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The Metaphysics of Real Estate

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The thesis that an analysis of property rights is essential to an adequate analysis of the state is a mainstay of political philosophy. The contours of the type of government a society has are shaped by the system regulating the property rights prevailing in that society. Views of this sort are widespread. They range from Locke to Nozick and encompass pretty much everything else in between. Defenders of this sort of view accord to property rights supreme importance. A state that does not sufficiently respect property rights is likely to be a totalitarian state, and will also be likely to fail to respect rights of other sorts.

While property rights are indeed important, this traditional estimation of their importance is both too broad and also insufficiently specific. For the traditional account of the importance of property rights obscures the fact that it is just one type of property right – the right to property in land – that is of paramount importance for political affairs. The traditional account accordingly subjects this particular type of right to very little in the way of deep analysis. What distinguishes rights to landed property from rights to property of other types turns on matters both geographic and ontological. To a great extent it is precisely the geographic dimension of this special sort of property right that sets it apart from rights of other sorts.

When Locke suggests that the first, original acquisition of property rights is the result of mixing one's labor with the owned thing, he surely has in mind landed property. For it does not make much sense to talk of mixing one's labor with a shirt or a hat. In any event, the value of applying the mixing-labor standard to hats and shirts is debatable. And similarly, when Nozick attaches so much importance to property rights that he considers them to be side-constraints to any political theory, i.e., constraints that are so basic that they are pre-theoretical and are not part of the theory itself, then it is landed property that he has in mind.

Property in land is distinguished also in this. That in the case of things like hats and shirts, ownership follows the age-old saw: possession is nine-tenths of the law. Your possession of a shirt constitutes a strong presumption in favor of your ownership of the shirt. The same is not true in the case of land: here possession is not a strong presumption in favor of ownership. Possessing a thing like a hat or a shirt is a rather straightforward affair: the person wearing the hat or shirt possesses the shirt or the hat. But what possession is in the case of land is not so clear; indeed it is not even clear whether land can be possessed at all.

In his thorough and far-reaching study of property rights, Richard Pipes discusses the etymology of 'possession' and cognate terms. He tells us:

> Some primates assert exclusive claims to land by physically occupying or "sitting" on it. This behavior is not so different from that of humans, as indicated by the etymology of words denoting possession in many languages. Thus, the German verb for "to own", *besitzen*, and the noun for "possession", *Besitz*, literally reflect the idea of sitting on or, figuratively, settling upon. The Polish verb *posiadać*, "to own", as the noun *posiadłość*, "property", have an identical origin. The same root underpins the Latin *possidere*, namely *sedere*, "to sit", from which derive the French *posséder* and the English "to possess". The word "nest" derives from a root (*nisad* or *nizdo*) signifying "to sit". The monarch occupying the throne has been described as engaging in "nothing else but the symbolic act of sitting on the realm" (1999, p. 68)

In this passage Pipes correctly emphasizes the "symbolic" and "figurative" nature of this "sitting on" and "settling upon" the land. For his purposes, it is not important to ask how much land a person (or primate) possesses (or owns) by symbolically sitting on it. It is unlikely that the person would be claiming exclusivity only over the surface of the land he is actually touching. Much more likely is it that a person would claim exclusivity over a region much larger than the area in actual contact with his body. And the symbolic practice of sitting gives absolutely no clue as to what the extension and boundaries of the land over which the person is claiming exclusive rights might be. Thus, the object a person claims to possess or to own is not well defined. Note that this factor of indeterminacy or uncertainty in the borders of one's property is geographic in nature: it has no analogue in the realm of shirts and hats.

It is our purpose in what follows to try to show the shortcomings of traditional accounts of property rights over land. Understanding these shortcomings will then shed light on how a more adequate account should look.

1. What Can We Own?

The crucial importance for political affairs of landed property (or real estate, we shall

use these two expressions interchangeably) has been eloquently summarized by Rousseau:

> The first person who, having fenced a plot of ground, took it into his head to say *this is mine* and found people simple enough to believe him, was the true founder of civil society. (1992, p. 44).

There are two aspects to Rousseau's view that deserve special attention; one concerns geography, the other ontology; more precisely the ontology of social reality. First, the act of fencing off need not, in the context of this passage, be restricted to the case where some physical boundary is constructed. It can be seen as including also the establishment of fiat boundaries. (Smith, in this volume.) To fence a plot of land is to create something new. The land itself, of course, exists before the parcel is plotted, but the act of fencing off nonetheless creates a new object. Second, the act of fencing alone is not sufficient for such object-creation. The latter requires also the existence of what John Searle calls collective intentionality (Searle 1995), that is, it requires that other persons (simplemindedly or not) *believe* that the land is indeed the property of he who fenced it off. Only then can a property right be said to arise.

This means that a comprehensive study of landed property will have three interconnected dimensions: (1) a geographic dimension, having to do with the pecularities of the ways in which real estate is related to the land itself (boundaries, mixing of labor, etc.); (2) an ontological dimension, having to do with what real estate is; and (3) a cognitive dimension, having to do with the interrelations between such geospatial phenomena and our culturally entrenched beliefs and conventions.

Let us use the term 'thing' to refer to anything that can in principle be the object of a property right. Adolf Reinach provides a useful first analysis of this notion, pointing out that:

> The concept of a thing [*Sache*] in no way coincides with that of a bodily object, even if positive enactments would restrict it to this. Everything which one can "deal" with, everything "usable" in the broadest sense of the word, is a thing: apples, houses, oxygen, but also a unit of electricity or warmth, but never ideas, feelings or other experiences, numbers, concepts, etc. (1983, p. 53).

Reinach's passage carries the suggestion that, although the concept of thing is not to be identified with that of a bodily object, still things must be concrete: abstract entities such as numbers and concepts fall outside the range of what can be owned. As Reinach himself would have accepted, however, it is perfectly possible that entities such as computer programs, architectural designs, and so forth could be owned. And even leaving aside such issues of intellectual property, we shall see that there is an important further class of abstract entities – rights themselves – which fall within

the domain of what is ownable.

Reinach suggests that being "usable" might be a necessary condition for something to be ownable, but it is not a sufficient condition. There is a long list of objects regarding which it is difficult to say whether they can be owned, though it is clear that these objects can be *used* in varied ways. Do we own ourselves? We have certain rights over our bodies, but are they property rights? (Munzer 1994, 1995) Whether or not human corpses, wild animals, body parts, can be owned are difficult questions to answer (Ryan 1994). Not all of the difficulties associated with the idea of ownership in such entities are of a geographic or ontological nature. The limitations which many societies place on the ownership of human corpses stem from religious and ethical views, not, for example, from any difficulty in ascertaining the boundaries of corpses. Similarly, limitations on the right to commercialize our body parts seem to stem from ethical considerations rather than from any ontological difficulty in determining the boundary of, say, a lung (a geographic dimension may, though, arise in relation to the buying and selling of fetuses, where we do indeed face a difficulty in determining the boundary between fetus and mother). We shall here, however, leave aside the discussion of those objects which are excluded from being ownable as a result of moral and religious views, and concentrate on the case of ownership in land.

The first step in trying to analyze land as an object that can be owned is to appeal to the age-old distinction between movable and immovable things. Land is the quintessential immovable thing. (The German term for real estate law is "*Immobilienrecht*".) The term 'real estate' refers precisely to those immovable things which are the objects of rights. But, is land really immovable? For lawyers and legal scholars, this question must surely seem absurd, and they will answer it without hesitation in the affirmative. From a more sophisticated ontological perspective, however, matters are not so clear. For there is a range of types of immovable things whose treatment will shed light upon the partly fictional nature of the (positive) legal concept of immovability.

The standard classification of immovables stipulates four types:

1) *Immovables by nature*, the paradigmatic examples of which are land-parcels, edifices (including buildings) and plants adhering to the soil.
2) *Immovables by destination*; here the best examples are agricultural machinery, animals associated with cultivation, and so on. These are all movable things that the law 'immobilizes' in order to account for the strict relationship of dependence in which these objects stand to other objects which are deemed immovables by nature.
3) *Immovables by the object to which they are applied*; this category pertains to *rights*. This is a bold fiction of the law, for as Planiol points out: "rights, being

incorporeal are, strictly speaking neither movables nor immovables. They are not tangible. They take up no room" (1930, p. 317). A classification of rights into movable and immovable can therefore be made only by attending to the object to which the right applies. If the right applies to an immovable thing, then the right is deemed immovable; if the right applies to a movable thing then the right is deemed movable.

4) *Immovables by declaration*; finally, the category of immovables by declaration is the most fictional of all categories of immovable things, since here immovability is just a consequence of some individual's whim. Someone may, for example, simply declare some specific good to be immovable (for example, someone may declare an artwork in her own house to be immovable). There are stark differences from country to country in the way immovables by declaration are provided for and dealt with.

As can be clearly seen, the extent to which the immovability of an object depends on legal fictions varies considerably in the four cases mentioned. But it is hardly ever admitted that even in the case of land there is an element of fiction involved in its putatively immovable nature, and even in those rare cases where this element is indeed admitted, it is not further investigated. Planiol, for example, refers to that which is immovable by nature as follows:

> Strictly speaking, there is nothing which is absolutely immovable. Even the elements which compose the soil, rocks, sand, minerals, may be displaced. When a canal is dug, when lots are leveled it is the soil which is transported. In America, engineers have displaced large buildings without demolishing them. In Paris, the fountain *du Palmier* on the *Place du Châtelet* was set back in its entirety to permit the opening of the *Boulevard de Sebastopol*. But the law does not envisage the possibility of movement with the same rigor as mechanics. The law holds those things to be immovable [by nature] which are *immovable in a durable and habitual manner and whose function is to be immovable*, even if they may be displaced, in some cases, by extraordinary means. (1930, p. 306).

Land moves, too, of course, with the movement of the earth (and a comprehensive analysis of land must take account of this fact if it is to do justice to the extension of property rights in land to the moon, or to distant planets, or even to entire subdivisions of the cosmos). Even when we take account of the many fictions which it might be politically or economically or astronomically fruitful to allow, however, we must conclude that the initially plausible distinction between movables and immovables has only limited potential as the cornerstone of a rigorous analysis of landed property.

2. The Elusiveness of a Comprehensive Account of Landed Property

The parceling of land into real estate is not, as we might be tempted to suppose, a simple geometrical affair. Real estate is a complex historical product of interaction between human beings, political, legal and economic and sometimes religious institutions, and the physical environment. All societies and all human activities – not excluding sleep and death, and speech – take up space, a resource whose utilization is typically subject to the pressure of demand by other, competing users. Moreover, all societies and all human activities manifest a spatial organization which varies systematically from culture to culture and from age to age. There is only one space, which we all must share. We must compete with each other for the use of this space (where each of us, by contrast, has his own time). You and I can compete for the use of a given chunk of space in a way that we cannot compete for the use of a given stretch of time. Stretches of space, moreover, can be embellished, can be more or less permanently improved upon, in a fashion which again does not apply to stretches of time. Stretches of space can, above all, be bought and sold.

Yet, as we have seen, there are difficulties in establishing the very nature of the object that one owns when one owns real estate. Given these difficulties, we will need to utilize rather sophisticated tools that belong to the related fields of ontology, geography and the science of cognition if we are to shed light upon the nature of this special form of property. This tripartite analysis will, moreover, differ from extant political or economic or historical accounts of property rights in that it will not begin by addressing normative or political or legal or economic issues pertaining to different institutions of landed property across the globe. Rather, it will seek to answer such seminal questions as: (1) what is landed property? (2) how are the boundaries of a land parcel first created and how do they continue to exist thereafter? and (3) what sorts of beliefs and other mental phenomena are required for the functioning of a stable system of landed property?

Approaching property rights in land from this perspective does not entail that there is only one set of answers to these questions that could be applied to all cultures and times. On the contrary, our analysis should be able to identify the flaws in those approaches which see land in absolute terms and thus ignore its dependence on aspects (for example legal and political) of the surrounding context. Indeed, the ontology of landed property should be able to provide a general framework within which different institutions of landed property (and of landed non-property) can be contrasted and compared.

Many authors have drawn passing attention to the ontological (metaphysical) aspect of property in general. Jeremy Bentham, for example, has eloquently ex-

pressed this characteristic in the following way: "There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind" (1958, p. 172). Yet, in spite of the obvious metaphysical import of property, few comprehensive analyses of property, and even fewer comprehensive analyses of *landed* property, have been attempted. When does a given land parcel begin to exist? When is a land parcel, at some given time, genuinely identical with what is putatively the same land parcel at another time? How are our answers to these and similar questions affected by the possibility of physical changes in the land itself, or by political changes in the corresponding or surrounding cultures, or by change in occupancy of the land or in the claims made upon it by others? Some of these issues have analogues in philosophical discussions of the ontological status of works of art and of other cultural entities (Smith 1988, Ingarden 1989, Thomasson 1999), as also to philosophical treatments of personal identity and to the debates between proponents of ontological and epistemological theories of vagueness. Some of them can be best addressed by employing the tools of geography, others by employing the tools of the cognitive sciences. Some of them, on the other hand, belong to a new territory: the ontology of legal entities.

Virtually all existing analyses of property ignore important aspects in the comprehensive analysis of property of the type we recommend. Consider the first few sentences of Andrew Reeve's otherwise highly informative survey of the philosophical dimensions of property:

> Property undoubtedly has a central place in arrangements surrounding social life, a place so central that some writers have claimed that it is impossible to imagine anything which could be called a society without some property institution. A moment's thought suggests that property is a key element of an economic system, a major concern of the legal system, and a focus of political dispute (1993, p. 558).

This passage neatly captures the different perspectives from which property is typically analyzed: political, legal, and economic. Full-blown treatments of property rights also tend to focus upon this or that aspect of property rights in general. These treatments typically fail in two ways. First, they fail to isolate property in land in a straightforward way (this is so even when, as is frequently the case, this is what the authors of the works in question have in mind: the problem is that they are not always aware that they are indeed talking exclusively about property rights in land). Second, they fall short of the comprehensiveness that an analysis of landed property demands.

The sorts of questions we find in standard treatments are as follows: What is the justification of property rights? What are the economic or welfare or equity implica-

tions of this or that system of landed property? How should existing systems of property rights be reformed in order to achieve this or that ideal? There is no doubt that these questions are important. It is our thesis here, however, that they can be answered only when a prior, robust understanding of the underlying objects has been gained. This means establishing, for example, what is the difference between a land parcel and raw land, and what is the difference between owning and possessing. (Analogously, one might argue that questions of ecological ethics can be satisfactorily addressed only if we have a prior, ontological, geographical and cognitive analyses of concepts such as 'environment', 'ecosystem', 'environmental protection' and the like.) In addition to the concern with geographical, ontological, and cognitive aspects surrounding landed property, the approach that we recommend here is characterized by its attempt merely to describe the phenomena it investigates. Normative issues surrounding landed property are no doubt important, but again: they can be adequately addressed only once the logically prior descriptive task is carried out in earnest. The analysis of landed property we recommend should thus provide a neutral vocabulary also for the discussion of normative and evaluative issues and for the unprejudiced and unblinkered comparison of different institutional and cultural arrangements concerning land. (Often, clashes between different systems of landed property are difficult to resolve simply because of the absence of a neutral common framework, a *lingua franca*, as it were, which would allow communication between the different systems.)

This descriptive and comprehensive analysis of landed property of the sort we envisage is not, though, without immediate practical implications. The economy of many countries suffers, for example, due to the fact that those countries espouse property systems in which some basic ontological, geographical or cognitive aspect is flawed in such a way as to make an intelligible and efficient method of *land registration* impossible. While landed property is not the only sort of property regarding which transactions are typically registered – this holds too for example of transactions involving cars, ships, planes, radioactive material – landed property is still the paradigmatic case of an object of registration. This is because in these other cases registration is a matter of political or economic efficiency or of public safety. A car is a car, whether it be registered with the Department of Motor Vehicles or not. In the case of land, in contrast, the very nature of the objects themselves, as we shall now see, is such as to require registration – and then if this registration is not forthcoming, or is forthcoming only in some deficient form, then the object itself is thereby detrimentally affected (Zaibert 1999).

The requirement of registration belongs to the essential core of landed property. The registration of landed property has two elements or stages. First is the registra-

tion of deeds, that is, of the specific transaction that is carried out when you buy, sell, or lease a piece of landed property. Second is the cadastral registration, the making of an entry in the *Grundbuch*, which is the registration of the very entity to which the transaction (of buying and selling, etc.) relates. (Bittner *et al*., 2000) This second element in the registration of landed property is absent in relation to property rights of other types, since the boundaries of cars, ships and planes (and even – at the level of granularity that is here pertinent – of portions of uranium) are not open to doubt. A cadastre of ships, or, *a fortiori*, of shirts or hats, simply makes no sense. But a system of property rights over land not backed by a system of cadastral registration (together with a registration of deeds or title) would make no sense either. If the cadastre decays, or is destroyed, or is put out of action by government edict, then the corresponding system of property rights is, in tandem therewith, deleteriously affected.

One pertinent analysis of human uses of space which deviates from the typical normative approach described above is that of E. T. Hall, who points to interesting aspects of the way in which humans interact with the territories on which they live and work. Hall's studies of cross-cultural differences regarding the treatment and conceptualization of space gives rise to the new discipline of 'proxemics'. Unfortunately, however, his work issues not in scientific analysis, but rather in a list of picturesque and somewhat amusing tidbits. Hall (1966) discusses, for example, differences between Western nations and their respective psychologies of space, for example between British, German, French, and Arabic conceptualizations of intrusion, privacy, spatial order. Hall uses these differences in an attempt to explain different habits regarding the volume at which people speak, their patterns of eye movement, their tone of voice when talking on the phone, their policies regarding behavior on the threshold of offices or homes, and many other curiosities. While Hall succeeds in presenting arguments which indicate certain connections between proxemics and systems of landed property, his principal focus is on cognitive cultural differences without regard for how these differences relate to geography and ontology.

A catalogue of the different ways in which different cultures divide, categorize, and conceive space is of course of value. But it can be of scientific import only if it is built up against the background of an ontological understanding of what the relevant geospatial objects are towards which our human conceptions and habits are related. Ontologically well-fouded empirical studies of human spatial cognition are still in their beginnings. (Mark, Smith and Tversky 1999; Smith and Mark 1999, 2001) We can already see, however, that there is a core (or 'primary') theory of the geospatial domain which is shared in common by non-expert subjects in different cultures, and which serves as the tacit basis, *inter alia*, for their interactions with the phenomena

of real estate.

A more substantial body of work does of course exist in the legal literature dealing in non-trivial fashion with issues of landed property and the law. While approaches such as Hall's emphasize the cognitive aspect to the detriment of the geographical and ontological aspects, typical legal approaches, overlook all three dimensions of landed property and pursue exclusively issues of a normative, pragmatic sort. Comparative legal approaches are focused overwhelmingly on the pragmatic interests of lawyers; they therefore tend to underestimate theoretical distinctions and similarities; very rarely do we encounter the attempts to establish a general theory of the institutions compared. Most commonly, analyses in comparative law are carried out with forensic goals; they are comparable to travel guides, designed to allow a lawyer from one culture to gain some vicarious familiarity with the legal institutions and practices of another.

In attempting to construct a general ontology of land and real estate we confront familiar issues pertaining to the nature of rights in general and of property rights in particular. But we also encounter hitherto unnoticed questions relating to the identity conditions of land parcels and associated entities. We shall now attempt to show that these and related questions can be addressed.

3. On the Nature of Landed Property

The space of landed property is *human* space. By that we mean that real estate is a product of the deliberate or intentional activity of human beings. In this regard, parcels of real estate are indeed similar to works of art. Moreover, the familiar distinction between aesthetically pleasing natural objects (such as sea shells and butterflies) and works of art (such as Michelangelo's *David*), corresponds rather neatly to the distinction between bare physical land and real estate. Both works of art and real estate are the result of human intervention: in the case of works of art it is creativity which sparks the human intervention; in the case of landed property it is (*inter alia*) socio-economic needs.

The most primitive relationship between human beings and land (and for that matter, between human beings and things in general) is that of *power* (dominion, faculty, authority over). It is for the sake of the resulting power over land that social groups become sedentary, that wars are fought, and that nations are built. Of course, we can also have power over other things which are not land, such as toothbrushes, guitars, books, pets, and so on. But nations are not built, wars are not fought, and nomadic ways of life are not abandoned, for the sake of power over these other sorts of entities. When a given power is recognized by the state it becomes a right.

(This, at least, is the view which we shall here assume for the sake of simplicity of exposition.) One could of course have rights over a given object without associated powers, and of course *vice versa*. John might have the right to use his car, say, though since it has been stolen, he lacks the power to use it; Susan might have the power to use her neighbor's car, though she does not have the right to do so. The standard view in political philosophy is that property rights are *absolute* in this sense: that the holder of a property right has, as the slogan puts it: the right to use and abuse the thing owned. Pipes points out that this slogan is, technically speaking, a mistranslation of the Latin "*jus utendi et abutendi*" which means rather: the right to use and to consume (1999, p. 11). There is a reason why the slogan has been mis-translated, however, which results from a tendency to emphasize the absolute, unlimited character of property rights. It is this absolute character of the property right which is at work in jurisdictions such as that of Japan, which are affected by strict policies of rent control and of security of tenants' rights. When someone rents a property in Japan, this may mean that he cedes virtually all his rights in this property to his tenant, but the residual property right in the property itself – the absolute right – he nonetheless keeps to himself. This absolute character of rights is however crucially affected by the fact that whatever rights one has over a given object are mediated by the state's intervention. We shall return to this issue below.

Property is often conceived, à la Hohfeld (1919), after the model of a bundle of sticks. Each stick in the bundle signifies a particular right or power: a right to use, a right to possess, to sub-divide, to rent, to build upon, to enjoy the usufruct from, and so on. An owner can, in certain cases, sell or give away specific rights, or see these rights removed, divided, or amended by the force of others. Our practical dealings with landed property in cases where the sticks have dwindled or been transformed in this fashion can be a very complex matter. It is important to point out, however, that the absolute property right itself is in no way affected by this dwindling of the rights (or powers) that make up the property right. This means that Hohfeld's 'bundle' analogy is in fact not quite correct, though we shall often find it useful to employ Hohfeld's terminology nonetheless. As Reinach has eloquently put it:

> If property were a sum or unity of rights, it would be reduced by the alienation of one of these rights, for a sum necessarily disappears with the disappearance of all its parts. But we see that a thing continues to belong to a person in exactly the same sense, however many rights he may want to alienate; it makes no sense at all to speak of a *more* or *less* with respect to belonging. The *nuda proprietas* in no way means that the owning "springs back to life" once the rights transferred to other persons have been extinguished; the thing rather *belongs* to the owner in the interval in exactly the same sense as before and after … This is the essential necessity which underlies the so-called "elasticity" or "residuarity" of property and which can hardly be reasonably considered as an

"invention" of the positive law (1987, p. 56).

Each of the sticks that make up the property right can, in principle at least, be the object of negotiations independently of the remaining sticks in the cluster, and whatever the outcome of such negotiations, the property right – the absolute relation of belonging – remains ontologically speaking intact. Someone can give away some of the sticks without giving away his property over the thing in question. Thus it is not uncommon to see cases in which someone has given away (or has had taken away) virtually all the sticks in the bundle (in the case, for example, of the possession of his land by squatters); but even then, however, his residual property right over the thing itself remains.

This is a peculiar situation. Someone who has given away all or most of the sticks in the putative bundle stands, to all practical purposes, in no relation to – he holds no power over – the thing in question. What is the point of holding someone to be the owner of a thing if that someone has no substantive right over the thing, and cannot use, sell, sub-divide, or possess it? Well, for most objects, things like toothbrushes, shirts and hats, there does indeed seem to be no rationale for holding the owner of a toothbrush to still be the owner even after he has given away all his rights over it. But landed property is different; it may make sense to subdivide and lease a plot of land, and to guarantee the fulfilling of certain obligations with regard to some of the subdivided plots of land, and to give the usufruct of those plots of land to someone else – and yet still want to remain the owner of that plot. This is above all the case because of the enduring character of land (as contrasted with hats or shirts), so that one may have the intention (or conceive that one's heirs may have the intention) of recuperating many or all of the sticks at some point in the future. Antarctica is, incidentally, a somewhat analogous case in the plane of international law: its parts are owned by separate nations, yet these separate nations are not allowed to exploit the corresponding parcels of land in any way, since only scientific research is permitted by treaty. The Moon, at this writing, is subject to similar treatment.

4. The Special Case of Property Rights in Land

Some political discussions regarding property rights do indeed recognize the distinction between landed and other forms of property. For example the Henry George movement called for the institution of a 'single tax' on land, on the grounds that one cannot legitimately own naturally occurring resources, but can only have rights to the value one adds through one's work – a proposal that has been endorsed in our own day by Hillel Steiner (1994). And as Richard Pipes reminds us, John Stuart Mill,

> questioned whether land should be treated as merely one particular form of property, on the grounds, first, that no one had made it, and second, that whereas in creating movable wealth one did not deprive one's fellowmen of an opportunity to do likewise, in appropriating land one excludes others (1999, p. 57).

The contrast drawn by George is far from being absolute, however. Thus it may take work (and the adoption of considerable risks) to discover natural resources such as gold, and land, and if all natural resources were to count as common property, then much of this work (and risk) would not be forthcoming. Mill's criterion of excludability is on the right track. But it captures only part of what is, from the ontological point of view, a much more complex phenomenon. For excludability is only one of the many rights in the bundle, and we want to argue here that land is different from other forms of property for reasons which have to do with features of this bundle as a whole.

The bundle of property rights in land has first of all the elastic or residual character that has been referred to already above. Such elasticity is manifested to some degree in other spheres, for example in the car rental or equipment leasing markets. But it still seems odd to suppose that someone might give away the right to use a washing machine or toothbrush for long periods of time while retaining title to the goods in question. In most such cases it seems that, when someone gives away a specific stick from the bundle, then he is actually giving away the full right of property over the object in question.

Two interconnected reasons explain why it is especially in the case of landed property that this residual character is essential. First, some types of negotiations relating to the sticks in the bundle make practical sense only in relation to landed property. Although the owner of, say, a painting, or a car, strictly speaking has the right to subdivide it, it seems unlikely that he will ever seek to exercise this right.

Second, it is primarily in landed property cases where the mentioned maneuvers (subdividing, commercializing the fruits of, etc.) are commonly carried out, precisely because there are here more sticks in the bundle, and they are more varied and complex than in relation to other types of property. Leasing, time-sharing, owning shares in a social club, borrowing, sub-dividing, using as collateral are examples which demonstrate just some of the possibilities here. And because of the central economic importance of land as the presupposition of all other human activity, it is only in the cases of landed property that correspondingly complex legal institutions have grown up in reflection of the different dimensions of rights involved.

Consider, for example, my property right over my watch: it is easy to see that the bundle of sticks which comprises this property right can only be altered with difficulty – and even then still only partially. Can we meaningfully talk, here, about sub-

dividing, or building upon a watch, or harvesting the usufruct therefrom? What purpose could be served by giving away the possession or the use of the watch while maintaining ownership over it? The age-old aphorism 'possession is nine tenths of the law' is, under this light, exactly right.

A further important reason for the differences between landed property and other types of property turns on the special geographic dimension of the objects of property rights in land (Smith 1995). The idea of a parcel of land is in greater need of ontological clarification than is, say, that of a watch or a lawnmower. A parcel of land has fiat boundaries. It needs to have its boundaries provided for by some associated human institutions. A full-blown ontological analysis of real estate must provide an account not only of the precise make-up of the bundle of sticks which comprises a property right in general, and of the accompanying institutions for example of boundary maintenance and title and cadastral registration, but also of the structure of that rather problematic entity which is a parcel of land itself. Such analysis must also provide an account of the interplay between these three dimensions – and this in such a way as to do justice also to the differences between different human cultures. The analysis in question must have at least the following components, each one of which will be seen to have been at work in the arguments above:

a) When someone owns a parcel of real estate, then there is a certain portion of the surface of the earth to which he is related.
b) This portion of land must have the character of an enduring object which – at least when considered on the scale of human events – endures permanently.
c) This portion of land must have definite, known (or at least knowable) boundaries.
d) The portion of land must be such that the owner, and in principle others, may gain (legal and physical) access.
e) Real estate gives rise to neighbors. There are no neighbors where there is raw land, simply because they are no boundaries in raw land. Even the so-called bona fide boundaries – those obvious discontinuities on the surface of the earth, such as coastlines, mountain ranges, rivers, etc., are not boundaries in the sense which pertains to the ontology of real estate – until someone considers them to be so.
f) Parcels of real estate have different conditions of identity than do raw land. I might exchange all the soil in my land in New York for the soil in your land in Delaware, yet I would still be the owner of real estate in New York and you in Delaware.
g) A parcel of real estate is multi-layered in the sense that there are ontologically

distinguishable aspects of what is, from a geometrical point of view, identically the same piece of land. There are layers of geology, of archeology, of history, of ecology, of rights of way, and so on, and the state can own (or have property rights in) some or all of these layers even in those circumstances where a private person is the ostensible owner of the plot of land simply conceived.

h) A parcel of real estate is a three-dimensional solid which includes regions above and below the surface of the earth itself. As an owner of a parcel of real estate I must for example have the right to prohibit my neighbor from building a structure that would invade the space above my land. This feature illustrates most clearly the institutional character of real estate. For even in regard to pure geometry, the specification of the height and depth of the relevant three-dimensional solid differs from culture to culture. In the United States, for example, the owner of a given parcel in fact (and in law) owns a cone-shaped region of space projecting from the center of the earth and reaching upwards (roughly) as far as the ear can hear. In other places these determinations are effected in different ways. One of the specific prerogatives which the state has in Latin America is that it owns the whole of the subsoil in the country, no matter who owns the surface of the land.

i) The boundaries of a land parcel are affected by a factor which we might call crispable vagueness – that is by a vagueness that can, where necessary for practical reasons, be alleviated by institutional fiat or by negotiation. (Smith, this volume) If someone owns a land-parcel in Venezuela, and finds gold some few inches below the ground, this gold becomes the property of the state. Of course, this presents the state with the problem of determining how to fix the boundary between the surface and the subsoil. It seems odd, to say the least, that a hand-made hole of merely a few inches constitutes a penetration in the state's exclusive property. Note that the problem faced by even developed institutions of property law in providing a clear demarcation of such a boundary is analogous to the problem of drawing a line between, say, territorial and extra-territorial waters. Fiat crisping will occur only where it is of practical importance. Cadastral and title registration, for example, is much more precise and reliable in countries, such as Switzerland or Austria or Holand, were land is scarce, than it is in the US or Australia or (presumably) Siberia.

5. Property and Sovereignty, or: The Englishman's Home …

It is clear that the owner of a piece of land has some power over it: it is not clear, however, exactly in what this power consists. Other familiar powers over land come

to mind, such as, for example, the power that the state has over land, even when that land is privately owned, or those powers over land arising when someone has leased a given parcel of land. The state always keeps some rights to itself, for example through zoning laws which regulate how a given portion of land can be used. The state can declare a certain piece of land of public interest and it can buy it (expropriate it) forcefully from its owners, etc. That it is not always easy to comprehend these different powers turns at least in part on the fact that they have traditionally been viewed as belonging to the subject-matters of separate disciplines. Morris Cohen, echoing Montesquieu, has put it succinctly:

> Property and Sovereignty, as every student knows, belong to entirely different branches of the law. Sovereignty is a concept of political or public law and property belongs to civil or private law. This distinction between public and private law is a fixed feature of our law-school curriculum (1927, p. 8).

The distinction between public and private law is so ingrained in contemporary academic culture that it will come as a shock in certain circles if we propose, now, to treat all powers over land on an equal footing, regardless of whether they arise in the public or private spheres. If we are right in this proposal, however, then the foundations of the institution of real estate will lie as much in the dimension of (different kinds of) power over land as they do in the physical dimension of land itself. Hence a general ontology of real estate will require in turn a general theory of all of the specific powers over land that can obtain in different cultures.

Our proposal is that there is a certain fundamental feature of landed property which is prior to all the contingent and a posteriori distinctions between powers or dominions of different sorts. This means also that the standard distinction between public and private law is inadequate for the purposes of an ontology of landed property. Two arguments can be given for this proposal.

First, the given distinction, if it has application at all, certainly cannot be applied in every case. Above all, the idea that there is such a wedge between the two realms does not do justice to the state of affairs in earlier times. In feudal Europe, for example, the distinction between powers over land that arose from sovereignty and powers that arose from property *simpliciter* was not clear at all. The separation of sovereignty from property had not yet taken place. As Morris Cohen puts it for the case of medieval England: "Ownership of the land and local political sovereignty were [in this period] inseparable" (1927, p. 156). Leopold, the King of the Belgians, was also the *owner* of the Congo. Otto Brunner has analyzed the cases of Austria and Germany in this spirit, as follows:

> In Germany, as we like to say, the modern state developed at the level of the individual ter-

> ritories, not at the level of the empire. German constitutional historians trace these territories back to the late twelfth century, with the appearance of the territorial lord or prince (the "*princepts terrae*" or "*dominus terrae*") … A territorial prince's lordship, originally a complex of diverse rights joined together in the hands of a lord, gradually became a unified whole. Beginning around the fifteenth century, the prince developed a unitary governmental power that transformed the medieval *territorium* into the "territorial state" of the sixteenth century (1984, p. 139).

The complex of diverse rights enjoyed by the medieval prince was composed of rights some of which we would nowadays consider to belong to the sphere of public law and some to the sphere of private law.

Second, such a sharp distinction between the public and the private spheres hinders the understanding of those non-Western ontologies of landed property in which this distinction plays little or no role. In fact, a tension between unbridled allodialism, i.e., absolute power over land, and the tendency towards some form of (Marxist) abolition of private property is visible in most cultures and in most eras. A general ontology of land and real estate of the sort here envisioned can help at least to understand this tension.

Regarding the tension between allodialism and extreme governmental interference over privately owned land in Anglo-Australian jurisprudence, Brendan Edgeworth has stated the following:

> The feudal imagery of English constitutional theory postulated the sovereign as the only true public person. As Michael Walzer describes it, "All other men and women [are] private, limited in their function, dependent, members of the body politic only because of the unifying role of the king". Ordinary citizens, or, rather, subjects as they are more accurately and conventionally termed in monarchical constitutional theory, are analogously in the sphere of property law, mere "tenants" holding of a superior lord. The French phrase captures the condition perfectly - *Nulle terre sans signeur*, no land is without an overlord (1994, pp. 413–414).

What a comprehensive analysis of landed property would reveal is that the owner of landed property holds some rights over a certain plot of land. These rights need not be only rights which belong to the socially constructed sphere of the 'private'. There have been times, and there continue to be places, where the owner is *eo ipso* the sovereign. As noted above, in most Western modern cultures, no matter how individualistic and respectful of property rights, some rights over land are still kept within the state. For example, if the government needs a specific plot of land to build, say, a highway, it can expropriate that plot of land (after paying its owner a more or less fair amount in compensation). Moreover, owners of plots of land have to respect all sorts of ordinances which regulate the type of edifice they can erect upon their land. Comparing the sorts of rights that different conceptions of property in land exhibit is

indeed a valuable way of measuring degrees of freedom in different societies. But even in the freest societies, absolute power on the part of the individual over his plot of land is not a feasible scenario.

6. Epilogue: Collective Intentionality and the Geography of Landed Property

Recall Rousseau's famous dictum quoted at the beginning of this paper. It is not only fencing off that is important; important also is that people *believe* that the person who fenced this plot of land is also the one who actually owns it. Collective intentionality is necessary for the existence of landed property.

A recent and powerful attempt to apply ontological tools to the analysis of unorthodox entities is carried out by John Searle in his *The Construction of Social Reality* (1995). Searle draws a distinction, first of all, between brute facts and institutional facts. Brute facts are those facts which exist independently of human conventions. Institutional facts are characterized by Searle as follows: that, as a consequence of human convention, some power is given, taken away, or in some way transformed. Searle does not distinguish between rights and powers; as a matter of fact, whenever he speaks of powers in the realm of institutional facts he really means rights in our sense (for having a power, in our sense, is typically a matter of brute facts). For the moment, nonetheless, we shall follow Searle in stating that the primitive term in the creation of social reality is power.

All institutional facts require collective intentionality. That rectangular bits of paper count as money requires that there is a group of people who believe that they are money. (How large this group of people needs to be is a difficult problem which Searle does not discuss.) That Susan is French, that Manuel is Mexican are institutional facts, insofar as nationalities require collective intentionality. (That two plus two equals four is a brute fact, since it does not require collective intentionality.) That someone owns the shirt he is wearing requires collective intentionality, and so does the fact that someone owns a plot of land.

The case of owning a plot of land, the case of landed property in general, requires collective intentionality in more ways than other forms of property. There is a sense in which the existence of any right whatsoever requires collective intentionality. Unless one believes in the existence of natural law, say, or of human rights which exist independently of any human intervention, any right requires that people believe that it is indeed a right. We admitted that there are property rights that someone might have over the shirt he is wearing. The only aspect of this situation that requires collective intentionality is that the person actually owns the shirt. In the case of prop-

erty in land, however, collective intentionality is required not only at the level of whether or not the person owns the land but also with respect to the existence of the very plot of land itself. It is not only the property right itself that requires collective intentionality, but also the object over which the right falls.

We suspect that this explains Rousseau's characteristically malicious suggestion that the people who would believe that the plot of land is indeed the property of the person who fenced it off are simpletons, dupes. It would have been less easy for Rousseau to make this same point in respect to, say, those of his fellows who believed that Rousseau himself was the owner of the shirt on his back. This is because, in relation to the ownership of the shirt, there is one level only that is subject to collective intentionality. In relation to the plot of land it is not only in the existence of the right of property that we have to believe, but also in the existence of the very object over which the property right falls – an object which would be somehow created by the very act of fencing off.

Rousseau's skepticism as to the possibility of acts which can somehow create objects seems nowadays anachronistic, in part because of our contemporary understanding of the considerable economic benefits of property in land. But people had of course been engaging in such creative acts for many thousands of years before Rousseau's time. Philosophers, too, are beginning to manifest a greater ontological sophistication, for example in their treatments of the ontology of works of art or of the object-creating powers of speech acts. The next phase is to carry over these new ontological insights into the normative fields of ethics and legal and political philosophy – to yield a species of *applied ontology*, of which this present investigation of the ontology of landed property is just a first, provisional foray.

References

Bentham, J. (1958), 'Principles of the Civil Code', in J. Bowring (ed.), *The Works of Jeremy Bentham*, Vol. 1, New York: Russell & Russell.

Brunner, O. (1984), *Land and Lordship: Structures of Governance in Medieval Austria* (H. Kaminsky and J. Van Horn Melton, eds.), Philadelphia: University of Pennsylvania Press.

Bittner, S., Wolff, A. von, Frank, A. U. (2000), 'The Structure of Reality in a Cadaster', in B. Brogaard (ed.), *Rationality and Irrationality* (Papers of the 23rd International Wittgenstein Symposium), Kirchberg am Wechsel: Austrian Ludwig Wittgenstein Society, pp. 88–96.

Cohen, M. (1927), 'Property and Sovereignty', *Cornell Law Quarterly* 13: 8–30.

Dorion, H. (1963), *La Frontiere Quebec-Terreneuve*, Quebec: Les Presses de L'Université Laval.

Edgeworth, B. (1994), 'Tenure, Allodialism and Indigenous Rights at Common Law:

English, United States and Australian Land Law Compared After Mabo V. Queensland', *Anglo-American Law Review* 23: 397–434.
Hall, E. T. (1966), *The Hidden Dimension*, New York: Anchor Books.
Hohfeld, W. (1913), 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Review* 23: 16–59.
Ingarden, R. (1989), *The Ontology of the Work of Art: The Musical Work, the Picture, the Architectural Work, the Film*, translated by R. Meyer with J. T. Goldthwait, Athens: Ohio University Press.
Locke, J. (1960), *Two Treatises of Government*, Cambridge: Cambridge University Press.
Macpherson, C. B. (1978), *Property: Mainstream and Critical Positions*, Oxford: Oxford University Press.
Mark, D. M., Smith, B., and Tversky, B. (1999), 'Ontology and Geographic Objects: An Empirical Study of Cognitive Categorization', in C. Freksa, and D. M. Mark (eds.), *Spatial Information Theory. Cognitive and Computational Foundations of Geographic Information Science. Proceedings of COSIT '99*, Berlin: Springer Verlag, pp. 283–298.
Munzer, S. R. (1995), *A Theory of Property*, Cambridge: Cambridge University Press.
Munzer, S. R. (1994), 'An Uneasy Case Against Property Rights in Body Parts', in E. F. Paul *et al.*, eds. (1994), pp. 259–286
Nozick, R. (1974), *Anarchy, State and Utopia*, New York: Basic Books.
Paul, E. F., Miller, F. D. Jr., and Paul, J., eds. (1994), *Property Rights*, Cambridge: Cambridge University Press.
Pipes, R. (1999), *Property and Freedom*, New York: Vintage.
Planiol, M. (1939), *Treatise on the Civil Law*, Lousiana State Law Institute translation.
Reeve, A. (1993), 'Property', in R. E. Goodin and P. Pettit (eds.), *A Companion to Contemporary Political Philosophy*, Oxford: Blackwell.
Reinach, A. (1983), 'The A Priori Foundations of the Civil Law', *Aletheia* 3: 1–143.
Rousseau, J.-J. (1992), *Discourse on the Origins of Inequality*, Indianapolis: Hackett.
Ryan, A. (1994), 'Self Ownership, Autonomy, and Property Rights', in E. F. Paul *et al.*, eds. (1994).
Searle, J. R. (1995), *The Construction of Social Reality*, New York: Free Press.
Smith, B. (1988), 'Practices of Art', in J. C. Nyiri and B. Smith (eds.), *Practical Knowledge*, London/New York/Sydney: Croom Helm, pp. 172–209.
Smith, B. (1995), 'More Things in Heaven and Earth', *Grazer Philosophische Studien* 50: 187–201.
Smith, B. (2001), 'Fiat Objects', *Topoi* (this volume).
Smith, B. and Mark, D. M. (1999), 'Ontology with Human Subjects Testing: An Empirical Investigation of Geographic Categories', *American Journal of Economics and Sociology* 58: 245–272.
Smith, B. and Mark, D. M. (2001), 'Geographic Categories: An Ontological Investiga-

tion', *International Journal of Geographic Information Science*, forthcoming.
Smith, R. M. (1984), *Land, Kinship and Life-Cycle*, London: Cambridge University Press.
Spector, M. B. (1986), 'Vertical and Horizontal Aspects of Takings Jurisprudence: Is Airspace Property?', *Cardozo Law Review* 7: 489–518.
Steiner, H. (1994), *An Essay on Rights*, Oxford: Blackwell.
Thomasson, A. L. (1999), *Fiction and Metaphysics*, Cambridge: Cambridge University Press.
Waldron, J. (1988), *The Right to Private Property*, Oxford: Oxford University Press.
White, A. R. (1984) *Rights*, Oxford: Clarendon Press.
Zaibert, L. A. (1999) 'Real Estate as an Institutional Fact: A Philosophy of Everyday Objects', *American Journal of Sociology and Economics* 58: 273–284.