survival in the state of nature, and it is the law of nature (= God's law) that provides the normative framework for the state of nature.¹³ If my revision of Hohfeld's scheme is accepted, however, the notion of a property right in Locke's *Second Treatise* corresponds to a

¹¹ V. Brown, 'Locke, Hohfeld and private property', in progress.

¹² See eg the discussion at A.J. Simmons (1992) *The Lockean Theory of Rights*, Princeton University Press, ch. 2.

¹³ For different approaches to the religious aspects of Locke's writings see eg J. Dunn (1969) *The Political Thought of John Locke*, Cambridge; J. Tully (1980) *A Discourse on Property: John Locke and his Adversaries*, Cambridge; A.J. Simmons (1992) *The Lockean Theory of Rights*, Princeton University Press; J. Waldron (1998) *The Right to Private Property*, Clarendon Press: Oxford, esp. ch. 6, and *God, Locke and Equality*, Cambridge; and V. Brown (1999) 'The "figure" of God and the limits to liberalism: a rereading of Locke's *Essay* and *Two Treatises*', *Journal of the History of Ideas*, 60: 83-100.

permission or protected liberty-right, since it is a permission granted within the framework of the law of nature to use and enjoy the material means of preservation. The protected exclusivity of this right is given, not by correlative duties on others, but by the fact that no one else has a right to what a rightful owner takes as his own.

This conception of a property right may be compared with the conception as a claim-right by contrasting it with the features of a private property right outlined above. A permission derives from and hence is a part of a normative system, whether that normative system is related to tradition, social convention, family or tribal jurisdiction, or a formal legal system. This private property right is thus conceptualised in terms of a social and normative system, not independently of such systems. It is thus inhospitable to the view that property is, or could be, a natural right independent of social or political context. Private property owners are constituted within a social and normative context so that human agency as such is social, even when individually or ‘autonomously’ exercised. This implies that even human ‘autonomy’ has to be expressed in terms of the needs and norms of human sociality.

As a consequence, social requirements or constraints with respect to the use of private property are not necessarily ‘extrinsic’ to the nature of the property right itself, and so they are not necessarily invasions or infringements of that right. Whether or not they are depends on the terms of the permission since some social conditions or expectations relating to that permission are intrinsic to the property right itself. Such an approach thus sustains a substantive notion of normative context whose social, cultural or political qualities are significant for understanding particular forms, uses and expectations of property. There is thus no necessary antinomy between the ‘private’ and the ‘social’ with respect to private property since private property rights are constituted as part of a social and hence normative order.

IV

Thus I’m arguing that private property rights might be conceived as socially constituted by normative frameworks or systems which grant, sustain and protect the permissions that are the property rights. An effect of this reconceptualisation of private property rights is that it *internalises* a normative dimension within the concept

of private property right. This thus challenges the received understanding of the exercise of private property rights in terms of which it is rational for agents to operate solely in terms of calculations of self-interested advantage and without consideration of normative or wider social issues which are conceived as extrinsic to the private property right itself.

What might be some implications of this for economic analysis?

First, it has implications for the conception of economic agency. As has been noted many times, economic agents are not well endowed with social attributes. To some extent economic agents are theorised simply in terms of being the bearers of the economic functions they perform, and this has led to the notion of *homo economicus* as someone who is motivated solely to maximise self-interest. In contrast the reconceptualisation of private property proposed here helps to blur the boundary between the agent and the social and normative context within which the agent functions. As a property owner an economic agent's role is partly socially constructed so that even the sense of 'self-interest' includes a social dimension. As a clarification and to avoid a possible misunderstanding, it should be emphasised that I'm not importing an ethical notion into the argument in the sense of an individual morality or private conscience. It is a standard economist's argument that faced with a choice between acting ethically and responding to financial incentives it is the latter that wins out, so that ethical solutions cannot be relied upon for social problems. What I'm suggesting is that some norms concerning private property are intrinsic to the conception of private property itself, so that acting in accordance with such norms isn't a case of relying on individual morality or private conscience but rather is acting in accordance with recognised social practice or socially accepted standards of responsible ownership. This raises questions of what might be meant by socially responsible ownership. As a social norm it is fluid and historically changing, influenced by many factors including public debate and education.

Second, incorporating a normative dimension for the conception of economic agency might suggest a broader and more socialised conception of what constitutes 'rational' behaviour. For example, in taking on board some of the social consequences of individual behaviour it might also include a greater responsiveness to the implications

of cooperative behaviour. The notion of 'self-interest' could be broadened to include a cooperative understanding of self-interest in contrast to an individualistic understanding of it. This might provide a fresh approach to analysing forms of cooperative behaviour that are hard to model using an individualistic notion of self-interest, such as experimental results in prisoners' dilemma games where agents play co-operatively and thereby further their self-interest.

Third, it might provide some new insights into the analysis of externalities. According to the standard analysis the economic function of the extension of private property is to internalise externalities by subjecting what were formerly social costs and benefits to a private calculus of maximisation. With social costs and benefits thus transformed into private costs and benefits, rational behaviour in maximising private returns results in the maximisation of social returns. In the face of new externalities caused by changes in technology and relative prices, so the argument goes, the extension of private property rights over what was formerly owned in common results in an increase in economic efficiency. But this analysis is changed if the conception of private property is one that internalises a normative or social dimension. That is, if the conception of private property internalises a normative dimension then this might itself provide a means of addressing the externality. If the permission that is the property right includes, even implicitly, norms and conventions on responsible ownership, then the issue of externalities might already be internalised to some degree without need for further privatization. What this is suggesting is that private property isn't seen solely as a means of maximising financial returns but is also imbued with social functions or implicit responsibilities that incline owners towards a more socially responsible form of behaviour that would take externalities into account. This might even provide a more economical method of addressing externalities since, if agents act so as to reduce externalities without formal measures being taken and without extensions of private property rights, transactions costs would be reduced.

Finally, this conception of private property rights might also suggest a different understanding of the economic relation between individuals and the state. According to the conception of private property as essentially a claim-right that others, including government agencies, keep off, *any* government regulation or taxation is in principle an infringement of the rights of private property. This makes it harder to explain the

extent to which regulations and taxation are in fact accepted in social democracies. It might be that citizens calculate that their own self-interest is best served by the government regulations and taxation. For example, they might calculate that their own individual access to health provision, education, public transport services and so on is best facilitated by public provision. But citizens don't only take into account their own private self-interest in their acceptance of government programmes; there is also a recognition of the broader responsibilities that attach to citizenship. This is also evident in relation to environmental issues where there some citizens seem to be ahead of their governments in accepting the need for stronger regulation to reduce greenhouse emissions. This is more explicable in terms of a conception of private property rights that internalises a social perspective since in this case such regulations and taxation are not in a relation of exteriority to the private property but are part of a broader 'package' comprising the rights and responsibilities that are intrinsic to the notion of private property.

V

Let me try to pull some threads together.

Generalised scarcity is a function of a system of economic relations; it is endogenous to the economic system. Affluence hasn't resolved the problem of scarcity. If anything, the problem of scarcity – in the sense of 'global scarcity' as the erosion of the global commons – has become more acute since Robbins wrote. The environment too has become endogenised; it has become an economic and social issue. Yet the conception of private property is understood primarily in individualistic terms, essentially as a claim-right held by the owner against others not to interfere. The extent to which this understanding of a private property right is a specifically modern phenomenon is something that lies outside this paper. But what this paper suggests is that the notion of private property rights as claim-rights is inappropriate, and perhaps increasingly so in a world of increasing global scarcity. The paper has suggested an alternative conception of a private property right as a protected permission. This has the advantage that the conception of a private property right is now rooted in a social framework of norms. It thus provides a conceptual space for recognising the social and normative embeddedness of economic agents, especially in a world of increasing global scarcity.

