Grotius and Pufendorf on Property

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1. Introduction

For some, property is an utter fiction. Proudhon famously said that all property was theft.[1] Rousseau disdainfully wrote:

> The first man who, having enclosed a piece of ground, bethought himself of saying 'This is mine', and found people simple enough to believe him, was the real founder of civil society.[2]

But, is property just a lie, something that in fact does not exist even though we act as if it does? At least since the Ancients, there have been many who thought otherwise. By the early Enlightenment, many political theorists were developing something approaching a materialist account of property. While they may have appealed to mysterious, unknowable or utterly subjective interpretations of divine will, many political theorists also described property as a social fact – something that exists in the social world as much as sports, governments and political authority. Property, on this view, is not an ineffable phenomenon. Rather, it has, in a manner of speaking, a tangibility. It is part of the way in which people live their lives when they live lives together.

I hesitate to say that there is a univocal view about the relationship between the social practices of a community and property. Some might have taken the practices to constitute property, others might have taken them to be something like a supervenience base for property and there are innumerable other accounts. But, there is one theme that

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[1] See Proudhon (1969).

[2] Rousseau, *A Discourse on the Origin of Equality*, Part II, Rousseau (1997), p. 161.

runs through these disparate accounts. Property is described as a response to a particular kind of social conflict, namely conflict about access to and use of resources. The response is, roughly speaking, for members of the population in which the social conflict recurs to coordinate their behavior in order to diminish the social conflict or even avoid it altogether. If we take this broad view of what a social practice is, then we can say that there is a tradition of analyzing property in terms of the social practice of coordinating behavior in order to overcome recurring conflict over access to and use of resources.

In this paper I offer some examples illustrating this theme. This goal of this paper is to offer arguments for any particular claim. Rather, its goal is to illustrate a tradition so as to situate my project within that tradition. To that end, I have assembled a few brief exegetical accounts of a range of philosophers' thinking about property. I have no intention of arguing that it is the correct view, although I obviously believe it is.

2. Aristotle

Although I shall not focus on classical sources, we can begin by very briefly considering one, namely Aristotle and his view of property as articulated in the opening chapters of the *Politics*. Property was central to Aristotle's conception of our political nature. He takes giving an account of property to be the 'natural beginning'[3] of any inquiry into what the best constitution would be. As a result, it is the first substantive issue he addresses after the introductory book.[4]

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[3] Aristotle *Politics* 1260b37 in Aristotle (1984), p. 2000. Below, I will cite only the Becker pages for the Aristotle texts. All translations are Jowett's from Aristotle (1984).

[4] *Politics* II begins immediately after giving his first argument about political authority in *Politics* I.3-7.

The best way to get at Aristotle's general thoughts were about property is to look at his argument for a particular distribution of property. In *Politics* II.5, Aristotle argues for a sort of limited socialism:

> Property should be in a certain sense common, but, as a general rule, private; for when everyone has distinct interest, men will not complain of one another, and they will make more progress, because everyone will be attending to his own business… It is clearly better that property should be private, but the use of it common…[5]

We can see that for Aristotle property is a matter of rules regulating access to and use of the land and its produce. Although Aristotle is clear that ought to choose property rights relations that structure the interactions of the citizens with respect to this access to and use of resources in a way that, according to Aristotle, would make everyone best off, it is not the case that property rights relations that fail to improve people's lives don't count as genuine cases of property. What makes something a property rights relation is that it is a system for coordinating behavior with respect to resources, regardless of how good the system is. In his argument for this claim (which I will not recapitulate here), Aristotle seems particularly sensitive to the problems of social conflict associated with access to and use of resources.[6] Aristotle recognizes that there are many different possible forms of property and that each goes some distance towards resolving social conflicts that emerge around a community's resources. He chooses the form of property he thinks will be most effective at preventing and resolving these conflicts.

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[5] *Politics* 1263a26-30, 39.

[6] See especially *Politics* 1263a14ff: "If [the citizens] do not share equally in enjoyments and toils, those who labour much and get little will necessarily complain of those who labor little and receive or consume much. But indeed there is always a difficulty in men living together and having all human relations in common, but especially in their having common property." Plato shares a similar concern about social conflict but his remedy is the opposite of Aristotle's: he argues for common ownership of all goods (at least among the Guardians). See *Republic* 416dff, Plato (1992).

Even though he focuses on the question of determining which form of property best suits his goal of constructing a political community that ensures a *eudaimon* life for all its citizens, Aristotle's discussion of property reveals his view that all forms of property share certain features. Aristotle takes all forms of property to be a social practice that provides rules for regular behavior in order to minimize conflict over the resources available to members of a community.

3. Hobbes

According to Hobbes, the state of nature is an "empire of passions…[and] solitude."[7] Each Hobbesian person exists in the state of nature either in constant fear of attack by another or constantly searching others to dominate. There is no social organization whatsoever. There is only fear and perhaps the pursuit of glory. Hobbes is quite clear that, in the state of nature, there is also no property.[8]

Why is there no property in the state of nature? Hobbes does not simply assert this. He offers a complex argument for the claim. I cannot possibly recapitulate it here. But we can identify a few of the conditions that, according to Hobbes, make property impossible in the state of nature. Hobbes argues that the main kind of social interaction in the state of nature is conflict. In particular, it is social conflict over the resources one needs to survive. The paradigmatic interaction is one in which individuals encounter each other and find themselves "desiring the same thing, which nevertheless they cannot both

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[7] *De Cive* X.1, Hobbes (1998), p. 116.

[8] *Leviathan* 13. Hobbes (1991), p. 90.

enjoy."[9] The obvious solution to such conflict is to coordinate behavior in such a way as to maximize limited resources and ensure a certain level of security and cooperation so as to facilitate the production of further resources.

But this is not so easily accomplished. Although persons in the state of nature may wish to coordinate their behavior so as to avoid conflict and ensure cooperation, they face two obstacles. First the subjectivity of their intentions and plans for cooperation leaves the parties who wish to cooperate unsure about each other's plans. One cannot knows for certain whether the other agent is willing to cooperate and, even in rare cases where there is mutual known interest in cooperation, plans for cooperation remain subjective. As a result, coordination of behavior is not feasible. These are the conditions that rule out property in the state of nature.

In order to establish property, people form civil societies in which they have stable expectations that their efforts to coordinate their behavior with others in order to reduce or entirely avoid conflict over resources will be successful. People form civil societies by establishing of a sovereign with absolute power. The function of the sovereign is to bring order to society and, most notably, to create the conditions necessary for the cooperation that generates property rights. The sovereign's accomplishes this by producing public rules and enforcing those rules. Property rights, then, are established in response to particularly nasty social conflict through the mechanism of public rules and forced compliance with those rules.

4. Grotius

[9] Ibid., p. 87.

Although Grotius was a natural lawyer, he famously argued that even one who does not believe in God would be convinced of his defense of property.[10] Grotius' main target, then, was a more general audience than those who shared his theological views. His target was all those who were skeptical about the possibility of natural law at all. Grotius himself gives us a good idea of what isn't natural law in a comment in *Mare Liberum* that was directed against those opposed to natural law:

> [Those opposed to natural law are those] who persuade themselves, or as I rather believe, try to persuade themselves, that justice and injustice are distinguished the one from the other not by their own nature but in some fashion merely by the opinion or custom of mankind.[11]

So, Grotius' natural law is not merely a matter of legislative action taken by persons who are living together in a political society. For these actions – which are mere extensions of the opinions or customs of the community – to be just (and therefore for them to be law), they must be "patterned after nature's plan."[12] It is not clear whether the legislators must intend to pattern their laws after nature's plan. Minimally, we can say that a necessary (but perhaps not sufficient) condition for legislator's decrees to have the status of law is for them to somehow meet the independent criterion of 'fitting' with whatever would count as nature's plan.

What does Grotius mean by 'nature's plan'? At first, one might take him to be asserting that there is a pre-determined historical progression of human society each

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[10] This is the famous *etiamsi daremus* clause found in *De Jure Belli ac Pacis* (*DJBP*), Prol. 11, Grotius (1853), p. xlvi: "What we have been saying would have a degree of validity even if we should concede 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." All quotations from *DJBP* are from this edition and translation.

[11] *ML*, 1, Grotius (1916), p.

[12] *De Jure Pradae Commentarius* (*DJPC*) 229, Grotius (1950).

moment of which has certain institutional arrangements. This view is far too strong. Rather, nature's plan should be understood more as the rules according to which natural features of the world. Thus, the apparently rule-governed process by which acorns grow into oaks or spring turns to summer are all parts of nature's plan. These processes are general processes, though: that a particular acorn falls at a particular moment and rolls to such and such a place and then itself grows to be an oak tree is not determined by nature's plan. Rather, nature's plan should be understood as almost entirely general rules of development. The particulars are left up to chance or, as in the case of law, opinion or custom.

So, what is nature's plan with respect to property? What are the rules according to which property develops? In order to work this out, we must look to the natural history of property given by Grotius. First of all, the *suum* – what is one's own – originally consists only of one's own body. This emerges from a God-given right to preserve our persons.[13] This, though, does not grant us ownership over items that exist outside of our bodies. So, what are the origins of property rights in all things other than our own bodies? According to Grotius, property results from natural – and therefore just – extensions of this original *suum* from our bodies to objects outside of our bodies. There are two kinds of justifications that he gives for this extension of exclusive property rights from the body to other objects. The first is a sort of natural history of property that depends heavily on biblical narratives and other myths. The second is a sort of rational history of property that justifies property in terms that are consistent with the natural history but that do not depend upon dubious historical claims. Let us consider each in turn.

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[13] The appeal to a God-given right of self-ownership appears to be the main instance of Grotius appealing to divine will for justifications.

According to Grotius, there was once a Golden Age when all things were commonly owned. This was a very limited form of common ownership: all people had liberty-rights to remove what they needed from the common:

> Everything was common and undivided, as if all had one patrimony. Hence each man might take for his use what he would, and consume what he could.[14]

This liberty-right to use is not a joint liberty-right such that the holder of the right was the world community. Rather, each individual had this liberty-right and did not need to seek the consent of her entire community prior to exercising the right. So, the all things in the world were for the taking by all people. Or, one might say that everyone was free to use the resources of the world.[15]

But, this liberty-right was very weak: as we have seen, a mere liberty-right to use is not nearly as strong as private property. So, it is not at all obvious how one could go from such a weak liberty-right to the sort of robust property rights Grotius wanted to defend. The solution Grotius proposes turns out to be iterated in a variety of different forms in all the natural lawyers' accounts of the origins of property.[16] We shall now turn to this solution.

Grotius begins by considering what is involved in the exercise of a liberty-right to use. He points out that certain items can only be used once and this precludes the possibility of subsequent use. For example, in order to exercise one's liberty-right to use

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[14] *DJBP* 2.2.2.1, p. 228.

[15] This is the same sort of situation that Locke describes at the beginning of chapter five of the *Second Treatise* in which he discusses property (see II.25).

[16] This is not to say that Grotius was the first to conceive of this process by which a liberty-right to use was transformed into a bundle of robust property rights. Cicero, for example, hinted at a similar process.

food one finds in the common, one does not collect the food and store it in a tree or under a rock. Rather, one eats and digests the food. This renders the food utterly unavailable for any other humans to consume it subsequently. In other instances, exercising one's liberty-right to use might not utterly preclude the possibility of subsequent use. Instead, it might only seriously diminish the possibility of subsequent use. This might be the case when one cuts down a tree to build a temporary shelter. The shelter might quickly degrade and the materials used might be only marginally useful after that point. Finally, in almost all instances, concurrent use was impossible. So, in cases where one exercised one's liberty-right to use on items that had the aforementioned characteristics (e.g., food-items, clothes, etc.), one gained at the very least a claim-right to use a thing and a power to exclude others from that thing[17]:

> Hence each man might take for his use what he would, and consume what he could. Such a universal use was then a right, as [private] property is now. What each one had taken, another could not take from him by force without wrong.[18]

This process is entirely natural: we must eat and what we eat exists outside our body. And, in order to secure these exclusive property rights that emerge from this process, communities construct conventions – laws – whose content are the codification of these rights. These laws can only be agreed to through a consent-based process. Grotius wrote:

> The recognition of the existence of private property led to the establishment of a law on this matter and this law was patterned after nature's plan.[19]

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[17] But, as we shall see, very few of the other incidents of property are gained through this process. For example, one does not gain the right to transfer the object in question.

[18] *DJBP* 2.2.2.1, p. 228.

[19] *DJPC* 229

On this picture, the right to private property is grounded in the using up of a resource. Borrowing from the old Roman account of property, Grotius refers to this as 'occupation.' The basis for an analysis of occupation is Grotius' paradigm case of occupation: the consumption of food.[20] In this instance, we take hold of some object and ingest it so that we can digest it for nourishment. There are three distinctive steps: first, there is the taking hold of the object; second, there is the ingesting of the object; third, there is the digesting for the purposes of nourishment. Each prior step is a necessary condition for the occurrence of the latter step. It remains an open question when in this process occupation has occurred. It seems reasonable to say that occupation occurs at the first step if the obvious goal is the final step. But, without the final step being the clear objective, then it is not entirely certain that there is a difference between occupation and mere hoarding. And, while occupation does generate property rights, mere hoarding does not (because hoarding is not necessary for protection of the original *suum*, i.e., one's body). What about ingesting? This is a bit trickier. On the one hand, a competing individual cannot access the ingested food without doing damage to one's body. So, this seems appropriately grounded in the sort of appeals to a right to preservation that are the foundation of Grotius' theory. But, this is problematic. For, the property right is not

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[20] We might also consider a Ciceronian quote that Grotius cites approvingly at *DJBP* 2.2.2.1, pp. 228 – 229:

> Cicero compares this state of things to the theatre, which though it be common, yet when a man has taken any place, it is his.

Despite the fact that everyone has equal liberty to take any particular seat in the theatre, whoever occupies a seat by sitting in it prevents others from using it. This is not taken to be a violation of anyone's property rights nor an overreaching of one's liberty-right to take a seat in the theatre. Rather, it is the natural consequence of people using the theatre in the manner it was meant to be used. If people could not do this, then the theatre would either sit empty during performances or be the site of brawls instead of theatrical performances. The quote is from Cicero's *De Finibus*, III, xx, 67. See also the following quote from Seneca (*De Beneficiis* VII, xii): "The equestrian rows of seats belong to all the Roman knights; yet the place that I have occupied in those rows becomes my own."

generated just because it is difficult for others to access the ingested material. The property right is generated because the *without* ingesting the food, the consumer would surely perish. That is, the property right in the food does not emerge because the process of reaching into someone's body and taking out the food item almost certainly would involve doing immediate violence to the consumer (e.g., cutting him or her open). The exclusive property right in the food emerges because if the food is removed from the consumer prior to its digestion, the consumer will die from hunger. It is the fact that the consumer needs the food to live and not the fact that getting at the swallowed food will kill the consumer that grounds these initial exclusive property rights in food.

This squares well with Grotius' initial position that hoarding will not generate exclusive property rights. For, the goal of hoarding is not to ensure one's immediate survival. It might be reasonable to hoard in view of current or impending scarcity, but this version of long-term consumption would either require too much social organization (e.g., an already established property rights relation that would protect the hoarded material) for this stage in Grotius' natural history of property or it would make exclusive property rights in Grotius' 'golden age' depend a bit too much on the abilities of moral agents at that time to defend their stuff from invaders.

So, while the first two steps in occupation are necessary for something to become owned, they are not sufficient. Once the final step is added, all three steps are jointly sufficient.[21] The necessity of this final step reveals an interesting feature of Grotius' concept of occupation. It is not sufficient merely to consume or to possess something. Rather, occupation requires that the occupied thing be used. It must play some important

[21] An interesting question to ask, by the way, is whether the third step is sufficient on its own to establish ownership.

role in a publicly recognizable human endeavor. In the early 'golden age' period, there was no social organization, so the only recognizable human endeavor was survival and the only objects in which one could have rights would be those that one held in one's hand and consumed at that moment. But, once social institutions developed around these basic property rights, other human endeavors became socially recognized and this in turn grounded new forms of occupation:

> There we learn what was the cause why men departed from the community of things, first of moveables, then of immoveables: namely, because when they were not content to feed on spontaneous produce, to dwell in caves, to go naked, or clothed in bark or in skins, but had sought a more exquisite kind of living, there was need of industry, which particular persons might employ on particular things.[22]

Hence, occupation extended from mere consumption and digestion of food to agriculture and industry.[23]

This might seem to be an over-reaching interpretation of Grotius' theory of property. But, we should note that he argued that the positive law that encoded exclusive property rights was based on consent. Everyone had to agree to move from the primitive common ownership condition to a society that was structured at least in part by property law. The agreement necessary for this move was not explicit consent. Rather, Grotius had a fairly low bar for consent – merely not dissenting was sufficient. Behavioral evidence sufficient for tacit consent would have been the following of the property laws. This gives us good evidence that Grotius was deeply concerned that a community's

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[22] *DJBP* 2.2.2.4

[23] Grotius, in fact, traces the development of human productive processes in this natural history. Humans began as agriculturalists and, after the Flood, became more advanced in their productive techniques (*DJBP* II.2.ii.2). At the first stage, there was only very limited property rights and no organized society. At the second stage, highly organized societies developed and well-defined property rules emerged. (*DJBP* II.2.ii.3) Thus, the development of property proceeded gradually.

property be fully integrated in the activities of that community. So long as people structured their lives around property then they were giving consent to it. And, to structure one's life around property is nothing more than to have the property rules play some role in one's endeavors.

It is important to understand that, *pace* Filmer, Grotius does not require a meeting of all persons in which there is a unanimous vote to establish private property. The consent of all is not a necessary condition for occupation to result in appropriation.[24] Private property emerges from particular acts of occupation around which others willingly structure their activities. Since this is sufficient for the emergence of private property rights, Grotius must think that person A hundreds of miles away from person B explicitly objecting to B's occupation of F is not sufficient to rule out B's appropriation of F. This is particularly striking in two ways. First, it indicates that the primitive common ownership is rather odd. It is not *world* ownership, i.e., ownership of goods by all the moral agents in the world. On the other hand, individuals do have veto-power on *some* people's appropriation of certain goods. So, it is a very limited form of common right to use all goods with only certain people having veto power over each other's appropriation. This is a unique way of conceiving the original common ownership and it leads us to the second striking feature of Grotius' limited requirement of consent for property, namely what determines who has veto power. Apparently, one has veto power over another's occupation of some good insofar as that occupation affects one's projects. Insofar as one's projects cannot be affected by the occupation by some person of some good, then it seems that one's consent is not necessary for the occupation to result in appropriation.

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[24] See *DJBP* 2.2.2.4-5, pp. 232 – 234.

That is why Grotius' theory is not subject to Filmer's objection that there was never a time when all people in the world got together and unanimously voted to give up common property for a private property-based system.

Interestingly, there is a problem if one does not explicitly consent to property but also cannot act in any manner that would be sufficient for tacit consent. This would occur if the property law requires either that one was structure one's actions in a manner that is not possible or that one structure one's actions in an entirely irrational manner. For example, imagine if the property law stipulated that the sun's rays were owned by a person A. And, suppose A decided to exclude everyone from the sun's rays in much the same manner she might exclude everyone from the food she had cooked and placed on her plate to consume for dinner that night. People would find it impossible to follow this property rule. And, if no one could structure their behavior in the manner required by this law, then they would not be able to give tacit consent to the law. So, the consent requirement would not be met and this property rule would not be legitimate. That means that A would not have any exclusive property rights in the sun's rays. So, there is not only a consent requirement in Grotius' theory. There is also a requirement that people be able to structure their lives according to the property rules.

This fits nicely with Grotius' concern that one can have exclusive property rights in some F if one can signal to others in one's community that one has rights in F against all others. It is not enough merely to want something or to declare it to be one's own without anyone around to here one make such a proclamation. Rather, in order to occupy an item, there must be some mechanism by which one can 'mark' the item as one's own.[25]

This mechanism can be as simply as grasping the item or as complex as the most complex social conventions. We might call this requirement the 'signaling requirement.' In instances in which signaling of ownership rights is not possible, ownership is not possible. Furthermore, since signaling almost always requires organized society, property can only exist given a background of consent:

> And thus we learn how things became property; not by an act of the mind alone: for one party could not know what another party wished to have for its own, so as to abstain from that; and several parties might wish for the same thing; but by a certain pact, either express, as by division, or tact, as by occupation....[26]

So, occupation also requires the possibility of signaling to others that one has taken control of the object in question.[27] And, in the pre-societal state, only items that were immediately used and/or constantly guarded could meet this requirement. Otherwise, no one would have known that someone had property rights in the object.

These possibility requirements square with the basic elements of Grotius' natural history of property. As mentioned above, in his natural history, the natural right to private property is grounded in the using up of a resource. If the resource can neither be used up nor used at all then it cannot be subject to property rules. Grotius, then, makes the purely conventional component of property secondary or posterior to what might be called the natural component of property: for something to be ownable, it must be nomologically possible to occupy it.

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[25] This presages Hegel's claim that marking something is sufficient for gaining property rights in it. But, the rather involved reasons given by Hegel are distinct from the more common sensical reasons offered by Grotius.

[26] *DJBP* 2.2.2.5, p. 233.

[27] Interestingly, this means that property rights cannot exist in a 'community' of one. Pufendorf notices this: "For community [held property] implies a sharer in the possession, and proprietorship connotes the exclusion of another's right to the same thing, and so neither is intelligible before more than one man has come into being." *De Jure Naturae et Gentium* (*DJNG*) 4.4.3, Pufendorf (1964).

This is precisely the point on which Grotius relies to make his argument in *Mare Liberum*[28] that no one (he was focusing on the Portuguese but his point was meant to be general) can lay claim to the open sea because it cannot be occupied. While it might be possible to take hold of a portion of the sea, it is not possible to consume that area such that others cannot make use of it. While it might be possible to do so if one had a constant presence in the area. But, that would not be a natural consequence of the universal natural liberty to use what is common. Rather, it would amount to hoarding and would not generate a property right. The comparable case would be someone who after consuming all that she needed to survive insisted on taking the food from the plates of those around her and claimed that this food was hers as well. Her rights to the food she consumed are grounded in the fact of nature that in order for her to survive, all other must be excluded from this food since she needs to convert all of it into energy so that she can live. But, the extra food will only sit unused until she chooses to consume it. During that period when it is not being consumed, it is not being occupied. The same thing goes for the sea. Of course, while a particular ship traverses a particular area of the sea, the crew or the captain (or the state from which the ship hails) might have temporary claim to that area of the sea. But, once the ship has passed, that part of the sea returns to the same state as it was in prior to the ship's passing. That is, it has not been used up in any way. Thus, to prevent others from traversing that part of the sea would amount to hoarding just as preventing others from consuming one's extra food would amount to hoarding. That it is possible to prevent people from traversing part of the sea or from consuming one's hoarded food is not reason enough to claim property rights in those items.

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[28] He recapitulates the argument at *DJBP* 2.2.3.1 – 2, pp. 234 – 5.

If all that Grotius offered us was this natural history of private property, then his theory would not be worth such scrutiny. For, it relies extraordinarily heavily on Biblical sources. But, this natural history of property can clearly be taken to be a metaphor for a more formal theory of property. This theory, which we can call the rational history of property, grounds exclusive property rights in the natural sociality of humans. Like Aristotle (and *pace* materialists such as Hobbes), Grotius argued that humans are naturally social:

> Man is, to be sure, an animal, but an animal of a superior kind, much farther removed from all other animals than the different kinds of animals are from one another; evidence on this point may be found in the many traits peculiar to the human species. But among the traits characteristic of man is an impelling desire for society, that is, for the social life – not of any and every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his kind; this social trend the Stoics called 'sociableness' [*oikeosis*].[29]

Grotius sees human beings not only as seeking society for the reason that we can meet our needs only if we live socially. For, as Grotius and others knew well, a sufficiently resourceful person can survive entirely cut off from society. Rather, the natural human capacities for living a life according to rational principles can only be realized in a social setting. We are compelled to be part of a certain social order because we can best exercise our natural intelligence and linguistic abilities, which are the features that distinguish us from other animals, by living in an organized community with others:

> The mature man in fact has… an impelling desire for society, for the gratification of which he alone among animals possesses a special instrument, speech. He has also been endowed with the faculty of knowing and of acting in accordance with general principles. Whatever accords with this faculty is not common to all animals, but peculiar to the nature of man.[30]

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[29] *DJBP*, Prol. 6, p. xli.

What Grotius is saying here is that people are naturally inclined to organize their lives, as Grotius puts it, "according to the measure of [their] intelligence[s]." And, such organization requires the structure of a well-organized society.[31] For, members of a well organized society – or members of a society whose understand their society as well-organized – will see a far greater part of their world organized according to rational principles than hermits. Hermits and animals capitulate to the whims of nature. They conform their behavior to the conditions in which they find themselves and thus cannot truly act "in accordance with general principles." Or, perhaps they can live according to general principles but only the most general ones, e.g., do what's necessary to stay alive. But, the general principles that concern Grotius are far more subtle and involved. Those who dwell in a well-ordered society experience the world differently. For, life within a well-ordered society is life in a world that is highly structured and whose structures make sense to them. These social structures seem to the individual to be, at least to a certain extent, self-generated and self-perpetuating. Thus, their experience is of a world that conforms to their conception of order. Thus, since human beings are impelled to live in a world that reflects their natural intelligence, they are impelled to live in societies and not merely as hermits.

The subtler rational principles generated by our intellect and according to which people are naturally inclined to live involve the recognition of oneself and other persons as moral agents who have distinct moral lives. This is not a full-blown Kantian

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[30] *DJBP*, Prol. 7, p. xliii.

[31] Tully claims that Grotius' concept of sociableness is nothing more than a 'negative duty of respecting what belongs to others.' (Tully (1980), p. 86). This is far too simplistic. Grotius does not assert that there is this special negative duty without offering some sort of justification for claiming that such a duty exists. And, his justification in this case is to appeal to the supposedly natural human drive to live in accordance with rational principles.

recognition of others as self-directing rational agents. Rather, it is more of a recognition of each other as moral agents who can be property holders who might have moral claims against one another.[32] In other words, we seek a well-ordered environment in which we can engage in our own projects (from nourishing ourselves to writing books) which entails that a certainty that others will not prevent us from doing so (and if they do prevent us, that they will pay reparations for damage done).[33] This is the fundamental basis of our natural sociableness. Our intellect drives us to organize the world in a manner that conforms to general principles that entail moral distinctions between one another. Thus we naturally seek for ourselves the security of being recognized as moral agents and as a result we seek to establish and maintain a social order. This social order is the foundation of law and, in particular, property law. Property arises out of and most conform to our natural rational capacities:

> This maintenance of the social order… which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfill promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.[34]

So, it is hardly a bare utilitarian drive to form social order that grounds property for Grotius. The expediency of property law merely reinforces its existence. Instead, we are compelled by our natural rational capacity to construct a world in accordance with the principles we generate by exercise of that capacity. Not to live in a well-ordered world

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[32] *DJBP*, Prol. 8, p. xliv.

[33] Ibid.

[34] Ibid.

would be to fail to live in a human manner – it would be akin to a fish choosing not to swim or a bee living outside of a hive. While one might say that it is expedient for these animals to live otherwise, it is not this expediency which drives fish to swim or bees to live in hives. Rather, living in such a manner is merely an expression of their natural capacities – the capacities that make them what they are. Although not reducible to expediency, though, the law of nature that drives humans to live in society (and animals to live as they are meant to live) 'has reinforcement of expediency.'

One point to notice here is that even this rational history of property involves the same kind of tacit consent that the so-called natural history of property involves. We can see this if we look closely at the sort of consent that is sufficient in Grotius' natural history of property. In this history, the behavior sufficient to signal the consent necessary for legitimate property is mere guidance by property rules without objection. A sufficient sign of this engagement would be following the property laws of the community. And, since property is all-encompassing and structure every aspect of our lives, guidance by the property norms without objecting is nothing less than organizing one's life according to general principles of property. But, this is exactly what Grotius argues in his rational history of property is constitutive of property. So, we can see the two lines of argument converging.

One might argue that this notion of consent is dangerously thin: everyone consents to nearly all rules that either are enforced with sufficient vigor or are sufficiently entrenched. This makes it far too easy for a tyrant to create conditions in which those who are under her rule are taken to have consented to that rule. This is not an entirely fair charge against Grotius. For, he requires that people willingly construct their lives around

the property rules. Wholesale rejection of property is a major form of resistance and it necessarily prevents one from engaging in any organized endeavor for one is rejecting simple distinctions such as mine from yours. This is not entirely what happens when one rejects a particular regime. One can easily reject a particular political regime yet nonetheless embrace many of the laws that structure that political society. This is not the case with property. The depth of property's influence on our lives far exceeds that of a political regime. So, there seems to be plenty of room to reject the claim that the sort of consent involved in accepting property is equivalent to the sort of consent involved in accepting a particular political regime: it must be possible to engage in behavior that shows clear rejection of the latter but that would not do so in the case of the former.

From this initial point of convergence in the two theories follows an additional and very important point of convergence. In the rational history of property one can find what I called above the 'natural component' of property, or the requirement that consent to the property rights be nomologically possible. Because consent is a necessary condition for legitimate property and this consent is rather robust (despite the fact that it is tacit consent), there are significant limits on the form of property that can develop in a society. If it is not possible to organize (at least part of) one's life around a particular property rule, then it would not be possible to give even tacit consent to it. Thus, contingently impossible to follow rules, such as property laws that allow for objects such as the Sun or the Moon to be owned, are property rules to which no one can give their consent. So, they cannot conform to the property rules that adopted by people so that they can organize their lives 'according to the measure of their intelligence.'

We can see that these two 'histories' of property actually coincide at crucial points. In both cases, property is grounded in human beings naturally being driven to establish social order in response to recurrent social conflict. In both cases, mature property rights relations arise out of human beings' public coordination with goal of furthering their projects. Property is never the result of the bare exercise of power. Rather, property is part of the fabric of the public social order that allows people to engage in endeavors that are recognized by other humans as expressions of natural human intelligence.

5. Pufendorf

Samuel Pufendorf's theory of property closely resembles the Grotian theory of property. Like Grotius,[35] Pufendorf uses a 'natural history' argument to present his theory of property. Unfortunately, he does not obviously supplement this with a rational history of property in the more explicit manner that Grotius supplements his theory.[36] Also like Grotius, Pufendorf grounds his theory in a fundamental right to self-preservation. Pufendorf argues that individual persons find themselves in conditions of extreme vulnerability. Pufendorf imagines a person "as dropped from somewhere into this world and left entirely to his own resources, with no help from his fellows after birth, and, furthermore, endowed with no more gifts of body and mind than are now generally discovered without previous culture." This person lives "a miserable and animal-like

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[35] While Pufendorf draws upon the work of many theorists to make comparisons and contrasts, Pufendorf explicitly presents his theory as a response to the Grotian theory of property. Thus, the construction of his theory should be understood as a very straightforward dialectical engagement with Grotius' work.

[36] Actually, Grotius' two approaches to theorizing about property appear in two different works. Constructing a natural history of property is the primary method of *Mare Liberum* while the rational history is the primary method in his other works, esp. *DJBP*.

existence."[37] Pufendorf quotes Hobbes approvingly when he says: "…outside a state, there is only the rule of passions, war, fear, want, squalor, loneliness, barbarity, ignorance, ferocity…"[38] But, this vulnerability should not be understood primarily as a Hobbesian vulnerability to others attacking us. Nor should it be understood as the vulnerability of the pre-societal human; it is a much deeper vulnerability. It is our vulnerability as animals that need food, shelter and clothing in order merely to survive:

> Such is the constitution of man's body that it cannot live from its own substance, but has need of substances gathered from outside, by which it is nourished and fortified against those things which would destroy its structure.[39]

Pufendorf uses a state of nature heuristic so that we can get a sense of how frail we are. But, this frailty hardly disappears once we are in a well-organized society. Rather, it is managed. And, it is managed primarily through property.

So, the initial force that drives the establishment of property (but is not sufficient for the establishment of property) is the recognition and establishment of the boundaries of one's person. Most fundamentally, these boundaries limn the contours of one's body, the objects connected to one's body and the immediate space in which one exists. For, it is within these boundaries that one can be directly injured and can feel the harshest of deprivation. And, what lies within these boundaries are what are one's own, these contents are the *suum*. And, this realm of the *suum* – this sort of original proto-property – must be respected by all. It does not require consent to establish this. Rather, it is a

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[37] *DJNG*, 2.2.2.

[38] Ibid., quoting *De Cive* X.1.

[39] *DJNG*, 4.3.1.

simple law of nature roughly in the sense that Hobbes used the term. It is a law of nature because everyone understands that they must follow it to avoid destruction:

> For such an animal [as humans] to live and enjoy the good things that in this world attend his condition, it is necessary that he be sociable, that is, be willing to join himself with others like him, and conduct himself towards them in such a way that, far from having any cause to do him harm, they may feel that there is reason to preserve and increase his good fortune.[40]

This sociableness is not nearly as robust as the Grotian sociableness which is deeply connected to our shared endeavors. On the other hand, it is far more optimistic:

> But by sociable attitude we mean an attitude of each man towards every other man, by which each is understood to be bound to the other by kindness, peace and love, and therefore by a mutual obligation.[41]

This grounds a *negative* community of property in which there is only a liberty-right to certain goods. In a negative community of property, things

> …are said to be nobody's, more in a negative than a positive sense; that is, that they are not assigned to a particular person, not that they cannot be assigned to a particular person. They are, furthermore, called 'things that lie open to any and every person.'[42]

This negative liberty to all things is so weak that one has the liberty to take what another person is using. For, once something enters into someone's *suum*, that is, once someone takes something no one else is using and begins to employ in order to 'live and enjoy the good things that in this world attend his condition,' it becomes part of their *suum* and thus ceases to be part of the negative community of goods. What makes this

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[40] *DJNG*, 2.3.15.

[41] Ibid.

[42] *DJNG* 4.4.2. See also 4.4.5: "…before any conventions of men existed there was a community of all things… that is, [a community in which] all things law open to all men, and belonged no more to one than to another."

occur? It is the sociableness mentioned above. We confront each other with 'kindness, peace and love' and thus respect each other's *suum*. So, Pufendorf's theory closely follows the Grotian theory.[43] Our natural sociableness makes us recognize that, given the necessity of employing material objects that lie in the negative community of goods in to stay alive and prosper, we ought to recognize a person's *suum* as extending beyond their body to include those things people use to stay alive. Thus, the mere liberty-right of the negative community of goods is transformed into a (only slightly more) robust claim-right to use. This is not a thin Hobbesian liberty-right to use, which offers scarce protection from the actions of others. Rather, Pufendorf's claim-right to use is a moral right that changes others' moral positions vis-à-vis the objects included in one's *suum*. And, *pace* Hobbes, this moral effect does not arise as a result of convention.[44] Rather, it arises because we are physically constituted in such a way that in order for people to respect each other's natural right to self-preservation, they must also recognize the extension of the boundaries of each other's *suum* to include the resources each of us has taken hold of in order to survive.

This claim-right to use, though, is not so strong as to ground a power to exclude. Once someone lays down something they have been using – or that they have created – they have no right to it. It ceases to be part of their *suum*.[45] So, Pufendorf explicitly

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[43] Pufendorf makes this point, with reservations, at many points. See esp. *DJNG*, 4.4.9.

[44] But, at *DJNG*, 4.4.9, he says that in the negative community, 'there was a tacit convention that each man could appropriate for his own use, primarily of the fruits of things, what he wanted, and could consume what was consumable.' But, this is far too weak a notion of convention and Pufendorf must have known that. For, in his main argument for the existence of use-rights in the negative community, he does not argue that they come from tacit convention.

[45] *DJNG*, 4.4.5.

disagrees with Grotius in that he argues that these two rights are not sufficient to establish actual property rights:

> …before any conventions of men existed there was a community of all things, not, indeed, such as we have called positive, but a negative one, that is, that all things lay open to all men, and belonged no more to one than to another.[46]

Perhaps they are rights, but only in the most extended of terms. He argues that true property rights can only be established by convention:

> …the grant of God, by which He allowed men the use of the products of the earth, is not the immediate cause of dominion [genuine property]… but that dominion presupposes absolutely an act of man and an agreement, whether tacit or express.[47]

Pufendorf argues that 'it is impossible to conceive how a mere corporal act of one person can prejudice the faculty of others, unless their consent is given, that is, unless the pact intervenes.'[48] So, it seems that Pufendorf is denying that there is a duty correlative to the claim-right to use that exists in a negative community of goods. That would mean that this right is in fact not a claim-right? But, that would be incorrect. The duty not to violate another's *suum* covers those objects that are within the boundaries of one's *suum*. So, it is a claim-right because everyone has a natural duty not to take others' lives and taking away goods necessary for another's survival is often sufficient to cause the other's destruction. What sets this claim-right apart from the usual property rights relations mediated by claim-rights is that the second relatum in the three-part property relation is the entire

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[46] *DJNG*, 4.4.5.

[47] *DJNG*, 4.4.4.

[48] *DJNG*, 4.4.2.

person plus whatever is within their *suum*. Nothing less than this can be an object of a person's claim-right to use prior to the institution by convention of property.

So, how and why do we move from a negative community of goods to a community structured by property? First, let us turn to the reasons Pufendorf gives for why we develop the conventions that take us out of the negative community of goods. Pufendorf argues that we move from this stage of negative community to positive community (in which the community as a whole owns the goods) and eventually to genuine proprietorship because living in a negative community results in a whole host of problems that can only be solved by the adoption of certain conventions regulating the production, use and consumption of scarce resources. These problems that need to be solved are problems we face when we try to cooperate with each other: we find that we must cooperate in order to produce, use and consume scarce resources in the community if these resources are going to be abundant enough to meet our needs. This problem arises when the population gets so large that individuals merely gathering the minimal resources needed to survive either exhausts the resources or results in conflict over who has claim to which resources. If individuals cooperated, coordinated production and distribution of resources becomes possible and therefore scarcity and conflict are averted. Failure to resolve this problem, then, will result in a situation that individuals recognize would be *less* preferable than the situation in which they coordinated their behavior. So, when this social conflict get serious enough, the members of the community recognize the need for coordinated activity and therefore seek to regularize their behavior with respect to one another. These regularities in behavior are not sought because there is one particular way of behaving that is itself superior to any other way. Rather, what the members of the

community recognize is that *general* conformity to *some* regularity that improves productivity and resolves disputes about distribution is better than there being no regularity of behavior at all.

This social conflict should not be understood merely as Hobbesian conflicts. Since Pufendorf asserts that we are naturally sociable, social conflict does not arise primarily because people are naturally self-interested, diffident or glory seeking (although they can arise because people sometimes are self-interested, diffident or glory seeking[49]). Rather, this social conflict arises primarily because people will have differing opinions on the domain and extent of each other's property rights[50] and will have differing opinions about the procedure that allows someone to claim to have property rights in a resource. Even if people in a negative community wanted to do so (and Pufendorf clearly assumes they do), they could not avoid conflict. Rather, they must adopt certain conventions about property in order to structure their own and each other's behavior in such a manner that efficient and fair modes of production and distributions of goods are achieved and maintained. Natural sociability, then, is not so strong as to allow us to remain in a negative community without conflict.[51] Rather, people must construct a positive community in order to avoid

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[49] We can also see that Pufendorf didn't taken these Hobbesian motives seriously given his comparison between the pre-convention human society and the conditions in which animals find themselves (at 4.4.5). He points out that animals take other animals' goods because 'there is no convention among animals which confers a special right over a thing to the one that first got it.' The problem is not that natural competition or natural diffidence or natural passions drive animals to steal. In fact, it is not even that these characteristics prevent animals from establishing conventions. The problem animals face is that they lack the rationality to establish conventions! It is our very rationality that drives us to cooperate in social groups.

[50] "Therefore, an occasion for quarrels and wars lay ready at hand, if two or more men needed the same thing, and individuals tried to appropriate for themselves the same thing, when it was not enough for all." (4.4.5) This is consistent with Hobbes' argument (Pufendorf approvingly cites *De Cive* I.6) But, as Pufendorf notes at 4.4.7, it is also consistent with Aristotle's theory of property, which certainly is consistent with a conception of humans as social animals.

getting in each other's way when producing goods, taking from others those goods that they had produced and disagreeing about the boundaries of one's *suum*.[52] Pufendorf writes:

> But since things are of no use to men unless at least their fruits may be appropriated, and this is impossible if others as well can take what we have already by our own act selected for our uses, it follows that the first convention between men was about these very concerns, to the effect that whatever one of these things which were left open to all, and of their fruits, a man had laid his hands upon, with intent to turn it to his uses, could not be taken from him by another.[53]

So, Pufendorf agrees with Hobbes that these sorts of disputes might escalate to a Hobbesian state of war. But, he does not agree with Hobbes with respect to the causes of and resolutions to these disputes. We do not seek peace through the establishment of a sovereign. Rather, the only way to resolve these problems, Pufendorf argues, is to develop conventions to solve the problem of coordinating resource consumption and use. *Pace* Hobbes' opinion of the rationality of violating covenants, then, Pufendorf argues that individuals recognize the importance of these conventions and willingly develop them and stick to them.

These conventions are arrived at by consent – people make a pact with one another to declare certain parts of the negative community their own to the exclusion of all others. This pact therefore makes all things that are subject of dispute the property of the community's. The pact requires that people in the community respect the use-rights of others in that community according to whatever principles established by the pact. These

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[51] At, *DJNG* 1.4.9, Pufendorf criticizes Grotius for thinking that negative community could have persisted if only people had more natural regard for each other.

[52] One can see clear hints of Locke's discussion about the inconveniences of the state of nature in the *Second Treatise*. See II.124 – 126. For more, see Tully (1980), pp. 73-77, 86-91.

[53] *DJNG*, 4.4.5.

individual things in which people have use-rights are not fully owned by individuals. Rather, they are still to be understood as *parts* of a whole that is owned jointly by all the members of the community. This is not a robust private property system because the community as a whole still has full say over the domain and extent of the property rights that each member might acquire.[54]

The move from positive community to positive law establishing full private property therefore is no more than the change by which individuals and not the community at large become holders of property rights.[55] This change is a change in the conventions that established the positive community in the first place and therefore requires the consent of all in that community.[56] But, it is not as significant a change as the change that occurs when people move from a negative community of goods to a positive community of goods. It is this move that generates the sort of robust property rights relations with which we are familiar (although Pufendorf rejected classifying as property anything but full liberal ownership).

The move from a negative community of goods to a positive community of goods transforms the very limited and indefinite use-rights of the negative community of goods into a determinate form. The community, through whatever processes will generate consent, work out for themselves the particulars of this determinate form. Pufendorf is clear that these conventions develop and are not settled once and for all. For, as

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[54] *DJNG*, 4.4.2.

[55] Ibid.

[56] Ibid.

conditions change, communities will adjust the property rules they adopt. These adjustments appear gradually as conditions in the world change:

> And finally, whatever may be said upon the eternity of natural law, it is certainly not necessary for all the objects of that law to have existed from all time, for many of them make their appearance gradually out of the conventions and institutions of men. Thus, the law of homicide found no object, so long as Adam was the only living man, nor did the law of adultery, while he was the only make, nor the law of false witness, before the institution of trials, nor the law of not coveting a neighbor's house, when caves were still the homes of men, nor of coveting a servant and handmaid, before the institution of slavery, nor the law of honoring one's parents, before Eve had brought forth.[57]

As new forms of social conflict develop in society, new positive laws must be developed in order to resolve those problems. So, as the population increased, property rights had to be extended to cover more of the land had,[58] and as new items were built or came into widespread use, they came to be covered under positive law. One might suggest that these new laws could be avoided simply by preventing the development of new forms of social conflict. But, Pufendorf doesn't consider this option. Instead he seems to assume that productive activity in human society will grow ever more complex. People will create new items and move onto new land both of which will need to be incorporated into property. Furthermore, people will engage in productive processes that will require increased coordination. This also will be dealt with by new property rules, i.e., new items will be designated ownable by individuals and new processes beyond mere grasping or simple occupation will establish ownership. So, property changes over time in response to the evolution of human institutions. All these changes in property are to be achieved through some process that generates consent of all those covered by the property

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[57] *DJNG*, 4.4.13.

[58] *DJNG*, 4.4.6.

rules. Therefore, the evolution of property is the result both of the development of conventions independent of property and of the development conventions that constitute property.

So, Pufendorf's argument that property is a solution to social conflict has two prongs. Both of these are supposed to be sufficient for pacts establishing property both to have the appropriately strong normative character and to be *naturally* occurring law, i.e., law that is a result of the natural development of rational human society in response to the naturally occurring conditions in which it finds itself.[59]

6. Conclusion

In this paper, I have tried to illustrate the early tradition of treating property as a natural response to recurrent social conflict over access to and use of resources. When faced with recurrent social conflict, parties establish a social order involving coordination with respect to access to and use of resources. This coordination is always public and situated within the context of the practices of the community. Thus, property, according to this tradition, is a *social practice*. This tradition reaches its zenith in the work of David Hume. A discussion of his great work will have to wait for another day.

[59] See *DJNG* 2.6.5: "After the introduction of ownership of things, men were given the ability not only of carrying on commerce with signal advantage to all mankind, but also, after securing such means, of making a richer display of humanity and kindness to others…"