

THE SPIRIT OF PROPERTY

by
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According to the legal scholar, Stephen Munzer (1990), there are two relevant connections between property and law: the psychological connection, consisting of the set of expectations people have, and the social connection, being the congruence of most expectations with efficacious legal systems. So in instances of societies with “efficacious” legal systems property is stable, irrespective of culture or ethnic distinctions, because of reciprocal relationships between peoples' expectations and the administrative apparatus set up to protect legitimate expectations.

There are many occasions of stable property relations without the type of social connection Munzer describes. This paper is directed to those settings. The literature regarding property is really quite vast, and for the purposes of this paper I will confine my discussion to a few empirical settings and a few prominent reviews of the literature by scholars of various disciplines. I will argue that the theory synthesized from critique of this literature need not be limited to these situations but is in fact a general theory of social order. So, what scholarly examples have we of theories and descriptions of property rules where the state is only one of many sources of expectations about the creation of property? What critique and theory can we synthesize from the selected examples? These are the tasks of this paper.

A Preliminary Theoretical Framework

It seems to me that epistemologically there are two main brands of explanation for the social sciences. Leaf (1979) refers to these traditions as dualist and monist (more commonly for our particular example “rationalist” and “skeptical”) and he lays out the history of the two traditions providing empirical and theoretical examples of each in the hands of respected social scientists and philosophers. Here I will only provide a brief discussion of differences between

dualist and monist accounts of social order and I rely heavily on Leaf's discussion (18-37).

Two initial examples are taken from Hobbes and Montesquieu as they represent distinct approaches to psychology and interaction in the description and theorization of social order. Hobbes' version of the social contract is to view civil society as an agreement between citizens and the state. His is the first system aimed specifically at the state, a social organization, rather than at law in general or at the conduct of rulers. When Hobbes identifies civil society as an "enclosure" of rights he introduces a critical assumption: the absence of civil society or social organization is the absence of enclosed rights. In making this assumption the notion of enclosure must be affirmed or denied. Social settings without "enclosed" rights are unorganized or chaotic. Hobbes' frames the problem of social order as a dualism, order is present or absent and his theoretical problem is thus simplified, connecting the idea of rights to that of enclosure and so justify the state.

Hobbes's argument for the connection lies in his use of "will" as opposed to "reason". His "community of goods" is the condition of unenclosed rights. Persons who claim a good in effect claim all goods and since the community of goods is unenclosed there is nothing to distinguish one persons claim from an others, hence the inevitable "war of all against all." However, this instability ends when people "partition" or enclose rights. This enclosure limits person's claims to that tolerable by others and so becomes the basis for "contracts." But moving from the community of goods to civil society Hobbes defined the state of nature as a state where all persons retain their will to act, the state of enclosed rights is the opposite, persons no longer retain their will to act. Hobbes's argument is that if a person retains his will, he retains it without restriction. Hobbes' dualistic logic presumes this person could not engage in any division of

rights or use of contract. Implied then, is that participation in the division of rights or in contracts means having surrendered the will to act freely. In other words, persons exchanged the terms of the "social contract" for their will. Civil society or the social organization of order is the handing over of will to the state since his logic precludes organized order in the war of "will against will."

The title of the paper includes the word spirit. This is not an innocent choice. In fact I borrow from Montesquieu's "The Spirit of the Laws" in which he provides a "monist" or skeptical account of natural and civil law and how they relate to each other. His argument involves two themes. The most important is that of "spirit," that which reflects how people's social relationships are organized. This notion is not mystical, rather it can be considered an attitude, an orientation and sense of coherence that varies between each community and its laws. The spirit does not cause the community nor does the community cause the spirit, each influences the other.

The second theme revolves around the notion of "reason." Instead of reducing reason to a principle Montesquieu treats it as a sense of fit between things in a society. Such is this sense that anyone can recognize a "reasonable" order in a society once it is pointed out. Reason is not a particular belief, it is a demonstrable order. However, this order is not of the entire system, it is instead demonstrable of subsystems. What we have is the idea that social order is composed of a loose and constantly changing collection of common usage that people create but are also influenced by and not limited only to law.

So, although society is not a unique entity it is not an impossibility. Social relations, including law, aim at society as an ideal people raise for themselves. Montesquieu did not claim a dominate motive for human behavior. Instead he saw human impulses as complex, people could

be stubborn and giving; lazy and energetic and so on. So Montesquieu's social psychology is social. All persons grow up and develop ideas in context to which they contribute, adding to constantly changing turns at observing, assessing, thinking, selecting and behaving. The contrast is stark, order is possible without law, but only in light of a fully developed social psychology of action and interaction. Order is not the surrendering of will, it is behavior consistent with the local attitude and reflective of one's choices with respect that attitude.

I find monist accounts as more appealing accounts of social order. Hobbes is not a straw man, his account and those based on it provide an insufficiently developed account of social relations and expectations based on the assumptions utilized. So in this paper I will argue that property is an activity, among many, organized by people's choice and communication of expectations and relations. Local activities are always caught in local, regional, national or international political economies to different degrees. These will be reflected in the local, usages in common, the local attitude and the choices people make.

We are interested in settings where law is only one source of expectations for property and we recognize Munzer's "social" connection presumes too much for the kind of empirical settings we are interested in. We need a psychology and expectations for action and interaction is fine, but the social connection need not be systemic. So since monist accounts do not need a social connection we can remain attentive to the various connections that are shaped and shape people's behavior. In the course of analysis we wish to maintain an explicit concern with social process, ephemerally fixed versus more enduring settings, mechanisms by which attitudes are transferred in groups and any overlapping activities that might contribute to or limit ongoing social order.

Most of the extant literature is dualist, analysts under specify the importance of expectations, ongoing relations or the common usages that connect them. Discussions of tenure problems are many and there is little synthetic work. However most of the literature has some key concepts in common. These concepts are few but heavy with history. The key concepts I have in mind include: social order, institution, collective action/activities, common resource dilemmas, custom/habit, norms/rules and finally, information. Usage of these, or minor variants of these concepts is wide spread in this literature and my discussion of them is informed by the monist/dualist distinction and my critique is of the concepts themselves as well as assumptions that link these concepts together. So for each author I will discuss how these concepts are used and the assumptions underlying the usage.

A Literature Review

The current task is to review literature that has to do with how property relations are established between people who have not a legal system as known in western, industrialized countries or, irrespective of location, cannot depend on expectations enforced by a legal system. In this review we will be on the watch for the way analysts use various keywords to theorize social order.

Pre-Legal Social Order and the Genesis of Property Markets

Anthropologists, Acheson (1989) and Cooter (1991) point out that people, most often kinship groups or people with common, long run economic interests in a resource, generate rules and customs to assign rights to resources (and prevent over exploitation of those resources) hence structuring the social order. The contention here is that life in the state of nature, while not

governed by formal law, is not unregulated. Cooter (1991) notes, "The state of nature is a life among kin...a condition of mutual obligation" (1991:793). Interpersonal relationships are the basis for the assignment of rights and the development of custom. Some rights will be held in common, others will be held privately (see Briggs and Van Ness, 1987). This stream of research suggests that interpersonally based customs structure the use of common resources.

Cooter (1991) examined the emergence of a market for property in Papua New Guinea. There are no property markets in Papua New Guinea: they had not been invented prior to contact with Westerners because land was not exchanged outside kin groups. The opening of kin groups to the outside world created opportunities for profitable exchange that local custom was not prepared for. Prior to contact with the industrialized world, exchange of land between or within kin groups was based upon mutual, long-run, economic obligations.

Note the potential overlap between social and psychological expectations.

Intergenerational transfers of property between kin groups establish an expectation about the quality and temporality of social relationships. Additionally there is an explicit overlap between some kin and economic obligations. So property is not solely a function of kin or economic obligations, it is a function of kin and economic obligations. The legitimate expectations generated by such a system are self-contained and communicated interpersonally by people who know about the expectations and concepts used in both sub-systems. The only problem I have with this analysis is that Cooter was not sufficiently specific with respect to the particular economic and kin obligations that overlapped. Without such specificity and exploration of the concepts in common usage we cannot begin to establish comparisons with different settings.

Slowly a market for land emerged and Cooter evaluates the three different options the

islanders had for a modern property system. The two most common systems are co-operative ownership and total privatization. Cooter considers both, but judges that a property system based on 'modernized' customary law, utilizing the kinship system, is the best choice. It is important to note that Cooter stresses the importance of long run obligations to economic and kinship activity. Customary systems do not happen overnight, it takes a long time to fine tune the locally common usages regarding rights and responsibilities and only over time will customs be practiced, exposed to hazard, adjusted and revised.

In the custom and kin based system Cooter describes we would expect a very stable social order with relatively few transactions, carried out ponderously over time. The transactions would account for various, economic and non-economic interests of the parties involved. However, Cooter's investigation assumes that the pressures giving rise to the modern, profitable exchange of land will not change the kinship system dynamics. This is a questionable assumption. Nevertheless, the theoretical point Cooter makes is that a property system can be based on local custom, in his case customary economic obligations owed between kin.

Acheson, (1989) produced a review of common property resource problems and critiques the economists approach which assumes that private holdings will maximize the efficient use of property. Economists typically start with the dualist assumption that the state, by way of law, is the only guarantor of tenure. Implicit then is that a) stateless tenure is impossible; b) that the state will be an equitable arbiter of order; and c) that the state is the appropriate social organization for establishing and arbitrating social order. The problem, according to analysts having an economic bent, is that common property resources are owned by no one. Without ownership, protection of the resource is not in any legal entities best interest. Furthermore, when

resources are subject to depletion the “rational” actor recognizes that if they do not acquire the resource to their benefit some other actor will.

Acheson points out that anthropologists are modifying this analysis based on confronting its assumptions. Acheson describes the common property issue as about how to preserve and allocate resources shared by all people in a particular society or community. He notes the notion of society is ambiguous since the problem of many common property issues is that the relevant community extends across political boundaries (e.g. the problem of acid rain or preserving tropical rain forests) or is actually a geographically particular group within particular political boundaries (for instance polluting, or sharing the benefits of a particular river). Contrary to the assumption that individual rights are privileged, anthropologists find that community rights are superior to individual rights and in fact regulate individual use of common resources. Further natural resources are more likely to be overexploited in technologically advanced societies with large populations operating in market economies. Acheson’s corollary critique is that there is not much evidence linking the assignment of property rights to conservation, at least not in anthropological studies. Finally, Acheson notes that in some cases communities establish institutions to protect resources. By “institution” he means no more than the idea that members of a community will establish governance rules for a resource. Acheson asserts that resources can be managed by more than just government action or privatization. However, he never provides a theory of establishing how a community will take some “middle” path.

The confrontation between assumptions reaches an impasse without a testable theory regarding why community rights might be superior to pure private or public governance. And since this question is null in the absence of context the key is to propose a theory of order similar

to that implicit in Cooter. Thus there are two key problems in Acheson's analysis. First is the empirical problem, Acheson's under-specification of the social connection between individuals use of common resources and how the community regulates the individuals use. The second problem is conceptual, but implicit response to the first problem. He provides examples of communities establishing common property institutions where "institution" is the rules that people learn and follow, but he does not provide a full understanding of institution which must involve a discussion of how people learn, follow, change and choose between rules.

There are other problems with Acheson's approach which are worth discussion. First, instead of distinguishing between individuals Acheson distinguishes between communities. In his world communities are clearly demarcated with little overlap so the issue becomes the community versus other communities without an explicit mechanism for resolving disputes between communities, in other words he merely displaces the management question. He calls for scholars to increase our understanding of how common property institutions are generated but ends up reifying important problems of interaction and expectation as matters of "institutional" design. Basically Acheson does not communicate a theory rather discussed a configuration of things that make order possible, superficially compelling, but assumptions and meanings of key terms remain unexplored.

Fugitive Property

Alan Smart (1988) asks the question: How was Hong Kong's informal housing market established? A lawyers term for property transacted apart from a legal system is fugitive property (see Munzer, 1990). Smart analyzed the squatter housing market in Hong Kong between 1986

and 1988. Instead of tribes or kin groups, Smart is interested in a squatter population and how members establish property rights for housing. In a modern property market title is researched prior to the sale and transfer of property. Since squatter property is not recognized by the government, parties to property transactions must develop an alternative tenure claim and enforcement system.

Smart characterizes this alternative as, "a fragmented and imperfect process." but, "much like the legal real estate market" (1988:24). Smart did fieldwork but he does not reveal any information about the participants in these transactions. He did say that squatters with out title seeking to build housing on land acquired rights to the land by purchasing access to the land and building upon it or, secondarily, by purchasing homes constructed and standing on fugitive property (1988:25-27). Neither technique involves the exchange of legal title, but informal paper receipts were exchanged between buyers and sellers and the transactions were registered in a "Kaifong" association (see also De Sousa Santos, 1977). Smart, however, did not explain what that association is except to call them "political organs" and part of the "general social organization".

Smart argues that three elements of informal regulation are the "legitimizing principals" that organize Hong Kong's "fugitive" property system. First, squatters who purchase or build on fugitive property have the social expectation that the property can be treated "normally" to build upon or as an investment or for any other use. So purchases of squatter property are expected to yield the same long run benefits as any other similar investment. The second component of this regulatory structure are the networks of "alliances of friends, relatives, neighbors and political patrons, which allow threatened property holders to mobilize support when the "normality" of

their property is threatened" (1988:25). The last component, not convincingly demonstrated but enumerated by Smart, entails the utilization of the government's own documents, for instance utility bills, to claim squatters housing is legitimate since the government bills them for legitimately paid for and provided services.

Smart's configuration of elements makes sense. Especially important to point out is the idea of "normality" in the relationship between people and property. That people strive irrespective of barriers, for "normal" property relations is important, but particularly important is to note that decision making information regarding the practice of customary usages is found in many types of relationships, in this case between people, between people and places and between people and statements. However, Smart's is an incomplete theory, it discusses only sources of expectations, e.g. normality, alliances, charges; and misses two things. First, he ignores his own data to make a dualist conceptual presumption: that there are two types of property and that each requires it's own theorization. Second, Smart ignores key elements of the empirical landscape. By ignoring the "Kaifong" he misses on a possible explanation for how expectations link into common usage and so become compelling to different parties. Such an explanation would be particularly interesting if the term "Kaifong" had its original usage in religion, kinship, politics or some other sub-system, so demonstrating the overlap that knits societies together.

One key to understanding a more complete theory of "fugitive" property is to recall that the parallel housing market evolved in the shadow of larger political and economic organizations and actors. The market for squatter property overlaps with the "legitimate" property market. Property owners, those who desire property and government managers and politicians all have knowledge regarding the availability of land to squat upon and the turnover of squatters, how

quickly land squatted upon reverts to the legal property system; how many new squatters need property and how government manages the dominant tenure concerns of "legal" or "legitimate" parties. Some parties straddle both systems (e.g. the Kaifong?) and a detailed analysis of the property market would theorize a) how different groups are compelled to defend one interest over some other interest and b) how people mobilize existing or create new "concepts in common" in the use of which social order is established, adjusted and maintained.

Smart hints at kinship relations and a system of implicit contracts that manage and enforce property title claims and relationships. Testable propositions, for instance: 1) people engage in kinship or kin-like relationships by obliging friends, family and political patrons to demonstrate on the behalf of squatters whose property is threatened, or 2) squatters also want the state to believe that paying bills establishes legitimate rights to their illegitimate property, are not provided. Nor are we provided the data or descriptions regarding the creation of new or amendment of old concepts that are used to describe such relationships. Smart's discussion leads me to believe that the property acquired is stable in the short run, but risky over several years, however no real data were provided to assess this point.

By introducing political patrons Smart suggests that property rights are contingent on relationships with them. Smart does not discuss the relational, hence expectational, sources of changes in alliances between politicians and property owners or differences among people in access to information and social relations. This probably affects the market for property: I can imagine political patrons selecting particular property for development, or speculation, at one moment abandoning, or the next supporting, clients based on deals the patron makes with developers. This is a complex calculus that we can only theorize by uncovering the concepts in

common in mutually shaping relations.

One concern of my work (Morales, 1993) is with fugitive property relations in a large street market in Chicago. Here 800+ vendors, of both genders, various ages and many ethnic groups, gathered together every Sunday to sell various types of new and used items. The vending spaces were lucrative business locations. Yet week after week and year after year vendors maintained an orderly regularity and transfer of space without the help (and despite poorly designed regulations) of the City of Chicago.

The account and theory I am developing (as part of a book about the Maxwell Street Market) begins with the concepts vendors develop in common, the vending "space," and the "legitimate" vendor. Then to account for the multi-ethnic nature of the property system I will show how common usages develop at the "boundaries" between members of different ethnic groups and how usages common, both within and between members of particular ethnic groups, serve to assist the transfer of property to new vendors.

Smart and Cooter are among scholars turning to a concern with privatization and property law, most especially in industrializing nations. To sum up they have exposed, if not analyzed, the importance of different types and compositions of social relationships. They discuss the role of the state and the difference between emergent and existing state society relations. Boaventura De Sousa Santos (1977) and Hernando de Soto (1989) represent part of this research stream in South America. Most of this work traces its concerns back 30-40 years ago to literature concerned with economic development. Some economic development literature examines the operation of street markets and I will now turn to some of that work for further insights about the property organization.

When Custom and Law Overlap

Every approach to an empirical inquiry has an intellectual lineage. In the 1960s and 1970s economic development and modernization perspectives dominated investigations into markets, bazaars and similar economic activities in less industrialized nations. Prior inquiries were mostly concerned with the relationship between market organization and economic development and less with the nuts and bolts of market organization. However, we will look at two of these studies because, although oriented with different goals in mind, they expose some of the nuts and bolts property problems we are concerned with.

Szanton (1972) is interested in how vendors in Estancia, a Philippine market town, organized the distribution of the consumer goods sold there. She enumerates but largely ignores several general problems that frame her main interests: the exchange between vendors and consumers and the importance of vending for survival. Among the "nuts and bolts" property problems she enumerates, the issue she devotes the most time to (two pages) is freedom of entry (becoming part of the market's property system) into the market. Entry to the Estancia market is barred in four ways: first, she notes the automatic, legal, exclusion of Chinese from the weekly market. Local law only permits Filipinos as vendors. Thus the market she examined was ethnically homogeneous by statute.

Second, vendors are supposed to obtain municipal vending licenses and pay fees to establish and operate a vending business. She observes that:

Theoretically these fees are uniformly enforced, market collectors have been known to reduce or forget them entirely in return for favors from the vendor...or occasionally to collect more than an equitable amount. They are also often accused of failing to remit all their collections to the municipal treasurer...As a result of complaints arising from such abuses, the municipal councilors took personal charge of their surveillance and control during the period when this study

was being conducted (1972:15-16).

This statement raises two issues: first, Szanton cannot relate information regarding the organization of fee or favor collection, whom it favors or does not and how that extortion affects business practice. Second, her presence had an experimenter effect: while she investigated business practices and economic activity the normal routine of collections probably changed and we do not know what happened to it after she left.

The third component of freedom of entry has to do with local politics. She notes that entry into smaller markets in villages surrounding Estancia, is controlled partly by partisan politics. With regard her investigation she notes:

The small-scale vendors inside the marketplace do not appear to be affected by such political pressures. Their most important interactions with the municipal power structure occur when they call in the mayor, council or municipal treasurer to settle a dispute between groups of vendors regarding changes in their physical arrangement in the marketplace (1971: 16-17).

Given the focus of her work she never details interactions between groups of vendors or between vendors and powerful people about the physical arrangement of vendors. We are given the impression that vending is an occupation anyone, with merchandise and the relationships to avoid, or money to pay the fees, can participate in.

The fourth component of freedom of entry has to do with the emergence of alternative tenure arrangements in the market. Unfortunately Szanton's central concerns led her only to report and not analyze the new tenure orchestration:

Stalls inside the marketplace which normally pay only rental fees have also been "sold,"...clearly exceeding the value of equipment transferred...As vendors put it, they were buying "the place" (puesto), the particular position in the marketplace, fully recognizing that its value to them was greater than the rent paid for it (1971:17).

This interesting development remained unelaborated. Who bought the "places?" Were they treated like stores? Were these vendors more or less likely to have problems with property that required calling in municipal authorities? What links existed between businesses in "owned" space and businesses in stores or other economic activities? Did the "ownership" of space represent an intermediate step in business development? Were new tenure arrangements adjustments to an overall property system that included corrupt fee collection and the organization of vending space? Szanton noted that the development of a market for vending space limited the government's ability to control entry to the market because the market for space kept rental fees low. Szanton analyzed the bargaining and other long term mutual obligations concerning trade instead of the infrastructure that supports trade. The infrastructure, that we call the property system had many complex and changing components, unfortunately we can say no more about the organization of property than it is supported by inter-vendor relations as well as by vendor relationships with parts of the government.

Szanton's case is an interesting combination of problems exposed by Cooter and Smart. A property system whose executors can make capricious but with room for stability. People practice vending and invest in the activity to show their conviction about the opportunity to vend. The state's role is clearer in theory but in practice state agents act to counter threats to legitimacy, to secure partisan support and appear efficient to the occasional ethnographer. Note however, the rudiments of a "monist" theory of order. First, is the use of law as a source of information for vendors, potential vendors and the general population about who might be eligible to co-create order in this market. Second, and third is her identification of the "licensing" and fee collection process and local politics. Both are sources of information and expectation for how different

vendors might mobilize existing or create new common usages between each other or between themselves and the “authorities” for the creation of stable property expectations. Fourth is the ongoing process of “alternative tenure arrangements.” Social relations of all kinds are typically in “process” and as such alternatives are tested, disregarded, adapted and amended over time.

Szanton was correct to identify these four barriers-to-entry, but since her concern was “survival” and economic development I find it disappointing that no further analysis was made to connect these barriers to her core questions.

A classic treatment of the bazaar economy is Geertz's (1963) comparative analysis of modernization in Indonesia. He analyzes the economic activity of an Indonesian bazaar. Of the vendors he says, "They lack the capacity to form efficient economic institutions; they are entrepreneurs without enterprises" (1963:30). Geertz analyzes the bazaar as a flow of goods and services, a set of economic mechanisms that support and regulate the flow of goods and services and as a social system (1963:30). Given this interest our question is: at what level of social relations does the organization and stability of traders entrepreneurial activities exist?

Geertz does not discuss how space is transferred between merchants, or how vendors initially acquire a place in the market: a market for vending location does not exist. Vendors tend to locate in areas of the bazaar where others selling the same product are located and these locations are traditionally attached to the products sold. In a letter from Geertz I learned that vendors rented stalls from the market administration. However what, if anything, relations between vendors and administrators had to do with the conduct of business or changes in business practice is unexplained. In summary, when considering both Geertz and Szanton we can see that local government plays a role as a source of information for allocating property. In both cases

tradition is also an important feature for locating particular kinds of goods, but in neither case have we a historical account of how either the state imposed or vendors developed new tenure arrangements.

By reviewing Szanton and Geertz we have relearned the lesson that investigators are attentive to the time they write: Geertz and Szanton were attentive to an interest in development and more recent writers are interested in rights and relations with the state (see McEvoy, 1986 and the following reviews). Geertz and Szanton infer the existence of a theory of property and social order, but imply that existing property conventions are stable while Cooter (1991) and Smart privilege kin relations and deal making in light of a changing political economy (see also Velez-Ibanez 1978, Castells, 1983 and who write on urban political economies).

A Contemporary Review of Property and Order

A legal scholar, Ellickson (1993) sets out to demonstrate that "customary land uses are not a shapeless jumble, but instead form an *unauthored* strategy that cleverly allocates a prized resource with confoundingly complex attributes" (1319, my emphasis). His most general thesis, the efficiency thesis, is that "land rules within a close-knit group evolve so as to minimize its members costs" (1320). The close-knit group that authors these land rules is "a social entity within which power is broadly dispersed and members have continuing face-to-face interactions with one another," (1320). How does the co-authors interaction produce the property in land? Ellickson's answer is deceptively simple "a close-knit group tends to create, *through custom and law*, a cost-minimizing land regime that adaptively responds to changes in risk, technology, demand, and other economic conditions" (1397, my emphasis). The question is, does Ellickson under specify his social psychology and theory of interaction? Does he provide answers to the

important questions like: what permits flexibility in the property “regime”? Where does custom and law come from? How do the two overlap? What is the relationship between custom and law and costs? Are there concepts-in-common or is there some other explanation for how people are constrained or make choices about property relations?

It is difficult to identify Ellickson’s answers to even the obvious implicit questions. His initial source of custom, and so the first part of his explanation of constraint and choice in property relations, is found in the case he makes for social control. He supposes that close knit groups have broadly dispersed power and members have continuing face-to-face interactions and so they develop informal social control (1320). Furthermore he supposes the emergence and internalization of norms of self control to ensure the stability of the land regime (1329). Presumably members have language in common, but we might imagine situations where this is not the case (for instance my work at Chicago’s Maxwell Street, Szanton’s and Geertz’s work in multi-lingual and multi-cultural settings, contemporary east and southeastern Europe, etc.).

Must a theory of property be limited to both small close knit groups with language in common? It is my argument in this paper that the two need not be identified. Should custom be identified as social control? Again, it is my contention that whatever custom is, social control is only one part of it. It is surely the case that small groups develop social control but do the members call their customs or traditions “social control?” My argument is that custom provides for both control and choice in people’s lives because activities and participants change over time and so customs also change and are constantly reconciled in the process of everyday life. Where do norms come from? Face-to-face interaction certainly, but are norms *de novo* or are they found as parts of other social sub-systems and then appropriately deployed to meet different

circumstances? Does the use of the concept "norm" give us greater conceptual clarity or theoretical vigor? I argue no, that under specified as it is, the use of the term "norm" begs more questions than it answers. Finally, how does flexibility or adaptability in a social order come from a system of control? Control or choice or both? It seems Ellickson needs a theory of social choice (not in the economists sense) as much as one of social control in order to account for adaptability in his framework.

The second part of Ellickson's explanation for land regimes comes from the coexistence of custom and law. In his discussion of law he is worth quoting: "In sum, a shift from group to individual ownership of land substitutes the relatively cheap systems of self-control and boundary monitoring for the relatively costly system of pervasive intragroup monitoring...Individual ownership does, however, generate some new transactions cost, mainly those arising from the proliferation of boundaries and ownership entities... a group must develop rules concerning adequate means of delineating parcels and proving ownership" (1329-30). Later he links privatization to reducing the "costs" associated with monitoring "The efficiency thesis predicts that innovations in technologies for marking, defending and proving boundaries lead to more parcelization because they reduce the transaction costs of private property regimes." Here we are concerned with the concept of a cost, what is the coin of Ellickson's realm? Certainly people act to increase certainty, but do they not also act in order to promote further interaction? Minimizing costs may not be as important as maximizing the benefits of interaction. People may enjoy each others company and so act consistently for some behavior in order to promote the chance for interaction (with members of the "close-knit group" in other (more pleasant?) surroundings. Abstracting one behavior about how to create a land regime from other social

behaviors does not necessarily make theorizing the resultant order any easier. It is possible that “transactions costs” are not reduced from law and technologies of parcelization but from trust and noting consistent behavior (Macaulay, 1963). Furthermore Ellickson introduces the “second order collective action problem” by presenting the close-knit group the problem of formulating rules for parcelization and proving ownership.

Ellickson makes one other key assumption, the impartiality of law. Where law is not impartial, where it favors some over others, as it invariably does, then Ellickson’s theory is insufficient explanation for social order. Legal partiality is only one of many “impartialities” that will occur in social settings, e.g. labor market situation is typically partial, with the result that some people will need access to alternative sources of income, and so require places to earn such income, instituting their own “social order” as they go.

Discussion

Some scholars reviewed have argued that different theories are required to describe different empirical cases of property. Occasionally these arguments are implicit by way of scholars assumptions in the use of particular concepts. In either case statements about the limitations of social science can become self-fulfilling prophecy, but are not necessarily correct. Furthermore the organization of scholarship might lead one to believe that it is impossible to produce a theory that can both account for behavior and explain where change in behavior comes from. I have argued that these limits are produced by the use of one, the dualist, philosophical position over the other (monist).

The common thread in reviews of the "tenure" literature correctly locate tenure problems as an aspect of human social behavior. Philosophically all this work is bound up in the problem of

social order. Places get used by participants for activities. How do the participants bound participation? But more importantly by what conventions do activities get produced in common in the first place?

Most of the authors reviewed indicated various social sources for tenure systems, but most also have key problems in common. These flaws can be grouped into one of two categories: first, scholars presume that tenure systems have some essential nature, or second, they under specify human interaction. Both flaws are reflected in the use of reified concepts that abstract behavior from context in a false sense of producing “general” theory. The typical essentialist flaw indicates that tenure is a function of “the” community or state and the typical interactionist flaw is revealed in empirical work that constrains human social psychology to one type, or assumes that the production of tenure can be delimited and decontextualized and analyzed apart from other social activities. Seen in this way we can understand how assumptions are not definitional they are systems of ideas that undergird the use of particular ideas. Occasionally some scholars lose sight of their roots and sometimes rediscover that the problems of their tradition are problems of knowledge in general. This paper has been an attempt to assess some contemporary discussions of order problems in light of the two different philosophical roots of explanation.

The “spirit” referred to in this paper’s title is in contrast to the analysis of property problems that distinguishes itself from analyst imposed categories or analysis of property based on acontextual grounds. The spirit of property is characterized by the creation and use of concepts drawn from 1) experience, and 2) from the conduct of overlapping activities. In contrast to these social scientific or legal approaches there is the social scientific and legal approach that sees order problems as an activity or an outcome in process, instead of a static outcome. Put differently, this

tradition indicates that the dependent variable or the thing to account for, is not order by itself. Instead what we are interested in is how order is a component of one or more ongoing activities.

The assumption here is that the people engaged in particular activities interact with each other to execute the activity. Furthermore, no one person can know all the strategies or ramifications of particular behaviors. So property mirrors other types of socialization processes. Secure and flexible tenure is not so much the result of conscious information gathering and evaluation as it is partial components of long, articulated biographies. Hence the method demands the description of the language in common, the concepts in use, as these constitute the primary tool for people doing the activity and so doing social order. Linguistic interaction (communication) need not always be face-to-face, nor even always between people, it could be within an individual's thought processes, it could be between people and the non-human aspects of the environment, and in fact it is all these in the course of doing most activities.

Policing is insufficient to maintain order, this is why Weber invokes the concept legitimacy and the notion of legitimate kinds of social order. In every instance people learn how to practice a working part of a social order rapidly because they have something to get done. But social order does not spring forth directly from values, instead people communicate about what they want and how they claim that which they desire. Peoples communications do not always reveal their values, instead the communications required to create and maintain social order are situationally specific ideas; communications mediated in interaction and in anticipation of future interaction. So ideas of local importance get articulated in peoples interactions with each other and modified appropriately according to the particular circumstances faced. This is to say that legitimacy is not some disembodied characteristic of the state, instead legitimacy, especially in

heterogeneous situations, is local and part and parcel of peoples' lived experience. The particularly tricky problem of order in heterogeneous societies is solved because people are people and often participate in similar activities. In order to learn the new rules of a local or create rules sufficient to participate members of new groups mobilize cross-cultural analogies to allow people of different groups to make sense of their common experience.

Conclusion

Systems of social order or property vary a great deal, explanations for social order also vary a great deal. However, in this paper I have located two basic types of explanations for social order, mostly for property systems in three types of social settings, the absence of the state, "fugitive" property settings and settings where state and society overlap in different ways to create the property system. The two types of explanations are not ideal types in a Weberian sense. Instead each is located in a philosophical tradition and the short hand titles for the two traditions are dualist and monist. I adapted a monist stance, largely absent from contemporary literature which I reviewed. I argued that the monist stance illuminates many contemporary investigations of order, but my review is far from complete.

In the future scholars should engage in debates regarding epistemology as well as theory for all the empirical problems in which they are interested. Histories of science, e.g. Leaf, 1979, indicate the ebb and flow between epistemological traditions and so the continuous process of decline and ascendance of one tradition over another. It is important to constantly relocate scholarship in light of these traditions especially in disciplines with policy orientations that can have a significant impact on peoples lives.

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