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THE ENVIRONMENT: PRIVATE OR COMMON PROPERTY?

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Taken together, the three papers presented here raise a question that strikes at the core of Western thought about property. The question is, should environmental goods be treated as private or as common property? This question obviously has profound importance for public policy regarding the environment. But it is also of profound philosophical interest, since it reveals a fundamental tension that has always existed in European thinking about property: between property as a private right, and as a public resource. This tension is visible, for example, in the writings of the natural law theorists of the sixteenth and seventeenth centuries. For Grotius, for Pufendorf, indeed for Locke himself, the problem of property is the problem of explaining how the goods of the Earth, given by God to Mankind in common, can be rightfully divided up and placed under the exclusive control of private individuals.[1] The structure of these authors' arguments, and the obligations they place on private ownership, show the tension between the competing conceptions of property, i.e., between the ideas that goods most fundamentally belong to individuals, or to a community.[2]

This tension between privacy and commonality is, in my view, conceptually ineliminable. Any conception of property that emphasizes one aspect to the exclusion of the other is only partial; fuller consideration of property will find the other aspect reasserting itself.[3] Thus, I do not think that we can find a conclusive, formulaic resolution of the tension — in favor of one side or the other, or that establishes some set combination of them. We do better, rather, to strike a dynamic balance between privacy and commonality — a balance that will shift in response to particular circumstances.[4]

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1. *See* HUGO GROTIUS, THE LAW OF WAR AND PEACE 186 (Francis W. Kelsey trans., Bobbs-Merrill Co., Inc. 1925) (1646); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 18 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 84 (James Tully ed. & Michael Siverthorne trans., Cambridge Univ. Press 1991) (1673).

2. The Lockean proviso that appropriators in the original commons leave "enough, and as good" for others is perhaps the clearest instance of this tension at work. LOCKE, *supra* note 1, at 21.

3. This fact contributes to the often noted ad hoc quality of takings jurisprudence. For parallel arguments, though regarding different tensions in the concept of property, see MARGARET J. RADIN, *Diagnosing the Takings Problem*, *in* REINTERPRETING PROPERTY 146 (1993); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825 (1997).

4. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 34 (1971) (providing Rawls' account of what he calls

This pragmatic approach can be seen at work in the papers by Andrew Sawyer and John Echeverria. Sawyer calls for a balance between private and common notions of property, when he concludes his paper with the suggestion that the property right in land could be treated more like water rights, in the sense that absolute dominion over one's property might yield a bit to the concept of stewardship. That is, one's "own" property could be seen as subject not only to the obligation not to harm others directly, but also to the obligation to maintain a common resource in which others have legitimate interest. Similarly, Echeverria's conclusion suggests that rather than subscribing exclusively to one conception of property, environmentalists ought to appeal both to the concept of public ownership (to assert that the public lands are *ours*),[5] and to the political values protected by a strong right to private property (to affirm that property rights help preserve autonomy). Echeverria's broader discussion of the politics of the property rights movement is in keeping with his conceptual pluralism regarding property, since pluralism in effect calls for an essentially political process of negotiation between parties who might hold divergent principles, but share a recognition that they must live together. I will return to the issue of politics below.

In contrast, James Huffman's article gives exclusive emphasis to the private dimension of property. For that reason I find his argument unpersuasive, and I will spend most of this comment trying to show that it suffers from its denial that there is any value to conceiving of environmental goods as common property. This denial works in two ways — regarding the fundamental nature of property, and also regarding the mechanisms by which property is distributed. Let us examine each way in turn.

First, Huffman holds that due to the individualized character of consumption, all property, in some ultimate sense, is private. Thus, he argues, private property is inevitable. The things human beings value are scarce, relative to the number of people who value them. Only one person can stand at the podium at a time, to cite his initial example, and the occupier of that position is, quoting him, "in a very real sense, the owner of the podium at the moment."[6] In general, any time one person's enjoyment of a scarce good — a spectacular view of the Grand Canyon, or the pleasure of floating the Colorado through it — excludes others' enjoyment of that good, that first person can be said to *own* the good, to have *property* in it.

But it is hardly clear that Huffman's examples support the idea that the speaker at the podium or the hiker at the Grand Canyon have *ownership*, in what Anthony Honoré has called the full liberal sense of the term.[7] Huffman's possession of the

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"intuitionism").

5. *Cf.* Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. LAW 1, 25-31 (1994) (arguing that we can regard the environment as a gift given to human beings in common, under the trustee-like obligation to pass it along to succeeding generations).

6. James L. Huffman, *The Public Interest in Private Property Rights*, 50 OKLA. L. REV. 377, 377 (1997).

7. *See* Anthony Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 107 (A.G. Guest

goods in question is temporary and very limited in scope; he may not do most of the things we associate with ownership of property. Further, Huffman's putative right to private property is established by simply ignoring other claims to the goods in question that are as valid as his own. Take the case of the podium. Of course its real owner is the University of Oklahoma. Considered with respect to the University, Huffman is by no means the owner, but at most holder of a temporary usufruct. Considered with respect to other speakers, Huffman has a share in the use of a common resource, provided by the University for a certain purpose. None of these speakers has a greater degree of control over the podium than any other; for none does their grant of use rise to the level of ownership. The case is even clearer with the Grand Canyon. Whereas Huffman speaks of the visitor "owning" some piece of the park, it makes more sense to speak of the visitor having the right to use the park — a right assigned by the park's actual owner: the public of the United States, for whom the Grand Canyon is common property, administered by the government.

How then does Huffman go from mere use to full ownership, to private property? His argument makes much of the notion of scarcity — scarcity requires exclusion of others. But nothing in his examples shows why that exclusion must be permanent — nor, as he acknowledges, why it grants any other control over the object than is needed for the specific use involved. And this is not really surprising, since it is easy to imagine cases where, rather than excluding others, the appropriate response to scarcity would be to share. Indeed, the imperative that scarcity requires sharing is at the core of the natural rights tradition to which Huffman appeals, and is based on the idea that in some originary way the goods of the Earth are common to the entire community of Mankind.[8] Thus, Huffman's appeal to scarcity fails to show why property cannot be common, but must be conceived only as private.

Consideration of scarcity leads us to the second way Huffman denies the value of thinking of environmental goods as common property. It is certainly the case, as Huffman suggests, that scarcity — for that matter, the logical character of consumption — requires that goods be distributed. Where a good is scarce we must figure out a system for allowing its users to use it undisturbed. But while it is necessary that there be some rules or other to govern the distribution of goods, that need does not in itself predetermine the character of the particular distributive rules in force. Note that where goods are treated as private property, the institution for distributing them to users is, of course, the market. But as we saw above, goods need not be treated as private property: there is a conceptual gap between use and ownership. Thus, environmental goods in particular are standardly treated as common property, and for common property the distributive institution is standardly the political system.

Now we can elicit from Huffman's paper the following argument: distribution by the market is morally preferable to distribution by the political system, hence

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ed., 1961).

8. *See supra* text accompanying note 1.

it is preferable to treat environmental goods as the form of property appropriate to the market (i.e. private property) than as the form appropriate to politics (i.e. common property). I do not wish to attack the market; rather, I want to question Huffman's attack on politics as distributive institution. He seems to suspect that environmentalists who use the political process to assert control over public resources through regulation are making an illegitimate demand on others: they are seeking to satisfy their own preferences at others' expense. And that would be wrong. Note in this context his suggestion that those who want to see water left in streams to benefit fish should be able to buy a private property right in instream flows. Privatizing river functions in this fashion would be economically more efficient than regulation. No one who didn't care about fish would be forced to pay for their maintenance, since those who do care would bear the full cost. That is, it would be morally preferable to "distribute" the environmental good at issue here by market mechanisms.

But why is it *wrong* for environmentalists to make demands of their fellow citizens to contribute to the cost of maintaining certain values? What is morality, if not a demand on others? The individual's moral appeal to his or her natural rights is certainly a demand that others act a certain way towards him or her. Thus, when I claim a natural right of property in my watch, I demand that everyone else leave me undisturbed in my possession of it. The case is strictly analogous when an environmentalist makes a moral appeal that publicly owned, common property ought to be managed a certain way.[9] The appeal is less unequivocal perhaps than one regarding something simple like personal property. No single person may dictate what is done with public property; it is up to the public as a whole to decide, by the political process established for that process. But the environmentalist's appeal has the logical status of an appeal in a moral argument made to the public, that it is morally better to manage its property one way rather than another. If that position is duly accepted by the public, the fact that it makes demands on the individuals who constitute the public is hardly sinister, or exploitative. It is a simple consequence of democracy, no more contentious or mysterious than the fact that people who vote for a losing candidate accept the authority of the winner.

To conclude, Huffman's article argues that, for both logical and moral reasons, environmental goods are best conceived under the rubric of private property. In this respect it is representative of a position that elevates the private and downplays the common dimension of property. But I have tried to show that it is harder than Huffman thinks to write commonality out of the script, so to speak. Indeed, I hold, the very concept of property is defined as much by the notion that there is a common claim to the goods of the earth as by the notion that individuals have exclusive rights over what is their own. This is by no means to say that any given item should be subject to public control. Rather, it is my view that for different categories of goods, and in different circumstances of life, different decisions are best as to the extent the goods in question should be

9. *See* MARK SAGOFF, THE ECONOMY OF THE EARTH 4 (1988).

considered as private or common property. It follows that there will also be different decisions about whether the market or the political system is the best mechanism for distributing the goods in question.[10] Where the goods in question are environmental, the common dimension cannot be avoided. This is why, I believe, it is inevitable that their distribution is a matter for politics.

10. *See* MICHAEL WALZER, SPHERES OF JUSTICE 119-23 (1983).