

Real Institutions, and really legitimate institutions

Eric Palmer, Philosophy, Allegheny College. epalmer@allegheny.edu

Abstract:

This presentation is intended to develop a thesis regarding the manner through which social institutions such as property come to be, and a second thesis regarding how these institutions ought to be legitimated. First thesis (Part b): The construction of social institutions can be understood clearly only if that topic is distinguished from the topic of their normative status. With the distinction in place, an informative socio-technical account of their construction can be formulated with little ado. Second thesis (Part c): The normative status of such institutions can be understood properly only if their legitimacy is distinguished from the legitimacy of government. I argue (Part a) that each of these theses is in need of explication largely because of the entrenched cultural influence of an erroneous reading of social contract theory concerning the origins of the state. The error yields a pair of myths: that government precedes and underwrites both the reality and the legitimacy of all other social institutions, and that people's choices alone generate social institutions.

Argument:**a. Avoiding a Hobbesian error.**

Thomas Hobbes conceived of government as composed of and justified by a social contract: an agreement of individuals to live in peace and to form a confederacy of government to improve their "nasty, brutish and short" lives. The familiar fiction he forwards is of "a covenant of every man with every man," each to give up his legitimate right to self-government by handing over his right, and practically also his strength, to a legislative, judicial and police force that the men form among themselves.¹

Hobbes mentions a "covenant" of each with all, and the process of generating this covenant is, I think, often envisioned as a first meeting of individuals, ultimately generating the state. It is a meeting that, so far as we know from history, has never taken place, and such a meeting is not clearly suggested by Hobbes, or by Locke.² Nevertheless, somehow, both agree that some sort of process to erect or recognize the sovereign must take place; and Rousseau would have us convene just such a meeting regularly, an assembly of all citizens, he says, to re-affirm the foundations of government.³

The culturally familiar story about an original covenant, I believe, has since led to a myth that pervades much political discussion: the view that legitimate political institutions are ultimately grounded in the free choices of existing people, the fundamental 'selves' that we have or that we are, prior to politics. This myth yields another, almost as prevalent: that government, as the original exit from the state of nature, is the mother of all other legitimate political institutions. From historical and sociological perspectives, these are certainly myths; from a

¹ Hobbes, *Leviathan* I:17.

² Though the precise extent to which Hobbes wished his argument to be treated as representative of history is quite open to debate, he certainly insisted that the state of nature is a genuine historical possibility which has existed in some places and times, and that commonwealth can arise only through covenant (pp. 65, 89). For Locke similarly, see *Second Treatise of Government*, Sections 86-90.

³ Rousseau, *Social Contract*, Part III, 18.

philosophical perspective, the myths cloud more helpful analyses of sovereignty and legitimacy that have been readily available since Kant.

Myths do have sociological, and so historical impact. These two myths play their parts today: consider a few current examples. To Myth 1: the Women's International League for Peace and Freedom launched the "Challenge Corporate Power, Assert the People's Rights" campaign this past summer⁴ – I take their slogan to suggest a fundamental, and vague, priority of people and their choices. Similarly, the National Lawyers' Guild suggests that, "In a democratic society, living human beings are sovereign and are the basis of all government authority."⁵ The claim concerning legitimacy of authority, is, I believe, true, but the previous claim is a misleading formulation. It is not just the social contract theorists who argue that sovereignty is surrendered to the government; many legal dictionaries⁶ assert the same, as do all governments with an executive branch, including democratic ones. The principle of state sovereignty that is reflected in international law also suggests otherwise. In their organizing materials, the Women's International League makes a similar maneuver.⁷

I find the work of both of these organizations to be worth examination, and particularly, I find the italicized formulation from the NLG Constitution inscribed just under 'National Lawyers' Guild' to be quite clear. I think these errors are minor, but they are also persistent. They are merely examples of vagueness in the way people express themselves, even when they are at their best, writing carefully drafted documents. They display a patch of vagueness concerning sovereignty, and I suggest that misleading background assumptions about the sources of sovereignty may be responsible for those vaguenesses.

⁴ See <http://www.wilpf.org/corp/corp-personhood.htm>.

⁵ See <http://www.nlg.org/committees/corporations.htm>.

⁶ See, e.g., "Sovereignty," Dictionary of Law, Oxford University Press, 1997.

⁷ See "Organizing Packet," at <http://www.wilpf.org/corp/corp-personhood.htm>.

To Myth 2: William Meyers, David Korten, and many others concerned to change the political landscape write of corporate personhood as a "legal fiction."⁸ But the work of the Institute for Liberty and Democracy provides good evidence regarding the extra-legal reality and robustness of business entities. Furthermore, deSoto's study makes a strong case that we should not expect, nor even desire, that institutions related to property and business develop simply and solely through the auspices of legislation and its interpretation in courts. DeSoto argues that the historical development of property in U.S. law did not fit that pattern, and that the government also did not always do an excellent job, for its part, in the development of the property system during the westward expansion. He is persuasive in his suggestion that extra-legal dimensions to development have their merits.⁹

Nonetheless, deSoto finds that many of us, and politicians in particular, are unaware of the role and extent of non-legal but socially real business activity.

What national leaders are missing is that people are spontaneously organizing themselves into separate, extralegal groups until government can provide them with one legal property system. ...

Why has everyone missed the real problem? Because there are two blind spots. First, most of us do not see that the surge in the world's extralegal population over the past forty years has generated a new class of entrepreneurs with their own legal arrangements. Government authorities see only a massive influx of people and illegal workers and the threat of disease and crime. ...

The second blind spot is that few recognize that the problems they face are not new. The migration and extralegality plaguing cities ... closely resemble what the advanced nations of the West went through during their own industrial revolution.¹⁰

DeSoto analyzes that neglect partly as the result of our inability to recognize how legality has developed historically, and as the product of small-mindedness of

⁸ William Meyers, "The Santa Clara Blues: Corporate Personhood vs. Democracy," <http://www.iiipublishing.com/afd/santaclara.html> (III Publishing, Nov. 13, 2000). Similarly, see David Korten, *The Post-Corporate World*, West Hartford: Kumarian, 1999. 75.

⁹ DeSoto, 126-7.

¹⁰ Hernando DeSoto, *The Mystery of Capital*, 73-5.

government officials, who see extralegal development simply as antisocial illegality, and not as necessary problem-solving in difficult circumstances.¹¹ I would like to suggest that the contractarian story has also played a large cultural role in allowing government officials and others to neglect the extra-legal business sector. It is not just that they are unaware of history: I think they have an origins story in their minds, about how institutions should be set up, that turns the eye away from history. The story also provides a foundation for myth #2, which drives that small-minded interpretation that deSoto notes. I think the social contract story, then, may be the root cause of the symptoms that deSoto points to.

To more clearly answer the question, "What makes a corporate body, or real property, real?" we must start by distinguishing between the social reality and constitution of an institution and its political or moral legitimacy, as the U. S. critics noted in earlier slides have not done. History can tell us much about the social reality of the institution; what Hobbes was concerned to explain was the rational basis of political legitimacy. He turned to a formulation in terms of a "compact" that was easily misread as a historical claim. It was left to Kant to show that there is no reason for linking the ideal of government with the story of its historical generation, if the ideal of legitimacy alone is what is to be understood. Kant steers us away from the error of thinking of people as entities somehow prior, and institutions somehow posterior, to the political situations enveloping them. Instead, we are pointed to a conceptual division between a world of facts (in which history occurs) and a kingdom of ends. Legitimacy concerns ends, motives and purposes; historical events are only accidental, or are symptomatic of legitimacy: they will always provide us with a faulty analysis of legitimacy.

¹¹ DeSoto, 88.

b. What makes a social institution real

The division allows us to return in clarity to the world of facts. Real social institutions are those that produce irreducible social facts, as Peter French has argued, or that are institutional facts, as Searle has argued. How do real social institutions such as property or business come to be constituted? It should become apparent that for each thing there will be a different story, but we can probably speak truly of types of stories for some groups of things. There are an open-ended variety of stories for how land is made into property, many of them quite obvious; here are a few:

1. Land is made property by fiat.

In the past, kings and other political leaders have claimed lands outright, and would-be kings have made claims to lands, then pursued those claims against others through war. Landed kings have also made claims to other lands, often allowing vassals that can subjugate the people of those lands to govern the lands in the kings' names. Minor variants on the same process continue today.

2. Land is made property by enclosure.

This is a particularly vivid case, where land is 'staked,' often under the fiat of a regime, and sometimes requiring document filing or an enclosing fence to establish the boundaries of the stake. Other times, the staking itself plays its role in the creation of the political regime: in such cases, good fences literally *make* good neighbors.

3. Land is made property by agreement.

Antarctica's territorial division is an especially clear example of this case; war settlement is another.

The point of the rather bland recitation above is to illustrate that we can consider how property is made without addressing the question of how it is made *legitimate*. The three stories of property creation briefly recounted above are one-sided and limited, of course: they may neglect competing stories concerning the

subjugated, the nomadic, and the voiceless, respectively. Those sociological and historical counter-stories are likely to also be a part of any reasonably informative account of the construction of social reality.

How property is made is a sociological, or more precisely, a socio-technical matter, for in the second case, the physical technology of the fence plays its particularly obvious role. I doubt that we can do better than to follow the lead of Bruno Latour in the sociology of science, or the research work of the Institute for Liberty and Democracy, and study the numerous processes of consolidation of property claims, if we wish to study how property is made from land.

This leads me to a side-track: a small criticism of both Searle and deSoto that I would like to offer. Both seem to be less impressed than they should be by the significance of physical objects in the construction of social reality, and they show it in different but linked ways: they both promote the contribution of the mind to social reality, to the neglect of the physical.

To warm you up: Consider the social significance of the speed bump, my favorite example from Bruno Latour's battery.¹² There are at least two obvious ways to turn dangerous speeders into good citizens, around school zones. One is to spend about \$100,000/year on a police officer and the necessary infrastructure to support him or her; another is to lay a lump of asphalt for cost and maintenance of, say, \$200/year. Their effects are of course not exactly the same, but they both reconfigure social reality in substantial and similar ways: no wonder that some English refer to the latter group as "lying policemen."

The essentially physical properties of speed bumps can yield social order: the invented technology re-makes social institutions, alters the economy, etc. DeSoto, however, provides an importance to written law that generally discounts the significance of technological regimes:

¹² See Latour's article, "On Technical Mediation - Philosophy, Sociology, Genealogy." *Common Knowledge* 3, 29-64.

It is law that detaches and fixes the economic potential of assets as a value separate from the material assets themselves and allows humans to discover and realize that potential. It is law that connects assets into financial and investment circuits. And it is the representation of assets fixed in legal property documents that gives them the power to create surplus value.

Lifting the bell jar, then, is principally a legal challenge...¹³

Yet the things of first importance when we speak of real property should doubtless include stakes and surveyors, for thousands of years past right to the present; and more lately, barking dogs and global positioning systems. These themselves are bound up in law also: a wooden stake is rarely acceptable, humane laws cover many barking dogs, and a GPS system requires a maintenance contract. But it is misleading to say that such matters are fundamentally legal: they are at least as much socio-technical, and the choice among and development of technological regimes is crucial to what law can speak of.

I have similar concerns with the discounting of the important role of physical reality in Searle. He misleads us towards mentalism when he writes:

In a sense there are things that exist only because we believe them to exist. I am thinking of things like money, property, governments, and marriages.¹⁴

--Well, only in a very loose sense! This ignores the socio-technical component of these things. Money, which is one of Searle's most developed examples, requires a technology, such as counters: we simply couldn't get by on our "beliefs" here—it couldn't practically work. And the same goes for all of the others in this list: one might be able to decide and keep in one's head who is the leader of a group, but governments of the sort with which we are acquainted require much more socio-technical apparatus, from voting machines to supreme courts to override them; and without their contributions, war just could not be declared by the U.S.A. Searle is too mentalist here: he gives too little credit to the sociological surround, and too little to things.

¹³ DeSoto, 157-8.

¹⁴ John Searle, *The Construction of Social Reality*, 1.

Searle does allow that money requires a physical technology, and he does writes of the "agentive functions" of objects with particular physical properties in social reality: he gives credit to the "sheer physics" of tall fences, for example.¹⁵ Yet his acknowledgement of debt to technical reality is miserly indeed, for he writes:

just about any sort of substance can be money, but money has to exist in some physical form or other. Money can be bits of metal, slips of paper, wampum, or entries in books. ... Most money is now in the form of magnetic traces on computer disks. It does not matter what the form is as long as it can *function* as money, but money must come in some physical form or other.¹⁶

Here Searle presents a partial analysis of the importance of physical facts to social institutions. But he downgrades the physical matter by suggesting that the form of it hardly matters, and actually becomes "arbitrary" over the course of institutional development, so long as the stuff "can function as money."¹⁷ But what the physical constitution of the counters *is* plays a great role in determining what constitutes the function itself.

Money isn't what it used to be: it has become electro-magnetic for good, non-arbitrary reasons, and that has altered its social role significantly. Particularly, recent electronic forms have allowed for the specific importance of currency traders in international economics, even though, I expect, such significance was in no-one's mind when letters of credit were first attested to by telegraph. The physical structure of money has been exploited for quite opposed purposes as well: according to Plutarch,¹⁸ the ruler and social engineer Lycurgus introduced iron, at very high weights per unit, as the exclusive legal currency in Sparta. By this means, he reduced theft, crippled external trade deliberately, and consequently, attacked luxury among wealthy citizens (including the luxury of

¹⁵ Searle, 20, 39.

¹⁶ Searle, 34-5.

¹⁷ Searle, 41-2.

¹⁸ Plutarch, *Lives of the Greeks*, Lycurgus, Ch. 9. See Plutarch, *Plutarch on Sparta*, trans. Richard Talbert, London: Penguin, 1988. 17. Talbert points out that Plutarch's reporting in this instance, as elsewhere, is largely, but not perfectly accurate; see fn. 1, 17.

hiring itinerant philosophers, notes Plutarch). Money lost many of its functions, as a consequence of Lycurgus' choice of physical technology.

Of course, people design money in different formats for functional reasons, and it is necessary that the functional possibilities of the physical technology be recognized by someone for them to actually be functional -- as opposed to brute facts ("my wallet is this thick...") and unintended consequences (the unintended devastation that currency traders can wreak). Recognizing the intellectual work is one of a pair of components that makes for almost any social fact: the specific physical technology involved is as important as the beliefs in functional success, and the specific physical form may produce radical social consequences, despite the intellectual efforts of all.¹⁹

c. Real institutions, and really legitimate institutions

Summing up: I have argued that the legitimacy of institutions is a matter entirely separate from their construction, and have shown how the construction of institutions can be studied without reference to legitimacy. I have also gestured at the division between facts and ends. What more can I say about legitimacy?

First, a caveat about what legitimacy is not. Good sociology demands that a socio-technical story of the development of any account of legitimacy may also be told, sketched along lines similar to those I have suggested for the establishment of property claims. But those stories, of course, will not serve as a normative basis for a legitimacy claim. I may write all I like about Kant, and a sociologist might write all he or she likes about the facts and causes of my education. These may bring up ideas for consideration, but neither will move us a step toward explaining what makes a real institution really legitimate in addition.

¹⁹ This point may be considered the 'material,' non-intensional flipside of Searle's partial analysis of function ("partial," because Searle writes "in part..." in his characterization of criterion 1: see Searle, 19). A third criterion of 'function' to be added to the two that he states might be: 3. Where a material object X is functional, whenever the function of X is to Y, then X should (*ceteris paribus*) cause Y.

As Kant has shown us, a normative account concerning the legitimacy of an institution need not always presuppose an account of the legitimacy of the current governing regime. What, then, makes any institution legitimate? Fairness.