

# The Construction of Social Reality: The Case of Land<sup>1</sup>

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## 1. Introduction: On Searle and de Soto

Issues of social ontology, the particular case of property, and its ramifications, are fascinating. In this paper, I aim to explore a rather different aspect of these ideas from that set out in the work of Searle and of De Soto. But in this introduction, I will make a few comments about their work – not least because we will, shortly, be participating in a session on their writings.

Searle,<sup>2</sup> it seems to me, has raised some important problems – one ones with which we will all be concerned in these sessions. He is also, surely, right in the emphasis that he places upon language – as, in a different way, did Peter Winch in his The Idea of a Social Science.<sup>3</sup> But it seemed to me that there were certain problems about his approach, not least, because our concern in the area with which he is dealing is also with intentional objects which may be the products of things that don't involve language, and also not only with 'the products of human action but not of human design' (to use a phrase that Hayek has stressed),<sup>4</sup> but also with their impact back upon ourselves.

Let me outline my concerns, briefly. One of the most striking things that face us, is the way in which, in social life, we interact with objects that we understand other than we would, in the physical sciences. My interactions with the words upon my computer screen as I write this paper, are an obvious case in point. Some of the things in question are, clearly, linguistic in their origin. But others, I would suggest, aren't, or are the product of an interplay between a few words, and things which we need to look at in other terms. Take, for example, the products of custom and of tradition: what there is to react to, and how we react to it, may be a product of custom or of tradition, as, indeed, may be some of the aspects of us that do the interacting. In some cases, these things may be primarily linguistic. In others, what is involved may be picked up tacitly, or as a product of being shown and corrected by others, and simply of practicing over the years. In making this point, I am not suggesting that these things are communicated silently, and that criticism is a matter of blows, as it might be in a Zen monastery. But at the same time, it would surely be doing what is involved an injustice, if we were to take what was tacit about it, as implicitly involving what was or could be said – as, say, we appreciate, when we are asked to give an explicit account of some item of tacit knowledge. Language is there; but, I would suggest, it acts in an interplay with various other things. And these in turn – as well as language itself – would seem to me best looked at as

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<sup>2</sup> See John Searle, The Construction of Social Reality, New York etc: Free Press, 1995.

<sup>3</sup> Peter Winch, The Idea of a Social Science, London: Routledge, 1958.

<sup>4</sup> Cf. Friedrich Hayek, 'The Results of Human Action but not of Human Design', in his Studies in Philosophy, Politics and Economics, London: Routledge, 1967.

resting upon a hierarchy of different levels of control, running down from the social to the biological, each of which, I would have thought that it is plausible to suggest, may give us ways of interacting with a world containing objects individuated other than in the terms that we might understand, from physical theory.

So far, however, we have considered only intentional objects. But our actions in the social world also have unintended consequences. And these may confront us, as if they had a thing-like character. Thus – if we take our prompting from Vico and others – we may feel that human action itself should be intelligible to us (although it is not so clear that this will be the case, in respect of products of custom, tradition, and the various shapings that others' bodies may have undergone). But the products of the actions of many of us, may confront even those actors with a thing-like character: as objects – like economic fluctuations, or the rate of interest – which affect us,<sup>5</sup> but whose workings may be far from transparent to us. Further, we may develop theories about them, on the basis of which we may act; but where those theories may themselves reflect misunderstandings of those objects and their character. The same, I suspect, is true of traditions: we may behave in various ways, and suddenly be shocked, by someone asking for an explanation of what we are doing, and may, indeed, have to invent one if we are pressed, just because what we are doing may, never, have had an explicit origin (such as where, say, people simply follow the way in which someone else has happened to act, and then what is involved becomes more elaborate, over time), or because whatever gave rise to it is now forgotten (and where what is done, may well have been affected by the fact that original purposes and intentions have been forgotten over the years).

From this, let me turn to De Soto.<sup>6</sup> His work, while less explicitly philosophical, seemed to me most interesting, and to pose some really important problems, and in striking ways. Surely, there is a case for the legitimation of property rights and other forms of informal capital, so that people can make use of them. It is also, I think, most important that other scholars take up his lead, and explore the ways in which these things have happened, in the past. For someone living in Australia, for example, the issue of the 'squatters' – people who settled upon often vast tracts of land, in the face of the law, and became wealthy once these holdings became legitimized – immediately comes to mind. In addition, it then becomes no accident that such settlers made use of ideas that they found in John Locke, to legitimize what they were doing.<sup>7</sup> For in Locke, you have a theory that tied land rights to making productive use of land, and which also suggested how someone could acquire a legitimate title independently of government, and without everyone having actually agreed to it, by virtue of how they made use of the land. But so, at the same time, do some problems. First, in the Australian and American contexts, we can, surely, say: what of the countries' aboriginal inhabitants?

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<sup>5</sup> Compare, in this context, Robert Nozick's brief but telling comments on 'filter mechanisms' in his Anarchy, State and Utopia, New York: Basic Books, 1974.

<sup>6</sup> My main concern will be with his Mystery of Capital, London: Bantam, 2000; but my discussion is also influenced by his discussion of similar issues in The Other Path, New York: Harper, 1990.

<sup>7</sup> For (highly critical) accounts of this, compare Henry Reynolds, The Law of the Land, Ringwood, Vic: Penguin, 1987 and James Tully, 'Rediscovering America: The Two Treatises and Aboriginal Rights', in G. A. J. Rogers (ed.) Locke's Philosophy, Oxford: Clarendon Press, 1994, pp. 165-96.

One problem, here, was that the lands being occupied were not just – as it were – huge tracts of virgin land that had been granted by Kings to their favourites. (Compare, in this context, the amazing tract of Northern Virginia that was given to Lord Fairfax – which covered not only the bulk of Northern Virginia, but a hunk of West Virginia, too.) The difficulty, rather, was that the lands were used by other people, but, typically, practicing different modes of subsistence. The authorities against whom squatters – and New England settlers – were often rebelling, were quite frequently engaged in paternalistic attempts to defend the rights of their aboriginal subjects.<sup>8</sup> One reaction to all this, notably in Canada, but also in Australia, following their lead, has been to recognize aboriginal people's land rights. But one problem, is that this has typically been done on a collectivized basis, so that while some individual may be a part-owner of a large tract of land, it cannot be used for any of the kinds of things with which de Soto is concerned. This may be fair enough, if the people in question were wishing to live upon such land as their ancestors had always done. But one consequence of European conquest, has been that it brought such forms of life up against 'commercial society'. And this – even in the miserable opportunities that it sometimes offers to such people – has proved irresistibly attractive to them. I just wonder how many aboriginal people will be living anything like a traditional style of life, in, say, three generations' time. But the fact that their landholdings are in a collective form, may mean that it becomes difficult if not impossible for them to make fruitful use of them, in the commercial societies in which they will in fact be living.

In a country such as Australia, this issue of land rights looms large. I am not sure – because of its cultural significance to Aboriginal peoples, and because of the grim things that occurred, as a result of the impact of people from outside the Australian continent (some of the diseases from which they suffered – e.g. smallpox – are now, I understand, thought also to have been passed on by Asian traders, rather than just by European settlers)<sup>9</sup> – how easy it will be to move to the kind of arrangement that de Soto favours, unless issues of compensation are also addressed. But there is more, in terms of problems of equity. In one of the accounts that he gives, he mentions that those involved in settlement typically receive some sort of document indicating ownership, and also that those involved in settlement may well set up their own rules – under which later settlers may have to pay them, in order to be able to settle in new tracts.

This, however, points to a couple of problems. One is of equity, upon which I hardly need to elaborate. The other is that it is one thing to legitimize existing settlements now, quite another for people to realize that, if they can successfully acquire things in the future, there is a good chance that what they acquire will eventually become legitimized. There is the risk, either of a kind of free for all by people who hope to hold what they grab,<sup>10</sup> or even of a readiness to try to overturn existing property rights, in the hope that, if one is successful, the system will be changed to one's advantage. And this, surely, one does not wish to encourage. For it would mean that the value of formal titles as security,

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<sup>8</sup> I would like to thank summer fellows for useful discussion of this issue, at IHS in the summer of 1991.

<sup>9</sup> I heard an account of this research in a program broadcast on Australia's Radio National, in March 2003.

<sup>10</sup> Compare, in this context, some of the problems that arise in the 'pre-contractual' period, in the approaches of rational choice contract theorists, such as James Buchanan.

say, itself becomes dubious, if those who might lend to you with that as a security fear that your entitlement to the property might itself become undermined by others' successful unofficial activity. This, in turn, suggests that what we need is a system that can accommodate, rather than be called into question by, future social change.

I have a suggestion for addressing this situation; one which, it seems to me, might also be used to address another problem posed by de Soto's account. This is, that his argument is, essentially, one for governmental action. Clearly, at one level, legitimacy is a product of governmental recognition. But one thing that concerns me about his approach, is that he seems to hope, in this respect, for government to act in ways that advantage not just ordinary people, but those who are at the bottom of the social pile: people who are newcomers, who may not have voting rights in the unofficial places where they are living, and who certainly do not have the resources to make large campaign contributions. While I accept his case for what needs to be done, I just wonder how feasible it is. This – as well as the other problem, indicated in the previous paragraph – suggests to me what one might call another path. It is that, rather than individuals or informal associations as actors, why not consider commercial companies as actors. They, on the face of it, might be better able to deal with government than can these unofficial groups. And they might well retain some kind of overall control of the land, while issuing people with derivative rights to their land etc; rights which are tradable, which can serve as securities, etc. If they had to operate competitively – e.g. by way of there being arrangements that limit them to a single district in a particular area – they would, presumably, be limited in the cut that they took. While they – rather than the government's bureaucracy – could then handle the issuing of titles, the registering of transactions, etc. This would, further, mean that newcomers could deal with them, and they would, in principle, be open to offers as to how better use might be made of existing land. Further, as they would be private companies, they would, themselves, be open to take-overs,<sup>11</sup> if they seemed to be exercising poor private stewardship of the land.

Rather than exploring these ideas further, I will, now, turn to the body of my paper – from which, it will also become clearer the kind of arrangement that I have in mind, in the comments that I have just made.

## 2. Land: From economics to ideas

At the center of De Soto's approach, there seemed to me to be a powerful vision of the way in which people might own capital, but – if their land (and what was on it) was not transformed from land into property rights, they would be able to make little use of it. What he had to say about this – and the economic disabilities involved – seemed to me telling. However, in this paper, I wish to argue that we might usefully see there as being another dimension to the issue. For property, in addition to being an economic asset, may also be seen as a vehicle with the use of which ideas may be tried out. G. W. F. Hegel, in his Philosophy of Right, offered an account of property, in terms of it being something into which people could externalize and develop their personalities: they could, by this

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<sup>11</sup> On the significance of which for the utilization of resources, compare Henry G. Manne, 'Mergers and the Market for Corporate Control', Journal of Political Economy 72, no. 2 (1965), pp. 110-20.

means, achieve something that would not have been possible, if they had had to restrict themselves just to subjective thought about such matters.<sup>12</sup> Hegel also, of course, suggested that we might view aspects of human history as amounting to the trying out of different ideas; for example, different ideas about human freedom. Hegel would not have liked the idea, but one might relate this to John Stuart Mill's ideas about 'experiments in living',<sup>13</sup> and also to Karl Menger's suggestion that the exemplification of ethical ideas,<sup>14</sup> by way of their systematic practise, might make an appraisal of them possible of a kind that could not occur, if they were seen simply as ideas that people thought about.

Perhaps the most striking account of how private property may serve to make such things possible, was provided in the unduly neglected 'utopia' section of Robert Nozick's Anarchy, State, and Utopia.<sup>15</sup> There, he suggested that a classical liberal system of property rights might be made use of, to allow people to live in different ways. Nozick's reasons for suggesting this were various. In part, he stressed that people might have different ideas and ideals – such that what would make Gandhi happy, would not suit a yuppie, and so on. In part – and this he developed with a reference to Karl Popper's ideas about the significance of learning by trial and error – he had in mind the idea that people might be able to make use of their property, to try out ideas about what would make for a good life, or, say, for what might make for a good system of democratic decision-taking. Of course – as with regard, say, to the literature on utopian sects – the people who typically learn from successes or failures, will typically be other people. But there is, surely, a sense in which the Shakers did enrich our wider culture, while trying out odd ideas of their own; while we might learn a lot from other experiments especially if those undertaking them could be persuaded to keep journals or were watched by sociologists! Less dramatically, we might also, surely, be able to learn simply by the successes or failures of one or another such idea: if something worked, others might copy it, or try out modifications in the hope that the results might be better still. Alternatively, if people tried out something that seemed promising, but it did not work, others might make a conjecture as to what had gone wrong, and try changing that.

There is, it seems to me, huge scope for learning from such experimentation. (Consider, here, the argument of Jane Jacobs in her The Death and Life of Great American Cities,<sup>16</sup> about our need to learn in the design of cities from what worked, rather than to imagine that the secret of how to conduct successful urban life could spring forth, full-grown, from the mind of some architect, to say nothing of a planning committee.) But we need to allow for two things: on the one hand, for ideas to be tried out systematically; on the other, to encourage innovation, and for people to be willing to put resources into such activities. Above all, however, we need to have structures within which learning can take place: to set up incentives for people to learn from what others have accomplished, and at the same time, for those undertaking the activities themselves to be ready to learn when

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<sup>12</sup> A lively presentation of the arguments which might appeal to those who would not fancy reading Hegel himself, is to be found in Jeremy Waldron's The Right to Private Property, Oxford: Clarendon Press, 1988.

<sup>13</sup> See John Stuart Mill, On Liberty [1859], chapter 3.

<sup>14</sup> See Karl Menger, Morality, Decision and Social Organization, Dordrecht and Boston: Reidel, 1974.

<sup>15</sup> Robert Nozick, Anarchy, State, and Utopia, New York: Basic Books, 1974.

<sup>16</sup> Jane Jacobs, The Death and Life of Great American Cities, New York: Vintage, 1961.

things are not going well, and to be ready to make the appropriate changes. This, it seems to me, suggests that what we need is private, commercial activity (supplemented, if people so wish, with various communal and cooperative efforts – though they are not as likely to be ready to learn if things are going wrong, just as it will be a huge climb-down to have to admit that ones pet ideals are no good).

### 3. Property is not enough

Let us, however, return to do Soto's ideas. Even if someone owns private property, certain kinds of regulation may have the effect of their being unable to make use of it for the kinds of purpose that De Soto has in mind. For example, if the property cannot be alienated, they will not be likely to be able to borrow upon it. If it is subject to certain kinds of multiple, tradition-dictated, ownership, it may be difficult to get the agreement of everyone concerned to undertake any kind of innovatory activity. While similarly, governmental regulation as to land use, or imposed for the sake of conservation, may drastically limit what may be done with it. I am not arguing, here, that no regulation (or its equivalent) is needed. But I would suggest that it is salutary to consider the way in which government ownership, or heavy government regulation, can have the effect of freezing what is done with land. In some cases, there may be arguments for the desirability of this. But in many others, it is useful to contrast the kinds of changes that take place, in property that is not subject to such regulation, over the years, with the lack of movement of the regulated property, and to ask: did government really get things right, back when the regulations were originally made?

The same, however, is true with regard to property as an exemplar of ideas. Regulation has the effect of limiting what might be tried out. And given that we – surely – don't know what is best, this has the effect of freezing us into inadequate solutions to our various problems. My argument, here, is, I would stress again, not an argument against regulation as such. But it seems to me that one of our big problems, is that we do not try out different kinds of systems of regulations, by allowing them to compete. Clearly, one would not wish a group of people to impose its unwanted externalities on others. But, on the face of it, there would seem to me every reason to allow companies to purchase large areas of land, and to replace, in respect of them, the existing functions of local (and possibly state) government, provided that they were not imposing externalities on others. (They would, thus, not be able to impose more pollution on others than did any other neighbourhood, and they would be required to make contributions to infrastructure affecting other areas – e.g. road construction – to match the kinds of costs that they, like other neighbourhoods, would be imposing on surrounding areas, and on the same financial basis.)

What this would mean, however, is that not only could one get away from the kind of dull uniformity which is imposed upon us by our existing regulations, but it might be possible to try out different ideals, or to develop ways of life which would speak to the needs of different people. Similarly, it would be possible to set up designs for ways of living that draw upon the successes, and learn from the lessons, of what has been accomplished in the past.

The underlying lesson, however, would be that just as, with regard to de Soto's problems, we should try to set up that kind of property regime which could be most conducive to making the best use of capital tied up in land, by way of picking the kind of regulation for property which would be likely to offer the best results (something that may combine learning from experience with theoretical analysis; for example, after the fashion of law and economics), so we would wish to look for the best kind of property and regulatory regime for learning. Here, it seems to me, we can look both to legal ideas, to experience, and also to ideas in methodology and epistemology. I have, elsewhere, argued that Karl Popper's work has some important contributions to make to this problem.<sup>17</sup> He has suggested that, for us to learn, we need to constrain ourselves by various methodological rules. We may, I have suggested, consider the way in which various sociological, legal and regulatory procedures act as methodological rules. But this means that, in turn, when we address our problem of what makes for the best property and regulatory regime for the purposes of the exemplification of ideas and learning, we might usefully look to epistemology for suggestions.

Rather than exploring these ideas in more detail here, I will, instead, turn to the question of whether anything of this kind is of any practical value.

#### 4. Some Lessons from Celebration

We may, here, usefully look to the Disney Corporation's town of Celebration, Florida,<sup>18</sup> as a partial exemplar of some of the ideas with which I have been dealing – and as pointing one way towards future developments. Celebration is interesting, because it was built upon land which was owned by Disney, where they had – for reasons connected with the conditions under which they wished to construct Disney World – been able to get the Florida legislature to grant them powers comparable to those of a county. Their Reedy Creek Development Corporation, operated, in effect, as a private government. Celebration – an actual residential town (or, perhaps better, large subdivision with facilities) – was constructed upon land which Disney negotiated to return to a local county, not least, because the inhabitants would otherwise have attained political control of Reedy Creek. This, however, meant that they were able to negotiate with the local county, that they retained a kind of control that developers seldom attain upon their creations.

What Disney then did, was to create a remarkably attractive town, in which strict design rules were developed and enforced. They drew – Jane Jacobs-like – upon many other

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<sup>17</sup> See, on this, my 'Religious Sect as a Cognitive System', Annual Review of the Social Sciences of Religion, 4, 1980, my 'Epistemology Socialized?', et cetera, Fall 1985, and my Political Thought of Karl Popper, London & New York: Routledge, 1996. See also, for a much fuller development of the 'social' aspects of Popper's thought, Ian Jarvie, The Republic of Science, Amsterdam & Atlanta: Rodopi, 2001.

<sup>18</sup> On which, see Douglas Franz and Catherine Collins, Celebration, USA, New York: Holt, 1999, Andrew Ross, The Celebration Chronicles, New York: Ballentine, 1999, and for my own treatment, with further references, 'Living with a Marsupial Mouse: Lessons from Celebration, Florida', Policy, 18, no. 2., Winter 2002, pp. 19-22: <http://www.cis.org.au/policy/winter02/polwin02-4.htm>

American towns, and on the architecture of ‘new urbanism’. The result, was intended to give people the kind of experience of neighbourliness they would have in a small town, but where this was combined with intranet facilities, good medical services, and also with architect-designed public facilities, and an attractive restaurant and boutique shopping facilities by the side of one of the town’s many artificial lakes. The town was designed to enhance interaction between inhabitants. And, in addition, Disney set up The Celebration Foundation, financed by a levy from house sales, which deliberately set out to promote participation in charitable, educational, and other activities, and thus, for those who chose to live there, served to overcome the kinds of problems in the fall-off in participation that have been bemoaned by Robert Putnam in his Bowling Alone.<sup>19</sup>

I would not wish to depict Celebration as an ideal. But it does seem to me to suggest what is possible. And what is particularly striking about it, is that it would obviously be chosen as a location only by those who favoured the kind of lifestyle that it was offering. It would seem, however, to suggest a model that could be adopted to other needs. And – as is illustrated by the materials in the recent collection, The Voluntary City<sup>20</sup> – there are different ways in which one might develop such ideas, suggested by actual historical examples. However, for this to be possible, it would seem to me that one would need to make the possibility of areas extracting themselves from local and State governmental regulation much easier – provided, of course, that this did not mean that they were able to impose externalities upon others of a kind that differed from those imposed by other areas. Another way of looking at this, is that what it seems to me is needed, is the possibility for private companies to take over the kinds of functions currently discharged by local government, while, at the same time, their residents would be exempted from local taxation (as they would be paying for the services they received, by way of fees that they paid directly to the companies). This, I believe, would offer the possibility for both the exemplification of difference and for experimentation, of a kind that one could not expect from government, and which it would, also, be inappropriate for government to be involved in.

It is, indeed, this kind of model that I would commend to De Soto, as an alternative to the way in which he wishes to have government solve the problems with which he is concerned. Clearly, such things would have to be approved by government. But – in my view – that, plus a few regulations to deal with what happens if such experiments are unsuccessful is all that we would need, although I would have no objection to people choosing to live under ordinary local governments, if they so wished.

Such a radical privatization of local and state government would also, I believe, speak to the issues to which I referred earlier, when discussing problems left over by De Soto’s work. For if land becomes fully commodified property, its owners could clearly adjust its use to demand – e.g. from migrants – without this calling into question the underlying

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<sup>19</sup> See, most recently, Robert Putnam, Bowling Alone, New York etc: Simon and Schuster, 2000.

<sup>20</sup> See David T. Beito et al (eds) The Voluntary City, Ann Arbor: University of Michigan Press, 2002; see also, for further discussion from the perspective which informs this paper, my review in Policy, Summer 2002-3, <http://www.cis.org.au/policy/summer02-03/polsumm0203-10.htm#1>



regime of property ownership. It should, thus, help to avoid the danger that other forms of accommodation – e.g. the forced revision of property rights – would pose to the very role (e.g. as a stable security for economic activity), that De Soto wishes them to play.

##### 5. Further Explorations – and back to Searle’s Concerns

My suspicion is that, if such ideas were tried out, one could well expect that the result would be something similar to Celebration, but reflecting different concerns and interests. That is to say, one would expect not gated communities, but communities with different kinds of regulations, open to the world, whose residents mostly went outside them to earn a living and to conduct many features of their lives – and drawing visitors from the rest of the area, to experience their style of life, and to use their facilities.

Such arrangements might also offer other possibilities, too. As I indicated, those living in Celebration have chosen a distinctive lifestyle, and many features, from the design of houses and how they are situated on lots, to the Celebration Foundation, serve to encourage people to behave in certain ways – ways that they favour, and which were among the reasons why they moved there in the first place. One could, however, imagine choices being made, for the sake of the effects that it was expected that they would have upon the people in question. For example, some of us find it all too easy to overeat the wrong things, and not to get enough exercise. One could imagine a town, in which one could simply not buy certain ranges of ‘unhealthy’ foods, and in which there was every encouragement to exercise (both by way of its facilities, and on the basis of how it was designed). Similarly, those who favoured a particular way of life – e.g. based on their religious views – might welcome an environment which would encourage rather than provide temptations to, its pursuit.

One might, however, take such matters further. Consider, say, Michel Foucault’s writings dealing with the ways in which people may be fashioned in various ways, by being subjected to particular disciplines. On this account, these things are both empowering, but also in certain ways problematic. It is not clear, however, why they should be problematic, if seen as the products of people’s choice (something which, perhaps, he himself came closer to, in some of his later writings in The History of Sexuality;<sup>21</sup> not least – as has been suggested – as a result of his personal exploration of sadomasochism). This very example, however, suggests that different such ideals may appeal to some and not others (I, personally, find sadomasochism utterly unappealing, to put it mildly). But one might, surely, think of the possibility of the choice of environments, to fashion ones self in one way or another.<sup>22</sup>

This, in turn, might then mean that different social arrangements and modes of interacting then become possible for such people – thus illustrating my earlier thesis of the possible

<sup>21</sup> See Michel Foucault, The History of Sexuality: An Introduction, volume 1, New York: Random House, 1978.

<sup>22</sup> For some further discussion of these ideas, see my ‘Beyond Fear and Greed?’, Social Philosophy and Policy 20 (1), Winter 2003, pp. 247-77.

interrelationship between social ontology and the dispositions that people may acquire and, indeed, may choose to acquire, if they are free to do so.