

Power, Property, the Law, and the Corporation – a Commentary on David Ellerman’s paper: ‘The Labour Theory of Property and Marginal Productivity Theory’

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The point of departure of David Ellerman’s paper is that the role of labour in economics can be looked at in a fundamentally different way than has typically been the case. The paper’s purpose is, therefore, oppositional. However, it cannot simply be dismissed. It is clearly articulated, well reasoned, and most importantly, thought provoking. It requires one to rethink how one conceives some basic issues in economics. As such, one does not need to be entirely convinced by the argument to consider it worthy of dissemination. At the same time, if one subscribes to the ethic of structured or critical pluralism one must also consider the pressure points of the argument (see Dow, 2004; Dobusch and Kapeller, 2012). Below, I briefly reconstruct Ellerman’s core claims and provide some comment on that argument.

1. Ellerman’s core claims

I first briefly enumerate as a consistent whole Ellerman’s core claims for the Labour Theory of Property. The intent is to be concise without traducing the argument. There is, of course, always a potential that summarising an argument will become a barbarisation of it. I suggest then, that one read the following in conjunction with Ellerman’s original paper.

1. Neither marginal productivity theory nor the Marxist labour theory of value actually explores the specific mechanism for the initiation and termination of property rights in the normal activity of production. ‘Who is to own the asset’ (the outputs) is simply intrinsic to the theory. This absence creates the need for an initial descriptive theory of property rights to clarify the mechanism.
2. The property right mechanism is not typically formal legal ascription via a trial. We tend rather to accept a ‘fundamental myth’. That is, property rights (to the outputs) follow from a relation to the ownership of capital used, the organisation of production or the firm. The implication is that there is a transition from a bundle of rights, which constitute ownership of the means of production (as assets), to a right of ownership over its products.
3. However, there is a degree of camouflage created by loose and inconsistent use of terms (capital, ownership...). Production is a process. The firm etc. is a going concern with a contractual role in a market economy. This is *different* from any possible property right to the many and different constituents in the process. A problem arises because the two are conflated or elided. Confusion then facilitates the fundamental myth.

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4. An appropriation then follows. This can be visible in the form of legal intervention to assign rights or invisible in the form of the market mechanism. The market mechanism applies a form of 'let it be' judgement. Rights to outputs are assigned to the first seller and last buyer. Appropriation follows a pattern of contracts.
5. Having clarified the descriptive elements of 'who is to own the asset' (establishing that one needs a theory of property to understand the mechanism) one can then consider the normative issues by criticising the focus on distribution. Here, one follows the juridical principle that one assigns *de jure* (or legal) responsibility according to *de facto* responsibility. Only a person can be responsible. Land, capital etc. cannot fulfil the criteria. Concomitantly, it is recognised that a person cannot be sold. However, neoclassicals (J.B. Clark, Frank Knight) allow that one can rent the self and so rights to output follow to those to whom one has rented the self. From this point of view this is 'just' in so far as one receives a marginal product from labour (Milton Friedman etc.). However, there is still appropriation of the whole product by the firm.
6. Appropriation of the whole product reveals that the focus on marginal distribution misses the point. Since only humans can be 'responsible' then only labour can be *de facto* responsible for the whole product. An employer's appropriation is then a violation of assignation according to responsibility. Responsible agency is inherently inalienable. A contract to rent the human is thus invalid. The employee and employer are jointly responsible. As such the imputation of legal responsibility to the employer for the using up of inputs (including labour services) creating rights over the fruits of that activity is mistaken (there is an institutional robbery).

Ellerman then states:

'Clearly, this property-theoretic analysis of the employment contract has *nothing* - repeat *nothing* - to do with the size of the wage payment (which was never used in the analysis) so it is totally independent of the superficial exploitation theories of the neoclassical variety (paying less than the value of the marginal productivity of labour) or the Marxian variety (extracting more labour time than is embodied in the wages)... It takes a property theory to critique a property system' (Ellerman, 2016: pp. 33-34).

For Ellerman, the argument provides grounds for a substantive critique of the current organisation of the capitalist firm. If responsibility is 'joint' then assignation necessarily implies that there is a case for economic democracy.

Ellerman's argument has a clear line of reasoning. The argument opens up a quite different way of thinking about economic theory in the context of capitalism. Contesting received ideas is an important function in any discipline. But this applies also to any critique of the fundamentals of received ideas. As such, I now consider some of the pressure points on the argument. It should be noted that exploring pressure points does not lead (by entailment) to refutation. Highlighting the commitments, which seem necessary for an argument to function effectively, may work to enhance or reduce the persuasiveness of argument. One must also acknowledge that property theory has a long tradition and one cannot adequately represent the entirety of it in one paper. I focus here on Ellerman's specific argument as set out in this issue of *Economic Thought*. Highlighting its pressure points may simply be a means to refer one to further reading (see, for example, Ellerman's list of references).

2. Pressure points for Ellerman's case

Ellerman's argument states that a property theory is required in order to understand a property system. It states that conflation regarding terms such as 'capital' disguise the actual issues of ownership. Thereafter, it turns on the claim that only the human can be responsible, responsible agency is inherently inalienable and the contract to rent the human is invalid. Since responsibility is applied to production and to outputs then property is ultimately being appropriated through an institutional system. There is a clear line of reasoning here, but also a structuring process of that line of reasoning.

One way to approach the whole would be to suggest that the argument appears incomplete. One could argue that if one needs a theory of property then one also needs a theory of power. One could read Ellerman's position as: there are a set of conventions expressed through the market mechanism that appear to be rooted in law. The conventions are internally inconsistent and the law incoherent. The consequence of this inconsistency and incoherence is an appropriation. The assumption is then that consistency and coherence create the grounds for a different system in which the appropriation does not occur. However, one might equally argue that a full explanation of the appropriation would be one that also addressed why the inconsistency and incoherence arise. A theory of property cannot be simply analytic. Ellerman's argument in his paper in this issue of *Economic Thought* seems incomplete in these terms.

Legal systems are relatively comfortable with contradiction and ambiguity, despite the precision that is also built into the codification of statute and that is formally applied to case law. The law accepts inconsistency and ambiguity. It often rules in accordance with inconsistency and ambiguity and develops both. It does so because the law is itself referenced to wider political, social and economic concerns within which these inconsistencies and ambiguities serve some identified purpose. A system emerges and is reproduced; its relations are always also power relations. This does not render Ellerman's argument redundant, but there may be many reasons why revealing inconsistencies and incoherence may not lead to inferences that a system is unjustified. There is no entailment from clarity to refutation; this depends entirely on issues of justification and these can extend to how one reasons out ambiguity and inconsistency for broader purposes. At the same time, if theory is incorrectly posed (and so a source of obfuscation), it is important to identify how and in what ways and to contest this as an adequate account of the world. *Particular* normative force, however, does not follow directly from a *given* descriptive correction. One must address the reasons why a system reproduces inconsistency and incoherence and then contest the norms on which this is based. These are not reducible to the argument that x is myth or y is appropriation based on description z . For something to be wrong (rather than incorrect) there must also be deliberation regarding what is better, subject to commitments founded in some criteria that shape the judgements applied to a system (function, ethics, etc.) and the terms of any alternative. Note, this is not an endorsement of a fact-value Humean guillotine or some version of the positive-normative division in economics. It is rather the claim that the integration of fact and value reveals the systemic complexity and openness of human systems. What occurs, including what is chosen, is not grounded in atomism.

For example, the modern corporation is (as Ellerman is no doubt fully aware) deeply problematic as a legal entity (Haldane, 2015; Coffee 1981; Jansson et al 2016; Corporate Reform Collective, 2014). It creates its own nexus of ownership problems (who owns a corporation?):

'Ownership, like friendship, has many characteristics and if a relationship has enough of them we can describe it as ownership. If I own an object I can use it, or not use it, sell it, rent it, give it to others, throw it away and appeal to the police if a thief misappropriates it. And I must accept responsibility for its misuse and admit the right of my creditors to take a lien on it. But shares give their holders no right of possession and no right of use. If shareholders go to the company premises, they will more likely than not be turned away. They have no more right than other customers to the services of the business they "own". The company's actions are not their responsibility, and corporate assets cannot be used to satisfy their debts. Shareholders do not have the right to manage the company in which they hold an interest, and even their right to appoint the people who do is largely theoretical. They are entitled only to such part of the income as the directors declare as dividends, and have no right to the proceeds of the sale of corporate assets — except in the event of the liquidation of the entire company, in which case they will get what is left; not much, as a rule' (Kay, 2015).

Thereafter, and more relevantly in terms of matters of inconsistency, it has legal person status and so has some of the rights attributed to natural persons, including ownership of assets. As many have noted, a legal person without consciousness has the quasi-status of a natural person, without all of the inherent characteristics. At the same time, in different contexts for different purposes, and based on the reproduction and augmentation of power within relations (expressed in but not reducible to the law) it is sometimes treated as though it had those characteristics and sometimes as though it did not (see Lawson, 2015). So, a corporation can sue for defamation, which implies a consciousness that can suffer harm. However, in many jurisdictions a corporation cannot be prosecuted for manslaughter etc., since it lacks a material entity that can be incarcerated and lacks a mind to which intentionality can be ascribed. The law seeks to deal with these problems by iterating inconsistencies (quasi conscious for some purposes, not conscious for others). For example, the law may focus on significant natural persons who occupy key roles within the corporation and seek to apply responsibility to them on behalf of the corporation (so there may be a 'corporate manslaughter' law and it may impose a fine on the corporation, but the significant penalty intended as deterrent is likely to be imprisonment of an executive).²

However, at the same time, the law seeks to balance the whole by limiting the degree to which the corporation as a generalised legal entity within society can be destabilised by the mere existence of any given law, since this affects broader economic concerns (capital markets, credit markets, pension funds, employment etc.) and narrower economic interests (vested in the lobbying of corporations steered by their executives). In an objective sense, one can view the law *in toto* as odd and inconsistent; at the same time, one can consider it explicable in its inconsistencies and identify the tendencies that arise (including a relation to conventions which may themselves be ambiguous or fluid).

One such tendency in the modern world has been the gradual augmentation of corporate power (see Drutman, 2015; Bakan, 2005), and then income inequality based on corporate power (precisely the issue of labour shares and profit shares that Ellerman puts aside based on distribution but reintroduces implicitly regarding the issue of a share in terms

² See the UK Corporate Manslaughter and Corporate Homicide Act, 2007. The test applied in the UK is management failure (a breach in a management system akin to gross negligence). For the various issues in context see Wells, 2001: Chapters 4 and 6; for more adversarial critique see Tombs and Whyte, 2015.

of economic democracy and joint responsibility). One might then argue that a fuller explanation of the inconsistencies in order to create the fuller case for economic democracy via ownership is not easily divorced from distributional issues. Distribution is a source of power, which in turn is rooted in socio-economic relations and is manifested in influence. This, for example, is basic to Piketty and many others argument regarding the institutional problems of wealth and income inequality (see Pressman, 2016). The broader point is that power relations seem to be intrinsic to any adequate theory of property. This being so, one can also ask what would be the actual response to the labour theory of property if it was to become widely disseminated? What would be the response in law and then through conventions to widespread dissemination of the argument that property is appropriated via the market mechanism and based on a myth? This is a different issue from simply suggesting Ellerman is incorrect in identifying camouflage and inconsistency. It by no means leads to the argument that making a case for an alternative is meaningless or pointless. I am extremely sympathetic to the intent - addressing the organisation of modern capitalism. But the argument does seem to be incomplete (at least as it is posed here).

In some respects the argument faces the same basic problem as the Marxist transitional argument from extraction of surplus labour to the case for the alternative. Many are aware that work is exploitative in general and their work relations are exploitative in particular; it is not the lack of awareness that prevents the alternative. What is it? One cannot be sure - but recognition and change combine issues of how power relations configure and how individuals and collectives are implicated in any configuration of power (and to be clear power need not always and everywhere be considered a negative). It is not impossible that the convention of 'let it be' simply continues despite a greater recognition of the inconsistency. Again I by no means wish to suggest the point refutes Ellerman's case, but it does suggest incompleteness.

Concomitantly, consider the core claim that responsibility is inherently inalienable. In a certain sense this seems unequivocal. I can act in conjunction with another, I can follow directions, but another responsible person cannot occupy my mind – there is then a basic difference between 'control' as following direction and 'control' as offering up sentience. I am always and everywhere a centre of responsibility. The issue then becomes whether inconsistency can be justified, such that property can be assigned non-jointly. Can one willingly collude in an inconsistency (perhaps as a greater good or lesser evil argument). It strikes me that there are many different ways this could then be developed (including different ideas of legal imposition, force of convention, consent and so on, none of which need be neoclassical). The point, however, is that *justification* is not necessarily prevented by a specific variety of inconsistency (inferred from non-alienability). Justification is more complex than simply the problem of inconsistencies. Clarity may be a service in terms of theory construction, but there is no necessary shift from clarity to consequent in argumentation. It depends on the nature of argumentation, subject also to a social reality of complex context dilemmas and openness (what collectively emerges and is reproduced intentionally and unintentionally).

Clarity is, though, an important service in so far as clarity provokes an explicit focus on justification. Ellerman's way of posing the problem does require one to think carefully about this and so opens up an extremely interesting set of issues. For example, it leads one to consider how one reconciles matters of social construction with arguments of normative force for particular claims regarding the nature of situations. The inalienability of responsibility is not a legal argument, it is something that can be recognised in law (and argued about legally). It is, however, at root an argument concerning the nature of personhood, the nature of what it means to be human. It is an ontological claim. So one might also note that

Ellerman's case – in at least its normative dynamic – requires a clear ontological argument regarding the nature of personhood (and species-hood), and the possible consequences of personhood for socio-economic forms, including the case for economic democracy. Before there can be property rights one must consider properties of the human to which they can adhere. This, arguably, is a broader issue than alienability *per se*.

3. Final comment

In this commentary I have focused on Ellerman's paper in isolation from the general discourse from which it arises. I have also taken it on its own terms as a relatively consistent and credible argument. Ellerman's paper does, of course, have context, and that includes further work on property theory and critique of it. Proudhon (1840[1994]), for example, is clearly concerned with power and with natural rights and how they are justified. Proudhon argues that, once the real position of property is revealed, people will recognise that only equality is consistent with property (there is the force of necessity in argument). Marx (1847/92[1952]), meanwhile, was deeply critical of Proudhon's *Philosophy of Poverty* in *The Poverty of Philosophy*, where he explores the totality of social relations within socio-historic materially influenced phases as an issue of exchange. Neither Marx's nor Proudhon's work is structured as economics in the disciplinary form we recognise today (and which Ellerman is addressing as the audience for his paper in this issue of *Economic Thought*). Ellerman takes up the Marxist critique in greater detail elsewhere (see his bibliography). The arising question is whether either the work on which he draws, or the Marxist critique are complete in terms of the points I have made here. Ellerman may have some further comment on this.

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