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THE CONCEPT OF OWNERSHIP

by
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I shall be mainly concerned with two questions: (1) What is the *meaning* of statements to the effect that someone owns something?, and (2) What is the *basis* of ownership, i.e. under what conditions does someone own something? In the context of this conference on the question "Who owns our genes?", one may wonder whether there are some "things" that *cannot* be owned by anyone. I guess the natural attitude among ordinary people would be that genes are not owned by anyone or, alternatively, that they belong to all of us together. In classical terms, a gene is either a *res nullius* or it is a *res communes omnium*. However, in order to justify—or discredit—such an attitude something has to be said about the questions (1) and (2). An answer to (2) might be sufficient, but in order to answer (2), a natural first step is to say something about (1).

The meaning of ownership.

So let's start with (1). It is commonly agreed that to own something, X, is to have certain rights and duties vis-à-vis other people or juridical persons with respect to X. In short, ownership is a bundle of rights and duties. For example, if you own a car, you have the right to drive it (provided you have a driver's license), the right to prevent others from using it, the right to sell it or to give it away, the duty to pay an owner's tax, and the duty to see to it that it satisfies certain safety regulations; moreover, the car is liable to execution for any debt or insolvency that you might have, and so on. However, we can hardly maintain that this is what we *mean* when we say that you own a car. For one thing, most of us have no clear conception of exactly what rights and duties are involved in the ownership of a car. Secondly, other instances of ownership may involve different rights and duties—e.g. if you own a piece of land, you may not have the right to prevent others from using it (in certain ways)—but it seems odd to say that the very meaning of terms such as "own", "ownership", and "property" varies from one instance to another. If this were the case, it would be hard to see how we could ever learn the meaning of these terms.

We might try to make a distinction between those rights and duties which are *essentially* involved in ownership and those which are only accidentally or *contingently* involved. For example, your ownership of the car involves the duty to pay a tax, but we can easily imagine a change in the law to the effect that car owners are no longer required to pay any tax just for owning a car. This suggests that this particular duty is only contingently involved in ownership. By contrast, we might try find some rights and duties which are necessarily involved in *all* cases of ownership; these could then be taken to define ownership. But what could these rights and duties be? Consider, for example, the rights to use X and to sell it. I have those rights with respect to my apartment in Stockholm, but I do not own my apartment; it is owned by an association (*bostadsrättsförening*) of which I am a member. Again, I may own a car even though I lack the rights to use it and to sell it, for it may be taken to execution for some debt of mine. In short, there are probably no rights or duties which are essentially involved in all cases of ownership.

Rather, it seems that the terms "own", "ownership", and "property" do not have a very clear meaning in ordinary language; they are at least vague, and possibly also ambiguous. They can hardly be defined by conditions which are both necessary and sufficient for ownership. Instead, we probably learn them by being introduced to certain fairly simple examples, in the case of which certain important rights and duties are indicated without any claim to exactness or completeness. My example above, in which you own a car, is an example of this kind. After a few examples, we see a certain similarity even if we cannot state it in precise terms. Roughly speaking, then, we come to see that a person owns something in so far as he or she has certain rights and duties *of the kind exemplified* in examples of this kind. This is surely vague, but that is not a serious problem. Lots of words in our ordinary language are learnt in a similar way and they are also vague in a similar way.

Three levels of analysis.

However, a further point should be made about the meaning of terms like "ownership" and "property". They share a certain systematic ambiguity with the related terms "rights" and "duties" or "liabilities". The latter terms may be taken either in a *factual* or in a *normative* sense. Consequently, and similarly, if we say that someone owns something, this statement may be either factual or normative. In the first case, what is meant is that the person in question has certain rights and liabilities *according to a certain legal system* (e.g. the legal system of the country of which he or she is a citizen). In other words, on this interpretation, the statement that someone owns something is elliptic and states a fact about a legal system. For example, it seems to be a fact that the

American company Myriad Genetics now owns the world patent for two genes that cause breast cancer, namely BRCA 1 and BRCA 2. This is so whether we like it or not, and whether or not it is a desirable state of the world that genes can be owned in this way.

By contrast, on the normative interpretation, the statement that someone owns something does not (merely) describe a matter of fact. It does not say anything about the way the world *is*; rather, it says something about the way things *ought* to be. Moreover, there is a certain principle, usually associated with David Hume and very widely accepted, according to which there is a logical gap between "is" and "ought"; this means that from premisses about the way the world is nothing can be derived about the way things ought to be. In other words, normative (or normatively legitimate) ownership is logically quite independent of factual ownership.

The distinction between factual and normative ownership is perhaps fairly clear in theory. However, it may not be so clear in practice. In particular, many statements to the effect that somebody owns something may have *both* factual and normative content. (To a certain extent, this is quite trivial. If I make the normative statement that Jones ought to have a certain bundle of rights, I thereby imply that Jones exists—which is a factual statement. But what I now have in mind is less trivial.) A legal system may not be *complete* in the sense that it settles every question of ownership in a purely mechanical or algorithmic way. The rules which make up a legal system may leave room for different decisions in particular cases. Moreover, it may also be possible to interpret and reinterpret the rules in different ways in accordance with different principles which are more or less implicit in the system. Therefore, judges may often have to weigh different considerations against one another, and in such cases competent judges may differ as to what is the correct answer. Moreover, there may be no clear distinction between the view that the "correct" answer is *actually* implicit in the system and the view that it corresponds to the way the system *ought* to be interpreted and applied. A supreme court may of course settle cases of this kind, but before its decision is taken different members of the court may differ about what the law says. Maybe their statements should be regarded as both factual and normative—or as something in between. And maybe the same is true of the court's decision. Maybe it can even be held that all legal decisions have this mixed character.

If this is so, we may still uphold the distinction between factual and normative statements. Philosophers who accept this distinction would probably say that, by definition, mixed statements are to be classified as normative. The normative element is dominant, as it were. Consequently, statements about ownership that are

internal to a legal system are normative. On the other hand, *external* statements, i.e. statements which are *about* the internal statements of a legal system, are factual. Hence, if a judge decides, in his official capacity, that Jones is the owner of a certain piece of land, then his statement is normative. On the other hand, if I say that Jones is the owner, my statement could be understood as an external and factual statement about the legal system to which Jones belongs. Roughly speaking, I am claiming, subjunctively, that if the question were put to the relevant court in that legal system, it would decide (normatively) that Jones is the owner.

Now, the question "Who owns our genes?" might be understood in at least three different ways. First, it may be taken as an internal and partly normative question which might be raised within a given legal system, a question for judges to answer. Second, it may be taken as an external and factual question about some particular legal system, a question which might be answered by legal theorists or by social scientists from some other discipline (like sociology or anthropology). Third, however, it may also be interpreted as a normative and political question concerning what would follow from a normatively correct or justifiable legal system. The third question is different from the first in that it is independent of any already established system of rules and legal decisions.

It seems to me that these three directions of interpretation should be clearly distinguished. We may label them the *internal*, the *external*, and the *political*. They may be regarded as three different levels of analysis.

The basis of ownership.

Let's now move to question (2), concerning the legitimate basis of ownership. This question is sometimes discussed under the heading "theories of ownership". However, it seems that here, too, we need to distinguish among the three levels of analysis just described. On the internal interpretation the question is raised within some given legal system, and it may be answered in different ways within different systems. This is a question for judges. On the external interpretation, we ask what is *regarded* as the basis of ownership within a given system or set of systems. This is a question for social scientists. In this paper, I am not concerned with actually existing legal systems, either internally or externally. So let me pass on to the third interpretation.

On the political interpretation, we ask what *ought* to be the basis of ownership. This is a question for politicians—and also, more generally, for philosophers. This is the question I shall be concerned with. It might be formulated as follows: What are the conditions that should be satisfied by a normatively acceptable legal system of ownership? More precisely, what are the conditions which must be fulfilled, according to such a system, in order for a person to own something? A closely

related, preliminary question is the following: Does ownership only exist within some legal system or is it possible to own something *outside* of all legal systems?

It might be held—and it seems to have been held by Jeremy Bentham, for one—that there is no property where there is no legal system. Of course, there are no *legal* rights and duties (and therefore no legal ownership) if there is no legal system. But perhaps there are so-called *natural* (or moral) rights and duties whether or not there exists a positive legal system, and maybe such natural rights and duties can constitute property in a *moral* (non-legal) sense.

However, it is hard to imagine a society in which there is no legal system at all. As long as a number of people interact, there will probably arise certain conventions which regulate their actions and attitudes. These conventions may be regarded as a legal system, even if it is a comparatively undeveloped one. In fact, there may be no clear distinction between a "legal" system in this wide sense and the "moral" system of a given society. Some conventions, at least, may be regarded as either legal or moral or both. But in any case, the conventions adopted by a society—whether or not they are best described as "moral" conventions—are not necessarily morally acceptable. Consequently, there may still be a distinction between legal ownership and moral ownership, where the latter is independent of the rules and conventions of existing societies.

Three theories of ownership.

It may be useful to consider three different views concerning the basis of ownership: the Lockean, the utilitarian, and the contractualist.

According to the *Lockean* view, as developed e.g. by John Locke and, in a contemporary version, by Robert Nozick, everyone owns his or her own person and body and the labour produced by it, and therefore everyone also owns those objects with which he or she "mixes" his or her labour, at least insofar as there is "enough and as good left in common for others". Moreover, one can transfer (parts of) what one owns to others, in which case what is transferred is then owned by those to whom it is transferred. For example, if I cultivate a piece of land, which is not owned by anyone else, I mix my labour with it and therefore come to own it. I also own the corn which I grow on my piece of land. In general, I own the fruits of my labour and that which has been transferred to me by others.

The *utilitarian* view of ownership goes somewhat as follows. A legal system should be devised in such a way as to satisfy the utilitarian criterion of rightness; i.e. it should maximize the overall welfare of all sentient beings. Ownership is defined by legal systems. Consequently, according to the utilitarian view, morally acceptable ownership is ownership as defined by a legal system that satisfies the utilitarian criterion. Jeremy Bentham and David Hume are well-known proponents of this

view, and I have the impression that it is also accepted by some philosophers and legal theorists today.

However, we should perhaps distinguish between an *unrestricted* and a *restricted* version of the utilitarian view. According to the former, the relevant consideration for the evaluation of a legal system is the welfare of every sentient being; according to the latter, the relevant welfare is only that of the people within the jurisdiction of the legal system in question. Strictly speaking, the restricted view is not really utilitarian at all. But it is still consequentialist: what matters are the consequences of adopting and applying the legal system in question.

The *contractualist* view can be developed in various ways. The most well-known form of contractualism in modern times is that developed by John Rawls. (However, Rawls himself does not discuss property; the terms "property" and "ownership" do not occur in the index of his main book, *A Theory of Justice*, and none of its 87 sections is devoted to this topic.) Roughly speaking, contractualism says that a legal system (or a basic constitution) is morally acceptable or just if it would be agreed upon, behind a veil of ignorance, by the people who are to live with it. The veil of ignorance means that the parties to the agreement (contract) do not know what their individual circumstances and individual characteristics are. They are supposed to have only general social and psychological knowledge. Their particular conceptions of the good are also removed; the parties are supposed to be purely self-interested and fully rational. These restrictions mean that personal biases and particular bargaining positions cannot influence the agreement—which will therefore be a fair one. Similarly, a system of property rules will be fair, and morally acceptable, if it can be agreed upon behind a veil of ignorance or, alternatively, if it is the outcome of process of legislation in accordance with a constitution that in turn satisfies the contractualist criterion.

Some problems.

Each of the three theories of ownership mentioned here may have a certain initial plausibility. However, it is fairly easy to see that each of them gives rise to rather serious difficulties. Let me now try to say something about the main problems with each of them.

There are several more or less well-known problems with the *Lockean* view. First, it is somewhat dogmatic. It starts with the assumption that everyone owns his or her own person and body. But why should we accept this? It is far from self-evident. Why should we not assume, rather, that *nobody* (not even the person in question) can own a person or a person's body? From a purely intuitive point of view, this is surely at least equally plausible. It would also explain the wide-spread conviction that no one is entitled to sell or give away himself or herself.

Second, even if everyone should own his or her own person and body, it does not automatically follow that everyone also owns the fruits of his or her labour, nor that one has the right to transfer such fruits to others as one wishes. In this connection, it should be noticed that "the fruits of one's labour" are usually dependent upon other people's labour as well. When I produce something, I may need raw materials, special components, tools, capital, and technological know-how which are usually produced by others. It is hard to decide how much, and what parts, of what I produce that should be attributed to me rather than others.

Third, the Lockean view is much too vague for practical purposes; it is not much help in hard cases. For example, it does not seem to give any clear guidance concerning the question of who owns our genes. Genes may be regarded as parts of our bodies, but they do not belong to any particular body; different people may have the same genes in varying degrees. Should we say that the breast cancer gene BRCA 1 belongs to each person who has that gene? Or does it belong to all of these people collectively? BRCA 1 itself is hardly the fruit of anyone's labour, but the *knowledge* that BRCA 1 causes breast cancer is perhaps such a fruit. Does the Lockean view imply that this knowledge can be owned (and sold, etc.)? If so, should the ownership be distributed among all those scientists who have somehow contributed to the research process which has led to this piece of knowledge? If so, how should the ownership be distributed? In proportion to the contribution? If so, a legal (or moral) decision would presuppose a lot of difficult research in the history of science. This is hardly realistic. But it also seems rather unfair to say that whoever published the actual result is the sole owner. In any case, even if the Lockean view should tell us who the owner is, it does not tell us exactly what rights and duties are involved in this particular case of ownership.

The *utilitarian* view of property is perhaps less arbitrary and more intuitively plausible than the Lockean view. Theoretically, it also settles more questions, for example questions about what the relevant rights and duties are. However, four points should be noticed about the utilitarian view, whether it is restricted or unrestricted.

First, according to the utilitarian view we can never know whether a person owns a certain object. This is so because the total consequences of (applying) a given legal system can never be calculated with any certainty. Moreover, there is no way we can list all possible legal systems, nor can we pick out any subset of these which we know are better than the rest. Consequently, we can never know that the consequences of one legal system are better than (or at least as good as) those of every alternative legal system. This greatly reduces the practical value of the utilitarian view of ownership. In practice, we may at best make very rough and uncertain utilitarian evaluations of possible revisions of a given legal system. This

may be worthwhile, but it is not really what is required to settle questions of moral ownership.

Second, the utilitarian view leaves open the possibility that more than one legal system is morally acceptable, since more than one system may maximize welfare. In such cases, the utilitarian view yields contradictions: a person may both own and not own a certain object, since he owns it according to one optimal system but not according to another. This is unacceptable. Perhaps this possibility would never be realized in practice. Still, it is theoretically awkward.

Third, according to the utilitarian view quite different legal systems may be morally acceptable in different places and at different times. A legal system that would maximize (general or local) welfare if it were applied in a given country at a given time may not do so if it were applied in a different country or at a different time. Consequently, from a utilitarian point of view, the correct answer to the question "Who owns our genes?" may very well vary from one time and place to another. Of course, the answer to this question may vary because the law is applied to different circumstances. But such a variation is not what I have in mind here. The point is rather that the (ideal) law itself may vary from time to time and from place to place. However, this is no objection to the utilitarian view.

Fourth, there remains the problem of how to delimit the relevant population, the welfare of which is to be maximized according to the utilitarian view. According to classical utilitarianism, each sentient being from here to eternity should be included, but this idea is probably not what most actual legislators have in mind. On the other hand, it would probably be regarded as too restrictive to include only the contemporary human population of a given national territory.

The *contractualist* view is intuitively attractive, but it is not easy to determine what it implies in practice. The following points should be noticed.

First, as Rawls himself points out, the contract agreed upon in a hypothetical contract situation depends upon how the contract situation is defined and, in particular, upon what beliefs, desires, and other psychological traits the parties to the contract are supposed to have. Consequently, nothing in particular can be derived concerning property rights and duties until these matters are fixed. And it is not clear how they ought to be fixed. To some extent, this depends upon what the contract would be under different assumptions. (There is a kind of circle here, but it is probably not a vicious one. It is openly acknowledged by Rawls.)

Second, the parties to the contract may concentrate upon a basic constitution and leave questions concerning the precise rules of ownership to future legislation. If so, they will probably decide that legislation must be governed by the constitution and that the constitution should be a democratic one. Consequently, the rights and duties of ownership in various areas will eventually emerge as a result of democratic

decision-making. But democratic decision-making is not completely determined by constitutional rules; other factors, such as technological development, class structure, cultural biases, and individual psychological facts about the decision-makers will also influence the outcome. Therefore, it cannot be known in advance what the rules of ownership would be.

Third, if the hypothetical contract already contains an explicit principle for evaluating property rules, the outcome depends upon what this principle is. Given certain assumptions about the parties to the contract, it might be plausible to assume that they would agree on (some version of) the utilitarian criterion. If so, the considerations mentioned above concerning the utilitarian view apply here as well. Another possibility is that they would choose the Lockean principles of ownership. The parties are taken to be rational agents and the Lockean principles are usually supposed to be discernible by reason; this seems to imply that the parties would choose those very principles. This would lead us back to the problems already indicated.

In conclusion, we can say that it is very hard indeed to settle political and moral problems of ownership in a principled way. In particular, if we abstract from actually existing legal systems, it is very much an open question who owns our genes. This may not come as a surprise—except, possibly, to those who believe that there also exists a determinate system of natural law.