CHAPTER 6

The state of nature and the origin of private property: Grotius to Hegel

THE EARLY ENLIGHTENMENT

Hugo Grotius (1583–1645), Samuel Pufendorf (1632–94) and John Locke (1632–1704) all sought to give private property the status of natural law by locating its emergence in the state of nature. The problem they faced was that they were working within a tradition, stretching right back into antiquity, according to which the primeval condition was a form of communality in which all humanity had equal access to the resources of the earth. Moreover, late antiquity and the Middle Ages had produced a Christian reading of this tradition, by which the Christian God had ordered things in this way. Their response to the challenge was twofold. First, in order to counter the possible charge that mankind had thwarted God's purpose, they argued that the establishment of private property, while not a direct consequence of a dictate of God, was man's rational response to the divine command to use the resources of the world for his self-preservation and increase. Secondly, in order to justify the apparent breach of the principle of equal access to material resources, Grotius and Pufendorf proposed that agreement, tacit or express, must have preceded first occupatio; while for Locke the crucial step in the establishment of rights over unoccupied land was creative labour.

The contributions to property theory of these philosophers of the early Enlightenment should be seen as part of a wider concern with the great political issues of the time, domestic and international. On the one hand, they were interested in the origins, character and authority of civil

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1 The position of Thomas Hobbes (1588–1679) is that there were no property rights prior to civil society. In this he had more in common with philosophers of the eighteenth century than those of his own century. Mankind in the state of nature had the right to necessities but no more. See On the Citizen, 3.9 (Tuck and Silverthorne 48); Leviathan, ch. 15 (Tuck 106); in general, Lopes (1973).
government and not just in property and law; and on the other, they wrote with more than one eye to the controversy over the legitimacy of the colonial enterprise. Thus, for example, John Locke’s *Second Treatise of Government* (1690) which contains his main statement on property, and the separately composed *First Treatise*, were an attack on absolute rule in general, and the claims of the royal government of Stuart England in particular. In addition, Locke used a single logic to argue for the justice of both the acquisition of property in the state of nature and the seizure of land from the native peoples in America. In the latter instance, Locke was following the lead of Grotius, who had argued in *On the Law of Booty (De Iure Praedae)* — or, as Grotius himself called it, *On the Indians (De Indis)* — of 1607, that the natural rights of people and of states were identical. As natural law entitled each man to preserve and protect his own existence, and to acquire for himself and retain those things that were needed and useful for life, so it laid down the same rights for each and every state. The treatise, we should note, was composed primarily to defend the aggressive commercial policies of the Dutch in the East Indies.2

Grotius gives first acquisition brief mention at various points of *On the Law of Booty*, and some connected thoughts in the context of a discussion of ‘the question of the sea’, that is to say, whether the sea can be brought under the jurisdiction of any particular nation.3 His principal and more accessible discussion4 of the evolution of private property is contained in his larger work *On the Law of War and Peace* (1625). This work shares the main premisses and subject matter of the earlier treatise, but this time Grotius devotes a section near the beginning of the second chapter of Book Two to ‘the origin and development of private property’. Men began as gatherers of the fruits of the earth. Life was easy and involved no toil. God had conferred on mankind superiority over other created things in the world, and each man could take what he needed. Nor could he, without injustice, be deprived of what he had taken. As an illustration of what Grotius calls a ‘universal right which took the place of ownership’, he summons up the exemplum of the spectator at the theatre from Cicero’s *On Ends* Book Three. (He had cited this exemplum already in *On the Law of Booty*, but in the version of Seneca.)5 He goes on to say that primeval communality might have lasted, had men remained

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3 The earlier work remained in manuscript except for ch. 12, printed as *Maris Liberum* in 1609 at the request of the East Indies Company, until it was discovered in 1864. See Tuck (1993), 81.
satisfied with living in caves and wearing animal skins or the bark of trees, or had the bonds of charity held firm. In setting out this second condition, Grotius was giving voice to his conviction that early man had a natural 'desire for society, that is community', which acted as a check on his instinct to seek his own interests. Thomas Hobbes in *On the Citizen* (*De Cive*, 1641) and *Leviathan* (1651) advanced the opposing thesis that the state of nature would inevitably be a state of war and chaos rather than peace and community. Pufendorf would later distance himself from Hobbes and expand Grotius' idea into a more generous theory of sociability. Be that as it may, according to Grotius, primeval man became dissatisfied with a life that was 'simple and innocent', men and animals grew in number and it proved inconvenient to bring things into a common store. So individuals began to appropriate things for themselves and private ownership followed.

Grotius imagines that private ownership when it came was not the result of a unilateral decision, an 'act of will', but was achieved by means of 'a kind of agreement (pactum), either expressed, as by a division, or tacit, as by occupation'. He cites a passage from Cicero, *On Duties*, Book Three, which however does not give him what he needs (nor, incidentally, does the passage in Book One discussed in my Chapter 5). By introducing the idea of a pact Grotius was departing from Cicero (and other ancient authors) and betraying a degree of sensitivity at the disruption of primeval communality by private ownership. A 'tacit agreement' justifying *occupatio* might not seem to us to amount to very much, but it is not in *On the Law of Booty*, and its introduction in the later work suggests that it did have some significance for Grotius. He seems to have found somewhat disturbing the idea that primeval men had rights that were

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6 See prolegomenon to 2nd ed. of 1631: 'appetitus societatis id est communitarianis'. Grotius goes on to invoke the Stoic doctrine of *adhaerens*, on which see Pembroke (1971); Long and Sedley (1987), vol. 1, 346–54. The word is virtually unsustainable: 'appropriation', 'familiarization', 'feeling-feeling' have all been canvassed. The influence of Stoic thought on the natural law theories is amply documented in their works. Two sixteenth-century writers helped spread Stoic teaching widely, namely, Guillaume du Vair (1556–1621) and Justus Lipsius (1547–1606).


8 On sociability see Horn (2003); Hochstrasser (2006), 40–77.


10 The idea was however canvassed by some medieval thinkers, e.g. Ockham, arguing against John XXII in *Work of Ninety Days* 434–5: 'where a system of common ownership prevailed the content of the community was required for any appropriation. See also 661, with Tierney (1997), 163–6.

11 Tuck (1992), 77, while acknowledging that it is a new development in Grotius' thought, is inclined to downplay it. It is worth noting however that Filmer's attack on consent was directed specifically at Grotius. See Burne (1999), 160–7.
being challenged or set aside by *occupatio/divisia*. Grotius could have reduced the level of his embarrassment (such as it was) by placing the beginning of the movement towards private ownership in a regime of negative rather than positive community, to use a distinction introduced later by Pufendorf. The significance of this is that only in positive community were there rights to be challenged and undermined. In a Pufendorfian negative community there was a rights- or claims-vacuum. That the style of regime envisaged by Grotius fits Pufendorf’s picture of positive community follows from the fact that Grotius attributes to it a common store, and finds comparison appropriate with the Essenes, the first Christians at Jerusalem and the monastic movement of his time.

The traditional, pessimistic reconstruction of the early history of the human race as a downward spiral from a Golden Age of ease and plenty did not appeal to Grotius and succeeding natural rights theorists. In particular, they saw private ownership, which in the Golden Age narratives often played a compromising role, as, if not a God-given natural right, at least a product of the natural reason which God had given to man. Thus, the context that they created for the transition from primeval communality to private ownership was one of progress rather than decline. Humanity was moving forward towards ever higher levels of achievement. In the economic sphere this process of advancement is viewed in terms of the passage from hunter-gatherer to pastoral and then agricultural society, with humanity at each level gaining an additional layer of knowledge and new technological skills. This three-stage process is already to be found in Dicaearchus, Aristotle’s pupil. Aristotle’s *Politics* had provided the raw material for such a theory – and for that matter for its extension into a four-stage process with the addition of a commercial society – in the account of the various ways of life open to and practised by humans.13 However Aristotle did not come up with a stadial theory of society. In fact, it was only around the middle of the eighteenth century that a sophisticated and comprehensive four-stage theory of human development was elaborated, by Adam Smith and his contemporaries.14

14 On the four-stages theory, see Stein (1988), ch. 2; Kerr (1993); Hart (2001b). Note however that not all stadial theories of society were along these lines. Thus Adam Ferguson (1773–86) in his *Essay on the History of Civil Society* (1767) produced a theory, drawing from Montesquieu, which is much less strongly connected to variations in forms of property than Smith’s. His main categories are ‘savage’ (only personal possessions such as tools and weapons), ‘barbarian’ (first rudiments of private property), and ‘civilized’ (the state). See *Essay*, esp. II.ii–iii, III.i. I owe this information to
Grotius was aware of Dicaearchus' evolutionary account and cites him for the first stage, the age of the hunter/gatherer. At another point he places the private acquisition of moveables before immovable, which may imply a progression from a primarily pastoral economy to one with an agricultural base. Elsewhere however there is stage-conflation, as where he attributes to 'the first brothers' (and note the order) 'the most ancient arts of agriculture and grazing not without exchange of commodities'.

One might say that in Grotius (and Pufendorf), the stadal evolution of society is underdeveloped and limited in scale, being tied, and that rather loosely, to an explanation of the origin and growth of private ownership.

Grotius does give the Golden Age myth an airing. However, he chooses to cite it from Dicaearchus, who had himself rationalized and scaled down the Hesiodic vision, with the consequent that he represented the life of primeval man as one of extreme simplicity and frugality verging on want. For Grotius the sheer primitiveness of that life guaranteed its impermanence. His picture was not bleak enough for Samuel Pufendorf. Writing in On the Laws of Nature and of Nations (1672), Pufendorf says that men in the state of nature were like 'miserable animals', living a 'life most wretched'. That is, if 'state of nature' is not an empty category, Pufendorf more or less defines it out of existence by denying it everything 'added to it by human institution'.

The influence of Thomas Hobbes, with whose On the Citizen and Leviathan Pufendorf was in constant dialogue, is palpable. Among authors from antiquity Pufendorf prefers Horace, Lucretius and Diodorus Siculus, for their stress on the extreme primitiveness of the first men, to the Augustan poets and Lactantius, who in his view exaggerated their degree of advancement.

As I have already indicated, Pufendorf clarifies and corrects the account of Grotius by introducing a distinction between negative and positive community. The defining feature of negative community is that 'all things lay open to all men and belong no more to one than to another'; positive community, on the other hand, presupposes the introduction of use-rights and institutions such as a common store, which are enjoyed

Jain McDaniels, In addition, Ferguson was much less optimistic than Smith (or Hume) about the historical fate of commercial society. See Hunt (2000b), 236-8.

14 Grotius, On the Law of War and Peace 3.2.2.
16 Pufendorf 3.2.2, citing Hor., Sat. 1.395; Lucr. 5.915; Diod. Sic. 1.8; etc. See also 4.4.8, on Lactantius, Div. Init. 3.5.
17 Pufendorf 4.4.9.
by a specific group or community to the exclusion of everyone else. Pufendorf did applaud Grotius for understanding the necessity of agreement before communality could give way to private property.

Pufendorf himself spins out that transitional process: 'Now men left this original negative community of things and by a pact established separate dominions over things, not indeed all at once and for all time but successively, and as the state of things, or the nature and number of men, seemed to require.' But why should primeval society undergo development at all? What was the motor for change? Of the state of nature he writes that 'nature could never have intended man to spend his days in that state'. Negative community too was destined to give way to other regimes. This might take time, if resources were plentiful and could easily go around a small population. But negative community contained the seeds of its own destruction. It would fall apart as soon as people began to acquire things for themselves: and 'things are of no use to men unless at least their fruits may be appropriated'. But such appropriation becomes problematic (he says 'impossible') 'if others as well can take what we have already by our own act selected for our uses'. Pufendorf is going some way to meet Hobbes in conceding that conflict was inevitable in a situation where no one owned or had exclusive rights to anything. However, against Hobbes, he sees the concession of use-rights to individuals or groups, and ultimately, private ownership, as an effective safety valve. Against the 'old saying', 'Mine and thine are the causes of all wars', he retorts: 'Rather it is that mine and thine were introduced to avoid wars.' Also against Hobbes' view that conflict would be endemic in the state of nature, he holds that men were capable through their innate sociability of steering away from hostile confrontation. Further, they could do this without having recourse to the protective and coercive apparatus of civil society, let alone the dictates of an absolute monarch.

How did these transitions from one regime to another take place? They were not engineered by God. God did allow men the use of the products of the earth, but 'He did not determine at that same time what things should be held individually, and what in common.' He did not impose dominion, and certainly did not designate Adam as sole proprietor.

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88 Ibid. 4.4.6. 89 Ibid. 2.1.4. 90 Ibid. 4.4.5.
91 Ibid. 4.4.7. This follows a jibe at the Utopians More and Campanella for advocating community of property (commune bonorum), 'I suppose because perfect men are more easily imagined than found.'
92 Ibid. 4.4.9-12, against Filmer, who is not named.
Rather 'he left to the judgement of men, that they should dispose of the matter according as it seemed to work for peace'. Men by the use of sound reason (ossa ratio) would decide how to head off the apparently inevitable collisions between individuals as they competed for God-given resources. The solution lay in the pact. 'Dominion presupposes absolutely an act of man and an agreement, whether tacit or express.' Pfundtordt insists that at every stage of societal development a prior agreement or pact had to be arrived at, a convention or pact negotiated within the community. Why? A convention was needed if people were going to be excluded. As he puts it: 'Assuming an original equal faculty of men over things, it is impossible to conceive how the mere corporal act of one person can prejudice the faculty of others, unless their consent is given.'

In conceding the necessity of pacts, in allowing that 'occupancy of itself, before the existence of pacts, does not confer any rights', Pfundtordt is giving a hostage to fortune. The pact is made to bear too much weight. If it was scarcity that forced change, as he thinks, then it needs to be explained how placing exclusive rights over resources in the hands of some at the expense of others could be expected to improve the situation; how 'the rest', those whose access to resources has been reduced, could benefit from the changes, and why they should ever agree to such a reduction. Aristotle is brought into service to show that ownership was beneficial to mankind 'when it had grown numerous'. But Aristotle bypassed the issue of competition for, or scarcity of, resources, and in general spoke as one of the 'haves' and reflects their interests.

Locke contended that private property rights were natural rights tenable independently of government and law. He allowed no role to pacts or agreements in the process of the creation of private property.

He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his ... And will any one say, he had no right to those acorns or apples he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.

In this Locke saw eye to eye with his opponent and sparring partner, Sir Robert Filmer (1588–1653), and was in fact using one of Filmer's
arguments against consent. This argument depended on the assumption that the first men were joint owners of the resources of the world, and that the agreement of 'all the men in the world at one instant of time' was required before anyone could have access to any of them. Filmer, and Locke in this passage, were working with a model of positive community, but it was not one that they shared with Grotius and Pufendorf. The latter were thinking rather, at least in the first instance, of agreements made on a local level in the setting of individual communities.

In any case, Locke's example of the gathering of the fruits of the earth (rather than the acquisition of land) fits more naturally into the context of a Pufendorfian negative community. In a lecture on Grotius delivered in Cambridge in 1754, Thomas Rutherforth, Regius Professor of Divinity, offered a solution to Locke's dilemma which distinguished between access to moveables (which man had as of right), and immoveables (for which the consent of mankind was needed):

When he gathered them [the apples and the acorns] and was eating them, he exercised his common right of using and enjoying, out of the joint stock, what his occasions called for. Though therefore we contend, that he could not acquire an exclusive right of property in them, or in anything else, without the consent of mankind, either express or tacit, yet there is no fear of his being starved, while he is waiting for this consent; because in the mean time the exercise of his common right will sufficiently provide for this subsistence.  

Locke and Filmer had different reasons for rejecting a conventional basis for property. Locke wanted to protect property rights from political interference, while Filmer held that property rights and absolute dominion over all mankind were a gift of God to Adam and his line, through which the authority of the Stuart monarchs had descended.  

Locke's own theory of appropriation, according to which first occupants established their rights to land simply by cultivating it, is itself rooted in his view of God's plan for man, which was that he survive and increase. Mankind had not merely a right to appropriate the means by which these

10 Goldie (1999), vol. 6, 243.
11 On Filmer's criticism of an original agreement, see Buckle (1980), 161–71. It is worth noting that Locke was prepared to bring consent in by the back door when it suited his argument. Thus he argues that men agreed to the introduction of money and the resultant 'apportionate and unequal possession of the earth' (Second Treatise 16, 47, 50). This suggestion is at odds with the 'sufficiency provision' which Locke attached to first acquisition: 'at least where there is enough, and as good left in common for others' (27). As to its plausibility, Waddan (2002), 176, calls it 'one of the worst arguments in the Second Treatise'. Note however that David Hume was quite prepared to champion the introduction of money convention of gold and silver as means of exchange. See Treatise of Human Nature Book III part II, 490 (Selby-Bigge/Nidditch).
ends could be achieved, but also a duty to God to carry out His purposes.\textsuperscript{32}
In a post-Lockean world dominated by secular values, this argument can be rephrased in terms of a concern that natural resources be exploited in such a way that a proper balance is maintained between the liberty of individuals to use or appropriate them, and the preservation of the environment.\textsuperscript{33} Such a formulation however rips the heart out of Locke's theory, for without the transcendental dimension it does not work.\textsuperscript{34} The specific arguments that he advances of course have to be evaluated on their own terms. Locke writes:

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person; this no body has any right to but himself: The labour of his body, and the work of his hands, we may say, are properly his. Whosoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labor being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.\textsuperscript{35}

Critics have been quick to notice, with reference to the so-called 'sufficiency proviso' of the last clause, that Locke's theory would apply only where unoccupied land is in plentiful supply, which it was not in the England of his day. John Stuart Mill wrote in his essay on 'Property in Land': 'It is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for the newcomer.'\textsuperscript{36} Locke it is clear had his eye on the opportunities for settlement in America. In the Second Treatise he insists that labour, the labour that justifies first acquisition, entails cultivation. By this yardstick the native inhabitants of America had no title to the land they inhabited.\textsuperscript{37} Locke's argument suffers from other basic weaknesses.\textsuperscript{38}

\textsuperscript{32} Waldron (2000), 160. \textsuperscript{33} See Clarke and Kohler (2005), 90.
\textsuperscript{34} Cf. Waldron (2002), 184.
\textsuperscript{35} Locke, Second Treatise 27. This passage gives the basic content of his theory. See also 31 (the spoliation provision: 'as much as anyone can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in'); cf. 46; add. 40–1 (the value-added argument).
\textsuperscript{38} Locke's argument has been picked over by as many expert commentators from the eighteenth century to the present day that one might say there are no unallocated acres or apples to be garnered, no spare wasteland to be cultivated. A selection of the more recent, major, studies might include Dunn (1969); Tuck (1973) and (1999); Tully (1985); Waldron (1988) and (2002); Searle (2003); Kramer (2007). I have learned much also from the discussions of Bucile (1994); Harris (1996); Clarke and Kohler (2005).
The state of nature: Grotius to Hegel

The concept of self-ownership may have made some kind of sense in an era where slaves were being made every day, albeit far from the shores of England, as Locke was aware. Kant, who wrote in such an era, was one who rejected the idea, though without offering a full critique — this in The Metaphysics of Morals of 1797:

An external object which in terms of its substance belongs to someone is his property (dominium), in which all rights in this thing inheres (as accidents of substance) and which the owner (dominus) can, accordingly, dispose of as he pleases (ius disponendi de re sua). But from this it follows that an object of this sort can be only a corporeal thing (to which one has no obligation). So someone can be his own master (iuris in rei) but cannot be the owner of himself (cannot dispose of himself as he pleases) — still less can he dispose of others as he pleases — since he is accountable to the humanity in his own person. This is not, however, the proper place to discuss this point...

In our world, inasmuch as slavery cannot be accepted as a feature of a just society, talking of humans as property, even of themselves, seems to be a category error. Modern lawyers, when faced for example with the problem of how to define a patient's interest in a cell removed from his body and used for medical research (with windfall profits for doctors and pharmaceutical companies a possible outcome), are inclined to talk in terms of personal rather than property rights.

The idea that labour can give entitlement to the product seems fair and reasonable. It appeared so to Aristotle (it is implicit in his critique of common ownership in the Politics) and equally to Pufendorf. Locke was often at odds with Pufendorf's account of property, but the latter had produced an argument linking the necessity of labour for making the resources of the earth usable to the claims of the labourer to the fruits of his work: 'Moreover, most things require labour and cultivation by men to produce them and make them fit for use. But in such cases it was improper that a man who had contributed no labour should have the right to things equal to his by whose industry a thing had been raised or rendered fit for service.'

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42 And to certain medieval scholars such as John of Paris. See On RoyaL and Papal Power, ch. 7 (Watt, 1953). 'Lay property is not granted to the community as a whole... but is acquired by individual people through their own skill, labour and diligence... ' Quoted in Coleman (2006a), 143, n. 16.
43 Aristotle, Pol. 1253b13–15; Pufendorf 4.4.6.
That labour should give rights to the land itself and not merely to its product, which is Locke’s central thesis, seems an extravagant claim. It happens that Pufendorf in the lines that follow the above quotation goes on to anticipate the sequential introduction of dominium of things ‘such as require labour and cultivation by men’. He appears to be preparing the ground for Locke here. The difference is that for Locke the acquisition that is legitimated by labour has both logic and morality on its side, whereas in the case of Pufendorf acquisition is the empirical outcome of the need for peace and the reality of population growth. It must also be preceded by a pact or agreement.

Later in the Second Treatise Locke raises the stakes with his ‘value-added’ argument. ‘Labour,’ he says, ‘puts the difference of value on everything’. No less than ninety per cent (or ninety-nine per cent) of the value of land, or other things that are useful to us, can be attributed to the work we have done. The same difficulty rears its head: why should the producer be entitled to permanent ownership of the asset in question, rather than merely the product of his labour, or at best, temporary possession?

Finally, it was open to sceptics to say that, if Locke had been hoping by means of the labour argument to justify first acquisition retrospectively, he had not succeeded. First acquisition still had to be justified, on its own terms. This was the point of Rousseau’s outburst in Discourse on the Origin of Inequality (1754–5): ‘No matter if they said: It is I who built this wall, I earned this plot by my labour. Who set its boundaries for you, they could be answered; and by virtue of what do you lay claim to being paid at our expense for labour we did not impose on you?’

Kant in The Metaphysics of Morals insisted that first acquisition of land and its exploitation required separate analyses. As Proudhon was to say in What is Property? (1840), citing his older contemporary Victor Cousin: ‘In order to labour it is necessary to occupy.’ The labour theory could not be used as a cover-up for or escape-route from the (equally unsustainable) principle of first occupancy.

THE RECEPTION OF LOCKE: HUME TO HEGEL

Locke’s labour theory of acquisition had a chequered career. It was twisted in an anti-establishment direction by thinkers whom Locke would

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Footnotes:

44 Locke, Second Treatise 40. 45 Rousseau, Second Discourse, 2:30 (Gourevitch, 172)
46 Kant, Metaphysics of Morals 2:33 (Gregoir, 52).
47 Proudhon, What is Property? 67 (Radley and Smith, cf. 84, citing Comte).
have regarded as his ideological opponents, and was given short shrift by most leading theorists of property. Among the latter, Hegel was exceptional in making positive use of it, though for him it was only the starting point for a much more elaborate and ambitious argument for private property.\(^{48}\)

Locke’s theory was received positively by opponents of the status quo. Thomas Rutherforth (in 1754) predicted that the theory might be used to argue the cause of the labourer against the landlord, but thought (or hoped) it would not be taken up:

Now the labour of the occupier puts the chief value upon the land, and without this labour it would be worth little; for it is to this, that we owe all its useful production... But no one will be led to conclude from hence, that because, according to this reckoning, in the value of an acre of land ninety nine parts in a hundred are owing to the labour of the occupier, the property, which he has in his own labour, will swallow up the property which the landlord has in the soil; and that the land, because he has cultivated it, will for the future become his own.\(^{49}\)

This was overoptimistic. In the late eighteenth and the early nineteenth centuries a number of English radicals, including Spence, Ogilvie, Thelwall and Hodgskin, deployed Locke on behalf of the labouring poor and communal access to land. The arguments of course surface again, with elaboration and development, in the works of the classic ‘subversives’, Proudhon and Marx.\(^{50}\)

The most eminent property theorists of the eighteenth century distanced themselves from Locke. Rousseau could see that occupants were likely to claim rights to land they had appropriated on the basis of labour – first to the produce of the land, then to the land itself: ‘For it is not clear what, more than his labour, man can put into things he has not made, in order to appropriate them.’ But, ‘regardless of how they painted their usurpations’, they remained just that, usurpations. No one had invited them to build walls, mark out plots and expend labour on them.\(^{31}\) In his *Treatise of Human Nature* (1739–40) Hume made a brief but telling statement on the issue of the nature of the relationship between person

\(^{48}\) However, Locke’s views on property were influential in France in the Age of Revolution. See Ch. 8, pp. 29-31.

\(^{49}\) Rutherforth, in Goldie (1990), vol. 6, 448.

\(^{50}\) Marx cites with approval in *Capital Book I* the last of them, Thomas Hodgskin (1787–1869), author of *The Natural and Artificial Right of Property Considered* (1832).

\(^{31}\) Rousseau, *Second Discourse* Part II, 34; 50 (Gourevitch 169, 172).
and property. At one point he states, in passing: 'A man's property is some object related to him. This relation is not natural, but moral, and founded on justice.' He follows this up a little later, in a footnote. He does not attribute the argument from labour expressly to Locke, and in fact does not mention him at all:

Some philosophers account for the right of occupation, by saying, that every one has a property in his own labour; and when he joins that labour to any thing, it gives him the property of the whole; But, 1. There are several kinds of occupation, where we cannot be said to join our labour to the object we acquire: As when we possess a meadow by grazing our cattle on it. This accounts for the matter by means of accession which is taking a needless circuit. 2. We cannot be said to join our labour to anything but in a figurative sense. Properly speaking, we only make an alteration on it by our labour. This forms a relation between us and the object, and thence arises property, according to the preceding principles.

Hume had just set out his view that there is no property, or property right, until civil society has been established. Finally, Kant in *The Metaphysics of Morals* is forthright and damning:

Moreover, in order to acquire land is it necessary to develop it (build on it, cultivate it, drain it, and so on)? No. For since these forms (of specification) are only accidents, they make no object of direct possession and can belong to what the subject possesses only insofar as the substance is already recognized as his. When first acquisition is in question, developing land is nothing more than an external sign of taking possession, for which many other signs that cost less effort can be substituted.

Kant goes on to denounce as fraudulent the sequestration of the land of native peoples which ignores their first possession. His examples are 'the American Indians, the Hottentots, and the inhabitants of New Holland':

Should we not be authorized to do this, especially since nature itself (which abhors a vacuum) seems to demand it, and great expanses of land in other parts of the world, which are now splendidly populated, would have otherwise remained uninhabited by civilized people or, indeed, would have to remain forever uninhabited, so that the end of creation would have been frustrated? But it is easy to see through this veil of injustice (Jesuitism), which would sanction any means to good ends. Such a way of acquiring land is therefore to be repudiated.\(^5\)

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\(^{54}\) Locke had interpreted labour narrowly in terms of cultivation.

\(^{55}\) Kant, *Metaphysics 532*, cf. 55 (Gregor).  

\(^{56}\) Ibid. 53 (Gregor).
Hegel produced a distinctive account of property, for which he is to some extent indebted to Locke. In contrast with the eighteenth-century philosophers considered above, he builds labour into his theory of property. In addition, and of central importance — therefore to be discussed first here — the germ (at least) of Hegel’s idea that the person of the owner is embodied in his property is to be found in Locke.

Locke’s argument went along the following lines: If I am not a slave, nobody owns my body. Therefore I own myself. Therefore I own all my actions, including those which create or improve resources. Therefore I own the resources, or the improvements, that I produce.

What happens between the agent and the object is a ‘mixing’ and a ‘joining’: ‘Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and therefore makes it his property.’ Locke talks also of labour as achieving the ‘fixing’ of ‘my property’ in resources removed from what was ‘commons’.

Hegel works the concept of self-ownership into his discussion of the first ‘phase’ in the relationship of person (or ‘will’) to the ‘thing’, which is the act of taking possession:

The human being, in his immediate existence in himself, is a natural entity, external to his concept; it is only through the development of his own body and spirit, essentially by means of his self-consciousness comprehending itself as free, that he takes possession of himself and becomes his own property as distinct from that of others. Or to put it the other way round, this taking possession of oneself consists also in translating into actuality what one is in terms of one’s concept (as possibility, capacity or predisposition). By this means, whatever one is in concept is posited for the first time as one’s own, and also as an object distinct from simple self-consciousness, and it thereby becomes capable of taking on the form of the thing.

The self-ownership idea is crucial in allowing a slippage between ‘mine’ in the sense of my person, body and actions, and ‘mine’ in the sense of the external things that I own. Both philosophers make use of the same

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16 For Hegel on property, see e.g. Knowles (1953); Waldman (1983), ch. 10; Patten (1992); J. W. Harris (1996b), chs. 13–14; Thomas (2003). A comprehensive treatment of Hegel’s views would naturally have to consider his thought in relation to that of Kant. See, briefly, Ilting (1977).
18 Second Treatise 27–8.
19 Hegel, Philosophy of Right 57 (Wood/Nisbet 86). A discussion of slavery follows, not in consequence but in order. It is noteworthy that there is a similar juxtaposition in Locke, though in his discussion slavery precedes property.
Thinking about Property

metaphysical idea that an agent is embodied in an external object. It is just that Locke's metaphysic is simple and undeveloped, Hegel's ambitious and all-encompassing.

Locke leaves it unclarified what it is of the agent that goes out from him into the thing owned. In Hegel, it is the will which is embodied in the thing. The human being is a free will, or spirit, a rational being. Or at least he is potentially so: Freedom in its completeness is displayed in the embodiment of the will in external objects - which are things that lack everything that a free spirit has: freedom, personhood, rights.60

The difference goes deeper than this. For Locke, there is an active agent which does something to a thing; Hegel, on the other hand, does not begin with an individual who can be isolated at the start, and who then takes action. Rather, an 'I' exists only as a process of moving 'back' from the will embodied in the thing. Meanwhile, the will itself exists retrospectively: I have a will only when there is a social context which recognizes my will as embodied in something (see below).

At this level of abstract right, then, a person has a right to property: 'A person has the right to place his will in any thing. The thing thereby becomes mine and acquires my will as its substantial end (since it has no such end within itself), its determination, and its soul - the absolute right of appropriation which human beings have over all things.' Hegel goes on to say that Plato's Republic contains 'a wrong against the person, inasmuch as the person is forbidden to own private property'; and to approve of the dissolution of monasteries where it has occurred 'because a community does not ultimately have the same right to property as a person does'.61

And Hegel also believed that only property can provide an appropriate stage on which a person's freedom can be acted out. His discussion of property begins with the following sentence: 'The person must give himself an external sphere of freedom in order to have being as Idea.'62 At the same time he allowed that at other levels, those of the family, society and the State, there were institutions in addition to property through which persons could fulfill themselves. These other levels of analysis were in fact of crucial importance to Hegel's theory. Property enables a person to show himself distinct from other persons, to mark out boundaries

60 Cf. ibid. 43: 'The circumstance that I, as a free will, am an object to myself in what I possess and only become an actual will by this means constitutes the genuine and rightful element in possession, the determination of property.'
61 Citation: ibid. 44: 46. 62 Ibid. 43.
between himself (his will) and others, and to be recognized as rational. The social context of property is absolutely essential. Society has to recognize the person as agent, and the person holds his property in accordance with the regulations of civil society. It is the social, rule-grounded recognition that transforms the possession of property into ownership, not the physical relationship to the object. Similarly, abstract right might have to give ground to the higher sphere of right embodied in the State in line with political, legal or moral considerations. Above all, abstract right is subservient to the absolute right represented by the World Spirit. As Hegel wrote:

Right is something utterly sacred,[63] for the simple reason that it is the existence of the absolute concept, of self-conscious freedom. But the formalism of right, and also of duty, arises out of the different stages in the development of the concept of freedom. In opposition to the more formal, that is, more abstract and hence more limited kind of right, that sphere and stage of the spirit in which the spirit has determined and actualized within itself the further moments contained in its Idea possesses a higher right, for it is the more concrete sphere, richer within itself and more truly universal.[64]

Hegel's thought is deeply theological, and at the centre of his philosophical theology is the Trinity. Within the Trinity it is the Third Person whom he favours. God is immanent. This is the animating spirit that inspired the first Christian communities and has guided the course of human history thereafter. Hegel's Lectures on the Philosophy of History conclude with the following paragraph:

That world history, with its changing spectacle of [individual] histories, is this course of development and the actual coming into being of the spirit — this is the true theodicy,[65] the justification of God in history. Only this insight can reconcile the spirit with world history and with actuality — the insight that God is not only present in what has happened and what happens every day, but that all this is essentially his own work.[66]

Hegel has left Locke far behind. Locke takes agent and object and looks at the relationship between the two. Hegel sees property as a social category: the crucial component is not the physical act of working the land,

[63] While that there be right is sacred, it does not follow that any particular entitlement to a specific object or piece of land is 'sacred'.
[64] Ibid. 30.
[65] It is true theodicy in two senses: it is a true account of what happened; and philosophy can present this account in such a way as to demonstrate that it is a theodicy.
[66] Hegel, Lectures 224 (Dicker/Netser).
or the seizure of the land that precedes it, but the recognition of the person as agent by the society, and the rules which society applies. Locke’s agent does not need societal recognition – at most he wants civil society to protect his right to the land which is his by natural law. Locke’s agent is assured of divine recognition – in the sense that he is assured that ownership is consistent with God’s command to exploit the resources of the world. The God in question however is the First Person of the Trinity, the God of the Old Testament, who is separate from his creation, not the God of the Third Age, the Spirit that is working among men and guiding human society. That Locke provided Hegel with a launching pad for his property theory is however beyond question.

We turn now to the subsidiary matter of the role allocated to labour in Hegel’s theory of property. Hegel allows for three ‘phases’ of property: possession, use and surrender. His account allots a significant role to both of the two first, and central, phases: acquisition and labour (in his terminology, ‘possession’ and ‘use’). Indeed Hegel’s presentation of the first ‘moment’ entails the interweaving of the two. There are three aspects to possession: physical seizure of the thing, giving it form and designating it as owned. Physical seizure may be ‘the most complete mode of taking possession, because I am immediately present in this possession and my will is thus discernible in it’, but it is ‘in general merely subjective, temporary, and extremely limited in scope …’. The second mode, the giving of ‘form’, is clearly viewed as complementary and essential: ‘To give form to something is the mode of taking possession most in keeping with the Idea, inasmuch as it combines the subjective and the objective … The effects that I have on it [the objects] do not remain merely external, but are assimilated by it.’65 This brings to mind Locke’s metaphors of ‘mixing’ and ‘fixing’. Moreover, Hegel’s prime examples concern the working of the land: ‘the tilling of the soil, the cultivation of plants’. He goes on (as Locke conspicuously failed to do) to include the pastoral economy, ‘the domestication, feeding and conservation of animals’, as well as the exploitation of whatever raw materials are available, and the introduction of technology, for example, a windmill (which uses the air without forming it, so without establishing a claim to it).

The consideration of the second ‘phase’, that is, the use of the thing, suggests that in Hegel’s thinking, Locke’s ‘mix-and-fix’ (always supposing that Hegel is in dialogue with Locke) can only be a first stage in a process

65 Hegel, Philosophy of Right 54; 56 (Wood/Nisbet).
which leads to the complete absorption of the thing; 'Use is the realization of my need through the alteration, destruction, or consumption of the thing, whose selfless nature is thereby revealed and which thus fulfils its destiny.' This idea is filled out in the Addition to the same section:

While I take complete possession of a thing in a universal way by designating it as mine, its use embodies an even more universal relation, because the thing is not then recognized in its particularity, but is negated by me. The thing is reduced to a means of satisfying my need. When I and the thing come together, one of the two must lose its [distinct] quality in order that we may become identical. But I am alive, a willing and truly affirmative agent; the thing, on the other hand, is a natural entity. It must accordingly perish, and I survive, which is in general the prerogative and rationale of the organic.

Hegel has interposed between these passages what amounts to a reminder that use is secondary to seizure. This takes the form of an attack on the view that land that was unutilized was properly regarded as wasteland and fair game to appropriation by another. This was Locke's idea. Locke had written:

Whatever he tilled and reaped, laid up and made use of, before it spoiled, that was his peculiar right; whatsoever he enclosed, and could feed, and make use of, the cattle and product was also his. But if either the grass of his inclosure rotted on the ground, or the fruit of his planting perished without gathering, and laying-up, this part of the earth, notwithstanding his inclosure, was still to be looked on as waste, and might be the possession of any other.

Hegel 'replies':

That use is the real aspect and actuality of property is what representational thought has in mind when it regards disused property as dead and ownerless, and justifies its unlawful appropriation of it on the grounds that the owner did not use it – But the will of the owner, in accordance with which a thing is his, is the primary substantial basis of property, and the further determination of use is merely the [outward] appearance and particular mode of this universal basis to which it is subordinate.

Apart from putting labour in its place as subsidiary to acquisition (for the will could hardly have been brought to bear on the object in the absence of physical seizure), this passage shows that in Hegel's thinking, the process of 'assimilation' or embodiment is initiated in the act of physical seizure (or occupatio), and does not wait on the use of the object taken, as it does in Locke's account. The embodiment of the owner in the

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66 Ibid. 59. 67 Locke, Second Treatise 98. 77 Philosophy of Right 59.
thing has begun at the first stage of occupation. In Locke it is apparently an accompaniment of labour, exclusively.

However physical seizure and use, acquisition and labour, are to be ranked against each other, and there are passages that suggest uncertainty over this,71 the central point is that Hegel, alone of Locke's successors, has provided an integrated treatment of these two central modes of possession.

Hegel produced an argument for the necessity and legitimacy of private property as such, rather than for first occupation in particular. He treats first occupation in one sentence, which is followed by a brief Addition.72 It was a trivial truth that no one can lay claim to property which is already occupied: 'That a thing belongs to the person who happens to be the first to take possession of it is an immediately self-evident and superfluous determination, because a second party cannot take possession of what is already the property of someone else.' That the first occupant is the owner doesn't follow from the fact that he is the first, but from the fact that he is a free will.

For Hegel (as for Locke) first acquisition was virtually a non-question. His theory of property had eliminated the need to discuss it. Grotius and Pufendorf had apparently expended their energies on the issue for nought. We may wish to reply that unilateral occupatio is not an issue that can be side-stepped in this way, that Hegel has shown insufficient concern with the inequality that arose inevitably out of it, and that he has failed to see that his argument that 'free person entails owner of property' has implications for all free people, not just a few.73

Hume, Rousseau and Kant, despite holding that property rights were a matter of convention rather than natural law, were willing, as Hegel was not, to engage with the natural jurists of the seventeenth century to a greater or lesser extent, which means that they were prepared to confront first acquisition and explore its 'historical' background. It is to their narratives that we now turn.

71 Ibid. 6: Addition: 'The field is only a field in so far as it produces a crop'; cf. 64 Addition: 'Prescription is based on the assumption that I have ceased to regard the thing as mine. For if something is to remain mine, continuity of my will is required, and this is displayed in the use or conservation of the thing in question.'
72 Ibid. 50.
73 For critiques of Hegel on such points, see Waldron (1988), 385–6; Harris (1990), chs. 13–14. On the issue of economic inequality, Hegel's view is that it was relevant only to the extent to which it leads to other bad consequences such as starvation. See *Philosophy of Rights* 43; cf. 241.
David Hume (1711–76)

Natural rights theorists located the right to property in the state of nature, with the understanding that the human race gave tacit or express consent to the intrusion that it represented. Hume’s account apparently does not allow for consent anterior to the conventions introduced by civil society (but we would do well to look at this again). Those conventions or laws are the laws of justice, no less: ‘Our property is nothing but those goods, whose constant possession is establish’d by the laws of society; that is, by the laws of justice.’\textsuperscript{74} Hume’s treatment of property is embedded in an extended discussion of virtues (and vices), which is in large part devoted to justice. Justice and property are very closely related, if they are not Siamese twins. To discuss the origin of one is to discuss the origin of the other.\textsuperscript{75} His reasoning is that ‘the stability of possession’ is the bedrock of civil society, and that once the rules of property were laid down, there was ‘little or nothing’ left to do in order to achieve a just society, one marked by ‘perfect harmony and concord’.

Justice according to Hume is not a natural virtue, and property is not a natural institution, for both have their origins in human convention. The consequences of this finding are worked out, and the origins of both justice and property are identified, in the course of a discussion of man’s experience in a pre-social setting. Hume held that before the advent of civil society possessions were chronically insecure, and that this was closely related to the absence of justice at that time.

Hume regarded the state of nature as a figment of the imagination of philosophers, and the Golden Age as an invention of poets. He holds back this judgement, however, until he has made good use of the state of nature as a heuristic tool, and has more or less completed his analysis of natural humanity: ‘This no doubt is to be regarded as an idle fiction; but yet deserves our attention, because nothing can more evidently shew the origin of those virtues, which are the subjects of our present enquiry.’\textsuperscript{76}

Hume sets out to graft his own psychological theory based on ‘common experience and observation’ (an application, as he saw it, of the method of Newton to the realm of human behaviour) onto the received

\textsuperscript{74} *Treatise* Book III, part II, 49 (Selby-Bigge/Nidditch). See Moore (1976).
\textsuperscript{75} Cf. *Treatise* 495.
\textsuperscript{76} Ibid. 474.
narrative of the evolution of humanity in the state of nature. The result is a distinctive and highly individual analysis; it is nevertheless one carried out on the same terrain as that traversed by the natural jurists. This means that he is in constant dialogue with the latter. In fact, in his *Enquiries concerning the Principles of Morals*, which appeared more than a decade after the *Treatise* (1751), and contained in an Appendix a summary of his views on justice and property, Hume claims that his thesis is ‘in the main the same with that hinted at and adopted by Grotius'. Tongue in cheek? He does not explain himself, instead quoting *in extenso* from Grotius’ discussion. And there was some explaining to be done. His account diverges from those of Grotius and Pufendorf in a number of significant respects. In the cited passage alone we note that in the final sentence Grotius states that humanity managed the transition to a regime of ownership through the device of ‘a pact, either express, as in division, or tacit, as in occupation’.  

Hume’s natural man is easily recognizable from the accounts of the natural jurists, in particular that of Pufendorf. Man in the state of nature was ‘rude and savage’, his condition ‘savage and solitary’, his state ‘wild and uncultivated’, his character marred by ‘rough corners and untoward affections’. It is through society and society alone that ‘all his infirmities are compensated’ and he becomes ‘in every respect more satisfied and happy’. Hume the behavioural scientist now gets to work. Natural man is torn apart by countervailing forces, on the one hand selfishness, on the other limited generosity. Here he was taking on Grotius (in the first instance), though he does not name him. According to Grotius natural man had an *appetitus societatis*, a sense of community with the human race, ‘which the Stoics call *oikeiosis*’. Hume provides a rival interpretation of *oikeiosis* (without using the term): ‘Now it appears that in the original frame of our mind, our strongest attention is confin’d to ourselves; our next is extended to our relations and acquaintance; and ‘tis only the weakest which reaches to strangers and indifferent persons.’

Hume’s interpretation is correct, as a glance at a substantial fragment of a work of the late Stoic philosopher Hierocles (fl. c.100 AD) shows.  

74 *Treatise* 386–94.  
80 *Treatise* 488.  
The state of nature: Grotius to Hegel

The message of Hicocles, which Hume reproduces accurately, is that humans instinctively regard themselves as the prime object of concern, then have regard for family and other relatives, and treat others as increasingly alien. This being the case, 'while the opposite passions of men impel them in contrary directions', without any convention or agreement to restrain them, possessions will be inherently vulnerable. Chronic instability together with scarce resources will produce without fail social dislocation and destruction. But in those very same factors Hume has also found what he was looking for, the source of justice: 'Here then is a proposition which, I think, may be regarded as certain, that tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin.'

Hume is adamant that it is 'the nature of our passions' rather than reason which provides the impetus for humanity to embrace justice. Pufendorf's *sana ratio* is sidelined. As to the Divinity, Grotius had written, famously: 'What we have been saying would have a degree of validity even if we should concede (etiam si daretur) that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.' Hume's response was to bypass God altogether.

Hume, then, seems to be deliberately distancing himself from his natural jurist predecessors. Yet he makes a significant concession which reduces the gap between them, though he does not draw attention to it. Pufendorf had strung out the developmental process by which humanity moved towards civil society, marking off the various stages with a series of acts of consent - consent was not a one-off for Pufendorf as it had been for Grotius. Hume, I suggest, allows for something similar. He acknowledges that there is a movement towards justice, which takes time and proceeds by trial and error: 'Nor is the rule concerning the stability of possession the less deriv'd from human conventions, that it arises gradually, and acquires force by slow progression, and by our repeated experience of the inconveniences of transgressing it.'

One wonders how a 'rule' of civil society establishing property rights can 'arise gradually', if not by means of ad hoc and provisional agreements between individuals and larger groups. Hume also writes (a few sentences earlier): 'I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same

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81 *Treatise* 495, original emphasis. 89 Ibid. 406.
manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. Hume even adds: 'and this may properly enough be call'd a convention or agreement berwixt us, tho' without the imposition of a promise'. He follows this up with an example of two oarsmen, whose (essential) cooperation is traced to 'an agreement or convention', again short of a promise. Hume seems so anxious to insist on the absence of a promise (which itself would 'arise from human agreements'), that he has admitted the concepts of convention and agreement, so dear to the natural jurists, by the back door.36

Hume makes a second, closely related, concession to the natural jurists, which is to recognize that society makes its appearance, at least in a vestigial form, in the state of nature, together with elementary property conventions. The fons et origo is the mutual attraction of the sexes, giving rise to a conjugal and then family unit.37 In a later section dealing with the source of allegiance (to government, whose origin he has just discussed), Hume interposes an intermediate stage of social development, namely, tribal society, looking sideways at the 'American tribes, where men live in concord and amity among themselves without any establish'd government'. He goes on to conclude: 'The state of society without government is one of the most natural states of men, and may subsist with the conjunction of many families, and long after the first generation.'38 Pufendorf would have been entirely comfortable with this statement (Hobbes not at all).

Hume has already anticipated this conclusion in the earlier discussion of the origin of justice and property, where he follows the logic of his own argument to the conclusion that natural man was always, and from the beginning, social: 'If all this appear evident, as it certainly must, we may conclude, that 'tis utterly impossible for men to remain any considerable time in that savage condition, which precedes society; but that his very first state and situation may justly be esteem'd social.'39 If Hume thought he was striking off on a path not traversed by his natural jurist predecessors, he was mistaken. Pufendorf had already elided the putative state of nature, for similar reasons.

36 For Hume on convention, see Wiggins (1960), 71–82; also, Forbes (1975), 26–7.
37 Cf. Treatise 486: 'the first and original principle of society'.
38 Ibid. 542. 39 Ibid. 493.
The state of nature: Grotius to Hegel

Society without government was fated eventually to collapse; it was the competition for resources that brought it down, driving humanity to seek stability in civil society. Given that men entered civil society with possessions in tow, what should become of those possessions? Hume views the ‘difficulty’ as in fact quite unproblematic:

This difficulty will not detain them long; but it must immediately occur, as the most natural expedient, that every one continue to enjoy what he is at present master of, and that property or constant possession be conjoin’d to the immediate possession. Such is the effect of custom, that it not only reconciles us to any thing we have long enjoy’d, but even gives us an affection for it, and makes us prefer it to other objects, which may be more valuable but are less known to us.29

In footnotes Hume adds to the rule already stated, that property follows the present possession, two other principles, ‘that it arises from first or from long possession’.30 In addition, he muses rather casually over the origin of these rules as to whether motives of public interest are in question, or whether they are not the fruit of the ‘workings of the imagination’. The mind, he explains, ‘has a natural propensity to join relations, especially resembling ones, and finds a kind of fitness and uniformity in such a union.’

Hume, then, does not agonize over the legitimacy of first occupancy, any more than he concerns himself over the issue of inequality.31 This was a member of the class of ‘lairds’, well content with existing property relations, and optimistic about the prosperity that an expanding commercial economy would bring to all sections of the population.32

Jean-Jacques Rousseau (1712–84)

Rousseau, on the other hand, was a son of a watchmaker, an autodidact and a provocateur. The Second Discourse, that is, The Discourse on the Origins of Inequality (1755), contains a conjectural reconstruction of the state of pre-political mankind.33 His outline of an ideal state, The Social Contract (1762), is also of major relevance to our theme.34

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90 Ibid. 503. 91 Ibid. 109, n. 2.
92 Cf. Enquiries 305, over the necessity for the laws governing property to be ‘inflexible’.
93 See Hone (1990a) briefly, Forbes (1973), from 87.
94 Oeuvres Completes III III. See e.g. Winkler (1979); (2004); Morin (1993). See Gourevitch’s editions of Rousseau’s works for extensive bibliography. A full study of Rousseau’s ideas on early mankind would have to take in Enquiry on the Origin of Languages, within which is tucked away (in ch. 9) an interesting treatment of the sexual theory (three-stage in this case) of the development of society. See Oeuvres Completes V, from 375.
95 Oeuvres Completes III 347.
Rousseau in his Preface to the *Second Discourse* openly admits that his first and main matter of interest is in ‘civilized’ social and political institutions and relations of his own day: ‘It is no light undertaking to disentangle what is original from what is artificial in man’s present nature, and to know accurately a state which no longer exists, and perhaps never did exist, which probably never will exist, and about which it is nevertheless necessary to have exact notions in order accurately to judge of our present state.’

In order to bring present actualities into sharp focus, he conjures up an ‘other’ which is set in the past, the life of early humanity in the state of nature. Thus far (but no further) he was following in the tracks of his predecessors. What he doesn’t quite say here, but will soon become evident, is that he is framing natural society as the *opposite* of modern civilized society as he sees it, and furthermore, that the latter will come off *worse* in the comparison — for Rousseau is a fierce critic of contemporary society. Already in the Preface there are rumblings, presaging a sequence of outbursts that punctuate the text.

His story is not one of linear progress from primitive beginnings to civilized society, as sketched out by the early Enlightenment thinkers in their various ways. Mankind may have made substantial progress in learning, science and the arts, but has regressed in the realm of moral, social and political behaviour. Equality, which ‘by common consent’ was the natural condition of men, has been supplanted by gross inequality. Certainly the state of nature in its last stages was falling apart in a Hobbesian state of war. But the civil society which replaced it was not what it was made out to be. Instead of being ‘the moment when, Right replacing Violence, Nature was subject to Law’, it was a coup by the rich to safeguard their power, influence and inordinate share of the earth’s resources.

Rousseau has a second line of attack on the culture of civilized, European society. Present-day society comes up short by comparison not only with what was, but also with what might have been, and might still be, namely, the state that Rousseau sketched out in the *Social Contract* a.

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95 *Second Discourse*, Pref. 4 (Gourevitch 121).
96 Nature/civilization is a ‘binary opposition’ and Rousseau is here using a methodology shared by other contemporary writers, albeit to different effect.
97 Rousseau had already shown his hand in the *Discourse on the Science and Arts*, or *First Discourse*, of 1755. Both were submissions in competitions organized by the Academy of Dijon, but only the former won the prize.
98 Pref. 3, 12; *Second Discourse* 1.9, 137-8; etc. 99 Pref. 3; Exordium 4.
decade and a half later. The latter is a "perfect moral commonwealth", an ideal form of government wherein man's true nature is realized, a regime that has never come into existence, because human history in its very first episodes took a wrong turning. It is worth investigating the role or roles that Rousseau assigns to private ownership in the two imaginary societies and in the one that is caught in the middle.

In the process of building up his picture of primeval man in the state of nature, Rousseau sets about stripping him of all the artificial or conventional qualities which, in his view, he could only have acquired after leaving the state of nature; they are, in particular, those qualities associated with the 'moral' as opposed to the 'physical' aspect of life. The philosophers', he says, have regularly transposed into the state of nature concepts and institutions that properly belong in civil society. 'They spoke of Savage Man and depicted Civil Man.' The two principles that survive the purge are 'amour de soi-même', that is, self-love, or interest in self-preservation; and pity, repugnance at seeing others suffer. Rousseau makes a point of excluding sociability, which is associated in particular (though not expressly here) with the narrative of Pufendorf. Nature has simply not prepared man for this quality, and in any case it is unnecessary: 'Indeed it is impossible to imagine why, in that primitive state, a man would need another man any more than a monkey or a wolf would need his kind ...

Rousseau goes on to criticize the idea, also Pufendorfian, that primitive man without sociability would have been miserable:

I know that we are repeatedly told that nothing would have been as miserable as man in this state ... Now I should very much like to have it explained to me what kind of misery there can be for a free being, whose heart is at peace, and body in health. I ask, which of the two, civil life or natural life, is more liable to become intolerable to those who enjoy it?

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104 For this distinction, see Emendatum 2.
105 Emendatum 15; cf. Second Discourse, 1:33 (a critique of Hobbes for improperly importing 'a multitude of passions' into the state of nature).
106 On the difference between 'amour de soi-même' and 'amour propre', see Rousseau's note to Second Discourse XV, 218; more refs. at 377n. On pity, see Second Discourse 1:35. Pity of the weak was a quality attributed to primeval man in a proto-Epicurean phase of the state of nature in Lucretius 5:602ff.
107 Second Discourse, Pref. 9:13. In the latter passage he is interested in making the wider point that it was not nature's purpose to bring men together through mutual needs. This is a theme of Essay on the Origin of Languages, where Rousseau is concerned to stress the role of man's natural passions in the formation of primeval society. See e.g. 1:3 (Discourses, ed. Gourevitch, 353). On Rousseau and Pufendorf, see Wokler (1934).
108 Second Discourse 1:35.
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A sideswipe at contemporary society follows. This is one of several occasions where the reader is suddenly put on the spot and invited, or forced, to compare himself unfavourably with a savage. Rousseau's primitive man was just that, a savage: naked, without habitat, leading a solitary and idle way of life, closer to the other animals than to civilized man. Rousseau does not rule out the possibility that 'more accurate investigations' will reveal that orang-utans are men. Man is superior to other animals only in so far as he is a free agent, capable of 'willing, or rather of choosing', and in being aware that he has this capacity. That however is the sum total of the qualities that can be subscribed to him on the 'metaphysical and moral' as distinct from the 'physical' side.  

Rousseau was not a 'primitivist', in the traditional sense. He did not idealize a Golden Age in the past at the dawn of human history. He was well aware of the existence of this alternative narrative, now sidelined by philosophers, and was not above flirting with it, and teasing and provoking his audience in the process. There is a 'golden episode in his state of nature (see below), and moral decline is a leitmotiv of his narrative, as it was in the classic Golden Age mythology.

By the same token, he did not reject the idea of progress altogether. His case was that progress in the realm of more ought to march in step with the expansion of knowledge and the cultivation of reason, whereas in practice it had fallen far behind. He concludes a passage comparing the tranquillity of natural man with the mental torture that modern man inflicts on himself, with the recognition that natural man had the potential to develop, and that such development could be 'providential', as long as man's capacities continued to be tailored to his needs:

It was by a very wise Providence that the faculties he had in potentiality were to develop only with the opportunities to exercise them, so that they might not be superfluous and a burden to him before their time, nor belated and useless in time of need. In instinct alone he had all he needed to live in the state of nature, in cultivated reason he had no more than what he needs to live in society.

This developmental potential in natural man is encapsulated in the quality of 'perfectibility', 'the faculty of perfecting oneself', which a little

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165 See Rousseau's note to Second Discourse VI 6, 108.  
166 See Second Discourse I.14–56.  
167 Lovejoy (1938) is too literal an attack on this notion.  
168 Cf. Essay in the Origin of Languages 9.6: 'These times of barbarism were the golden age, not because men were united, but because they were separated.'  
169 Second Discourse I.35.
earlier in the Discourse he had introduced as distinctively human. That this word entered the vocabulary of the history of political thought during the Enlightenment is less surprising than that it was introduced by Rousseau, scourge of the Enlightenment. It was 'the last of the philosophes', Condorcet (1743–94), who gave perfectibility full rein in his Sketch for a Historical Picture of the Progress of the Human Mind (1795). It is ironical that Condorcet put the finishing touches to this hymn to progress shortly before his death in a prison cell, a victim of the Revolution. Rousseau was ambivalent about perfectibility. In his account the positive attributes are matched, or outweighed, by the negative. 'Wise Providence' needed to give a guiding hand, though in fact luck is allotted a more significant role. On the positive side Rousseau allows for a developmental stage within the state of nature, which he hails as 'the happiest and most lasting epoch', and 'the genuine youth of the world'. He thinks that most native peoples of his time had arrived at this state. But humanity continued to evolve. A dark age of conflict and warfare came next, followed in its turn by a flawed civil society in which human reason was perfected, but at the cost of 'the deterioration of the species'. Rousseau did however retain the belief that progress and enlightenment were possible on his terms, that individual perfectibility and the perfection of civil society could be achieved by the Social Contract. Furthermore, Rousseau's perfectibility was not ahistorical, as was, for example, Plato's. Plato's ideal of moral perfectibility was realizable only through the individual's grasping of the timeless and eternal world of intelligible forms, through the use of his own practical imagination and highly developed rational capacities.

Part I of the Second Discourse has little to say about private property; it deals in the main with the pure state of nature, in which not even 'the slightest notion of thine and mine' had intruded. Part II begins with an explosion:

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117 Ibid. 1.17: 30.
118 There is the germ of this idea perhaps in the doctrine advanced by some canon lawyers in the twelfth century, that human nature was inherently rational and morally responsible. See Tierney (1973), ch. 2. More relevant for Rousseau is likely to be the influence of Genevan Calvinism. See Rosenblatt (1997), esp. 82, 172–4.
119 Second Discourse 1.51; cf. 1.6.
120 Ibid. 1.44 on the Caribs and Rousseau's note XVI, 218, an appraisal of the way of life and attitudes of the savages.
121 He holds out hopes for Consitute; see Social Contract 1.10.6 and the treatise The Constitutional Project for Conitute: Oeuvres Completes III.
122 Second Discourse 1.39.
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The first man who, having enclosed a piece of ground, to whom it occurred to say *this is mine*, and found people sufficiently simple to believe him, was the true founder of civil society. How many crimes, wars, murders, how many miseries and horrors mankind would have been spared by him who, pulling up the stakes or filling in the ditch, had cried out to his kind: Beware of listening to this impostor! You are lost if you forget that the fruits are everyone's and the Earth no one's.

In chapter 27 he lists other evils, moral, social and economic, which were all the 'first effect' of property, and its running mate 'nascent' inequality — nascent implying that there was much more and worse to come.

Property came onto the scene at the last stage of the state of nature after significant antecedent 'progress', 'industry' and 'enlightenment', a process that culminated in the introduction of an agricultural economy. Agriculture brought in its train division, the recognition of property, and 'the first rules of justice', which are: to each his own, and to the cultivator the fruits of his labour. These feeble structures could not arrest the growth of inequality. The 'right' of the first occupant could not withstand the 'right' of the stronger. 'Nascent society gave way to the most horrible state of war.' With the world 'at the brink of ruin', the rich closed ranks and established a political and judicial system that stabilized society on the basis of existing inequalities of power and wealth, and with a further 'progress of inequality' all but guaranteed.17

Such was, or must have been, the origin of society and of laws, which gave the weak new fetters and the rich new forces, irreversibly destroyed natural freedom, forever fixed the law of property and inequality, transformed a skilful usurpation into an irrevocable right, and for the profit of a few ambitious men henceforth subjugated the whole of mankind to labour, servitude and misery.18

If we now fast-forward to Rousseau's ideal state as outlined in the *Social Contract*, we find a system of private property in place, and the right of the first occupant enshrined.19 Has Rousseau changed his position on property? He has not. Rather, society has undergone a revolution. Mankind has been brought together into an association 'which will defend and protect the person and goods of each associate with the full common force, and by means of which each, uniting with all, nevertheless obeys only himself and remains as free as before.'20 And again, a little later, summing up the social contract, Rousseau says: 'Each of us puts his

17 Rousseau allows for three stages in the development of civil society, as there were three in the state of nature; each one more corrupt, and culminating in despotism.
18 Second Discourse 2:33. 19 Social Contract i.3. 20 ibid. 1:8-4.
person and his full power in common under the supreme direction of the General Will; and in a body we receive each member as an indivisible part of the whole. The terms are quite different from those dictated by the cunning few to the hoodwinked many at the inauguration of real civil societies. As to property, the right of the first occupant is the basis of the property arrangements, but that right is recognized only on certain conditions: that the land is not yet taken; that only so much land be held as is necessary for subsistence; and that the land be worked. It is a first occupancy carried out by men whose reason has been 'moralized' that receives the blessing of Rousseau, not the first occupancy of the state of nature. With his gaze fixed firmly on 'civilized' Europe, Rousseau concludes that its state of corruption can only have sprung from a first occupancy that amounted to unilateral usurpation, that took place before mankind was ready for it, and that did not respect the principle of equality, specifically, the equal access of all to the resources of the world. There is an implication that the property arrangements of real societies, which had in the first instance been carried over from the state of nature, and had subsequently undergone further development, would have to be transformed at the introduction of the ideal state of the Social Contract.

It is difficult to imagine such a transformation taking place without an element of coercion. Rousseau famously allowed for the forcible submission of the individual will to the general will: 'Whoever refuses to obey the general will shall be constrained to do so by the entire body: which means nothing other than that he shall be forced to be free: for this is the condition which, by giving each Citizen to the Fatherland, guarantees him against all personal dependence.'

Immanuel Kant (1724–1804)

Kant lectured in philosophy at the University of Königsberg (now Kaliningrad). Among his students in the 1760s was Johann Gottfried

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124 Ibid. t.6.9.

125 See Bertran (2001), 89–96, who cites other statements on property in Rousseau's works, of which the most interesting are Discourse on Political Economy 46 (Gouverneur 3); a ringing endorsement of private property but in purely general terms; and The Constitutional Project for Carcass: Genres Complets Ill. 932–4: 'Far from wanting the state to be poor, I should like, on the contrary, for it to own everything, and for the individual to share in the common property only in proportion to his services ... In short, I want the property of the state to be as large and strong, that of the citizens as small and weak, as possible.'

125 Social Contract 1.7.8. See Tuck (1999), 197–207, for similarities (and differences) between Rousseau and Hobbes; and below, p. 170 for compulsion in Kant.
Herder, a friend of Goethe and an icon of the German literary revival of the 1770s. Herder's correspondence includes an engaging pen-picture of his teacher: 'In the prime of his life, he had the joyful cheerfulness of a young man which, I believe, remains with him in his most advanced years. His broad brow, built for thought, was the seat of an indestructible serenity and joy. Words, full of ideas, flowed from his lips, jocularity, wit and humour were at his disposal, and his didactic discourse was like the most entertaining conversation ... I recall his image with pleasure.'\(^2\)

In the mischievous cartoon of 1849 with which I introduced this topic of the origins of property (in Chapter 5), a teacher of Roman law at the University of Leipzig, Theodore Mommsen, is shown at the podium, vigorously propounding the thesis that 'Property is Theft.' The message that the young Herder is likely to have heard from Kant is: 'Property is Freedom.' Kant held that it was the right and duty of a man, as a rational, autonomous individual, to own property.

Kant's discussion of property is concentrated in *The Metaphysics of Morals* (1797). It would be best to begin our discussion with *The Grounding of the Metaphysics of Morals* (1785), wherein Kant sets out the underlying premises of his moral philosophy, above all his concept of a moral law grounded in Reason, and his vision of a moral society composed of individuals who are moral authorities in their own right and respect the moral agency of their fellows. Private property was a central institution of the Kantian moral society.

Kant as moral philosopher set himself the task of enunciating principles or laws to serve as the basis of morality. His leading ideas were freedom and equality.\(^3\) The individual is a free, independent and rational person or will, who is capable of making his own decisions about what he ought to do, and is duty-bound to do so. His freedom is a right, deriving from his intrinsic worth.\(^4\) All other rights follow from this right. Further, they are held by us as persons equally, commoners included. Kant had learned from Rousseau that ordinary people were worthy of respect. He was himself the son of a harness-maker, who by sheer talent had climbed up the academic ladder in his local university, and gradually attracted attention and finally fame in the world outside, into which he did not

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\(^2\) *Herder, Briefe zu Beförderung der Humanität*, no. 79, quoted Reis/Niches 105 in their edition of Kant's *Political Writings*.

\(^3\) For Kant as 'the philosopher of the French Revolution', see *Political Writings* (Reis 3). The third ideal of the Revolutionary, fraternity, is perhaps picked up in Kant's notion of the 'kingdom of ends'. Kant of course followed with dismay the degeneration of the Revolution into the Terror.

\(^4\) *Grounding of the Metaphysics of Morals*, 434–1 (Ellington 40).
venture. One can express the same idea of human worth or dignity by characterizing an individual as an end in himself, and furthermore as a member of a 'kingdom of ends'. By this is meant 'a world of rational beings', a systematic union of different rational beings governed by common laws. In short, a moral community of free and equal members each of whom behaved as autonomous individuals while living in harmony with one another.

In so far as we are rational and free we are morally autonomous: we dictate the moral law to ourselves. This is a universal law. 'Just this very fitness of his maxims for the legislation of universal law distinguishes him as an end in himself.' Kant calls his law 'the categorical imperative', and expresses it as follows (there are a number of variants): 'Act only according to the maxim by which you can at the same time will that it should become a universal law.' Or, in a different formulation (which may not be equivalent): 'Act so that you treat humanity, whether in your own Person or in that of another, always as an end and never as a means only.' The categorical imperative, while directed at ourselves, carries rights and duties for other people as well. It lays down rules and formulates claims which must be consistent with the innate right to freedom of all those who might be affected by them.

It is Reason that gives us the laws of morality. No other basis for moral law is acceptable. 'There is no genuine supreme principle of morality which does not rest on pure reason alone.' Any external source of authority has to stand before the Tribunal of Reason. The founder of Christianity is himself subservient to the moral rule springing from the legislating intelligence which is the rational agent. 'Even the Holy One of the Gospel must first be compared with our ideal of moral perfection before he is recognized as such.' As an instance of the defectiveness of Jesus' law, Kant cites the 'trivial' Golden Rule, 'Do not do to others what you do not want done to yourself.'

117 Ibid. 438: 435.
118 'Kant invented the conception of morality as autonomy.' So Schneewind (1998), 1, in his first sentence.
119 Grounding 438.
119 See ibid. 464 for the categorical/hypothetical imperative distinction. On the categorical imperative, Foon (1997) is still useful. For a brief critique of the concept, see McIntyre (1998), 186–93.
120 Grounding 409. 119 Ibid. 408.
120 Ibid. 430. 123 Ibid. 430 n. 23: 'It is merely derived from our principle, although with several limitations. It cannot be a universal law, for it contains the ground neither of duties to oneself nor of duties of love toward others. . . . Nor finally does it contain the ground of strict duties toward others, for the
Thinking about Property

It would be equally mistaken to ground our ethical system as the classical Greek philosophers had done on happiness or the good. That would be to substitute inclination for Reason, and therefore to build our house on shifting sands. Happiness is an indeterminate concept: 'Unfortunately, the concept of happiness is such an indeterminate one that even though everyone wishes to attain happiness, he can never say definitely and consistently what it is that he really wishes and wills.' But also, whether or not our desires will be fulfilled depends on something that is not in our control, namely the constitution of the world, and so moral evaluation would have a contingent element, which was anathema to Kant.

As for a 'mixed' moral philosophy, 'compounded both of incentives drawn from feelings and inclinations and at the same time of rational concepts', that was no solution, because it would be seriously dysfunctional. It 'must make the mind waver between motives that cannot be brought under any principle and that can only by accident lead to the good but often can also lead to the bad'.

Kant strips us down to pure intelligence, discarding all our empirical properties. We can be certain that we are rational beings. We can be equally certain that there is one thing and one thing only that is morally good without qualification, a good will. (Kant begins The Grounding with this dictum.) The will does not waver, 'it can never conflict with itself'. Equipped with a reason-directed will, one can arrive at maxims for behaviour that are not contradictory, and one can begin to put together a picture of what a society would look like which is peopled by individuals who legislate moral laws for themselves, even if they cannot always abide by them (as Kant readily concedes).

So much for Kant's conceptual apparatus, in brief summary. He does raise the issue of proof at several points of the Grounding, but only to palm it off. His construction, he tells us, depends not on any proof, logical or empirical, but on the conviction that the mass of ordinary people accept the necessity of moral behaviour and recognize in themselves a capacity, as autonomous agents, freely to choose between the morally good and bad. A sceptical age such as ours does not share his confidence.

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\(^{94}\) Grounding 418. \(^{95}\) Ibid. 411. \(^{96}\) Ibid. 437. \(^{97}\) Ibid. 444-5.
A feature of the Kantian moral society, as already intimated, is that rights of property are guaranteed and protected. These rights rest on a postulate of moral reason, according to which there is an integral relationship between the possession of private property and the exercise of freedom. This has the status of an a priori proposition. It is a mixed proposition because it embraces the empirical notion of property. It is a synthetic, a priori proposition of right that every free person has a right to private property. Because a universal law is in question, everyone else is placed under an obligation to refrain from using the particular external objects, and the individual imposes on himself a reciprocal obligation to respect the rights of others to external objects of their choice.

Property rights are 'conclusive' only within the framework of civil society. 'It is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone with this assurance [i.e., that one's freedom as a property owner will not be infringed].'

This casts a shadow over first acquisition, which is a unilateral act. Unless first acquisition is in some way authorized by the moral law, continuity of possession between the pre-civil and the civil condition is in jeopardy. Kant does not follow the natural rights theorists of the seventeenth century in fixing property rights in the state of nature. His way round the difficulty is to admit a category of 'provisionally rightful' (as distinct from 'conclusive') possession, which is 'possible' prior to civil society, as long as it proceeds 'with a view to', and is 'leading to', the civil condition. Such 'compatibility' with the introduction of a civil society means that the individual is 'the better placed' in any conflict over his act of acquisition.

How is it exactly that the individual gets an edge over any challenger? How does his act achieve the status of compatibility with the law of a moral society? Kant answers that 'provisionally rightful' acquisition does not consist merely in empirical possession, but engages the will, the rational, free will of the individual. It is a will that has set its sights on entering civil society.

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195 *Metaphysics of Morals* 6:166. At the tail-end of the whole discussion, Kant introduces for the first time the word *dominion* instead of *possessio*, to underline the point that right to property is consummated only in a civil society. See 6:270.

196 Equally, Kant rejects their view that prudential motives provide a sufficient and satisfactory explanation for the institution of civil society.

197 A closely related idea is that the will establishes 'intelligible' (noumenon) rather than 'physical' (phenomenon) possession, inasmuch as, e.g., an apple from my tree is mine even if it is not in my grasp. See 6:247.
As the argument proceeds it is disclosed that the involvement of the will makes external acquisition a duty as well as a right. It is a duty which binds others: they have an obligation to give their consent. Their consent to external acquisition, however, carries with it consent to the establishment of a civil society, in which alone possession is based on (public) law. Finally, and remarkably, any who are opposed to entering civil society may be forced into it, 'since leaving the state of nature is based upon duty'. All in all, provisional acquisition in the state of nature is true acquisition. The state of nature can be seen as a civil society-in-the-making.

The admission of the 'principles of right' into the state of nature, if only in a provisional way, produces another, striking consequence, that the concept of *res nullius* is condemned as incoherent. To classify a thing as belonging to no one, to put something which is usable beyond the possibility of being used, is to deny us our freedom to acquire. Thus first acquisition necessarily presupposes possession in common: 'Unless such a possession in common is assumed, it is inconceivable how I who am not in possession of the thing could still be wronged by others who are in possession of and are using it.' Similarly, I can only bind another to refrain from using a thing if he is a possessor-in-common, and joins with others who possess it in common to accept an obligation not to use the thing.

What Kant calls 'original possession-in-common' is not an empirical concept and has nothing to do with any historical or pseudo-historical community. It is 'a practical rational concept which contains, a priori, the principle in accordance with which alone people can use a place on the earth in accordance with the principles of right'. Kant had stated in the introduction of *The Metaphysics of Morals* that his search for moral laws was not to be confused with 'moral anthropology', which deals only with 'subjective conditions in human nature'. He goes on to give the assurance that he will not be founding his moral law on the laws of nature, but rather on the laws of freedom. Kant was distancing himself from David Hume, who mistakenly looked for the origins of justice in man's pre-social psychological and cultural development.

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120 *Metaphysics of Morals* 6:14677; cf. 165: 312. 121 Ibid. 6:1465. 122 Ibid. 6:1461.
123 Ibid. 6:1462. For that reason, Kant's dictum on the impossibility of *res nullius* is not a direct challenge to the Pufendorfian negative community, out of which mankind is supposed to have progressed, via positive community, into a regime of ownership.
124 Ibid. 6:147-148.
The state of nature: Grotius to Hegel

So it is worth paying attention when Kant manages to escape from the straitjacket of his conceptual scheme, as he does briefly in two essays, *Idea for a Universal History with Cosmopolitan Knowledge* (1784), and *Conjectures on the Beginning of Human History* (1786), published in a learned periodical out of Berlin, a year before and a year after *The Grounding*. In the earlier essay he states that his subject matter will not be metaphysics but history, not the concept of the free will, but the operation of the will 'in the world of phenomena, that is, human actions'. But he has in mind 'universal history' rather than 'history proper'; he is not offering a narrative of events, but will be attempting to lay down general historical laws. He is not optimistic about the possibility of achieving in the realm of human action what Kepler or Newton did in the field of science (a comment at Hume's expense?), but still manages to come up with nine propositions. The later of the two essays is introduced as a *jeu d'esprit*, an 'exercise in the imagination', 'a healthy mental recreation', a 'pleasure trip'. We are grateful for the essays, however slight they might appear in the eyes of their author. They bring Kant into closer contact with his predecessors from Grotius to Rousseau than his quasi-theological dogmatic is able to do.

The later-composed of the two essays tells the story of human development in the state of nature, and I take it first. Kant takes the Bible as a guide. This in the Age of the Enlightenment is something of a surprise, but Kant is dogging the footsteps of Herder, the first instalments of whose *Ideas on the Philosophy of the History of Mankind* (1784–91) he had recently reviewed in critical vein (causing a breach in their relationship which was never repaired). Kant also (more significantly for us) is in dialogue with Rousseau. The story begins with a man and a woman in a garden, happy in 'the womb of nature'. Kant imagines them 'not in their wholly primitive state, but only after they have made significant advances in the skilful use of their powers', over, he presumes, 'a significant interval of time'. Kant is following Rousseau's lead in placing his Golden Age after a primitive stage of savagery. In this way he neatly weaves together into one story the two distinct traditional narratives of the Golden Age and the state of nature.

165 *Berlinerische Monatschrift* IV and VII. The essays are translated with notes in Reiss/Naßgärtner 41–53, 229–34. See also their editorial introduction to Kant's Review of Herder's *Ideas*, and to *Conjectures*, 192–200.

166 *Conjecturen* 192 (Reiss/Naßgärtner). 167 Ibid. 222.
Thinking about Property

Reason disturbs the peace of the couple, showing them how to be inventive in diet, to choose between alternative ways of life, to think constructively about the future, and above all, to appreciate that mankind is an end in itself. This first ‘taste of freedom’ carries the ‘penalty’ that they must depart from the garden and follow the path towards perfection under the guidance of reason. Rousseau’s doctrine of perfectibility comes to mind, and its author soon surfaces in the discussion and is given sympathetic treatment. The tension between man’s ‘aspiration towards his moral destiny’ and his nature as a physical species engenders conflict and misery, which are exacerbated as the economy evolves through the traditional stages. The arrival of agriculture is accompanied by permanent, defensible settlements and the private ownership of land. In such communities sociability acts as a unifying, and inequality as a divisive, force. Rousseau, we are told, did not appreciate that inequality may have produced evil in abundance, but is also the ‘source . . . of everything good’. Kant provocatively draws a parallel with international affairs: war between nations is ‘an indispensable means’ of securing cultural advancement.

The correct response to man’s predicament is not to sink into a malaise as do some ‘thinking men’ (as Rousseau did?). So to the upbeat conclusion: ‘We should be content with providence and with the course of human affairs as a whole, which does not begin with good and then proceed to evil, but develops gradually from the worse to the better. Each individual for his part is called upon by nature itself to contribute towards this progress to the best of his ability.’

The Idea for a Universal History goes some way toward bridging the gap between the empirical and the metaphysical Kant, because it ‘to some extent follows an a priori rule’. In Conjectures, Kant had seen early humans depart from paradise and set off on the path of progress. In Idea for a Universal History, he looks ahead to their entry into civil society. The Fourth Proposition holds the key:

*The means which nature employs to bring about the development of innate capacities is that of antagonism within society, in so far as this antagonism becomes in the long run the cause of a law-governed order. By antagonism, I mean in this context the unsocial sociability of man, that is, their tendency to come together in society, coupled, however, with a continual resistance which constantly threatens to break this society up.*

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13 Kant mentions property only here, at 239; in Rousseau’s Second Discourse it plays a leading role. 14 Conjectures 230. 15 Ibid. 234. 16 Ideas 39 (Revis/Niches). 17 Ibid. 44, original emphasis.
In Rousseau rivalry and emulation are seen as utterly destructive. Kant disagrees: ‘Without these asocial qualities (far from admirable in themselves) which cause the resistance inevitably encountered by each individual as he furthers his self-seeking pretensions, man would live an Arcadian, pastoral existence of perfect concord, self-sufficiency and mutual love.’ He would be as ‘good-natured’ – and empty of value – as the sheep he tended, his rational nature ‘an unfilled void’. Nature deserves our gratitude for promoting ‘social incompatibility, enviously competitive vanity, and insatiable desires for possession or even power’. These qualities, and the conflict and misery they produced, forced humanity out of ‘the state of savagery’ (alias the ‘state of nature’) into a civil constitution in which their capacities would no longer lie dormant.

There is a catch. Civil society would remain defective and the human species less than perfect so long as antagonism between states is maintained. Kant offers a final bouquet to Rousseau.\textsuperscript{114} If we bear in mind the present state of international affairs, ‘Rousseau’s preference for the state of savagery [over existing civil society] does not appear so very mistaken . . .’\textsuperscript{115}

CONCLUSION

Two basic narratives of the life of early man were laid down in classical antiquity: one told of decline from a primeval Golden Age (and there was a Judaeo-Christian version of this theme derived from Scripture); the other traced man’s development from savagery through barbarity to civilization. Neither story was without ambiguity; thus, for example, Golden Age storytellers exposed and exploited a tension between technological and cultural progress and moral regress. Some writers, Lucretius, Grotius and Rousseau, for example, drew from both traditions, and their accounts were the more equivocal and complex as a result. The history of these traditional narratives as they passed through the hands of philosophers, theologians and lawyers over many centuries is itself a fascinating subject; my main preoccupation has been to explore attitudes to property in so far as they emerge in the pertinent works. It goes without saying that there is a great deal of variety in the way property is treated, reflecting the differing aims, ideologies, backgrounds and historical contexts of the writers in question.

\textsuperscript{114} See \textit{Idea}. Proposition VII; and the essay of 1795 (rev. 1796), \textit{Perpetual Peace, a Philosophical Sketch}, in \textit{Ranke/Nisbet} 93–110.

\textsuperscript{115} \textit{Idea} 49.
In a number of these imaginative reconstructions of primeval society a role is given to first acquisition (occupatio). First acquisition is symbolic of the arrival of private ownership in the world. It is the first act in the dissolution of primeval communality, the order which, in one form or another, was universally agreed to have prevailed at the dawn of history. Some writers, certainly, did not give first acquisition their serious attention. Cicero in On Duties afforded it only a cursory glance, moving on with speed to press upon the governing class of Rome, at a time when the political order was visibly crumbling, the urgent necessity of respecting and safeguarding private property. Hobbes and Hume (among others) held that property institutions were purely conventional and existent only in the context of civil society. Accordingly they had only limited interest in tracing their origins. For Locke and Hegel property rights did not hang on first occupation as such, but on the fact that the agent actively worked the land (Locke), and that he was a free will (Hegel).

Through much of the period under survey, Christian doctrine played a crucial part in shaping the discussion. The consequences of its influence were not uniform. In one set of narratives, ownership was labelled a creation of fallen man, an institution of a corrupt society, and allowed no part in the state of nature. The authoritative first digest of canon law assembled by Gratian in the mid-twelfth century stated quite baldly that private property was wrong, being in contradiction of the original communality established by divine law (equals natural law). Caught up in Gratian’s slipstream, medieval canon lawyers moved to salvage the reputation of private property by characterizing communality as non-normative, and placing the institution of private property within a narrative that followed the advance of man out of a state of extreme primitiveness, guided by God-given reason. Natural jurists of the early Enlightenment such as Grotius, Pufendorf and Locke, especially Locke, were still under the spell of Christianity. They too followed a progressivist trail, structuring their narratives around a three-stage development of early man as successively hunter/gatherer, pastoralist and agriculturalist. And, in a break from the medieval tradition, they located property in the state of nature, thus giving it the status of natural law, even if of a lower order. Grotius and Pufendorf (not Locke) introduced the significant innovation that the establishment of private ownership was conditional

\[\text{See Ch. 3.}\]
on the whole community’s giving its consent. They evidently felt that first occupation without agreement, tacit or express, was not morally defensible. Locke elided the problem of first acquisition with or without consent (or so he may have thought) with the argument that there was both a right and a duty to own property, in accordance with God’s plan for man that he survive and increase – the main condition being that the land in question must be actively worked.

In the eighteenth century two accounts of first acquisition stand out, each idiosyncratic. Rousseau’s treatment of first acquisition and the emergence of property in general was hostile through and through. He denied the legitimacy not only of *occupatio* in the state of nature but also of the property arrangements (based on first acquisition) of an unreformed civil society. That Kant should have given attention to first acquisition at all is unexpected, given his conviction that the property institutions and rights were ‘conclusiva’ only in the framework of civil society (cf. Hobbes), and that the free, rational and autonomous will was the source of property rights (cf. Hegel). It seems that he was so concerned that the transition from natural to civil society be an orderly one that, in a tortuous argument, he conferred on first acquisition the status of ‘true’ acquisition, despite its ‘provisionality’.

Our survey of state of nature narratives through the ages has not led us to a solution of the problem of first acquisition. There is no Holy Grail. ‘It can fairly be said that no adequate theory of initial acquisition exists.’ ‘It is very hard to find a satisfactory principle of justice in acquisition. Perhaps it is impossible.’ For Proudhon it followed that property is theft. Other theorists have ‘moved on’, to confront another challenge, that of arriving at a satisfactory formula for the distribution of the resources of existing society. Organizing principles such as liberty, the happiness of the greatest number, and justice are among those that have been canvassed. Responses have ranged all the way from Karl Marx’s demand that private property be abolished altogether as a constraint on liberty, to John Rawls’ endorsement of the arrangements and principles that governed American constitutional, political and economic arrangements in his day. Few of the thinkers whom we have been considering...

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17 Gray (1986), 63; Wolff (1996), 118.
18 See Geuss (2004), 29–39, at 32. Rawls’ theory issues out of a discussion conducted by all members of the society ‘in the original position’. This calls to mind the Pufendorfian notion of agreements arrived at by early men in the state of nature. Marxist communism is obviously an echo (but no more) of primitive communism.
seriously addressed the problem of existing inequalities of wealth. It was standard practice, especially among those writers (pagan as well as Christian) who worked with the Golden Age myth, to expose in their narratives the abuse of wealth in contemporary society. Rousseau was unusual in advocating the equal distribution of property (so long as the General Will was in favour).

I have left a number of loose ends, among them the important matter of property rights: when and how the language of rights came into use, and how the sense and application of the term varied and was transformed. For surely the concept of ‘rights’ did not carry the same meaning for Cicero, Ockham and Hegel. To these matters I now turn.