

THE A PRIORI FOUNDATIONS OF PROPERTY ECONOMICS

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Court decisions and legislation have a profound impact on the economy because they define and modify property rights. Economists have therefore always been interested in analyzing this impact. In the past 70 years or so, the dominant way of doing this was to construct equilibrium models of the economy before and after a modification of property rights and to compare these models. Starting in the early 1960s, then, Ronald Coase and his followers have added another dimension to the study of the relationship between law and economics, trying to show that a comparative analysis of government interventionism has something to say about how the positive law, especially judge-made law, *should* define property rights. Both approaches—the positive and the normative—are at the forefront of “Law and Economics,” today an important field within economic science.

In the present work, we will deliver a critique of Coase’s approach and then outline an alternative approach to the study of law and economics. Although this alternative approach has a venerable tradition in economic science, it lacks a generally recognized name. We will call it “property economics.”

Property economics is not a tool for the normative definition of property rights, and it does not rely on equilibrium modeling to analyze the impact of the positive law on the workings of a market economy. Rather, it is a comparative analysis of two mutually excluding types of appropriation. It compares the effects that when appropriation takes place *with* the consent of the present owner to the effects that result if appropriation takes place without the present owner’s consent. These relative effects are constant in time and space. They are thus a special class of economic laws, namely, counterfactual laws of appropriation.¹ We will argue that the study of such laws allows us to evaluate the

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¹In Hülsmann (2000), we have tried to show that there are also counterfactual laws of success and failure, which are the foundation of equilibrium analysis. For a general discussion of counterfactual laws in economics see Hülsmann (2003).

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impact of the law on the economy without any additional hypotheses concerning equilibrium states. The implication is that policy analysis can be realistic; it does not have to rely on fictional equilibrium models of the economy. Again, we do not claim that this approach is new; rather, the purpose of the following pages is to clarify the logical character of a type of analysis that has a venerable tradition in our science.

Our paper is organized into three parts. In the first part, we will deliver a critique of the basic concepts of Coasian economics. The discussion of these familiar grounds will serve us as an introduction to the subsequent outline of our realist approach. The second part deals with the foundations of property economics, in particular, with property, appropriation, and with the justification of property and appropriation through speech acts. In the third part, then, we will argue that property economics stresses counterfactual laws of appropriation and that these laws are at the heart of realistic policy analysis.

A CRITIQUE OF COASIANISM

Coasian Economics in a Nutshell

In his well-known article on “The Problem of Social Cost” (1960), Ronald Coase established two propositions that have come to define a Coasian paradigm and in fact the very discipline of Law and Economics:

- (1) In a world without transaction costs, the initial allocation of property rights does not matter, because each single resource tends to end up in the hands of the person that produces the greatest value with it.
- (2) In the real world, the presence of transaction costs prevents that resources are more or less automatically allocated where they are most value-productive. Thus transaction costs make production *inefficient* in comparison to the world without transaction costs. This harmful impact can be diminished through firms, because firms are devices for the reduction of transaction costs (Coase 1990b). But firms are no panacea. They can operate profitably only to the extent that their selling receipts outweigh their outlays including transaction costs. For all other cases, one needs governments. Their task is to allocate resources in the hands of those persons who *would have come to own them* if there were no transaction costs. But even the government should do this only to the extent that the *costs associated with its own intervention* are smaller than the added value or gain of this intervention.

Is Social Cost a Possible Criterion for Decision-Making?

Coase’s basic idea is that, in a world with positive transaction costs, the value of aggregate production is a function of property rights. In such a world, therefore, the value of aggregate production can be maximized by a suitable

initial definition of property rights.² Coase suggests that this consideration should play an important role in the adjudication of conflicts. Disputes over the use of resources should be settled in the light of an economic imperative: maximize aggregate value, minimize social costs!

But *can* disputes be so settled? The problem of Coase's precept lies in the ambiguity of the expression "value"³—an ambiguity that allows him to slip over the crucial difference between exchange-value (money prices) and use-value (or simply "value," as the Austrians say). Money prices are cardinal. Different money prices *can* therefore be computed into one sum and the result of this computation can be maximized—at least from a purely arithmetic point of view. But value is not cardinal. Different values thus *cannot* be computed and it is meaningless to assert that something like "aggregate value" could have a maximum. The idea that judges and legislators could allocate property rights in a way that maximizes the aggregate value of production is a chimera. It follows that Coase's theory cannot give a scientific underpinning to court decisions and legislation; yet it can be abused to provide rhetorical cover for arbitrary judges and tyrannical legislators.⁴

We will proceed by first considering the best case that can be made for this theorem and argue that this best case is a mere logical possibility that is virtually impossible ever to exist in the real world. Then we shall turn to various problems that come into play once we take real-world conditions into consideration.⁵

The best case that can be made for Coase's first proposition obtains in a fictional market economy inhabited by *homines oeconomici* and concerns a conflict between two businessmen A and B, say, over a piece of land. How do A and B evaluate the land? Purely in terms of money prices. Each of them appraises the additional revenue that the use of the land would entail for him. If A could derive an additional revenue of 150 oz. of gold from the land, whereas B could earn only an additional 120 oz., then the land would end up

²Notice that Coase (1990a, p. 27) emphasizes that he subscribes to the assumption that "the best outcome for the system as a whole" is attained through "maximizing the value of total production (and in this I am Pigovian)."

³Sometimes Coase uses other, similarly ambiguous expressions such as "gain."

⁴At the very end of his lengthy essay on "The Problem of Social Cost," Coase states that his "analysis has been confined, as is usual in economics, to comparisons of the value of production, as measured by the market" (Coase 1990c, p. 154). This is a mischaracterization. It is true that his theory is most plausible in a pure market context, in which the presence of money prices allows for economic calculation. But Coase definitely goes beyond this context, for example, when he applies his scheme to discuss the economics of smoke nuisance. And it was precisely this apparent possibility to generalize the theory that attracted the attention of the economics profession.

⁵The critical literature on Coase is legion and some of these criticisms are rather devastating. This concerns in particular the works by Walter Block, Gary North, Hans-Hermann Hoppe, and others that we have quoted in the introduction to this volume. The purpose of our present discussion is not to add to this literature, but to provide a foil for the exposition of property economics.

in A's hands, irrespective of who owns it initially. If A owned it initially, he would keep it because B could not afford to buy or rent it from him. And even if B owned it initially, A would nevertheless come to own it eventually, because he can afford to pay B more money for it than he (B) could derive from its use. And money income is the only relevant consideration for a self-respecting *homo oeconomicus*.

However, this scenario holds water only if we make the further assumption that A and B have exactly the same marginal consumer preferences. Each of them must spend any additional revenue exactly as the other would have spent it. Otherwise the initial allocation of the land would affect the sums of money spent on the different products in this economy, and because of the interconnectedness of all trades this would also affect the relative profitability of A's and B's businesses.

The assumptions under which we have examined Coase's theorem so far have no more than academic interest. The theorem never applies to the real world; yet *not*, as Coase has it, because of transaction costs, but because of two other facts:

First, each individual has specific marginal consumer preferences. This is most obvious in the case of great differences in wealth—consider the case of A being an established businessman and B a young start-up. But it holds true even if we consider persons who are equally wealthy. Rich would not spend his income quite the same way Opulent would spend it, and these differences could not fail to affect in turn the sums of money that other people spend on the products of Rich and Opulent. The initial allocation of the land to either A or B therefore does affect the profitability of the land use in A and B's businesses. The marginal revenue that the land produces if used by A or B depends on who owns it initially.⁶

Second, and most importantly, human beings are no *homines oeconomici*. They do not evaluate resources exclusively in terms of the money income streams that these resources could entail, but in terms of their personal value judgments. In our example, the land could have personal value for B because his family has owned it for 500 years. He would therefore not sell it to A or anybody else, not for any amount of money.

Coase and his followers routinely concede the existence of personal values, but only to assert that such values have a monetary equivalent (see Coase 1990c, p. 111). Thus the land's personal value for B might be an extra 1,000 oz. of gold, meaning that B would be willing to sell the land for that extra payment, in compensation of his personal attachment to it. And this monetary equivalent of his attachment could then be used in the Coasian value-maximizing calculus.

However, it is not true that *all* personal preferences can be reversed by compensatory payments. And even if we stipulate for the sake of argument

⁶Coase recognizes these effects, but says they would “normally be so insignificant that they can safely be neglected” (1990d, p. 174).

that they can, we must not ignore that such compensatory payments depend on the initial allocation of resources. Suppose that B is the poor heir of an old family. He could then *exact* a price of 1,000 oz. of gold for a piece of land to which he is emotionally attached, but he could not *pay* this price.⁷ For all prices lower than 1,000, therefore, the initial allocation of the land would in our example affect the eventual use of that land.⁸

Thus we see that Coase's fundamental first proposition is untenable. It is not true that in a world without transaction costs the initial allocation of resources does not affect the eventual allocation of these same resources. The initial allocation affects the eventual allocation, in virtually every single case. The least thing we can say, therefore, is that the reduction of "inefficiencies" that result from the presence of transaction costs is not the only issue when it comes to the initial definition of property rights. Other considerations willy-nilly come into play, considerations that cannot be addressed by the Coasian scheme of maximizing value / minimizing social costs.

Now a Coasian economist might grant this point, yet argue that it does not change anything to the basic Coasian prescription. He could point out that all other factors that affect the eventual allocation of resources do not necessarily introduce *inefficiencies*. These other factors merely modify the growth path of the economy, but each of the possible growth paths could be efficient in the absence of transaction costs. Thus transaction costs are still a problem apart and the basic Coasian prescription still holds: The government should allocate resources in the hands of those persons who would have come to own them in a hypothetical ideal world without transaction costs, to the extent that this can be done in a value-productive way.

But this argument would not hold water either. As we have seen above, the Coasian framework can deal with a bunch of identical robots in a purely commercial context. But it cannot deal with real-world human action because it fails to come to grips with subjective value. The greater the role of subjective value in any given case, the more inadequate is Coase's approach. It is entirely unsuitable once we wish to analyze conflicts between producers and households (consumers), or conflicts between different households. There is simply no way to add up subjective values and it is therefore nonsensical to speak of a maximization of subjective value. It is possible to add up the money prices paid for a stock of wheat and compare the sum to other accumulated money

⁷Could our poor heir not just take a credit? But then we would need to make additional assumptions concerning his ability to pay back the credit; and there would also be the question why credit facilities should be available for him alone, not also for his competitors.

⁸The only way out of this Coasian dilemma is to argue that compensatory payments do not have to be actually made and that the monetary equivalent of personal values could be determined in other ways than actual payments. But then one enters the land of fiction and opens a Pandora's box of arbitrary powers for those who are entrusted with determining those fictional values. See the debate between Walter Block (1997, 1995, 2000) and Harold Demsetz (1979, 1997).

prices; and it is similarly possible to compare “costs” in the sense of money expenditure. But value is an entirely different animal. It is not a cardinal entity, but an ordinal one, and thus it cannot be added up as money prices can. This holds true already for any individual, and it holds true even more for groups of persons.⁹

Coase’s seemingly attractive solution to conflict—be agnostic on the “ethical” question of responsibility, concentrate on the “economics” to maximize value and minimize inefficiency—is therefore nothing but a figment of the imagination. There is no such thing as “inefficiency” of the sort Coase has in mind because this thing could only exist if there were a basic cardinal unit in terms of which one could add up the subjective values of different individuals. But no such basic subjective value unit exists. It is true that economic analysis deals with values, but it does add up subjective values and could not do this because of the problem we just pointed out. No economist is therefore in a position to say, for example, that A’s making noise is more (or less) valuable than B’s enjoying silence. Conflicts about property right must be decided on other grounds than the fictitious maximization of aggregate subjective value.

Are “Transaction Costs” a Useful Tool for Economic Analysis?

So far we have shown (1) that Coasian *normative* economics relies on two assumptions: market participants have homogeneous value scales and one can integrate the subjective value scales of all market participants into an economic calculus; and (2) that these assumptions are contrary to fact. Now we have to deal with Coase’s influential *positive* approach to law economics, which stresses the influence of “transaction costs” and the related concept of “inefficiency.” Let us therefore first quote the master himself:

The argument has proceeded up to this point on the assumption . . . that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption. In order to carry out a market transaction, it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost. (Coase 1990c, p. 114)

Thus Coase distinguishes between “market transactions” and “operations” that go in hand with those transactions. The operations are presented as being “costly,” whereas the transactions themselves are apparently not costly. It is

⁹An analogy: One can add up the height of different persons and select a group of human beings in such a way as to maximize the compound height of this group, however meaningful this arithmetic exercise might be. But it is impossible to add up the proper names of these persons. It would therefore be meaningless to assert that their aggregate name could be smaller or bigger in one case than in other cases.

therefore the operations that entail the transaction costs and thereby introduce inefficiencies in regard to the allocation of resources.

In the eyes of most economists, this definition seems to be sufficiently precise.¹⁰ Critics of Coase usually focus on his two fundamental propositions and take it for granted that the transaction cost concept itself is (1) sufficiently clear and (2) a useful tool for the comparative analysis of the real world. But this is not in fact the case, as we shall now proceed to show.

One way of defining transaction costs in a clear-cut way is to emphasize the difference between the nature of market transactions and the nature of operations. Let us see where this leads to. What is the meaning of market transactions once we strip them of all affinities with the operations? The examples Coase gives of operations are convenient because they are sufficiently removed from the transactions in time and space. But watch as we get closer to the heart of the transaction: A businessman drives from his home to his business building, where he will sign a contract. Is this part of the operations or of the transaction? If it is *not* part of the operations, what makes the car ride different from conducting negotiations and drawing up the contract? And we go on: What about our businessman walking through a hallway from his office to the conference room where the contract will be signed? What about him lifting the pen with which he will sign the contract out of his jacket? And so on. Similar things could be said about consumers. Suppose Jones just agreed with a baker to buy some bread. The handing over of the money would willy-nilly have to be classified as an operation. But then what about Jones's way home? What about him eating the bread using knives and fingers?

Thus we would be led to classify virtually all of human life as being part of the "operations." The transactions are strictly speaking removed from the passage of time; they exist just at the very moment when a deal is struck. Everything else—everything that is extended in time—consists in operations. So far, so good.

The problems appear as soon as we try to tie up these distinctions with the phenomenon of cost. As Coase has it, operations are *per se* costly (they entail the transaction costs), whereas transactions are *per se* not costly. Now there are two standard concepts of costs: (1) money expenditure on factors of production and (2) opportunity costs. The first concept does not lend itself to the Coasian framework because money spent in "transactions" to obtain factors of production would also have to count as cost and thus it would no longer be possible to maintain the distinction between non-costly transactions and costly operations. The only remaining question is whether the second cost concept applies.

An opportunity cost is the value of the next-best choice alternative that has not been realized. (We need to keep in mind that it has not been realized because the acting person believed that the choice alternative he or she did realize was even more valuable.) Every human action entails opportunity

¹⁰An important exception is James Buchanan (1984).

costs. All “operations” that lead up to transactions entail such costs. However, precisely because opportunity costs are an inherent feature of every human action, they do not *per se* lend themselves to distinguish efficient from inefficient allocations of resources. From the fact that a Coasian “operation” entails opportunity costs it does not follow that this operation is inefficient. It *could* be inefficient, namely, if the acting person wrongly allocates a resource to a use in which it produces a lower value. But this is not always the case, and it is certainly not necessarily the case. Furthermore, consider that all Coasian “market transactions” have opportunity costs too. It follows that market transactions too can be inefficient, not just the Coasian “operations.”

Thus we are in an impasse. Are other ways of defining transaction costs more fruitful? The main problem with our above definition of transaction costs was that it was too broad. It covered virtually all human actions and thus did not allow us to distinguish efficient operations from inefficient ones. These problems can be overcome if one defines transaction costs as *the opportunity costs of all those operations and transactions that would not exist under perfect foresight*. If a man believes of himself that he does not have complete knowledge of the future, he has an incentive to do all kinds of things to cope with this ignorance. And because of the universal condition of scarcity, these activities necessarily prevent a certain number of productive ventures from being started. The foregone value of these ventures is then the opportunity cost of the ignorance-induced actions and institutions.

This seems to be the definition of transaction costs that Ronald Coase has in mind.¹¹ It is because man is more or less ignorant of the future that he will try “to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on.” And clearly, all these operations, by virtue of their mere existence, “prevent many transactions that would be carried out in a world in which [human beings had perfect foresight].” So far, so good.

Now there is no doubt that “it is impossible to understand the workings of the economic system, to analyze many of its problems in a useful way, or to have a basis for determining policy” if one does not take account of the fact that man is more or less ignorant of the future. The existence of this fact implies that the “people one deals with, the type of contract entered into, the kind of product or service supplied, will all be affected” (Coase 1990a, pp. 6f.). It is a completely different question, however, whether it is pertinent to characterize the actions and institutions that spring from human ignorance as “costly.” And it is quite extravagant to propose that judges should allocate

¹¹See Coase (1990c, pp. 114, 150). He agrees with Dahlman, who in his view has “crystallized the concept of transaction costs by describing them as ‘search and information costs, bargaining and decision costs, policing and enforcement costs’” Coase (1990a, p. 6) quoting Dahlman (1979, p. 148).

resources to persons who would have come to own these resources if they were not human beings, but perfect-foresight cherubim.

The costs that we deal with in economic science—opportunity costs—are a real-world phenomenon. Real-world behavior results from choices and that to choose means to do something *and* not to do other valuable things that could have been done instead. The costs of real-world behavior are the values of such real alternatives. But transaction costs as Coase understands them can only be defined in terms of “alternatives” that have never been open to human beings and which never will. To be a human being means to act under uncertainty. This fact permeates all aspects of human behavior. It is therefore meaningless to hold up perfect foresight as a standard in terms of which real-world human action appears to be costly.¹²

Consider the following analogy: It is a fundamental fact that human beings need food to stay alive and that most of them desire to stay alive. Thus we could argue along Coasian lines that it would be “impossible to understand the workings of the economic system, to analyze many of its problems in a useful way, or to have a basis for determining policy” without the concept of “nutrition costs.” For indeed the “existence of nutrition costs will lead those who wish to trade to engage in practices which bring about a reduction of nutrition costs whenever the loss suffered in other ways from the adoption of those practices is less than the nutrition costs saved. The people one deals with, the type of contract entered into, the kind of product or service supplied, will all be affected.” In other words, just as ignorance of the future (uncertainty) prompts us to do many things that we would not have done if we were cherubim, so the need to feed our bodies impels us to do many other things that we would not otherwise have done too. All these activities consume scarce resources that could have been employed in alternative ventures. Thus it would be legitimate to speak of transaction *costs* and of nutrition *costs*, which is tantamount to saying that the economy labors under *inefficiencies* induced by ignorance and food-dependence.

We can then go on to explore the other implications of nutrition costs. They are certainly the key to understanding “The Nature of the Soup Bowl” and “The Nature of the Kitchen.” And even though economic science has so far neglected this important concept, as the transaction costs revolution has shown, there is reason to be optimistic that nutrition costs will get their fair share of attention. And then there will be new frontiers associated with other important but neglected concepts such as time costs, space costs, speed costs, age-difference costs, and gender-difference costs, to name just a few.

We do not wish to insinuate that it is useless to compare our real world with fictitious other worlds. The point is to be careful in defining and using fundamental concepts lest we invalidate our analyzes of the real world. The

¹²Notice that perfect foresight (the absence of uncertainty) is not a necessary condition of general equilibrium. It is therefore not a postulate on which general equilibrium analysis has to rely. See Hülsmann (2000, esp. pp. 14-16).

cost concept underlying Coasian transaction costs has nothing to do with the opportunity costs that we use in economic analysis. Rather, transaction costs have affinities with what a distinguished follower of Coase has called “the nirvana approach”¹³—identifying “inefficiencies” in our world through comparisons with a perfect-foresight nirvana. This is a deficiency that vitiates Coasian explanations of the emergence and transformation of social institutions. It is one thing to point out that human beings are more or less ignorant of the future; and that to overcome this limitation they engage in certain practices and set up certain institutions. These facts were known long before 1937.¹⁴ By contrast, it is misleading to say that those practices and institutions spring from a special type of “costs”—transaction costs. And it is wrong to infer that one can explain the evolution of those practices and institutions in terms of transaction costs. Explanations that rely on the nirvana approach can be more or less exciting literature, but they add nothing to science. Valid explanations of human action and human institutions must stress real-world choices among real-world alternatives. This approach too has been known before 1937. It is called methodological individualism.

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Economic analysis à la Coase does not establish a scientific “economic” criterion for legal and juridical decision-making; and it does not provide a tenable framework for positive economic analysis. Yet the valid core of the Coasian approach is to stress that comparative economic analysis—in particular when it concerns issues of public policy—must feature meaningful terms of comparison. The whole difficulty of “law and economics” consists in unearthing such terms. Coase fails precisely because he uses fictional terms of comparison.

We will now show that realistic terms for the comparative analysis of public policy can be identified if we study appropriation processes. Legislation and court decisions deal with conflicts and all such conflicts concern questions of ownership. The most straightforward way of settling conflicts is therefore to take a look at what private property is, how it comes into existence, how it is transformed, and how it can be justified. Most social philosophers at most times have espoused variants of this approach. We will rely essentially on Reinach (1989) and Hoppe (1989, 1993) who championed a purely factual analysis of the emergence and transformation of private property.

¹³Demsetz (1969). To avoid misunderstandings, let us emphasize that our present criticism concerns only the concept of transaction costs. Coase’s precept for judges and legislators—maximize social product, minimize social costs—is coined in terms of relevant alternatives and thus avoids the nirvana fallacy. As we have argued above, however, this precept suffers from other grave shortcomings.

¹⁴This was the year when Coase first stressed transaction costs to explain “The Nature of the Firm.” For a critique of this theory of the firm see Don Mathews (1998). For a realistic theory of firms see Salin (2002).

Property and Self-Ownership

Let us begin by taking a look at those general features that make a given object the property of its owner, irrespective of who this owner is, and irrespective also of what the Law says who the owner should be. An examination of how the word “property” is used in our language will give us an intuitive lead toward the underlying phenomena.

A property is usually understood to be a certain quality of a thing. Thus, some apples have the property of being green, iron has the property of being corrosive, man has the property of being two-legged and two-armed, etc. In other words, a property is a partial aspect of something more comprehensive to which it belongs.

In the same way, property in the sense relevant for legal objects such as contracts, exchanges, and the positive Law is something that belongs to a human person—it is a part of the person, which is why we use possessive pronouns to speak of my car, your flowers, their hamburgers, etc. In this wide and vague sense of property, my car is mine just as my right hand is mine. Both belong to me, are part of my person, even though in different ways.

We can give another fairly general specification of what property is. Unless one is in a position to control the thing under consideration, it cannot be one’s property. It would be meaningless for me to assert, for example, that the moon is mine, or that all of China is my property. For as a matter of fact, even if there were some sort of a relationship between me and the moon, or between me and China that would make it licit for me to assert that the moon and China are parts of my persona, they would not be my property because I am totally unable to use the moon or China as means of my actions.

The foregoing observations have yielded three general characteristics of property in the legal sense. First, property in this sense is a part of human persons, either of individuals or of groups, but in any case of humans. Second, property stands in a particular relationship of “belonging” to the human person of whom it is a part. This relationship is commonly called ownership and the respective human person is commonly called an owner. Third, one cannot be the owner of a thing if one cannot possibly control this thing.

These very general characteristics of property do not tell us anything about how property is related to any specific human person. They do not determine who owns what, but merely what it means for a thing to be property, irrespective of whose property it is. The problem is that most pieces of property—for example, pieces of land—do not intrinsically, that is by their very nature belong to any individual. A chunk of land *might* be the property of Jones, but since it is not the nature of this piece of land to belong to him, *if* it is his property it must be so due to more or less contingent factors.

Before we investigate the existence and character of such contingent factors it is however necessary to first address a related question: Is there any type of property that intrinsically belongs to a certain person? The existence of such a type of property would of course enormously facilitate the resolution of conflicts, since at least as far as *it* is concerned there would be clearly identifiable owners. Fortunately, such a type of property exists and—even

more fortunately—it has a great and transcendental importance, such that the laws of appropriation can be derived from it.

The type of property in question is the individual self of each human person, in particular, the property of each individual to make choices of his own. This property is by its very nature bound up with the human person, that is, unlike many of the human person's other properties it cannot be separated from it. One's arms or one's legs, for example, when they are considered simply as raw meat, do not intrinsically belong to a person because they *can* be separated from the remainder of the human body, and be sold or given away. Things are entirely different when it comes to *using* one's arms as arms or one's legs as legs, because this form of control cannot be transferred to other persons. Only I can control my legs as legs and my arms as arms, whereas all other men and animals could merely use them as raw meat. And even more so is it impossible that anybody but me makes use of my will power and of my ability to make choices. In other words, the human will is inalienable (Rothbard 1998, chap. 19). By its very nature it cannot be separated from the human persona because it is an intrinsic property of the human person.

Rothbard referred to this fact as self-ownership, meaning that each individual by its very nature owns himself.¹⁵ Thus when we speak of human beings as self-owners, we do not make a normative claim but state a matter of fact. We do not assert that individuals should own themselves, but that as a matter of fact they do always and everywhere own themselves in the very precise sense that we explained above.

This fact is crucial for the definition of property rights and the settling of conflicts. Indeed, all parties to a conflict that are willing to *settle* this conflict, rather than shoot it out, not only acknowledge that self-ownership exists, but also acknowledge that the self-owners *should* exercise the factual control that they have over their wills and bodies. Why is this so? The settling of conflict requires some form of communication and argument. But arguing would be senseless if it could not change the opinions and actions of others. The point is precisely that we want our discussion partners to think and act differently. We acknowledge that they have control over their wills and bodies, and moreover we want them to exercise this control. In other words, in any exchange of argument, all discussion partners *agree* at least on two things: (1) that each of them is the factual owner of his will and body, and (2) that each of them should

¹⁵Terrell (1999) has criticized this notion on theological grounds, arguing that human beings do not own themselves, but belong to God. God is therefore the true owner of our minds and bodies and human beings are only temporal stewards or caretakers. This argument misses the mark, however, even though it is pertinent in its own right. Rothbard does not argue that human beings own themselves in some *ultimate* sense. His point is that the *immediate* control that each individual has over his mind and his body can be distinguished from the *immediate* control that other individuals exercise over *their* minds and bodies. For this to be true it plays no role whether God owns us, whether we control our property by His grace, etc.

exercise this control. There might of course be disagreements on *how* this control should be exercised, but this does not affect the consensus on the two points.

In this sense, therefore, wherever there is argument and debate, self-ownership is *per se justified* in the eyes of all debaters. And nobody who takes part in an argument can deny this without contradicting himself. Such a person would argue in fact that his discussion partners should not be the factual owners of themselves; whereas by this very argument he asks them to continue to exercise that ownership.¹⁶

Original Appropriation

Let us now deal with those factors that above we referred to somewhat vaguely as the “contingent factors” that make a thing the property of any given person. As we shall see, these factors do all emanate from individual self-ownership, and they are contingent only in so far as human decision-making is contingent to time and space.

Acting man can use the property that he has in himself to physically transform various things of his environment, for example, Jones can carry an apple from place A to place B, dig a hole in the ground under his feet, catch a rabbit and eat it, etc. Each of these things is physically transformed by his action: the apple is at a different place than it otherwise would have been, the hole would not have come into existence at all, and the rabbit would be eating carrots rather than being eaten itself. In these physical transformation processes, Jones’s actions are “added to” or “mixed with” the apple and the soil and the rabbit, and these things thereby acquire physical properties emanating from Jones’s actions that they did not have before or, more precisely, that they would not otherwise have had.

Since Jones is the owner of his actions it follows that he is also the owner of the things that are mixed with his actions or, more precisely, in so far as they are mixed with his actions and thereby appropriated by him (Locke 1924, Rothbard 1998, Hoppe 1989). The apple and the soil and the rabbit bear the stamp of Jones’s persona, they have the property of being-transformed-by-Jones, and in this sense they become—as a pure matter of fact and irrespective of any normative connotation—parts of Jones’s property. They are *his* apple, *his* soil, and *his* rabbit.

Justifiable Consecutive Appropriation: Exchange and Gifts

So far we have discussed simple settings of “original appropriation”—that is, settings in which physical things are transformed and thereby appropriated by

¹⁶These statements on the justification of property rely essentially on works by Hoppe (1989, chap. 7) and Kinsella (1996). Similar observations had previously been made by van Dun (1982). The unifying theme of these works—that speech acts are a foundation of legal objects such as property rights—had been anticipated in Reinach (1989). Let us emphasize that none of these works have direct normative implications. They do not bridge “is” and “ought.” But they have given us a praxeology of justification processes, the major result of which is that violations of property rights cannot be justified without self-contradiction.

a single human person. This is the case, for example, when Jones is the first person to move the apple or to touch the soil or to catch the rabbit. No other human being has appropriated these things before him, which is why his respective acts are called acts of original appropriation. The situation becomes somewhat more complicated once we consider the—practically highly relevant—case in which several persons transform a thing either simultaneously or at different points of time, for example, the case that Smith takes the apple from where Jones has left it and brings it to another place. Such cases are indeed at the centre-stage of the discipline of law and economics, but before we can adequately deal with them we need to make a few more preliminary considerations.

Let us turn once again to our initial simple setting, in which only original appropriations take place, and assume that Jones and Smith have originally appropriated different things: Jones has collected an apple and Smith has caught a fish. Assume furthermore that both of them know about the other one's possession, and that Jones would prefer to possess the fish rather than the apple whereas Smith would rather possess the apple than the fish. As we know from basic economic theory, in this case an exchange is feasible and worthwhile; Jones and Smith could benefit from an apple-fish exchange.

Assume now that such an exchange takes place and let us try to describe as accurately as possible what it is and what it implies for property and appropriation. What exactly happens when Jones exchanges his apple against Smith's fish? We can distinguish three features of this process. First, each party acknowledges the other party as the owner of the good he wants to buy; Jones acknowledges that the apple is Smith's property and Smith acknowledges that the fish is Jones's property. Second, party A wishes the party B to let A become the owner of B's property; Jones wishes Smith to let him become the owner of the fish, and Smith wishes Jones to let him become the owner of the apple. Third, party A assents to B's wish provided B also assents to A's wish; Jones assents to let Smith become the owner of the apple provided that Smith lets him become the owner of the fish, and Smith assents to let Jones become the owner of the fish provided that Jones lets him become the owner of the apple.

In short, an exchange involves a mutual acknowledgment of each other's property as a matter of fact, and a conditional consent between the exchanging parties about the future ownership of goods that they presently own. But how can a mere act of the will—the consent of the exchanging parties—affect property? How can an exchange between Jones and Smith make Jones the owner of the fish and Smith the owner of the apple?

This question cannot be answered on grounds of our insights about how original appropriation creates property through physical transformation. For one thing, an exchange does not physically transform the goods that are exchanged—or, to be more precise, the physical transformation of these goods is no necessary attribute of the exchange. Moreover, even if, as a consequence of an exchange, a good is physically transformed and thereby appropriated by its new owner, it still bears the stamp of the previous owner's persona and in this sense still is his property. The exchange thus brings about a state of

affairs in which the exchanged good is subject to various layers of consecutive transformations by different persons.

From a purely physical point of view, therefore, an exchanged good is not just tied to any one person, but to several persons. This raises the question how it can be the property of just one person. Rothbard (1998, p. 133) asserts that the right of property “implies” the right to make contracts about this property. This assertion might be correct as far as the transmission of *rights* is concerned, but how is it related to what we said so far about factual appropriation? We have not been concerned about rights at all, but only about appropriation through physical transformation, and we stressed at the outset of our analysis that we would not be dealing with normative questions, but with purely factual ones. Rothbard’s assertion about property rights (in so far as it concerns a normative issue) does therefore not answer to question how things are appropriated through exchanges.

How, then, do exchanges affect property? An exchange has certain implications for the justification of the post-original appropriation of the exchanged goods. After the exchange, Smith cannot object to the appropriation of the apple through Jones; or, more precisely, he cannot so object without self-contradiction, because he has assented to letting Jones appropriate the apple. Similarly, Jones cannot without contradiction refuse to appropriate the apple because by virtue of the exchange he has given his assent to becoming its owner. It follows that the apple henceforth bears the (antecedent) stamp of Smith and the (consecutive) stamp of Jones. But Smith’s stamp can no longer be claimed for Smith, because Smith himself has, through the exchange, given up the claims he had on the apple.

Notice that these statements about justification do not raise any normative issues. We do not say that Smith should or will object to Jones’s appropriation of the apple, or that Smith should not or will not make such an objection. We only say that, by not making it, he will not contradict himself whereas he would contradict himself if he did make it. In other words, respect for the stipulations of an exchange can be *justified* whereas violations of these stipulations cannot. This is a purely factual statement.¹⁷

To sum up, gifts and exchanges do not by themselves transform the physical properties of the gifts or the exchanged goods, and therefore they do not make them one’s property in the same way as original appropriation can make them one’s property. Rather, gifts and exchanges are justifications concerning the future, consecutive appropriation of these goods. They involve two elements: first, the mutual acknowledgement of previously existing property; and

¹⁷Here again we can rely on two Reinachian insights: first, that legal objects such as property claims can be analyzed in a purely factual manner, that is, without addressing the normative question who should have which property rights; and second, that property rights can be created or instituted through social (speech) acts. And we can also rely on related insights by Hoppe, van Dun, and Kinsella about the conditions under which property claims can be justified.

second, the previous owner's renunciation to further appropriate the property in favor of the new owner, who alone has henceforth the right to transform and thereby appropriate it. Hence, exchanges and gifts sanction the appropriation of a good through a person other than its present owner.

Unjustifiable Consecutive Appropriation: Fiat Appropriation, Fraud, and Threats

So far we have discussed forms of appropriation that are strictly based on the respect of the self-ownership of other persons. Original appropriation or homesteading establishes property through the transformation of hitherto unowned resources; therefore the property of other people is not affected. Appropriation consecutive to exchanges and gifts is based on the respect of past appropriation and therefore confined within the limits set by each person's self-ownership.

Now we have to deal with an important class of appropriations that are not so confined. In these cases, a person appropriates goods that are already owned by other persons, but his appropriation cannot be justified because he lacks the permission of these other persons.

Consider again our initial setting, in which so far only original appropriation has occurred: Jones has collected an apple and Smith has caught a fish. Now assume that Smith desires to eat the apple and that he just takes and eats it without asking for Jones's permission—for example, because he (Smith) is not willing to buy the apple by exchanging it against his fish and Jones is not willing to give the apple away as a gift. Smith's appropriation of the apple then cannot be justified by a permission of the previous owner, Jones. Rather, Smith appropriates the apple on grounds of his own say-so—in other words, he appropriates it by his own *fiat*.

This is precisely the case that Murray Rothbard (1998, chap. 8) had in mind when speaking of invasion or aggression. The aggressor "invades" other people's property by virtue of the fact that he starts using or otherwise transforming this property without having the permission of the present owner. The physical ties that his action creates between him and the property in question are not justified by the consent of the previous owner. Rather those ties are *fiat* ties.

The case of fraudulent appropriation is only slightly different. Here the present owner *does* allow another person to appropriate his property. But he gives his permission only because he was in error about a relevant circumstance *and* because the other person was responsible for this error. In terms of our apple example, Jones would act fraudulently if he offered to buy the apple for 10 gr. of silver, but handed over a copper coin that had merely an outward layer of silver. In this case, even if Smith then hands over his apple,

¹⁸We define taxation in the customary way as payments that the government exacts under the threat of invading the taxpayer's property. Voluntary payments to the government are not taxation. See on this question Block and DiLorenzo (2000).

Jones has in fact no permission to appropriate the apple at all, because the permission he obtained from Smith was *conditional* upon the transfer of 10 gr. of silver (see Kinsella 2003, p. 34).

It might be argued that we smuggle here a moral principle through the back door: “Thou shalt not bear false witness.” But this is not the case. We are not dealing with the question whether it is morally good or bad to lie. We merely assert that Jones’s lie made his appropriation of the apple unjustifiable, because he did not obtain consent from the present owner.

And similarly, appropriations that occur under threats are unjustifiable even if the present owner “consents” to these appropriations to prevent further invasions of his property. Here too we do not address the question whether it is good or bad to utter threats. We merely assert a commonplace, namely, that consent obtained under threats is no true consent. It follows that, if a person appropriates some previously owned resource under threats, he cannot justify his action by referring to the consent of the previous owner.

Thus our analysis is still descriptive and contains no normative propositions. We do not say that it is good or preferable to transfer property by exchanges and gifts, or that one should not appropriate things by invasion. Rather, we make a series of purely factual statements. It is a fact that appropriation of an object *can* be justified by reference to the permission of the present owner. It is a fact that appropriation *can also* take place without being so justified. And it is a fact that no appropriation of an object can be justified without inner contradiction if this object already has an owner and if this owner does not give his consent to the appropriation.

AN OUTLINE OF PROPERTY ECONOMICS

Counterfactual Analysis of Appropriation

We have now gathered all elements that are needed for a realistic comparative analysis of public policy. In particular, we have seen that all appropriations fall into one of the following two classes: either the appropriation in question is justifiable; or it is not justifiable. That is, either the present owner truly assents to the appropriation of his property through another person, or he does not give such assent. Here we have the realistic comparative terms that we need for the economic analysis of public policy.

Notice that these terms entail a dichotomy. It is impossible that a person A both assents *and* does not assent to another person B using A’s car. He must do either the one or the other. *Tertium non datur*. Following the German sociologist Franz Oppenheimer we might call these two exclusive ways of appropriating a good the economic means and the political means respectively (Oppenheimer 1990; Spencer 1995, p. 62). The economic means is applied in all instances of homesteading, in cooperative but unpaid production, in market exchanges, in donations and bequests, and all other appropriations that respect the will of the present owner. By contrast, the political means is applied

in all instances of invasion of property. Typical cases are private crimes such as fraud, robbery, and murder, but also government action such as taxation.¹⁸

This consequence of our dichotomy, that government action finds itself in one class with private crimes, is entirely descriptive and has no normative connotations. We are not here concerned with those particular aspects of taxation that distinguish it from private robbery. Neither will we pronounce any ethical judgements on behalf of it. What matters for our present purposes is that the dichotomy between the economic and the political means is a realistic analytical tool because it covers all real-world choice alternatives. One can use the political means or the economic means—but one always uses either one of them. And this in turn puts us in a position to compare the respective implications of the economic and the political means in any given context.

This comparison has a rather particular character, though, that needs to be emphasized. Because the alternative between economic and political means is dichotomous, the choice of one of them *precludes* the other. If Jones decides to buy Smith's fish by exchanging it against his apple, he thereby precludes stealing the fish; and if he does steal the fish he thereby precludes buying it or receiving it as a gift. It follows that the comparison between the two possible courses of action is a counterfactual one. Whatever Jones does, one compares it to what he *could* have done instead. Thus assume that Jones buys the fish from Smith. Considering this fact one can assert that both are better off than they otherwise would have been—"otherwise" connoting the counterfactual alternative that Jones steals the fish. For in this case only Jones would be better off than he otherwise (in the case of purchase) would have been, whereas Smith would be worse off.

As this example shows, for the application of our counterfactual analysis of appropriation it plays no role which sort of appropriation takes place in actual reality. If Jones steals the fish we can compare the implications of this action to the (counterfactual) implication of him buying the fish or receiving it as a gift. If he buys the fish or receives it as a gift we can compare this factual course of action to the counterfactual impact of him stealing it. Thus, either way, we apply counterfactual analysis to explain what happens by relating it to what could have happened instead. And the counterfactual laws that we uncover through this sort of analysis are laws of appropriation.

These laws exist irrespective of the degree to which a society is peaceful or violent. Reality might feature a Hobbesian war of everyone against everyone else, or an earthly paradise in which not a single violation of property occurs or has to occur. Yet we can understand both of these extreme cases by reference to what would have happened if the other method had been applied to some extent. Speaking about perfect peace one can assert for example that "the division of labor and physical productivity is here greater than it otherwise would have been." That is, the division of labor and the resulting production is greater than it would have been if invasions of property had deterred people from cooperating. And similarly one can assert that "a Hobbesian war diminishes the standard of living below the level it would otherwise

have reached.” It would make no sense to assert that a Hobbesian war makes everyone worse off if it were an unavoidable event governed by laws of dead nature. We can conceive of the economic implications of the *decision* to wage such a war only through a counterfactual comparison with the implications of the alternative decision, namely, not to wage such a war.

Let us emphasize that one can describe the laws of appropriation without making any stipulation about whether the economy is in equilibrium or disequilibrium. Consider the case of income taxation. It incites the taxpayers to produce a smaller marketable quantity than they otherwise would have produced. Taxation entails this effect independent of the question whether the economy is in general equilibrium. How much the taxpayers will reduce their production for the market cannot be said in the light of this counterfactual law. Or consider the case of a monopoly privilege. If this condition is given, then it follows that the revenue of the monopolist is greater than it otherwise would have been.

The laws of appropriation do therefore exist and they can be accurately described irrespective of the actual state of society. They are truly *a priori* laws that are independent of observable reality. They do not concern relationships between various observable events, but relationships between observable events and the counterfactual alternatives to these events.

Institutionalized Fiat Appropriation

Fiat appropriation can occur without following a general rule, but it can also be institutionalized. The most important example of institutionalized fiat appropriation is the modern State, which relies in fact on two such institutions: taxation and fiat money. The economic consequences that result from the presence of these two institutions have been analyzed in a rather massive literature and need not be discussed here.¹⁹ But we have to emphasize two points:

First, the presence of institutionalized fiat appropriation does not simply multiply the kind of consequences that obtain in the case of random fiat appropriation. Rather, it produces specific *new* types of consequences that do not exist in the latter case. The reason is that it is difficult—though not impossible—to *anticipate* individual acts of fiat appropriation that do not spring from a general rule. But it is not difficult to anticipate such acts if they result from institutions designed for the very purpose of committing such acts. As soon as fiat appropriation can be anticipated, it has a systematic impact on human behavior. People have an incentive to join the ranks of the beneficiaries of institutionalized fiat appropriation and to leave the ranks of its victims. This tendency manifests itself for example in the growth of fractional-reserve banking, bureaucracy, and “official” (tax-subsidized) unemployment; in the evasion of fiat money during a hyperinflation; as well as in tax evasion through black markets, emigration, and capital exports.

¹⁹See, for example, Mises (1998, part VI); Rothbard (1977, 1993); Hoppe (1989, 1993).

Second, this impact on human behavior can be described in terms of counterfactual laws; and it can be described properly *only* in terms of such laws. Consider the case of price controls. If the price is set at variance with the equilibrium price, it will entail surpluses or it will entail shortages. Now markets are virtually never in general equilibrium. Does this invalidate the laws of price controls? It does not, provided that we state them counterfactually and say that maximum prices (typical case: public utilities) have the tendency to produce greater shortages than would otherwise have occurred; and that minimum prices (typical case: labor) have the tendency to produce greater surpluses than would otherwise have occurred.

Some Problems Considered:

1. Consent of the “victims”

One could point that all human actions entail choices and argue that, therefore, all actions are voluntary and all social interaction is based on consent. In particular, the subjects of a government really do consent to the rule of the latter, as evidenced by the fact that they do not resist this rule. It would follow that the terms that we proposed for the comparative analysis of public policy—appropriation *with* consent of the present owner as compared to appropriation *without* his consent—would not apply, because public policy is always consensual.²⁰

However, this line of argument is nothing but wordplay. We have already pointed out that the “consent” obtained through fraud and threat is in fact no consent at all. This is readily admitted by virtually all writers when they are dealing with private fraud and private threats. But when it is the State that defrauds and threatens its subject, some are inclined to make distinctions without a difference. Again, for the purposes of our economic analysis of public policy, we do not have to deal with any moral and legal considerations in the light of which fraud and threat might appear differently if perpetrated by a government. We merely have to insist that governments do use such methods; that this entails certain consequences; and that these consequences are entirely independent of the question whether there are moral or legal reasons to have recourse to fraud or threats. If I don’t like to be robbed and know there are many more muggers in Bavaria than in Hessen, I will tend to avoid Bavaria for this reason. Things are not different if I don’t like to pay taxes and know that taxes are much higher in Bavaria than in Hessen.

²⁰The notion that subjects “consent” to invasive rule goes back to Hobbes. It is therefore only logical for Hobbesians to cast their comparative analysis of law and economics in terms of a basic trade-off between the “costs of disorder” (springing from a lack of government) and the “costs of dictatorship” (springing from excessive government). See Djankov et al. (2003). The basic problem of this approach is that it does not correspond to fact. It is not the case that government creates economic order. It creates disorder (Hoppe 2001). For example, the Soviet Union did not create a magnificent order at the price of dictatorship. It created tyranny and disorder in epic proportions. The alleged Hobbesian trade-off between disorder and dictatorship therefore simply does not exist.

2. Accidental Welfare Improvements

One could also object to our approach that appropriation without the consent of the present owner does not necessarily work out to the detriment of this person. It is possible that he will be better off as a consequence of the invasion. It is possible that at first he resists it (*ex ante*), but then (*ex post*) welcomes it after the fact. For example, Brown might steal a bottle of whiskey from his friend Black so that Black does not get drunk. At first Black is resentful, but eventually he admits that he has been better off as a consequence of our invasion. It would follow that there is no such thing as a counterfactual law according to which fiat appropriations make the victims worse off than they otherwise would have been.

There is no doubt that such cases do exist. However, their significance for counterfactual analysis must be qualified in three ways. First, the fact that fiat appropriation might entail *ex post* welfare improvements for the victim does not invalidate the basic distinction between appropriation with and without the present owner, because this distinction concerns *ex ante* situations. Second, the fact that accidental *welfare* improvements are one *possible* consequence of fiat appropriation does not change the fact that fiat appropriation *necessarily* entails various other consequences. This concerns in particular the impact of fiat appropriation on human behavior. Even if a person admits *ex post* to have benefited from an invasion into his property, *ex ante*—that is, in his actual behavior—he will resist such invasions. Third, this impact on human behavior is especially strong in the case of *institutionalized* fiat appropriations. In this case, it is also least likely that fiat appropriation will be welcomed after the fact by its victims.

3. Change of Persons, Change of Standard

The foregoing observations allow us to deal with a related problem. Consider that the human person is not a constant entity, but evolves through time; and that this evolution is determined by the choices that are being made in the course of the evolution path. In short, any decision that I make now will affect what I am in the future. This seems to entail a problem for counterfactual analysis: If we compare the consequences that the choice of any of my alternatives will have for me, do we not have to stipulate that the standard of comparison (me after the choice) is independent of the choices that I make?

This problem is less formidable than it appears. First and most importantly, as we have seen, it is not the case that in counterfactual analysis we only deal with the *ex post* welfare impact of choice on the acting individual. We are primarily concerned with its impact on actual human behavior. Second, even if we consider only the *ex post* welfare impact, it is not the case that counterfactual analysis cannot be applied at all. In choosing A rather than B now, I speculate that the future “A me” that I produce through my choice will prefer the consequences that result from A to the consequences that would have resulted from B. And I also speculate that, had I chosen B, the future “B me” would *also* have preferred the consequences that would have resulted from A

to the consequences that did result from B. It is true that my speculations can be wrong. But, again, this does not affect the validity of counterfactual analysis *per se*, and it does not affect the most important applications of this type of analysis.

Applying Counterfactual Laws of Appropriation

The laws of appropriation have great practical importance due to the simple fact that each person has it in his hands to invade or not to invade other people's property. One *can* decide that an object X is the rightful property of person A rather than of person B. One *can* also decide that government should not interfere with (regulate, nationalize, etc.) private property in some concrete case. And one *can* adopt the maxim that, in general, government should minimize violations of private property.²¹

Moreover, the laws of appropriation are especially relevant for public decision-making because it is here that their application is least problematic. Nobody in government or in the Ministry of Finance doubts that virtually all taxpayers have rightfully acquired their property, or that the overwhelming majority of the taxed and regulated enterprises obtain their revenue through voluntary exchanges. The government does not tax and regulate them to correct improper acquisitions. It taxes and regulates them *in spite of* the fact that by and large all private property has been properly acquired, because there are other considerations that suggest such interference.

The genuine problems of applying the laws of appropriation arise only in what is today (in the age of heavy government intervention) a minority of cases. For such problems emerge whenever it is not clear who owns what, and such indeterminacy always means that it is not clear who has acquired what. These problems emerge on three occasions: (a) when property is homesteaded, (b) when it is jointly produced, and (c) when it is exchanged.

Case *a* is given, for example, when I find a jacket in the woods and take it home in order to keep it. Have I properly homesteaded it? This depends on the answers one can give to a number of questions, for example, whether its former owner has abandoned it or whether he has just left it for some hours on that spot and was already on his way to take it back. Similar questions arise when I come to a visibly unowned land and transform it through my work. What precisely have I acquired? Do I own just the surface? Do I own the surface and three (thirty, three hundred, etc.) meters of ground beneath it? How much of the airspace above the surface have I acquired? These questions have to be answered in order to tell what I can acquire or what I have acquired. Cases *b* and *c* are obviously related to case *a*. I cannot sell any more than I own, and may not use other people's property without their permission. However, these cases have also problems of their own. It might be doubtful what precisely I have bought or sold, or some event might occur that the contract did not foresee.

²¹This contrasts with the economic laws uncovered by equilibrium analysis, which cannot be applied in practical decision-making. The simple fact is that one cannot decide not to commit any errors, or to attain or not to attain equilibrium.

All this is not to say that these problems cannot be solved. Some of the oldest professions and institutions of mankind (judges, lawyers, and courts) have time and again proven that there are solutions for even the most intricate problems of this kind. They provide the solutions on which the applied economist can base his research. And again we should emphasize that the application of property economics enjoys a big advantage over the application of equilibrium economics. To apply equilibrium economics we more or less have to start each second anew. Each moment a new situation—and thus a new problem—is given and acting man has to act successfully under these conditions. The rapid appearance and disappearance of problems makes it difficult and senseless to develop standard solutions. By contrast, the problems do not change so quickly when it comes to determine property. It might be difficult to tell who owns what, especially when a problem arises for the first time. However, if a solution is found then it can be applied to a great variety of cases.

Now let us come to our main proposition in this context. None of the above cases *a*, *b*, and *c* can be treated with the means of economic science. Economists here have to rely on the judgements of lawyers, or they must judge these cases *qua* lawyers and not *qua* economists. The reason is twofold.

First, property economics studies the comparative implications of peaceful and violent acquisitions. However, as an investigation *a priori* it does not seek to determine who owns what. We have argued that, under present conditions, this question is most easily answered in the overwhelming majority of cases. The answer is difficult in a minority of cases. Yet whatever the answer might be—it is clear that it must refer to the particular circumstances of the individual case, and that it is not the task of the economist to provide it.

The second and crucial reason is that economics is the science of choice, and *choice already presupposes property*. It would therefore be circular reasoning to deduce from choice the solution of a problem that this very analysis of choice must assume to be solved, or at least to be solvable, on other grounds. Property economics assumes that there are objective, that is, choice-independent standards by reference to which one can tell whether a person A or a person B owns an object X. Only on the basis of this assumption can one distinguish between economic and political means. Only then becomes our comparative investigation possible.

The Austrian Tradition

The purpose of the preceding pages was to highlight the nature of the laws of appropriation. These laws enable us to perform a special type of comparative analysis—they enable us to compare the implications of an appropriation that actually takes place, or is planned to take place, to the implications of an appropriation that could have taken place instead.

As we have seen, counterfactual comparisons of this sort are highly relevant for political decision-making. It is therefore not surprising that, from very early on, economists have been aware of the fact that their statements about any given economic policy relied on a comparative assessment of this policy, contrasting its impact to a state of *laissez-faire*.

The first economist who clearly recognized that in all cases the comparison between government intervention and a *laissez-faire* or free-market economy led to the same result, namely, that government intervention makes things worse than they would be in a (however imperfect) free market, was the great French philosopher Etienne Bonnot, Abbé de Condillac. He wrote only one book on economic science, which though would turn out to be a classic: *Le commerce et le gouvernement*. In a brilliant axiomatic analysis, Condillac first explains the operation of a completely unhampered market, and then highlights the impact of various government interventions on the market, which in each single case turn out to be “blows directed against commerce.”

Condillac’s economic work had an unfriendly reception with the economic-science establishment of his country, the physiocrats. Unlike most other contemporary French tracts on economics, it was therefore not translated into English and came to be neglected—eventually it was translated more than 200 years after its original publication as *Commerce and Government*.

More than seventy years after the first publication of *Le commerce et le gouvernement*, another French economist, Frédéric Bastiat, made further strides toward the clarification of the nature of economic analysis of government intervention. In the tradition of Condillac, he stressed that the correct procedure of economic analysis is to first examine the operation of the unhampered market, and then to turn to the impact of government interventionism.²² Going beyond Condillac, Bastiat clearly saw that this approach is useful because there are for human beings exactly two manners of acquiring means of sustenance: creation or theft (1851, p. 502). In other words, economic science could rely on a comparison of the modes of appropriation characteristic of *laissez-faire* on the one hand, and of interventionism on the other hand. Bastiat grasped that what was here involved was a rather special type of comparison, namely, counterfactual comparisons. In his great essay “What is Seen and What is Not Seen,” Bastiat presented this insight as a counterfactual tale about a broken window. A boy breaks a pane of glass and the usual economic sophists gather to praise the accident because it keeps industry going. Bastiat (1964, pp. 2f.) objects:

Suppose that it will cost six francs to repair the damage. If you mean that the accident gives six francs worth of encouragement to the aforesaid industry, I agree. I do not contest it any way; your reasoning is correct. The glazier will come, do his job, receive six francs, congratulate himself, and bless in his heart the careless child. *That is what is seen.*

But if, by way of deduction, you conclude, as happens only too often, that it is good to break windows, that it helps to circulate money, that it results in encouraging industry in general, I am obliged to cry out: That will never do! Your theory stops at *what is seen*. It does not take account of *what is not seen*.

²²“La science économique doit commencer par exposer la théorie des transaction humaines supposees libres et volontaires, comme la physiologie expose la nature et les rapports des organes, abstraction faite des causes perturbatrices qui modifient ces rapports.” Bastiat (1851, p. 489)

It is not seen that, since our citizen has spent six francs for one thing, he will not be able to spend them for another. *It is not seen* that if he had not had a windowpane to replace, he would have replaced, for example, his worn-out shoes or added another book to his library. In brief, he would have put his six francs to some use or other for which he will not now have them.

Here is the nature of economic argument in a nutshell. Unfortunately, Bastiat died in the same year in which he published these insights. But other French economists followed him in his net departure from the type of argument cherished by the British school of Smith and Ricardo, which had reduced economics to a science of (visible) facts, and replaced human happiness by a materialistically-conceived “wealth.” The most notable of these followers, who contributed enormously to the clarification of the nature of the economic analysis of government intervention was J.G. Courcelle-Seneuil. In his *Traité d'économie politique*, he recognized that this analysis consisted in a “comparison of two systems of appropriation” (1867, pp. 372ff.), and he explained the rationale for this procedure in the following words:

When we consider . . . all systems of property that have ever existed . . . we recognize without difficulty that they are but diverse combinations of two elementary modes of appropriation. In fact, either the individual has the sovereign control over his labour and some part of the sum of social wealth, or this sovereign control belongs to someone else. In the first case, we say that wealth is appropriated *by liberty* and in the second, *by authority*. (1867, p. 202; my translation)

These two modes of appropriation are generally combined in very diverse combinations and have never led a separate existence but in very exceptional circumstances. Still it is easy to separate them in our thinking and to find them again in the facts of history once we analyze these facts. (1867, pp. 202f.; my translation)

Thus Courcelle-Seneuil recognized that one important branch of economic science engages in a theoretical comparison two elementary modes of appropriation. The results of this analysis—the comparative laws of appropriation—can then be applied in the analysis of any given historical situation.

Unfortunately, this perspective on the comparative nature of economic laws fell into oblivion. Bastiat and his followers were defamed as a political agitators and their scientific achievements were systematically diminished, especially from the side of British economists.²³ Economic science fell under the sway of British political economy, which, as far as its materialistic methodology is concerned, found its fulfillment in the wave of positivism that swept economic science in the twentieth century.

In the twentieth century, economists of the Austrian School upheld Bastiat's approach, even though they did so rather unconsciously and therefore

²³See Salerno (1988, 2001). A notable exception is John Neville Keynes (1890) who emphasized that economic science starts from an analysis of pure *laissez faire*, and then proceeds to analyze other modes of social interaction.

unsystematically. Ludwig von Mises grasped somewhat more firmly than Bastiat that certain economic laws are not only comparative, but also counterfactual in nature. But he did not recognize the significance of this fact and so it did not make it into his methodological thought. Still his analysis of government intervention in the market economy features plenty of counterfactual arguments. Thus he refers to government fixing “price at a height different from what the market would have fixed if left alone” (1998, p. 757) and to labor unions raising “wage rates above the height at which the unhampered market would determine them” (1998, p. 763); similarly, in analyzing the impact of credit expansion, he states that “the gross market rate continues to lag behind the height at which it would cover both originary interest plus the positive price premium” (1998, p. 549).

Among contemporary writings, Hoppe’s *Theory of Socialism and Capitalism* (1989) is an outstanding piece of *a priori* comparisons between *laissez-faire* and government intervention, but Hoppe too was unaware that the nub of his argument was a counterfactual comparison.

CONCLUSION

The analysis of the impact of positive law (legislation and court decisions) on the economy requires a comparative approach. The main difficulty is to unearth suitable terms for such a comparison. We have argued that such terms can be found if we look at how economic goods become private property. In particular, we have shown that there is a dichotomy between two types of appropriation: one can appropriate any given economic good with the consent of its previous owner, and one can also appropriate it against his will. Consensual appropriation entails specific consequences in comparison to non-consensual appropriation, and vice-versa. These relative consequences are constant through time and space. They constitute a special class of *a priori* laws, which we have called counterfactual laws of appropriation. Such laws have a long tradition in economic science, especially in the Franco-Austrian tradition of economic analysis of government interventionism. However, their logical character has never been clearly stated.

Counterfactual laws of appropriation can be applied in realistic analyzes to describe the impact that the positive law has on the economy. Because they are counterfactual laws, they exist and operate independent of any factually given legal framework. Either the positive law protects appropriation by consent; or it makes provisions for forced appropriations. Yet whatever the stipulations of the positive law might be, their economic impact can be explained comparatively in light of counterfactual laws of appropriation. Economists can therefore with full justice engage in aprioristic analysis of social reality.

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