



## **Property and other worries**

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## Property and Other Worries

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NICK SAGE 

**ABSTRACT** *This comment, written for a symposium on Rowan Cruft's Human Rights, Ownership, and the Individual, considers some aspects of Cruft's discussion of property. I suggest that Cruft glosses over certain complexities in this area, especially concerning the relation between property and other kinds of right. I question some of Cruft's arguments about the justifiability of property and indeed whether he is really interested in property as such.*

*Human Rights, Ownership, and the Individual* is an extraordinarily ambitious book. Professor Cruft develops a sophisticated abstract framework for thinking about rights, which he then applies to various areas of legal and ethical life, especially human rights and property. This approach connects areas that might otherwise seem disparate by viewing them through the lens of the same philosophical abstractions. At the same time, it risks overlooking significant detail. Here I will consider aspects of Cruft's discussion of property, suggesting he glosses over complexities in this area, especially concerning the relation between property and other kinds of right. I will question Cruft's arguments about the justifiability of property and indeed whether he is really interested in *property*. But none of what I say will call into question the philosophical value of his discussion.

### Cruft On Property

Why does Cruft discuss property? In part because it seems to him very difficult to justify. Property rights do not obviously advance the good of anyone other than the owner.<sup>1</sup> In fact,

As his use of the first person suggests, Cruft is worried here not just about the property portfolios of the extremely rich – though he does express concern that Bill Gates might have ‘\$2 billion kept in one of his bank accounts’.<sup>3</sup> Cruft is also worried about his ownership of a garden shed in Stirling in which he and his family keep their bicycles.<sup>4</sup>

In expressing this concern about the connection between property and poverty or other disadvantage, Cruft joins a philosophical tradition dating back at least to the Franciscan debates at the beginning of medieval rights discourse.<sup>5</sup> He also joins more modern traditions of capitalist critique. Cruft wants to reevaluate ‘the systems of trespassory duties and economic liberties broadly constitutive of modern free markets: systems that give individual people and corporate entities property over much more’ than may be justifiable.<sup>6</sup> At the same time, Cruft observes that these systems are not wholly

to blame for the injustices he identifies, and they may also bring many benefits – a point to which we shall return.

Given this motivation for discussing property, what does Cruft think property is? He focuses on the institution's 'conceptual core'.<sup>7</sup> At the very heart of property, Cruft believes, are the owner's Hohfeldian 'rights of exclusion over X', correlating with the duties others owe, roughly speaking, 'to keep off X'.<sup>8</sup> Slightly less central, though still part of the core, are the owner's Hohfeldian privileges 'to use X', correlating with others' lack of any right to prevent the use.<sup>9</sup> While Cruft does not explicitly define the variable 'X', his initial discussion suggests he is thinking, at least paradigmatically, of physical things (or spaces): his examples include a coat, an artwork, an apartment, a garden, and a meadow.

Subsequently, Cruft refines his definition of property, after reflecting upon money – including money holdings in bank accounts – which he takes to be a kind of property. Cruft's reflection on money first of all 'reveals the Hohfeldian power to be almost as central to modern property' as rights of exclusion and privileges of use.<sup>10</sup> Because, 'constitutive of money', Cruft believes, is a Hohfeldian 'power to create rights ... over something over which someone else currently has rights (normally conditional on consent from that party)'.<sup>11</sup> Hence Cruft can use £10 to buy a haircut, a lecture, or a chicken from you, if you consent.<sup>12</sup> Cruft's reflection on money also confirms he is inclined to think of the subject matter of a property right ('X') as a 'thing' or 'object'<sup>13</sup> – though the thing may be 'non-physical', 'non-material', or 'non-concrete'.<sup>14</sup> (It must also be 'possessable' and 'detachable' from its possessor.)<sup>15</sup> Thus, for Cruft, 'property' includes money not only in the form of a physical coin or note but also a bitcoin, an IOU, or a sum in a bank account.<sup>16</sup>

Having outlined his understanding of property rights, Cruft turns to their justification. In particular, he asks whether they might be *natural* rights. Now, Cruft's account of natural rights is technically daunting, but very roughly, he thinks a right can be natural only if the right-holder's interests in the existence of the correlative duty regularly outweigh the countervailing interests of those the duty burdens.<sup>17</sup> Thus, to determine whether a natural right exists, we must undertake a certain calculus of interests. Applying this view, Cruft concludes most property rights cannot be natural. At least above some very minimal level of property holdings, the countervailing interests of persons who are excluded from the property will regularly outweigh the interests of the owner.<sup>18</sup> Clearly, on this view, Bill Gates can have no natural property rights to all of his enormous wealth.<sup>19</sup> Almost as clearly, a Scottish academic has no natural property right over his bicycle shed.<sup>20</sup>

Cruft's conclusion that his calculus of interests dooms most natural property rights is 'bolstered by a related thought about taxation'.<sup>21</sup> Taxation of property, it would seem, is regularly justifiable. According to Cruft, that is because the property owner's interests are regularly outweighed by the countervailing interests of others who benefit from the tax. This seems to confirm that a property owner does not have any regularly countervailing interest of the kind needed to ground a *natural* property right. Here Cruft inverts a familiar libertarian argument: rather than beginning with a claim about natural property rights and proceeding to argue taxation is unjustified, he begins with the justifiability of taxation and argues there cannot be much in the way of natural property.

## Property and the Person

Cruft's arguments against property rights as natural rights should seem plausible to many. But has he proved too much? For his arguments also seem to strike at other important rights, which are usually thought of not as 'property' but as aspects of the entitlement to one's person.

Consider your body, and your physical and intellectual efforts, movement, time, and skill. Consider also your reputation and your privacy. One can conceive of these items as protected by Hohfeldian rights of exclusion. They may also be associated with privileges of use, and powers of exchange. At least some of them may be thought of as 'things', physical or nonphysical. (A requirement that the thing be detachable from its possessor would arguably not exclude much beyond the major bodily organs.) Therefore, at least some of these items would seem to be 'property', on Cruft's account.

Whether or not these rights over one's body and incorporeal personality are, strictly speaking, 'property' for Cruft, to determine whether they are *natural* rights we will presumably have to apply his calculus of interests. And it seems doubtful the calculus will recommend extensive personality rights of the kind we currently enjoy. At least above some relatively minimal level of personality holdings, the countervailing interests of other persons who are excluded will regularly outweigh the relevant interests of the holder. Were the brain, technical nous, or dogged efforts of Bill Gates and Rowan Cruft at the disposal of others with very little, those others might no longer be impoverished; abolish the exclusionary duties protecting Gates' and Cruft's persons and those others might be liberated, able to feed and educate themselves.

Is it problematic that Cruft's calculus of interests would seem to recommend far more minimal personality (including body) rights than we currently enjoy? This depends on whether one takes the conventional view that at least some aspects of our personality are sacrosanct, and so not available for disposal to others in the same way as our property. Alternatively, on a more radical philosophical view, even some of our body parts, for example, may be confiscated for others' benefit.<sup>22</sup> My point is merely that the logic of Cruft's account seems to require him to address these issues.

Indeed, reflection on the implications of Cruft's account for personality rights might also lead us to question his avowed focus on *property*. That focus might now come to seem somewhat arbitrary, given Cruft's stated motivations. We saw Cruft worry that property is particularly difficult to justify because exclusionary rights over things may create poverty and other disadvantages. However, that worry should surely also lead us to reevaluate our claims over our bodies and associated physical and intellectual freedoms. These likewise perpetuate economic disadvantage – certainly, they play a large role in ensuring the relative prosperity of people like Cruft and Bill Gates.

Finally, it is worth noting that Cruft's 'bolstering' argument from taxation is also susceptible to a challenge based on its implications for personality rights. As David Owens and Antony Duff have objected, if taxation of property shows that the owner's relevant interests are regularly outweighed by others', and therefore that property rights are not natural, military conscription seems to show there is no natural right to one's body and associated capacities.<sup>23</sup> Now, Cruft has various responses here – for example, he claims conscription is not as regularly justifiable as taxation but appropriate only on extraordinary grounds such as to prevent war. Yet the objection can be broadened. The right to one's person is restricted by acts of self-defence, arrest,

punishment, and so on. It is also arguably restricted by taxation – one might think of, say, income tax as in part a tax on labour. Similarly, rights to privacy, reputation, and so forth may be restricted by the public interest in a free press. Thus, someone who is *prima facie* attracted to Cruft's account, but who favours natural personality or body rights, has their work cut out for them – since they will apparently have to explain away all of these sorts of limitations.

### Property and Contract

Cruft also declines to respect another distinction between different kinds of right that lawyers, at least, would want to draw: between proprietary and contractual rights. Consider the \$2 billion Cruft worries Bill Gates might keep in his bank account, to the exclusion of everyone else who might enjoy it. On one popular way of thinking, a bank-account holder such as Gates has a property right over a sort of nonphysical object, the money in his account. Cruft, as we have seen, essentially endorses this view. (Though he also analytically refines it, breaking it down into a bundle of more specific Hohfeldian jural conceptions: the account holder's rights to exclude others from the money, corresponding to their nontrespassory duties, his privileges of use, and, of course, his powers of exchange.)

Contrast the traditional legal understanding of a bank account. In the eyes of the law, the account holder's rights are at least in the first instance not proprietary but contractual.<sup>24</sup> When you deposit, say, some coins at your bank, you retain no property right over those physical objects – they become the bank's, and it is entitled to deal with them as it likes. Having given up your relevant property rights, you are left with a contract with the bank. This contract contains various enforceable promissory obligations on the bank's part and yours, including its obligation to repay you (upon the presentation of an appropriate demand) an equivalent sum to that which you have deposited (plus interest, etc.), or to pay the same amount to a third party you have nominated, and so forth. On this view, then, your bank balance does not list a sort of store of things (material or immaterial) over which you have proprietary rights to exclude others, correlative to their nontrespassory duties not to interfere. Rather, the account balance records one aspect of a complex contractual relationship comprising various interdependent promises between you and the bank.

While in the popular imagination Bill Gates might keep £2 billion in a bank account, in reality that would, of course, be far too risky and unprofitable. Gates may well keep little if any money in any bank account – that is, maintain a credit balance with a given bank. Since Gates is eminently creditworthy, he could no doubt cover his day-to-day expenses by taking out low-interest debt, using an overdraft or credit card or equivalent. In legal contemplation, this would involve a contract obliging Gates to pay money to the bank or credit-card company. On Cruft's account, by contrast, Gates' negative bank balance or credit-card debt would presumably show up as the bank or card company's 'property' (that is, its rights of exclusion over an immaterial thing, the money owed by Gates, correlating with others' nontrespassory duties not to interfere with that money, etc).<sup>25</sup> To cover other short- and medium-term expenses Gates might invest in relatively liquid assets such as bonds (or funds that invest in

them), and those holdings would, of course, involve, *inter alia*, another elaborate set of contractual obligations.

Why does it matter whether we think of certain forms of wealth, not as ‘property’ in the Cruftian sense – on the model of an owner of an object entitled to exclude others – but as a matter of contract? For one thing, because it becomes unclear how Cruft’s calculus of interests should even be applied. The structure of the required analysis starts to look quite different. On the property model, the calculus of interests is relatively straightforward. It directs us to consider, on one side of the ledger, the owner of an object, and on the other side, everybody else in the world who is excluded from that object. So, for example, we can assess the interests Bill Gates has in exclusively enjoying one of his jets and weigh this against the interests of everyone else who is excluded from the jet. (And it may seem obvious that the interests of everyone else are overwhelming.) Contrast the contractual case. Here we must consider the interests implicated by a consensual *relationship* between *two* contracting parties, such as the contractual relationship, comprising a complex set of interdependent promises, essentially amounting to a mutual credit or debit arrangement, between Bill Gates and, say, JP Morgan Private Bank. This raises a number of questions. Consider the first side of the ledger: should we here aggregate the interests that Gates and his bank have in establishing this relationship, or keep their respective interests distinct for the purposes of the calculus? On the other side of the ledger, whose interests shall we compare to those of Gates and/or the bank – those of everyone else in the world to whom either of these parties could be required to loan, or from whom they could be required to borrow?<sup>26</sup> Justifying a bank account, when conceived as a contractual relationship, arguably starts to look quite different from justifying an individual’s ownership of a coat, a meadow, or a chicken.

Finally, this line of thought might also lead us to realise that if, like Cruft, we are concerned about the injustice of relative wealth and poverty, we may need to consider not just property rights but also the vast set of contractual relationships to which people in a modern economy are party.

## Property and Taxation

Let us return to Cruft’s ‘bolstering’ argument against natural property rights – which assumes property taxation is regularly justifiable and takes this to show that there cannot be much in the way of natural property, since the owner’s interests seem to be regularly outweighed by the interests of others who benefit from the tax. I now want to suggest that the force of this argument may be diminished if we consider how little taxation there actually is on *property*.

An admittedly very cursory investigation suggests that in Stirling, for example, there is not much tax on property as such. Certainly, there is not much tax that applies merely because someone is enjoying a property right to exclude others from an object. In the case of land, one possible exception is council tax – but even this arguably taxes the enjoyment of council services rather than property holding as such,<sup>27</sup> and in any event it is minimal relative to the value of expensive properties. (The Stirling Council website suggests that for residential properties it is capped at just over £4,000 per year.) There is, of course, tax on *transfers* of land. (The Scottish Land and Buildings

Transaction Tax (aka. stamp duty) takes up to 12% of the purchase value, increased by 3% if the property is a second residence.) As for property other than land, there seems to be even less tax. There are some taxes that relate to particular forms of moveable property, but again it seems unlikely these are imposed because the owner is enjoying a right to exclude. (For example, you can avoid vehicle tax if you do not drive on public roads, suggesting it is really a road-use tax.) Of course, levies such as inheritance and income tax may catch transfers of moveable property or the gains from property.

Arguably, then, the current judgment reflected in the law of Scotland is that there should be *no* taxation on the beating heart of Cruftian property – the enjoyment of an Hohfeldian claim-right to exclude others from an object. (Only taxation on transfers of property; on profitable activities that may involve property, etc.) Certainly, there is no extensive taxation of the mere ownership of a garden shed, let alone a family's bicycles. Now, my point here is *not* that Scotland's taxation system is less redistributive than some might imagine or prefer. My point is that there is arguably no taxation on *property*, as such. That, I suggest, should lead us to question Cruft's 'bolstering' argument. Cruft seeks to bolster his case against natural property rights by pointing to the legitimacy of property taxation – but arguably, at least in Cruft's part of the world, there is no such thing.

Of course, Scotland's existing tax system may be a poor guide to what taxation is actually legitimate.<sup>28</sup> A full treatment of this issue would presumably require us to examine other jurisdictions' tax systems too, before reaching a more considered judgment about property taxation that reconciles the facts of existing systems (and perhaps public opinion about them) with philosophical intuition and reasoning. My point here is only that attention to the stark reality of taxation on the ground in Stirling should prompt this line of inquiry.

And once again, this line of thought might also suggest that, if our concern is the justifiability of wealth in a world where many are poor, we should not focus just on property rights as such, but instead attend more closely to related activities such as earning income, transacting, or otherwise profiting – activities that may or may not involve *property*.

## Property and Markets

In the end, Cruft decides that something like our current property system is in fact justifiable. We *do* have 'common good reasons to create and sustain the systems of trespassory duties and economic liberties broadly constitutive of modern free markets'.<sup>29</sup> Cruft somewhat reluctantly reaches this conclusion because he is persuaded by classical liberal economists who claim we must recognise extensive property holdings in order to reap the benefits of free-market capitalism.

Crucially, however, Cruft thinks our property system need not be understood to confer property *rights* – i.e., claims that are justified because of the benefit they provide the right-holder or owner. Instead, we should try to think of our property system as a scheme of nontrespassory duties that is designed to further the common good of everyone.<sup>30</sup>

In this discussion, Cruft is perhaps surprisingly willing to accede to a particular kind of liberal view about what ‘constitutes’ the market – a view that emphasises the role of property. A different kind of liberal might argue that modern free markets are also constituted by a panoply of other legal and nonlegal rules and institutions. Consider just a few, legal examples. An important role in constituting markets is surely played by some of the other kinds of legal right we have already considered: rights to one’s body and associated capacities such as labour, and, of course, contractual rights. Furthermore, in our market economies there is extensive consumer protection, safety, and other regulation of virtually all goods and services and their trading. These regulations define what market actors can produce and the terms on which they must deal with each other. Competition law maintains the very ‘freedom’ of the market against monopoly, cartel, and other forms of abuse. And so on. Once we recognise that our markets are constituted by a very complex apparatus of many different kinds of rule and institution, we might become even more reluctant than Cruft to endorse the classical liberal case for *property*. The benefits of markets can be invoked only to make a case for the entire complex of rules that constitute them.

Finally, we might again notice that, if we are concerned about relative wealth and deprivation, we perhaps need to expand our field of view beyond property, to consider the many other rights, rules, and institutions with important economic effects. Since the Franciscan debates and continuing through more modern critiques and defences of free-market capitalism, there has been a tendency to focus on the role of property. But that may give property more significance – both bad and good – than it really deserves.

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## NOTES

- 1 Rowan Cruft, *Human Rights, Ownership, and the Individual* (Oxford: Oxford University Press, 2019), p. 200. All subsequent references are to the book unless otherwise noted.<sup>2</sup>
- 2 p. 200.
- 3 p. 210.
- 4 p. 210.
- 5 p. 199 n6.
- 6 p. 234.
- 7 p. 202.
- 8 p. 246. Specifically, ‘to refrain from using, handling or (in the case of land) crossing or occupying X’.
- 9 p. 246.
- 10 p. 203.
- 11 p. 205.



- 12 p. 204. We might question whether, say, a hairdresser at any point ‘currently has rights’ over the haircut he provides for Cruft’s £10. Doesn’t the haircut come into being with Cruft’s rights attached? (Compare a standard objection to ‘transfer’ theories of contract and promise.)
- 13 Cruft poses himself the philosophical conundrum: ‘In what, then, do these non-material “things” that are money consist?’, p. 206.
- 14 p. 206.
- 15 pp. 205–09.
- 16 pp. 205–09.
- 17 See sections 5.2, 7.6, 8.2.
- 18 When defining property, Cruft thinks, in Hohfeldian terms, of the owner of a given object holding a vast number of claim-rights over it, each right corresponding to the nontrespassory duty owed by another person. When considering property’s justification, Cruft appears to weigh the owner’s interests against those of everyone else in the world. Arguably, in a more Hohfeldian spirit, he should instead undertake the calculus of interests pairwise – first comparing his interests in his shed to my interests, then to yours, then to Bill Gates’, and so on for each other person in the world. On this approach, there would presumably end up being more natural property rights.
- 19 pp. 210–12.
- 20 pp. 210–12.
- 21 p. 212.
- 22 Cécile Fabre, *Whose Body is it Anyway?* (Oxford: Oxford University Press, 2006).
- 23 p. 214 n11.
- 24 *Foley v Hill* (1848) 2 HLC 48; 9 ER 1002. ‘In the first instance’ because, *inter alia*, a contractual debt claim may be assignable by the creditor to a third party, in which case it arguably (a matter of controversy among legal scholars) takes on ‘proprietary’ aspects in the eyes of the law. Prompted by my comments at the workshop on his book draft, Cruft acknowledges the legal conception of a bank account but still prefers the popular view. See pp. 204 n22, 210 n1.
- 25 So whether the account-holder or the bank has Cruftian ‘property’ will fluctuate depending on whether the account is in the black or in the red.
- 26 Here we are not even considering the chains of contracts and other relationships the bank has with its employees, shareholders, other customers, other financial institutions, and so on.
- 27 Mere residents of the property, including squatters, may be liable for the tax before the owner is, and the tax is often calculated by assessing the value of services provided by the council in the area (such as wastewater in Stirling).
- 28 Cruft is wary of ‘unquestioningly rationalising the actual’, p. 235
- 29 See note 6 above.
- 30 Chapter 13.