

5. Honoré points out that concepts of property other than the extensive notion that Nozick assumes are not only conceivable but actually exist and appear to be defensible. This is because a system of property may exist for different purposes. What different purposes might be served by different systems of property? What, if anything, follows about Nozick's concept of property?

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## Property, Title and Redistribution

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This discussion paper is concerned with the relationship between the institution of private property and the notion of economic equality. Is it inconsistent, or morally obtuse to recognize the value of the institution and at the same time to argue that each member of a society is entitled to an equal or approximately equal standard of living? I shall be particularly concerned with the argument of R. Nozick, in *Anarchy, State and Utopia*<sup>1</sup> to the effect that under a system of "just entitlements" such as he specifies there is no room to admit that the state has the right or duty to redistribute benefits so as to secure an equal or more equal spread, because "the particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition."<sup>2</sup> Though Nozick's "just entitlements"<sup>3</sup> are not confined to titles to property I shall so confine myself. Rights of a more personal character could in theory be the subjects of redistribution and indeed Nozick discusses the case for transplanting organs from A to B in order to correct physical maldistribution of parts of the body.<sup>4</sup> Fascinating as such speculations may be, the physical and technical difficulties involved in such a programme would be stupendous and the moral objections to the invasion of people's bodies for whatever purpose are much stronger than they are when what is proposed is to tax or, in some cases, to expropriate. Nor can one concede the argument that the redistribution of part of what A has earned to B goes beyond the invasion of property rights and amounts to a system of forced labour<sup>5</sup> by which A is compelled to work part of his day for B, so that redistribution of property is really an invasion of the status and freedom of the person taxed or expropriated. This

is no more compelling than the Marxist argument that a wage-earner whose surplus product is appropriated by the employer is a sort of wage slave. The objection to this is not that the income-earner freely works under a system in which he knows that part of what he produces will be appropriated by his employer or transferred to other people by means of taxes. He may have no choice, if he is to earn a living, but to accept a system which he dislikes. The argument is open to attack rather because it rests on the morally questionable view that a person is entitled to keep exclusively and indefinitely for himself whatever he makes or produces. This would be true of a man working in complete isolation; no serious argument has been advanced to show that it is true of a social being.

Nozick's argument depends on accepting this questionable view. Against those who favour a principle of social justice by which things are to be distributed according to need, desert, the principle of equal claims or the like, he argues that the just allocation is the historically justifiable one. This can be ascertained, in relation to any given item of property, by asking whether the holder acquired it by a just title or derived his title justly from another who so held it, either originally or by derivation from such a just acquirer. Consequently just distribution depends on just acquisition and transfer, and redistribution is confined to those instances in which the original acquisition or the subsequent transmission of the property was unjust.

All therefore turns on what count as just principles of acquisition and transfer of title. According to Nozick—

1. a person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding
2. a person who acquires a holding in accordance with the principle of justice in transfer from some one else entitled to the holding is entitled to the holding
3. no one is entitled to a holding except by (repeated) applications of 1 and 2

The complete principle of distributive justice would say simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution.

What is presupposed by this set of rules for tracing title is apparently only that the principles of acquisition and transfer should be morally respectable. For acquisition something like *Locke's* theory of property is understood.<sup>6</sup> Transfers in a free society will be consensual. But that is only the appearance. What *Nozick* additionally presupposes, without seeking to justify, is that the interest acquired and transmitted is the ownership of property as conceived in western society on the model of Roman law.<sup>7</sup> He is assuming, first, that the acquirer obtains an exclusive right to the thing acquired, that he is entitled, having cleared the land, made the tool etc. to deny access and use to everyone else. Secondly he is supposing that the right acquired is of indefinite duration. The man who has made the clearing can remain there for his lifetime. He is not obliged to move on after so many years, and leave the fruits of his labour to another, nor does he lose his right by leaving. Thirdly the right is supposed to be transmissible inter vivos and on death, so that it can be sold, given, inherited, mortgaged and the like again without limit of time. Under such a system of property law, of course, the initial acquisition is decisive. Once A has cleared the land his neighbours, friends, associates and, if it comes to that, his family are obliged to look on while he enjoys and transmits his "entitlement" to whomsoever he chooses, irrespective of the fact that in a wider context they, along with him, form part of a single group<sup>8</sup> which is dedicated, among other objects, to the preservation of all. This system of property law, whatever its economic merits, is not self-evidently just. If the interest acquired (western type ownership) is greater than can be morally justified, then however just the methods by

which A acquires the thing in question and transfers it to X, the distribution of property under which the thing is allocated to X is not thereby saved from criticism. Indeed, quite the contrary. If the interest awarded to owners under the system is greater than can reasonably be justified on moral, as opposed to economic grounds, any distribution of property will be inherently unjust. Hence the intervention of the state will be needed if justice is to be done.

There is no doubt that the *Nozick* rules about just acquisition, transfer and distribution reproduce in outline western systems of property law based on the liberal conception of ownership. According to these notions, ownership is a permanent, exclusive and transmissible interest in property. But this type of property system is neither the only conceivable system, nor the easiest to justify from a moral point of view, nor does it predominate in those societies which are closest to a "state of nature."

In so far as the *Nozick* principles are meant to reproduce western property law they are incomplete in that they omit provision for lapse of title and for compulsory acquisition. Lapse of title is not perhaps of great moral importance, but it is worth noting that legal rules about limitation of actions and prescription embody the idea that an owner who neglects his property may be deprived of it. The acquirer (squatter or the like) obtains it by a sort of private expropriation. More important is expropriation by the state or public authority. It is not at all clear why the parts of western property law favourable to the private owner should be reproduced in the system of entitlements to the exclusion of those which favour the claims of the community. The latter, after all, balance the former. The individualistic bias of property law is corrected by the admission of state claims to tax and expropriate.

Aside from the omission of rules about lapse and compulsory acquisition one may note that *Nozick's* principles rest on the assumption that whether a justification exists for acquiring or transferring property can be decided in abstraction from the historical and social context. A just acquisition in 1066 or 1620 remains a just root of title in 1975. If this were really so one would have to say either that the acquisition of slaves is seen in retrospect always to have been unjust and that the state would have been justified in inter-

vening in a slave-owning society to correct the injustice, or that the descendants of slave-owners are entitled to own the descendants of freed slaves. So with colonies, *mutatis mutandis*. Are we to say that as a result of the post-war movement to free colonies we now see that the acquisition of colonies, apparently valid at the time in international law and morality, was always wrong and that the international society would have been justified, had it been so minded, in intervening even in the nineteenth century to free the existing colonies and prevent further acquisitions? If so, how can we be sure that there are not equally unjustified forms of property ownership in present-day society which in fact justify state intervention in a redistributive sense? And how can we be sure in any future society that these objectionable forms of acquisition are not present? In which case, outside Utopia, the thesis advanced by Nozick has no application. But if the acquisition of slaves and colonies was initially just, surely some provision should be made in his system for the redistribution of entitlements when the moral basis on which they originally rested has become eviscerated. These instances would count morally as cases of lapse of title owing to changing views of right and wrong. Legally they would furnish examples of just expropriation. There would have to be a further exception in Nozick's system to cater for changing conditions of fact. Suppose, apart from any question of the justification for colonies, that in the nineteenth century Metropolitania occupied a deserted tract which it proceeded to colonize, building roads and irrigating the land. As a result a numerous indigenous population crowded in from the neighbouring areas. These people now claim to be free and to decide their own destinies. Whether or not colonization is in general thought a permissible form of "entitlement" the changed situation must surely change one's moral evaluation of Metropolitania's title to the formerly deserted tract. So with the Mayflowerite who bagged a large stretch of unoccupied land in 1620. If the situation is now that irrespective of title the tracts in question are occupied by people who have nowhere else to live surely the moral basis of the title of the Mayflowerite's successors must at least be open to debate. Once there was more than enough to go round, now there is not. And is the case very different if the thousands without property

instead of occupying the colonies or tracts in question crowd the periphery and make claims on the unused resources inside: All this is intended to make the simple point that it is obtuse to suppose that the justification for acquiring or transmitting property could be settled once and for all at the date of acquisition or transfer. Legally it may be so, subject to the rules of lapse and expropriation. This is because of the need to frame rules of law in such a way as to ensure certainty of title. They are meant however to be applied in a context in which social and moral criticism may be directed against their operation and in which their defects may be corrected by legislation or similar means. Apart from positive law, can it seriously be maintained that the rules about what constitutes a just acquisition or transfer both express unchanging verities and, in their application to the facts of a given acquisition or transfer, are exempt from reassessment in the light of changed circumstances?

Systems of property law which diverge from the orthodox western type based on liberal conceptions of ownership are conceivable, morally defensible and have actually obtained in certain societies. To begin with the conceivable, let us take an imaginary case. Suppose that, in a "state of nature" a group of people live near a river and subsist on fish, which they catch by hand, and berries. There is great difficulty in catching fish by hand. Berries are however fairly plentiful. There are bits of metal lying around and I discover how to make one of them into a fishhook. With this invention I quadruple my catch of fish. My neighbours cannot discover the knack and I decline to tell them. They press me to lend them the fishhook or to give them lessons in acquiring the technique. I have however acquired western notions of property law and Lockean ideas about entitlement, I point out that I have a just title to the fishhook, since according to Nozick's version of Locke they are no worse off as a result of my invention. I am therefore entitled to the exclusive, permanent and transmissible use of the fishhook. My neighbors may try their hands at finding out how to make one, of course, but if they fail they may look forward to eating berries and from time to time a bit of fish while I and those persons whom I choose to invite to a meal propose to enjoy ourselves with daily delicacies. If they object that this is unfair I shall point out (though

the relevance is not obvious) that they are not actually starving. Nor am I monopolizing materials. There are other pieces of metal lying around. They are no worse off than they were before or than they would have been without my find (in fact they are worse off, relatively to me). As to the parrot cry that they protect me and my family from marauders, wild animals and the like, so that I ought to share my good fortune with them, I reply that they have not grasped what is implied by a system of just entitlements. Are they saying that I am not entitled to the fishhook?

One of my brighter neighbours might well answer me as follows. "I do not deny that you have a right to the fishhook. As you say you made it and you invented the system of using it to catch fish. But it does not follow that, as you assert, your right to it is exclusive, permanent and transmissible. Your views seem to be coloured by reading books about sophisticated societies. In those societies men are dedicated to increasing production, come what may, and in order to achieve that they accept institutions which to us seem very unfair. We are simple people used to sharing our fortunes and misfortunes. We recognize that you have a right to the fishhook but not that the right has the unlimited content which you assign to it. You ought to allow each of us to use it in turn. Naturally as the maker and inventor you are entitled to a greater share in the use than the rest of us individually, and if you like to call that share 'ownership' we shall not object. But please stop looking up the definition of 'ownership' in foreign books. These notions will only disrupt our way of life."

The point my neighbour is making is that a system of private property can be inherently distributive. In the system envisaged there is an "owner" in the sense of a person whose right to the use of the thing is greater than that of others, who has a residual claim if others do not want to use the thing, and in whom powers of management will be vested. He will be responsible for lending the fishhook out, it will be returned to him each evening, he will keep it in repair. But these powers of use, management and reversion fall short of western conception of ownership. In such a system the redistributive power of the state will be unnecessary unless the members of the group fail to keep the rules. For the rules themselves ensure an even distribution of prop-

erty, subject to the recognition of desert and choice — recognition which is not allowed to subvert the principle of sharing.

Is the projected system of property law obviously unjust? How does it compare with western notions of ownership? From the point of view of justice, though perhaps not of economic efficiency, it seems to compare rather favourably. It is designed to give effect to the interdependence of the members of the group and to recognize overtly that they cannot survive in isolation. It rejects the notion that I do no harm to a member of my group if as a result of my effort I am better off, and he is no worse off than he would otherwise be. That notion, which is common to the outlook of *Nozick* and *Rawls*, however much they otherwise differ, rests on the assumption that a person who is comparatively worse off is not worse off. But he is, and the precise wrong he suffers is that of being treated as an unequal by the more fortunate member or members of the group.

The fruits of an invention which raises production have therefore, in the projected system, to be shared, either by a system of compulsory loan or, in a weaker version, by a system of surplus sharing, under which what an owner "has in excess of his needs or is not using must be made available to other members of his group."

The sort of system envisaged is unlikely to survive the division of labour, viz. specialisation. The members of the group other than the inventor are likely to feel that he can fish better than they and that they would do well to get him to fish for them. But then they must pay him. At first perhaps the payment is a fraction of the catch. Later the inventor is bemused by the idea that he is entitled to the whole product of his invention. So he argues that his neighbours owe him the whole of his catch and, if they want any of it, must pay in some other way, as by repairing his hut. As he has possession on his side his views may prevail. We slide insensibly, therefore, from a participatory to an exclusive system of property law, and it is difficult to keep alive, in a society of economic specialisation, the notion that each participates in a common enterprise. The remedy for this is not, or is only to a minor extent, a return to rotatory labour. It is, rather that the community as a whole, the state, must act as the surrogate of the participatory principles. The inventor of the fishhook will

have to be taxed. In that way the economic advantages of specialisation can be combined with a just, or juster distribution of the benefits derived from it. The tax will be used to give the other members of the group benefits corresponding to their former rights to use the fishhook.

There is no point in attempting to work out in detail what a participatory system of property law would be like. The idea is easy to grasp. If such a system is morally sound, then it follows that in a western-type system the intervention of the state, so far from being, as *Nozick* thinks, ruled out except in peripheral instances, (initially unjust acquisitions, subsequently unjust transfers) is essential in order to achieve justice in distribution.<sup>10</sup> Whether one says that this is because in a western-type system all the holdings are unjust (because they are holdings of an unjust sort of property interest) or that they were initially just but that their permanent retention cannot be justified, is debatable: the former seems more appealing. In any event either *Nozick's* conclusion is empty because the premises are never fulfilled, or if the premises are fulfilled, they do not lead to the conclusions which they seem to lead.

If it is accepted that the sort of property system described is conceivable and morally defensible, that is sufficient to rebut the argument which denies a redistributive function to the state. It is not irrelevant, however, to draw attention to the fact that among the variety of property arrangements found in simple societies there are some which approximate to the distributive arrangement outlined. Among other things this will serve to rebut any argument that I am relying on a gimmicky obligatory principle of transfer.<sup>11</sup> A convenient outline of the variety of such property systems is to be found in *M. J. Herskowitz's* work.<sup>12</sup> They are of course multifold: apart from arrangements which resemble the western institution of ownership there are to be found types of group (e.g. family or clan) ownership, public ownership, rotating individual use (e.g. of fishing grounds) and also the sort of arrangement here envisaged, namely what may be called private ownership subject to compulsory loan or sharing. Thus among the Bushmen<sup>13</sup> "all kinds of food are private property" and "one who takes without the permission of the owner is liable to punishment

for theft" but "one who shoots a buck or discovers a terrain where vegetable food is to be gathered is nevertheless expected to share with those who have nothing," so that "all available food, though from the point of view of customary law privately owned, is actually distributed among the members of a given group." The dividing is done by the owner and the skin, sinews etc. belong to him to deal with as he pleases. Among the Indians of the Pacific North-West<sup>14</sup> a man is said to have "owned" an economically important tract and this "ownership" was expressed by his "giving permission" to his fellows to exploit the locality each season but "no instance was ever heard of an 'owner' refusing to give the necessary permission. Such a thing is inconceivable." The individual "ownership" is a sort of stewardship or ownership in trust carrying with it management and the right to use but not excluding the right of others to a similar use. Among certain tribes of Hottentots<sup>15</sup> a person who dug a water-hole or opened a spring made this his property and all who wished to use it had to have his permission, but he was under an obligation to see that no stranger or stranger's stock was denied access to it. Among the Tswana<sup>16</sup> where the chief allocates (and in that sense "owns") the land he will allot cattle-posts to individuals, but not exclusively. The allocée, whose position is closest to that of the private owner, "must share with a number of other people the pastures of the place where his cattle-post is situated, although no one else may bring his cattle there without permission." Yet occupation does give a certain prior right. "If a man builds a hut and so indicates that it is not merely for temporary use, he established a form of lien over the place, and can return to it at any time."

There are also examples of what I have termed surplus sharing, which give effect to the principle that what a person has in excess of his needs, or is not using must be made available to other members of the group. Among the Eskimos the principle that "personal possession is conditioned by actual use of the property" comes into play. A fox-trap lying idle may be taken by anyone who will use it. In Greenland a man already owning a tent or large boat does not inherit another, since it is assumed that one person can never use more than one possession of this type. "Though what a

person uses is generally acknowledged to be his alone any excess must be at the disposal of those who need it and can make good use of it."<sup>17</sup>

These examples show that there is nothing unnatural about distributive property arrangements in a simple society. The mechanism, or one of the possible mechanisms by which such arrangements are secured, is that of what it seems preferable to call private ownership subject to a trust or a duty to permit sharing. The "ownership" is not of course ownership of the classical western type, but neither is it "primitive communism." Its essential feature is that the titles to acquisition are much the same as in modern societies—finding, invention, occupation, making and the like—and the types of transfer—sale, gift, inheritance—are not necessarily dissimilar, but the type of interest acquired and transmitted is different. The principle of sharing is written into the delineation of interests of property.

There is no special reason to think that our moral consciousness is superior to that of simple societies. So if compulsory sharing commends itself to some of them it should not be dismissed out of hand for societies in which the division of labour has made those simple arrangements out of date: but in these, given the weakened social cohesion which the division of labour introduces, the central authority (the state) is needed to see that sharing takes place.

#### NOTES

1. Oxford 1974.
2. Nozick p. 238.

3. Nozick pp. 150–182.

4. Nozick p. 206.

5. Nozick pp. 169 f, arguing that redistributive arrangements give B a sort of Property right in A. This mistake stems from the Lockean argument that we own ourselves and hence what we make etc. If human beings are free they cannot own themselves; their relationship to themselves and their bodies is more like one of "sovereignty" which cannot be alienated or foregone, though it can be restricted by (lawful) contract or treaty.

6. Nozick pp. 174 ff.

7. For an analysis see Honoré, "Ownership," in: Guest, *Oxford Essays in Jurisprudence* (London 1961).

8. For an analysis see Honoré ARSP 61 (1975) 161.

9. Herskowitz, below n. 12, p. 372.

10. Nozick, pp. 174 ff. However one interprets Locke's requirement that the acquirer must leave enough and as good in common for others (Second Treatise sec. 27) the intention behind it is not satisfied unless entitlements are adjusted from time to time according to what then remains for others.

11. Nozick p. 157.

12. M. J. Herskowitz, *Economic Anthropology* (New York 1952), part IV. Property.

13. Herskowitz, pp. 321–2, citing L. Schapera, *The Khosian Peoples of South Africa, Bushmen and Hotentots* (London 1930) p. 148.

14. Herskowitz pp. 332–3, citing P. Drucker "Rank, Wealth and Kinship in Northwest Coast Society," *Amer. Anth.* 41 (1939) p. 59.

15. Herskowitz pp. 343–4, citing Schapera, above n. 13, at pp. 286–291.

16. Herskowitz p. 344, citing L. Schapera and A. J. H. Goodwin "Work and Wealth" in *The Bantu-Speaking Tribes of South Africa* (ed. L. Schapera) pp. 156–7.

17. Herskowitz pp. 373–4 citing K. Birket-Smith, *The Eskimos* (London 1936) pp. 148–151.

#### Ideas for Class Projects, Papers, or Debates

1. As Honoré notes, while the Western, liberal concept of property is very broad, it is not without limits. Zoning restrictions are among the most common justified by the public interest. Look at the cases of *Euclid v. Ambler Realty Co.* and *Belle Terre v. Boraas*. *Euclid* simply says that residential zoning is a legitimate public interest. It also illustrates how much an individual property owner can lose from a simple zoning change. Consider the arguments presented for restrictive zoning in *Belle Terre*. Support or oppose the Court's decision in the case.

2. The case of *State v. Shack* presents a conflict between the right to exclusive control of one's property—presumably a very basic element of ownership itself—and the civil right to access to legal counsel and medical treatment. Explain the Court's decision in the case and why it is or is not justified.