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Men and Things: The Liberal Bias Against Property

by Thomas L. Shaffer

Ownership of property is as prevalent in human society as taxes and government, and almost as prevalent as sex. Most men are more concerned with their possessions and with what it takes to acquire and protect them than they are with righteous indignation.

WHEN A PROPERTY teacher sets out to learn about the human facts in his subject—if, for instance, he wants to learn about the behavioral aspects of the law of the dead (wills, trusts, future interests and death taxation)—he will be discouraged by the fact that psychological literature has a great deal to say about sex, and even quite a bit about death, but almost nothing about property.

There are a couple of metaphysical essays by Jean-Paul Sartre,¹ and, from the founders of psychoanalysis, the theory that our concern about property begins at the potty chair.² But for the most part the men who have been most interested in studying the human spirit have not been concerned about our relationships with things. There may be a reason for that. And the reason may be useful for our profession, which necessarily deals with property and which should begin to learn what it cannot learn from behavioral science.

Most Revolutionaries Are Naive About Property

Here is a guess: The most revolutionary elements in our society are naive about property. They say, as William Stringfellow, a distinguished lawyer, said in his book *Dissenter in a Great Society*:

The venerable ideological conflict in our society between those who regard property, and the ownership of property, as the moral basis for society and those persuaded that human rights must have precedence in the ordering of society and the making of public policy once more dominates the American scene.³

Some of our revolutionaries (not including Mr. Stringfellow) say that banks must burn and some that houses should be owned communally. The aspiration is that we share our burdens

and our benefits and forget about ownership. In some hard-to-get-at way this sentiment is implicit in the communal spirit—the let's-get-together ethic—of the coming generation. And something like this same spirit is implicit in the ideas and sympathies of those of us who often cheer at the irreverence of the coming generation. This is a mildly utopian idea; it is prevalent in the literature of the new left and the not-so-new, not-so-left, and it suggests a liberal bias against property. (If the word "liberal" seems bothersome, substitute "reformer's" or even "revolutionary's". "Liberal" is used here, frankly, to provoke annoyance.) There is at least the implied aspiration that it is possible to separate the ownership of property from the rights of men. Whatever it is, it seems to be erroneous, and the error could make a difference. More to the present point is that it seems to be part of the current liberalism in behavioral science.⁴

My favorite image on men and things is Humphrey Bogart on the *African Queen*, chugging down that fetid jungle river with Katherine Hepburn. The boat's ancient steam engine jammed and rattled and scattered hot steam, and Bogart jumped up, ran to the boiler and kicked it. And the boiler worked again.

Hepburn asked what was the matter with the boiler, and Bogart said it was jammed. Hepburn asked him why, and Bogart said, "I left a screwdriver in it one day when I was working on it, and the screw driver jams a valve." Hep-

1. SARTRE, *EXISTENTIAL PSYCHOANALYSIS* (1953).

2. FERENCZI, *SEX IN PSYCHO-ANALYSIS* (1958).

3. STRINGFELLOW, *DISSENER IN A GREAT SOCIETY* (1964); see Slater, *Cultures in Collision*, *PSYCHOLOGY TODAY* 31 (July 1970).

4. See Moynihan, *Eliteland*, *PSYCHOLOGY TODAY* 35 (September, 1970).

Men and Things

burn asked why he didn't take it apart and take the screwdriver out. And Bogart said, "I could do that, Miss, but I like to kick her. She's all I got."

You cannot talk about the captain of the *African Queen* as a person unless you are willing to talk about the *African Queen* as an extension of its captain—as part of his personality. That seems obvious, but it is an instinctive judgment on which the behavioral scientists have presented no data. They have defaulted on their clear duty to satisfy the curiosity of lawyers. If they had not failed us—or if they someday propose to redeem their failure—what might be the behavioral theories on man's ownership of things? Here are three ideas.⁵

"I Am What I Have"

First, property is something I am. It is a part of what is me. Sartre makes a theoretical case for that proposition:

The quality of being possessed does not indicate a purely external denomination . . . ; on the contrary, this quality affects its very depths. . . . This is the significance of primitive funeral ceremonies where the dead are buried with the objects which belong to them. . . . The corpse, the cup from which the dead man drank, the knife he used make a single dead person. The desire to have is at bottom reducible to the desire to be related to a certain object in a certain relation of being.

* * *

I draw the collection of my surroundings into being with myself. If they are taken from me, they die as my arm would die if it were severed from me.

* * *

The totality of my possessions reflects the totality of my being. I am what I have.⁶

Property personality is a common thing in the law of succession—in this culture and others. Consider the astounding respect that is shown for the wishes of a dead man on the disposition of his property. In Tahiti,⁷ and in Iowa and Kansas for that matter, one reason a man makes a will is in order to prevent fights—because his survivors will not resist what he wants done as much as they will resist someone else, someone who lacks the dead

man's identification with the property. Throughout the law of succession, in all cultures, there lingers the idea that the property is the personality of the dead man. Property is his immortality.⁸

Try that thought on yourself. Pretend you are going on a long trip, a trip from which you may never return. What will you take with you? What is the most valuable thing you own? And what is the most significant thing to you personally? Can you tell clearly where you end and the things on your take-along list begin?⁹ Those who study the dynamics of "total institutions"—prisons and asylums—report one of the principal ways to make inmates docile is to take away everything they own.¹⁰ The result is not only a naked man, but also a naked personality. Justice Holmes said: "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."¹¹

Property Is Something I Do

Property is more than something I am. It is also *something I do*. One of the first signs of a beginning of ownership among primitive, communistic societies is respect for primary rights in things that are the fruit of labor. Among the Yamana of South America, for instance, if I catch a whale, the blubber belongs to everyone in the village. But I get first pick and, to some extent, get to choose who gets second

and third pick.¹² In the Semang society on the Malay Peninsula, there is no ownership of land or buildings, but every warrior owns his own poison tree.¹³ The Eskimos of Greenland and the Arctic Siberians recognize almost no exclusive ownership, but if you want to learn a spell or a hunting song you have to pay the man who knows it.¹⁴

In each of these instances—and in the case of American businessmen—property is what I do. And this is true beyond consideration of wealth. I asked a veteran life insurance underwriter a couple of years ago about his business clients. He said they were always greatly concerned about what would happen to their businesses when they died. I asked him if they knew how much their businesses were worth, and he said they usually did not.

Property Is Something I Use

Property is more than what I am and more than what I do. It is also *something I use*, and there are three radically different aspects of property as *use*.

Property may be a conduit to other people; it may be a cornerstone of human relationships. Freud noticed this in his *Psychopathology of Everyday Life*.¹⁵ I am enjoying myself at your house but have to leave, and when I leave I forget my coat. I have to go to the office on a Sunday afternoon and resent it, and find when I get there that I left my keys at home. My things—coat and keys—are where I wish I were. A patient of Freud's was having trouble with his wife; she gave him a

5. See also SHAFER, DEATH, PROPERTY, AND LAWYERS (1971); Shaffer, *The Psychology of Testation*, 108 TRUSTS & ESTATES 11 (1969); Shaffer, *Will Interviews, Young Family Clients, and the Psychology of Testation*, 44 NOTRE DAME LAW. 345 (1969); and Shaffer, *The Psychological Autopsy in Judicial Opinions under Section 2035*, 3 LOYOLA UNIVERSITY OF LOS ANGELES L. REV. 1 (1970).

6. SARTRE, *supra* note 1, at 122-123.

7. Cairns, *The Explanatory Process in the Field of Inheritance*, 20 IOWA L. REV. 266, 281 (1935).

8. See generally GOODY, DEATH, PROPERTY, AND THE ANCESTORS (1962).

9. Thanks to Dr. Oron South, of the Midwest Group for Human Resources, for this

suggestion.

10. GOFFMAN, ASYLUMS (1961); SYKES, THE SOCIETY OF CAPTIVES (1958).

11. Holmes, *The Path of the Law*, 10 HAR. L. REV. 457, 477 (1897).

12. Lowie, *Incorporeal Property in Primitive Society*, 37 YALE L. J. 551, 552-553 (1928).

13. *Ibid.*

14. *Id.* at 553-555; The return of succession and even testation to Soviet law is an interesting parallel. See Griffin, *The About Turn: Soviet Law of Inheritance*, 10 AM. J. COMP. L. 431 (1961).

15. FREUD, THE PSYCHOPATHOLOGY OF EVERYDAY LIFE (Mentor ed., 1951); ch. II, JONES, PAPERS ON PSYCHO-ANALYSIS (Beacon ed. 1961).

book and he misplaced it. Six months later their relationship improved, and the patient found the book in some obvious place in his desk.

It has usually been thought that primogeniture, the legal system under which property is inherited by an eldest son to the exclusion of everyone else, is medieval and undemocratic. But societies that have observed primogeniture—including fairly modern societies—are often prosperous. This comes about because the central family—father or eldest son—takes care of everyone else. Property is used to keep the family together at least as much as the family is used to keep the property together.¹⁶

The line between rights in things and rights in persons is functionally obscure. Most legal systems have always recognized rights in persons as a species of property. The levirate—a custom under which a widow is given to her husband's brother—seems a cruel instance of that, but it is not really so different from child ownership, or even wife ownership, in our own society.¹⁷ Engels saw this connection; he wrote that the institution of marriage had to decline with decline in the institution of property. The two go together—a dogma that caused great theoretical turmoil in the Soviet Union until Stalin rejected it.¹⁸

Property is something I use, in a second sense, as a significant personal expression not otherwise available to me. There is a custom among one tribe of Indians in Arizona, for example, that everything a dead man owns is destroyed when he dies. Survivors are afraid of the dead; they want solid earth between them and all extensions of the dead man—including his property personality.¹⁹ We all know carpenters who could not be who they are without wood and tools. The only ownership recognized in many primitive societies is the ownership of things to work with. A quaint example of that is the Hopi garden. A husband may own the garden, and he may do whatever he wishes with his produce as long as he is in the garden. But if he brings the produce into the house—his wife's house, as the Hopi see it—the produce

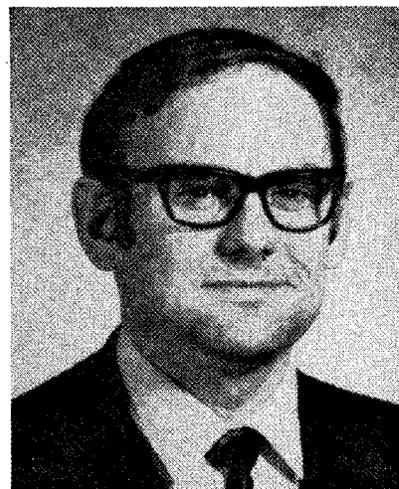
doesn't belong to him anymore and only his wife is allowed to give it away.²⁰

The idea of ownership begins when self-expression with property requires exclusive rights in it. It may be that the need for exclusive control has important psychological significance. The anthropologist Rene Millon hit upon the very rude beginnings of land ownership among the Sierra Populaca of Mexico. Those people were just beginning to permit a man to demand exclusive rights in his grove of coffee trees—the land as well as the trees. They had recognized for a long time that a man could own the trees, but only recently did they expand this idea to the land itself. And the apparent explanation of the extension is that they had discovered that they could grow more and better coffee that way. Millon does not guess at the effects of this transition on the social and psychic personality of the coffee grower.²¹

There is a third sense in which property is something I use, and that is as a means of assuming and protecting power. The coffee trees of the Sierra Populaca suggest that development. There are many instances in our own history. An example is the use of land grants in the United States and in Spanish America, not only as a means of economic development, but as a means of solidifying power. For another example, the English feudal system, from which our law of property grew, was above all a system of government.²²

Transmissions of Status and Property Are Inseparable

The transmission of status—which is a symbol of power—and the transmission of property are functionally inseparable. Titles and positions of honor illustrate that throughout Western history; and there is more transmission of status in our own culture than we may be ready to admit. You can reflect on that fact as you run down the roster of names in the United States Senate. In societies entirely alien to our own, the transmission of corporate membership—in clan groups, in castes, in the primitive equivalent of the country



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club—is property used to assume and protect power.

I think Mr. Stringfellow and reformers of his persuasion, as well as revolutionaries who will doubtlessly be influenced by him, make a mistake when they equate the assumption and protection of power with property ownership. And the mistake may lead them far beyond anything they had in mind. There is a kind of revolution that is callow and therefore unwittingly inhumane. Successful revolutions—and the most successful of all revolutions, the American Revolution, was designed and implemented by lawyers—are built on a healthy respect for the way people are.

16. Cairns, *supra* note 7 at 268-281; Radcliffe-Brown, *Patrilineal and Matrilineal Succession*, 20 IOWA L. REV. 286, 297-303 (1935); Griffin *supra* note 14.

17. *Ibid.* (Radcliffe-Brown).

18. Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185, 186, note 3 (1935).

19. Blauner, *Death and Social Structure*, 29 PSYCHIATRY 378 (1966).

20. Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, 20 IOWA L. REV. 304 (1935).

21. Millon, *Trade, Tree Cultivation, and the Development of Private Property in Land*, 57 AMERICAN ANTHROPOLOGIST 698 (1955).

22. See generally Cairns, *supra* note 7; JOHN, *LAND TENURE IN EARLY ENGLAND* (1960).

Men and Things

Callow revolutions tend to unexpected catastrophe. I agree with Justice Holmes that "the notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug".²³ One thing every reformer ought to try for—on pain of failure—is an appreciation for what is most important to the people he proposes to reform.

In terms of national policy, an appreciation for the way people are and the way people own will tend to support, for example, the way our federal tax structure has grown up, so that businessmen are taxed just this side of destroying their desire to own more than they have. And death taxes are kept just low enough so that a man does not lose all hope of aggregating status and power and passing it along to his children.

A primary goal of the American welfare state—supported, as it is, by taxing policies that take realistic account of the way people are—is that every household should have a house. Every person should have enough property to guarantee and safeguard personality; for dignified labor; for sound relation-

ships with those he loves; and for self-expression.

Behavioral scientists don't probe property relationships in *our* culture because they are members, by and large, of Mr. Stringfellow's species of reformer. The trite label for that species is middle-class liberal. Middle-class liberals are ambivalent about property. They are comfortable with their things. They couldn't get along without things. But social passions and consider-the-lilies-of-the-field idealism leave one somehow ashamed of ownership—and, especially, of the love of ownership.

Hypocrisy of Property Is a Sore Spot

The enlightened American liberal has come to terms with his sex impulses and even has learned to live with anxiety about death—both more advertently, and more efficiently, than he has dealt with his ambivalence about the comforts of property. The rebellious kids have some pretty useless ideas about *distribution* of property, but they hit a sore spot when they talk to their elders about the *hypocrisy* of

property.

Middle-class liberals aside, most men are more concerned with their things and with what it takes to acquire and protect their things than they are with righteous indignation. The comparison is important because self-expression—the "firstness of the First" (Amendment)—appears to be a sort of primary, non-negotiable value among the vocal leaders of the coming generation, and even more so among the admirers and supporters they have in the command generation. But most people set almost as much store by the nonvocal dimensions of their personalities.

All of us are more involved in our things than many of us care to admit. Anyone who proposes to be a revolutionary should realize that, as Judge Prettyman said, "The right of a man . . . to warm his slippers before his own open fireplace is as great as his right to gather with his neighbors in the corner pub and cuss the government."²⁴

23. HOLMES, COLLECTED LEGAL PAPERS 306 (1921).

24. PRETTYMAN, TRIAL BY AGENCY 15 (1959).

Calendar of Association Meetings

Annual

New York, New York	July 5-7, 1971
and London, England	July 14-20, 1971
San Francisco, California	August 14-17, 1972
Washington, D.C.	August 6-9, 1973
Honolulu, Hawaii	August 12-16, 1974
Montreal, Canada	August 11-15, 1975
Atlanta, Georgia	August 7-12, 1976
Chicago, Illinois	August 6-11, 1977
New York, New York	August 5-10, 1978

Midyear

Chicago, Illinois	February 4-9, 1971
New Orleans, Louisiana	February 3-8, 1972
Cleveland, Ohio	February 7-13, 1973
Houston, Texas	February 1-5, 1974

Spring, 1971

Williamsburg, Virginia	April 26-30, 1971
(Administration Committee, April 27 and 28; Budget Committee, April 26, 27 and 28; Board of Governors, April 29 and 30.)	