

## COMMON PROPERTY AND CORPORATE PROPERTY: A COMPARISON OF PROPERTY RIGHTS

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### ABSTRACT

Common property bears an obvious resemblance to corporate property since both involve joint ownership of productive resources. There are, however, important differences which are illuminated by an analysis of property rights.

I take three property rights to be most fundamental to modern "ownership": the right to use (and determine the use of) property; the right to transfer ownership (all rights) to others; the right to ownership of any proceeds from transfer. I then analyze the nature of common property, for-profit corporations (businesses) and not-for-profit corporations (such as universities) using this framework. The results are as follows:

-Commoners own the CPR in common, but acquire individual ownership of the products they harvest from the commons by authorized methods.

-Common property owners typically harvest from the commons as individuals, taking benefits in kind, whereas corporate owners typically employ others to produce monetary benefits for them.

-While commoners acquire all three property rights for harvested products, they have typically, de facto, lacked rights of transfer and proceeds to the CPR.

-Not-for-profit corporations provide a partial parallel for this in modern, law-governed societies, since the rights to proceeds for their property is vested in the corporate person, and not in any group of individuals.

-The absence of rights to proceeds might appear to make the common property form a better protector of natural resources than private property, but the same ends are probably better achieved by other devices, such as purchase of development rights or conservation easements from private owners.

In the following, by "common property institution" I mean a social institution that owns and manages a common pool resource. An adequate definition would, of course, be more detailed, but because of my short time I will omit those further details.

Even this simple definition mentioned ownership. Ownership is itself, however, a complex concept, and another social institution. The material fact of possession is no doubt the grain of sand around which the pearl of ownership has been elaborated--historically speaking--and possession is still at the center of ownership in the simplest cases. But the modern institution of ownership is certainly not reducible to the fact of material possession. Possession is not sufficient for ownership. A thief is not the legal owner of the property he has stolen, though he possesses it and the rightful owner does not. Nor is possession necessary. Very rich people sometimes own whole corporations--and not very long ago, whole villages and their inhabitants--without ever setting eye or foot on the property, perhaps even without knowing the property exists.

What separates ownership from material possession, and makes possible possession without legal ownership, and ownership without literal possession, is that ownership is a social artifact. Ownership consists of a bundle of rights and obligations. Society, in the form of courts, police, and ordinary citizens is pledged to enforce the owner's rights. Total strangers still sometimes chase, and even punish, blatant thieves like purse snatchers. You may, if you are so bold, test my claim by taking candy from a baby, or the cane from an invalid, on the streets of Bodo.

Ownership of private property in modern societies confers three most basic rights: (1) the right to use the property--including the right to forbid or allow others to use it, and the right to use up or destroy the property; (2) the right to transfer use of the property to others by gift, bequest or trade (including sale); (3) the right to the proceeds of transfer (if any), i.e. ownership of whatever is taken in trade.<sup>1</sup>

I shall now use these three rights to compare and contrast common property with corporate property in its two forms, the for-profit, or business corporation, and the not-for profit corporation, of

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<sup>1</sup>This is a simplified account of property rights tailored to the points I wish to make about common property as compared to private property. For a fuller account of property rights see Honore (1961).

which universities, charities, and churches are prominent examples. Business corporations can have single owners, but I shall ignore this case and deal with corporations having multiple shareholders.

Common property and corporate property both involve joint ownership of some entity by many individuals, but they differ in many other respects. The modern joint stock company (henceforth called simply a Corporation) involves a complex development of private property. Collectively the owners of Corporate stock possess the three rights listed above, but they delegate these rights to "the Corporation" and can exercise them only indirectly. In normal circumstances the rights of use, sale and proceeds are not exercised by individual stock holders, but by Corporate employees. These, although they may own Corporate stock, exercise property rights on behalf of the Corporation not as stockholders but as officers or employees. In particular, while they are authorized to sell Corporate property, they do so only on behalf of the Corporation and have no right as individuals to the proceeds of sale. These belong to the corporation and ultimately to the stockholders.

The stockholders participate in this arrangement in hopes that they will receive benefits from the corporation. These benefits are, almost universally, in cash, not in kind. Owners of General Motors stock do not receive their dividends in autos and spare parts, and may not even buy the products of the company.

By contrast, the owners of common property typically own the "source" and the "flow" in different senses. They jointly "own" the common pool resource. (Henceforth abbreviated as "CPR.") That is they jointly possess the right to use it, and to determine who else uses it and in what way. But they individually own what they harvest from the CPR. Each individual acquires the rights of use, transfer and proceeds to whatever he takes from the CPR following sanctioned procedures.

Thus, among the contrasts between corporate and common property is this: while corporate owners typically employ others to exercise their property rights and produce a stream of cash benefits for them, commoners typically themselves use their common property to produce benefits for themselves in kind. Even in cases in which commoners employ others to exercise their rights to the commons, the individual commoners manage the appropriative process, contribute resources that are vital to it, and

receive an individual stream of benefits in kind.<sup>2</sup> They act, one might say, more like entrepreneurs than like corporate shareholders.<sup>3</sup>

I said above that commoners typically "own" the CPR in the sense that they jointly share the right to its use. But what is the status of the rights of transfer and proceeds in the ownership of the CPR?

This question is difficult to answer straightforwardly for at least two reasons. First, common property institutions are extremely varied in their details. Second, most CPRs have arisen outside the framework of modern, Western property rights. But the latter point may provide an answer. Existing, as most have, outside the framework of a fully developed market economy, historically most common property institutions have *not* possessed the rights of transfer and proceeds. Outside a robust market system, the right to transfer the CPR itself was impracticable if not inconceivable.<sup>4</sup> So it seems likely that, while common property ownership could carry the rights to transfer and proceeds of the CPR, de facto it usually has not. Most commoners have probably regarded the CPR as a resource held in trust for future generations, not as a commodity to be marketed when discounted future benefits were less than those of alternative investments.

Of course, as traditional commons have come within the orbit of expanding markets (not least in the enclosure movement in early modern Britain), they have often been transferred away from traditional to new owners. Sometimes this process may have involved a real exercise of transfer and proceeds rights on the part of commoners: that is, sometimes the traditional commoners may have freely chosen as a

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<sup>2</sup>Two of these exceptional cases illustrate the point. Ostrom (1990) describes a fishery in which a minority of well-to-do commoners employ others to exercise their fishing rights. Stevenson (1991) describes alpine commons in which commoners employ others to tend and milk their cows, and to make cheese from the milk. But those who employ others to fish for them select their employees, and apparently contribute the capital (their share of the nets and boats) as well. And the alpine commoners contribute the cows, and bear the maintenance costs of the commons as individuals. Both sets of commoners receive their benefits in kind.

<sup>3</sup>My claim about commoners acting as individual entrepreneurs harvesting from the commons by their own efforts within the rules of the commons is a claim about what typically happens. There are certainly exceptions. McKean (1992) describes a Japanese village in which certain products harvested from the commons went into a common pool and were divided equally among households. But this is an atypical arrangement, even in this village.

<sup>4</sup>The right to transfer the "source," the CPR itself, is not to be confused with the right to transfer membership in the common property institution. Membership in the institution confers the right to use the CPR. That membership can be transferred does not imply that members have the right to transfer the CPR itself.

group to transfer ownership of the CPR in return for compensation. But outright seizure, deliberate fraud, and cultural misunderstanding seem to have been more common, so that exercise of rights to transfer and proceeds of CPRs appears rare.

The de facto lack of assigned transfer and proceeds rights gives common property an interesting resemblance to a more familiar class of institutions. Not-for-profit corporations are contemporary examples, though the type existed before the development of the modern corporate form.

As with a joint stock company, not-for-profit corporations (which I shall henceforth call simply Foundations), have officers and employees authorized to use, sell and receive the proceeds of sale of Foundation property. But while sale or transfer of particular assets is common, and sale or transfer of all of the assets is at least a possibility, Foundations differ from a business corporation: there are no shareholders and the right to proceeds of sale belongs to no individual or individuals; it is permanently lodged in the Foundation, and transferable only to the State, or to another Foundation.

There is an underlying philosophical justification for this configuration of property rights. Such Foundations have a mission separate from the financial benefit of any finite group of persons. The Catholic Church, for example, has a mission to all of humankind, for all of earthly time. Total sale of the Church assets is not a possibility seriously to be contemplated, and far less is the possibility of dividing the proceeds of sale among any finite group of existing persons. The Pope not only cannot sell the Vatican and keep the money for himself, he can't sell the sum total of Church assets and distribute them to the faithful. For to do so would be to betray the mission of the church, which transcends any group of persons existing at any one time.

It might be thought--as the authors of Whose Common Future? (1993) seem to have--that common property will be preserved as a legacy to future generations more frequently than private property. And there may be some basis for this hope. Commoners extracting vital benefits may wish to hold on to the security the commons provides, and may wish to bequeath both the security and their way of life to their children.

The same, however, may be true of private property as well--think of the family farm. I observed above, in the comparison of common property to Foundations, that de facto common property has

frequently lacked the rights of sale and proceeds, but I also noted that this was a result of existing market circumstances rather than a necessary feature of common property. It is, of course, logically possible to imagine converting a commons into a Foundation by stripping the rights of sale and proceeds from common property. This would prevent the willful diversion of common property to other uses. But the same could be done for parcels of private property where it desirable and politically feasible. In any case, other methods of achieving the same end have already been developed within modern legal systems. It is possible, for instance, to buy development rights for private property through an easement which limits use rights but leaves the rights of sale and proceeds with the owner.

In conclusion, common property is a distinctive property type bearing only a superficial resemblance to corporate property in either for-profit or not-for-profit form, but of the two, it is closer to the for-profit type. Common property exists to further the economic interests of the commoners. The systematic isolation of the assets of the institution from the economic interests of individuals which not-for-profit corporations seek to establish is not present in the common property form. Hence, common property probably has a useful role to play in protecting environmental resources. But there are mechanisms, like land trusts and conservation easements, developed within the market environment, and with the explicit purpose of environmental conservation, which make contributions that common property does not. A combination or confluence of these two institutional streams, may hold a greater potential for environmental protection than either taken alone.