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**Colonialism, Natural Right, and the Problem of Jurisdiction:
Modern Natural Law Theory and Hegel's Critique**

A Dissertation Presented

by

Chad Kautzer

to

The Graduate School

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Requirements

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Doctor of Philosophy

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The Graduate School

Chad Kautzer

We, the dissertation committee for the above candidate for the Doctor of Philosophy degree, hereby recommend acceptance of this dissertation.

Eduardo Mendieta – Dissertation Advisor
Associate Professor of Philosophy
Philosophy Department, Stony Brook University

Jeffrey Edwards – Chairperson of Defense
Associate Professor of Philosophy
Philosophy Department, Stony Brook University

Allegra de Laurentiis
Associate Professor of Philosophy
Philosophy Department, Stony Brook University

Jeffrey Paris
Assistant Professor of Philosophy
Department of Philosophy, University of San Francisco

This dissertation is accepted by the Graduate School

Lawrence Martin
Dean of the Graduate School

Abstract of the Dissertation

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It has been commonplace to associate the modern natural-law tradition with the social contract, which grounds legitimate political sovereignty and, occasionally, private property in an implicit or explicit *consensual* act. Whether the result is absolutism or republicanism, the individuals constituting the contractual foundation of political society are typically theorized in a *state of nature*. This tradition, however, also offers a set of *nonconsensual* arguments for the same—arguments traditionally obscured or marginalized in the secondary literature, for they have not been recognized as responses to pressing justificatory problems engendered by European colonialism's extra-national jurisdictional and proprietary claims.

Although Hegel was an advocate of colonialism, arguing it to be a structural necessity in his *Philosophy of Right*, he also articulated one of the most trenchant critiques of the natural-law and social-contract tradition, undermining the philosophical foundations of previous rights-based claims in the colonies. In this dissertation, I reconstruct, compare, and critique of modern natural law (particularly Locke) and German Idealist (particularly Hegel) justifications of colonial jurisdiction and the theories of right, property, sovereignty, and personality that constitute them. In addition to an epistemic and materialist reading of Locke's theories of property and sovereignty in the context of British colonialism, an immanent critique of Hegel's *Phenomenology* on the significance of modern colonialism for objective spirit, and the problems of colonial jurisdiction in the *Philosophy of Right*, my project tells something of an untold story about the evolution of the concept of *dominium* in theories of public and private right. This story supports the conclusion that the irresolvable problems with respect to the establishment of colonial jurisdiction, through public or private means, are also problems for the establishment of jurisdiction, and thus of right, within the colonizing nation-states themselves.

Dedicated to Alissa Betz
Former Philosophy Department Secretary
Current Assistant to the Chair
Friend

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Introduction

It is common to closely associate the modern natural law tradition with the idea of the social contract, which grounds the legitimacy of political sovereignty and, in some versions, private property, in an implicit or explicit *consensual* act. Whether the result is absolutism (as in Grotius and Hobbes) or republicanism (as in Locke), the theorization of the individuals constituting the contractual foundation of political society almost always begins with a *state of nature*. One of the most trenchant critiques of these two pillars of natural law theory—the naturalization of the individual and the contractual foundation of political society—was articulated by Hegel, reformulated by Marx, and continues to inform communitarian thought today. It was essentially an Aristotelian reversal, theorizing the rights-bearing individual as the product, rather than the precursor, of political society, and relegating contractual relations (abstract right) to property relations.

It is much less common to associate modern natural law theory with arguments seeking to legitimate the *nonconsensual* establishment of property and sovereignty and to recognize how this oft-overlooked tradition served to justify the expansion of territorial jurisdiction via colonization, particularly against the counter-claims of competing colonial powers. Indeed, we would not be amiss to claim that the history of modern natural law theory is the history of modern colonialism, from the foundational works of Francisco de Vitoria and Hugo Grotius, to its culmination in the work of John Locke.

Thus, Hegel's critique of modern natural law and its characteristic components—such as the state of nature, the labor theory of property, the private right to punishment, and even the social contract itself—is simultaneously a critique of the modern justification of colonialism. Having directly undermined the philosophical foundations of colonialist arguments from Vitoria to Locke, however, Hegel himself argues, from the *Phenomenology* to the *Philosophy of Right*, for the phenomenological significance and structural necessity of colonialism. Before addressing the specifics of Hegel's arguments and those subject to his critique it is perhaps helpful to note some of the philosophical questions involved in the “colonial question.”

All arguments for colonialism, past and present, contain an implicit or explicit theory of the establishment of legitimate jurisdiction, which itself entails a more fundamental theory of the generation of right (*ius* or *Recht*). Jurisdiction (*jurisdictio*) is the speaking of right and power to administer justice by the sovereign of a particular territory. Theories of jurisdiction in the colonial context are, then, inextricably related to justifications of legitimate power, jurisdiction, and *imperium* within the colonizing powers themselves. In the modern natural law theory of the Catholics Vitoria and Suarez, as well as the Protestants Grotius and Locke, both are theorized together, united by the problematic of natural *dominium*, public and private. How and where one situated these forms of *dominium* resulted in either absolutist or popular theories of sovereignty, the presence or absence of a theory of resistance, the justification of slavery, private property and, subsequently, limits to accumulation.

These public and private dimensions were commingled in the original Roman idea of *dominium*, i.e. that sphere within which the *potestas* of the *dominus* or

paterfamilias was exercised. It functioned as the anchor of Roman jurisprudence, while simultaneously falling outside it, thus serving as a foundation from which and through which all other relations and *iura* were conceptualized. This Roman understanding of *dominium* influenced subsequent legal and philosophical traditions of Western Christendom after the Gregorian Reformation and Investiture Struggle (1075-1122) and the recovery and institutionalization of Justinian's *Corpus Juris Civile* in the eleventh and twelfth centuries.

In late medieval and early modern discourse, there developed a general understanding of *dominium* as a power of personality, which when reflexively exercised is called liberty, and when exercised over others, is called domination. Juridically conceived, i.e. when combined with *ius*, *dominium* was to become property in private law, and sovereignty (*imperium*) in public law. More specifically, this *ius* or right associated with *dominium* eventually became subjectively understood as a quality of one's person—an assimilation of liberty, *dominium*, and right unknown to Roman law and probably originating with Jean Gerson in the early fifteen century. Once these public and private forms of *dominium* are externalized, either in the products of one's labour or in the personality of the state or sovereign, they are viewed as objectified forms of personality that in turn facilitate the theorization of a rights-bearing person.

Within modern natural law theory we can view the process of colonization as essentially a process of *accumulation*, private and public. These processes of accumulation did not, however, involve the mere transference of pre-existing rights, but were theorized in such a way that the accumulation and usurpation of private and public *dominium* was the generative process of right itself, be it through just war, *primo*

occupatio, private punishment, or individual labor. The modern re-differentiation of these public and private forms of *dominium*, after their conflation in vulgar Roman and subsequent feudal law, included a tendency toward absolutism in both, which was itself a critique of the subinfeudations of public and private law in feudal legal and political relations. Thus, we already find the use of the absolute right of the property owner in Bodin's *Six livres de la République* (1576) as an analogy for his understanding of absolute *imperium* or sovereignty. It was this clear and absolutist distinction that was attacked and collapsed by Sir Robert Filmer. And it was Filmer's argument that Locke spent his entire *First Treatise* refuting, innovatively inverting a trope in natural law theory, i.e. he made *the public* a consequence of *the private* through what we might call an epistemological and productivist theory of right.

My dissertation is situated within this historical and philosophical context and is divided into two parts. Part One culminates in a thesis about how Locke's understandings of natural law, the state of nature, right, punishment, and private property are influenced by, and often constructed to justify, British colonialism as a political and economic project. This reading helps us to appreciate a little recognized challenge facing Locke, namely, how a Protestant natural law theory can establish jurisdiction in the colonies without relying on prior consent, just war, the *a priori* denial of the Amerindian capacity for rights, or the universal jurisdiction bestowed by the Catholic Church. It was Sepúlveda, for example, who famously argued against Las Casas that indigenous peoples within these spheres of Portuguese and Spanish influence lived in sin and thus lacked *dominium* and could be dispossessed and enslaved. For Francisco de Vitoria, this reasoning, despite its Aristotelian overtones, relied on a reformist heresy supporting

popular resistance, for if *dominium*, as a right of rule, was lost “in a state of mortal sin,” then Lutherans, relying on their conscience, could choose to resist a sinful sovereign. *Dominium*, for Vitoria, is conferred by God’s authority, not by grace, and thus indigenous people possess it despite their sins and ignorance, which are attributable to poor education. The only way for the Spanish to establish *dominium* in the colonies, then, was either (privately) through first occupation or, if the natural right of Spaniards to travel, trade, occupy land, or preach is resisted, then, under the law of nations (*ius gentium*), a just war can be fought and victory entailed dispossession and enslavement, establishing both public *and* private *dominium*. These jurisdictional disputes were decisive for natural law theories into the 17th century, including Locke’s. Through critiques of Grotius, Pufendorf, Hobbes, and Filmer, Locke’s *Two Treatises* addressed the origins of secular authority (against advocates of absolutism) and colonial jurisdiction (against papal titles and the first occupation claims of Catholics and Protestants alike) in ways that can only be understood within this larger context.

In Chapter One I reconstruct Locke’s theory of property and personality, developing an epistemological reading of Locke’s idea of the self and its rights-founding faculty—generating an exclusive subject right in the state of nature—that is more complicated and, I would argue, more compelling than conventional interpretations. Chapter Two sets this reading in greater context, providing a (schematic) historical look at *dominium*, secular and ecclesiastic, private and public, in natural law theory. In this context, I analyze some significant transitional moments, such as the vulgarization of Roman law, the Franciscan poverty debate; the conciliarist challenge to papal absolutism; and the Valladolid Debate, which captures the crisis of jurisdiction in modern

colonialism—reconstructing how, from an early Roman representation of the *dominus*, whose pre-judicial *potestas* anchored, but fell outside of, Roman jurisprudence, there developed something like Aquinas’s notion of rational self-*dominium*, which generates *dominium* over external objects and persons, but does not yet produce subjective rights, to Locke’s notion of self-*dominium*, or liberty, which, for him, does produce such a right. Chapter Three focuses on Locke’s *Two Treatises*, including his critique of Filmer’s patriarchalism and his idea of the state of nature, which I argue is best understood as a juridical colonial concept. I describe this concept as “juridical” for it is the existence or absence of right that defines it, not the psychology or socialization of individuals within it, or the existence or absence of most institutions we associate with political societies. Locke’s state of nature is, I argue, quite innovative in light of the Salamanca and Grotian schools of thought, providing the framework within which to justify the non-consensual establishment of public and private *dominium*, while avoiding the political absolutism entailed in the jurisdictional theories of his Protestant and neo-Thomist predecessors.

In Part Two, I turn to Hegel’s critique of modern natural law theory from the perspective of free personality—which can only arise within the nation and establish right, as the realization of free will, only within the ethical totality of the state—and Hegel’s phenomenological and structural analyses of colonialism, the former being confined by him to colonialism’s pre-modern forms. That is to say, we find that contrary to his assessment of the relative insignificance *modern* colonialism, Hegel attributes great significance to colonial experiences in the preceding world-historical spirits of the Greek and Roman empires: In the *Philosophy of History*, he not only celebrates the originary heterogeneity and internalization of otherness engendered by the colonial origins of the

Greek and Roman worlds, but in both we find the middle period of their triadic historical division to be precisely one of conquest and colonialism. When spirit, however, reaches its forth and final world-historical phase in the Germanic world (represented predominately by Protestant Germany, Scandinavia, and England), Hegel characterizes its middle period (stretching from Charlemagne to the Reformation), not as an *external* experience of inter-national conflict and domination, as he has done with previous national spirits, but as an *internal*, oppositional dynamic of theocracy and feudal monarchy—even in the case of the Crusades. In so doing, I argue, Hegel elides many of the radical changes in European objective spirit—i.e. the understandings of right and *dominium* discussed in Part One—that emerged from the inter-national, extra-jurisdictional conflicts engendered by modern colonialism. In Chapter Four, I thus take up the experience of modern colonialism within the context of Hegel’s *Phenomenology of Spirit* (and against the backdrop of his *Philosophy of History*) in an immanently critical attempt to provide a deeper appreciation and broader context for Hegel’s critique of: (1) the social-disintegrating and alienating force of legal personality; and (2), the terror that arises from absolute freedom. While this is intended to enrich our understanding of Hegel’s analysis in “Culture” insofar as I apply it to phenomena previously excluded from consideration, it also foregrounds—and, thus, integrates or appropriates—two significant developments in the evolution of modern concepts of natural right within the modern Catholic and Protestant natural law traditions; developments I discussed at some length in previous chapters. In particular, I draw upon Hegel’s analysis of absolute freedom and terror in the *Phenomenology*, arguing, for example, that the experience of *terror* in the colonies prompted the recognition (and thus institutionalization) of universal

abstract personality (in the form of natural public *dominium*) in neo-Thomist theology and political theory, while the Protestant argument for the right of private punishment in a state of nature—notably made by Grotius and Locke—resonates with Hegel’s understanding of the nature and (terrorizing) consequences of absolute freedom, even more so that the post-revolutionary Terror in eighteenth-century France, which Hegel famously, albeit implicitly, invokes.

In Chapter Five, I turn from Hegel’s phenomenology of right to his philosophy of right, where we find the presentation of abstract right divorced from, or at least implicitly presupposing, Hegel’s earlier accounts of its achievement through social labor and cognitive struggles—set forth in *System of Ethical Life*, *Natural Law* essay, and the *Phenomenology*—which ironically contributes to what we might call Hegel’s ‘fictive’ account of the colonial condition. That is to say, besides the brevity of Hegel’s discussion of colonialism—seemingly in inverse proportion to its importance in shoring up, *ad infinitum*, the centrifugal force of the “internal dialectic” of civil society—one notes the conspicuous absence of conquest, struggle, slavery, and death. We find that Hegel’s colonists settle a space that is not only *res nullius*, but uninhabited. This conspicuous oversight in the *Philosophy of Right*, reinforced throughout his *Philosophy of History*, is subjected to criticism, for it circumvents the theorization of the extra-jurisdictional condition, wherein persons confront and conflict with inhabitants for recognition of public and private rights-claims.

Hegel is, I argue, compelled to make such an argument, for the irrepressible expansionary logic of the inner dialectic of civil society originates precisely in the institutionalization of abstract right, which he advocates. The state as the concrete ethical

totality has then a responsibility to counter the internally disintegrating and outwardly expansionary consequences in a non-contingent manner by colonial expansion. This proves problematic, for the vertically and dialectically integrated ethical totality of the state seems here to be digressing, and necessarily so, to the principle of the family or immediate ethical spirit, through colonial expansion. Hegel sought to retain capitalist property relations, the basis of abstract right (abstract personality), yet institutionally mediate and ultimately reconcile them within the concrete personality of the sovereign: a world-historical dialectic of personality moving from the abstract to the concrete, yet whose centrifugal force is, by Hegel's own admission, not containable within the state's territory or jurisdiction. Chapter 5 will also bring us back to a direct engagement with the modern natural law tradition insofar as I take up Hegel's critique of state-of-nature theorizing, beginning with the *Natural Law* essay wherein he argues that the "fiction of the state of nature."

In addition to producing: (1) a novel interpretation of Locke's *Two Treatises*, situating it in the natural law (colonial) jurisdictional debates of the 16th and 17th centuries; (2) an immanent critique of Hegel *Phenomenology* on the significance of modern colonialism for objective spirit; and (3), an immanent critique of the *Philosophy of Right* on the problems of colonial jurisdiction, my project tells something of an untold story about the evolution of the concept of *dominium* in theories of public and private right. This story supports the conclusion that the problems with the establishment of colonial jurisdiction, through public or private means, are also problems for the establishment of jurisdiction, and thus of right, within the colonizing nation-states themselves. The success or failure of one entails the success or failure of the other, and

we find that both Locke's theory of jurisdiction founded on a natural private right (to property), and Hegel's theory of the intersubjectively constituted public right of the sovereign, are unsuccessful; for in Locke no more than a right of usufruct can be defended and in Hegel the intersubjectively derived foundation of territorial jurisdiction cannot be extended beyond the territorial boundaries of the nation-state (without regression).

In my conclusion I discuss (in outline) Marx's more radical, anti-juridical position, which embraces colonialism as a necessary stage—*empirically* as the logic of capital and *normatively* as a process of cultural modernization—in capitalist development for a different reason; it increasingly produces the agent of its own transcendence. In this context, transcendence means the appropriation of alienated personality in its abstract and concrete forms. The difficulty with Marx's critique, I argue, is its presupposition of finitude. He assumes the eventual exhaustion of the (capitalist) colonialist process, which is a precondition of crisis, and thus of revolution and total appropriation. If, however, we distinguish processes of accumulation by dispossession (Harvey) from state-driven colonial practices, which is a particular historical form that entailed a clear usurpation of political sovereignty, then Marx's defense becomes suspect, and we are compelled to seek new ways of theorizing both the metaphysics of right and structural logic of accumulative processes, public and private, which continue to this day.

Chapters One: Locke on Natural Law, Property, and Personality

I begin this chapter with a discussion of Locke's *Essays on the Law of Nature* (Section 2). We find there that Locke's early and only sustained treatment of natural law is missing the most famous and influential principles found in his later work, particularly the *Two Treatises*. That is to say, we do not yet find a state of nature, the origin of property (first in the self and subsequently through labour), the duty to labour, or the private right to punish violations of natural law. It is only when Locke later fuses his moral theory with an economic theory reflective of the enclosures, colonialism, and agrarian capitalist conditions of his time that his rendition of natural law and right take the distilled, almost aphoristic, form so familiar to us now.¹ This is not to say that Locke's natural law theory of property, for example, is a superficial ideological argument. On the contrary, I argue (Section 3) that Locke has a historical and dialectical understanding of personality—often overlooked in the popular positivist interpretations of his text—that is central to the establishment of subjective right through the externalization of individual will in practical activity (labour), and which consciousness appropriates in recognizing itself as the source of that activity. In the context of British colonialism, this

¹ It wasn't until the latter 1660s that Locke became interested in economic questions, which seems to coincide with his relationship with Anthony Ashley Cooper, at the time Lord Ashley, and soon to become Earl of Shaftesbury. In 1669, Locke became involved, through Lord Ashley, in the colony of Carolina, eventually having a hand in writing its constitution.

understanding of personality is foundational, for it bestows a *dominium*-founding capacity to individual labour outside of civil society, which as already mentioned, serves as a presupposition for legitimate political jurisdiction or *imperium*.

I. Natural Law, Property, and Punishment

Locke was a natural law theorist of voluntarist and empiricist stripe, although not a particularly consistent one.² This has led some to question whether Locke should be seen as continuing or radically deviating (with Hobbes) from the natural law tradition.³

2 J. B. Schneewind rightly notes that this combination voluntarism and empiricism in Locke's moral theory is found in Bacon and Pufendorf, the latter clearly having a direct influence on Locke. See Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge: Cambridge University Press), Chapter 8. Much has also been written on Locke's apparent vacillation between voluntarist and rationalist (or intellectualist) positions and its relation to his hedonistic moral theory in the *Essay*, which appears more Hobbesian. This is, however, not an unusual move in the seventeenth century. A similar position is held by Francisco Suarez in his *De Legibus ac Deo Legislatore* (1612) [II. 2. 4], Culverwell in his *An Elegant and Learned Discourse of the Light of Nature* (1651), Parker in his *An Account of the Nature and Extent of the Divine Dominion and Goodness* (1666), and Richard Cumberland in his *A Treatise on the Laws of Nature* (1672). See Francis Oakley, "Locke, Natural Law, and God: Again," in *Politics and Eternity: Studies in the History of Medieval and Early-Modern Political Thought* (London: Brill, 1999), 217-248, for an overview of the contemporary secondary literature on this debate. Oakley views Locke as a solid voluntarist in the tradition of Ockham and D'Ailly, emphasizing a "covenantal" interpretation—one "espoused in Locke's own lifetime by such luminaries of the new scientific thinking as Walter Charleton, Robert Boyle and Sir Isaac Newton" (238). This covenantal reading sought to synthesize the claim that natural law and our obligation to it was grounded in God's *will*, while also seeing that law as eternal, immutable, and discoverable by reason. Thus, while "God cannot be said to be bound by the canons of any merely human reason or justice, he is certainly capable by his own free decision [i.e. his promise of covenant] of binding himself to follow a certain pattern in dealing with his creation" (235). Locke is thus "a voluntarist of the late-medieval stamp whose emphasis on the divine omnipotence is so modulated as to accommodate a firm commitment to the existence of an order—natural, moral, salvational—seemingly intellectualistic in nature but actually grounded in the divine will, choice, promise and covenant" (245).

3 Leo Strauss, for example, has written that "Locke cannot have recognized any law of nature in the proper sense of the term." Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 220. Elsewhere he writes that one is compelled to "look in the essays on natural law for suggestions of an alternative to natural law, or at any rate to the traditional natural law teaching." Strauss, "Locke's Doctrine of Natural Law," *The American Political Science Review*, Vol. 52, No. (June 1958), 499. Echoing a claim in *Natural Right and History* that "Locke deviated considerably from the traditional natural law teaching and followed the of Hobbes" (221), he queries in this later essay "whether Locke does not intend to follow the lead given by Hobbes and to replace the traditional natural law teaching by a moral teaching

Despite those, such as Leo Strauss, who see Locke as an advocate of the latter, Locke's understanding of natural law has historical precedent, reviving much more its scholastic heritage than his humanist predecessor, Grotius, had done—which is another way of saying that there is indeed more than one natural law tradition.⁴ I will not take up the question of why Locke's *Essay Concerning Human Understanding*, composed around the same time as the *Two Treatises*, makes almost no mention of natural law, and when it does, it appears inconsistent with the latter; or, as Peter Laslett puts it: “The *Essay* has no room for natural law.”⁵ This discrepancy, compounded by Locke's hedonistic understanding of moral motivation and obligation in the *Essay*, only prolonged the mystery of the author of the anonymously published *Two Treatises*, even among those very familiar with the *Essay*.⁶ That said, however, in Section 3 below I take up two

which is grounded on the desire or instinct for self-preservation” (499). He even asserts that Locke is closer to Machiavelli than many assume (500). As for inconsistencies, one minor one is found between the claim in the *Second Treatise*, §11 that natural law was “writ in the Hearts of all Mankind,” and the third essay of his *Essays on the Law of Nature*, in which he claims to “show that there exists no such imprint of the law of nature in our hearts.” Locke, *Essays on the Law of Nature: The Latin Text with a Translation, Introduction and Notes, Together with Transcripts of Locke's Shorthand in his Journal for 1676*, edited by W. von Leyden (Oxford: Oxford University Press, 1988), III, 137. The phrase “law written in their hearts” is from Saint Paul in *Romans* 2. 14-15, and was often cited by theorists of natural law. Richard Hooker discusses this claim in his *Of the Laws of Ecclesiastical Polity*, Volume I, Book I, VIII (London: Everyman's Library, 1969), 176-79, which was very influential on Locke.

4 Locke's position included, for example, a clear rejection of Grotius's anti-voluntarist position, famously captured in the *Prolegomena* to the first edition of his *De Jure Belli ac Pacis* where he claims that natural law would be valid “even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God [*“etiamsi daremus...non esse deum”*]. Grotius, *The Rights of War and Peace, together with Grotius's Prolegomena to the First Edition of De Jure Belli ac Pacis*, Volume III, edited with an introduction by Richard Tuck, from the edition by Jean Barbeyrac (Indianapolis: Liberty Fund, 2005), 1748. Locke subsequently (and logically) also rejects Grotius's alternative justification of natural law based on *sensus communis*, a view also held by Richard Hooker in his *Of the Laws of Ecclesiastical Polity*, which Locke often and positively cited.

5 Peter Laslett, “Introduction,” in Locke, *Two Treatises of Government*, edited by Peter Laslett (Cambridge: Cambridge University Press, 1999), 81.

6 According to J. B. Schneewind, there “is no clear and unequivocal suggestion in Locke's published work of any intuitionist rationalism about the law of morality. And if obedience to God's commands ultimately leads to our own greatest happiness, then on an egoistic hedonistic view of motivation we can be moved to obey them, although the commands depend only on his will.” Schneewind,

important continuities between these texts: the first concerns how epistemological arguments in the *Essay* support the moral and normative political theorizing in the *Two Treatises*, and the second concerns how the (epistemic) concept of the self in the *Essay* plays a central role in the origin of property in the *Two Treatises*.

Although Locke published very little of his thoughts on natural law, he did give a series of lectures on natural law in Latin—now carrying the title *Essays on the Law of Nature*—in traditional scholastic form (*Quaestiones*) at Christ Church, Oxford between 1663 and 1664, but these were never published in his lifetime, despite the entreaties of his friend James Tyrrell to do so. The political implications of his understanding of natural law in the *Two Treatises* is certainly at odds with the political theory evident in these early lectures, which is surely one reason why Locke refused offers to publish them. For example, in the lectures, there is an unqualified duty to be obedient to a superior, or what Schneewind has called a “law enforcement model of morality”:⁷ “a king has command over us by right [*quia jure in nos imperium obtinet*]; that is to say, because the law of nature decrees that princes and a lawmaker, or a superior by whatever name you call him, should be obeyed.”⁸ There is no discussion of obedience being contingent upon the existence of an impartial judicial authority or consent, conditions found in the *Two Treatises*; nor is there any evidence of Locke’s private right to punishment or his famous

“Locke’s Moral Philosophy,” in *The Cambridge Companion to Locke* (Cambridge: Cambridge University Press, 1994), 222n.

7 Schneewind, *The Invention of Autonomy*, 23.

8 Locke, *Essays*, 189. Locke even makes an argument reminiscent of Filmer’s position, and thus directly contradicting his position in the *Two Treatises*, asserting that obligation exist when “all things are justly subject to that by which they have first been made and also are constantly preserved; or by the right of donation, as when God, to whom all things belong, has transferred part of his dominion [*partem imperii*] to someone and granted the right to give orders to the first-born, for example, and to monarchs.” Locke, *Essays*, VI, 185. Locke, as we shall see, argues against Filmer in the *Two Treatises* that God does not transfer dominion in part, but rather to all in common.

labour theory of property, which will come to play such a crucial role in his theory of political legitimacy and obligation.⁹ On the subject of the natural obligation to the will of a superior, Locke was not alone in changing his view at this time. We witness just such a development, i.e. the move from natural obedience to a superior to that obedience being contingent on the legitimacy of the superior, in the work of Samuel Pufendorf. In his *Elementa Jurisprudentiae Universalis* (1660), Pufendorf had argued that once a particular action is known to conform to a law—what Pufendorf calls a “notional norm”—“immediately there arises in the subject the obligation to act in accordance with that law, and this because he understands that he who enjoins that law upon him has the authority to compel him by the imposition of some evil, if he refuses to obey...”¹⁰ In his *De Iure Naturae et Gentium* (1672) and its shorter version, *De Officio Hominis et Civis* (1673), Pufendorf qualified this obedience: “An obligation is properly introduced into a man’s mind by a superior, who has not only the strength to inflict some injury on the recalcitrant, but also *just cause* to require us to curtail the liberty of our will at his discretion.”¹¹ Pufendorf was of course highly regarded by Locke and often an unnamed interlocutor in the *Two Treatises*.¹²

⁹ Peter Laslett claims that Locke “simply had not thought in a systematic way about property before 1679. He had not worked out his justification of ownership in terms of labour.” See his Introduction to the *Two Treatises*, 34.

¹⁰ Pufendorf, *Elementa Jurisprudentiae Universalis Libri Duo*, Volume II: The Translation, by William Abbott Oldfather (New York: Oxford University Press, 1931), 153.

¹¹ Pufendorf, *On the Duty of Man and Citizen according to Natural Law* [*De Officio Hominis et Civis*], edited by James Tully (Cambridge: Cambridge University Press, 2000), 28, emphasis added. See also Richard Tuck’s discussion of this development in Pufendorf, which he sees as an attempt by Pufendorf to critique Hobbes, in *Natural Rights Theories*, 156-61.

¹² Schneewind writes that “Locke’s notion of mixed modes so helpfully fills out Pufendorf’s theory of moral entities that it might have been designed for the purpose.” Schneewind, *The Invention of Autonomy*, 148. Locke’s regard for Pufendorf is evidenced in his recommended reading list for “Gentleman”: “When he has pretty well digested Tully’s *Offices*, and added to it Pufendorf, *De officio*

Despite these early lectures on the theory of natural law, when Locke comes to write the *Two Treatises*, natural law is not even found worthy of argument or justification

it would be besides my present purpose, to enter here into the particulars of the Law of Nature...yet, it is certain there is such a Law, and that too, as intelligible and plain to a rational Creature, and a Studier of that Law, as positive Law of Common-wealths, nay possibly plainer; As much as Reason is easier to be understood, than the Phansies and intricate Conveniences of Men, following contrary and hidden interests put into Words; For so truly are a great part of the *Municipal Laws* of Countries, which are only so far right, as they are founded on the Law of Nature, by which they are to be regulated and interpreted.¹³

Thus the inconsistency between the *Essay* and the *Two Treatises*, as well as the fact that Locke's extensive treatment of natural law in his early lectures finds no equivalent in the *Two Treatises* (where natural law and right appear without philosophical justification), makes his mature position (and its development) difficult, if not impossible, to ascertain. With this limitation in mind, I briefly summarize below Locke's position in his *Essays on the Law of Nature*, which are composed of eight essays, briefly indicating where there are great divergences from the *Two Treatises*.¹⁴

The first question Locke poses is the most basic: Is there a law of nature [*lex naturae*] or rule of morals [*morum regula*]? His answer is of course affirmative, and his reasoning begins with the undeniable existence of god, for god's will, so the voluntarist argument goes, is the foundation of all order in the universe:

hominis et civis, it may be seasonable to set him upon Grotius, *De jure belli ac pacis*, or which perhaps is the better of the two, Pufendorf, *De jure naturali et gentium*." Locke, "Some Thoughts Concerning Reading and Study for a Gentleman," in *Locke: Political Essays*, edited by Mark Goldie (Cambridge: Cambridge University Press, 1997), 349.

13 Locke, *Second Treatise*, §12, 275.

14 There is a ninth essay, which was Locke's Valedictory Address at Censor of Moral Philosophy at Christ Church in 1664, but it does not substantively expand on his arguments laid out in the previous eight essays. Von Leyden publishes this ninth essay separately and Mark Goldie does not even include it at all in his edited volume of Locke's political essays.

some divine being presides over the world—for it is by his order that the heaven revolves in unbroken rotation, the earth stands fast and the stars shine, and it is he who has set bounds even to the wild sea and prescribed to every kind of plants the manner and periods of germination and growth; it is in obedience to his will that all living beings have their own laws of birth and life; and there is nothing so unstable, so uncertain in this whole constitution of things as not to admit of valid and fixed laws of operation appropriate to its nature.¹⁵

There can therefore be no natural law or obligation without God, a point he makes against Hobbes elsewhere. If natural law “did not proceed from God as a lawgiver...[it] could not properly be called a law, and the not taking God into his hypothesis has been the great reason of Mr. Hobbeses mistake that the laws of nature are not properly laws nor do oblige mankind to their observation when out of a civil state or commonwealth.”¹⁶ “For, ultimately,” writes Locke in *Essay VI*, “all obligations lead back to God”¹⁷ Obligations, public and private, which Locke describes as binding by a “power external to themselves” are thus operative only insofar as God’s superior will exists, which alone has an “intrinsic force” to bind us.¹⁸ Without it, there can be no natural law, and without natural law “men can have no social intercourse or union among themselves.” Indeed, writes Locke, “there are two factors on which human society appears to rest, i.e. firstly, a definite constitution of the state and form of government, and, secondly, the fulfilment of

15 Locke, *Essays*, I, 109.

16 Quoted in a letter from Tyrrell to Locke in 1690; cited in Laslett’s Introduction to the *Two Treatises*, 80.

17 “*in Deum enim ultimo resolvitur omnis obligation.*” Locke, *Essays*, I, 183.

18 See Locke, *Essays*, VI, 187. “All that dominion [*imperium*] which the rest of lawmakers exercise over others, both the right of legislation and the right to impose an obligation to obey, they borrow from God alone, and we are bound to obey them because God willed thus, and commanded thus, so that by complying with them we also obey God” (187).

pacts [*pacti fides*]. Every community among men falls to the ground if these are abolished, just as they themselves fall to the ground if the law of nature is annulled.”¹⁹ Why? Because rulers, although sometimes capable of compelling subjects to obey through coercion, cannot force the internal motivation of an obligation, and for those entering contracts, “it is not to be expected that a man would abide by a compact because he has promised it, when better terms are offered elsewhere, unless the obligation to keep promises was derived from nature, and not from human will [*voluntate humana*].”²⁰

So what then is natural law, according to Locke? It “can be described,” he writes, “as being the decree of the divine will discernable by the light of nature and indicating what is and what is not in conformity with rational nature, and for this reason commanding and prohibiting.”²¹ It is thus (1) the decree of a superior will [*superioris voluntatis*], (2) the expression of what is (morally) to be done or not done, and (3) contains within itself the cause of obligation.²² It is not a dictate of right reason [*recta ratio*], for reason is the interpreter, not the maker of natural law.²³ It is equivalent neither to the law of nations [*jus gentium*], which “is not imposed by the law of nature but has

19 Locke, *Essays*, I, 119.

20 Ibid.

21 Ibid., 111-113.

22 On the necessary existence of a superior will, Locke writes in *Essay VI* that “we must understand that no one can oblige or bind us to do anything, unless he has right and power [*jus et postestatem*] over us; and indeed, when he commands what he wishes should be done and what should not be done, he only makes use of his right. Hence that bond derives from the lordship and command [*dominio et imperio*] which any superior has over us and our actions, and in so far as we are subject to another we are so far under an obligation” (181-183).

23 Grotius, among many others, defined natural law as a dictate of right reason. See Grotius, *The Rights of War and Peace*, Volume I, Book I, Chapter I, Section 10.

been suggested to men by common expediency,”²⁴ nor natural right [*jure naturali*], which “is grounded in the fact that we have the free use of a thing, whereas law is that which enjoins or forbids the doing of a thing.”²⁵ He agrees with Aristotle’s claim in the *Nicomachean Ethics* (Bk I, Ch. 7) that “the special function of man is the active exercise of the mind’s faculties in accordance with rational principle” (1098a7), and that the law of nature obtains everywhere (Bk V, Ch 7, 1134b18).²⁶ Because it is natural and universal, it is, unlike the conventions of civil law, subject to scientific study—a science of virtue, which Grotius advocated and Locke cites approvingly, albeit in a paragraph ultimately deleted from the final lectures.²⁷

24 Locke, *Essays*, I, 163.

25 *Ibid.*, 111.

26 *Ibid.*, 113.

27 The deleted paragraph does not appear in the von Leyden translation. The relevant section, which refers to the Prolegomenon, §30, of Grotius’s *De Jure Belli ac Pacis* reads: “This argument is also demonstrated by the fact that the theory of virtues can be comprised within the limits of a science, for it is by this that ‘whatever depends on convention is highly distinguished from things natural; for things concerning nature, being always the same, can readily be gathered into a science, while those which are the outcome of convention form no part of science, because they often change and are different in different places.’” See *Essay I* in *Locke: Political Essays*, 84. The deletion does not reflect a change in belief, however, for the thrust of his *Essay* is to demonstrate that the world of morals and politics affords the opportunity for real knowledge, placing “*Morality among the Sciences of Demonstration*.” Locke, *An Essay Concerning Human Understanding*, edited by Peter H. Nidditch (Oxford: Oxford University Press, 1975), Book IV, Chapter III, §18, 549. “*Morality is capable of Demonstration*,” claims Locke, since “the precise real Essence of the Things moral Words stand for, may be perfectly known; and so the Congruity, or Incongruity of the Things themselves, be certainly discovered, in which consists perfect Knowledge.” Locke, *Essay*, Book III, Chapter XI, §16. As James Tully writes: “Locke has therefore shown [in the *Essay*] that the kind of knowledge which man is capable of having of much of the subject matter of morals and politics—human actions, institutions and social relations—is archetypal and, as such, is the kind requisite for theoretical and scientific treatment.” Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge: Cambridge University Press, 1980), 21. Jean Barbeyrac later argued in his “An Historical and Critical Account of the Science of Morality” (an essay that appeared with the English translation of Pufendorf’s *The Law of Nature and Nations* (1729)) that it was Bacon and particularly Grotius who rightly retrieved such a science of morals, which began with the Stoics but was eclipsed with the rise of Aristotelianism after the fall of Rome. See Richard Tuck, *Natural Rights Theories: Their origin and development* (Cambridge: Cambridge University Press, 1979), 174-75.

Since the universalism of natural law is not empirically evident in the organization of political societies or in their civil laws and moral behaviour, Locke must account for this discrepancy. While he admits that “all people are by nature endowed with reason,” he argues that “it does not necessarily follow that it is known to any and every one.”²⁸ Thus it is not the majority who should be consulted on the dictates of natural law, but “those who are the more rational and perceptive than the rest.”²⁹ Why? Because of the four possible kinds of knowledge that Locke entertains—inscription, tradition, divine revelation, and sense-experience—it is only the fourth, sense-experience, that is capable of discovering a law operative outside of ourselves, using the reason operative within us.³⁰ Drawing an analogy between the acquisition of knowledge and the acquisition of wealth—an analogy that will, I argue, become much more literal in Locke’s later work—he writes

Careful reflection, thought, and attention by the mind is needed, in order that by argument and reasoning one may find a way from perceptible and obvious things into their hidden nature. Concealed in the bowels of the earth lie veins richly provided with gold and silver; human beings besides are possessed of arms and hands with which they can dig these out, and of

28 Locke, *Essays*, I, 115.

29 Ibid., I, 115. Locke easily draws an elitist conclusion from this discrepancy. As he writes in *The Reasonableness of Christianity*, Christianity thankfully contains certain simple propositions, making it well suited to the “vulgar capacities” of the “labouring and illiterate Man,” for: “The greatest part of Mankind have not leisure for Learning and Logick, and superfine distinctions of the schools. Where the hand is used to the Plough and the Spade, the head is seldom elevated to sublime Notions, or exercised in mysterious reasoning. Tis well if Men of that rank (to say nothing of the other Sex) can comprehend plain propositions, and a short reasoning about things familiar to their minds, and nearly allied to their daily experience.” *The Reasonableness of Christianity*, in *John Locke: Writings on Religion*, edited by Victor Nuovo (New York: Oxford University Press, 2002), 209. In his first economic text, “Some Considerations of the Consequences of the Lowering of Interest, and Raising the Value of Money,” he writes: “the labourer’s share, being seldom more than a bare subsistence, never allows that body of men, time, or opportunity to raise their thoughts above that, or struggle with the riches for theirs, (as one common interest) unless when some common and great distress, uniting them in one universal ferment, makes them forget respect, and emboldens them to carve to their wants with armed force: and then sometimes they break in upon the rich, and sweep all like a deluge.” Locke, *The Works in Nine Volumes* (1824), Volume IV, p. 71.

30 See Locke, *Essays*, II, 123-125.

reason which invents machines. Yet from this we do not conclude that all men are wealthy. Firth they have to equip themselves; and it is with great labour that those resources which lie hidden in darkness are to be brought to the light of day. They do not present themselves to idle and listless people, nor indeed to all those who search for them, since we notice some also who are toiling in vain.³¹

Thus the discrepancies we find between peoples or nations (and between the individuals within them) concerning the interpretation of natural law and its translation into civil law are attributable to the fact that “there are only a few who, neither corrupted by vice nor carelessly indifferent,” make use of the “light of nature.”³²

Before closing this summary, it is worthwhile to identify Locke’s position on three topics that will come to play important roles in his later political philosophy: punishment, property, and accumulation. Punishment justly follows the failure to fulfil a natural obligation, which is the “bond of law”—that is, “to fulfil the duty which it [the law] lies upon one to perform by reason of one’s nature, or else submit to the penalty due to a perpetrated crime.”³³ Obligation involves a twofold liability, for Locke: first, we have “a liability to pay dutiful obedience [*debitum officii*], namely what anyone is bound to do or not to do at the command of a superior power”; secondly, we have a “liability to

31 Locke, *Essays*, II, 135. Elsewhere, Locke writes that “without the help and assistance of the sense, reason can achieve nothing more than a labourer can working in darkness behind shuttered windows.” *Essays*, IV, 147-149. We find a similar sentiment in Hooker: “[T]hose Laws [of nature] are investigable by Reason, without the help of Revelation supernatural and divine. Finally, in such sort they are investigable, that the knowledge of them is general, the world hath always been acquainted with them...but this Law is such that being proposed no man can reject it as unreasonable and unjust. Again, there is nothing in it but any man (having natural perfection of wit and ripeness of judgement) may by labour and travail find out.” Hooker, *Of the Laws of Ecclesiastical Polity*, Volume I, Book I, VIII, 182.

32 Locke, *Essays*, II, 135. By “reason,” Locke means “the discursive faculty of the mind, which advances from things known to things unknown and argues from one thing to another in a definite and fixed order of propositions. It is this reason by means of which mankind arrives at the knowledge of natural law. The foundations, however, on which rests the whole of that knowledge which reason builds up and raises as high as heaven are the objects of sense-experience [*objecta sensuum*]; for the senses primarily supply the entire as well as the chief subject-matter of discourse and introduce it into the deep recesses of the mind” (149).

33 Locke, *Essays*, IV, 181.

punishment [*debitum supplicii*], which arises from our failure to pay dutiful obedience.”³⁴ Again, the “bond of law” arises when one “has right and power [*jus et potestatem*] over us”—it “derives from the lordship and command [*dominio et imperio*] which any superior has over us and our action,”³⁵ by “natural right and the right of creation [*jure naturae et creationis*]...or by the right of donation [*jure donationis*].”³⁶ In the context of these early lectures, Locke does not specify who specifically is to carry out punishment, only that it will be done by a superior will; a will that is superior by right of nature or god’s donation. Locke also does not entertain the idea of a “state of nature” in these essays—a political hierarchy is always presumed—so there is no discussion of a private right of punishment outside of civil society.

In addition to the absence of a discussion of a state of nature and a private right to punishment, Locke’s discussion of property in these lectures does not touch upon the question of origins. That is to say, he does not yet have here a *theory* of property (about self-ownership, labour, etc.), although property does have great importance in his lectures: “For what justice is there where there is no personal property or right of ownership [*nulla proprietas aut dominium*], or what personal property where a man is not only allowed to possess [*possidere*] his own [*suum*], but what he possesses is his own

34 Locke, *Essays*, VI, 183. As von Leyden notes, “In the English translation of Robert Sanderson’s *De Juramenti Promissorii Obligatione*, entitled *De Juramento* (London, 1655, lect. I, sect. xii, p. 25), *debitum officii* is rendered thus: ‘...debt, according unto which every man is bound by the precept of the Law to act’. Locke derived this distinction between two kinds of duty from Sanderson. In accordance with his voluntarist theory of law, however he substituted the expression *ex edicto superioris potestatis* for Sanderson’s phrase *ex praecepto juris* (*De Juramenti Promissorii Obligatione*, 1646, i. 12).” And *debitum supplicii* is defined in Sanderson’s text as “...debt, according to which every man is bound by the decree of the Law to suffer if he neglect his duty.” Locke, *Essays*, 183n.

35 Ibid., VI, 181-83.

36 Ibid., VI, 185.

[*suum*], merely because it is useful to him.”³⁷ And in his lecture against theories asserting that natural law is based on or derived from individual interest or utility—i.e. from expediency, as with *ius gentium*—Locke employs private property to demonstrate how, despite the falsity of these theories, general and individual interests are not at odds.

[W]hen we say that each man’s personal interest [*privatam cujusque utilitatem*] is not the basis of natural law, we do not wish to be understood to say that the common rules of human equity [*jus commune hominum*] and each man’s private interest are opposed to one another, for the strongest protection of each man’s private property is the law of nature, without the observance of which it is impossible for anybody to be master of his property and to pursue his own advantage. Hence it will be clear to anyone who candidly considers for himself the human race and the practices of men that nothing contributes so much to the general welfare of each and so effectively keeps men’s possessions safe and secure as the observance of natural law.³⁸

As mentioned above, Locke does invoke labouring analogies in his epistemological discussion of our rational discovery of natural law, and elsewhere he nebulously discusses work as a kind of duty, but in no way is labour connected with property. He writes in *Essay* I, for example, that “it does not seem to fit in the with the wisdom of the Creator to form an animal that is most perfect and ever active, and to endow it abundantly above all others with mind, intellect, reason, and all the requisites for working, and yet

37 Locke, *Essays*, VIII, 213. In the *Essay*, Locke asserts that there is no injustice in this condition either. “Where there is no Property, there is no Injustice, is a Proposition as certain as any Demonstration in *Euclid*.” *Essay*, Book IV, Chapter III, §18, 549.

38 Locke, *Essays*, VIII, 207. One can detect a tension not just between the *Essays* and the *Two Treatises*, but within *Essays* themselves, for although a finitude of resources is supposed to give rise to moral limitations on accumulation, Locke is advocates that individuals “pursue their own advantage,” presumably in a condition of competition, and this is said to contribute (in Smithian fashion) to the general welfare. I discuss the differences between the two works on this topic below.

not assign to it any work [*opus*]...”³⁹ And in *Essay IV*, he writes it is impossible to believe that

all this equipment for action is bestowed on him by a most wise creator in order that he may do nothing, and that he is fitted out with all these faculties in order that he may thereby be more splendidly idle and sluggish. Hence it is quite evident that God intends man to do something...⁴⁰

We can almost feel that Locke’s description of this open-ended natural duty to “do something” is looking for a more circumscribed task; a task later identified in the *Two Treatises* as labour, or more specifically, agrarian “improvement,” which produces private property and also paints British colonialism as a natural moral obligation (i.e. to develop the wastelands of America). But in the *Essays on the Law of Nature*, this duty to work is not yet connected to property; his moral theorizing is not yet systematically integrated with economic principles.

Finally, concerning the issue of wealth accumulation, we find Locke’s position in the *Essays* to be the inverse of his later position in the *Two Treatises*. Thus, in the early lectures there is an economic assumption of finitude, stasis, and a zero-sum conception of wealth distribution. “In point of fact,” writes Locke, “the inheritance of the whole of mankind is always one and the same, and it does not grow in proportion to the number of people born.”⁴¹ Because the wealth of the world is of “a predetermined quantity,” it follows that “when any man snatches for himself as much as he can, he takes away from another man’s heap the amount he adds to his own, and it is impossible for anyone to

39 Locke, *Essays*, I, 117.

40 Ibid., IV, 157.

41 Ibid., VIII, 211.

grow rich except at the expense of someone else.”⁴² If we were to assume that private interest was the basis of natural law, it would also follow, claims Locke, that “each person is required to procure for himself and to retain in his possession the greatest possible number of useful things; and when this happens it is inevitable that the smallest possible number is left to some other person, because surely no gain falls to you which does not involve somebody else’s loss.”⁴³ Compare this with radically different position of the *Two Treatises*, where labour and is now connected to property and duty, while value (a product of labour) is subject to unlimited growth: “*As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common*” (II, §32), and since appropriation “does not lessen but increase the common stock of mankind” (II, §37), the “*Property of Labour should be able to over-balance the Community of Land*” (II, §40). In the following section, I discuss this development in relation to colonialism, domestic enclosures of the commons, as well Locke’s increasingly scholastic metaphysical turn to support it.⁴⁴

42 Ibid. The sentences prior to this claim read: “Nature has provided a certain profusion of goods for the use and convenience of men, and the things provided have been bestowed in a definite way and in a predetermined quantity; they have not been fortuitously produced nor are they increasing in proportion with what men need or covet... Whenever either the desire or the need of property increases among men, there is not extension, then and there, of the world’s limits. Victuals, clothes, adornments, riches, and all other good things of this life are provided for common use. And so, when any man snatches for himself as much as he can, he takes away from another man’s heap the amount he adds to his own, and it is impossible for anyone to grow rich except at the expense of someone else.” (211).

43 Locke, *Essays*, VIII, 211-213.

44 This position is in opposition to Schneewind’s claim that “the natural law [Locke] used in his political writings and briefly explained elsewhere was not Thomistic.” J. B. Schneewind, “Locke’s Moral Philosophy, in *The Cambridge Companion to Locke*, edited by Vere Chappell (Cambridge: Cambridge University Press, 1994), 209. Elsewhere, Schneewind writes: “Locke frequently cites Hooker in the *Second Treatise*, yet, as his strong endorsements of Pufendorf suggest, it is better to take him to be working with the modern natural law framework than to be using a Thomistic view.” Schneewind, *The Invention of Autonomy*, 142. My argument about Locke’s scholasticism is not an argument about whether Locke was a

II. Property, Personality, Duty, and Value

The beginning of *private* property in Locke's *Two Treatises of Government* is of course through individual labour, although the origin of property *in general* is through God's creation: of the world itself, which is owned in common—"a Dominion in common" (I, §29)—with an *inclusive* use right (*ius ad rem*);⁴⁵ and the property within each person as a product of God's "workmanship" (II, §6), which entails an *exclusive* use right (*ius in re*). Locke's discussion of property in Chapter Five, *Of Property*, (II, §§25-51) of the *Second Treatise* is probably the most famous discussion of the subject in modern philosophy, but with fame has come simplification and de-contextualization. I

voluntarist or rationalist per se. Locke had positions that resemble both, and the centrality of subjective natural rights in his theory is influenced more by the neo-Thomists than Aquinas himself, for example, and although I will treat him more as a voluntarist, his voluntarism more resembled that of Suarez than that of Luther. On Suarez's mixed position, Schneewind writes: "The voluntarists were strongly opposed by those who, following Thomas, held that God's legislation reflects or expresses his intellectual nature and therefore complies with the eternal truths of logic and morality. Suarez developed a position that would take account of both of these views. He argued, on the one hand, that God's legislative activity is guided by the goods and evils that are connected to the unalterable natures of created things, but he insisted also that moral obligation arises solely from God's command and that without command there is no law." Schneewind (ed.), *Moral Philosophy from Montaigne to Kant* (Cambridge: Cambridge University Press, 2003), 68. My claim, however, has more to do with Locke's scholastic understandings of *dominium*, self-mastery (i.e. liberty) and how he theorized the proprietary state of the world prior to political society. I discuss these below in Section 4. For Skinner's account of how much Locke was influenced by Jesuit and Dominican counter-reformation writers, see his *The Foundations of Modern Political Thought*, Vol. II, (Cambridge: Cambridge University Press, 1978), Chapter 6.

45 The claim that Locke is working with an assumption of original common ownership is contrary to the position of several Locke interpreters. The disagreement, I believe, arises from historical and terminological ambiguities. Locke does not speak of "private" and "public" property, but only of property, private possessions, dominion in common, and the community of land. While it is clear that Locke intends "property" to mean what we call private property, i.e. exclusive individual ownership, the absence of talk about "public" property in this context has created some confusion. We must keep in mind that "public" in this context would assume not only a distinct polity, but a state or commonwealth personality—one which represents the will of the people, not just the will of the rulers, be they monarchs or aristocrats. Since Locke is speaking of the state of nature where no such public personality exists, talk of public property would be anachronistic. He does, however, speak of the rights that all individuals, whom he variously refers to as "Mankind," "them all," etc., have in the commons. I return to this issue later in the chapter.

address the first in this section, treating Locke's understandings of duty, value, and self as they relate to property in turn. The task of greater historical contextualization will be taken up in Chapter Two.

As in the early lectures on natural law, duties here are universal, theologically informed (i.e. voluntarist) entailments of natural law in Locke's text. "The *State of Nature* has a Law of Nature to govern it, which obliges everyone" (II, §6), writes Locke, and three particular duties entailed by this law are relevant to Locke's discussion of property. These include the duty: (i) to self-preservation (II, §6); (ii) to "*preserve the rest of Mankind*" (II, §6) by enforcing the laws of nature, including punishment and reparations (II, §11); and, (iii), his the revolutionary addition to his interpretation of natural law, subdue the Earth, as stipulated in *Genesis* I. 29, through improvement of uncultivated lands, which results in private dominion or appropriation (II, §35).

The duty to self-preservation always remains operative, but the second and third duties are only operative within a state of nature (discussed further in Chapter Three), and are transformed, if not nullified, in political societies with legitimate governments.⁴⁶ Thus, the duty to individually enforce the law of nature, for each to act as judge and executioner, is not valid under governments that possess an impartial judicial authority. And the duty to privatize the commons as God created them is not valid in a political society with contractually legitimate property recognized in positive law and enforced by the state. The commons within a political state can only be privatized through the mutual consent of all who possess an inclusive use-right to it, unlike in the state of nature where

46 As we shall see, the right of self-preservation, while still operative for individuals protecting their persons in a legitimate political society, also becomes collectivized when government becomes illegitimate or arbitrary and absolutist. In the latter case, the right of self-preservation becomes a right of resistance and even revolution held collectively by the "people".

labour privatizes and consent is unnecessary.⁴⁷ Since I further address the first two duties later in this chapter, I focus here on the third duty: that of appropriation through labour.

“God, who hath given the World to Men in common,” writes Locke, “hath also given them reason to make use of it to the best advantage of Life, and convenience” (II, §25). Yet utilizing this gift from God is not a mere option, but, echoing a sentiment already expressed in the *Essays on the Law of Nature* some twenty years earlier, is a duty. “God, when he gave the World in common to all Mankind, commanded Man also to labour, and the penury of his Condition required it of him. God and his Reason commanded him to subdue the Earth, *i.e.* improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour” (II, §32). For, “it cannot be supposed [God] meant it should always remain common and uncultivated” (II, §34). This is the path of the “Industrious and Rational” who labour on the earth and “improve” it, *i.e.* make it productive in a way that not only creates use value, but creates exchange value as well. (I return to this point in my discussion of value below.) We now that the aforementioned missing link between Locke moral and economic theory:

God Commanded, and his Wants forced him to *labour*. That was his *Property* which could not be taken from him where-ever he had fixed it. And hence subduing or cultivating the Earth, and having Dominion, we see are joyned together. The one gave Title to the other. So that God, by commanding to subdue, gave Authority so far to *appropriate*. And the Condition of Humane life, which requires Labour and Materials to work on, necessarily introduces *private Possessions* (II, §35).

47 “’Tis true, in *Land* that is *common* in *England*, or any other Country, where there is Plenty of People under Government, who have Money and Commerce, no one can inclose or appropriate any part, without the consent of all his Fellow-Commoners: Because this is left common by Compact, *i.e.* by the Law of the Land, which is not to be violated” (§35).

Although labour, and thus private appropriation, is a duty, it is a duty within natural law and thus cannot contradict other like duties: “Every one as he is *bound to preserve himself*, and not to quit his station; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind*” (II, §6). In the context of private appropriation in the state of nature, there is a natural limitation on the amount one can appropriate, for one’s individual labour is surely finite: “The measure of Property, Nature has well set, by the Extent of Mens *Labour, and the Conveniency of Life*: No Mans Labour could subdue, or appropriate all” (II, §35). That said, it is possible for one’s labour to produce more than is necessary for the “Conveniency of Life,” and therefore what exceeds the latter becomes common once again: “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” (II, §38).⁴⁸ Thus the duty of preserving others, as well as their own duty to self-preservation, can lead to the products of one’s labour being appropriated by others as long as they exceed what one needs for one’s self-preservation (and would otherwise go to waste) and, indeed, we have a duty to protect their right to do so.

This natural limitation is overcome by exchanging things that cannot be consumed before spoiling for durable goods, a practice made easier with the introduction of money.⁴⁹ According to Locke’s early lectures on natural law, this would seem to open

48 “The same Law of Nature, that does by this means give us Property, does also *bound that Property* too. *God has given us all things richly*, I Tim. vi. 17. is the Voice of Reason confirmed by Inspiration. Buy how far has he given it to us? *To enjoy*. As much as any one can make use of to any advantage of life before it spoils; so much may by his labour fix a Property in” (II, §31). I discuss this further in below.

49. I discuss this further in Section 3.2 below.

the door to what he variously refers to as “inconveniencing” or “prejudicing” others, i.e. to taking more than needed and thus potentially leaving less than enough for one’s neighbours, but now Locke sees it differently. As mentioned in the previous section, he argues that because this new system of commodity production, initiated by the introduction of money as a common medium of exchange, increases surplus value, and appropriation “does not lessen but increase the common stock of mankind” (II, §37),⁵⁰ and the “*Property of Labour* should be able to over-balance the Community of Land” (II, §40). That is to say, not only are we securing our own preservation through appropriation, but we are increasing the amount of commodities to help secure the preservation of others. Locke, however, does not address an important change here, namely, that this new “common stock” is privately, not collectively, owned and thus just having labour power is not enough to secure material necessities. One must have the money (via wages or the sale of one’s own products) to buy them, making self-preservation in a money economy a socio-economic variable rather than a natural one.

Before moving on to the discussion of value, which I’ve only briefly touched upon thus far, there is one more issue that should be discussed concerning the limitation to the duty of appropriation. Because Locke’s discussion of appropriative labour is within the context of a state of nature, the territorial boundaries of the appropriator are not restrictive. That is to say, the duty to appropriate uncultivated or “waste” land (*res nullius* or *vacuum domicilium*) is a duty operative wherever such land exists. Thus, even in Locke’s seventeenth-century England, he and his fellow citizens have a duty to

⁵⁰ As Macpherson points out, this part of §37 was not present in the original edition of the *Two Treatises*, but was added to the fourth edition. See C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (New York: Oxford University Press, 1962), 211n.

appropriate, for example, “vacant places of *America*” (II, §36). As Locke explains, “there are still *great Tracts of Ground* to be found, which (the Inhabitants thereof not having joyned with the rest of Mankind, in the consent of the Use of their common Money) *lie waste*, and are more than the People, who dwell on it, or can make use of, and so still lie common” (II, §45). God commands us to subdue the earth, says Locke, not just this or that part of it. As we shall see, Locke’s seventeenth-century fellow citizens enter a state of nature the moment they exit the territorial jurisdiction of their government, thus reactivating all the above duties when they do so. Locke is, in effect, here articulating a duty to colonize insofar as the appropriative labour of these English citizens establishes private property (*dominium*): the necessary first step toward the establishment of legitimate political jurisdiction.

Locke’s theory of labour is sometimes referred to as his labour theory of value, for “’tis *Labour* indeed that *puts the difference of value* on every thing” (II, §40). Locke says that if we “rightly estimate things as they come to our use” we will recognize that “in most of them 99/100 are wholly to be put on the account of *labour*” (II, §40). His comparative example to demonstrate his point is here, as it is throughout this chapter, Amerindian life and land use (§41):

There cannot be a clear demonstration of any thing, than several Nations of the *Americans* are of this, who are rich in Land, and poor in the Comforts of Life; whom Nature having furnished as liberally as any other people, with the materials of Plenty, *i.e.* a fruitful Soil, apt to produce in abundance, what might serve for food, raiment, and delight; yet for want of improving it by labour, have not one hundredth part of the Conveniencies we enjoy: And a King of a large and fruitful Territory there feeds, lodges, and is clad worse than a day Labourer in *England*.

Locke goes on in the following section to compare the values of consumables which

“unassisted Nature furnishes us with.” such as acorns, water, leaves, skins, etc. with the value of products “which our industry and pains prepare for us” (II, §42), such as bread, wine, cloth, etc., before turning to the most significant type of property: land. “And the ground which produces the materials, is scarce to be reckon’d in, as any, or at most, but a very small, part of it; So little, that even amongst us, Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, *wast*; and we shall find the benefit of it amount to little more than nothing (II, §42). Again returning to a comparison with land use in America, Locke this time increases the value of labour from 99% to 99.9%, for “Nature and the Earth furnished only the almost worthless Materials, as in themselves” (II, §43).

Locke’s labour theory of value is thus fairly clear. Natural raw materials have almost no value until they are combined with labour, significantly increasing the value of what have become useable objects or exchangeable commodities. Although the hunting and gathering of objects like water, acorns, moss, fish, deer, etc. constitutes value-producing labour with respect to their removal from their original place in nature, for Locke, objects that are actually the products of labour, such as silk, wine, cloth, etc. have many times more value. Locke’s discussion of land use, however, is notably more Eurocentric, for it is definitively limited by agrarian criteria. One consequence of this move is that while “all the Materials made use of” for “any part of the Work” that goes into producing a loaf of bread (II, §43) are calculated, the land necessarily made use of in hunting is nevertheless worthless. Indeed, Locke’s strongest assessment of the worthlessness of uncultivated land is in the context of American land use; the same context in which he ups his ratio of labour value from 99% to 99.9%. Later, in the context

of legitimate political societies with money economies, Locke will grant that scarcity creates value in uncultivated land where there is an “Increase of People and Stock, with the *Use of Money*,” contrasting it with land in America which still “lies waste” because “the Inhabitants” have not “joyned with the rest of Mankind, in the consent of the Use of their common Money” (II, §45).

The introduction of money as a tacitly consensual institution has several significant consequences in Locke’s account: (1) it facilitates the overcoming of the spoilage limitation on appropriation; (2) it facilitates the transformation of what Locke calls the “intrinsic value” of things; and (3) it generates inequality, which is justifiable since means of achieving this inequality was consensually introduced. Thus, the condition that

every Man should have as much as he could make use of, would still hold in the World, without straitning any body, since there is Land enough in the World to suffice double the Inhabitants had not the *Invention of Money*, and the tacit Agreement of Men to put a value on it, introduced (by Consent) larger Possessions, and a Right to use them (II, §36).

First, there is nothing surprising about the first consequence, the overcoming of the spoilage limitation. Money is neither the first nor the only way of accomplishing this, for exchanging non-durable for durable goods, such as metal, shells, stones, or diamonds has the same effect.⁵¹ Nonetheless, Locke downplays this continuum in order to rhetorically create a greater contrast between European economies, which for him have clearly recognizable currency, and Amerindian economies, which may hoard durable goods, but

⁵¹ “Again, if he would give his Nuts for a piece of Metal, pleased with its colour; or exchange his Sheep for Shells, or Wool for a sparkling Pebble or a Diamond, and keep those by him all his Life, he invaded not the Right of others, he might heap up as much of these durable things as he pleased; the *exceeding of the bounds of his just Property* not lying in the largeness of his Possession, but the perishing of any thing uselessly in it” (§46).

apparently never use them as a medium of exchange. In paragraph §45 of the *Second Treatise*, money almost sounds like a sufficient condition for legitimate political societies, which it clearly is not by Locke's own definition elsewhere.

Secondly, for Locke, money as a medium of exchange changes the natural, or “intrinsic,” value of things⁵²—things once gathered, hunted, or produced only for their use value—because they can now be exchanged rather than consumed. This possibility of exchange value not only produced a new *right* to enlarge one's possessions (II, §§36, 46, 48, and 49), but produced a new *desire* as well: greed. “Find out something that hath the *Use and Value of Money* amongst his Neighbours, you shall see the same Man will begin presently to *enlarge* his *Possessions*” (II, §49). This new desire is described positively in the *Two Treatises*, and as Locke remarks elsewhere, as in the *Essay* for example, such desire is the “chief if not only spur to humane Industry and Action,”⁵³ and in *Some Thoughts Concerning Education*, he claims that “where there is no Desire, there will be no Industry.”⁵⁴

Lastly, the inequality that results from this new right and desire is justifiable, because it is the natural consequence of an institution to which all have consented, expressly or tacitly. Locke concludes that

52 “This is certain, That in the beginning, before the desire of having more than Men needed, had altered the intrinsic value of things, which depends only on their usefulness to the Life of Man; or [Men] had *agreed, that a little piece of yellow Metal*, which would keep without wasting or decay, should be worth a great piece of Flesh, or a whole heap of Corn” (§37). And we also read in §43: “An Acre of Land that bears here Twenty Bushels of Wheat, and another in *America*, which, with the same Husbandry, would do the like, are, without doubt, of the same natural, intrinsic Value.”

53 Locke, *Essay*, Book II, XX, §6, 230.

54 Locke, *Some Thoughts Concerning Education*, in *The Educational Writings of John Locke*, edited by James Axtell (Cambridge: Cambridge University Press, 1968), 234.

it is plain, that Men have agreed to disproportionate and unequal Possession of the Earth, they having by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus, God and Silver, which may be hoarded up without injury to any one, these metals not spoiling or decaying in the hands of the possessor (II, §50).

It should be remembered that a money economy is possible in a state of nature: “an inequality of private possessions, men have made practicable out of the bounds of Society, and without compact, only by putting a value on gold and silver and tacitly agreeing in the use of Money” (II, §50).

III. Recognition and Locke's Epistemic Self

Perhaps the most perplexing and least understood component of Locke theory of property is the causal (and seemingly metaphysical) chain Locke constructs between having property in one's own person and “mixing” it with external objects through labour, thus extending an exclusive property right to one's self into the external world of objects. In one of the most famous statements in the *Two Treatises*, 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. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his Property... [and] no Man but he can have a right to what that is once joyned to...(II, §27).

Through labour, external objects—previously common property, or what Pufendorf

called a “positive community” with an *inclusive* use right for everyone—become *private* property with a correlative *exclusive* use right.⁵⁵ Labour, writes Locke, puts a “distinction between them and the common,” having “added something to them more than Nature” (II, §28). But what is being joyned or fixed or added here? Perhaps it is simply *value*. The above distinction between the private and the common resonates with a claim by Locke quoted at the beginning of the previous section, where labour is said to put “*the difference of value* on every thing” (II, §40). And when he writes that “*labour makes* the far greater part of *the value*” of things, we could easily understand this as something labour *adds* to natural objects, i.e. value. Locke certainly intended this connection, but this explains the “adding” not the “joyning,” for how does this value become the private right of an individual? How can we say that the work of our hands is our property, even if we accept an earlier premise that there is an original property in our person? And even if we accept this premise, isn’t this property, i.e. the property in one’s own person, actually God’s property? In his chapter *Of the State of Nature*, Locke writes that individuals are God’s “Property” because they are his “Workmanship” (II, §6). If we accept this claim (and the problem it raises concerning the now ambiguous recipient of an individual’s property-generating labour), we’re still faced with the original problem: how does workmanship create property, not just value, even when it is the workmanship of God?

To attempt to answer these questions, we have to go beyond the *Two Treatises*, and look at Locke’s other writings, particularly *An Essay Concerning Human Understanding*, for while it is not discussed in the *Two Treatises*, Locke’s conception of

⁵⁵ See Pufendorf, *Of the Laws of Nature and of Nations*, edited by Basil Kennett (Oxford: Lichfield, 1703), Book IV, Chapter IV, 318. James Tully argues against this position, saying that Locke did not recognize the commons as commonly owned. I will argue that Tully is wrong on this point in the following section.

the self is very relevant to the subject at hand. This also allows us to address a widely held, albeit problematic idea about Locke's theory of property, namely, that Locke had *two* theories of property, one narrow (i.e., property as an exclusive right to external objects) and the other general (i.e., property as life and liberty).⁵⁶ Once we take account of Locke's understanding of the self, this distinction collapses, for the self and its practical activity will be recognized as the foundation for both. This is not to say, however, that the relationship of the Lockean self to each of these manifestations of 'property' is clear-cut. On the contrary, his use of it is inherently ambiguous, not because he was essentially confused on the matter, I would argue, but because he used the term "property" for a relation of *dominium*, which carries with it a dual sense of mastery, lordship or command on the one hand and ownership on the other. While Locke does not use the term *dominium* in his description of self, life, and liberty, many who exercised an

56 "Man... hath by Nature a Power... to preserve his Property, that is, his Life, Liberty and Estate" (§87); "Lives, Liberties and Estates... I call by the general Name, *Property*" (§123); "By *Property* I must be understood here, as in other places, to mean that Property which Men have in the Persons as well as Goods" (§173). Macpherson argued that Locke was essentially confused on the matter. Barbara Arneil argues that what "is peculiar about his use of these two definitions is that, on examination, they are used in very specific sections of the Second Treatise... Of the twenty references to 'property' in the narrow sense, fifteen of them occur in the chapters 'On Property' and 'Conquest'. None of the twelve references that Laslett has listed of property defined as 'Life, Liberty and Estate' occurs in these two chapters. In other words, the two definitions seem to be mutually exclusive and are used by Locke in very specific places in his argument." Arneil, *John Locke and American: The Defence of English Colonialism* (New York: Clarendon Press, 1996), 133. Arneil's conclusion that speaking of property in broader or narrower terms in different sections of the text is evidence that they are "mutually exclusive" definitions is completely unfounded. Since in one section Locke is discussing the legitimate purpose of government (as, we shall see, Richard Baxter does) and in another the means by which private property is established, we would expect that property be treated differently. This is not to say that Locke is always consistent or that he has anywhere in the text actually explained just what he means by 'Life, Liberty and Estate,' but recognizing the different contexts of Locke's discussion of property should not encourage, but rather caution us against drawing such a conclusion. For a historical contextualization of Locke among his contemporaries on the topic of property, see Judith Richards et al, "Property' and 'People': Political Usages of Locke and Some Contemporaries," *Journal of the History of Ideas*, Vol. 42, No. 1, (Jan.-Mar., 1981), 29-51.

influence on Locke did.⁵⁷ Concerning the relation of *dominium* to the self, for example, Tierney writes:

A continuous chain of texts connects the idea of dominion of self with the seventeenth-century doctrines. There are relevant comments, for instance, in Olivi, Gerson, Summenhart, Vitoria, Suarez, and Grotius. Sometimes *dominium* was taken in Aquinas's sense of self-mastery; sometimes the idea of property persisted, especially in discussions on whether a man could sell himself into slavery. It is a story that has never been adequately written.⁵⁸

In the theological debates over Franciscan poverty in the thirteenth and fourteenth centuries, the renunciation of this self-*dominium* was considered necessary, not only because it constituted a type of command and ownership inconsistent with poverty, but because (as in Locke) it was origin of all other types of command and ownership.⁵⁹

Although Aquinas, as a Dominican, rejected the Franciscan position on the possibility of complete poverty, he clearly agreed on the originary relation of self-*dominium*:

⁵⁷ Locke is at best ambiguous on this, which is not unusual among his contemporaries. In the *Essays on the Law of Nature*, his use of *imperium* is often translated as dominion, as for example when he speaks of God transferring “part of his dominion,” the Latin reads “*partem imperii*.” In the essays he also speaks of *dominio et imperio*, which has been translated “lordship and command,” but in §123 of the *Second Treatise*, he speaks of one’s “Lordship” as being one’s “Empire,” the standard English translation of *imperium*. A more systematic study of Locke’s language in this context is much needed.

⁵⁸ Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta, Scholars Press for Emory University, 1997), 89. Tierney is correct on all accounts here, including his last assertion about the unwritten history of *dominium*; a fact that has made my attempt to theorize the relation between *dominium* and *imperium* in the modern colonial context that much more difficult. Much has been written on the history of *imperium* in its Roman, papal, monarchic and popular forms, for example, but little systematic treatment has been given to a similar history of *dominium*—outside of its relation to the medieval origins of subjective *ius*—and perhaps more importantly, the relation between *dominium* and *imperium*.

⁵⁹ In this spirit, the Franciscan John Pecham writes around 1270: “He only perfectly abnegates himself who fully renounces his own proper will. For the will is in a man’s power to such an extent, that it cannot be extorted by anyone else. A man can therefore offer God no sacrifice so pleasing as to cut off from himself that which is supremely his own, that is, dominium of his own proper will... This is the obedience which annihilates all of a man, keeping nothing of the human to himself, so that the obedient man does not live himself, but Christ in him.” John Pecham, *Tractatus pauperis*, edited by A. G. Little, in C. L. Kingsford, A. G. Little and F. Tocco (eds.), *Pecham de paupertate* (Aberdeen, 1910), 13-90, Chapter 10, 31; cited in Annabel Brett, *Liberty, Right and Nature: Individual rights in later scholastic thought* (Cambridge: Cambridge University Press, 1997), 13.

Now nothing is more desirable to man than the liberty of his proper will [*propiae voluntatis*]. For it is this that he is a man and master [*dominus*] of other things, by this that he can use and enjoy them, by this even that he masters his own actions. So that just as the man who relinquishes riches, or persons conjoined to him, denies their being; so he who foregoes the authoritative judgement [*arbitrium*] of his proper will, by which he is master [*dominus*] of himself, denies his own being.⁶⁰

We find this idea before Aquinas, of course. Annabel Brett argues that the “notion that *dominium* of one’s will is liberty and is constitutive of humanity as such antedates the recovery of Aristotle’s *de Anima*,” tracing it to:

the neoplatonic notion of the reflexivity of the two spiritual powers of intellect and will, which was transmitted to medieval theology principally via Augustine’s work *De trinitate* and the Latin translation of the anonymous Arabic *Liber de causis*. Both of these sources differentiate between material or corporeal, and immaterial or spiritual, powers in the ability of the latter to reflect upon themselves, that is to constitute themselves as their own object or to be self-determining. Rationals, that is all creatures endowed with reason, are distinguished from all the rest of creation through the possession of spiritual powers, whose characteristic of reflexivity is the foundation of liberty and *dominium*.⁶¹

In the early fifteenth century, Jean Gerson spoke of a “*dominium* of liberty”⁶² and, as Tierney noted, similar arguments are found in Vitoria and the Jesuit Francisco Suárez, a student of Vitoria steeped in the neo-Thomism of his day and a target of Filmer’s critique

60 Aquinas, *De perfectione spiritualis vitae*, Chapter 11, 79, in *Sancti Thomae de Aquino, Opera omnia iussu Leonis XIII P. M. edita, cura et studio Fratrum Praedicatorum*, vol. XLI, parts B-C (Rome, 1969); cited in Brett, *Liberty, Right and Nature*, 14. Tierney notes that this continuity—between *dominium* of oneself and things in the world—was commonplace in late medieval thought, but that Locke’s “mixing” metaphor is novel. See his discussion in Tierney, “Historical Roots of Modern Rights: Before and After Locke,” *Ave Maria Law Review*, 3:23 (2005), 23-43. Cf. William Blackstone’s famous and similar sounding comment on property: “There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” Blackstone, *Commentaries on the Laws of England*, Volume II, Chapter 1.

61 Brett, *Liberty, Right and Nature*, 14-15.

62 In *De Vita Spiritualis Animae* (1402), Gerson writes: “There is a natural *dominium* as a gift from God, by which every creature has a *ius* directly from God to take inferior things into its own use for its own preservation. Each has this *ius* as a result of a fair and irrevocable justice, maintained in its original purity, or a natural integrity. In this way Adad had a *dominium* over the fowls of the air and the fish in the sea... To this *dominium* of liberty can also be assimilated, which is an unrestrained *facultus* give by God...” *Oeuvres*, III, 145; cited in Tuck, *Natural Rights Theories*, 27.

in *Patriarcha*.⁶³ Suárez is, I believe, largely the source (directly or indirectly) for Locke's thoughts on the matter.⁶⁴ It is significant, for example, that Locke defended Suárez's basic position (without naming him) against Filmer in the *First Treatise*, and as we shall see, shared Suárez's premise, derived from Aquinas, that the world was originally common property from which individuals privatize portions thereof.⁶⁵ And on the subject of self-ownership, Suárez writes, again echoing Aquinas (himself echoing Aristotle⁶⁶): "nature itself confers upon man the true property [*dominium*] of his liberty, [and]... he is not the slave, but the master [*dominus*] of his actions."⁶⁷

John Tierney has also noted that Locke's phrase "Lord of his own Person and Possessions," is almost word for word a phrase Peter John Olivi used in the thirteenth century: "each one is lord of himself and of his own," *dominus sui et suorum*.⁶⁸ In the

63 Sir Robert Filmer, *Patriarcha and Other Writings*, ed. Johann P. Sommerville (Cambridge: Cambridge University Press, 1991), 15-16.

64 W. von Leyden argues that there is reason to believe that Locke was familiar with Suárez's *Tractatus de Legibus ac Deo Legislatore*. See von Leyden, Introduction, *Essays on the Law of Nature*, 36-37. As I mentioned above (See footnote 44), Schneewind does not find Thomist traces in Locke's theory of natural law, although they can be found in Locke's Protestant contemporaries, such as Hooker, Culverwell, Sanderson, and Taylor: "Hooker's theory was Thomistic, as was that published in England in 1652 by Nathanael Culverwell, who followed closely the exposition of Thomistic natural law doctrine by the Spanish Jesuit Francisco Suárez (1612). Protestants in general felt no need to disavow this part of Catholic teaching. Such distinguished seventeenth-century divines of the Church of England as Robert Sanderson and Jeremy Taylor made Thomistic natural law theory the basis for their work on conscience and casuistry. Locke knew the work of Sanderson and Culverwell but the view of natural law he used in his political writings and briefly explained elsewhere was not Thomistic." Schneewind, "Locke's Moral Philosophy," 209.

65 Tully makes this connection in *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), chapter four; and his *A Discourse of Property*.

66 See Aristotle, *Nicomachean Ethics*, 1114a 12.

67 Suárez (2.14.16), cited in Tully, *A Discourse of Property*, 111.

68 Tierney, "Historical Roots of Modern Rights," 34. This phrase in Locke appears in a pregnant and pivotal paragraph at the beginning of Chapter IX: "If Man in the State of Nature be so free, as has been said; If he be absolute Lord of his own Person and Possessions, equal to the greatest, and subject to no Body, why will he part with his Freedom? Why will he give up his Empire, and subject himself to the

same century, John of Paris, who was greatly influenced by Aquinas and paraphrasing in part the theory of Godfrey of Fontaines,⁶⁹ articulated what could perhaps be the first “Lockean” theory, for it clearly combined a notion of self-*dominium*, a labor theory of acquisition outside of civil society, and a clear distinction between jurisdiction and ownership on the part of secular and religious rulers, affording rulers only the former (*jurisdictio*).⁷⁰ Grotius, on the other hand, referred to the power we have over ourselves as a faculty (*facultus*), which is liberty, and the *facultus* we have over others as either fatherly power (*patria potestas*) or the power of the slave owner, which he distinguished from a third *facultus*: ownership.⁷¹

Dominion and Controul of an other Power? To which 'tis obvious to Answer, that though in the state of Nature he hath such a right, yet the Enjoyment of it is very uncertain, and constantly exposed to the Invasion of others. For all being Kings as much as he, every Man his Equal, and the greater part no strict Observers of Equity and Justice, the enjoyment of the property he has in this state is very unsafe, very unsecure.” *Second Treatise*, §123, 350.

69 Godfrey of Fontaines and Henry of Ghent (whom I discuss momentarily) were both opponents of the Franciscans in the mendicant poverty debates, and their understanding of *dominium*, with its correlative conception of subjective right, provided (as with Locke) a basis for a theory of resistance. As Godfrey of Fontaines writes of *dominium* in the 1280s: “On account of this, that each one is bound by the law of nature to sustain his life, which cannot be done without exterior goods, therefore also by the law of nature (*iure naturae*) each had dominion and a certain right [*dominium et quoddam ius*] in the common exterior goods of this world which right also cannot be renounced.” And on resistance he writes: “Good rulers, especially ecclesiastical ones...ought to rule as in fitting in the best polity, one in which the ruler does not intend his own good but the good of his subjects, who are not slaves but free men, having the power to oppose their ruler if he wishes to tyrannize over them.” Cited in Tierney, *The Idea of Natural Rights*, 38. See Janet Coleman, “Property and Poverty,” in *The Cambridge History of Medieval Political Thought: c. 350 – c. 1450*, edited by J. H. Burns (Cambridge: Cambridge University Press, 1988), 607-648.

70 As Janet Coleman describes John’s position, the property of lay people is “prior chronologically to spiritual power and institutions, is acquired by the individual’s skill, labour and own industry and individuals as individuals have in these things *ius et potestatem et verum dominium*, right and power and valid lordship. Each person may order his own, dispose of, administer, hold or alienate as he will without injury to any other since he is *dominus*. In the lay world property is distributed discretely through a process of acquisition characterized by individual labor. One acquires rights over the goods for which one has laboured and therefore one can use or alienate such goods.” Janet Coleman, “*Dominium* in Thirteenth and Fourteenth-Century Political Thought and its Seventeenth-Century Heirs: John of Paris and Locke,” *Political Studies* 33 (1985), 82. See also Brian Tierney’s chapter on John of Paris in his *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism*, enlarged new edition (New York: Brill, 1998).

71 Hugo Grotius, *The Rights of War and Peace*, Book I, Chapter I, §5, p.138.

Besides the history and ambiguity of the language of *dominium*, which I return to at greater length in Chapter Two, we must also keep in mind what so much of the secondary literature on Locke often forgets: Locke's use of the term *property* (as opposed to the Latin *dominium*) for one's self, acts, and liberty is not novel either—neither to him nor to other seventeenth-century philosophers, theologians, and jurists. Although it is somewhat exceptional, in the thirteenth century Henry of Ghent spoke of having property (*proprietas*) in one's own person. The topic was raised by Henry in the context of the question of whether a condemned criminal has a right to self-preservation (and thus, unlike Socrates, chose to flee) even when the authorities have a right to inflict (capital) punishment. Henry concluded that he did and his discussion of the topic was later taken up by Jacques Almain in the early sixteenth century and, as Skinner has claimed, there is a tractable connection between Locke and Almain on this topic.⁷² And as C. B. Macpherson and other have pointed out, the English Levellers and other contemporaries were explicitly using the concept in Locke's time.⁷³ As Richard Overton, for example,

⁷² See Skinner, *Foundations of Modern Political Thought*, Vol. II, 119. J. H. Burns provides a critique of Skinner's position in "Jus Gladii and Jurisdictio: Jacques Almain and John Locke," *The Historical Journal*, Vol. 26, No. 2 (Jun., 1983), 369-374. See also Brian Tierney discussion of Henry of Ghent in his *The Idea of Natural Rights*, chapter 3. As he writes: "Henry of Ghent based his whole argument on an elucidation of the individual rights of each party. Starting out from some canonistic definitions and doctrines, he created a kind of rights language that was neither Thomist nor Ockhamist, nor indeed, as the argument progressed, like that of any preceding canonist, but that was oddly similar to the language of early modern rights theorists. Henry's argument was not identical with that of any seventeenth-century writers...but it contains many of the same elements of discourse that characterized the later works" (87).

⁷³ See Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (New York: Clarendon Press, 1962). Despite the strong continuities between the Levellers's doctrine of property and Locke's, Macpherson says that "their thinking was possessive, but not as fully possessive as Locke's" (156), because they, unlike Locke, did not argue for unlimited appropriation or accumulation. According to Macpherson, possessive individualism is a product of seventeenth-century thought and is characterized by the belief that the individual is "essentially the proprietor of his own person or capacities, owing nothing to society for them" (3). For a more comprehensive definition of possessive individualism, see his discussion in chapter 6 of *The Political Theory of Possessive Individualism*, 263-277. While Macpherson is right about this possessive quality that characterized seventeenth-century thought, I have obviously been arguing that its foundations are to be found earlier than the seventeenth century. Indeed, some of Locke's arguments are

wrote in his Leveller pamphlet *An appeale from the degenerate representative body* (1647), “to every individual in nature, is given individuall propriety by nature, not to be invaded or usurped by any...for every one as he is himselfe hath a selfe propriety...”⁷⁴ In an unpublished manuscript from the 1660s, Matthew Hale writes that one has “an unquestionable property in his own life and in his own self.”⁷⁵ Right around the time Locke started writing the *Two Treatises*, Richard Baxter published his *The Second Part of the Nonconformist’s Plea for Peace* (1680), which not only asserts that “men’s lives and Liberties are the chief parts of their propriety,” but speaks of a natural “propriety in *his own members*,” and of the propriety in the “*acquisitions* of his industry,” making it “*naturally antecedent to Government*.”⁷⁶ In his *Leviathan* (1651), Hobbes writes: “Of things held in propriety, those that are dearest to a man are his own life, & limbs; and in the next degree, (in most men), those that concern conjugall affection; and after them

“novel”, not because they are new, but because they retrieve and synthesize some quite old ideas in the service of theorizing contemporary conditions. Thus, we should avoid simply opposing Locke’s modernism with “medieval thought” the way Macpherson does when he claims, for example, that in “emphasizing that a man’s labour is his own Locke marked out the extent of his departure from the medieval view,” (219).

⁷⁴ *Leveller Manifestoes of the Puritan Revolution*, edited by D. M. Wolfe (New York: Thomas Nelson and Sons, 1944), 162; cited in Tuck, *Natural Rights Theories*, 149.

⁷⁵ Mathew Hale, *Treatise of the Nature of Lawes in Generall*, B. M. Hargrave MS 485, ff. 3v-4; cited in Tuck, *Natural Rights Theories*, 164. Hale also writes of a labour theory of property: “And the same may be said in reason of such acquisitions, that are made by art or industry, whereby the things so acquired are in some kind become his effects; as by planting, semination, culture, artificial manufacture and the like.” *Ibid.*

⁷⁶ The full quote reads: “Propriety is naturally antecedent to Government, which doth not Give it, but regulate it to the Common good: Every man is born with a propriety in his own members, and nature giveth him a propriety in his Children, and his food and other just acquisitions of his industry. Therefore no Ruler can justly deprive men of the propriety, unless it be by some Law of God (as in the execution of justice on such as forfeit it) or by their own consent, by themselves or their Delegates or Progenitors; And men’s lives and Liberties are the chief parts of their propriety. That is the peoples just reserved Property, and Liberty, which neither God taketh from them, by the power which his own Laws give the Ruler, nor is given away by their own foresaid consent.” Baxter, *The Second Part of the Nonconformist’s Plea for Peace* (London, 1680), 54-5; cited in Laslett’s Introduction to the *Two Treatises*, 287. See also Richard Tuck’s discussion of Baxter in Tuck, *Natural Rights Theories*, 168.

riches and means of living.”⁷⁷ Richard Cumberland writes in his *A Treatise on the Laws of Nature* (1672) of God’s right to “take away any Creature’s Property in his own Life or Goods.”⁷⁸ And although Grotius’s limited conception of property—to private property arising in part through consent—disallows him from employing the term here, his intention and phrasing is certainly similar, for he writes in *The Rights of War and Peace* (1625) that “our Lives, Limbs, and Liberties, had still been properly our own [before the introduction of property], and could not have been, (without manifest Injustice) invaded.”⁷⁹

The point here is that general language of a proprietary relation between self, actions and liberty was not peculiar to Locke. Unfortunately, Locke does not go far beyond the cursory comments on the subject made by his predecessors, but his analysis of the self and the appropriation of its practical activity in *An Essay Concerning Human Understanding* can help us understand just what he was getting at with his metaphors of “joyning” and “mixing” in the *Two Treatise*, where discussion of the self is completely absent. It is there that we find the epistemological basis of Locke’s idea of a natural subjective right emerging from one’s practical activity.

In *A Discourse on Property: John Locke and his adversaries* (1980), James Tully, expanding on the work of John Yolton,⁸⁰ gives us a good argument for a particular

⁷⁷ Hobbes, *Leviathan*, edited by Richard Tuck (Cambridge: Cambridge University Press, 1991), 235-36.

⁷⁸ Richard Cumberland, *A Treatise on the Laws of Nature*, translated by John Maxwell, edited by Jon Parkin (Indianapolis: Liberty Fund, 2005 [1727]), 277.

⁷⁹ Hugo Grotius, *The Rights of War and Peace*, Book I, Chapter II, §3, p.184.

⁸⁰ See John Yolton, *Locke and the Compass of Human Understanding* (Cambridge: Cambridge University Press, 1977), particularly chapter 8, entitled “Property: an example of mixed-mode analysis”.

epistemic continuity between the *Essay* and the *Two Treatises*; a “relational model of man and his maker,” which he calls the “workmanship model.”⁸¹ This model is evident throughout Locke’s works, particularly—as we already saw above—in his justifications of property and normative political theory, and is founded on the existence of two complex ideas (articulated in the *Essay*): “The *Idea* of a supreme Being, infinite in Power, Goodness, and Wisdom, whose Workmanship we are, and on whom we depend; and the *Idea* of our selves, as understanding, rational Beings.”⁸²

According to Locke, there are two types of general ideas, archetypes (originals) and ectypes (copies), with the former, which includes every general idea except those of substances, being divided into modes and relations (2.12.4, 7). Mixed modes consist of several different kinds of ideas, while relations are general ideas that consist in the comparing of one idea to another (2.12.7). As Yolton writes, “action and morality is the domain of mixed modes, those ideas which, according to Locke’s science of signs, are in their origin and validity freed from the dependence upon close and careful observation of things.”⁸³ In the case of substances, ectypes are general ideas standing for things in the world independent of our knowledge of them (2.31.13). That is to say, unlike the social sphere of morals and politics, the natural sphere of substances (i.e. the object domain of

81 Tully, *A Discourse on Property*, 4.

82 Locke, *Essay*, Book IV, Chapter 3, §18; cited in Tully, *A Discourse on Property*, 9. As for the relation of obligation that results from these two Ideas, Locke writes: “He also that hath the *Idea* of an intelligent, but frail and weak Being, made by and depending on another, who is eternal, omnipotent, perfectly wise and good, will as certainly know that Man is to honour, fear, and obey GOD, as that the Sun shines when he sees it. For if he hath but the *Ideas* of two such Beings in his mind, and will turn his Thoughts that way, and consider them, he will as certainly find that the Inferior, Finite, and Dependent, is under an Obligation to obey the Supreme and Infinite, as he is certain to find, that *Three, Four, and Seven*, are less than *Fifteen*.” *Essay*, Book IV, Chapter 13, §3, 651.

83 Yolton, *Locke and the Compass of Human Understanding*, 181; see also Schneewind, “Locke’s Moral Philosophy,” 204-206.

the natural sciences) can only be represented by ectypes of originals (things) beyond our epistemic world. Our knowledge about them can thus never achieve certainty.

Conversely, the social sphere of moral norms and politics, because they are our creation, fall within an epistemic world within which we can achieve certain knowledge.⁸⁴

According to the *Essay*, these archetypes are “not intended to be the Copies of any thing, nor referred to the existence of any thing, as to their Originals” (2.31.13). As Tully writes, “Ideas of substances are intended to copy their object *in re*; the idea is derived from its object. The ‘adequacy’ of such knowledge is judged by comparing the idea to its object (2.31.1, 13). Knowledge of social or conventional reality is just the opposite. Here, the knowledge, not the object, is the archetype.”⁸⁵ This, then, “gives political philosophy, which treats of archetype ideas, its superior status with respect to natural philosophy”⁸⁶—a conclusion shared by others such as Vico, Pufendorf, Cumberland, etc.

In addition to the general epistemic certainty that follows from the “workmanship model”—what Habermas called the certainty of the technician: “we *know* an object insofar as we can *make* it”⁸⁷—there is clarity concerning obligation and the constitution of right. Thus from our knowledge of the above two complex ideas (of a supreme being and our rational selves), the nature of the obligation is epistemically undeniable:

He also that hath the *Idea* of an intelligent, but frail and weak Being, made by and depending on another, who is eternal, omnipotent, perfectly wise and good, will as certainly know that Man is to honour, fear, and obey GOD, as that the Sun shines when he sees it. For if he hath but the *Ideas*

84 “Systematic truth is a property of abstract concepts,” writes Yolton. Yolton, *Locke and the Compass of Human Understanding*, 181.

85 Tully, *A Discourse on Property*, 12.

86 *Ibid.*, 16.

87 Habermas, *Theory and Practice*, translated by John Viertel (Boston: Beacon Press, 1973), 61.

of two such Beings in his mind, and will turn his Thoughts that way, and consider them, he will as certainly find that the Inferior, Finite, and Dependent, is under an Obligation to obey the Supreme and Infinite, as he is certain to find, that *Three, Four, and Seven*, are less than *Fifteen*.⁸⁸

This echoes a sentiment we found in Locke's early lectures on natural law, where he asserted that "a superior by whatever name you call him, should be obeyed"⁸⁹ Why?

Because "all things are justly subject to that by which they have first been made and also are constantly preserved" or, Locke adds with a sentiment that could come from Filmer's pen, "by the right of donation, as when God, to whom all things belong, has transferred part of his dominion [*partem imperii*] to someone and granted the right to give orders to the first-born, for example, and to monarchs."⁹⁰ A similar sentiment is found in

Cumberland's *A Treatise on the Laws of Nature* (1672):

Before I had *universally* and *distinctly* consider'd the Original of *all* Dominion and Right whatsoever, I *us'd*, indeed, as most others do, to deduce the Divine Dominion intirely from his being the Creator: *For* I thought it *Self-evident*, that every one was Lord of his own Powers, which are little different from the Essence of any Thing, and that, *therefore*, any *Effect* must be *subject* to him, from whose *Powers* it receiv'd its whole Essence, as in the case in *Creation*, by which the whole Substance of the Thing is produc'd into Being.⁹¹

88 *Essay*, Book IV, Chapter 13, §3, 651. In an unpublished manuscript, Locke writes: "The original and foundation of all Law is dependency. A dependent intelligent being is under the power and direction and dominion of him on whom he depends and must be for the ends appointed him by that superior being. If man were independent he could have no law but his own will no end but himself." MS. Locke, c.28, fo. 141; cited in Tully, *A Discourse on Property*, 36.

89 Locke, *Essays*, 189. Locke even makes an argument reminiscent of Filmer's position, and thus directly contradicting his position in the *Two Treatises*, asserting that obligation exist when "all things are justly subject to that by which they have first been made and also are constantly preserved; or by the right of donation, as when God, to whom all things belong, has transferred part of his dominion [*partem imperii*] to someone and granted the right to give orders to the first-born, for example, and to monarchs." Locke, *Essays*, VI, 185.

90 Locke, *Essays*, VI, 185.

91 Cumberland, *A Treatise on the Laws of Nature*, 672-73.

For Locke (and Cumberland) the fact that God is maker, that God brings us “into Being,” means that we have a distinct duty to God. This workmanship model explains our production of things through our labor and the right produced through that labor. For a more thorough explanation of this model in the context of individual labor, we have to investigate Locke’s concept of the self.

Locke’s conceives of the self as a desiring self, which is egotistical, located in consciousness, and wanting of power and dominion (as property).⁹² It is a self conscious of pleasure and pain, capable of voluntary action and thus of law, but starts out empty and undefined much like his description of the mind in the *Essay*: “white Paper, void of all Characters.”⁹³ Picking up this analogy in Book IV, Locke writes:

Thus I see, whilst I write this, I can change the Appearance of the Paper; and by designing the Letters, tell before-hand what new *Idea* it shall exhibit the very next moment, barely by drawing my Pen over it: which will neither appear (let me fancy as much as I will) if my Hand stands still; or though I move my Pen, if my Eyes be shut.⁹⁴

92 In *Some Thoughts Concerning Education*, Locke writes of children loving “Dominion” more than liberty, which “is their desire to have things be theirs; they would have *Propriety* and Possession, pleasing themselves with the Power which that seems to give, and the Right they thereby have, to dispose of them, as they please.” See §§103-05 of *Some Thoughts Concerning Education*, in *The Educational Writings of John Locke*, edited by James Axtell (Cambridge: Cambridge University Press, 1968). 207-08. I have found Neal Wood’s *The Politics of Locke’s Philosophy: A Social Study of An Essay Concerning Human Understanding* (Berkeley: University of California Press, 1983), particularly helpful for my discussion here.

93 The full paragraph reads: “Let us then suppose the Mind to be, as we say, white Paper, void of all Characters, without any *Ideas*; How comes it to be furnished? Whence comes it by that vast store, which the busy and boundless Fancy of Man has painted on it, with an almost endless variety? Whence has it all the materials of Reason and Knowledge? To this I answer, in one word, From *Experience*: In that, all our Knowledge is founded; and from that it ultimately derives it self. Our Observation employ’d either about *external Objects*; or about the *internal Operations of our Minds, perceived and reflected on by our selves, is that, which supplies our Understanding with all the materials of thinking*. These two are the Fountains of Knowledge, from whence all the *Ideas* we have, or can naturally have, do spring.” Locke, *Essay*, Book II, Chapter 1, §2, 104.

94 *Ibid.*, Book IV, Chapter 11, §7, 633-34.

Thus, out of this void the self is constituted, or better said, constitutes itself, through its awareness of its own past and present practical activity. A *person*, for Locke, is described in his chapter *Identity and Diversity* as

a thinking intelligent Being, that has reason and reflection, and can consider it self as self, the same thinking thing in different times and places; which it does only by that consciousness, which is inseparable from thinking, and as it seems to me essential to it: It being impossible for any one to perceive, without perceiving, that he does perceive.⁹⁵

The *person* is thus the *reflexive self*: “every one is to himself, that which he calls *self*.”⁹⁶

It thinks and experiences and is aware that it thinks and experiences, i.e., it is a *conscious self*.⁹⁷ This reflexive relation, the state of self-consciousness, is the simultaneous presence of sensation and reflection necessary to generate ideas and thus knowledge.

From *Experience*: In that, all our Knowledge is founded; and from that it ultimately derives it self. Our Observation employ'd either about *external Objects*; or about the *internal Operations of our Minds, perceived and reflected on by our selves, is that, which supplies our Understanding with all the materials of thinking*. These two are the Fountains of Knowledge, from whence all the *Ideas* we have, or can naturally have, do spring.⁹⁸

Ideas and knowledge are “stored up” in the mind, collected by an acquisitive and active self within the world. One of the problems Locke seeks to solve in the *Essay* is how we can conceive of personal identity, how can we recognize the self-same self, as enduring through time. Locke writes:

95 Ibid., Chapter 27, §9, 335.

96 Ibid., Chapter 27, §9, 335. And in §26, Locke writes: “*Person*, as I take it, is the name for this self. Where-ever a Man finds, what he calls *himself*, there I think another may say is the same *Person*” (346).

97 Locke, *Essay*, Book II, Chapter 27, §11, 336.

98 Ibid., Chapter 1, §2, 104.

For since consciousness always accompanies thinking, and 'tis that, that makes every one to be, what he calls self; and thereby distinguishes himself from all other thinking things, in this alone consists *personal Identity*, i.e. the sameness of a rational Being: And as far as this consciousness can be extended backwards to any past Action or Thought, so far reaches the Identity of that *Person*; it is the same *self* now it was then; and 'tis by the same *self* with this present one that now reflects on it, that that Action was done.⁹⁹

The self is thus continuous via the awareness of itself as the author of its own past and present thoughts and actions. To be the author is, for Locke, to be the owner and ownership is constituted by consciousness of one's own practical activity. The term *person*, then, is nothing other than the *conscious self*, which is

a Forensick Term appropriating Actions and their Merit; and so belongs only to intelligent Agents capable of Law, and Happiness and Misery. This personality extends its *self* beyond present Existence to what is past, only by consciousness, whereby it becomes concerned and accountable, owns and imputes to it *self* past Actions, just upon the same ground, and for the same reason, that it does the present. . . And therefore whatever past actions it cannot reconcile or appropriate to that present self by consciousness, it can be no more concerned in, than if they had never been done.¹⁰⁰

This is the basis of the self as proprietor or owner of its actions or labour. We can now return to that famous claim in the *Two Treatise*, equipped with Locke's more technical discussion of the terms person, self, identity, and their relation to one's actions, and give it a fresh reading: "yet Man (by being Master of himself, and *Proprietor of his own Person*, and the Actions of *Labour* of it) had still in himself the *great Foundation of*

99 Ibid., Chapter 27, §9, 335.

100 *Essay*, Book II, Chapter 27, §26, 346. And in §16, Locke writes: "yet tis plain consciousness, as far as ever it can be extended, should it be to Ages past, unites Existences, and Actions, very remote in time, into the same Person, as well as it does the Existence and Actions of the immediately preceding moment: So that whatever has the consciousness of present and past Actions, is the same Person to whom they both belong" (340).

Property” (§45). We now know that the person, as conscious self, constitutes, reconstitutes, and expands its identity through time by appropriating its actions and attributing them to itself. The self’s constitution through the appropriative act of awareness is fundamentally a proprietary relation: one is “*Proprietor of his own Person,*” and consistent with the above discussion in the *Essay*, this proprietorship includes “the Actions of *Labour*” of the self or person. Appropriative self-consciousness is “the *great Foundation of Property.*”

On this reading, the essential subjectivist moment of ownership, described by Locke’s metaphors of “mixing” and “joyning” one’s labour with an object, is the self’s appropriative *awareness* that the transformation of the form of the object through its labour, and that the value such labour produces is attributable to its own action. Our recognition of the value we add to objects is the recognition of it as a product of our own creative practical activity, our workmanship, which our self appropriates as evidence of its own externalization. This is “how *labour* could make Men distinct titles to several parcels” of the commons (II, §39).

This, however, brings us to a second point. I previously noted how Locke used the term *property* for what his predecessors (particularly Aquinas and Suárez in this context) called *dominium*, and that this latter term carries with it a dual sense of mastery/command/lordship and ownership.¹⁰¹ Both senses of *dominium* (discussed further in Chapter Two) involve the capacity to exercise a particular power with respect

¹⁰¹ Tully argues, with Olivecrona, that Locke’s term “property” is better taken as the English equivalent of *suum*. I disagree with Tully and Olivecrona and take up the topic of *suum* in the following section.

to things or persons and, returning to Locke's *Essay*, we discover that both senses are for Locke unified under his epistemological understanding of quality or *property*.¹⁰²

Locke distinguishes three types of qualities in objects or bodies: primary qualities; secondary qualities that are immediately perceivable; and secondary qualities that are mediately perceivable. The latter two are types of powers.¹⁰³ The immediate kind of secondary quality comprises what we usually associate with the term, e.g. sounds, tastes, smells, colours, etc., and the power referred to here is the power to affect our senses. The mediate kind of secondary quality is a power to change the primary qualities of another body: "Thus the Sun has a Power to make Wax white, and Fire to make Lead fluid."¹⁰⁴ Locke later refers to these mediate and immediate powers as passive and active power, thus the Sun has an active power to make wax white and the wax has a passive power to be so changed. The most important active power taken up by Locke in his chapter on power in the *Essay* is *liberty*: "the *Idea* of *Liberty*, is the *Idea* of a Power in any Agent to do or forbear any particular Action, according to the determination or thought of the

102 My argument in the following is very much indebted to Max Milam's excellent essay "The Epistemological Basis of Locke's Idea of Property," *Western Political Quarterly*, 20:1 (March 1967): 16-30. For other discussions of the connection between Locke's *Essay* and the *Two Treatises*, see Yolton, *Locke and the Compass of Human Understanding*; John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969); Tully *A Discourse on Property*; and Neal Wood, *The Politics of Locke's Philosophy: A Social Study of "An Essay Concerning Human Understanding"* (Berkeley: University of California Press, 1983).

103 "The Mind, being every day informed, by the Senses, of the alteration of those simple *Ideas*, it observes in things without; and taking notice how one comes to an end, and ceases to be, and another begins to exist, which was not before; reflecting also on what passes within it self, and observing a constant change of its *Ideas*...so comes by that *Idea* which we call *Power*... [T]he *Power* we consider is in reference to the change of perceivable *Ideas*. For we cannot observe any alternation to be made in, or operation upon any thing, but by the observable change of its sensible *Ideas*; nor conceive any alternation to be made, but by conceiving a Change of some of its *Ideas*." *Essay*, Book II, Chapter 21, §1, 233-34.

104 *Essay*, Book II, Chapter 8, §23, 140-41. Again, seeing liberty as a type of power is not new to the seventeenth century. As Gerson writes in his *Definitiones Terminorum Theologiae Moralis*: "*Ius* is a *facultas* or power appropriate to someone and in accordance with the dictates of right reason. *Libertas* is a *facultas* of the reason and will towards whatever possible is selected." *Oeuvres Complètes*, IX, ed. P. Glorieux (Paris, 1973), 134; cited in Tuck, *Natural Rights Theories*, 26-7.

mind, whereby either of them is preferr'd to the other.”¹⁰⁵ It is a free and active power of the individual to affect change in other bodies and for such change to be sensible to us and others. Thus the power to alter and increase the value of an object through our labour is the active “Power to produce any *Idea* in our mind”—it is a “Quality of the Subject where that power is,” writes Locke.¹⁰⁶ When the individual labours, “the Mind must collect a Power somewhere, able to make that Change.”¹⁰⁷ Liberty, for Locke, is thus an active power of the individual to intentionally affect the qualities of other bodies, which are properties attributable to the active power of the individual. That is to say, the *increase in value* of an object through my labour is a *property of my person*, and when this power is directed toward my own thoughts or behaviour, it is a kind of self-mastery; the kind of self-*dominium* Aquinas, Suárez, and others thought that we, as rational beings, essentially possess.

Locke’s claims about “life” as property is, I believe, a bit more ambiguous in the epistemological context. Max Milam argues that it “seems beyond question that, to Locke, ‘life’ was only another word for the simple idea of power...Nothing if not this connection between life and human power, fits his definition of a ‘simple mode’.”¹⁰⁸ While I don’t find this connection “beyond question,” Locke clearly articulates, both in

105 *Essay*, Book II, Chapter 21, §8, 237. Locke discusses at length the difference between the idea of liberty and the idea of will in this chapter, both of which he views as powers, but only one of which is free. He thus finds questions concerning the freedom of the will to be misplaced: “Tis plain then, That the *Will* is nothing but one Power or Ability, and *Freedom* another Power or Ability: So that to ask, whether the *Will has Freedom*, is to ask, whether one Power has another Power...For who is it that sees not, that *Powers* belong only to *Agents*, and are *Attributes only of Substances*, and not of *Powers* themselves” (§16, 241).

106 *Ibid.*, Chapter 8, §8, 134.

107 *Ibid.*, Chapter 21, §4, 235.

108 Milam, “The Epistemological Basis of Locke’s Idea of Property,” 412.

the *Two Treatises* and in the *Essay*, that the life of individuals is the creation of God's power and workmanship, which, as noted above, we have a duty to preserve. Indeed, the idea of God Locke finds within us is evidence of the active power of God and is the very foundation of all moral duties:

The *Idea* of a supreme Being, infinite in Power, Goodness, and Wisdom, whose Workmanship we are, and on whom we depend; and the *Idea* of our selves, as understanding, rational Beings, being such as are clear in us, would, I suppose, if duly considered, and pursued, afford such Foundations of our Duty and Rules of Action, as might place *Morality amongst the Sciences capable of Demonstration*.¹⁰⁹

As discussed above, this act of creation by God produces a determinate moral relation and, according to Locke, "we have for the most part, if not always, *as clear a Notion of Relation, as we have of those simple Ideas, wherein it is founded*."¹¹⁰ This fundamental relation is a moral duty to self-preservation: "Man had a right to a use of the Creatures, by the Will and Grant of God. For the desire, strong desire of Preserving his Life and Being having been planted in him, as a Principle of Action by God himself... And thus Man's *Property* in the Creatures was founded upon the right he had, to make use of those things, that were of necessary or useful to his Being."¹¹¹ The property in things necessary for preservation is a common right, exercised by all individuals, for all individuals are products of God's creation and thus have a moral relation, a duty, to preserve that property of God.

109 Locke, *Essay*, Book IV, Chapter 3, §18, 549.

110 Locke, *Essay*, Book II, Chapter 28, §19, 361.

111 Locke, *First Treatise*, §86, 205.

We can thus see how this common right to things in the world beneficial to our preservation is a right attributable to our moral duty to preserve God's property, our life. This is an inclusive right. Exclusive rights are produced when our own actions create or produce changes in that external world and the *relation* between our active power and the passive power of the things changed are sensible to ourselves and others—they are appropriated by us and recognized by others. This is a result of our liberty, a fundamental active power located within our selves and is thus our property. This is what Locke means when he claims: "Man...hath by Nature a Power...to preserve his Property, that is, his Life, Liberty and Estate" (§87); "Lives, Liberties and Estates...I call by the general Name, *Property*" (§123); "By *Property* I must be understood here, as in other places, to mean that Property which Men have in the Persons as well as Goods" (§173).

We might call the recognition given others of the value we add to an object through our labour the *intersubjectivist moment* of ownership, which is confirmed through exchange (still possible in a state of nature).¹¹² The beginning and establishment of private property thus has two cognitive moments, one subjective and the other intersubjective. While the former, i.e., the relation between the self and the external material world, is, I have argued, dialectical, the relation of subject to subject does not seem to be. Thus, we can take issue with Neal Wood's claim that there is "no essential qualitative change, no interpenetration or reciprocity between subject and object" in Locke, but he is right to claim this of "self and other," for society "and individual

¹¹² This is, of course, similar to Hegel's understanding of the relation of property and personality. As Herbert Marcuse writes: "Hegel has stressed that the individual is free only when he is recognized as free, and that such recognition is accorded him when he has proved his freedom. Such proof he can furnish by showing his power over the objects of his will, through appropriating them. The act of appropriation is completed when others have assented to or 'recognized' it." Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory* (London: Routledge, Kegan & Paul, 1941), 192.

exist in opposition, instead of being complementary and dialectically interactive.”¹¹³ That said, we also don’t yet have here an *objective* moment—in either Locke’s theory or in the level of capitalist production of Locke’s day—which Lukács famously described as part of the universality of the commodity form. The commodity form in Locke’s theory is, Lukács (and Marx) would say, still an impure form, for it has not yet lost its connection to either use-value or labour and thus hasn’t undergone true reification.¹¹⁴

Now we can return to the problem of trying to reconcile the claim that we are God’s property, yet that the property we “mix” with external objects makes it our own and not God’s. From the above, we can see that the property of God’s workmanship is not the same property that we “mix” or “joyn” with external objects. To put it simply, God creates life and the basic materials for intelligent, rational and self-conscious beings, according to Locke, but we as individuals create the self, which, although beginning as a *tabula rasa*, is constituted through the conscious appropriation of our own practical activity or labour.¹¹⁵ Although it is a moral duty for us to labour, the products of our labour belong exclusively to us, not to God. “He that in Obedience to this Command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his Property, which another had no Title to, nor could without injury take from him” (II, §32). Our duty to protect and preserve God’s property is the duty to self-preservation and the preservation of the species, which is different from the protection or preservation of

113 Wood, *The Politics of Locke’s Philosophy*, 161.

114 See Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, translated by Rodney Livingstone (London: Merlin Press, 1968).

115 As James Tully writes: “The distinction between man and person is central to Locke’s theory. God is the proprietor of man because, as we have seen, God makes man. Man, on the other hand, is said to be the proprietor of two items. He has a property in, or is the proprietor of his person and, he is also the proprietor of the actions of his person.” Tully, *A Discourse on Property*, 105.

the property we appropriate through our labour, although the analogy between God's creation and our own is clear: "God makes him *in his own Image after his own Likeness*, makes him an intellectual Creature, and so capable of *Dominion*."¹¹⁶ This conclusion is consistent with Locke's thoughts on the question of alienation, insofar as he says that we cannot willingly alienate our life or liberty—through suicide or slavery—although it is rightly considered property. We can, however, alienate our goods and our labour.¹¹⁷

Suarez, Grotius and Pufendorf all argue that one cannot alienate their life, but their liberty is not inalienable—a necessary foundation for a kind of absolutism that Locke rejects.

This subjectivist and dialectical reading of Locke's theory of property—with its notion that the foundation of property in one's person is an appropriative self-consciousness that recognizes (and thus appropriates) its own value-creating action, which is also recognized as one's own by others in the act of exchange—is at variance with many positivist readings popular today, which reject so-called "expressivist" or "Hegelian" interpretations. Even James Tully, who has rightfully argued for the centrality of the self and the essential continuity between the *Two Treatises* and the *Essay*, in the end summarizes Locke's idea of property with the positivist axiom: "Locke means by 'property' what he says he means...any sort of right, the nature of which is that it cannot be taken without a man's consent."¹¹⁸ This may be a true, negatively formulated claim, but it is not an account of what property *is* or how it *comes about* and this distinction

116 Locke, *First Treatise*, §30.

117 Macpherson rightly notes this distinction. "Thus while no one has a natural right to alienate his own life, which is God's property, or to take arbitrarily the life or property of another, he is left with a natural right to alienate his own property." Macpherson, *The Theory of Possessive Individualism*, 219.

118 James Tully, *A Discourse on Property*, 116.

often becomes conflated in the secondary literature, particularly after frustrated attempts to clarify Locke's positively formulated metaphors of "mixing" and "joyning".

The temptation to negatively state Locke's theory of property, or to merely seek one categorical description that captures all true claims about it, is quite strong, for it avoids the metaphysical and epistemological difficulties in Locke's theory, including some of its inconsistencies. One such argument, which has been somewhat influential, was put forth by Karl Olivecrona in a series of articles in the early to mid-1970s, in which he introduces the concept of *suum*, or "one's own", as an explanatory tool in understanding what appears to be an expansive concept of personality in Locke's theory of property.¹¹⁹ This fairly novel approach is combined with the claim that this extension of personality is not the result of labour or practical activity, but of will—thus, one of the abovementioned "expressivist" or "Hegelian" theories—albeit non-dialectically understood. I critique both claims by Olivecrona below, for both have been influential in their own ways: his expressivist account has been influential by serving as somewhat of a strawman for positivist dismissals of a dialectical reading of Locke's theory of property, while his use of *suum*, has appealed to these positivist readings due to its objectivist perspective of property right in Locke.

Suum is most famously associated with Ulpian's definition of justice: "*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*" (*Digest* 1.1.10), which roughly translates as "justice is the continuing and perpetual will to give each their own." As Tuck comments: "Ulpian had presumably meant by this simply that a judge should

119 See Karl Olivecrona, "Appropriation in the State of Nature: Locke on the Origin of Property," *Journal of the History of Ideas*, 35 (1974), 211-30; "Locke's Theory of Appropriation," *Philosophical Quarterly*, 24 (1974), 220-234; and "The term 'property' in Locke's *Two Treatises of Government*," *Archiv für Rechts- und Sozialphilosophie*, 61 (1975), 109-115.

always seek the just outcome to a dispute, and he enumerated later the criteria for a just outcome (including, but not exclusively, giving everyone their *suum*—their own).”¹²⁰

While I argue that Olivecrona’s understanding of a more expansive (or expanding) concept of personality in Locke is warranted, his use of the concept of *suum* (and its separation from labour) is problematic, for it not only treats Locke’s subjectivist understanding of right objectively, but it is also couched in terms of negative liberties:¹²¹

The fundamental principle of the law of nature was expressed in the Stoic maxim of according to everybody his own (*ius suum cuique tribuendi*). As interpreted by the teachers of natural law this maxim had a purely negative significance. It only said that you shall leave to each what belongs to him. The principle of right behavior was to abstain from interfering with that which belongs to another (*alieni abstinetia*). The Stoic maxim was therefore most often expressed in the sentence that you must not harm another (*neminem laedere*). Robbing another of something that belonged to him was to commit an injury (*iniuria*) upon him.

This presupposed that everybody has a sphere of his own. The sphere was called the *suum*, ‘that which belongs’ to an individual. The real content of the maxim that one should leave to each his own was evidently dependent on how the sphere of the *suum* was delimited.¹²²

Although Olivecrona speaks of *suum* in his text as if it is a subjective right, it can only consistently be understood objectively within a natural law tradition of *distributive* justice. *Suum* is most often understood in the sense of Aristotle’s *dikaion*, which could be rendered as “an objectively right state of affairs,” “what’s fair,” or the *iustum* of a right action. In this sense, *suum* would not be a claim, relation, or subjective power (negative

120 Tuck, *Natural Rights Theories*, 14.

121 Cf. Isaiah Berlin’s definition of negative liberty as answering the question: ‘What is the area within which the subject...is or should be left to do or be what he is able to do without interference by other persons?’” Isaiah Berlin, “Two Concepts of Liberty,” *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 121.

122 Olivecrona, “Locke’s Theory of Appropriation,” 222-23.

or positive). The importance of this distinction relates to how the sphere of one's *suum* is constituted and extended, rather than to what is quantitatively included within it. Locke's innovation—i.e., the *dominium*-founding practical activity of the self—has to do with former, whereas the juridical-distributive perspective deals with the latter, which is what Olivecrona is focusing on. As we will see, this move by Olivecrona stems from a misunderstanding of Locke's state of nature.

Olivecrona's account of *suum* has five characteristics. First, it is the personal sphere of the individual within which are contained the individual's belongings: "What a man collected became his own. It was included in his *suum*."¹²³ This sphere is, secondly, negatively defined as that from which others cannot take without causing injury. Thirdly, this sphere is synonymous with one's personality—"The *suum* was the sphere of personality"—entailing the perhaps unintentional consequence that one's personality can only be defined negatively. Fourthly, one's personality can be extended—"The *suum* could also be enlarged by the human will, that is, by convention"—although we're not told by whose will or what convention, and, lastly, although this is only a derivation of the fourth point, "human will" and "convention" are different from "labor." This last move is supposed to save Locke's various examples of legitimate appropriation that do not seem to fit the labor paradigm, such as killing a deer, catching a fish, picking up an acorn, etc.

It would be absurd to contend that the 'labour' of killing a deer or picking up an acorn from the ground is, in the exact sense of the expression, 'mixed' with the deer or the acorn respectively. Locke cannot have meant it so. His meaning can only have been that the action of killing the deer or

123 Ibid., 223.

picking up the acorn was the means by which something of the spiritual ego infused into the object. His fundamental statements about appropriation seem to make sense only on this interpretation, which is quite in harmony with his definition of ‘being one’s own’.¹²⁴

In this way, Olivecrona separates *mixing* (although he does not explain what the “exact sense of the expression” mixing is) from *labour*, allowing one to mix or “infuse” one’s ego in the thing without labour. He also concludes that ‘mixing’ does not change the value of the thing, for picking up an the acorn, writes Olivecrona, “cannot be said to increase the value of the acorn.”¹²⁵ In this sense, it must be supposed that mining diamonds or extracting oil doesn’t create value either. In any case, it is important to note, and to anticipate my argument in Chapter Three, that Olivecrona does not recognize Locke’s theory of property and the state of nature as strategic in the colonial context, and therefore the importance for Locke in establishing jurisdiction outside political society. If he had, he would not have been able to so thoroughly separate treatment of *ius*, *suum*, and *dominium*, neglecting the latter altogether and only giving an objectivist reading of the former two. This objectivist reading is, by the way, quite startling given that in the history of natural rights theory Locke’s theory is a subjectivist theory *par excellence*. Olivecrona also does not incorporate Locke’s concept of the self as constituted by recognition of its practical activity, nor does he accept any element of the labor theory of value—in either producing use values, or in bringing products into the circulation of exchange—bringing us to the question, what then are we to gain from his interpretation?

124 Ibid., 226.

125 Ibid., 226.

“The meaning cannot be that a man becomes the owner of an object when it has been *created* by his work. That interpretation,” he writes, “would be incompatible with Locke’s words and examples.”¹²⁶ Is he completely doing away with Locke’s labor theory of appropriation and privatization merely to save Locke on the question of hunting and gathering? He need not, for intentional practical activity (such as collecting, harvesting, or hunting) or labor is the *dominium*-founding process, not only “creation” in the sense of commodity production.¹²⁷

Olivecrona’s use of *suum* is supposed to be an alternative to the labor theory of property and value, which is not only rejected by him, but considered absurd: “Locke cannot have meant to say that labour was *the title* to the right of property and that this was so because the value of things depended on the amount of labour spent on them. That would have been patently absurd.”¹²⁸ Why would Olivecrona make such a strong claim in the face of so much textual evidence in support of the labor theory? Because, for him, Locke’s famous statements about the beginnings of property “obviously had contemporary conditions in mind,” for he speaks of cloth and silk and ropes and masts, which “did not exist in ‘the first Ages of the World’,”¹²⁹ i.e., in what Olivecrona

126 Ibid., 225-26.

127 According to Tully, he need not, since the “point for Locke is that actions of joining and mixing with external material are present in the intentional acts of catching, killing, gathering, tilling, planting and cultivating.” Tully, *A Discourse on Property*, 120. Contra Tully, intention is not enough for Locke, for the action must be carried out and attributable to one’s own labour. What Tully also does not distinguish here, however, is that catching, killing, and gathering (traditional *usufruct*) are expressions of *dominium* in Locke that disappear with their consumption, their immediate use, whereas tilling, planting and cultivating are the foundations not only for a lasting private *dominium*, but in turn for the establishment of political *dominium* and thus political society itself. This is in part no doubt attributable to the fact that at the time of writing his book, *A Discourse on Property*, Tully hadn’t yet realized the importance of colonialism to Locke’s thought. Colonialism does, however, play a larger role in his subsequent publications.

128 Olivecrona, “Locke’s Theory of Appropriation,” 232.

considers Locke's state of nature. He concludes that "it is therefore unlikely that Locke intended the statements [about labor constitution value and property right] to be the foundation of his theory of appropriation."¹³⁰ Rather they "must have been to say something of significance for contemporary distribution of property."¹³¹ The absurdity arises when we try to reconcile the generation of property right and value through labor with the existing legal system in seventeenth-century England, where "titles to property were defined in law and consisted in conveyances, inheritances, etc. The whole distribution of property was directly or indirectly based on agreements. Thus there is only one possibility left. Locke's intention must have been to *justify* the actual distribution of possessions."¹³² Now we can see why the natural law concept of *suum*, as a principle of distributive justice, is more palatable to Olivecrona for interpreting Locke's theory of property. Had he not read the state of nature as a pre-social or even pre-historic, but rather as a colonial condition, the supposed absurdity and anachronism of Locke's comments would have disappeared and the perspective switch from the establishment of *dominium* and the generation of right through labor to distribution of right through law would not have seemed necessary.

Olivecrona's restriction of Locke's theory of property to a discussion of *suum* in turn lends itself to a positivist, non-historical and non-dialectical reading of the self, which neither transforms nor is transformed in the process of its "expansion," and which completely neglects the establishment of *dominium* and its relation to right. It is simply a

129 Ibid., 231.

130 Ibid.

131 Ibid., 232.

132 Ibid.

process of addition: “What a man had collected became his own. It was included in his *suum*.”¹³³ His simplistic description of the self is telling: “We all assume the existence of a spiritual ego. The ‘I’ is not identical with the body. But it is immanent in the body. In that sense, the body ‘belongs’ to the ego.”¹³⁴

Such a positivist reading can also be found in Stephen Buckle’s *Natural Law and the Theory of Property* (1991), which finds Olivecrona’s use of *suum* quite useful, but for what purpose is not clear. “The idea of the necessity of extending the *suum*,” he writes, “is thus the best explanation of Locke’s attraction to the ‘mixing’ metaphor in his account of appropriation.”¹³⁵ Rather than explaining the process of ‘mixing’, however, Buckle thinks that it is better for us if all talk of ‘mixing’ is set aside and “appeal is made directly to the right to preserve oneself.”¹³⁶ For him, *suum* is simply the property of self, and its expansion means the inclusion of things beyond the self. We must expand our *suum* to include those things in the world we need for self-preservation, but such expansion is not spatial: “although the idea of extending the *suum* encourages thinking of it as a kind of physical realm, as some sort of special substance, it is in fact a moral realm: that realm which cannot be encroached upon by other without doing an injury.”¹³⁷ Recall Tully’s interpretation of Lockean property: “any sort of right, the nature of which is that it cannot be taken without a man’s consent.”¹³⁸ In Olivecrona, Buckle, and Tully, then, the *source*

133 Ibid., 223. This is not unlike Neal Wood’s reading in *The Politics of Locke’s Philosophy*.

134 Olivecrona, “Locke’s Theory of Appropriation,” 224.

135 Stephen Buckle, *Natural Law and the Theory of Property* (New York: Oxford University Press, 1991), 171.

136 Ibid.

137 Ibid., 177.

and dialectical *generation* of right through the self's transformative activity in the world becomes lost in a positivistic discourse of right, rendered here as *suum*. Ironically, Buckle claims that interpreters of Locke need to "take him at his word. He wants to know how things can become mine, not through positive legal acts of human societies, but naturally,"¹³⁹ but after advocating Olivecrona's position, concludes: "mixing ceases to play any important role in legitimate appropriation... The mixing metaphor only complicates the issue."¹⁴⁰

138 Tully, *A Discourse on Property*, 116.

139 Buckle, *Natural Law and the Theory of Property*, 171.

140 *Ibid.*, 174.

Chapters Two: *Dominium, Jurisdiction, and Colonialism*

If, according to Olivecrona, dealing with Locke's 'mixing' metaphors complicates matters, then situating Locke's subjectivist understanding of property right within the history of the concept of *dominium*, briefly discussed above, promises to complicate them all the more. But expanding on the *dominiumsfrage* now will not only prepare the groundwork for an understanding of Locke's theory of colonialism and *dominium* in a state of nature (Chapter Three), it will also contribute to some of the technical discussions of Hegel and Marx on rights, property, and sovereignty in subsequent chapters. That is to say, although my presentation of this history can be no more than schematic, particularly before the sixteenth and seventeenth century, I find it necessary for understanding the trajectory of Hegel and Marx's theories (which are informed by this history). As we will see later chapters, Hegel will attempt a mediated synthesis or reconciliation of *dominium* and *imperium*, represented by abstract and concrete personality, in his *Philosophy of Right*, while Marx will forcefully advocate for their complete re-appropriation by their original source—the labouring individual who has experienced political and economic alienation. With all three, colonialism is not only a

productive backdrop against which to analyse the dialectic of these concepts in their work—for colonialism plays a critical role in each of their systematic philosophies—but is one of the most important and constitutive historical processes in the formation of the terms of this dialectic. In the case of Locke, this involves a fresh look at his *state of nature*, which, as I have already intimated in Chapter One, is best understood to be a juridical concept within his natural jurisprudence. In contrast to the traditional reading of Locke’s state of nature as mechanism to argue for a particular theory of the consensual or contractual beginnings of legitimate civil society, it will be shown in Chapter Three that, quite the contrary, Locke uses the state of nature to argue for the *non-consensual* beginnings of *dominium* and *imperium* in the colonies.

The history of the evolution of and relation between *dominium* and *imperium* is—as my discussion of self-mastery and private property in Locke’s concept of the self in Chapter One made evident—difficult to summarize. Even formulating the relation this way (as one *between* these two concepts) must be historically qualified, for, as we shall see, their historical differentiation is never complete and are, at times, subject to almost complete dedifferentiation, particularly within feudalism.¹⁴¹ Since its Roman origins, it has been variously associated with possession (*possessio*), property (*proprietas*), power (*potestas*), use (*usus*), right (*ius*), faculty or power (*facultas*), liberty (*libertas*), jurisdiction (*jurisdictio*), and sovereignty (*imperium*), fluctuating, aggregating, and disaggregating over the years, from ancient Rome to revolutionary England. For example, while *dominium*, *ius*, *potestas*, and *facultas* were distinct for most of Roman history, the

141 For this reason I have retained the Latin terms *dominium* and *imperium*. As the historian Francis Oakley writes: “The word *dominium* itself, if not impossible to translate into English, at least defies transliteration...because its meaning underwent a significant mutation during the medieval period.” Oakley, *The Political Thought of Pierre d’Ailly: The Voluntarist Tradition* (New Haven: Yale University Press, 1964), 66-67.

dominium theory of William of Ockham (in the context of the Franciscan poverty debate) combined *ius* and *potestas* in the fourteenth century, while Jean Gerson (in the context of the Great Schism) assimilated *ius* and *facultas* in the fifteenth, forging what some think to be the first subjective rights theory and the true precursor of the seventeenth-century individualism that C. B. Macpherson so famously articulated in his *The Political Theory of Possessive Individualism* (1963).

It is a long and complicated history that has yet to be written and from which I can only extract a few influential moments to bring context to the philosophical and juridical divisions made in Locke's time and work. In this relatively short, reconstructive account I make a qualified distinction between two dimensions of *dominium*, which I refer to as the vertical and horizontal. Concerning the latter, *dominium* is either differentiated from other kinds of individual use, consumption, or claim rights (as in the above distinction between *ius* and *dominium*), or is itself divided into different kinds (e.g. *dominium directum*, *utile*, etc.) representing the overlapping practices and interests characteristic, for example, of medieval social relations. With the vertical, there is a differentiation between governing (involving a *potestas iurisdictionis*) and proprietary *dominium*, conceived of as different spheres *tending* toward the more familiar (Roman and modern) division of political and (private) proprietary realms. We find this division, for example, in Seneca's claims, "*Omnia Rex imperio possidet, singuli dominio*" [The king possesses everything in governance, individuals in ownership]¹⁴² and "*Ad reges potestas omnium pertinet, ad singulos proprietas*" [To kings belongs the power over everything, to private individuals the property] (*De Beneficiis*, lib. 7, ca. 5)—both of

142 "The king has *imperium*; the subject *dominium*. This neat formula," writes Glenn Burgess, "sums up a crucial theme of English common-law thought." Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven: Yale University Press, 1996), 74

which are, significantly, cited by Bodin in his influential account of modern absolutist sovereignty.¹⁴³

We must be cautious, however, for there is often an inclination to connect a division of political and proprietary spheres to the spheres of modern public and private law. This should be avoided, for when we speak of a king's *dominium* as *dominus omnium temporalium*, for example, it can also be understood as a private proprietary power.¹⁴⁴ In the thirteenth century, the law of Justinian *Bene a Zenone* (*Codex* 7.37.3)—e.g. “*Omnia enim sunt in potestate imperatoris*” [All things are in the power of the Emperor] or “*cum omnia principis ess intelligantur*” [All things are understood to be owned by the prince]—was at times, for example, interpreted as making the emperor the sole proprietor;¹⁴⁵ a position shared by Sir Robert Filmer and the subject of Locke's critique in his *First Treatise* (and discussed in Chapter Three).

There have also times when this vertical distinction almost completely collapses, particularly in feudal relations. “Just in so far as the ideal of feudalism is perfectly realized,” write Pollock and Maitland, “all that we call public law is merged in private law: jurisdiction is property, office is property, the kingship itself is property; the same

143 Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, edited and translated by Julian H. Franklin (Cambridge: Cambridge University Press, 2006), 41. The translations of Seneca are Franklin's. I will return to the significance of Bodin's conception of the relation between sovereignty and propriety below.

144 *Dominium* is also at times even distinguished from proprietary power. Gierke notes that in the *Digest dominium mundi ratione iurisdictionis et gubernationis* is distinct from *dominium ratione proprietatis*. See Otto Gierke, *Political Theories of the Middle Ages*, translated by F. W. Maitland (Bristol: Thoemmes Press, 1996 [1900]), 178n.

145 See Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993), 18. The translations here of the *Bene a Zenone* are Pennington's.

word *dominium* has to stand now for ownership and now for lordship.”¹⁴⁶ The result is what Marx called “eine engbrüstige Art von Nationalität”¹⁴⁷ wherein, writes Rodney Hilton, “jurisdictional power” is the “right to try the subject population and to derive profit from the exactions implicit in jurisdiction...”¹⁴⁸

In the following, I begin at the beginning with a look at classical and vulgar Roman juridical understandings of *dominium*, *imperium*, *ius naturale*, and *ius gentium*, which are important for this study, I argue, for they played a large role in shaping subsequent Western legal and philosophical traditions, including, of course, those of Locke, Hegel, and Marx. “Western” is here taken in the sense defined by Harold J. Berman, i.e. as subsequent legal and philosophical traditions growing out of Western Christendom after the Gregorian Reformation and Investiture Struggle (1075-1122) and the recovery and institutionalization of Roman legal concepts contained in Justinian’s *Corpus Juris Civile* in the eleventh and twelfth centuries.¹⁴⁹ The influence is clear in the whole history and organization of the Christian Church and papacy, which incorporated

146 Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, Volume I (Cambridge: Cambridge University Press, 1898), 230. Or as McIlwain puts it, there was “the tendency in some quarters toward a fusion of *imperium* and *dominium*, and the failure of the middle ages clearly to distinguish between the king and Crown or between the official and the private revenues of the king...” Charles Howard McIlwain, *The Growth of Political Thought in the West: From the Greeks to the end of the Middle Ages* (New York: Cooper Square Publishers, Inc., 1968), 198.

147 Marx, *Ökonomische-philosophische Manuskripte*, in Marx/Engels, *Ausgewählte Werke*, 645.

148 Rodney Hilton, “Introduction,” in *The Transition from Feudalism to Capitalism* (London: Verso, 1987), 16. See also Hilton’s “Feudal Society” entry in *A Dictionary of Marxist Thought*, edited by Tom Bottomore (Malden, MA: Blackwell Publishers, 2001), 191-96. He writes: “If we are to define ‘feudal society’ in broader terms than simply ‘the feudal mode of production’, the political and ideological dimensions must not be neglected. As we have seen power, by and large, was exercised through jurisdiction. Jurisdiction was politics, so that one could say that the means by which landowners extracted surplus from peasants was political rather than economic” (195).

149 See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 1-4.

“the very language, substance and method of Roman law into Christian ideology,”¹⁵⁰ while in turn providing a monotheistic ideological boost to the monarchic understandings of *imperium* in the later Roman empire.¹⁵¹ And the organization of the Church as a distinct community (a *universitas fidelium*) of course influenced the legal organization and governmental ideologies of civil commonwealths.

It is, however, often argued that Locke’s England, with its common law tradition, is an exception to this sphere of influence and this is an important claim since we are trying to understand the juridical background of Locke’s thought. Thus, Pollock and Maitland, whom I quoted above, claim that Roman law in England “led to nothing,” for “there would be no court administering Roman law.”¹⁵² One could perhaps “become a diplomatist; there was always a call in the royal chancery for a few men who would be ready to draw up treaties and state-papers touching international affairs, and to meet foreign lawyers on their own ground.”¹⁵³ In one sense, they are right, for England’s domestic legal and political institutions were grounded in common law, but the almost throw-away comment about the use of “a few men” schooled in Roman law for international affairs elides the great importance of Roman law for conceptualizing international relations, law, external sovereignty, and, most importantly for this study,

150 Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas* (Ithaca: Cornell University Press, 1975), 33.

151 “The fusion of Roman law with Christian doctrine and notably the permeation of the Bible with Roman law...was one of the presuppositions for the ready acceptance of the monarchic theme by both the Christian apologists and the Roman constitutional jurists. As has been persuasively shown, the monotheism of the Christian religion was a very powerful agent in the promotion of monarchic ideas and their wholesale acceptance by the Christians. The monarchy practiced by the late Roman emperors seemed singularly well to reflect the divine monarch...” Ullmann, *Law and Politics in the Middle Ages*, 34.

152 Pollock and Maitland, *The History of English Law Before the Time of Edward I*, Volume I, 122.

153 *Ibid.*, 123-24.

colonialism. Thus, although Henry III banned the teaching of Roman law in the London schools in 1234 and Pope Innocent IV banned its teaching in France, England, Scotland, Wales and Hungary in 1254, Henry VIII created the post of Regius Professor of Civil Law at Oxford and Cambridge in 1540, which at Oxford (in 1587) was taken by none other than Alberico Gentili, who had earlier been appointed professor of Roman law at Oxford in 1581.¹⁵⁴ Ken Macmillan explains this turnaround and the new English effort for legal pluralism as follows:

Unlike Roman law, common law possessed no doctrines for the acquisition of sovereignty over territory because the doctrine of tenures held that no land subject to the common law could be outside a state of sovereignty. Newfound lands, by virtue of being *terra incognita* before the age of expansion, were considered to be foreign territories and their settlement was a new activity that was not addressed in the domestic common law. Another legal system, therefore, was required to legitimize and oversee these activities, one that would enable the crown to govern its foreign territories in a manner consistent with natural laws and liberties, and that would also enable it to gain the recognition of the supernational community.¹⁵⁵

This pluralism had a very interesting consequence. Since common law, which fell under the purview of both King and parliament, did not extend to new territories, the king could decide whether to formally unite the new territory with England (as he did in the case of Wales), thus extending English common law (*lex terra*) into the territory, or apply his own law (*lex coronae*), using Roman law or an absolute (as opposed to ordinary) prerogative. The latter, absolute prerogative excluded parliament from jurisdictional powers within the colonies, creating a bi-lateral relation between king and colonists

154 See Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006), Chapter 1. Jean Bodin went so far as to claim that “it is treason to pose Roman law against the ordinance of one’s prince.” Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, 38.

155 MacMillan, *Sovereignty and Possession in the English New World*, 33.

wherein the king was absolute “lord and proprietor.”¹⁵⁶ The distinction between absolute prerogative (the power of the king) and ordinary prerogative (the power of the king and parliament), was a distinction first made by Hostiensis in the thirteenth century. He coined the terms *potestas absoluta* and *potestas ordinata* to clarify the imperial powers of the pope—a highly contested question arising from competing interpretations of Ulpian’s claim in the Justinian *Institutes* 1.2.6: “what the *princeps* has pleased to ordain, has the force of law.” According to Hostiensis, *potestas absoluta* was the power of the pope given by god and *potestas ordinata* was that given by positive law. If the pope was to undermine or transgress positive law, he must act with *potestas absoluta*, while in all other actions he too is subject to positive law. As it so happens, Hostiensis was one of those “few men” in the employ of Henry III for dealing with matters of Roman law.¹⁵⁷

To understand this distinction in the context of England and its colonies, Matthew Hale, in his influential *Prerogatives of the King*, put the distinction this way: if one were, for example, in Ireland (a conquered territory of England), one would be “*extra regnum Angliae*, though he be *infra dominium regni Angliae*.” That is to say, one would be

156 See MacMillan, *Sovereignty and Possession in the English New World*, 31-41. MacMillan writes: “In the absence of a formal unification between England and other dominions of the English monarch, the common law had no jurisdiction. The forms of actions, for example—the remedial writs of right and possessory assizes—which provided much structure and character to the English law, did not function in any land outside of England and Wales. The prerogative writs, however, and certain proclamations and ordinances, which were issued by the king under his absolute prerogative, did apply because they were issued on behalf of the king’s *imperium* and not on behalf of the political nation. These writs, including those of *habeas corpus*, *mandamus*, and *quo warranto* (the instrument ultimately used to dissolve the Bermuda, Massachusetts Bay, and Virginia Companies in the seventeenth century), applied throughout the entirety of the English monarch’s dominions, including the palatinates, civil law courts, and colonies” (35).

157 See Kenneth Pennington’s excellent discussion in “Law, Legislative Authority, and Theories of Government, 1150-1300,” in *The Cambridge History of Medieval Thought c. 350 – c. 1450*, edited by J. H. Burns (Cambridge: Cambridge University Press, 1988), 427-36.

outside the jurisdiction of the English government, but within the jurisdiction of the English king.¹⁵⁸ And similarly in the North American territories:

...the English planters carry along with them those English liberties that are incident to their persons. But those other laws that concern the lands, and property, and disposal of them, are settled according to the king's pleasure, who is lord and proprietor over them, till he shall dispose of them by patent.¹⁵⁹

Many of the soon-to-be American revolutionaries agreed insofar as they used this distinction to critique the British parliament's attempts to tax them. John Adams, for example, rhetorically asked: "by what law the parliament has authority over America? ...by the common law of England, it has none, for the common law, and the authority of parliament founded on it, never extended beyond the four seas."¹⁶⁰ And for Locke, as we have seen, the "liberties incident to their persons" that were most important were natural liberties, and those serve as the foundation for the generation of new rights of individuals, English or otherwise, which give them jurisdiction, private and public. In this sense, Locke's entrepreneurial colonist, who generates the grounds of sovereignty through private appropriation, is at odds with the king's *potestas absoluta* to extend political jurisdiction. Although it is consistently overlooked in secondary literature, this is one more way in which Locke's *Two Treatises* is a critique of absolutism; a topic I return to in Chapter Three.

¹⁵⁸ Hale, *Prerogatives*, 38; cited in MacMillan, *Sovereignty and Possession in the English New World*, 36.

¹⁵⁹ *Ibid.*, 43; cited in MacMillan, *Sovereignty and Possession in the English New World*, 37.

¹⁶⁰ John Adams, *Life and Works*, edited by Charles Francis Adams, Volume 4 (Boston, 1850-6), 37; cited in MacMillan, *Sovereignty and Possession in the English New World*, 40.

I. Dominium, imperium, and ius gentium

The medieval collapse of *dominium* and *imperium* was anticipated in the transition from the republican period of Rome (roughly 450 B.C. to 27 B.C.) to its “principate” and, in the third century A.D., to its eventual “dominate” phase. While republican *imperium*, as civil and military power (*imperium domi* and *imperium militiae* respectively), was shared by two consuls—originally ‘praetors’ and later ‘magistrates’, the latter term soon coming to represent figures just below the consuls with some form of *imperium*—in the dominate phase, the emperor became the sole seat of *imperium* and was no longer called *precept* or “first citizen”, but *dominus* of his subjects.¹⁶¹ This coincided with a growing territorial dimension to the concept of *imperium*. One could now speak of *imperium Romanum*, as opposed to the earlier, republican *imperium populi Romani*, which reflected the belief that although the emperor had supreme power (*potestas*), such power was vested in him by the citizens.¹⁶² Both ideas are encapsulated in Ulpian’s influential and oft-quoted claim: “what the *princeps* has pleased to ordain, has the force of law, since by a regal law enacted concerning his *imperium*, the people has conceded to him and conferred upon him the whole of its *imperium* and *potestas*.”¹⁶³ For the most

161 See H. F. Jolowicz, *Historical Introduction to the Study of Roman Law*, 3rd edition, edited by Barry Nicholas (Cambridge: Cambridge University Press, 1972), Chapter I.

162 J. S. Richardson argues that the first use of *imperium Romanum* “is in Sallust, who, in a retrospective passage in the *Catiline*, describes Carthage as having been ‘*aemula imperi Romani*’. This new usage,” he argues, “coincides with a more territorial notion of the *imperium Romanum*.” J. S. Richardson, “Imperium Romanum: Empire and the language of Power,” in *Theories of Empire, 1450-1800*, edited by David Armitage (Aldershot: Ashgate Publishing, 1998), 6.

163 Justinian’s *Institutes* 1.2.6. This first claim in this quote, that the prince makes the law at will, was the subject of centuries of debate after the recovery of Justinian’s *Corpus Juris*. The distinction made

part, *iurisdictio*, or legal jurisdiction, coincided with *imperium*,¹⁶⁴ so with the concentration of *imperium* in the emperor, concentrated *iurisdictio* followed.¹⁶⁵ This was particularly true of the *provincia* or conquered territories, which had previously fallen under the *imperium* of a magistrate.¹⁶⁶

These transformations in the conception of *imperium* coincided with great changes happening in the absolutist conceptualization of ownership (*dominium*) characteristic of the classical period. As Richard Tuck writes:

in the later Empire, such an independent and total control began to seem increasingly implausible. The Emperor was now someone with whom all citizens had bilateral relationships, and who claimed to be able to intervene in their social and economic life in a wide variety of ways. The consequence is easy enough to understand: *dominium* came to be seen as another kind of *ius*, not as something outside the area of *iura*...it was a *ius* because it was constituted by a gift from the Emperor to his tenants.”¹⁶⁷

The title of *dominus* for the emperor draws an analogy to the Roman head or master (previously *herus*) of the household (*domus*), which is understood quite expansively to

by Hostiensis I discussed at the end of the previous section was one attempt among many to clarify and institutionalize this absolute legislative power. See Pennington, “Law, Legislative Authority, and Theories of Government, 1150-1300.”

164 Jolowicz notes that although consuls had both *imperium* and *iurisdictio* in the beginning, the establishment of the praetorship as a special jurisdictional magistracy, meant that *imperium* and *iurisdictio* came to be somewhat divided, with the consuls retaining *imperium*. That said, “every magistrate with *imperium* had *iurisdictio*, at least in principle, there are some magistrates who have *iurisdictio* but no *imperium*.” Jolowicz, *Historical Introduction to the Study of Roman Law*, 47n.

165 “The history of the courts of juridical procedure during the principate is closely parallel to that of the government as a whole. Republican institutions were not abolished, but new imperial institutions grew up by their side, with the result that they became atrophied and finally perished. This process however was not complete until the principate had given way to the dominate, and here, as in other departments of life, it was the provinces that took the lead, while Rome herself retained the relics of republicanism longer than any other part of the empire.” Jolowicz, *Historical Introduction to the Study of Roman Law*, 395.

166 “*Provincia* literally means just ‘sphere of authority of a magistrate’, and the sense from which our word province is derived is simply the result of the territorial application of the same idea. A ‘province’ is a sphere of authority with territorial limits assigned to a magistrate with *imperium*, and, as much, is outside Italy, for within Italy there were no such geographical limits on the *imperium*.” Jolowicz, *Historical Introduction to the Study of Roman Law*, 66-67.

167 Tuck, *Natural Rights Theories*, 10-11. See also Ernst Levy, *West Roman Vulgar Law: The Law of Property* (Philadelphia: American Philosophical Society, 1951).

include land, slaves, etc.¹⁶⁸ *Dominium* seems to have originated as a term for those things which fall under the *dominus*'s power or *potestas*, although in the classical period (roughly 40 B.C. to 240 A.D.) *dominus* and *dominium* came to mean simply owner and full ownership respectively.¹⁶⁹ It is not clear when the term *dominium* came to represent full ownership—as opposed to lesser forms such as *usucapatio*, *possessio*, *dominium bonitarum*, etc.—but it was fairly widely used in the late republic and certainly in the texts from the classical period compiled centuries later in the *Corpus Juris Civilis* by order of the Byzantine emperor Justinian in the early sixth century.¹⁷⁰ *Dominium* in these texts meant—and it is this meaning that is overwhelmingly associated with the term today—full ownership or ownership *ex iure Quiritium* (“by Roman right”),¹⁷¹ which entails an absolute control over the use and alienation of things or interests (both considered *res*) owned.¹⁷² As implied in the above Tuck quote, *dominium* did not

168 See C. Reinold Noyes, *The Institution of Property: A Study of the Development, Substance and Arrangement of the System of Property in Modern Anglo-American Law* (New York: Longmans, Green and Co., 1936).

169 This power was previously called *manus*, a term later reserved for the husband's relation to his wife. From *manus* came *mancipium*, which “appears for the first time in the XII Tables and continues until the third century of the Republic to cover the idea of the act of acquiring by formal purchase... a certain class of things—the *res mancipi*.” Noyes, *The Institution of Property*, 75. Although Jolowicz disagrees with de Visscher, the latter argues that root meaning of *mancipium* “is the power exercised by the *paterfamilias*. With the development of the idea of property, the free subordinate members of the family came to be excluded from the category of *res mancipi*, though continuing to be objects of *mancipation* (it is indeed in relation to them that Gaius, 1.116ff., explains the ceremony), and eventually the idea of *mancipium* is swallowed up by *dominium*.” Jolowicz, *Historical Introduction to the Study of Roman Law*, 138n.

170 The *Corpus Juris Civilis*, the title later given to Justinian's *Codex*, consisted of the *Institutes*, *Digest*, *Code*, and *Novels* and enacted as law in 529 A.D. For a good overview of the organization, history and future influence (in the east) of the *Corpus*, see Jolowicz, *Historical Introduction to the Study of Roman Law*, Chapter 29.

171 *Quirites* represents Roman citizenship, although its etymological origin is unknown. See Justinian's *Institutes* 1.2.2.

172 “Gaius divides *res* into (a) *divini juris*, not the subject of human ownership, and (b) *humani juris*, owned by men... *Res humani juris* were either *privatae* or *publicae*, not in the ownership of private persons but of public bodies, like the Senate and municipalities.... Justinian's main division follows Gaius

originally represent a mere *ius*, and some have argued that it excluded the concept of right altogether. In either case, it is clear that in the classical period, *dominium* was not conceptualized as a bundle of *iura*, which together constitute absolute ownership, but rather that rights were only conceptualized when the supreme power (*potestas*) associated with the *dominus* (originally the *pater familias*) was lacking. This idea suggests itself in a claim by Ulpian in the *Digest* (7.6.5): “the *ius* of using and taking the crop can only be attributed to the man who has the usufruct; the *dominus* of an estate does not have it, since anyone who enjoys ownership of something does not have a separate *ius* to use it and take its produce.” Tuck explains it this way:

the explanation of the distinction was that *dominium* was not constituted by an agreement or other transaction between independent and private parties. It did not come into being because one person promised something to someone else (though it could be transferred in such a way, like most *res* in Roman law, including some *iura*), but was simply given by the fact, as it seemed to the Romans, of a man’s total control over his physical world—his land, his slaves or his money.¹⁷³

It does seem to be the case that the original sphere of *dominium*, that sphere within which the *potestas* of the *dominus* or *pater familias* is exercised, is the juridical anchor of Roman jurisprudence, which simultaneously falls outside it. It is a bare fact of sorts, a foundation from which and through which all other (lesser) relations and *iura* are conceptualized, but to which they do not apply. It is, in a sense, the ultimate right “which

very closely: *res in nostro patrimonio*, owned by someone, and *res extra nostrum patrimonium* which cannot be owned by a private person. The latter roughly corresponds with Gaius’s *res divini juris*, but is more elaborately divided into (a) *res omnium communes*, thing which all the world may enjoy, viz. the air, running water, the sea, and the seashore; (b) *res publicae*, the property of the State, but dedicated to the use of its citizens, like roads, rivers, and harbours; (c) *res universitatis*, the property of a corporation, e.g. a theatre in some Roman city; (d) *res nullius*, which is divided in precisely the same way as Gaius’s *res divini juris*” Richard W. Leage, *Roman Private Law: Founded on the Institutes of Gaius and Justinian*, second edition by C. H. Ziegler (London: Macmillan and Co., 1942), 136-137.

173 Tuck, *Natural Rights Theories*, 10.

has no right behind it,”¹⁷⁴ and we can thus see an analogy with medieval Christian interpretations of the *Corpus Juris*, which posit a similar role for God’s *dominium*—governmental and proprietary—which is given to humankind in one way or another. Thus, we must remember that the terminology of *ius in rem* (sometimes *ius in re* or *ius reale*) and *ius in personam* was developed much later to represent the original Roman procedural conceptions of *actio in rem* and *actio in personam*.¹⁷⁵ The classical Roman *ius* was reserved for those things or interests that were less than full ownership, such as the limited rights—objectively, not subjectively, construed—individuals have, roughly speaking, in the property of another, which have been called *iura in re aliena* (although this specific phrase emerged quite late, probably first coined by Hugo Donellus and later popularized by Hugo Grotius).¹⁷⁶ These are also referred to as *iura in personam*—and by the sixteenth century were called *iura ad rem* (rights to something)—because they are claims relating to particular people as opposed to *iura in rem* (rights in something), which are claims against all the world. *Iura in personam* arise in various servitudes (such as the right to cross the land of another, have access to water, light, etc.), *ususfructus* (taking the

174 William W. Buckland calls it the “ultimate right.” See Buckland, *Elementary Principles of Roman Private Right* (Cambridge: Cambridge University Press, 1912), 81. Janet Coleman, following Buckland, describes *dominium* as the ultimate right or “that which has no right behind it.” Coleman, “Property and Poverty,” 612n.

175 See Jolowicz, *Historical Introduction to the Study of Roman Law*, 412-14; and Robert Feenstra, “*Dominium* and *ius in re aliena*,” in *New Perspectives in the Roman Law of Property*, edited by Peter Birks (Oxford: Clarendon Press, 1989), 111-122. Feenstra suggests that the Roman distinction between *actio directa* and *actio utilis* may have been the inspiration for the later distinction *dominium directum* and *dominium utile*. See Feenstra, “*Dominium* and *ius in re aliena*,” 113. Levy also suggests that their original source is (vulgar) Roman law, rather than Germanic. See Levy, *West Roman Vulgar Law*, 66-67.

176 See Feenstra, “*Dominium* and *ius in re aliena*.”

fruits of another's property), and *usus* (using a thing, for example, as when living on a certain parcel of land, but not taking its fruits).¹⁷⁷

In keeping with Roman procedural categorization, objects of ownership were divided into categories of *res mancipi* and *res nec mancipi*. In order to alienate or acquire the former type of *res*, the formal method of *mancipatio* or *in iure cessio* is required, while alienating or acquiring the latter can be carried out by mere *traditio* or delivery. *Mancipatio*, *in iure cessio*, and *usucapio* (the method of acquiring ownership through continued possession) are the three main methods of acquisition within civil law, which was limited to Roman citizens. The above *traditio*, as well as *occupatio* (the process of first occupation or factual possession of something unowned),¹⁷⁸ and *specificatio* (rightful acquisition gained by the creation of a new object) were the three main methods of acquisition by natural law or *ius gentium*, which applied to citizen and peregrine alike. *Dominium* was limited to acquisition in civil law and, in particular, to those *res* acquired through *mancipatio* or *in iure cessio*. Although these latter methods of acquisition were only valid for citizens, the distinction between *res* subject to *mancipatio* and those to mere *traditio*, for example, was more than merely procedural. That is to say, the relative importance of the things necessary for security or economic and agrarian sustainability determined (or excluded them from) formal methods of conveyance.¹⁷⁹ These

177 Justinian's *Institutes*, 2.3-5. Hegel discusses these categories in his *Elements of the Philosophy of Right*, edited by Allen Wood and translated by H. B. Nisbet (Cambridge University Press, 1991), §40, hereafter *PR*.

178 Gaius writes in the *Digest* 41.1.1: "what belongs to no one is conceded to the occupier by right reason." ["*Quod enim nullius est id ratione naturali occupanti conceditur*"]

179 The *res mancipi*, for example, "are things which are most important in a settled community which is both agricultural and warlike: the land, the slaves and beasts with which it is worked, and the rights of way and water without which, if it is away from the public road or has no water on it, it cannot be

distinctions diminished over time, however, in large part due to the influence the expanding empire, which brought with it a new body of legal theorizing, *ius gentium*, applicable to citizens and non-citizens alike, thus simplifying commercial transactions. Thus we can read in the *Institutes* (2.1.11): “Things become the property of individuals in many ways. We obtain *dominium* of some things by *ius naturale*, which as we have said is called the law of nations *ius gentium*, and of other things by *ius civile*.”¹⁸⁰ This is quite a dramatic development in the conceptualization of *dominium*, signaling a repositioning from its earlier foundational role.

This process was accelerated by changes in Roman citizenship, which was first reserved for free-born men in Rome, extended to all of Italy before the end of the republic, and in 212 A.D. was extended by Emperor Caracalla to almost all inhabitants of the Roman empire.¹⁸¹ With the expansion of citizenship came the expansion of individuals—previously rightless or without recognition of legal personality unless they had a special treaty with Rome admitting them to *commercium*—subject to the *ius civile*. At the same time, with the growing recognition of *ius gentium*, or law of peoples, the nature of *ius civile* changed. Thus we find a convergence of two trends: citizenship and its law are being expanded and the nature of that law is becoming simplified and vulgarized, i.e. a kind of de-absolutizing of individual *dominium*. Thus, the circle of

well farmed, and the horses used in battle. Such things must not pass from hand to hand as less important things may; if the ownership in them is to change there must be a public act of transfer of which witness can afterwards be given in case of any dispute.” Jolowicz, *Historical Introduction to the Study of Roman Law*, 137-38.

180 The Latin reads: “*Singulorum autem hominum multis modis res fiunt: quarundam enim rerum dominium nanciscimur iure naturali, quod, sicut diximus, appellatur ius gentium, quarundam iure civili.*” The texts within the *Corpus Juris* are not consistent on this point. Sometimes ownership is natural and conventional, sometimes only the latter. See Janet Coleman’s discussion in “Property and Poverty,” 611-12.

181 See Jolowicz, *Historical Introduction to the Study of Roman Law*, 345-52.

citizenship widened to encompass those previously excluded, but the rights and privileges of that citizenship—such as absolute ownership *ex iure Quiritium*—were weakened in turn expanding the reach of the emperor.

The theorization of *ius gentium* was clearly tied to the growing commercial relations with non-Romans, itself largely the result of the acquisition, by force, of new territories or “provinces.” By 275 B.C. Rome had conquered most of the nations of Italy and by 241 B.C. (after the first Punic war) had acquired Sicily, its first province beyond Italy. The conquest of large parts of Spain and North Africa soon followed. The recognition of *ius gentium* was fully institutionalized with the appointment of a second, special praetor (or jurisdictional magistrate) in about 242 B.C.— the *praetor peregrinus*, *peregrini* being the term for foreigners—to deal with legal disputes in the rising “inter-nation” commerce resulting from Roman imperialism. I say “inter-nation” because as the empire expanded and encompassed most of the known world, terms inter-state, international, or even foreign commerce would misrepresent the fact that such commerce was occurring between subjects (citizens and otherwise) internal to the empire.¹⁸²

In Justinian’s *Institutes* 1.4 (*Digest* 1.2), Ulpian divides law into public and private, the latter derived from *ius naturale*, *ius gentium*, or *ius civile*. The law of nature “is the law instilled in all creatures” (1.2), whereas *ius gentium* is the law “which natural reason makes for all mankind [and] is applied the same everywhere” (1.2.1). While

182 From this development, writes Jolowicz, “there did grow up, through the edicts of the *praetor peregrinus* and the provincial governors, a system which was neither the Roman *ius civile* nor a code of ‘private international law’, but a general system of rules governing relations between free men as such, without reference to their nationality. Much of this system of law, seeing that it was based on the edicts of Roman magistrates, was Roman in origin, but it was Roman law stripped to a great extent of its formal elements, and influenced by other, especially Greek ideas.” See Jolowicz, *Historical Introduction to the Study of Roman Law*, 103. See also Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas*, 3rd edition (London: John Murray, 1866), 44-72.

Ulpian here differentiates *ius naturale* from *ius gentium*, Gaius identifies them¹⁸³ as did Cicero and Aristotle insofar as to be natural is to be common or universal.¹⁸⁴ In either case, *ius gentium* and *ius civile* come to be fused, resulting in a denigration of the latter particularly as it relates to *dominium* in the “later Empire,” as noted above by Tuck.

It is often overlooked that some three centuries separated Justinian’s *Corpus Juris* and the end of the classical period and in those intervening years many of the refined and complex distinctions of classical law devolved or completely disappeared. This was in part due to the influence to the other legal systems encountered in the expanding empire, the incentive toward simplification for commercial reasons, the ever more dispersed authorities with juridical powers within the provinces, and the increasing encroachment of previously distinct political powers into the private sphere of proprietary rights.¹⁸⁵ As a

183 *Institutes* 1.9: “All nations which are governed by statutes and customs make use partly of law which is peculiar to the respective nations, and partly of such as is common to all mankind. Whatever law any nation has established for itself is peculiar to that particular state (*civitas*), and is called civil law, as being the peculiar law of that state, but law which natural reason has laid down for mankind in general is maintained equally by all men, and is called *ius gentium*, as being the law which all nations use.” Cf. 2.1.11. See Tierney’s discussion of the differences between Gaius and Ulpian, *The Idea of Natural Rights*, 135-37.

184 See Aristotle, *Rhetoric*, Book I, Chapter 13, 1373b.

185 As Levy notes in his *West Roman Vulgar Law*: “During the earlier republic...both magistrate and pater familias were prominently guided and limited by extralegal forces such as usage and morals which favored or demanded a course promoting the best of their subjects. If personal conduct or property management on the part of those in public or private power failed to live up to those standards, the censor might bring effective, if indirect, pressure to bear on the violator. As time went on, however, and self-interest came to prevail over public spirit and ancient tradition, moral ties gradually weakened. The pertinent activities of the censors came to a standstill, and the other magistrates, wherever feasible, refrained from interfering with the doings or property of a citizen” (102). This trend, notes Levy, was reversed in the principate and was exemplified by the thought of Marcus Aurelius, who was “deeply devoted to the idea that privileges conflicting with the common good had to yield” (108). In the dominate, the private sphere of *dominium*, formerly conceived as under the absolute control of the *dominus*, dissolved. “No province of human activities remained free from state regimentation. Conscription of man power [*munera*] and resources was practiced, whether it truly served the commonweal or merely the interests of the public purse. The *utilitas publica*, abundantly referred to as a rationale, indiscriminately covered both objectives. Private ownership in particular though upheld as an institution was primarily supposed to served the general welfare or the authorities, and only within these qualifications might it be used to the advantage of the individual” (110).

result, whereas classical law made a clear distinction between full ownership, *dominium*, and factual possession, *possessio*, they almost completely collapse in vulgar law, as does the separation of *actio in rem* and *actio in personam*. “The disintegration of classical *dominium* was not confined to its mingling with *possessio*,” writes Ernst Levy. “The antithesis between *dominium* as the essentially total right of control and the limited rights others might have in the thing did not survive either.”¹⁸⁶ Something like *usufructus*, which was once considered a *ius in re aliena*, became then a form of *proprietas*—a limited or qualified conception of *dominium*.¹⁸⁷ We find here a development usually attributed to Germanic sources after the fall of the western empire (476 A.D.)—the disintegration of absolute *dominium* into a spectrum of qualified, lesser forms.¹⁸⁸ As Levy writes in one of the most thorough studies of vulgar law:

Looking back to the characteristics of the vulgar law of property as they took shape in the Empire and the succeeding kingdoms, we cannot but notice various features familiar to Germanic *vestitura* (seisin, *Gewere*). The resemblances are numerous and evident. Just as *possessio*, *Gewere* required, as a rule, a factual holding *suo nomine*. Just as *possessio*, *Gewere*, while not being a real right, was its typical outward appearance.¹⁸⁹

186 Levy, *West Roman Vulgar Law*, 34.

187 “Reaching far beyond its classical limits, [*possidere*] became the basic concept and, to a large extent, the common denominator of the law of property. For it was prominently applied to designated all real rights normally combined with factual holding, whether ownership or usufruct, perpetual lease or building rights. Instead of calling a man the owner, the jurists preferred to point to him as *possessor*, *possidens*, or having *possessio*.” Levy, *West Roman Vulgar Law*, 61.

188 “This doctrine has frequently been traced to Germanic points of view and contrasted with Roman concepts. But the approach of the vulgar law opens up an entirely new vista. In any event, so far as tangible evidence goes, it was the legislation of the fourth and fifth centuries and passages of the Digest rather than Germanic sources which served the Glossators and Bartolus as the point of departure.” Levy, *West Roman Vulgar Law*, 68. Levy’s mention of Bartolus refers to the latter’s distinction between *dominium directum* and *dominium utile*, which I discuss in the next section.

189 Levy continues: “Hence it was not only commonly used to couch the right; it also established a presumption that such a right existed. *Vice versa*, just as *dominium* occasionally did not mean more than lawful possession, so *eigen*, translated with *proprium* or *proprietas*, may have pointed to the land a man had in his *Gewere*. Moreover, the right to possess, ordinarily underlying both *possessio* and *Gewere*, did

Levy thus concludes—contrary to the standard narrative that “Roman property law” was essentially different from Germanic law—that there is much continuity and even causality between this vulgar Roman law of the west and the Germanic legal conceptions, most importantly concerning *Gewere* and later seisin after the fall of the western empire.¹⁹⁰ We witness a collapse of the vertical dimension of *dominium* and an expansion of its horizontal dimension, which in the west, after the fall of the empire, dissipates into multiple *iure* in land, none of which resemble full ownership.¹⁹¹ This disintegration is the conceptual precursor to feudal property and political relations.¹⁹²

not have to be ownership; it might as well be a perpetual lease, usufruct or another real right. Hence all these rights, whether expressed in terms of *Gewere* or *proprietas*, were considered as alike in structure and different solely in the benefits they carried, with no room left for a sharp contrast between *proprietas* and *ius in re aliena*.” Levy, *West Roman Vulgar Law*, 96-97.

190 “It is an established fact that Germanic draftsman of legal instruments started by drawing upon the patterns of the vulgar law and to some extent continued that practice well into the following centuries. Similarly Roman was in particular the employment of these instruments for the purpose of conveyance. Such usage, in turn, came to mingle with the partly indigenous type of *traditio*, the (*in*)*vestitura* in the early sense of the term, i.e., that formal act upon the land which originally combined the real agreement and the transfer of possession... The Germanic jurists may well have taken advantage of those Roman concepts which met half-way with their native ideas. If so, Roman and Germanic usages may both have contributed to the law of *Gewere*. The proportion of these shares is, of course, not open to calculation. But it will be hard to maintain that *Gewere* was a typically or peculiarly Germanic institution.” Levy, *West Roman Vulgar Law*, 98-99.

191 For a discussion of seisin in English law, see Pollack and Maitland, *The History of English Law Before the Time of Edward I*, Volume 2 (Cambridge: Cambridge University Press, 1895), §2, 29-79. See also the etymological discussion of seisin in Noyes, *The Institution of Property*, 99-100.

192 “Early Germanic landholding remains a subject dogged by controversy, but it has been suggested that it was the source of the characteristically medieval view of property, so different from that of the Roman lawyers. This view involved no exclusive right of ownership, and what the law protected was rather ‘seisin,’ or actual possession ‘rendered venerable by duration.’ And possession—for example, of a piece of land—was merely one right which by no means excluded others... With the growth of feudalism and the concomitant proliferation of tenancies of indefinite duration, divided ownership became increasingly common, although at first the lord tended to be regarded as the owner in the sense envisaged by Roman law, and the vassal as possessing rights akin to the Roman usufruct. But the fact that the vassal had the effective possession of the fief enabled him to consolidate his real right and to extend it at the expense of the lord’s, so that ‘already in the eleventh century the rights of the vassal over his fief had extended far beyond those allowed by the Roman conception of usufruct’... Thus the Roman conception of ownership as unique and indivisible finally collapsed under the sustained and stubborn pressure of feudal social conditions, and divided ownership was enshrined at the very heart of the law. There can certainly be

II. The Revived Corpus, the Franciscans and the Conciliarists

This process—i.e. the vulgarization of classical law with the expansion of empire that precipitated the disappearance of *dominium* and the rise of property rights talk—experienced somewhat of a turnaround after the recovery of the *Corpus Juris* in the eleventh century and its systematic analysis and interpretation in the twelfth. As Francis Oakley writes:

After the revival in the twelfth century of the study of Roman law in the West, the Civilians tried to reconcile these [feudal] rights with Roman legal ideas, and finally succeeded in doing so (if at the expense of a somewhat forced interpretation of Roman private law) by means of the doctrine of divided dominium. According to this, the vassal was conceded to possess more than a mere *jus in re aliena*. He had a real right in his fief, for he possessed the *dominium utile* or useful ownership of it. This did not mean, however, that the lord had forfeited his ownership for he was said to possess the *dominium directum*...¹⁹³

This language of *dominium utile* and *dominium directum* came out of the glosses of the *Digest* at law school at Bologna, founded by Inerius. While classical law, the newly collected body of canon law in the *Decretum* of Gratian (1140), and other twelfth-century jurists drew a distinction between usufruct and *dominium*, regarding the former as *natural* possession and the latter as *civil* possession, the later interpreters at Bologna did not. The

no doubt about the value of this doctrine in rationalizing the feudal hierarchy of landholding, for it permitted the original possessor to retain his legal right over the land even after it had passed, in accordance with the feudal contract, out of his hands and into those of a vassal or even of a vassal's vassal." Oakley, *The Political Thought of Pierre d'Ailly*, 68-70. See also McIlwain, *The Growth of Political Thought in the West*, 175-77.

193 Oakley, *The Political Thought of Pierre d'Ailly*, 69.

decisive blow to this dichotomy was made in the influential thirteenth-century gloss of Accurius, the *Glossa Ordinaria* (c.1250), which was to become the standard work for some time. This innovation, which some attribute to Accurius and others to Pillius—subsequently developed by Jacques de Révigny, Pierre de Belleperche, and Bartolus of Saxoferrato—reflected proliferating subinfeudations of property at the time.¹⁹⁴

The recognition of a *dominium utile*, writes Tuck, “was to transform rights theories. For now *dominium* was taken to be any *ius in re*: any right which could be defended against all other men, and which could be transferred or alienated by its possessor, was a property right, and not only rights of total control.”¹⁹⁵ It was probably Johannes Bassianus who first made the previously mentioned distinction between *ius in re* and *ius pro re* (the latter eventually becoming *ius ad rem*), which set the stage for divided *dominium*.¹⁹⁶ The latter—having a right *to* something—as mentioned above, would include claims individuals have to things they *do not possess* and which thus involve *claims* directly or indirectly on other individuals and/or institutions, which as we saw was called *ius in personam*. Thus, a child may have a *ius* (without *dominium*) with respect to her father (to be fed, protected, etc.), while the father exercises *dominium*, or is *dominus*, with respect to the child. In terms of external objects, *ius ad rem* is also another way of representing usufruct and possession (*possessio*), as opposed to the *ius in re*—having a right *in* something—of full ownership (*dominium*). Every individual was often

194 Tuck, relying on the work of Meynial’s work, attributes it to Accurius. See his *Natural Rights Theories*, 16. Robert Feenstra argues that it was probably Pillius. See his “*Dominium and ius in re aliena*,” 112-113.

195 Tuck, *Natural Rights Theories*, 16.

196 Tuck calls Bassianus’s distinction “one of the most potent observations in medieval jurisprudence.” Tuck, *Natural Rights Theories*, 14.

said to have *ius ad rem* with respect to the appropriation and use (usufruct) of things necessary for self preservation.

The idea of a divided *dominium*, which combined *ius* and *dominium*, served as a discursive weapon for Dominicans, like Aquinas, against Franciscan arguments for apostolic poverty found in the work of Duns Scotus and William of Ockham.¹⁹⁷ As Annabel Brett writes, poverty for the Franciscans

was not seen merely to involve the absence of *divitiae*, riches...It had in addition a sense as an antonym of *potentia* or *potestas*. The pauper was the *servus* or *subditus*, the subject of the *dominus* or *potens*, the person of superior might...Poverty thus came to have in addition a juridical dimension in the sense of absence of legal standing. It was the opposite of *dominium*, which signified the relation of power over objects and persons, defensible in law and consequently yielding standing in law.¹⁹⁸

The Franciscan position was supported by a papal bull, *Exiit*, issued by Pope Nicholas III in 1279. It distinguished *proprietas*, *possessio*, *usufructus*, *ius utendi*, and *simplex usus facti*. The last was a type of simple use, or simple consumption, which did not entail the right or liberty to alienate or exchange the object to be consumed, and was thus consistent with the Franciscan vow of poverty. The previous four were considered types of *dominium* and thus unavailable to the Franciscans. Pope John XXII withdrew support from the Franciscan position in the 1320s, issuing his *Quia vir reprobus* in 1329, which claimed that *dominium* was irreversibly and unexceptionally introduced in the state of innocence (*statu innocentiae*) when Adam was given *dominium* over temporal things (*dominium rerum temporalium*). This move, while motivated by the conservative political

¹⁹⁷ In his *Quaestiones in librum Sententiarum* (15.2), Scotus argued that “in the state of innocence common use without distinct dominium is more valuable for everyone than distinct dominium” [*in statu autem innocentiae communis usus sine distinctione dominiorum ad utrumque istorum plus valuit, quam distinctio dominiorum*]. *Opera Omnia*, XVIII (Paris, 1894), 256-7; cited in Tuck, *Natural Rights Theories*, 21.

¹⁹⁸ Brett, *Liberty, Right and Nature*, 12.

and economic interests of the Church faced with the radical implications of apostolic poverty, had the ironic effect bestowing greater natural liberty and the powers of *dominium* to individual agents beyond the jurisdiction of the Church or state.¹⁹⁹ I would argue that this is an incredibly important moment in the history of the ideas and relations of sovereignty and private property, for it is the reactionary Church of the thirteenth and early fourteenth centuries that recognizes, i.e. codifies, the subject as having a natural or true *dominium* (*dominium verum*), for the reasons above, while simultaneously, because it is experiencing a successful push back on its jurisdiction from secular authorities, articulates an extreme, absolutist form of sovereignty. As Michael Wilks writes:

Although the ability of the papacy to control the activities of the European monarchs steadily declines during the course of the thirteenth and fourteenth centuries, this process is counterbalanced by the elaboration of a doctrine of power unparalleled since the days of imperial Rome, and destined to pass...into the political thought of the secular state in the sixteenth and seventeenth centuries. The less the popes could achieve in the world of fact, the more far reaching were the claims of their supporters, who, relieved of the necessity for maintaining some sort of relationship between theory and practice, were able to give full expression to that juristic desideratum, the omnicompetent sovereign.²⁰⁰

Wilks's remark is very true of the sixteenth century, particularly of Bodin's theory of sovereignty, which not only streamlined this originally thirteenth-century absolutist

199 As Tuck notes: "The end result of this debate was that the conservative theorists had been led to say that men, considered purely as isolated individuals, had a control over their lives which could correctly be described as *dominium* or property. It was not a phenomenon of social intercourse, still less of civil law: it was a basic fact about human beings, on which their social and legal concepts to the problems of the essential character of men had led pretty directly to a strongly individualistic political theory which had to undergo only a few modifications to emerge as something very close to the classic rights theories of the seventeenth century." Tuck, *Natural Rights Theories*, 24.

200 Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge: Cambridge University Press, 1963), 151. See also James Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250-1550* (Philadelphia: University of Pennsylvania Press, 1979), and Hinsley, *Sovereignty* (Cambridge: Cambridge University Press, 1986). particularly Chapter 3.

formulation, but coupled it with a similar formulation of private ownership. That is to say, by the time we get to Bodin, we find a post-feudalist conception of absolute ownership (of private property) serving as an analogy for absolute political sovereignty.²⁰¹

Returning to the fourteenth century, we find that the theories of Richard Fitzralph and John Wycliffe have incorporated this individualistic interpretation of natural *dominium*, but in Augustinian fashion, have made it natural but subject to grace. Their work not only served as an important precursor to the Protestant Reformation, but created the foundations for a theory of resistance as well.²⁰² We will see in the following section that it is precisely this heresy—a theory of resistance founded on grace, originally articulated by FitzRalph and Wycliffe, appropriated by Luther, and finding echoes in Sepúlveda—which Bartolomé de Las Casas and Francisco Vitoria confront in early sixteenth-century justifications of Spanish colonialism and to which Vitoria, for example,

201 Bodin writes: “For the people has here dispossessed and stripped itself of its sovereign power in order to put him in possession of it and vest it in him. It has transferred all of its power, authority, prerogatives, and sovereign rights to him and [placed them] in him, in the same way as someone who has given up the possession of, and property in, something that belonged to him.” Within his explanation of absolute power, he also writes: “For the people or the aristocracy (*seigneurs*) of a commonwealth can purely and simply give someone absolute and perpetual power to dispose of all possessions, persons, and the entire state at his pleasure, and then to leave it to anyone he pleases, just a proprietor can make a pure and simple gift of his goods for no other reason than his generosity. This is a true gift because it carries no further conditions, being complete and accomplished all at once, whereas gifts that carry obligations and conditions are not true gifts.” Bodin, *On Sovereignty*, 6-7; 7-8. The critical point here is how much this claim relies on an implicit critique of feudal political and property relations. The division of *dominium*, public and private, into subinfeudations has been wiped away.

202 “The issue of right and dominion had grown out of the old disputes over Franciscan poverty. Richard FitzRalph, invited by Pope Clement VI in 1350 to reconsider these questions, developed a theory of dominion based on divine grace. Since God was lord of all things, he argued, only men who enjoyed God’s favor could exercise licit authority on earth. This was not so shocking in itself. There were scriptural and Augustinian texts that could be adduced in support of such a position; and Giles of Rome had earlier based a whole papalist ecclesiology on similar arguments. But, in the generation after FitzRalph, his conclusions were developed in a radically antinomian fashion by John Wyclif.” Tierney, *The Idea of Natural Rights*, 229. On the question of resistance and the Reformation, it should be noted, however, that the early positions of Luther and Calvin did not advocate a theory of resistance, but rather a form of “passive political obedience” as Skinner has called it. See Skinner, *The Foundations of Modern Political Thought*, Vol. II, particularly Chapter 7.

responds with a neo-Thomist argument that re-articulates the naturalness of *dominium* (public and private), even in the case of infidels and “barbarians.”

Vitoria’s position concerning the possibility of private and public *dominium* in the case of infidels (which I return to in the following section) was essentially a return to what Ockham had argued in the fourteenth century,²⁰³ which although not articulated in the context of a debate over colonialism, was similarly contributing to a debate over the jurisdictional relationship between church and state, between *sacerdotium* and *regnum*. On the question of private *dominium*, Ockham defended apostolic poverty by arguing that there were types of use (*usus facti*) that did not entail property, and that those rights of appropriation that might entail property could be renounced.²⁰⁴ *Dominium*, for Ockham, is “the principal human power [*potestas humana*] of vindicating a temporal thing in court, and of treating it in every way, which is not prohibited by natural law.”²⁰⁵

On the question of public *dominium*, he was responding to “the argument of high papalist theologians like Giles of Rome [Aegidius Romanus], who maintained that all *dominium*, including licit jurisdiction and right of ownership, was derived from the pope and that, accordingly, it could not be held outside the church.”²⁰⁶ As with Fitzralph and Wyclif who followed him, Giles of Rome drew inspiration from St. Augustine’s view that a commonwealth cannot be truly just if it is not Christian. “The de facto exercise of

203 As Ockham writes in his *Brevioquium*, 2.4, 118 “...*apud infidels est verum dominium temporalium rerum et vera iusdictio temporalis*”; cited in Tierney, *The Idea of Natural Rights*, 172.

204 Ockham described *usus facti* as “every act, which any person may exercise with regard to an external object, such as eating, drinking, dressing, writing, reading a book, riding and the like.” Ockham, *Opus nonaginta dierum*, in J. G. Sikes and H. S. Offler (eds.), *Guillelmi de Ockham. Opera politica*. Vols. I-II, 2nd edition (Manchester, 1963), 301; cited in Brett, *Liberty, Right, and Nature*, 58.

205 Ockham, *Opus nonaginta dierum*, 306; cited in Brett, *Liberty, Right and Nature*, 63.

206 Tierney, *The Idea of Natural Rights*, 172.

authority, either proprietary or governmental... can give merely a presumptive title to dominium, which is truly possessed only if the person claiming to exercise it is in proper subordination to God and has received it through the grace of God.”²⁰⁷

Ockham, on the contrary, argued that the power to institute a ruler, i.e. the power to establish jurisdiction, was, like the power of appropriation, a power granted by god to the people not the church or pope—and it too could be alienated.²⁰⁸ A similar argument was put forth by Bartolus of Saxoferato (or Sassoferrato) (1314-1357), founder of the post-Glossator school, who articulated a sophisticated theory of *dominium* and *imperium* with quite radical implications. Much like the aforementioned division of *dominium utile* and *dominium directum*, Bartolus argued that there was a generic *dominium*, which included incorporeal rights (like usufruct or obligation), and a stronger *dominium plenum* which is “the right of perfectly disposing of a corporeal object, unless it be prohibited by law.”²⁰⁹ Analogously, he argued that *iurisdiction* was the genus of two species *imperium* and *iurisdiction simplex*, the former divisible into *merum imperium* and *imperium mixtum*. Such a division of *imperium* was made by Ulpian in the *Digest*, where *merum* included the power of punishment (*gladii potestatem*) and jurisdiction, while *mixtum* included only

207 Francis Oakley, *The Political Thought of Pierre d’Ailly*, 71-72. Fitzralph had a quite complicated division of *dominium*. He distinguished three species: *divinum*, *angelicum*, and *humanum*. The last can be subdivided into *naturale sive originale* and *adventicium sive politicum*. The second, *dominium politicum*, is divisible into *domesticum*, which is equivalent to the sphere of the Roman household with a *dominus* patriarch; *civile*, which concerns the goods of a community of such households; and *regnum*, which is the governmental *dominium* of a single *dominus* over an entire territory. See J. H. Burns, “Fortescue and the Political Theory of *Dominium*,” *The Historical Journal*, 28:4 (1985), 795. See also Graham McAleer, “Giles of Rome on Political Authority,” *Journal of the History of Ideas*, Vol. 60, No. 1 (January, 1999), 21-36.

208 See Tierney’s discussion of Ockham in *The Idea of Natural Rights*, Chapter 7. Tierney argues that Ockham was original insofar as he argued that “the institution of a ruler and the alienation of the right to elect was set in the context of a discussion on natural law and natural rights” (182).

209 Cited in Brett, *Liberty, Right and Nature*, 22. Brett argues that *dominium plenum* “carries the connotation of liberty and sovereignty.” Ibid.

the latter.²¹⁰ Each of these three (*imperium merum*, *imperium mixtum*, and *iurisdictio simplex*), he argued, have six degrees of strength: *maximum*, *maius*, *magnum*, *parvum*, *minus*, and *minimum*. The *princeps* (which, as noted, was the title of “first citizen”, first given to the Roman emperor Augustus, and is root of the English term “prince”) held *maximum imperium merum*, but, he continued, the *civitas* was also its own *princeps* with its own jurisdiction, declaring “that the *populus liber* of a *civitas* can make laws and statutes at its pleasure on matters of public utility.” The authority of the *civitas* on affairs conducted within its own realm of jurisdiction is parallel to that of an emperor. In Bartolus’s celebrated phrase, “the *civitas* is its own emperor (*civitas sibi princeps*) and like an emperor, it does not recognize a superior.”²¹¹

It is not an accident that such an argument was made during the political and ideological struggles of the city-republics of northern Italy—the *Regnum Italicum*—against the Holy Roman Emperor over the origin and seat of political sovereignty. As Skinner argues, Bartolus “clearly set out in such a way as to supply the Lombard and Tuscan communes with a legal and not merely rhetorical defence of their liberty against the Empire.”²¹² Others, such as Marsiglio of Padua in his *The Defender of Peace* (1324) and Dante Alighieri in his *Monarchy* (c. 1313) used a similar tactic against the Papacy,

210 *Digest* 2.1.3: “*Imperium aut merum aut mixtum est. merum est imperium habere gladii potestatem ad animadvertendum facinorosos homines, quod etiam potestas appellatur. mixtum est imperium, cui etiam iurisdictio inest, quod in danda bonorum possessione consistit. iurisdictio est etiam iudicis dandi licentia.*”

211 Julius Kirshner, “*Civitas Sibi Faciat Civem*: Bartolus of Sassaferrato’s Doctrine on the Making of a Citizen,” *Speculum*, Vol. 48, No. 4 (Oct., 1973), 697-98.

212 Skinner continues: “The result was not only to initiate a revolution in the study of Roman law (which was later consolidated by his great pupil Baldus) but also to take a large step towards establishing the distinctively modern concept of a plurality of sovereign political authorities, each separate from one another as well as independent of the Empire.” Skinner, *The Foundations of Modern Political Thought*, Vol. I, 9.

which although previously allied with the city-republics against the Empire, was now trying to extend its jurisdiction over them just as the Emperor had done.

Ockham's reasoning concerning the origin of both public and private *dominium* as grounded in natural right conceived of as a human *potestas*, and Bartolus's argument that the *civitas* was its own jurisdictional sovereignty, were positions that influenced the coming conciliarist movement, which arose in wake of the jurisdictional debates within the *Regnum Italicum* and the Great Schism that began in 1378.²¹³ Both figures contributed to a strain of natural law-based constitutionalism in conciliar thought—whose theorists included John of Paris, Nicholas of Cusa, Pierre d'Ailly, Jean Gerson, John Major, Jacques Almain, etc.—which sought to resolve the question concerning the source, limitations and justifications of the ecclesiastic authority.²¹⁴

As Francis Oakley writes:

213 "The question of *dominium* and the role of the Church in administering wealth and property," writes Coleman, "was providing arguments of the Church possessing truly governmental powers, an argument that developed the much earlier Gelasian view concerning the relationship between royal power and priestly authority. The debate between *sacerdotium* and *regnum* and the conflict of jurisdiction was to reach its height in the confrontation between Philip the Fair of France and Boniface VIII at the turn into the fourteenth century." Coleman, "Property and Poverty," 621. Ullmann argues that Bartolus had a significant influence on subsequent political thought: "The conciliar movement is one such obvious instance which derived its juristic ingredients from his sovereignty thesis. Indeed, an echo of the thesis of representation can be heard in the constitutional troubles in France and also in seventeenth-century England." Walter Ullmann, *Law and Politics in the Middle Ages*, 110. See also Magnus Ryan, "Bartolus of Sassoferrato and Free Cities," *Transactions of the Royal Historical Society*, 6th Ser. Vol. 10 (2000): 65-89; Floriano Jonas Cesar, "Popular Autonomy and Imperial Power in Bartolus of Saxoferrato: An Intrinsic Connection," *Journal of the History of Ideas*, Vol. 65, No. 3 (2004): 369-381; and David Johnston, "The General Influence of Roman Institutions of State and Public Law," in D.L. Carey Miller and R. Zimmermann (eds.), *The Civilian Tradition and Scots Law* (Berlin: Duncker & Humblot, 1997), 87-101.

214 The "Great Schism" represents the crisis that arose in Church at the end of the fourteenth century. The papacy had moved from Avignon to Rome in 1378 and a new pope, Urban VI, was chosen. After public outcry and infighting between the cardinals, the latter traveled to Avigni and elected a new pope, Clement VII, who took up residence in Avignon. Neither would step down and the crisis was only exacerbated when in 1409, after the Council of Pisa, a third pope, Alexander V, was chosen to supposedly resolve the issue. As Oakley writes: "These years of grave constitutional crisis within the Church gave rise to much anxious questioning about deficiencies in the machinery of Church government and also to good deal of far-reaching speculation about the very nature and location of ecclesiastical power." Oakley, *The Political Thought of Pierre d'Ailly*, 3.

D'Ailly, Gerson, Major and Almain—all of them repeatedly insist that the right of the Church as a whole to rid itself of an incorrigible head and to prevent its own destruction was not simply a right based on ecclesiastical custom or derived from canon law but an inalienable right pertaining to all 'free communities' and grounded in the dictates of natural law itself. And d'Ailly is doing nothing more than putting the positive side of that negative case when he says that the right of the Romans to elect the pope is nothing other than a particular manifestation of that right, rooted in natural law, 'which pertains to all those over whom any authority either secular or ecclesiastical is placed—that is, the right to elect their ruler.' In that particular formulation he is following closely on the heels of William of Ockham.²¹⁵

The medieval constitutionalism of the conciliarists was at once corporatist and individualist, insofar as they opposed a corporatist understanding of *potestas* and jurisdiction to the absolutism of the pope—originally derived from Ulpian's famous declaration about emperor's will being law. They did so, however, on a foundation of individual natural rights—a combination revived by Hegel albeit with different foundations—which did not undermine the corporate personality, but distinguished itself from the radical implications of, for example, Wyclif's understanding of *dominium*. This understanding, as I said, was individualistic and natural but subject to grace, and this included the ecclesiastical hierarchy. He could thus argue that "since the rulers of the church were evidently corrupt, they had forfeited all their rights as prelates. They could exercise no licit dominion—rulership or ownership—over the church or its property. Accordingly he urged the secular power in England to embark on a radical policy of disendowing the church."²¹⁶ This thinking was condemned at the Council of Constance and Jean Gerson, perhaps the most famous and influential of the conciliarists, countered

215 Francis Oakley, "Natural Law, the *Corpus Mysticum*, and Consent in Conciliar Thought from John of Paris to Matthias Ugonius," *Speculum*, Vol. 56, No. 4 (Oct. 1981), 798.

216 Tierney, *The Idea of Natural Rights*, 229.

with a description of natural *dominium* as “a gift from God by which a creature has the right (*ius*) immediately from God to take inferior things for his use and preservation” and to this “*dominium* of liberty can also be assimilated.” In response to the arguments of Fitzralph and Wyclif, he added: “no one is such a sinner as to have no dominion that can be called natural.”²¹⁷ Gerson’s assimilation of liberty, *dominium*, and right (unknown to Roman law) is claimed by some to be the true beginning of the subjectivist theory of natural rights that flourished centuries later. Gerson’s theory was, at least temporarily, eclipsed however by a revival of the arguments like that of Fitzralph and Wyclif by Luther and the rise of a new scholasticism in Spain and Portugal. In the latter tradition, the history of *dominium*, *ius*, and *imperium* that I have thus far sketched is drawn upon to construct a palatable theory of colonial conquest and jurisdiction—a theory that is, in turn, countered by the likes of Grotius and Locke, who represented competing colonial powers.

III. The Neo-Thomists

Sixteenth-century Spain witnessed a strong revival of Thomist natural law theory thanks to Francisco Vitoria (1485-1546), who, as Prime Chair of Theology at the University of Salamanca, revived Aquinas’s fourfold theory of law, and influenced a generation of students, including Melchior Cano, Fernando Vazquez, and Domingo de Soto, as well as the Jesuits Cardinal Robert Bellarmine, Gabriel Vazquez, Luis de Molina

217 Gerson, *Oeuvres*, 3:146; cited in Tierney, *The Idea of Natural Rights*, 231.

and Francisco Suárez.²¹⁸ They came to be known as the Salamanca School, which brought about the so-called “second scholasticism”.

This revival of Aquinas’s four-fold understanding of law brought with it new debates over the nature of *dominium*.²¹⁹ As mentioned in my introductory remarks, this debate was as much about countering the reformist threat posed by Luther and his followers (with their notions of grace and *sola fide*) as it was about articulating a justification of Spanish colonialism clearly grounded in a Thomist theory of natural law. Concerning reformist threat, I claimed that to secure the ecclesiastical hierarchy, Thomas Cajetan and Vitoria both argued for a strict separation between the Church and commonwealth, claiming (as Aquinas had) that the Church was subject to divine law and the commonwealth subject to natural law (and positive law, of course).

Concerning the question of whether the pope or his representatives possesses jurisdiction within the colonies, Vitoria was clear: the “pope has no dominion (*dominium*) in the lands of the infidel,” and those “who think that the pope is lord of the whole world properly by temporal dominion (*dominium*), and that he has temporal authority and jurisdiction over all princes in the world, are wrong.”²²⁰ This position might appear definitive on the problem of colonial jurisdiction—the pope simply does not exercise

218 See Quentin Skinner, “The revival of Thomism,” in his *The Foundations of Modern Political Thought*, Vol. II, 135-173; J. H. Burns, “Scholasticism: survival and revival,” in J. H. Burns (ed.), *The Cambridge History of Political Thought, 1450-1700* (Cambridge: Cambridge University Press, 1991), 132-155; Paul Cornish, “Spanish Thomism and the American Indians: Vitoria and Las Casas on the Toleration of Cultural Difference,” in Cary J. Nederman and John C. Laursen (eds.), *Difference and Dissent: Theories of Tolerance in Medieval and Early Modern Europe* (New York: Rowman and Littlefield, 1996), 99-118; and Tuck, *Natural Rights Theories*, 32-57.

219 Aquinas’s fourfold distinction included external law (*lex aeterna*); divine law (*lex divina*) as revealed in scripture; nature law (*lex naturalis*) and its corollary natural right (*ius naturale*); and positive human law (*lex humana, lex civilis* or *ius positivum*).

220 Vitoria, *On the Powers of the Church*, in *Political Writings*, edited by Anthony Pagden (Cambridge: Cambridge University Press, 1992), 84.

temporal jurisdiction in the colonies—but a related question was also the subject of great controversy: Even if it were the case that the pope does not have temporal jurisdiction, does it follow that the infidels (in the colonies) themselves possess such jurisdiction (or natural *dominium*)? As a Thomist, Vitoria relied on Aquinas’s Aristotelian concept of *dominium* rather than Augustine’s.²²¹ According to the former, political society was natural and therefore political or coercive power was natural as well, yet Aquinas drew the following important distinction:

‘Dominion’ is understood in two ways. In one way, it is contrasted with servitude; and so a master [*dominus*] in this sense is one to whom someone is subject as slave. In another way, dominion is understood as referring in a general way to [the rule of] any kind of subject whatsoever; and in this sense even he who has the office of governing and directing free men can be called a master. In the first sense, therefore, one man could not have had dominion over other men in the state of innocence; but, in the second sense, one man could have had dominion over others even in the state of innocence.²²²

This distinction, i.e. between ruling over free subjects and ruling over slaves, is an important one in the sixteenth-century debate, because Juan Ginés de Sepúlveda, theologian and Aristotle scholar and translator, famously disagreed with Vitoria’s position, a position forcefully voiced by Bartolomé de Las Casas years before Vitoria published his *Relectio de Indis* [On the American Indians] (1539). In the most important debate concerning natural *dominium* since the Franciscan poverty controversy, Sepúlveda sparred with Las Casas over the justness of Spanish conquests between 1550 and 1501 in

²²¹ Augustine wrote in *De civitate Dei* 19:15 that “God did not intend that His rational creatures, made in his own image, should have lordship over any but irrational creatures; not man over man, but man over the beasts”. Cited by Aquinas in his *Summa theologiae* at Ia. 96. See *St Thomas Aquinas Political Writings*, edited and translated by R. W. Dyson (Cambridge: Cambridge University Press, 2002), 12.

²²² *Ibid.*, 13.

Valladolid.²²³ In this exchange, Sepúlveda coupled a reading of Aristotle's doctrine of natural slavery with an Augustinian notion of *dominium*—which, as already noted, can be found in the theories of Hostiensis, FitzRalph, Wycliffe, and Luther—arguing that non-Christian indigenous peoples lived in sin and thus lacked *dominium*.²²⁴ This was tantamount to claiming that the Amerindians were barbarous and had no right-bearing powers to counter Spanish claims to rule over them and their land.²²⁵ Although Las Casas too thought the Amerindians were barbarians, he distinguished different types, or causes, of barbarity: (1) due to savage and cruel behavior; (2) due to the lack of written language; (3) due to an essentially evil nature or lack of rationality; and (4) simply because they were not Christians. The first two are quite restricted, solvable, and could never apply to a whole people—and Las Casas quips that the first more accurately applies to the *conquistadors*—while the third option denies well-documented Amerindian culture and

223 In an extraordinary move, King Charles V, the Holy Roman Emperor, formally suspended all overseas conquests in April of 1550 until they was proven just. See Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500 – c.1800* (New Haven: Yale University Press, 1995), 46-62.

224 Aristotle had claimed that “those who cannot exist without each other necessarily form a couple,” one example being “a natural ruler and what is naturally ruled... For if something is capable of rational foresight, it is a natural ruler and master, whereas whatever can use its body to labor is ruled and is a natural slave. That is why the same thing is beneficial for both master and slave.” Aristotle, *Politics*, 1252a26-35. Later he writes: “For rule by a master, although in truth the same thing is beneficial for both natural masters and natural slaves, is nevertheless rule exercised for the sake of the master's own benefit, and only coincidentally for that of the slave. For rule by a master cannot be preserved if the slave is destroyed” (1278b32-37). For an excellent and thorough discussion of this idea of natural slavery in the history of Spanish colonialism, see Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge: Cambridge University Press, 1986), Chapters 3 and 4.

225 Sepúlveda, who had translated Aristotle's *Politics*, employed the latter's argument on natural slavery to the Amerindians. According to Hanke, it was actually the Scottish conciliarist in Paris, John Major, who in *Commentaries on the Second Book of Sentences* of 1510 first applied Aristotle's argument in this context. Las Casas recognized that Major was a source for Sepúlveda's use of Aristotle, and explicitly attacked him for it. See Hanke, *Aristotle and the American Indians: A Study in Race Prejudice in the Modern World* (Chicago: Henry Regnery Company, 1959), 14-15; and Hanke, *All Mankind is One* (DeKalb: Northern Illinois University Press, 1974), 100-105. On why Sepúlveda's text was never published, despite his numerous efforts, see Hanke, *All Mankind is One*, 62-64 and Hanke, *Aristotle and the American Indians*, 96-97.

society, which produced sophisticated arts and systems of law and commerce, clearly demonstrating them to be rational.²²⁶ Thus, because they are rational, they are capable of exercising *dominium* public and private, and while it is true that Amerindians might be considered barbarous for being non-Christians, this did not make them incapable of salvation.²²⁷ Just the opposite, their rationality would lead them to it, with the assistance of the Spanish, of course. In response to Sepúlveda's claim that Spaniards could punish Amerindians for violating natural law (an argument used by both Grotius and Locke), Las Casas argued that just punishment implies jurisdiction, of which there are four causes, but none of which the Crown or the Church *actually* possess (a view shared by Vitoria). Las Casas goes on, however, to make an Aristotelian distinction, which Aquinas quite deviously incorporated into an argument about Church jurisdiction over unbelievers.

Aquinas writes:

Although those who are unbelievers do not actually belong to the Church, yet they belong to it potentially. This potency is based on two things: primarily and principally, the power of Christ, which is sufficient for the salvation of the entire human race; secondarily, the freedom of the will.²²⁸

226 Las Casas argued that the Amerindians had "excellent, subtle, and very capable minds," and that they are "endowed by nature with the three kinds of prudence named by the Philosopher [Aristotle]: monastic, economic, and political." Las Casas, *Obras Escogidas*, 5 vols, ed. Juan Pérez de Tudela (Madrid: Biblioteca de Autores Españoles, 1957-58), Vol. III, 3.4; selected and translated in *Witness: Writings of Bartolomé de Las Casas*, edited and translated by George Sanderlin (New York: Orbis Books, 1993), 100. See also Hanke, *All Mankind is One*, 82-99; and Brian Tierney: "Las Casas mentioned one rare kind of human being who might correspond to Aristotle's natural slaves—wild, savage men who lived alone in the forests and mountains like brute animals without any ordered society. Las Casas' argument ended here with a striking conclusion. Even these people, even the most degraded class of humans, were not entirely without rights, he maintained. Specifically they had a right to brotherly kindness and Christian love." Tierney, "The Idea of Natural Rights: Origins and Persistence," *Northwestern University Journal of International Human Rights*, 2 (April 2004), p.11 at: <http://www.law.northwestern.edu/journals/JIHR/v2/2>

227 He writes: "not all barbarians are irrational or natural slaves or unfit for government. Some barbarians, in accordance with justice and nature, have kingdoms, royal dignities, jurisdiction, and good laws, and there is among them lawful government." Bartolomé de Las Casas, *In Defense of the Indians*, translated and edited by Stafford Poole (DeKalb: Northern Illinois University Press, 1974), 42.

The conclusion Las Casas draws from this is that “it is apparent that Saint Thomas thought that the Church does not have actual but only potential jurisdiction over unbelievers, since he says that this potency is based on the power of Christ who does not force anyone, as well as upon the freedom of the will, which cannot be forced either.”²²⁹ Las Casas also calls this “habitual possession of jurisdiction”, which, for example, a pastor without parishioners would possess. It was a clever argument, which didn’t raise the ire of those who would reject outright the claim that the Church has *no* jurisdiction, while it also made peaceful evangelizing a necessary entailment of jurisdiction itself.

In response to Sepúlveda’s claim that the Amerindians oppress and kill innocent people, Las Casas denied it on factual grounds,²³⁰ and in response to his claim that, as John Elliot puts it, “war and conquest formed an essential prelude to all attempts at evangelization,”²³¹ Las Casas wrote: “Just as there is no natural difference in the creation of men, so there is no difference in the call to salvation of all of them, whether they are barbarous or wise, since God’s grace can correct the minds of barbarians so that they have a reasonable understanding.”²³² That is to say, as the above “habitual jurisdiction” entails, conversion must come through preaching and reasonable persuasion, not force.

228 Aquinas, *Summa Theologiae*, III, q. 8, a. 3, ad 1^{um}, cited in Las Casas, *In Defense of the Indians*, 60.

229 Las Casas, *In Defense of the Indians*, 60-61.

230 Las Casas added that war cannot be waged against them “even if they may have killed preachers, since they do not kill the preachers as preachers or Christians as Christians, but as their more cruel public enemies, in order that they may not be oppressed or murdered by them. Therefore let those who, under the pretext of spreading the faith, invade, steal, and keep the possessions of others by force of arms—let them fear God, who punishes perverse endeavors.” Las Casas, *In Defense of the Indians*, 181.

231 Elliott, *Imperial Spain, 1469-1716* (London: Edward Arnold, Ltd, 1963), 62.

232 Las Casas, *In Defense of the Indians*, 271.

Although Vitoria and Las Casas both opposed the argument for natural slavery and the Augustinian notion of *dominium* in Sepúlveda's argument, Vitoria was Professor of Theology at Salamanca and the most important theologian of the Counter Reformation, while Las Casas was Bishop of Chiapas (1544-1550)—the “Apostle of the Indians”—spending most of his life in the colonies and the latter half of it forcefully speaking out against Spain's “infernal methods of tyranny” practiced there.²³³ That is to say, their interests were quite different even when discussing the same question, such as that concerning natural *dominium*. Vitoria was more concerned about answering the reformist heretics than saving individuals souls, be they Castilian or Amerindian. More specifically, his concern was that an argument like Sepúlveda's maintained a reformist heresy supporting popular resistance, for if public *dominium*, as a right of rule, was lost “in a state of mortal sin,” then Lutherans, relying on their conscience, could choose to resist a sinful sovereign: “There have been some who have held that the title to any dominion (*dominium*) is grace, and consequently that *sinners, or at least those who are in a state of mortal sin, cannot exercise dominion over anything.*” However, “it is axiomatic that every dominion (*dominium*) exists by God's authority”²³⁴ concludes Vitoria, rejecting what Skinner has called “the quasi-Lutheran contention that any genuine political society must always be founded in godliness.”²³⁵

Vitoria made these arguments in his *Relectio de Indis* [*On the American Indians*], a series of lectures dealing with the Spanish conquest and whose opening question was:

233 Las Casas, *The Devastation of the Indies: A Brief Account*, translated by Herma Briffault (Baltimore: Johns Hopkins University Press, 1992), 31.

234 Vitoria, *On the American Indians*, 1.2, in *Political Writings*, 240-41.

235 Skinner, *The Foundations of Modern Political Thought*, Vol. II, 142.

“Whether these barbarians, before the arrival of the Spaniards, had true *dominium*, public or private?” He continues: “That is to say, whether they were true masters of their private chattels and possessions, and whether there existed among them any men who were true princes and masters of the others.”²³⁶ Vitoria faults others, such as Wyclif and Fitzralph for not making the “necessary distinctions” in their discussions of *dominium*, for we must distinguish he insists between jurisdiction (*dominium jurisdictionis*) and all types of ownership (*dominium rerum*), which Vitoria generally refers to as public and private *dominium* respectively.²³⁷

Vitoria ultimately finds, as Pope Innocent IV had influentially claimed centuries before, that the indigenous peoples legitimately possess both senses of *dominium*.²³⁸ For

236 Vitoria, *On the American Indians*, 1.1 §4, in *Political Writings*, 239. Burns makes the distinction this way, “*Dominium civile* has two elements, *dominium proprietatis* and *dominium jurisdictionis*” with the latter involving a *jus gladii*, the right to defense and punishment. J. H. Burns, “Scholasticism: survival and revival,” 149. For how Vitoria’s understanding of *dominium* related to “modern heretics” such as Wycliff and Huss, see Vitoria, *On the American Indians*, 1.1 §5; and Pagden, “Dispossessing the barbarian: the language of Spanish Thomism and the debate over the property rights of the American Indians.” See also J. H. Burns, “Fortescue and the Political Theory of *Dominium*,” 777-797; Richard McKeon, R., “The Development of the Concept of Property in Political Philosophy,” *Ethics* 48:3 (1938), 297-366; Coleman, “*Dominium* in Thirteenth and Fourteenth-Century Political Thought and its Seventeenth-Century Heirs: John of Paris and Locke”; and Tuck, *Natural Rights Theories*.

237 Vitoria, *On the American Indians*, 1.2, in *Political Writings*, 241.

238 For Las Casas, as already noted, the Amerindians clearly possessed *dominium* and the Church and Crown possessed no jurisdiction over them except potentially. In other words, the 1493 donations of Pope Alexander VI supposedly giving the Spanish Crown control over the American territories did bestow a *ius ad rem*, though not a *ius in re*. That is to say, if while exercising their right to evangelize the Amerindians give their consent to Spanish rule, then, in line with the Roman maxim “*quod omnes tangit debet ab omnibus approbari*”, the *ius ad rem* becomes a legitimate *ius in re*. the “*quod omnes tangit...*” maxim is significant. Originally a maxim of private law in the Justinian’s Code (5.59.5.2), it became, with Gratian, a maxim of canon law in the Decretum (1140), and exists today in the Roman Catholic Code of Canon Law at §119.3. See Kenneth J. Pennington, “Bartolome de Las Casas and the Tradition of Medieval Law,” *Church History*, Vol. 39, No. 2 (June 1970), 149-161. As Pennington notes, “It was imperative, of course, that Alexander’s donation not be construed as giving what its words indicated literally: *cum omnibus illarum dominis . . . et jurisdictionibus*; with all their dominions and jurisdictions. Las Casas read what the canonists had to say about papal prescripts, and he concluded that the pope could not have meant what he said. The pope could not, after all, grant letters which prejudiced a third party, and the privilege of one party could not usurp the right of another. Concessions and privileges are to be made without injury to another party. He observed that it would be absurd if the pope had actually taken the Indians’ *dominium* away; all he gave to the Spanish was the right to preach the faith” (159). Cf. Pagden, *Lords of All the*

the Amerindians, however, this theoretical conclusion had made little practical difference. If they were deemed rational and thus capable of *dominium*, as Vitoria and Las Casas (in the tradition of Innocent IV) argued, then they are subject to natural law, which allows Europeans to travel (*ius perigrinandi*), trade, and (so crucial for Grotius and Locke) settle uncultivated land. Any resistance to these stipulations would be justification for punishment or war.

If, on the other hand, the Amerindians are deemed incapable of *dominium* (public and private), as Sepúlveda argued against Las Casas, then they are simply subject, like the earth itself, to the private *dominium* of others. Since Vitoria responded with the first answer, the only way to establish Spanish *dominium rerum* was through first occupation,²³⁹ and the only way to establish both *dominium rerum* and *dominium jurisdictionis* was through just war. War would be just if the natural right of Spaniards to travel, trade, occupy land, or preach is resisted, and under the law of nations (*ius gentium*), victory entails legitimate dispossession and enslavement.

[I]f the barbarians nevertheless persist in their wickedness and strive to destroy the Spaniards, they may then treat them no longer as innocent enemies, but as treacherous foes against whom all rights of war can be exercised, including plunder, enslavement, desposition of their former masters, and the institution of new ones.... This, then, is the first title by which the Spaniards could have seized the lands and rule of the barbarians...²⁴⁰

World. Pagden argues that Las Casas “never once doubted the legitimacy of the Spanish occupation of the Americas. Only the argument that the Native Americans had surrendered their natural rights to political self-determination of their own free will could leave the political structure of the empire intact while freeing the Indians and their rulers within it. Las Casas was one of the few to endorse, in this way, both the validity of the Papal Bulls and the emperor’s claim to universal sovereignty” (52).

239 Vitoria, *On the American Indians*, 3.1 §4, in *Political Writings*, 280-81. Vitoria writes that “if there are any things among the barbarians which are held in common both by their own people and by strangers, it is not lawful for the barbarians to prohibit the Spaniards from sharing and enjoying them.” And, of course, “in the law of nations (*ius gentium*) a thing which does not belong to anyone (*res nullius*) becomes the property of the first taker, according to the law *Ferae bestiae* (*Institutions* II. 1.12)” (§4, 280).

240 Vitoria, *On the American Indians*, 3.1 §8, in *Political Writings*, 283.

So conclusive is Vitoria on this point that his next set of lectures, *De Indis Relectio Posterior, sive de iure belli*, is, as the title suggests, an appendix of sorts, discussing what rules thus pertain to just war. In his opening lines, he writes: “Since it emerges finally, after the lengthy discussion in my first relection on the just and unjust titles of the Spanish claim to the barbarian lands of the so-called Indians, that possession and occupation of these lands is most defensible in terms of the laws of war, I have decided to round off the previous relection with a brief discussion of these laws.”²⁴¹

For Vitoria, *dominium*, both private and public, is a gift from God, part of God’s law, and cannot be nullified by if you are a sinning Christian or an infidel unfamiliar with Christian teachings. Its forfeiture is a juridical matter, not a religious one. If one violates the law of nature or of nations, then public and private *dominium* can be denied within the rules of just war. Or put another way, others can claim *dominium rerum* with respect to your land and possessions, and *dominium jurisdictionis* with respect to your person, including enslavement, regardless if you are a combatant or not.²⁴²

Vitoria, like Locke, had an understanding of self-*dominium* and right traceable to Aquinas, whom Vitoria obviously held as an authority on the matter. As Tierney writes:

For Aquinas the key distinction between humans and other creatures was that humans, by virtue of their self-mastery could act freely; other animate and inanimate creatures acted by necessity. Commenting on Aquinas, Vitoria added that self-dominion was a right inhering only in humans: ‘Brutes do not have a right in themselves but man has a right (*habet ius*).’

241 Vitoria, *On the Law of War*, in *Political Writings*, 295. Both of these lectures were delivered in 1539, although Pagden notes that *De Indis* was originally written for the academic session 1537-38.

242 “That one may lawfully enslave the innocent under just the same conditions as one may plunder them. Freedom and slavery are counted as goods of fortune; therefore, when the war is such that it is lawful to plunder all the enemy population indiscriminately and seize all their goods, it must also be lawful to enslave them all, guilty and innocent alike.” Vitoria, *On the Law of War*, in *Political Writings*, §42, 318.

So, for Vitoria, freedom and self-mastery and inherent human right were all connected.²⁴³

Additionally, we will see that the violation of natural law is the decisive, nonconsensual juridical mechanism of establishing *dominium jurisdictionis* in Locke's *Two Treatises* as well. Where we see differences arise on the question of private *dominium* is in Locke's rejection of the principle of first occupation for establishing *dominium rerum* and with introduction of a criterion, namely labour, for translating, or perhaps better said, extending the property or *dominium* one has in one's person into the land one occupies or the possessions one keeps. We see many differences arise on the question of *dominium jurisdictionis*. First, Vitoria's criterion for the capacity of legitimate rule (public *dominium*) is rationality, having dismissed other suggested nullifying criteria such as sin, insanity, or being a child or infidel.²⁴⁴ Agreeing with Aristotle's idea of natural slavery with its criterion of rationality (*Politics*, Bk. I., 1254b 20), he writes that "if the barbarians were [natural] slaves, the Spaniards could appropriate them,"²⁴⁵ yet concludes that the Amerindians are indeed rational, although perhaps a bit stupid: "Hence, granting that these barbarians are as foolish and slow-witted as people say they are, it is still wrong to use this as grounds to deny their true dominion (*dominium*); nor can they be

243 Brian Tierney, *The Idea of Natural Rights*, 268. The quote from Vitoria is from *De justitia*, 2.2ae 64.1, 267.

244 As Tierney notes: "The idea that sinners and infidels could have no rightful dominion had a respectable ancestry in the works of theologians like Giles of Rome and Richard FitzRalph. Among the canonists, Innocent IV had defended the rights of infidels in the mid-thirteenth century, but the greatest canonist of the next generation, Hostiensis, held that, after the coming of Christ, there could be no rightful dominion outside the church. The issue remained a matter of dispute until the Council of Constance in 1415 condemned Wyclif's radical version of the doctrine of dominion founded on grace." Brian Tierney, *The Idea of Natural Rights*, 266.

245 Vitoria, *On the American Indians*, 1.2, in *Political Writings*, 239.

counted among the slaves.”²⁴⁶ For Locke, “all people are by nature endowed with reason,”²⁴⁷ and *legitimate* political societies are constituted through their consent. The exercise of legitimate *dominium jurisdictionis* can only follow from political rule so instituted, with the additional condition that it possesses an impartial judicial authority to adjudicate property disputes. And as we have seen, private property originally comes about only through labour and, in the case of land, through agricultural improvement in particular.

IV. Grotius on Property and Punishment

As Vitoria notes in the introductory remarks of his *Relectio de Indis*, he was writing it for “our princes Ferdinand and Isabella, who first occupied the Indies.”²⁴⁸ It was in content and presentation a neo-Thomist natural law justification for the establishment of Spanish *dominium* in the colonies; a natural law alternative to the papal donations of the Church (whose legitimacy Vitoria rejected), which exercised the authority of divine law. With the Reformation and the rise of the Dutch as a colonial power at the turn of the century, the need, first, for a justification of Dutch incursions into Spanish shipping routes and, second, for an alternative justification of colonial jurisdiction, grew rapidly. Hugo Grotius provided both. The first major work by the so-called father of international law

246 Ibid., 251.

247 Locke, *Essays*, I, 115.

248 Ibid., 234.

was a defence of the Dutch East India Company's seizure of a Portuguese trading ship in 1602—it was entitled *De iure praedea Commentarius*, sometimes referred to as *De Indis*, the full manuscript of which was only discovered in 1864. Its most influential chapter was published as *Mare Liberum* [*Freedom of the Seas*] at the request of the East Indies Company in 1609. The text contained a now canonical argument about why jurisdiction cannot be extended over the open seas. While distinguishing political jurisdiction from private property much the way the Vitoria had, Grotius's innovation was to predicate the former on the possibility of the latter, arguing that since the sea could not be owned, jurisdiction could not follow for any nation, regardless of papal donation.²⁴⁹ Like most of his predecessors, including Vitoria, Grotius subscribed to the Roman principle of first occupation (*prima occupatio*) as “the only natural and primitive Manner of Acquisition”—but one which the sea naturally resists.²⁵⁰ As he writes in Chapter Five of *The Freedom of the Seas*:

that which cannot be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation... [and] that all that which has been so constituted by nature that although serving some one person it still suffices for the common use of all other persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature.

In *The Rights of War and Peace* (1625), Grotius makes an additional argument: “There is also a natural Reason which forbids, that the Sea, thus considered, should be any Body's

249 Grotius makes the distinction between jurisdiction and property in *The Rights of War and Peace*, Book II, Section III, 456-7. On the illegitimacy of jurisdiction over the sea via papal donation, see Chapter 6 of Grotius, *The Freedom of the Seas* [*Mare Liberum*] (New York: Oxford University Press, 1916).

250 See Grotius, *The Rights of War and Peace*, Book II, Section III, 455.

Property, because the taking of Possession obtains only in Things that are limited.”²⁵¹

Presupposed in Grotius’s argument was that the world was originally held in common with a general use-right for all—a type of common possession (*communis omnium possession*) we find in the Gratian’s *Decretum*, which does not entail *dominium*—but that agriculture, a growing population, and the division of labour necessitated private property. Grotius speaks of the increase in the “Number of Men, as well as of Cattle” making it “proper at last to assign a Portion of Lands to each Family; whereas before they were only divided by Nations,”²⁵² for people “wanted to live in a more commodious and more agreeable Manner; to which End Labour and Industry was necessary, which some employed for one Thing, and others for another. And there was no Possibility then of using Things in common.”²⁵³

Although private appropriation was a natural right because it became necessary, Grotius included a contractual dimension:

Thus we see what was the Original of Property...resulted from a certain Compact and Agreement, either expressly, as by a Division; or else tacitly, as by Seizure. For...all Men were supposed, and ought to be supposed to have consented, that each should appropriate to himself, by Right of first Possession, what could not have been divided.²⁵⁴

We soon find this presupposition criticized by Sir Robert Filmer, himself in turn the target of Locke’s *First Treatise*, but for now I focus on a more immediate problem: how does Grotius’s above formulation cope with the presence of indigenous peoples on

251 Ibid., Book II, Section II, 430.

252 Ibid., 425-26.

253 Ibid., 426.

254 Ibid., 426-27.

would-be Dutch settlements?²⁵⁵ Couldn't they be seen as first occupants? Grotius responds with a permeable concept of jurisdiction, arguing that "vacant" land (*res nullius*), even within a recognizable territorial jurisdiction, is still open to appropriation. This was a way of circumventing the neo-Thomist barrier of indigenous public *dominium*: "But altho' Jurisdiction and Property are usually acquired by one and the same Act, yet are they in themselves really distinct; and therefore Property may be transferred, not only to those of the same State, but even to Foreigners too, the Jurisdiction remaining as it was before."²⁵⁶

If settlement of these lands, legitimate under natural law, is resisted, then the consequences are not that different from what Vitoria concluded: forceful dispossession and possible enslavement. Yet Grotius's justification is quite different from that of Vitoria's, for not only does Grotius introduce an element of Protestant individualism in the form of a natural right to *private punishment (jus gladii)*—for individuals in a state of nature are said to be morally similar to the state—but he says that individuals can punish those who violate natural law, even when they themselves are not directly injured.²⁵⁷

We must also know, that Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for

255 At the time of *Mare Liberum*, Grotius was more interested in securing trade routes, than in justifying the appropriation of non-European lands, which was not yet a Dutch practice. By the time he wrote his masterwork, *The Rights of War and Peace* (1625), Dutch settlements had, however, begun and his work came to reflect it. See Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press, 1999), 103-04.

256 Grotius, *The Rights of War and Peace*, Book II, Section III, 457.

257 "Is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals... no one is able to transfer a thing that he never possessed." Grotius, *De Iure Praedae Commentarius*, I. trans. Gladys L. Williams and Walter H. Zeydal (Carnegie Endowment for International Peace, Oxford University Press, 1950), 91-2; Cited in Tuck, *The Rights of War and Peace*, 82.

those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations.²⁵⁸

War and can thus be made against those who are “inhuman to their Parents,” “eat human Flesh,” and so forth, for “the justest War is that which is undertaken against wild rapacious Beasts, and next to it is that against Men who are like Beasts.”²⁵⁹ This view, acknowledges Grotius, is “contrary to the Opinion of *Vitoria*, *Vazquez*, *Azorius*, *Molina*, and others, who seem to require, towards making a War just, that he who undertakes it be injured himself...or that he has some Jurisdiction over the Person against whom the War is made.”²⁶⁰ And this natural right to punish and wage war is operative “both before the Foundation of Governments, and even is now still in Force in those Places, where Men live in Tribes or Families, and are not incorporated into States.”²⁶¹

That said, Grotius does not completely disregard the jurisdictional claims of non-European peoples. Although he assumes an original act of consent for appropriation by first occupation and thus that, according to natural law, even foreigners have the natural right to develop land that is *res nullius*, one must first ask permission of those living on such land or when it falls within their political society: “whatever remains uncultivated, is not to be esteemed a Property, only so far as concerns Jurisdiction [*imperium*], which always continues the Right of the ancient People.”²⁶² That is to say, although Europeans have a right to occupy uncultivated land, they must still get

258 Grotius, *The Rights of War and Peace*, Book II, Chapter XX, Section XL, 1021.

259 Ibid., 1024.

260 Ibid.

261 Ibid.

262 Grotius, *De jure belli ac pacis*, II, 2. 17.

permission from the political authorities who have jurisdiction (*imperium*) over the territory. When such permission is not forthcoming it is clearly a violation of natural law and thus justifies forcible occupation.

For Grotius, then, the world was originally common, not in the sense of collective ownership as the neo-Thomists and Locke would have it, but in the sense of what Pufendorf called a “negative community” - an inclusive right to use it for their survival and benefit. Despite the introduction of private property on land, the open seas remained in this original condition and thus the Spanish and Portuguese could not deny the Dutch use of the very same trade routes. His assertion of a right to private punishment and his argument that violations of the law of nature could be punished even when the punisher was unaffected by it, was a justification for forceful conquest of non-Europeans. This, coupled with his commitment to *primo occupatio* as a legitimate mechanism of appropriation, constituted the two anchors for establishing *dominium*, public and private. Again, Grotius, like Vitoria, made sure to keep these two types of *dominium* (as property and jurisdiction) distinct: “Now, as to what belongs properly to no Body, there are two Things which one may take Possession of, Jurisdiction, and the Right of Property, as it stands distinguished from Jurisdiction.”²⁶³ Grotius then goes on to distinguish two types of jurisdiction, clearly having Dutch colonialism in mind: “Jurisdiction is commonly exercised on two Subjects, the one primary, *viz.* Persons, and that alone is sometimes sufficient, as in an Army of Men, Women, and Children, that are going in quest of some new Plantations; the other secondary, *viz.* Place, which is called *Territory*.”²⁶⁴ As Richard Tuck rightfully notes, “the key point for Grotius was that jurisdictional rights could not

263 Grotius, *The Rights of War and Peace*, Book II, Section III, Chapter IV, 456.

264 *Ibid.*, 457.

be pleaded as a justification for stopping free passage or the occupation of waste: since both these activities are entirely legitimate, no local authorities could have rights over people in their territory which would extend to preventing them from behaving in this way.”²⁶⁵ As we shall see, Locke will agree with Filmer’s critique that Grotius’s (and Pufendorf’s) claim to an original compact, or act of consent, said to legitimate appropriation is untenable—replacing it with his nonconsensual theory of labour, of course. He will however defend the above separation of public and private *dominium* against Filmer, as well as the private right of punishment and what I called a “permeable concept of jurisdiction” against Pufendorf.

²⁶⁵ Tuck, *The Rights of War and Peace*, 107.

Chapters Three: The *Two Treatises* and the Juridical State of Nature

I. Filmer and the First Treatise

Locke's understanding of the division and relation of *dominium* is articulated within an exhaustive critique of Sir Robert Filmer's royalist publications *Observations concerning the Originall of Government* (1652) and his more famous *Patriarcha* (published posthumously in 1680), which consumed the entire *First Treatise*, but draws little philosophical interest today.²⁶⁶ As Alan Ryan writes, "Locke's negative arguments against Filmer strike most later readers as a simple, if unnecessarily prolonged knockout of a wholly inept target."²⁶⁷ Filmer's arguments are often viewed as something of an oddity today, as part of a soon-to-be-extinguished royalist tradition naturally swept away by secular liberalism. Yet if we wish to reconstruct something of the nature and history of *dominium* that informed and preoccupied Locke—because, as we have seen, it

266 For a critique of this neglect, see Charles D. Tarlton, "A Rope of Sand: Interpreting Locke's First Treatise of Government," *Historical Journal*, vol. 21, no. 1, 1978, 43-73. It is noteworthy that the first American edition of Locke's work, not published until 1773, included neither the *First Treatise* nor the first chapter of the *Second Treatise*. See Peter Laslett, "Introduction," in *Two Treatises*, 14. Nor did it appear in an American edition until 1947. See Michael P. Zuckert, "An Introduction to Locke's First Treatise," *Interpretations*, 8:1 (1979), 58. This exclusion of the *First Treatise* continues to be common practice today.

267 Alan Ryan, *Property and Political Theory* (Oxford: Basil Blackwell, 1984), 14-15.

preoccupied so many of his predecessors—we have to revisit the proverbial ladder supposedly kicked away by Locke’s more liberal critique of Filmer.

Filmer had argued that all legitimate power is a fatherly power originating in the “natural and private dominion of Adam,”²⁶⁸ which is “the fountain of all government and property” inherited by the king or *Pater Patriae*: “All the duties of a king are summed up in an universal fatherly care of his people.”²⁶⁹ He combined a defence of absolute and indivisible sovereignty, greatly influenced by Bodin, with a biblical argument for its patriarchal origin (absent from Bodin), to defend against advocates of popular sovereignty or limited government. Indeed, the subtitle of his books reads *The Naturall Power of Kinges Defended against the Unnatural Liberty of the People*. His tracts defending absolute monarchy were written in the heady days of the English Civil War(s) between the Parliamentarians (Whigs) and Royalists (Tories) in the mid-seventeenth century (1642-51) and republished, after his death, during the Exclusion Crisis (1679-81). This was a time when the Whigs, struggling against the Tories, sought to exclude James, the Catholic Duke of York, from taking the throne.²⁷⁰ Perhaps because of the decidedly political context of the crisis then unfolding in the House of Commons, Filmer’s argument is today often glossed over as one merely concerning the debate between monarchical and parliamentary political rule, an “absolutist” text on political sovereignty in line with, say, Bodin and Hobbes. Yet Filmer was making a much more

268 Filmer, *The Originall of Government*, in *Patriarcha and Other Writings*, 225.

269 Filmer, *Patriarcha*, 12.

270 See James Tully, *A Discourse on Property*, Chapter 3; Richard Ashcraft, *Revolutionary Politics & Locke’s Two Treatises of Government* (Princeton: Princeton University Press, 1986); and John Dunn, *The Political Thought of John Locke*, Chapters 5 and 6. Richard Tuck argues that Filmer’s tracts were actually written much earlier, perhaps beginning as early as 1614. See his *Philosophy and Government 1572-1651* (Cambridge: Cambridge University Press, 1993), 262

comprehensive claim.²⁷¹ He was arguing that private *dominium* as private property, is a derivation of Adam's natural (paternal or political) *dominium*: “none of his posterity had any right to possess anything, but by grant or permission, or by succession from him.”²⁷² It was a position, as we saw (Chapter Two, Section 1.1), argued by Pope John XXII in his decretal *Quia vir reprobus*—an early fourteenth-century contribution to the famous Franciscan poverty debate that elicited an equally famous rebuttal by William of Ockham—now revamped for English pamphleteering. Ockham had considered Adam's *dominium* a “power of ruling,” not a “power of owning,” the latter arising only when appropriation of *res nullius* was eventually conjoined with human compacts and laws, i.e., property arises in human, not divine law, which legitimizes appropriation of *res nullius*. He writes: “Although it may be conceded in one sense that our first parents had dominion of temporal things in the state of innocence, it is not conceded that they had property in temporal things because this word ‘dominion’ has meanings that ‘property’ does not have.”²⁷³

Against Suárez, for example, who held that by “right of creation Adam had only economical power, but not political,” and that this could become “complete economic power”²⁷⁴ within his family, Filmer writes:

271 See Herbert H. Rowen, “A Second Thought on Locke's First Treatise,” *Journal of the History of Ideas*, 17:1 (1956), 130-32.

272 Filmer, *Observations upon Aristotles Politiques*, in *Patriarcha and Other Writings*, 236.

273 William of Ockham, *Opus nonaginta dierum*, in *Opera politica*, H. S. Offler, ed., 1-2 (Manchester, 1963-64), 485; cited in Tierney, *The Idea of Natural Rights*, 160. Both Ockham and Locke argue that the world was given by God in common, although Ockham does not interpret this as common *property*, whereas Locke does.

274 Quoted in Filmer, *Patriarcha*, 15. See Skinner's *The Foundations of Modern Political Thought*, Vol. II., for a discussion of Suárez on this point, particularly 156ff.

I know not what this ‘complete economical power’ is, nor how or in what it doth really and essentially differ from political. If Adam did or might exercise in his family the same jurisdiction which a king doth now in a commonweal, then the kinds of power are not distinct, and though they may receive an accidental difference by the amplitude or extent of the bounds of the one beyond the other, yet since the like difference is also found in political estates, it follows that economical and political power differ no otherwise than a little commonweal differs from a great one.²⁷⁵

Suárez’s problem, according to Filmer, originates with Aristotle (whom Filmer otherwise deferred to) who in the *Politics* said it was wrong to consider that “the qualifications of a statesman, king, householder, and master are the same, and that they differ, not in kind, but only in the number of their subjects.”²⁷⁶ Aristotle, writes Filmer, “gives [this] lie to Plato and those that say that political and economical societies are all one.”²⁷⁷

Filmer was, in short, attempting to revive a unified, absolutist conception of *dominium* found, he argued, in scripture—“Adam was the father, king, and lord over his family. A son, a subject and a servant or a slave, were one and the same thing at first”²⁷⁸—as well as in the classical Roman law of the *pater familias*:

As long as the first fathers of families lived, the name of patriarchs did aptly belong to them. But after a few descents, when the true fatherhood itself was extinct and only the right of the father descended to the true heir, then the title of prince or king was more significant to express the power of him who succeeds only to the right of that fatherhood which his ancestors did naturally enjoy. By this means it comes to pass that many a child, by succeeding a king, hath the right of a father over many a grey-headed multitude, and hath the title of *pater patriae* [father of the fatherland].²⁷⁹

²⁷⁵ Filmer, *Patriarcha*, 19.

²⁷⁶ Aristotle, *The Complete Works of Aristotle*, vol. II, revised Oxford translation, ed. Jonathan Barnes (Princeton, N.J.: Princeton University Press, 1995), 1252a 7-17, 1986.

²⁷⁷ Filmer, *Patriarcha*, 17.

²⁷⁸ Filmer, *Observations upon Aristotles Politiques*, in *Patriarcha and Other Writings*, 237.

As previously noted, the *pater familias*, or father of the Roman household possessed *dominium* and the *vitae necisque potestas* (at least in earlier Roman law) or power of life and death over his wife, children, and slaves. “The Father predominated; he became what he was: chief, political soldier, and hence Law or Right (as imposed on the vanquished in the ordering of victory: the sharing-out of booty and the reassignment of places— primarily land),” writes Henri Lefebvre. He “reorganized [the world] according to his power and rights, Property and Patrimony at once magistrate and priest, [he] thus reconstituted the space around him as the *space of power*.”²⁸⁰

Locke sidesteps Filmer’s claim to Roman historical tradition, repudiates his Adamite argument of succession, and shifts the terms of the debate to a contractual, state-of-nature paradigm within natural jurisprudence.²⁸¹ Filmer argued that the divine right of Kings is inherited from Adam, whose natural (paternal/governmental) and private (proprietary) *dominium*, as the original absolute Monarch, is the fountain of all legitimate power. Locke first separates these two spheres of *dominium*—“Fatherhood and Property are distinct titles”²⁸²—and then attacks Filmer’s justification for each in turn. Regarding paternal (governmental) power, Filmer argued that “every Man that is born is so far from being free, that by his very Birth he becomes a Subject of him that begets him.”²⁸³ This

279 Filmer, *Patriarcha*, 10. See also James Muirhead, *Historical Introduction to the Private Law of Rome* (London: Adam and Charles Black, 1899), Chapter 3.

280 Henri Lefebvre, *The Production of Space* (Malden, MA.: Blackwell Publishers, 2001), 243.

281 See Peter Laslett, “Introduction,” *Two Treatises*, 69.

282 Locke, *Two Treatises*, §73 [197].

283 Cited in Locke *Two Treatises*, §50 [176].

would seem to resonate almost perfectly with Locke's earlier claim in *Essays on the Laws of Nature* that "all things are justly subject to that by which they have first been made and also are constantly preserved."²⁸⁴ Filmer's claim about a natural state of unfreedom is, however, a form of "traductionism," which privileges the role of the father as the "begetter," giving him *dominium* over his children, and by extension, according to Filmer, giving the Monarch *dominium* over his subjects.²⁸⁵ Locke replies with a "creationist" argument: "They who say the Father gives Life to his Children, are so dazzled with the thoughts of Monarchy, that they do not, as they ought, remember God, who is the Author and Giver of Life."²⁸⁶ Locke thus consistently privileges "God our maker" as the begetter of life over that of a father or King. As individuals we are all God's "workmanship", as we saw in Chapter One, Section 3, and thus fall under God's *dominium*, making us God's "property."²⁸⁷ This undermining of earthly patriarchal hierarchy allows Locke to claim in the *Second Treatise* that, contra Filmer, "all Men" are naturally born into a condition of perfect freedom and equality. For Locke, therefore, natural *dominium*, or governmental power, is equally shared by all in a state of nature. This can only legitimately change when one "puts on the bonds of Civil Society" by consenting to forge "one Body Politic, wherein the majority have a right to act and conclude the rest"²⁸⁸ or when "the Lord and Master of them all, should by any manifest

284 Locke, *Essays*, VI, 185.

285 For a discussion of traductionism versus creationism, see Tully, *A Discourse on Property*, 58-59.

286 Locke, *Two Treatises*, §52 [178].

287 *Ibid.*, §6 [271].

288 Locke, *Two Treatises*, §95

Declaration of his Will set one above another, and confer on him by an evident and clear appointment an undoubted Right to Dominion and Sovereignty.”²⁸⁹

Locke’s argument against Filmer concerning private *dominium* is structurally similar to his argument concerning natural *dominium*, despite their very different relations to consent. Filmer argued that, by right of succession, Adam passed his private *dominium* to his monarchical heirs, thus granting the Monarch the power to determine who in his kingdom was entitled to ownership. His argument was based on his particular interpretation of *Genesis* I. 29: “God said unto them, be Fruitful and Multiply and Replenish the Earth and subdue it, and have Dominion over every thing that moveth upon the Earth.” Filmer held that this was a private grant to Adam, giving him and him alone, proprietary *dominium*. Locke countered that “by this Grant God gave him not Private Dominion over the Inferior Creatures, but right in common with all Mankind.”²⁹⁰ That is to say, original *common property* was indeed a part of God’s creation, according to Locke (a position not shared by Grotius and Pufendorf). Thus, like the original equality of natural *dominium* in the Lockean state of nature, property too was originally and equally shared by all.²⁹¹

The pivotal question for Locke was how such property could legitimately be removed from the commons and become private. His answer is already familiar: Each has property in his own person, and when one labors on something “and joyned to it something that is his own,” i.e., the property in one’s person, it is legitimately privatized.

289 Locke, *Two Treatises*, §4

290 Ibid., §24 [157].

291 This, of course, is a very different position than that of Hobbes, who held that in a state of nature or, better, a state of war, “there be no propriety, no dominion, no *mine* and *thine* distinct.” Hobbes, *Leviathan*, Chapter XIII, §13, 78.

“As much Land as a Man tills, Plants, Improves, Cultivates, and can use the product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common.”²⁹² The only restrictions to appropriation are that: (a) one cannot appropriate more than one can actually use (before the introduction of money); and (b) there must be enough land, water, etc. left for use or private appropriation by others (a condition effectively nullified by Locke’s understanding of the productivity of privatization).²⁹³ Despite these two conditions, however, Locke’s account of the origin of property is “without any express Compact,”²⁹⁴ unlike the origin of civil government, which is necessarily founded on consent: “the Sovereignty founded upon Property, and the Sovereignty founded upon Fatherhood, [have] come to be divided.”²⁹⁵

Locke’s critique of Filmer was thus more than a rejection of divine right; it was a division of *dominium* into distinct spheres in need of distinct forms of justification. It was an explicit call for an already implicit division of sovereignty to which Locke contributed a set of very influential justificatory discourses. While these spheres of *dominium* were tightly nested in the Roman *pater familias*, organically entwined in feudal relations—a spatial coincidence Filmer was attempting to recapture—Locke was keen on theorizing their differentiation into spheres of political sovereignty and property right, which although retaining an organizing metaphoric of patriarchy, would break from the literal

292 Locke, *Two Treatises*, §32 [290].

293 As we saw in Chapter One, in his *Essays on the Law of Nature*, Locke believed that appropriation was a concrete and perpetual subtraction from the commons: “And so, when any man snatches for himself as much as he can, he takes away from another man’s heap the amount he adds to his own, and it is impossible for anyone to grow rich except at the expense of someone else” (211). In the *Two Treatises* this is no longer the case, for private appropriation (in the state of nature) is only possible by making the land productive, which thus increases the overall amount of goods available. This increase in goods is, however, in private possession, but that does not seem to raise a moral problem for Locke.

294 *Ibid.*, §25 [286].

295 *Ibid.*, §73 [197].

deployment of natural (i.e. paternal) *dominium*. As is evident from Chapter Two, the differentiation of *dominium* in both theory and practice (including law) was clearly not new, but Locke's justification for their complete separation, as well as his understanding of their relation was novel. Unlike natural law theorists such as Grotius and Pufendorf, Locke argued that property, not just use or possession, was possible in a state of nature. That is to say, Locke asserted that there was a *private* right to ownership legitimate beyond the bounds of public authority or individual contract, and defensible by private war.²⁹⁶ Yet Locke did more than assert a complete separation of private proprietary *dominium*; his understanding of its relation to the *imperium* was the inverse of Filmer's (and Hobbes's): public *dominium* or *imperium* follows from proprietary *dominium* and not vice versa. "The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government," writes Locke, "is the Preservation of their Property."²⁹⁷ In short, and just as Jefferson had come to believe, "government follows the ownership of land."²⁹⁸

The relevance of these arguments can only truly be appreciated within the context of English colonialism, for although Locke's *Two Treatises* served as a powerful legitimating discourse of the enclosure movement at home, arguably its most important role was to service public and private forms of accumulation by dispossession in North America, of which Locke was himself an important actor and beneficiary.²⁹⁹ As will be

296 This is a significantly different interpretation than Tully's, which denies that there is "full ownership" in Locke's state of nature.

297 Ibid., §124 [350-51]

298 Tuck, *The Rights of War and Peace*, 176.

299 As Tully notes in his "The Two Treatises and aboriginal rights" (1993): "As secretary to Lord Shaftesbury, secretary of the Lord Proprietors of Carolina (1668-71), secretary to the Council of Trade and

explained below, the state of nature for Locke is not a pre-political condition in the sense of preceding the formation of nation-states, but rather one in which positive law is simply not operative. This would be the case with a British trader, for example, entering the stateless territory of the Amerindians. Because, contra Filmer, “Sovereignty founded upon Property, and the Sovereignty founded upon Fatherhood” are separated for Locke, jurisdiction in the state of nature can only be established through private action, through labor, and only once established can legitimate sovereignty or political *dominium* then follow. This is the case even if the British trader (or pirate) is empowered by the crown to travel, trade, or even conquer and colonize Amerindian territory via imperial charter or letters patent, for this is only a political sanction to carry out private actions that establish proprietary *dominium*.³⁰⁰ It would follow from Locke’s theory, then, that the political

Plantations (1673-4), and member of the Board of Trade (1696-1700), Locke was one of the six or eight men who closely invigilated and helped to shape the old colonial system during the Restoration. He invested in the slave-trading Royal Africa Company (1671) and the Company of Merchant Adventurers to trade with the Bahamas (1672), and he was a Landgrave of the proprietary government of Carolina” (140-41). The double function of Locke’s argument—although, it is better seen as only one argument for primitive accumulation, albeit applicable in different geographic locations and under different economic systems—is explicitly taken up, several years before Tully, by Herman Lebovics in his article “The Uses of America in Locke’s *Second Treatise of Government*,” *Journal of the History of Ideas*, 47:4 (1986), 567-581.

300 For a discussion of colonial charters or letters patent, see MacMillan, *Sovereignty and Possession in the English New World*, Chapter 3. We should also remember that Joint-stock companies of all the major European powers, including the French and the English East India companies that were also founded in the seventeenth century, continued to be significant mechanisms of colonization up through the nineteenth century. “While governments ultimately came to establish formal authority over the areas carved out by private and semi-private activities,” writes Holsti, “fully 20 percent of all the new colonies established in the nineteenth century were organized by chartered companies or private persons.” K. J. Holsti, *Taming the Sovereigns: Institutional Change in International Politics* (Cambridge: Cambridge University Press, 2004), 241. Perhaps the most notorious of these “private activities” was the Congo Free State (now the Democratic Republic of Congo), which was nothing less than the private property of Belgium’s King Leopold II., recognized as such by the fourteen participating nations at the 1884 Berlin Conference. It remained in his possession and under his genocidal rule (during which approximately fifteen million people perished) until its official annexation by Belgium in 1908. It was a complete collapse and singularization of *dominium* and *imperium*. Not unlike the limited liability multinational corporations of today, the joint-stock companies of the 16th and 17th centuries were able to pool capital to such a degree that their power and influence rivalled that of many states, making them significant sources of revenue and credit for governments, as well as the most efficient mechanism of colonization of the time. See Kurt Burch, “Property” and the Making of the International System (London: Lynne Rienner Publishers, 1998),

sovereign of the home country does not, can not, establish jurisdiction in new territory, but only facilitate the private process of doing so. This, as we saw in Chapter Two, is in concert with the Common Law tradition, which does not have the resources to account for the extension of jurisdiction beyond English territory:

Unlike Roman law, common law possessed no doctrines for the acquisition of sovereignty over territory because the doctrine of tenures held that no land subject to the common law could be outside a state of sovereignty. Newfound lands, by virtue of being *terra incognita* before the age of expansion, were considered to be foreign territories and their settlement was a new activity that was not addressed in the domestic common law.³⁰¹

As we shall see in the next chapter, Hegel conversely argues in the *Philosophy of Right* that political *dominium* embodied in the monarchical sovereign simply expands its jurisdiction into new territories—a process that does not involve a struggle for the establishment of right itself—in order that private *dominium* may then follow.

Chapter 6. See also William Robert Scott's chauvinist, but unparalleled study, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720*, Vol. I, *The General Development of the Joint-Stock System to 1720* (Cambridge: Cambridge University Press, 1912). As Scott proclaims: "To the companies of this period [1600 to 1635] belongs the honour of giving England a foothold in India, Africa, Virginia and New England..." (441). Their authority paralleled that of the civil governments where they claimed jurisdiction, allowing them in many cases to "seize and defend territories within [their] sphere of action, to make peace, to levy taxes, to administer local justice, and to make local laws. Shepard B. Clough, *The Economic Development of Western Civilization* (New York: McGraw-Hill, 1959), 153. See also Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 68-70. See also M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green & Co., 1926).

³⁰¹ MacMillan, *Sovereignty and Possession in the English New World*, 33. Also quoted in the Introduction of Chapter 2.

II. Accumulation and the Rise of Absolutist Private Dominionium

The true import of Locke's theory of property is overlooked if we misunderstand his conception of the state of nature and its relation to colonialism. As was evident from our discussion in Chapter One, James Tully understood well the relation of Locke's epistemological concept of the self and his workmanship model in the *Essay* to his argument about private appropriation in the *Two Treatises*. But the significance of this understanding is lost if we do not recognize its operation within the colonial context. We also saw how Olivecrona's understanding of Locke's expansive concept of the self runs aground when he assumes that Locke's state of nature is the mythology of a by-gone pre-political era. Only if we situate Locke's arguments on sovereignty and property in the jurisdictional debates (public and private, secular and ecclesiastical) I have outlined in the previous sections, can we gain a full understanding of Locke's influences and interlocutors, named and unnamed.

Through critiques of Grotius, Pufendorf, Hobbes, and Filmer, Locke's *Two Treatises* addressed the origins of secular authority (against advocates of absolutism) and colonial jurisdiction (against papal titles and the first occupation claims of Catholics and Protestants alike) in ways that can only be understood within this larger context. As we saw with the case of the Spanish and Portuguese, inter-territorial jurisdiction was formally, albeit largely unconvincingly, established through the Church in the form of papal donations. These donations began in the mid-fifteenth-century, giving the

Portuguese Crown a right of conquest, first in Africa, and eventually beyond, and then with Spain's colonial efforts in the late fifteenth century in lands not claimed by the Portuguese.³⁰² For the Portuguese and Spanish Crowns, the colonial jurisdiction issue was formally settled, but as we saw with the case of Vitoria, Las Casas, and Sepulveda, the expansion of the known world and the discovery of new peoples residing there raised questions that came to dominate the natural law discourse of the "second scholasticism" in the sixteenth century. As Tierney writes, "even when the sixteenth-century writers were discussing such familiar medieval themes as the temporal powers of the pope, the universal authority of the emperor, or the right of resistance to tyranny, the case of the American Indians was often present in their minds."³⁰³ The result, in the case of the neo-Thomists, was a rationalist application of Thomist natural law theory combined with a robust conception of subjective natural rights, making European jurisdiction in the colonies contingent upon, not the Church's authority, but consent on the part of the Amerindians who possessed natural dominium (*dominium verum*) or victory in the case of just war.

One could thus say that modern natural law theory—from Vitoria to Grotius to Locke—matured in its service to European expansionism. This growing natural law tradition drew from a rich history of canon and secular theory, including the *Corpus Juris* (recovered in the twelfth century), which provided the framework for burgeoning international relations, particularly after Westphalia, and colonialism. Roman law was of

302 For an excellent overview of the colonial discourse of this time, see Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

303 Brian Tierney, *The Idea of Natural Rights*, 255. This "inspiration" is even more palpable in the seventeenth century, with the rise of the Dutch and English colonial empires at the expense of the Spanish, Portuguese, and French.

course well-suited to the modern colonial condition precisely because its conceptualization of *ius gentium* was an achievement of its own imperialist experiences. This, as I noted, served as a much needed bridge between domestic English common law and the international justification of foreign conquests.

The rise of modern natural law theory in general and *ius gentium* in particular is, thus, reflective of at least two socio-political and economic developments of the era: the first is the consolidation of the “absolutist state”—a vertical realignment of political power that Hinsley describes as the rationalization of “overlapping and conflicting communities and authorities”³⁰⁴ and its institutionalization in the Peace of Westphalia (1648), which recognized the territorial sovereignty of the signatory states at the end of the Thirty Years War (1618-48). As we saw in the case of Bodin, the absolutist state is the institutional expression of an absolutist form of *imperium*, which presupposes a post-feudal condition (See Chapter Two, Section 2). This is not to say that Bodin’s theory of sovereignty was merely descriptive—he was much too brilliant as a political thinker for such a banal exercise. Bodin was certainly intervening in a political struggle, but we must also recognize that his normative account was impressive and influential precisely for its grounding in the actual absolutist tendencies of the state and his theorization of their potential trajectory.

We must also keep in mind that the Westphalian order was a geographically confined, distinctively European order, whose identity was constituted by the mutual recognition of participating states and its lack of recognition of non-European others. The second development is the “accumulation by dispossession” of colonialism and domestic enclosures, the former inflected by the Spanish and Portuguese mercantilist policies in

³⁰⁴ Hinsley, *Sovereignty*, 75.

the sixteenth century and the proto-capitalist emphasis on agrarian settlements and labour in the seventeenth, particularly by the English. These two developments are, of course, related. As Charles Tilly notes: “at the same moment as empires were losing out within Europe,” each being reduced to nation-state status and borders, “Europe’s major states were creating empires beyond Europe, in the Americas, Asia, and the Pacific.”³⁰⁵ That is to say, as empires geographically contracted under the new order within Europe, their spatial reconfiguration included a projection of *imperium* beyond it.

The contours of proprietary *dominium* emerging in the new territories of these empires, as well as the notions of *imperium* developing among European nation-states, had as much to do with geography and indigenous land use as it did with the property relations, modes of production, and inter-imperialist rivalries of the colonizing countries. The rise of proprietary *dominium* thus cannot be understood in abstraction from the particular policies and practices of European *imperium* and expansionism.³⁰⁶ And it is only in this context that we can understand the revolutionary ideology of the British colonists in North America, for we witness an absolutist concept of private *dominium* (also present in Bodin later work) completely detached from, and being wielded against, political sovereignty. Thus, in his influential pamphlet *A Summary View of the Rights of British America* (1774), Thomas Jefferson argued that he and fellow colonists were analogous to his “Saxon ancestors” who migrated to Britain and “held their lands, as they did their personal property, in absolute dominion, unencumbered with any superior,

305 Charles Tilly, *Coercion, Capital, and European States, AD 990-1990* (Cambridge: Basil Blackwell, 1990), 167.

306 See Anghie, *Imperialism, Sovereignty and the Making of International Law* for a defense of the general thesis that the “sovereignty doctrine acquired its character through the colonial encounter” (29).

answering nearly to the nature of these possessions which the feudalists term allodial”³⁰⁷—that is, before the imposition of the “Norman yoke” in the eleventh century. This was a radical, indeed revolutionary argument, appealing to individually sovereign property-holders in a Lockean state of nature, which, when wronged, held the right of punishment, resistance, and private war. Jefferson coupled this claim of a historical retrieval of the Saxon tradition, purged of all subsequent feudal vestiges, with an even more radical claim of historical rupture, asserting that America’s “geographical peculiarities may call for a different code of natural law to govern relations with other nations from that which the conditions of Europe have given rise to here.”³⁰⁸ It was a prescient observation, reflective of an emerging American social imaginary of concurrent universalism and exceptionalism—rooted in absolutist proprietary *dominium* and the particularities of North American geography—and made possible by the significant and influential Lockean division of *dominium*, and thus sovereignty.

Turning to the different forms of accumulation taking place in the colonies, we find that whereas the French, for example, were primarily (and for the longest period) interested in the fur trade, which necessitated some form of cooperation (rather than settlement) with the Amerindians, the English quickly pursued a policy of displacement, land appropriation, and extensive settlement.³⁰⁹ This entailed not only genocide, but also

307 Jefferson, *Papers of Thomas Jefferson*. Cited in Williams, *American Indian in Western Legal Thought*, 268.

308 Cited in Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World* (Cambridge: Cambridge University Press, 2002), 111.

309 See Ellen Meiksins Wood, *Empire of Capital* (London: Verso, 2003), Chapter 5. It is also noteworthy that where the French did establish extensive settlements, as in Canada, they were largely feudal in nature. See James Muldoon, ed., *The Expansion of Europe: The First Phase* (Philadelphia: University of Pennsylvania, 1977), Chapter 1

the establishment of new, exclusionary property relations reflecting England's burgeoning agrarian capitalism and increasing enclosure of the commons at home. British land titles in North America often resembled *allodial* (unencumbered) tenures, which offered near absolute ownership, hence the source of Jefferson's historical musings. I should note these *near* allodial tenures did indeed have historical precedence—to some degree in Roman law, pre-Norman English common law, and medieval reclamations³¹⁰—yet the sheer rapidity and expansive territorialization of North American landscape with this form of property relation is astonishing and unprecedented.

By contrast, the Spanish under Columbus's governorship instituted (in practice) what was to be called the *encomienda* system,³¹¹ in which land and Amerindians were "commended" to Spaniards (*encomenderos*) at least in its earlier period (1499-1502).³¹² Under Columbus's rule, these Amerindians were near or complete slaves, which placed them as property rather than subjects under the dominion of an individual *encomenderos*, rather than under the *imperium* of the Crown – a condition that did not please the latter.³¹³

310 Reclamation is the process of cultivating previously uncultivated land, "reclaiming" it from swamps or forests.

311 There is often a confusion between the terms *repartimiento* and *encomienda*. As Lyle N. McAlister notes: "Generically, a *repartimiento* was a division or distribution of something. More particularly, during the Reconquest and in the Canaries it commonly meant a division of spoils. In America, Indians were a form of spoil. The *encomienda* was simply an institutionalized *repartimiento* characterized by legal prescriptions for tenure and use... The crown preferred the word *encomienda* because it connoted a donation by royal grace. Settlers preferred *repartimiento* because the term implied control of labor and territory won by conquest, although they liked to be called *encomenderos*, a title that smacked of nobility, very much reminiscent of the *comenderos* of the Spanish military orders." Lyle N. McAlister, *Spain and Portugal in the New World, 1492-1700* (Minneapolis: University of Minnesota, 1984), 164-65.

312 Hanke argues that "in practice, the *encomienda* system was established by Columbus in 1499 after the failure of his attempt to impose a definite tribute on the Indians of Hispaniola... The *encomienda* system, then, started with Columbus, when he assigned three hundred Indians to Spaniards. When Queen Isabella learned this, she asked her famous question: 'By what authority does the Admiral give my vassals away?'" Hanke, *The Spanish Struggle for Social Justice in the Conquest of America* (Philadelphia: University of Pennsylvania Press, 1949), 19-20.

After a reprimand from Queen Isabella, the Amerindians were officially declared free, slavery was formally abolished in 1500, and in 1502 Columbus was removed from office and Isabella appointed Nicolás de Ovando as Governor of Hispaniola.³¹⁴ Thereafter the *encomienda* system employed was formally constrained to a milder, but still feudalistic, title to labor, although the practice of slavery persisted for decades.³¹⁵

III. The State of Nature and Nonconsensual Jurisdiction

Although Locke's state of nature is much maligned, I am going to make the argument that it is explicitly constructed and employed by Locke as a mechanism for establishing colonial jurisdiction. Locke's state of nature is unique in this respect, for it is neither a thought experiment, speculative history, nor some combination of the two. Most significantly, it is not a description of "natural man", but rather of a juridical concept, which in light of his theories of property and private punishment, can only plausibly

313 As John H. Elliott writes, "the *encomienda* system came to assume characteristics which at times made it barely distinguishable from outright slavery." Elliot, *Imperial Spain*, 59.

314 Ironically, Las Casas was a member of Governor Ovando's expedition in 1502. See Hanke, *All Mankind is One*, 6-7.

315 Pagden writes: "The Native Americans were given over (*encomendado*) to their master, who was entitled to the use of their labour in return for a small wage and the duty to protect them and instruct them in the Christian religion." Pagden, *Lords of All the World*, 91-92. Again, though, this was most likely a shrewd move on the part of the Crown, not driven by the recognition of Amerindian liberty and *dominium*, but of the potential threat the establishment of fiefs in the New World represented. "If, then, the abolition of slavery and the weakening of the *encomienda* represented a triumph for Las Casas and his colleagues, they also bore witness to the remarkable success of the Spanish Crown in imposing its authority on remote territories under conditions that were often extremely unfavorable. A great hereditary feudal aristocracy did not develop in the New World... Instead, the officials of the Spanish Crown slowly asserted their authority over every aspect of American life, forcing *encomenderos* and *cabildos* to yield before them." Elliot, *Imperial Spain*, 64. See also James Muldoon, *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1994).

apply to the colonies. This reading, I argue, is consistent with recent scholarship, has greater historical and textual support than previous interpretations, and counters most critiques of Locke's so-called abstract individualism.

The claim that the justificatory intent of the *Two Treatises* included British colonialism—in addition to the Glorious Revolution, domestic enclosures, and resistance to (Hobbesean) absolutism—doesn't yet enjoy consensus, but it is only a matter of time, rather than argumentation, before it becomes convention. Thanks to recent scholarship, we now know much more about Locke's extensive knowledge and involvement with a colonial policy he benefited from and helped devise, and this has prompted fresh readings of his *Two Treatises*.³¹⁶ Herman Lebovics, James Tully, and Barbara Arneil among others, have demonstrated how Locke's definitions of political society and property intentionally exclude Amerindian forms of government and land use in order to ease British appropriation,³¹⁷ while Richard Tuck has even argued that Locke specifically

316 As Tully notes: "As secretary to Lord Shaftesbury, secretary of the Lord Proprietors of Carolina (1668-71), secretary to the Council of Trade and Plantations (1673-4), and member of the Board of Trade (1696-1700), Locke was one of the six or eight men who closely invigilated and helped to shape the old colonial system during the Restoration. He invested in the slave-trading Royal Africa Company (1671) and the Company of Merchant Adventurers to trade with the Bahamas (1672), and he was a Landgrave of the proprietary government of Carolina," "The Two Treatises and aboriginal rights," 140-41. The connections between Locke's *Two Treatises*, colonial settlements, and displacement of Amerindians in North America have only recently been addressed, particularly by philosophers and historians such as James Tully, Richard Tuck, David Armitage, Barbara Arneil, and Herman Lebovics, whose seminal article, "The Uses of America in Locke's Second Treatise of Government," *Journal of the History of Ideas*, 47:4 (1986), 567-82, anticipated the direction of the much subsequent scholarship. See Barbara Arneil's *John Locke and America* for a nice summarization of the literature on the topic at the time of publication. See also Neal Wood's *John Locke and Agrarian Capitalism* (Berkeley: University of California Press, 1984), which Arneil overlooks; Duncan Ivison, "Locke, liberalism and empire," in *The Philosophy of John Locke: New Perspectives*, ed. Peter R. Anstey (London: Routledge, 2003), 86-105; and David Armitage, "John Locke, Carolina, and the *Two Treatises of Government*," *Political Theory* 32 (2004), 602-627.

317 See Lebovics, "The Uses of America in Locke's Second Treatise of Government," Tully, "Rediscovering America: the Two Treatises and aboriginal rights," and Arneil, *John Locke and America*. See also David Armitage, "John Locke, Carolina, and the Two Treatises of Government".

sought to refute William Penn's policies in Pennsylvania, which recognized Amerindian ownership:

Penn's whole approach was diametrically opposite to that of Locke, and the founding of Pennsylvania represented a major challenge to the principles upon which the English colonies had so far been planted in America. Locke seems to have been suspicious not only of Penn's generosity to the Indians, but also of the absolutist tendencies displayed by Penn's 'frame of government' for the settlers—in 1686 he wrote an extensive critique of the constitution, attacking it for its 'dangerous' and 'unlimited' powers. So Pennsylvania represented all the things Locke was attacking in the Second Treatise.³¹⁸

I focus on Tully's thesis, since it is the most representative and influential. As noted, Tully argues that Locke's characterization of "Amerindian political formations and property... serve to justify the dispossession of Amerindians...and to vindicate the superiority of...specifically English, forms of political society and property..."³¹⁹

Regarding the generation of legitimate property in land, Locke, we know, employed a narrow conception of title-creating labour limited to European sedentary agriculture.³²⁰

What doesn't come under such labour "lies waste" and is open to appropriation. "Land that is left wholly to Nature," writes Locke, "that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, *wast*; and we shall find the benefit of it amount to little more than nothing."³²¹

318 Richard Tuck, *The Rights of War and Peace*, 178. See also Locke's critique, Bodleian Locke MS. f. g., ff. 33-41.

319 Tully, "Rediscovering America: the Two Treatises and aboriginal rights," 139.

320 See Tully, *A Discourse of Property*.

321 *Second Treatise*, §42, 297.

“Since American Indians lack the dynamic system of market-oriented property,” writes Tully of Locke, “they have no need for the institutions of a political society to regulate it, and therefore they do not have governments.”³²² “Thus, by definition, a political society only comes into being on the basis of, and to govern, a regime of private property...”³²³ Tully additionally and rightfully notes the importance of Locke’s private right of punishment as a mechanism for justifying violence, dispossession, and even enslavement of indigenous peoples for violating natural law.³²⁴ Quentin Skinner has suggested that Locke’s doctrine of private punishment is taken from Jacques Almain (a conciliarist whom Cajetan and Vitoria sought to refute), but J. H. Burns builds a strong argument against this association.³²⁵ In either case, Locke’s attempt to develop a *collectivist* right to resistance or self-defense is similar to Almain’s. The *individual* right to punish (*ius gladii*) is, as we have seen, clearly found Grotius, who held that individuals in a state of nature are morally similar to the state in this sense: “Is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to

322 Tully, “Rediscovering America: the *Two Treatises* and aboriginal rights,” 164.

323 *Ibid.*, 164. Tully writes as if this is a necessary and sufficient condition for a legitimate political society, but as we shall see, it is only a necessary condition. A consensually derived and impartial judicial body is the sufficient condition, and only when this condition is met, does a political society exit the state of nature, i.e., become a legitimate civil society for Locke. Thus, “a planter in the West Indies” has private property and European agriculture, but still lives in a state of nature. This is significantly different from Hobbes, who argued that a contractually derived absolute power, not judicial apparatus, was the exit strategy.

324 See Tully, “Rediscovering America: the *Two Treatises* and aboriginal rights,” 141-145.

325 See Skinner, *The Foundations of Modern Political Thought*, Vol. II, 119; and Burns, “*Jus Gladii* and *Jurisdictio* – Jacques Almain and John Locke,” 369-74.

the state from private individuals... no one is able to transfer a thing that he never possessed.”³²⁶

On almost all accounts, here, Tully is correct,³²⁷ and this colonialist reading is strengthened by wonderful examples of proto-Lockean arguments decades before the *Two Treatises*, and the assimilation of Locke’s rhetoric into colonialist arguments and international law decades after.³²⁸ An example of a proto-Lockean argument would be that of Robert Gray, who, in his *A Good Speed to Virginia* (1609), wrote of the Amerindians: “these Savages have no particular proprietie in any part or parcel of that Countrey, but only a generall recidencie there.”³²⁹ And perhaps the most important and influential appropriation of Locke’s thought in international law was by Emerich de Vattel in *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Sovereigns* (1752). After writing of how every nation “is obliged by the law of nature to cultivate the land that has fallen to its share,” he explains why some nations should colonize, incorporating a Lockean duty to labour (where labour is equated with cultivation alone) and why peoples who don’t so labour should be punished or even exterminated:

Those nations (such as the ancient Germans, and some modern Tartars), who inhabit fertile countries, but disdain to cultivate their lands, and choose rather to live by plunder, are wanting to themselves, are injurious

326 Grotius, *De Iure Praedae Commentarius*, 91-2; Cited in Tuck, *The Rights of War and Peace*, 82

327 Among these claims, it is Tully direct causal connection between private property and political society that is problematic, for as we shall see, Locke recognizes absolute monarchies as political societies that have private property, but still categorizes them as illegitimate and thus in a state of nature.

328 See Tully, “Rediscovering America: the *Two Treatises* and aboriginal rights,” 149-76.

329 Cited in Arneil, *John Locke and America*, 109.

to all their neighbors, and deserve to be extirpated as savage and pernicious beasts. There are others, who, to avoid labour, choose to live only by hunting and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner. Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands.³³⁰

Despite these excellent examples, Tully's reading becomes problematic when he situates the above account within a non-Lockean theory of a state of nature. This not only undermines the political intentions of his imminent critique, but also overlooks the significant innovations and historical context of Locke's state of nature within the jurisdictional debates outlined above. He writes, for example:

Locke was aware that the native peoples did not govern themselves in the wholly individual and independent manner laid out in his description of the state of nature, but were organized politically into nations. However, he describes their national forms of government in such a way that they are not full 'political societies' and thus native Americans can be dealt with as if they are in a late stage of the state of nature.³³¹

330 Emerich de Vattel, *The Law of Nations; or, Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns*, translated by Joseph Chitty (London: Stevens and Sons, 1834), Book I, Chapter VII, §81, 35.

331 Tully, "Rediscovering America: the Two Treatises and aboriginal rights," 151. Tully also writes: "They lack the European institutions that, according to Locke, constitute the universal criteria of political society: an institutionalized legal system, institutionalized judiciary, legislature and executive," (151-52) citing §87 of the *Second Treatise*. In this section Locke does insist that "there, and there only is *Political Society*, where every one of the Members hath quitted this natural Power [of being one's own judge], resign'd it up into the hands of the Community in all cases that exclude him not from appealing for Protection to the Law established by it," yet, contra Tully, he makes no mention of legislative and executive institutions. He is, as always, insisting that an impartial judicial authority is the criterion of exiting the state of nature. Locke, *Two Treatises*, 324.

There is, however, no “late stage of the state of nature” in Locke’s text, nor are those in such a state ever said to live in a “wholly individual and independent manner.” Because Tully misses the juridical significance of Locke’s theory, he falls prey to a conventional reading of the state of nature as representing individuals outside of political societies, often construed as non-socialized or racially essentialized savages.³³² We witness the latter when Tully conflates Locke with vulgar colonialist arguments, referring to the “Locke-Bulkley Eurocentric concept,” which asserted that Europeans rightfully engaged with Amerindians “as with savages, whom they were to quiet and manage as well as they could, sometimes by flattery; but oftener by force.”³³³ From this, Tully concludes that Locke mischaracterized Amerindian life in order to categorize it as a state of nature, yet when we examine Locke definition of the state of nature, we come to a very different conclusion.

The brilliance of Locke’s use of the state of nature is how he employed it in his larger theory to simultaneously address several challenges posed by his contemporaries. He defended Grotius against Pufendorf and Filmer on the separability of political jurisdiction and property: the entire *First Treatise* was a critique of Filmer, who saw legitimate power as originating in the “natural and private dominion of Adam,” the sole

332 Duncan Ivison repeats this mistake in a recent article on Locke and colonialism, where he writes that “Hugo Grotius, Thomas Hobbes and John Locke, amongst others, took up the model of relations between natural men...” Duncan Ivison, “Locke, liberalism and empire,” 87.

333 Tully, “Rediscovering America: the Two Treatises and aboriginal rights,” 167-68. Tully is referring to an argument by William Samuel Johnson in 1743.

“fountain of all government and property.”³³⁴ This critique also applied to Hobbes, who argued in the *Leviathan*:

The distribution of materials of this nourishment is the constitution of *mine* and *thine*, and *his* (that is to say, in one word *propriety*) and belongeth in all kinds of commonwealth to the sovereign power. For where there is no commonwealth, there is...a perpetual war of every man against his neighbour; and therefore everything is his that getteth it, and keepeth it by force; which is neither *propriety*, nor *community*, but *uncertainty*...Seeing therefore the introduction of propriety is an effect of commonwealth, which can do nothing but by the person that represents it, it is the act only of the sovereign...³³⁵

334 Filmer, *Patriarcha and Other Writings*, 225.

335 Hobbes, *Leviathan*, Chapter XXIV, paragraph 5, p. 160. It is in this same chapter, “Of the Nutrition and Procreation of a Commonwealth,” that Hobbes discusses colonies as the “procreation (or children) of a commonwealth...which are men sent out from the commonwealth, under a conductor or governor, to inhabit a foreign country, either formerly void of inhabitants, or made void then by war” (164). There are two things noteworthy about Hobbes’s account. First, in the above, he describes colonialism as the act of a sovereign, rather than an action either sanctioned by the sovereign, or an action carried out by individuals who do not yet have a sovereign, i.e. the violent act of dispossession is considered a public war, led by an already constituted sovereign, and jurisdiction is established through military victory in an international state of nature, wherein everyone has a right to everything and thus justice, in the Ulpian sense of giving each their due, is a non-starter. Second, in Chapter XX, paragraphs 10 and 11, Hobbes does not take the position of Locke, Grotius, or Vitoria on the means of acquiring *dominium* (at least in its public form) over Amerindians. For them, victory in a just war entails such *dominium*, if not a proprietary *dominium* as well. For Hobbes, however, conquest must be followed by the consent of the vanquished in order to achieve public *dominium* or sovereignty. In Hobbes’s most famous account of the origin of the commonwealth—what he calls a “commonwealth by institution”—fear drives the consent of individuals in a pre-political condition to transfer their rights to a sovereign with overwhelming power. In the case of colonialism, “dominion or sovereignty” is gained by what Hobbes calls “commonwealth by acquisition,” which is when “sovereign power is acquired by force; and it is acquired by force when men singly (or many together by plurality of voices) for fear of death or bonds do authorize all the actions of that man or assembly that hath their lives and liberty in his power” (127). Both types of sovereignty are the result of fear. In conflict, one must fight or submit, and when one submits the victor acquires what Hobbes’s calls “despotic dominion” since the vanquished, “to avoid the present stroke of death, covenanteth either in express words or by other sufficient signs of the will, that so long as his life and the liberty of his body is allowed him, the victor shall have the use thereof, at his pleasure” (130). Choosing to live is thus a sign of consent, just as it is in Hegel’s account of the life-and-death struggle for recognition in the *Phenomenology*. “It is not the victory that giveth the right of dominion over the vanquished, but his own consent,” writes Hobbes (131). While it is the case that all sovereigns are in a continual state of war with each other, according to Hobbes, and that they therefore have the right to conquer one another at will and without injustice, the reasons for colonialism, as opposed to war generally, in the *Leviathan* are worth our attention, and they will also resonate in Hegel’s *Philosophy of Right* in significant ways. Hobbes argues in Chapter XXX, that “men, by accident inevitable, become unable to maintain themselves by their labour, they ought not to be left to the charity of private persons, but to be provided for...by the laws of the commonwealth” (228). This includes forced labour, but because of increasing population and poverty, the “multitude of poor (and yet strong) people...are to be transplanted into countries not sufficiently inhabited, where, nevertheless, they are not to exterminate those they find their, but constrain them to inhabit closer together, and not range a great deal of ground to snatch what they find, but to count each little plot with art and

Hobbes was thus denying a *dominium*-founding faculty in individuals, through occupation or otherwise. Conceding to Filmer the implausibility of Grotius and Pufendorf's claim of originary consent for *appropriation*, Locke limited consent to *political society*, and countered with individual labour, rather than mere occupation, as a *dominium*-founding faculty rendering consent unnecessary.³³⁶ This move presupposed another difference with his Protestant predecessors: Locke, now more in concert with this counter-reformation contemporaries, held that the world and everything in it was originally common *property*, thus shifting the debate from the origin of property to the question of privatization. Because true property existed even in a state of nature, according to Locke, the private right to punish transgressors, contra Pufendorf, followed. Finally, Locke radicalized Grotius's understanding of the relationship between political jurisdiction and private property: rather than the former being dependent on the *possibility* of the latter, Locke made private property a condition of legitimate political jurisdiction—since political jurisdiction is founded in a “Government [that] has no other

labour, to give them their sustenance in due season. And when all the world is overcharged with inhabitants, then the last remedy of all is war, which provideth for every man, by victory or death” (228-29). Hegel takes a similar position, arguing that there is a “inner dialectic of [civil] society” (§246) creating poverty, overpopulation, and over production, and that it would be mistaken to “restrict the alleviation of want to the *particularity* of emotion and the *contingency* of [charity's] own disposition and knowledge” (*PhR*, §242), for the cause of want is not contingent. The solution is systematic colonization, “initiated by the state” (§248). But as with Hobbes recognition of a natural finitude, Hegel recognizes the limitations of his colonialist solution, noting impotence struggles, which ultimately benefits the “mother state, just as the emancipation of the slaves is of the greatest advantage to the master (§248). I discuss these parallel's in general, and the significance and problems of Hegel's argument in particular, in Chapter Five.

336 As mentioned in Chapter One, first occupations (*primo occupatio*) was a Roman principle, which remained the most common principle of establishing a private use right, if not full property in that which belonged to no one (*res nullius*). As Vitoria writes: “[I]n the law of nations (*ius gentium*) a thing which does not belong to anyone (*res nullius*) becomes the property of the first taker, according to the law *Ferae bestiae* (*Institutions* II. 1. 12)... and there are certainly many things which are clearly to be settled on the basis on the law of nations (*ius gentium*), whose derivation from natural law is manifestly sufficient to enable it to enforce binding right.” Vitoria, *On the American Indians*, 3.1 §4, in *Political Writings*, 280-81.

end but the preservation of Property,”³³⁷ which only arises through the consent of property owners. Since labour is synonymous with agrarian improvement, one wouldn’t need to identify vacant lands around the spaces of Amerindian hunting and gathering. Nothing they did produced private property, and since jurisdiction only follows from such property, they exercised neither ownership nor political jurisdiction.

Locke thus provides a philosophically consistent theory for establishing colonial jurisdiction, while also addressing the aporias and undermining the absolutism of Grotius, Pufendorf, Hobbes, and Filmer. While not operative for citizens within legitimate commonwealths, Locke’s jurisdiction-founding mechanisms of labor and private punishment *are* operative in a state of nature. What, then, is Locke’s state of nature?

“Men living together according to reason, without a common Superior on Earth, with Authority to judge between them, is *properly the State of Nature*.”³³⁸

This condition is true in four cases. First, the relation between independent governments: “Tis often asked as a mighty Objection, *Where are, or ever were, there any Men in such a State of Nature?* To which it may suffice as an answer at present; That since all *Princes and Rules of Independent Governments all through the World, are in a State of Nature, tis plain the World never was, nor ever will be, without Numbers of Men in that State.*”³³⁹

This claim is nothing novel—many predecessors and successors claimed it—so I focus in

337 Locke, *Second Treatise*, §94 (329).

338 Locke, *Second Treatise*, §19 (280). John Simmons disputes that this is a complete definition of the state of nature for Locke. See his “Locke’s State of Nature,” *Political Theory* 17:3 (August 1989), 449-470.

339 Locke, *Second Treatise*, §14 (276).

the following on cases relating to individuals. Secondly, we are all born into a state of nature, for citizenship is not automatic. One must either give *express* consent through an oath of allegiance, or *tacit* consent by continuing to live in and enjoy the benefits of a political community. Locke explains tacit consent this way: “every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it...”³⁴⁰ Thirdly, individuals are in a state of nature when living in political societies that lack government, or if they have government, lack an impartial judge. Lastly, we are in a state of nature when entering another territorial jurisdiction, or a territory where there isn’t formal jurisdictional at all. The third and fourth cases are the most relevant to my thesis,³⁴¹ but before returning to them, we should note that in all four cases positive law is inoperative and that a state of nature can arise anytime and anywhere. Nowhere in Locke’s text is it presented as historical artifact,³⁴² a racial distinction, or a condition of non-socialized individuals.³⁴³ It is, in all cases, a *juridical concept*.

340 Locke discusses the question of tacit consent in §§119-121. For some of the difficulties that arise for generations beyond that of the original founders of political society in Locke’s account, see Julian H. Franklin, “Allegiance and Jurisdiction in Locke’s Doctrine of Tacit Consent,” *Political Theory*, 24:3 (1996), 407-422.

341 These two cases are, of course, also the most relevant to all discussions of Locke’s state of nature. Very little attention has been paid to Locke’s claim that we are born into a state of nature until giving our express or tacit consent to a specific political community, and the claim that states are in a state of nature with respect to one another is so common among modern theorists (and continues today among so-called Realists in international relations theory) that Locke’s claim has not invited particular attention.

342 Locke discusses the *historical* formation of political societies in Chapter VIII of the *Second Treatise*. There he makes the argument that all political societies are born of consent, although we may not have records of their coming into being: “Government is every where antecedent to Records” §101. The inequality witnessed in some governments does not mean, for Locke, that they were born of inequality. All individuals are born free and equal, although they may enter into societies that treat them unequally. If they

In an important article, Richard Ashcraft argues that there are “three categorical descriptions of the state of nature”; the legal, the moral and the historical.³⁴⁴ He reserves the legal (or juridical) for Locke’s discussion of absolute monarchies. While Ashcraft has contributed considerable clarity to the topic, I think all of his categories can be reduced to the juridical. More recently, John Simmons has argued, also in a very good article on the subject, that all of Locke’s examples can be considered “moral.”³⁴⁵ But as Ashcraft has rightly said, “it should be noted that Locke frequently merges ‘legal’ and ‘moral.’”³⁴⁶ Both Ashcraft and Simmons avoid a vulgar, abstract individualist reading of Locke, although neither, in keeping with all other secondary literature on the subject, consider Locke’s argument in the colonial context. John Dunn has also given a juridical or ‘jural’ reading of the state of nature, although it is analytical in the sense John Rawls’s original position. He describes it as “simply an axiom of theology” having the function of

did not consent, then they are slaves and there is no government by definition. Remember that for Locke, consent can be explicit, through an oath, or implicit, by continuing to live within a political society one was born into or later entered. This may not seem a robust enough concept of freedom and equality for us, but we are here discussing Locke’s minimalist definitions.

343 This is not true of Hobbes, of course. “It may peradventure be thought, there was never such a time, nor condition of warre as this; and I believe it was never generally so, over all the world: but there are many places, where they live now. For the savage people in many places of America, except the government of small Families, the concord whereof dependeth on natural lust, have no government at all; and live at this day in that brutish manner.” Hobbes, *Leviathan*, 90. Hobbes goes on to also use the relation of independent governments as another example. The phrasing of this paragraph and its use of America and international relations as examples of the state of nature are strikingly similar to Locke’s in §14 of the *Second Treatise*. This has no doubt contributed to a misunderstanding of Locke. Upon closer inspection, one will find that in Locke’s case, the “Indian in the Woods of America” is not in a state of nature because he or she is without government, but rather because the ‘Indian’ is trading with a Swiss and no positive law applies to them both, i.e., it is an example of the above, fourth case of a state of nature. See Locke, *Second Treatise*, 276-77.

344 Ashcraft, “Locke’s State of Nature, Historical Fact or Moral Fiction?” *American Political Science Review*, 42:3 (September 1968), 216.

345 See Simmons, “Locke’s State of Nature.”

346 Ashcraft, “Locke’s State of Nature, Historical Fact or Moral Fiction,” 215.

“theological reflection”: “Rather than a graphic depiction of the actual moral situations of men, it represents the set of jurial co-ordinates on which such situations must be placed if they are to be understood accurately.”³⁴⁷

Returning to the third case of a juridical state of nature, we should first take heed of Locke’s distinction between political society and government, the former being the foundation of the latter. This distinction is discussed throughout the *Second Treatise*, Chapter XIX, §§211-243, but it should be noted that Locke is not always consistent here, most likely because parts of the *Second Treatise* were written at different times, with the above discussion of the dissolution of government written perhaps the latest. Earlier in the text (and in its writing), when Locke discusses the origins of political society and government, he often collapses the two, as in Chapter VII and VIII, for example (although, Locke does in §106 distinguish them: “That the *beginning of Politick Society* depends upon the consent of the Individuals, to joyn into and make one Society; who, when they are thus incorporated, might set up what form of Government they thought fit.”) The later discussion was certainly affected by the contemporary political crisis of Locke’s day: the dissolution of parliament by the Charles II and the effort by the Whigs to articulate a suitable theory of resistance or revolution in response.³⁴⁸ If government does not possess an impartial judicial authority, as in absolute monarchies, it continues in a *state of nature*: “*Absolute Monarchy... is indeed inconsistent with Civil Society,*” writes Locke, for “every *Absolute Prince*” is “*still in the state of Nature*” (§90), because having

347 Dunn, *The Political Thought of John Locke*, 103, 97, and 110.

348 For an excellent discussion of this context, see Richard Ashcraft, *Revolutionary Politics & Locke’s Two Treatises of Government*, chapter 7.

“both Legislature and Executive Power in himself alone, there is not Judge to be found...who may fairly, and indifferently, and with Authority decide” (§91).

If rulers exercise illegitimate force against the people, as in tyrannies, it devolves into a *state of war*. “*Want of a common Judge with Authority, puts all Men in a State of Nature: Force with Right, upon a Man’s Person, makes a State of War*, both where there is, and is not, a common Judge”(II, §19). And Locke picks up this topic again later in the *Second Treatise* (§227):

For if any one by force takes away the establish’d Legislative of any Society, and the Laws by them made pursuant to their trust, he thereby takes away the Umprirage, which every one has consented to, for a peaceable decision of all their Controversies, and a bar to the state of War amongst them. They, who remove, or change the Legislative, take away this decisive power, which no Body can have, but by the appointment and consent of the People; and so destroying the Authority, which the People did, and no body else can set up, and introducing a Power, which the People hath not authoriz’d, they *actually introduce a state of War*, which is that of Force without Authority.

In the case of absolute monarchies, there is still government, in the case of tyrannies, there is not, (although, absolute monarchies can become tyrannies) but in both cases a state of nature or of war doesn’t mean that political society is dissolved. When governments dissolve, authority devolves to the community, and only when latter dissolves, does authority devolve to individuals: “*The Power that every individual gave the Society*, when he entered into it, can never revert to the Individuals again, as long as the Society lasts... So also when the Society hath placed the Legislative in any Assembly of Men...*the Legislative can never revert to the People whilst that Government lasts*” (§243). I raise this distinction, because it is often argued that Locke’s natural right to private punishment is his justification for political resistance, particularly to Charles Two.

While Locke does invoke the right of self-preservation in support of resistance, resistance (or revolution) is not the exercise of the private right of punishment. Locke is very clear that it is a right of self-defense held collectively, not privately—much like the corporatism of the conciliarists discussed in Chapter Two. The state of war initiated by a despot is a war of the despot against the *people*, although individuals have the right to individually defend themselves when confronted with violence. Thus, if “Controversie arise betwixt a Prince and some of the People...the proper *Umpire*, in such a Case, should be the Body of the *People*” (§242). “For the *Society* can never, by the fault of another, lose the Native and Original Right it has to preserve itself, which can only be done by a settled Legislative, and a fair and impartial execution of the Laws made by it” (§220).

Locke’s theory of property-producing labor does not apply in this case either, since pre-existing private property, money, and contracts legitimately continue in this state of nature. This is true of the commons as well.³⁴⁹ In fact, the *only* place where Locke’s famous theory of property and his natural right to private punishment—the only two nonconsensual beginnings of jurisdiction, or what Vitoria called *dominium* private and public—are operative is in the fourth case, which exists, for example, “between two Men in the Desert Island...or between a *Swiss* and an *Indian*, in the Woods of *America*” (§14). By what right can one “*punish an Alien*...[if one’s] Laws... reach not a Stranger,” asks Locke, for “Those who have the Supream Power of making Laws in *England*, *France* or *Holland*, are to an *Indian*...Men without Authority: And therefore if by the Law of Nature, every Man hath not the power to punish... I see not how the Magistrates

349 As Locke writes: “*Land* that is *common* in *England*...no one can inclose or appropriate any part, without the consent of all his Fellow-Commoners.” Locke, *Second Treatise*, §35.

of any Community, *can punish an Alien* of another Country...” (§9). This private right allows the offended to appropriate “to himself, the Goods or Services of the Offender” (§11), “in the perfect condition of *Slavery... between a lawful Conqueror, and a Captive*” (§24)—hardly language appropriate for describing political revolution or an Englishman confronted with a French thief.

While Locke’s critique of absolute monarchy in the third case clearly applies domestically, we must remember that Locke describes Amerindian political societies in monarchical terms—“the *Kings of the Indians in America*,” who “are little more than *Generals of their Armies...and exercise very little Dominion*”(II, §108)—and while his condemnation of absolutism is strong, he reserves his most virulent language for those “aliens” who “trespass against the whole Species” (§8), and have “declared War against all Mankind, and therefore may be destroyed as a *Lyon* or a *Tyger*, one of those wild Savage Beasts” (§11).

And if these biting words weren’t clear enough, Locke explicitly describes where labor can *create* property—in the “inland Parts of *America*”—and on whom private punishment should be exercised: “A Planter in the *West Indies*,” for example, can gather forces “against the *Indians*, to seek Reparation upon any Injury...and all this without the *Absolute Dominion of a Monarch*.”³⁵⁰ In the following section (§131), he continues:

May not therefore a Man in the *West-Indies*, who hath with him Sons of his own, Friends, or Companions, Soldiers under Pay, or Slaves bought with Money, or perhaps a Band made up of all these, make War and

350 Locke, *First Treatise*, §130 (237). Locke continues in the following section: “May not therefore a Man in the *West-Indies*, who hath with him Sons of his own, Friends, or Companions, Soldiers under Pay, or Slaves bought with Money, or perhaps a Band made up of all these, make War and Peace, if there should be occasion, and *ratifie the Articles too with an Oath*, without being a Sovereign, an Absolute King over those who went with him? He that says he cannot, must then allow many Masters of Ships, many private Planters to be Absolute Monarchs, for as much as this they have done” §131 (238).

Peace, if there should be occasion, and *ratifie the Articles too with an Oath*, without being a Sovereign, an Absolute King over those who went with him? He that says he cannot, must then allow many Masters of Ships, many private Planters to be Absolute Monarchs, for as much as this they have done.

This is not a story about the origin of commonwealths—that would be a story of consent, taken up later in Chapter VIII. In that chapter, punishment and property play almost no role, for Locke is seeking to demonstrate how historically even the simplest political organizations are, *contra* Filmer, *originally* based on consent. Many commentators look at Locke’s treatment of early monarchical forms of governance—characterized as semi-natural considering their conditions—as a concession to Filmer or a mistaken foray into history when purely logical argumentation would suffice. I disagree. Locke’s text is historical throughout, and his treatment of early monarchical orders can plausibly be read as evidence that Locke is not unaware of this history, but that it does not entail the Adamite conclusions that Filmer wants to draw. Locke writes, for example:

Thus we may see how probable it is, that People that were naturally free, and by their own consent either submitted to the Government of their Father, or united together, out of different Families to make a Government, should generally put the *Rule into one Man’s hands*, and chuse to be under the Conduct of a *single Person*, without so much as by express Conditions limiting or regulating his Power, which they thought safe enough in his Honesty and Prudence. Though they never dream’d of Monarchy being *Jure Divino*, which we never heard of among Mankind, till it was revealed to us by the Divinity of this last Age; nor ever allowed Paternal Power to have a right of Dominion, or to be the Foundation of all Government (§112).

No, Locke is not telling a story of consent in his state of nature, but a story about the establishment of rule, *dominium*, public and private, *without* consent. This natural condition, “wherein all the Power and Jurisdiction is reciprocal,” writes Locke, “unless

the Lord...should by any manifest Declaration of his Will set one above another, and confer on him...an undoubted Right to Dominion and Sovereignty.” Locke then tells us how, by following God’s will through natural law, one gains *dominium* over persons and property: in defending the law of nature, “*one Man comes by a Power over another*” (§8), while “cultivating the Earth, and having Dominion,” he writes, “are joynd together” (§35).³⁵¹

It is a story about how members of a political society can, through private punishment (a Protestant individualization of just war) and labour, subjugate and appropriate beyond their society—without consent or the authority of church and state. *Dominium*, for Locke, is not found in God’s grace or divine law, but, first, in the property of one’s own person, established by God, and externalized through individual labour, and, second, through the natural right to protect one’s self and its products. It is a natural law solution to colonial jurisdiction, which doesn’t rely on papal donation, divine law, consent, or mere occupation, and in Protestant fashion, leaves each individual to be their own interpreter and judge (of natural law). It essentializes culture (insofar as it privileges a particular type of labour), but not race, so subjugation results from law-breaking, not inferiority: even Amerindians possess *dominium*, though lacking the “Industrious” (Protestant) work ethic, they fail to externalize it as God wills. Returning to that duty articulate in his early *Essays*, he writes: “God gave the World to Men in Common; but since he gave it to them for their benefit, and the greatest Conveniencies of Life they were capable to draw from it, it cannot be supposed that he meant it should always

351 Ibid., §35. This power includes the right of dispossession and enslavement, of course.

remain common and uncultivated. He gave it to the use of the Industrious and Rational, (and *Labour* was to be *his Title* to it)” (§34).

IV. Concluding Remarks

We can now also see how James Tully’s attempt at an imminent critique of Locke, i.e. to establish by Locke’s own standards that indigenous land use was not “waste” and indigenous political societies were not in a state of nature, fails. He was attempting to set the record straight, so to speak, concerning the legitimacy of non-European forms of political society and economy against Locke’s political misuse of his own philosophical principles. While Tully’s goal is worthy, his imminent critique falls short because Locke’s state of nature *is* a description of the colonial condition and he is thus philosophically consistent, at least on this point. Where Locke is guilty of intentionally misleading the reader concerns his claim that Amerindians did not practice agriculture, which he certainly knew to be a spurious claim. Acknowledging this, however, would not have “removed” the Amerindians from the state of nature according to the above juridical interpretation.

John Dunn once wisely wrote that Locke’s state of nature “is the focus of the most startling of the myths and misconceptions which surround his thought.”³⁵² Reading Locke’s state of nature as a juridical and colonial construct clears up many misinterpretations and connects Locke’s work with a long and complicated natural rights

352 Dunn, *The Political Thought of John Locke*, 67.

and colonialist tradition. While I do not claim that there is a single meaning of the state of nature in Locke's work, or that their various meanings are entirely consistent, the interpretation I have given is both textually and historically supported. Thus we can say that, contra C. B. Macpherson, Locke was not reading "back into the nature of men and society certain preconceptions about the nature of seventeenth-century man and society which he generalized quite unhistorically."³⁵³ Nor is Locke's state of nature "a curious mixture of historical imagination and logical abstraction from civil society,"³⁵⁴ though this may be said of his history of the development of political society, which John Dunn has rightfully called "ludicrous."³⁵⁵ Dunn also is correct to assert that Locke's state of nature is a "jural condition" that is "not asocial; nor is it psychologically or logically prior to society. It is neither a piece of philosophical anthropology nor a piece of conjectural history."³⁵⁶ Yet he is mistaken to call it "simply an axiom of theology"³⁵⁷ or merely a thought experiment having the analytical function of "theological reflection."³⁵⁸ He writes: "Rather than a graphic depiction of the actual moral situations of men, it represents the set of jural co-ordinates on which such situations must be placed if they are to be understood accurately."³⁵⁹ On my reading, the state of nature precisely represents

353 Macpherson, *The Political Theory of Possessive Individualism*, 197.

354 Ibid., 209.

355 Dunn, *The Political Thought of John Locke*, 113.

356 Ibid., 110.

357 Ibid. 103.

358 Ibid. 97.

359 Ibid. 110.

these “actual moral situations of men” and none more strikingly than those in the colonial condition.

This then raises the question of Locke’s supposed pre-political, non-socialized, or abstract individualism. Locke is often said to be describing “natural man,” in the sense of an individual hypothetically stripped of their education, social and political norms, etc. or historically living before such socialization occurs. The most sophisticated of these is, of course, Hegel’s, which is taken up by left and right Hegelians alike, including Marx and contemporary communitarians. Rooted in notion that the community is antecedent to the individual, as found in Aristotle’s *Politics* (1253a, 25-9)—not to mention in Plato and Montesquieu—it holds that the individual in Locke’s state of nature is an ideological mystification and historical inversion, stripped of its intersubjective constitution in social labor and communication, themselves dialectically marked by struggles of *Herrschaft* and *Knechtschaft*, conqueror and captive.³⁶⁰ The critique of this atomistic form of abstract sociality is found in Hegel’s early *Natural Law* essay and *System of Ethical Life*,³⁶¹ but is most thoroughly developed in the dense analysis of “Legal Status” (*Rechtszustand*) in the *Phenomenology of Spirit*, which I take up in the following chapter.

³⁶⁰ I’m drawing a comparison here between Locke’s “perfect condition of slavery” resulting from conquest (II, §24) and Hegel’s famous discussion of the dialectic of lordship and bondage in *The Phenomenology of Spirit*, translated by A. V. Miller (New York: Oxford University Press, 1979), §§178-96, hereafter *PS*.

³⁶¹ In *Natural Law*, he writes that the “fiction of the state of nature” is a product of “scientific empiricism,” which can get us no further than what he calls a perverse “abstract unity and absolute multiplicity.” Hegel, *Natural Law: The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law*, trans. T. M. Knox (Philadelphia: University of Pennsylvania Press, 1975), 65, 66. See also Hegel, *System of Ethical Life (1802/03) and the First Philosophy of Spirit (Part III of the System of Speculative Philosophy 1803/04)*, translated by edited by H. S. Harris and T. M. Knox (Albany: State University of New York, 1979), 129ff.

This criticism, we shall see, is fair for a number of state-of-nature theorists—such as Pufendorf and Rousseau—but if we accept that all cases of Locke’s state of nature are juridical, and that the most famous and imaginative of them is a colonial condition in which individuals are in a state of nature, not because they don’t belong to political societies, but because they don’t belong to the *same* political society, then the innumerable critiques of Locke’s supposed pre-political, non-socialized, or abstract individualism become suspect, if not wholly inapplicable. This would seem to be even more true of the Hegelian critique when we take into consideration the epistemic reading of Locke’s *dominium*-founding labour given in Chapter One, insofar as appropriation is much more dialectical and more Hegelian, in nature than conventional interpretations of Locke’s theory have acknowledged.

In the subsequent chapters of Part Two, I take up Hegel’s critique of modern natural law theory within the context of his own analysis of colonialism. In my treatment of the *Phenomenology* (and the *Philosophy of History*) in Chapter Four, this involves building a case for the integration of the European experience of modern colonialism into the phenomenological structure of European (objective) spirit as articulated in Hegel’s text. In so doing, I argue that the dialectical emergence (within context of modern colonialism) of two previously discussed conceptual developments in the natural law tradition—the institutionalization of natural *dominium* (or abstract legal personality) in Catholic theology and political theory, and the Protestant arguments for a right to private punishment in the state of nature—were experiences as significant as any analyzed by Hegel, if not more so, in the *Bildung* of objective spirit. In the context of this experience of modern colonialism, my reconstruction in Chapter Four of the phenomenology of right

in Hegel's early work develops the philosophical infrastructure for a productive and critical engagement with Hegel's philosophy of right in his later work in Chapter Five, and will bring us back to a more direct engagement with the interpretation of Locke offered above.

Chapter Four
The Abstract Right and Terror of Modern Colonialism in Hegel's
Phenomenology of Spirit

Adam Smith once claimed that the “discovery of America” was one of “the two greatest and most important events recorded in the history of mankind.”³⁶² Whether or not one concurs with Smith, few would disagree that modern colonialism in general, and the colonization of the Americas in particular, fostered a revolution in Europe’s self-understanding, entailing racial, political, religious, and economic upheavals as significant as any in the shaping of modernity. It was, indeed, an othering of global proportions in which the “discovery” of the “New World” was simultaneously the invention of the “Old”. Howard Winant reflects this view when he writes: “By evolving systems of enslavement and conquest that differentiated their ‘nationals’ (soldiers, settlers) from the proto-racial ‘others’ who were the conquered and enslaved, imperial nations also consolidated themselves. They were not only the French, the Portuguese, the Dutch, the British; they were also the whites, the masters, the true Christians.”³⁶³ Informing Winant’s assessment—shared by Aimé Césaire, Frantz Fanon, Albert Memmi, and

362 The second was the discovery “of a passage to the East Indies by the Cape of Good Hope.” Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Vol. I and II, ed. R. H. Campbell and A. S. Skinner, Vol. II of the *Glasgow Edition of the Works and Correspondence of Adam Smith* (Indianapolis: Liberty Fund, 1981), 626. Smith goes on to acknowledge the devastation of indigenous peoples that followed. Cf. Marx’s description of the economic significance of colonialism for primitive accumulation as well as the human tragedy and racism it entailed. Karl Marx, *Capital: A Critique of Political Economy*, Volume I (London: Lawrence & Wishart, 1983), Chapter 31, 703ff.

363 Howard Winant, *The World is a Ghetto* (New York: Basic Books, 2001), 23.

Edward Said, among so many others³⁶⁴—is an understanding of identity formation attributable to the intersubjective, recognitive model of self-consciousness (i.e. the dialectic of lordship and bondage) within the development of spirit in Hegel’s *Phenomenology* (IV.A).³⁶⁵

While it is easy to see how one could quite generically apply this model to modern colonialism, taking it as significant experiences for colonizer and colonized alike, it might then be surprising that Hegel does not.³⁶⁶ That is to say, the experience of European colonialism does not play a role in the actualization of what we might call the Western European *spirit* within the logic of the *Phenomenology*.³⁶⁷ Perhaps even more intriguing is that contrary to his silence concerning modern European colonialism, Hegel attributes great phenomenological significance to colonial experiences in the preceding

364 See Aimé Césaire, *Discourse on Colonialism*, translated by Joan Pinkham (New York: Monthly Review Press, 2000[1955]); Frantz Fanon, *The Wretched of the Earth*, translated by Constance Farrington (New York: Grove Press, Inc, 1968 [1961]); Albert Memmi, *The Colonizer and the Colonized* (Boston: Beacon Press, 1967 [1957]); and Edward Said, *Orientalism* (New York: Vintage, 1979). See also Charles Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997), chapter 3. Contra tradition, these authors theorize from the perspective of colonial subjects, and in the work of Césaire and Fanon in particular, we can detect the influence of French Marxist readings of the *Phenomenology*, such as those of Alexandre Kojève, Jean Hyppolite, and, subsequently, Jean Paul Sartre.

365 The intersubjective and recognitive starting point of Hegel’s model originates, to be sure, in Fichte. See J. G. Fichte, *Foundations of Natural Right: According to the Principles of the Wissenschaftslehre*, edited by Frederick Neuhouser and translated by Michael Baur (Cambridge: Cambridge University Press, 2000). I take up Fichte’s analysis only briefly in Section 2.1 of this chapter, but at greater length in Chapter Five. For an earlier discussion of lordship and bondage by Hegel, see his *System of Ethical Life* (1802/03), 125ff.

366 Susan Buck-Morss argues that Hegel’s lordship and bondage model is most likely taken from the current events of his days in Jena, namely, the Haitian slave revolts and revolution. See Buck-Morss, “Hegel and Haiti,” *Critical Inquiry*, Vol. 26, No 4 (Summer, 2000), 821-865.

367 This is not necessarily the case in the later *Philosophy of Mind*, where we find the following provocative and theoretically inconsistent claim: “To become free, to acquire the capacity of self-control, all nations must therefore undergo the severe discipline of subjection to a master...Slavery and tyranny are, therefore, in the history of nations a necessary stage and hence *relatively* justified.” Hegel, *Philosophy of Mind, Part Three of the Encyclopaedia of the Philosophical Sciences* (1830), translated by William Wallace (Oxford University Press, 1971), §435, *Zusatz*.

world-historical spirits of the Greek and Roman empires, and in the *Phenomenology*, the rise of abstract legal personality is arguably the result of imperialism. Europe's contact with other nations through *modern* colonialism, however, is "entirely different from that sustained by the Greeks and Romans," Hegel explains, because "the Christian world is the world of completion," the "grand principle of being is realized," and "the end of days is fully come."³⁶⁸

This is not to suggest that the conflicted model of lordship and bondage disappear, but rather that the terms of the dialectic have changed, insofar as subsequent shapes of spirit internalize the lordship and bondage relation within a single self-consciousness: "In Stoicism, self-consciousness is the simple freedom of itself. In Skepticism, this freedom becomes a reality, negates the other side of determinate existence, but really duplicates *itself*, and now knows itself to be a duality. Consequently, the duplication which formerly was divided between two individuals, the lord and the bondsman, is now lodged in one."³⁶⁹ This unhappy consciousness thus has within it what Hegel calls a unity of the changeable and unchangeable (*PS* §208), the latter being that (stoical) abstract self eventually to find recognition in law. This development is, however, only subsequent to the experiences of spirit as reason, moving through its observing and active moments, before its empty idealism can find content in the world it itself constitutes through the work of self-consciousness. It is only then that the universality of abstract right—

368 Ibid., 342.

369 Hegel continues: "The duplication of self-consciousness within itself, which is essential in the Concept of Spirit, is thus here before us, but not yet in its unity: the *Unhappy Consciousness* is the consciousness of self as a dual-natured, merely contradictory being." Hegel, *Phenomenology of Spirit*, §206. When referring to the original German, or when altering Miller's translation, I use the Meiner edition: G. W. F. Hegel, *Phänomenologie des Geistes*, newly edited by Hans-Friedrich Wessels and Heinrich Clairmont (Hamburg: Felix Meiner Verlag, 1988).

represented historically by the Roman Empire—gains recognition in the emergence of *personality* out of ethical immediacy, whose mediating (legal) institutions are property and contract and whose legitimacy is grounded in universal reason. All of this is only to say that if we are to remain true to Hegel’s methodological precepts, any phenomenological significance to be found in the experience of European colonialism would be within the context of the relations of right achieved subsequent to the lordship and bondage struggle for recognition (of natural self-consciousness and between two selves) in Chapter IV of the *Phenomenology*.³⁷⁰ In other words, if one were to give a phenomenological account of modern colonialism in keeping with the methodology of Hegel’s text, it would be a *phenomenology of right (Recht)* within the objective spirit of “Culture.”³⁷¹ This is where we can locate the positing, testing, and negations of (inadequate) conceptions of right implicated in struggles over the establishment and recognition of *jurisdiction* beyond the nation-state, which are at the heart of colonialism.³⁷²

370 In the *Philosophy of Mind*, Hegel claims that the lordship and bondage struggle is antecedent to civil society and the State: “To prevent any possible misunderstandings with regard to the standpoint just outlined, we must here remark that the fight for recognition pushed to the extreme here indicated can only occur in the natural state, where men exist only as single, separate individuals; but it is absent in civil society and the State because here the recognition for which the combatants fought already exists.” Hegel, *Philosophy of Mind*, §432, *Zusatz*.

371 The claim that there is a “phenomenology of right” in Hegel’s *Phenomenology* is not uncontroversial. Some interpreters of the *Phenomenology* argue that right is philosophically marginal to Hegel’s discussion, which is read instead as a narrative of subjective spirit alone. I read the *Phenomenology* as a narrative of the phenomenological (not philosophical) development of all three dimensions of spirit: subjective, objective, and absolute. On this reading, Hegel does not articulate a theory of the state in his *Phenomenology*, for all (historically identifiable) forms of right discussed are deficient, but a phenomenological account of right’s development is indeed provided. It is only after the development of spirit conveyed in the *Phenomenology* is completed that a philosophical or deductive account of right can be given, which is the project of Hegel’s *Philosophy of Right*.

372 As I wrote in my Introduction to the dissertation, all justificatory arguments for colonialism contain an implicit or explicit theory of the establishment of legitimate jurisdiction (*jurisdiction*), which

In the following I take up the experience of modern colonialism within the context of Hegel's *Phenomenology* in an immanently critical attempt to foster a deeper appreciation and broader context for Hegel's notion of objective spirit, his critique of the social-disintegrating and alienating force of legal personality, and the terror that arises from absolute freedom. While this is intended to enrich Hegel's analysis in "Culture" insofar as I apply it to phenomena previously excluded from consideration, it also foregrounds—and, thus, integrates or appropriates—two significant developments in the sphere of natural or abstract right within the modern Catholic and Protestant natural law traditions; developments I have already discussed at some length in previous chapters. The theorists of these traditions—from Francisco de Vitoria and Bartolomé de las Casas, to Hugo Grotius and John Locke—provided justificatory strategies for establishing nonconsensual colonial jurisdiction, which were, in turn, significantly transformed by the actual experience of colonialism.

In the case of the Catholic tradition, I demonstrate how well we can understand the dialectical development of a secularized jurisdiction as well as the concept of (universal) personality—understood in terms of *dominium*—in the natural law debates over the legitimacy of Spanish slavery and sovereignty in the Americas within the context of the objective spirit of the *Phenomenology*. The most important of these

itself entails a more fundamental theory of the generation of right (*ius* or *Recht*). Jurisdiction is at its root the speaking (*dictio*) of right (*ius*) and the power to administer justice (*iustitia*). Whether conceptualized as antecedent to political society or as beyond the territorial boundaries of an existing one, the generation of right in what was called a "state of nature" in the natural law tradition, relies on a principle of universality—located in natural law, reason, or will (divine or human)—for in the case of the pre-political, there is no other right to which it can appeal, and in the case of the inter-national, it must be able to trump the legitimacy of existing conventional right. The need for the colonial powers to give an account of the *establishment of right* and to justify their *jurisdictional expansion* was pivotal in the development of the modern natural law theory that informed the natural-rights constitutional and revolutionary moments of the late eighteenth century.

debates—initiated by the horrific tales of terror and genocide emerging from the colonies—was, we have seen, between Sepúlveda and Las Casas on the topic of the justness of Spanish conquests and carried out in Valladolid (1550-51). The upshot of this debate, and the texts produced by Vitoria in response to earlier, yet similar debates, was the establishment of universal legal personality (based on reason) and the a principle of secular political jurisdiction within Catholic natural law theology and law.³⁷³

From the Protestant tradition, I turn to the *individual* natural right to punishment (*ius gladii*) advocated by Grotius and taken up by Locke, which, as I have previously argued, justifies dispossession and enslavement of indigenous peoples for violating natural law. Unlike the Catholic example above, which I use to critique Hegel’s exclusion of modern colonialism from his articulation of the development of objective spirit, my example from the Protestant tradition is intended to demonstrate the fruitfulness of Hegel’s analysis in “Culture” when it is applied to the colonial context. The right to private punishment was expansively interpreted to include the right to punish even when one is not physically or materially injured by the transgression, for the violation was a violation of universal reason. I situate this conceptual development within the context of Hegel’s analysis of “Absolute Freedom and Terror” (VI B III)—intended as an account of the Terror that followed the French Revolution—wherein the *absolute freedom* of individuality “ascends the throne of the world without any power being able to resist it” and that “its purpose is the general purpose, its language universal law, its work the

373 As noted in Chapter Two, it was thus resolved that the only way to establish Spanish private *dominium* was through first occupation, and the only way to establish both *private and public dominium* was through just war. War would be just if the natural right of Spaniards to travel, trade, occupy land, or preach is resisted, and under the law of nations (*ius gentium*), victory entails legitimate dispossession and enslavement.

universal work” (*PS* §585) from which follows the “fury of destruction” (*PS* §589). It is in the colonial context (i.e. the colonial “state of nature”) where, I argue, we can find an illustrative example of unmediated personality—free from differentiation into legislative, judicial, and executive powers and unifying the universal and individual will—which unleashes the “sheer terror of the negative” (*PS* §594).³⁷⁴

Thus, I argue in the following that modern European colonialism was, on Hegel’s own terms, significant in the development of European (objective) spirit and that we can therefore locate the experience and consequences of it, contra Hegel, within the logic of the *Phenomenology*. After incorporating categories developed in the *Philosophy of History*, I use the above two examples from the modern Catholic and Protestant natural law traditions to illustrate my argument, demonstrating their dialectical emergence from the colonial experience. These developments essentially bookend the development of objective spirit within “Culture” (i.e. from legal personality to absolute freedom and terror), and provide the philosophical context for my argument in Chapter 5, which takes up Hegel’s theory of colonialism in the *Philosophy of Right*, and his critical stance toward the natural law tradition discussed above.

³⁷⁴ “Spirit thus comes before us as *absolute freedom*... It is conscious of its pure personality and therein of all spiritual reality, and all reality is solely spiritual; the world is for it simply its own will, and this is a general will.” *PS* 584.

I. World-historical Spirit and the Individual

According to Hegel, there are four phases in world history, which manifest themselves in four worlds or empires: the Asian; Central Asian (Greek); Roman; and Germanic. “The history of the world,” he writes, “travels from East to West, for Europe is absolutely the end of history, Asia the beginning.”³⁷⁵ The realization of spirit in Protestant Europe is the final phase of its Westward journey, which, after negating the ethical immediacy of customary life and the self-alienated actuality of cultural life, finally returns home, within itself (after the Reformation), in universal self-consciousness and freedom. This path of return, of homecoming—traversing through its self-differentiating moments of consciousness, self-consciousness, reason, and (immediate) spirit—is tragic, self-critical, educative, and above all redemptive, for Hegel’s tale of the modern world is a theologically-inflected one; it has a destiny, it is a theodicy.³⁷⁶ Rising from a spiritual slumber, which, submersed in nature, experienced no opposition and thus no development, spirit experiences suffering, diremption, and alienation—“the terrible discipline of culture,” as he calls it³⁷⁷—only to ultimately find reconciliation by overcoming the last of its unreal (self-generated) oppositions.

375 Hegel, *The Philosophy of History*, translated by J. Sibree (New York: Dover, 1956), 103. The Asian phase of history is, however, pre-spiritual or “unhistorical history” (105), so although world history is said to have four phases, there are only three world-historical (national) spirits.

376 In the concluding paragraph of his *Philosophy of History*, Hegel writes: “That the history of the world, with all the changing scenes which its annals present, is the process of development and the realization of spirit—this is the true *Theodicaea*, the justification of God in history” (457). See also Hegel, *Philosophy of History*, 15.

377 Hegel, *Philosophy of History*, 344.

This progression of world-spirit is the progression of the individual, for world-spirit is its substance. That is to say, the individual is the product of the “enormous labour of world-history” (*PS* §29), of consciousness’s bumpy and conflicted journey through its successive shapes.³⁷⁸ “As the individual works his way individually from the immediate perception of objective reality to the point where its rationality is discerned,” writes Lukács, “he traverses all the phases of man’s history up to the present.”³⁷⁹ It is only at the end of this formative journey that a fully reflexive moment becomes possible, allowing the individual to appropriate or “inwardize” this history—or “Spirit emptied out into Time” (*PS* §808)—for itself and thus comprehend its own substance.³⁸⁰ It is only then that knowledge of world history becomes self-knowledge, when history becomes recollection, bringing the universal and the individual, subject and object, into union: “As its fulfillment consists in perfectly *knowing* what *it is*, in knowing its substance, this knowing is its *withdrawal into itself* in which it abandons its outer existence and gives its existential shape over to recollection” (*PS* §808). Until that moment, the individual is estranged from a seemingly distinct and contingent history operative behind its back, not yet comprehending the rationality and dialectical dynamic of history’s movement.³⁸¹ The

378 “The single individual must also pass through the formative stages of universal Spirit so far as their content is concerned, but as shapes which Spirit has already left behind, as stages on a way that has been made level with toil.” *PS* §28.

379 However, he continues, “he is *not yet* conscious of them as history, but as a sequence of different human destinies. What the acquisition of rationality means to the individual self-consciousness is that he gradually comes to perceive the real character of society and history is something created by men together.” Georg Lukács, *The Young Hegel: Studies in the Relations between Dialectics and Economics*, translated by Rodney Livingstone (Cambridge, MA: The MIT Press, 1975), 470.

380 See *PS* §804.

381 “This past experience is the already acquired property of universal Spirit which constitutes the Substance of the individual, and hence appears externally to him as his inorganic nature,” a nature that he

reader of the *Phenomenology* is thus the beneficiary of two different histories—that of the individual and of universal spirit—whose difference is no difference but to the fettered individual consciousness whose coming-of-age story we follow through its pages. In reading it, however, it becomes our story as well.³⁸²

Spirit, Hegel tells us, “is essentially the result of its own activity: its activity is the transcending of immediate, simple, unreflected existence—the negation of that existence, and the returning into itself.”³⁸³ We can think of this activity as the production and supersession of oppositional terms, which animate the immanent process of consciousness’s dialectical self-movement along what Hegel famously called the path of despair. That is to say, the immanent movement of Spirit is the result of self-differentiation (as original division or *Urteil*) into different shapes, engendering a dialectic of negation (of spirit’s own self-sundering),³⁸⁴ which thrusts it forward into a new stage. Such division, opposition, and overcoming is essentially an *epistemic* process of positing, testing, and negation, so that the totality of Spirit’s activity is conceived by Hegel as a process of *knowing*; a positing of object and the criterion for knowing that object—both of which ultimately exist within the same consciousness that posits them—which is then immanently tested through process of experience (*PS* §82). When the present form of consciousness is found lacking in light of its own standards, the

must take “possession of it for himself.” *PS* §28

382 See Alexandre Kojève, *Introduction to the Reading of Hegel: Lectures on the Phenomenology of Spirit*, edited by Allan Bloom and translated by James H. Nichols, Jr. (New York: Basics Books, 1969), 92-3.

383 Hegel, *The Philosophy of History*, 78.

384 It is, indeed, the process of life itself and, as Harris reminds us, the “embodied logic of the *Phenomenology* is how ‘the Concept mediates between itself and life.’” H. S. Harris, *Hegel’s Ladder I: The Pilgrimage of Reason* (Indianapolis: Hackett, 1997), 40. See Hegel’s description of “life” in *PS* §§171-77.

knowledge and subsequently the object are superseded, producing new ones in turn (*PS* §85). With the production of a new object and new knowledge “a new pattern of consciousness comes on the scene as well” (*PS* §87), making the entire experience of positing, testing and negation phenomenologically significant in spirit’s development. It is, one could say, a series of forms of false consciousness, necessarily leading to the true form of consciousness in *absolute spirit*. The *Phenomenology*, as a “Science of the *experience of consciousness*” (*PS* §88), is thus best understood as a systematic account of the successive patterns of consciousness generated by these phenomenological experiences, ultimately culminating in *absolute knowing*.³⁸⁵ It is, Hegel writes, a description of the “coming-to-be of *Science as such* or of *knowledge*” (*PS* §27), which is only possible after the achievement of spirit’s cognitive appropriation of its substance.³⁸⁶ The development of self-consciousness (V.B) within this model of spirit’s dialectical progression is conceived by Hegel as “essentially the return from *otherness*” (*PS* §167). It is a return to self through the overcoming of its own externalization in the other, bringing to light, as we shall see, the double-ground or intersubjectively mediated condition of freedom.

According to Hegel, the dialectical achievement of self-consciousness involves three stages: abstract immediacy, abstract universality, and mediated universality, or forms of immediate, universal, and reflected unity (*PS* §172). The three distinct moments

385 Robert C. Solomon is perhaps more on target when he writes that “Hegel’s *Phenomenology* is not so much about experience as it is about *changes* in experience.” See Solomon, *In the Spirit of Hegel: A Study of Hegel’s Phenomenology of Spirit* (New York: Oxford University Press, 1983), 13.

386 That is to say, science “does not appear in Time and in the actual world before Spirit has attained to this consciousness about itself. As Spirit that knows what it is, it does not exist before, and nowhere at all, till after the completion of its work of compelling its imperfect ‘shape’ to procure for its consciousness the ‘shape’ of its essence, and in this way to equate its *self-consciousness* with its *consciousness*” (*PS* §800).

of self-consciousness's doubling and return begins when the pure, undifferentiated 'I' is taken as its immediate object (*PS* §173). Yet, as Hegel reminds us, the movement of self-consciousness entails otherness, for "this abstract object will enrich itself for the 'I' and undergo the unfolding which we have seen in the sphere of Life" (*PS* §173). This enriching and unfolding is attributable to the passive medium of life as universal substance; the in-itself whose natural diremption into different shapes produces the otherness of difference (*PS* §171). It is otherness which this moment of self-identity seeks, but fails, to exclude. In the second moment, self-consciousness attempts to achieve self-certainty by "superseding this other that presents itself to self-consciousness as an independent life" (*PS* §174). Hegel calls this state of self-consciousness "desire" (*Begierde*).³⁸⁷ The catch-22 in this moment is that self-certainty depends upon the supersession of the object, thus creating and recreating a relation of dependency precisely through its attempt to achieve independence. "Desire and the self-certainty obtained in its gratification, are conditioned by the object, for self-certainty come from superseding this other: in order that supersession can take place, there must be this other" (*PS* §175). The object is thus continually reproduced and so too the desire to supersede it, keeping the goal of real independence perpetually elusive. The true satisfaction of desire is only accomplished in the third moment with "the reflection of self-consciousness into itself" (*PS* §176), which results in the duplication of self-consciousness, and thus the abovementioned double-ground of freedom:

387 As Hyppolite rightly points out: "In the practical part of the *Science of Knowledge*, Fichte discovered impulse (*Trieb*) to be at the base of theoretical consciousness as well as of practical consciousness, and he showed that the first condition of this sensuous instinct was 'an instinct for instinct,' a pure action in which the I strives to rediscover the 'thetic' identity of self-consciousness." Jean Hyppolite, *Genesis and Structure of Hegel's Phenomenology of Spirit*, translated by Samuel Cherniak and John Heckman (Evanston: Northwestern University Press, 1974), 157.

Consciousness has for its object one which, of its own self, posits its otherness or difference as a nothingness, and in so doing as independent. The differentiated, merely living shape does indeed also supersede its independence in the process of Life, but it ceases with its distinctive difference to be what it is. The object of self-consciousness, however, is equally independent in this negativity of itself; and thus it is for itself a genus [*Gattung*], a universal fluid element in the peculiarity of its own separate being; it is a living self-consciousness (*PS* §176).

It is at this moment that sociality is recognized to be both internal and integral to a free and independent self-consciousness, the famous “‘I’ that is a ‘We’ and ‘We’ that is an ‘I’” (*PS* §177). “The road to interiority passes through the other,” writes Robert Williams.³⁸⁸ This understanding of the inherently social grounds of self-consciousness was certainly not an innovation on Hegel’s part. Indeed, it is difficult to understand Hegel’s ideas of freedom and self-consciousness without viewing them as greatly influenced by, and responding to, their immediate precursors in Fichte’s *Foundations of Natural Right* (1796-7) and Schelling’s *System of Transcendental Idealism* (1800).³⁸⁹ Although I take up these subjects at greater length in my treatment of Hegel’s *Natural Law* essay and the *Philosophy of Right* in Chapter Five, it is helpful to anticipate here some of the connections between recognition, right, and freedom. Fichte, for example, provocatively couples a Kantian transcendentalism—“The concept of right should be an original concept of pure reason”³⁹⁰—with an original argument for reciprocal recognition (*Anerkennung*) as the condition for the possibility of self-consciousness. Right, for Fichte, is thus not only a necessary and thus deducible concept, which has its source in

³⁸⁸ Robert R. Williams, *Hegel’s Ethics of Recognition* (Berkeley: University of California Press, 1997), 49.

³⁸⁹ I say “immediate” here, because, of course, Rousseau and Kant are the eight-hundred pound gorillas in the room about whom I can say very little due to limitations of space and time.

³⁹⁰ Fichte, *Foundations of Natural Right*, 9.

human reason, but it is necessary relational, for “the *complete object* of the concept of right,” is “a *community among free beings as such*.”³⁹¹ Unlike Kant, however, right entails “no talk of moral obligation.”³⁹² The concept of right “is the concept of the necessary relation of free beings to one another.”³⁹³ That is to say, the cognitive relation of right entails that one posits the existence of other equally rational individuals, which simultaneously allows one to ascribe a “free efficacy” to oneself and to them as they do the same. As Fichte writes, the “concept of *individuality* is a reciprocal concept, i.e. a concept that can be thought only in relation to another thought, and one that (with respect to its form) is conditioned by another—indeed by an *identical*—thought...it is a shared concept within which two consciousnesses are unified as one.”³⁹⁴

As is well known, the initial process of coming to terms with this “shared concept” by natural consciousnesses is dramatically portrayed by Hegel in the dialectic of the lordship and bondage (*Herrschaft und Knechtschaft*) struggle for recognition; relational terms given to the “two opposed shapes of consciousness” resulting from the aforementioned dichotomous dissolution of the simple or immediate unity of the ‘I’ (*PS* §189).³⁹⁵ As we have already seen with the three moments of the abstract concept above,

391 Ibid., 10.

392 Ibid., 10.

393 Ibid. 9.

394 Ibid. 45. Cf. Kant: “Right is therefore the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom.” Kant, *The Metaphysics of Morals*, §B., in *Political Writings*, edited by Hans Reiss (Cambridge: Cambridge University Press, 1996), 133.

395 Fichte did not see the moment of mutual recognition as Hegel does, as the outcome of a struggle, since “it is impossible to superimpose upon a human shape any concept other than that of oneself, every human being is inwardly compelled to regard every other human being as his equal” (74). This, he

self-consciousness here begins with “simple being-for-self, self-equal through the exclusion from itself of everything else” (*PS* §186). This “everything else” includes other self-consciousnesses—the product of the process of life—which have not yet been taken or recognized as such. From this condition, this division, there arises the immediate desire for self-certainty or self-possession, for pure self-consciousness through the negation of its own externality, or what Hegel calls its “objective mode” (*gegenständlichen Weise*). The self thereby attempts to take possession of the other, positing it as *thing-like*, or as *immediate consciousness* (*PS* §189).³⁹⁶ This is a life and death struggle, for self-consciousness must show that “it is not attached to any specific existence [*Dasein*], not to the individuality [*Einzelheit*] common to existence as such, that it is not attached to life” (*PS* §187). One must therefore risk one’s own life to prove one’s independence from natural existence, i.e. to win freedom, although death as the non-dialectical natural negation of consciousness is itself no solution (*PS* §§187-88). And even when death is avoided, reciprocal recognition is not won, for the two intertwined self-consciousnesses enter into an unequal relation of dependency. That is to say, this struggle to secure self-certainty, to supersede the independence of the other in order to shore up its own, i.e. to achieve freedom, is doomed to fail. This, however, seems to be a

says, does not arise “through habituation and learning, but through nature and reason,” (75), thus “one should not think...that the human being must first go through the long and difficult reasoning process we have just carried out, in order to understand that a certain body outside him belongs to a being that is his equal. Such recognition either does not occur at all, or it is achieved instantaneously, without being aware of the reasons for it” (76). Thus the question of “how do I know whether the protection afforded by [Kant’s principle of] universal legislation befits only the white European, or perhaps the black Negro” (75), is supposedly already answered.

³⁹⁶ “In place of the rude destruction of the immediate object there ensues acquisition, preservation, and formation of it, as the instrumentality in which the two extremes of independence and non-independence are welded together.” Hegel, *Philosophy of Mind*, §434. See also Harris’s enlightening discussion in Harris, *Hegel’s Ladder* I, 345ff.

necessary process for Hegel, for it is through the mediating position of bondage, for example, that the servile self-consciousness achieves self-will and freedom—the bondsman is ultimately the “truth” of self-consciousness.³⁹⁷ This happens, first, through his service to the lord, which “rids himself of his attachment to natural existence... by *working on it*” (PS §194),³⁹⁸ and, second, through the experience of absolute fear to shake off its determinate being, thus overcoming the merely formal “inward and mute” fear that had prevented it from had becoming explicitly *for itself*: “In the lord, the being-for-self is an ‘other’ for the bondsman, or is only *for him* [i.e. is not his own]; in fear, the being-for-self is present in the bondsman himself; in fashioning the thing, he becomes aware that being-for-self belongs to *him*, that he himself exists essentially and actually in his own right” (PS §196).

We might recall my discussion in Chapter One (Section 4) concerning the idea of *self-dominium*, which stretched from Aristotle and Aquinas through the natural lawyers, the latter translating this into self-ownership or having property in one’s person.³⁹⁹

Aquinas, for example, argued that “nothing is more desirable to man than the liberty of

397 See Kojève, *Introduction to the Reading of Hegel*, chapter 1, and Hyppolite, *Genesis and Structure of Hegel’s Phenomenology of Spirit*, Part III. This necessary trial by fire is perhaps the motif of the entire *Phenomenology* and found throughout his later works. See quote from Hegel’s *Philosophy of Mind*, §435, *Zusatz*, footnote 6. In the *Philosophy of History* we find that the “Church fought the battle with the violence of rude sensibility in a temper equally wild and terroristic with that of its antagonist: it prostrated the latter by dint of the terrors of hell, and held it in perpetual subjection, in order to break down the spirit of barbarism and to tame it into repose. Theology declares that every man has his struggle to pass through, since he is by nature evil, and only by passing through a state of mental laceration arrives at the certainty of reconciliation” (407).

398 “Through this rediscovery of himself by himself, the bondsman realizes that it is precisely in his work wherein he seemed to have only an alienated existence that he acquires a mind of his own.” PS §196.

399 Although, as we saw in Chapter One, Section 4, Henry of Ghent was exceptional in this case in that as early as the thirteenth century he spoke of having property (*proprietas*) in one’s person.

his proper will [*propiae voluntatis*]. For it is this that he is a man and master [*dominus*] of other things;” it is “his proper will, by which he is master [*dominus*] of himself.”⁴⁰⁰

Suárez echoed this writing: “nature itself confers upon man the true property [*dominium*] of his liberty, [and]... he is not the slave, but the master [*dominus*] of his actions.”⁴⁰¹ We could thus say that Hegel is going back to this earlier understanding of *dominium* as *will* rather than *property* and therefore it is through the bondsman’s negation of objects in the world via his labor that he becomes conscious of his will and thus achieves an important step in the realization of subjective freedom. Unlike this tradition, freedom, for Hegel, is not a natural endowment, but rather the result of the (historical) objectification and institutionalization of social structures that recognize the interaction of free wills. That is to say, becoming for-itself is not enough, for we do not yet have the development of personality and abstract right; a point I discuss at greater length below.

In any case, the hard lesson to be learned is this initial struggle for recognition is that recognition must, in the end, be reciprocal: they “must *recognize* themselves as *mutually recognizing* one another” (PS §184), for “*self-consciousness achieves its satisfaction only in another self-consciousness*” (PS §175). As with all of consciousness’s failures, however, it is an educative one, for, as we will see, this experience opens up a *universal* form of spirit (Reason) represented by Stoicism, thus setting in motion the dialectical triad of Stoicism, Skepticism, and Unhappy Consciousness, leading us to the

400 Aquinas, *De perfectione spiritualis vitae*, Chapter 11, 79; cited in Brett, *Liberty, Right and Nature*, 14.

401 Suárez (2.14.16), cited in Tully, *A Discourse of Property*, 111.

dualistic self-estrangement of Culture (*Bildung*).⁴⁰² As noted in my Introduction, we should remember that this discussion of the dialectic of lordship and bondage precedes, yet is absolutely integral to, the development of legal personality and the condition of right in Hegel's subsequent phenomenology of law.⁴⁰³

When self-consciousness achieves freedom, it becomes a thinking, not just a living, self-consciousness, for the universality of thought is itself necessary for freedom. "In thinking, I *am free*, because I am not in an other, but remain simply and solely in communion with myself, and the object, which is for me the essential being, is in undivided unity my being-for-myself" (*PS* §197). The object of thought is thus the immediate unity of being-in-itself and being-for-itself, and the first form of consciousness capable of such thinking is called stoical. The Stoic, as we know, aims to be free in thought, taking an indifferent disposition that "steadfastly withdraws from the bustle of existence" (*PS* §199). "Freedom in thought has only pure thought as its truth, a truth lacking the fullness of life. Hence freedom in thought, too, is only the concept of freedom, not the living reality of freedom itself" (*PS* §200).⁴⁰⁴ It is an attempt to withdraw from the determinations of the world and is thus still abstract, an incomplete

402 Stoicism, writes Hegel, "is the freedom which always comes directly out of bondage and returns into the pure universality of thought. As a universal form of the World-Spirit, Stoicism could only appear on the scene in a time of universal fear and bondage, but also a time of universal culture which had raised itself to the level of thought." *PS* §199.

403 As Hyppolite writes: "It is noteworthy that Hegel is interested here only in the individual development of self-consciousness; he will show the social consequences of the recognition he discusses here only in the part of the *Phenomenology* that deals with spirit. There, the juridical world of persons, the world of Roman law, corresponds to stoicism." Hyppolite, *Genesis and Structure*, 172.

404 Robert Solomon rightly reminds us of the stoicism evident in Fichte's *Vocation of Man*, where he says, "...with this insight, mortal, be free, and forever released from the fear which has degraded and tormented you. You will no longer tremble at a necessity which exists only in your own thought, no longer fear to be crushed by things which are the product of your own mind" (83). Cited in Solomon, *In the Spirit of Hegel*, 461.

negation of otherness, which is unable to give content to its thought (and thus posit any criteria of truth).⁴⁰⁵ The attempt to realize the absolute negativity of this concept of freedom in the fullness of the world, of which stoical consciousness is incapable, is the truth of *skeptical* consciousness. Together, as two moments of consciousness, stoicism and skepticism are the new placeholders of the lord and bondsman in the previous dialectic, insofar as the former represents their abstract independence and the latter their realization of independence in the world: “It is clear that just as Stoicism corresponds to the *Concept* of the *independent* consciousness which appeared as the lord and bondsman relationship, so Skepticism corresponds to its *realization* as a negative attitude towards otherness, to desire and work” (*PS* §202). Skepticism, like stoicism, denies the world of determinations in which it (negatively) acts by taking them as inessential and, further, its relation to them as inessential. “What Skepticism causes to vanish is not only objective reality as such, but its own relationship to it, in which the ‘other’ is held to be objective and is established as such” (*PS* §204). Keeping these two moments apart—i.e. the universal form of stoical freedom in thought, and the recognition of the determinate world it tries to deny—results in a contradictory consciousness. “It does not itself bring these two thoughts of itself together. At one time it recognizes that its freedom lies in rising above all the confusion and contingency of existence, and at another time equally admits to a relapse into occupying itself with what is unessential” (*PS* §205). Unhappy consciousness, as I mentioned in the Introduction, is the unity of these two contradictory moments in one self-consciousness, i.e. it holds the essential and unessential, the

405 “To the question, *What* is good and true, it again gave for an answer the *contentless* thought: The True and Good shall consist in reasonableness. But this self-identity of thought is again only the pure form in which nothing is determined.” *PS* §200.

unchangeable and changeable within itself. It participates in the universal (of reason and will), but cannot reside there, for it is grounded in the world as a particular (body of desire and finitude), and the awareness of this duality is the cause of its unhappiness; it is the truth of early Christianity, of which St. Augustine is perhaps the classic example (and the medieval Church its real institution).⁴⁰⁶

My reasons for rehearsing this development of spirit in the *Phenomenology* is to locate the emergence of the universal in stoical consciousness—as an outcome of the struggle of lordship and bondage, which has now initiated a struggle from within unhappy consciousness, whose dualism will come to define culture.⁴⁰⁷ The stoical moment, as formal reason, is capable of participating in a condition of right, it “embraces a specific mode in which ethical laws, too, are present as sovereign commandments” (*PS* §203). It is thus capable of being recognized as a *person*.⁴⁰⁸ The skeptical moment is, however, a perpetually undermining force, for it throws into question the plausibility of legitimately making stoical ethical laws a basis of practical philosophy, since our relation to the world is said to be unessential, contingent, and conventional. Skepticism is antagonistic to the laws of the Understanding, taking *mere* appearance, which is subject

406 “In the historical progression from Stoicism, culminating in the philosophy of Marcus Aurelius in the second century A.D., to Skepticism, as summarized by Sextus Empiricus in the second century too, Augustine fits in perfectly, following the intervening period of the Gnostics, Plotinus, and other varieties of neo-Platonist philosophy. Augustine’s Christian philosophy was thoroughly dualistic, so painfully obvious in his own *Confessions*. He saw himself torn between two selves, the bodily self of desire and needs in bewildering confusion, and the rational self of the will with its quest for unity with God and the eternal. Augustine more than anyone...is the ‘unhappy consciousness’. But Hegel doesn’t even allude to him.” Solomon, *In the Spirit of Hegel*, 467. See also Harris, *Hegel’s Ladder I*, 395ff.

407 “In the prelegal context of Lordship and Bondage, *Eigensinn* was already a *skill*; but now, in the cultured world of Stoicism, it is the free consciousness that is defined by legal recognition. The legal right of a skilled craftsman is a special case of legal recognition; the finite bourgeois concept of self-conscious existence has moved forward in step with the ‘infinite’ (or philosophical/religious) concept of universal humanity.” Harris, *Hegel’s Ladder I*, 386.

408 Cf. Locke’s definition of a person in Chapter One, Section 4.2.

to contradictory interpretations, as proof of the impossibility of truth (not yet realizing that contradiction is part of the truth as a whole). The tension which thus arises between these two views is found in the chasm between universal natural law of *humanity* (recognized by the Stoic) and the positive laws emanating from the contingent individual will of a (secular) sovereign (observed by the Skeptic). “The Stoic does not take the alien authority of another’s will as the criterion of truth,” writes Harris. “The conviction of the Emperor that he is indeed ‘Lord of the world’ is only a vain ‘sense of his own’; it is no more significant than the Stoic’s own abstractly singular will.”⁴⁰⁹ The purported solution to the contentless or formal universal reason of stoicism is, of course, Christianity, for the Christianization of earthly lordship (as exemplified by Constantine in 312 A.D.) is the antidote to the Skeptics’ doubt concerning the contingency of the emperor’s will; the will of a Christian emperor is no longer just any other will. The universal, however, is still a beyond, still external, for this conflicted consciousness: “what it does *not* know is that this object, the Unchangeable, which it knows essentially in the form of individuality, is *its own self*, is itself the individuality of consciousness” (PS §216). This knowledge will not fully come, the appropriation of the alienated universal will not fully take place, until Luther and the Reformation—but will still be challenged afterward by the sensuousness of Catholicism (and its reliance upon a “mediator” (PS §228)) and the alienation of Enlightenment—there is still a unification of individual with the universal will, albeit conducted through an external mediator, and thus the idea of Reason in its *subjective* moment is made possible.⁴¹⁰

409 Ibid. 387.

410 “Unhappy Consciousness,” writes Harris, “does not take itself to be God’s Will, because

II. Reason, Ethical Substance, and the Rise of Personality

The development of Reason as universal self-consciousness, its movement from observing to active Reason, will give birth to ethical substance—the *objectification* of spirit in nations—and thus the simple universality (i.e. social harmony) of customary life exemplified in the Greek polis; the true beginning of objective spirit. The downfall of this simple truth of spirit, we find, is also the rise of the atomistic and alienated legal personality of the ‘soulless community’ characteristic of the Roman Empire; the true beginning of culture.

Reason, Hegel tells us in Chapter V of the *Phenomenology* is no longer formal (stoicism) and distinct from the world, but takes up a positive rather than negative relation to otherness:

Up till now it has been concerned only with its independence and freedom, concerned to save and maintain itself for itself at the expense of the *world*, or of its own actuality, both of which appeared to it as the negative of its essence. But as Reason, assured of itself, it is at peace with them, and can endure them; for it is certain that it is itself reality, or that everything actual is none other than itself; its thinking is itself directly actuality, and thus its relationship to the latter is that of idealism. (*PS* §232).

God’s Will is what is presented to it by the ‘middle term,’ i.e., by the priest; and behind him there is this universal community through which God’s Will is present on earth: the Church.” Ibid. 448. For thoroughly historical and religious readings of unhappy consciousness, see Harris, *Hegel’s Ladder I*, 395-446, and Quentin Lauer, Jr., *A Reading of Hegel’s Phenomenology of Spirit* (New York: Fordham University Press, 1993), 134-48.

The world is now the world *of* Reason; it is an object of its knowledge.⁴¹¹ Reality, one might say, has a transcendental nature and Reason has become certain of it. Reason thus recognizes itself in the world and in so doing, appropriates it to its ‘I’, which has become a *simple category*.⁴¹² The simple category of the ‘I’ (i.e. the ‘I’ of Fichte’s idealism, in particular), writes Hegel, means that “self-consciousness and being are the same essence, the same, not through comparison, but in and for themselves” (*PS* §235). Self-consciousness now possesses difference within itself and, therefore, need no longer fear that the world is a barrier to its autonomy, or as something to be denied or negated (as in skepticism and unhappy consciousness). Yet, although it finds itself in the world, it does so only immediately and thus deficiently. This is an *empty idealism* insofar as the simple or pure category of the ‘I’ can only produce other pure categories (from the difference within itself) that are equally indeterminate. Its essence is to be “immediately one and selfsame in *otherness* or absolute difference” (*PS* §235), yet this difference “appears as a *plurality* of categories” (*PS* §235).⁴¹³ The problem (and here Hegel probably has Kant’s deduction of the categories in mind), is that the emergence of this plurality has a particular “ambiguity” attached to it, for “in their plurality they possess otherness in

411 As we will see, this will take us back to a form of “Sense-Certainty” (A I).

412 “Reason is the certainty of being all *reality*. This *in-itself* or this *reality* is, however, a universal pure and simple, the pure *abstraction* of reality. It is the first *positivity* in which self-consciousness is *in its own self* explicitly *for itself*, and ‘I’ is therefore only the *pure essentiality* of the existent, or is the simple *category*.” *PS* §235.

413 “Quite obviously Hegel is saying that neither Kant nor Fichte is justified,” writes Lauer, “on the basis of reason alone, in affirming the manifold determinateness of reality. Both are caught up in a circle, out of which Kant gets by appealing to a sensibility which is not reason and in which Fichte stays.” Lauer, Jr., *A Reading of Hegel’s Phenomenology of Spirit*, 154. See also the impressive analysis in see Harris, *Hegel’s Ladder I*, 452-68. Harris argues that “the advent of ‘Reason’ in the phenomenology of World-Spirit is substantially identical with the scientific revolution, and the advent of scientific rationalism...”, but that “for the most part Hegel’s discussion of the standpoint of ‘Reason’ in paragraphs 234-39 refers to the world-view that began to unfold only in 1781 with the publication of the *Critique of Pure Reason*” (456).

contrast to the pure category” (*PS* §236), i.e. the ‘I’. That is to say, the pure category of the ‘I’ is now supposed to contain a plurality, which is a contradiction. Self-

consciousness as Reason, says Hegel,

fancies that by pointing out this pure ‘mine’ of consciousness in all being, and by declaring all things to be sensations or ideas, it has demonstrated this ‘mine’ of consciousness to be complete reality. It is bound, therefore, to be at the same time absolute empiricism, for in order to give filling to the empty ‘mine’, i.e. to get hold of *difference* with all its developed formations, its Reason requires an extraneous impulse, in which first is to be found the *multiplicity* of sensations and ideas (*PS* §238).

Hegel’s point, I take it, is to demonstrate that “empty idealism” recognizes the infusion of reason in the world, but not yet it’s productive or active moment: it is a subjective, but not yet absolute idealism. Unlike skepticism, it has a positive relation to otherness, but like skepticism, it runs into contradiction. This appears, in short, to be a critique of Kant and Fichte (particularly the latter’s empiricism, which he took over from Locke).⁴¹⁴

Reason, we might say, is not yet spirit; it is substance, but not yet subject. To become the latter, Reason must now relive, through the category of the ‘I’, the previous movement of consciousness through sense-certainty, perception, and the Understanding, yet this time also experience the sociality of the double movement of self-consciousness. “The category, which is the *immediate* unity of *being* and *self*,” writes Hegel, “must pass through both forms, and it is precisely for consciousness *qua* observer that the category

414 “In the history of the *Weltgeist* (rather than that of Hegel himself) the story of Reason’s certainty begins with Locke. For Locke ‘the human Understanding’ is the ‘pure category’ that embraces all possible reality. What we can know is only ‘our own ideas’; and our rational certainty is that they are indeed all ours. This is the return of ‘sensible certainty’ at the level of Reason. The standard of sensible certainty is the foundation stone for Empiricism as a philosophical position. Hegel fixes our attention here upon the way that Fichte took over Locke’s empiricism wholesale. Locke’s ‘substance, I know not what’ reappears without change as the *Anstoss*, the limitation through which all finite consciousness arises. In this empirical aspect, Fichte’s idealism is far more primitive than Kant’s philosophy of science” Harris, *Hegel’s Ladder I*, 467.

presents itself in the form of *being*” (PS §344). The proposition that follows is that the self (of unhappy consciousness) is a *thing*, which leads to mediating or negative “self-superseding antithesis,” for the object (i.e. the self) is the object *of* self-consciousness. In other words, “the category which, in the course of observation, has run through the form of *being* is now posited in the form of being-for-self: consciousness no longer aims to *find* itself *immediately*, but to produce itself by its own activity” (PS §344). It is, in short, the movement from observing to active Reason.

Self-consciousness as Reason is now the end of its own actions, for its object is an independent, but not alien, self-consciousness. Self-consciousness thus becomes aware of itself as merely an individual (*das Individuum*) that produces its reality in another, i.e. that actualizes itself in the other—which is to say that Reason has become *universal* insofar as it is consciousness “already recognized in and for itself” and thus “unites all self-consciousness” (PS §348). This is the birth of ethical substance, for

...this is nothing else than the absolute spiritual *unity* of the essence of individuals in their independent *actual existence*; it is an intrinsically universal self-consciousness that takes itself to be actual in another consciousness, in such wise that this has complete independence or is looked at as a Thing, and it is precisely therein that the universal self-consciousness is aware of its *unity* with it, and only in this unity with this objective being is it self-consciousness. This ethical *Substance*, taken in its abstract universality, is only law in the form of *thought*; but it is no less immediately actual *self-consciousness*, or it is *custom* (PS §349).

The intrinsic universality of the individual, i.e. with Reason as its universal substance, makes individuals’ actions the actions of the universal, of universal custom: “As the individual in his *individual* work already *unconsciously* performs a *universal* work, so again he performs the universal work as his *conscious* object; the whole becomes, as a

whole, his own work, for which he sacrifices himself and precisely in so doing receives back from it his own self” (PS §351).⁴¹⁵ Hegel is, in a sense, fusing here a Rousseauian concept of the general will with Adam Smith’s concept of the structural rationality of individual labor and satisfaction of desire, in which the individual unintentionally serves the universal.⁴¹⁶ Yet more importantly, perhaps, is the Lutheran idea of vocation (*vocatio* or calling) operative here, for it was Luther who spiritualized individual non-ecclesiastical labor as serving the community in communion with the universal.⁴¹⁷ The universal and thus spiritual element of individual work/action will, of course, become a central pillar in Hegel’s concept of capitalist civil society,⁴¹⁸ but he is here concerned more generally with the engendering of universal ethical action within unity of customary life. “This unity of being-for-another or making oneself a Thing, and of being-for-self,

415 “In other words *his labor, qua laboring* of a single [laborer] *for his own needs*, is *at the same time* a universal and ideal...His labor is for *need* [in general], it is for the abstraction of a need as universally suffered, not for his need; and the satisfaction of the totality of his needs is a *labor of everyone*.” Hegel, *First Philosophy of Spirit*, 247-50.

416 Although Hegel takes an extremely critical view of the general will in his analysis of absolute freedom, see the transformation of the singular to general appears to be at play here, insofar individual sacrifices to the universal in an act to regain the self at a higher level. Hegel would, of course, reject Rousseau’s presuppositions of pre-social individuals and the social contract in this context.

417 “Works serve our neighbor and supply the proof that faith is living” runs one of the lines from the Lutheran hymnal “Salvation unto us has come.” *The Lutheran Hymnal* (St. Louis: Concordia Publishing House, 1941), Hymn 377. Luther writes: “Therefore he should be guided in all his works by this thought and contemplate this one thing alone, that he may serve and benefit others in all that he does, considering nothing except the need and the advantage of his neighbor.” A Christian, asserts Luther, “lives not in himself, but in Christ and in his neighbor.” Martin Luther, “The Freedom of a Christian,” in *Martin Luther: Selections from his Writings*, edited with an introduction by John Dillenberger (New York: Doubleday, 1962), 73, 80.

418 “In civil society, each individual is his own end, and all else means nothing to him. But he cannot accomplish the full extent of his ends without reference to others; these others are therefore means to the end of the particular. But through its reference to others, the particular end takes on the form of universality, and gains satisfaction by simultaneously satisfying the welfare of others.” Hegel, *Philosophy of Right*, §182, *Zusatz*.

this universal Substance, speaks its *universal language* in the customs and laws of its nation” (PS §351).

We witness here, then, the transition from subjective to objective or concrete spirit (although Hegel does not employ this categorization in the *Phenomenology*); from theoretical to practical reason. Within this stage of objective spirit, we can thus now speak of the life of a *people*, of nations—forms of *worlds* rather than just forms of consciousness. In this world, self-consciousness knows itself to be the being-for-self of universal substance and thus has law immediately within it: “sound Reason knows immediately what is right and good...so too the law is valid for it immediately” (PS §422). As mentioned, Hegel is referencing here the ethical sociality (or simple universality) of the Greek polis, which will get full treatment in the first section of “Spirit”, “The True Spirit – The Ethical Order” (*Der wahre Geist. Die Sittlichkeit*) (VI A a). This form of spirit, Hegel says, “can be called the human law, because it is essentially in the form of a reality that is conscious of itself. In the form of universality it is the *known law* [*bekannte Gesetz*], and the prevailing custom [*vorhandene Sitte*]” (PS §448). Government is the reality of this spirit (PS §455); it is the “unitary soul or the self of the national Spirit” (PS §473). As the effective activity of human law, government “*is, moves, and maintains* itself by consuming and absorbing into itself the separatism of the Penates [i.e. independent families]...keeping them dissolved in the fluid continuity of its own nature” (PS §475). This nature, we might say, is continually attempting to dissolve or resolve tendencies toward division, and while Hegel here speaks of separate families,

the important division to be avoided is the division of *private and public*.⁴¹⁹ In the polis, community itself is the individual, thus “suppressing the isolation of individuals *within it*,” yet the community is also “spontaneously active in an *outward direction*” (PS §475), which is to say that it tends toward conquest and colonization. This logic gives expression to a contradiction, for the suppression of particularity within the universality of the community produces a collective individuality that tends outward toward *war*, but which, in turn, encourages the emergence of the very particularity its continuance needed to suppress.⁴²⁰ Thus, while divisions of public and private that begin to emerge within the community—such as “the individual *systems* of property and personal independence, as well as the *personality* of the individual himself” (PS §475)—are shaken from their contingent determinacy and pressed into service of the universal in war, the outcome of war is subject to strength and contingency. “Because the existence of ethical life rests on strength and luck, the *decision is already made* that its downfall has come” (PS §475).

Hegel’s discussion of this moment in the *Phenomenology* is quite cryptic, for it is not entirely clear to what extent the downfall of ethical life rests with the *natural* contingency of war, or with the fact that victory is also determined by strength, i.e. the individuality of youthful “manhood” previously suppressed within the nation, but which is now elevated in its service in war.⁴²¹ According to Hegel, womankind is perpetually trying to subvert the universal ends of government, to pervert “the universal property of the state into a possession and ornament for the Family,” by claiming that “it is the power

419 For a discussion on Hegel’s changing views on the “privatization” of human life, see Lukács, *The Young Hegel*, 313-14.

420 Cf. Hegel, *Philosophy of Right*, §§321-24.

421 Cf. Hegel’s equally cryptic discussion on the topic in *System of Ethical Life*, 147-48.

of youth”, or the worth of the son or that of a brother, that really matters (PS §475). While the community continually suppresses this principle for its own survival, when faced with war, the very individuality it suppresses becomes its savior. “The negative side of the community...finds its weapons in individuality,” writes Hegel, and the “brave youth in whom woman finds her pleasure, the suppressed principle of corruption, now has his day and his worth is openly acknowledged” (PS §475).⁴²²

I will not debate this further here, as I am more concerned with *personality* and Hegel’s subsequent analysis in “Culture”—for it is in this arena that the experience of modern colonialism can most appropriately be situated. Thus, suffice it to say for now that we can identify two causes of the downfall of harmonious customary life: first, the continual presence of natural immediacy,⁴²³ insofar as the fate of the nation is subject to the natural contingency of war; and, second, the fact that victory in war relies on the strength of the particularities that it sought to suppress within its formal universality. In the dissolution of the ethical life of the Greek polis, formal universality is withdrawn, alienation ensues, and spirit is “shattered into a multitude of separate atoms” (PS §476), which we call *persons*. We now move to the world of the Roman Empire.

Personality, then, has stepped out of the life of the ethical substance. It is the independence of consciousness, an independence which has *actual* validity. The non-actual thought of it which came from renouncing the *actual* world appeared earlier as the *Stoical* self-consciousness. Just as this proceeded from lordship and bondage, as the immediate existence of self-consciousness, so personality has proceeded from the immediate life of

422 While he does not discuss it in the *Phenomenology*, Hegel’s analysis of war in the *Philosophy of Right* (§§325-28) will include a discussion of valor and of the military class that embodies it.

423 “This determination of immediacy means that Nature as such enters into the ethical act, the reality of which simply reveals the contradiction and the germ of destruction inherent in the beautiful harmony and tranquil equilibrium of ethical Spirit itself. For this immediacy has the contradictory meaning of being the unconscious tranquility of Nature, and also the self-conscious restless tranquility of Spirit.” PS §476.

Spirit, which is the universal dominating will of all, and equally their service of obedience. What was for Stoicism only the *abstraction* of an *intrinsic* reality is now an *actual* world. Stoicism is nothing else but the consciousness which reduces to its abstract form the principle of legal status, an independence that lacks the life of Spirit (PS §479).

For Hegel, the rise of personality marks the rise of individual free-will and thus the capacity for abstract right, which involves free relations with others. We are now back to a form of contentless stoicism, but one which is *actual* insofar as it will find recognition in the positive law of a particular concrete or objective world. The original form of stoicism recognized what we might call a universal or natural moral law, but not yet a concept of natural right, subjective or otherwise. The Stoicism of personality, however, is the realization of the “right of a person” as an autonomous formal self for whom the actualization, however arbitrary, of its abstract right is found in legal right. As a formal or “sheer empty unit” (PS §480), which is a positive universal, this actualized stoicism must seek content outside itself through possession, which is realized (through Skepticism as the actual experience of Stoicism) in the abstract universality of property right (PS §480).⁴²⁴ “That actuality of the self that did not exist in the ethical world has been won by its return into the ‘person’,” writes Hegel, “what in the former was harmoniously one now emerges in a developed form, but alienated from itself” (PS §483). Harris summarizes this well: “The content of legal right is made by self-externalization.”⁴²⁵ Such alienation or self-externalization is the world of unhappy consciousness, which belongs to the world of culture, but before moving on to “Culture” and the question of

⁴²⁴ Cf. Hegel’s discussion of possession and property right in Hegel, *System of Ethical Life*, 118ff, and *First Philosophy of Spirit*, 249-50.

⁴²⁵ Harris, *Hegel’s Ladder II: The Odyssey of Spirit* (Indianapolis: Hackett, 1997), 248.

colonialism in its development I would like to recall some of my discussion of Roman law and *dominium* in previous chapters.

In Section 1.1 of Chapter Two, we saw that increasing commercial pressure within the growing territorial empire of Rome eventually all but collapsed the distinction between civil and natural law and awarded citizenship to almost all inhabitants of the empire; an act of Emperor Caracalla in 212 A.D.⁴²⁶ This is process that Hegel is most likely referring to when he writes that “now the *living* Spirits of the nation succumb through their own individuality and perish in a *universal* community, whose simple universality is soulless and dead, and is alive only in the *single* individual, *qua* single” (*PS* §475). With the expansion of citizenship, came the increasing inclusion of many previously “rightless” or legally unrecognized individuals (excepting slaves) within the sphere of the *ius civile*. At the same time, we witnessed the increasing prominence of stoical idea of *ius gentium*—clearly tied to the growing commercial relations with non-Romans (itself largely the result of the acquisition, by force, of new territories or “provinces”) and greater exposure to the legal systems of other nations—which changed in the nature of *ius civile*.⁴²⁷ That is to say, the expansion of citizenship was accompanied by a dissolution of the concept of *dominium*—the absolute ownership previously reserved for Roman citizens (*ex iure Quiritium*)—into various forms of rights

426 See Jolowicz, *Historical Introduction to the Study of Roman Law*, 345-52. Harris uses Caracalla as the paradigm of “Legal Tyranny”. See Harris, *Hegel’s Ladder II*, 249.

427 Remember that by 275 B.C. Rome had conquered most of the nations of Italy and by 241 B.C. (after the first Punic war) had acquired Sicily, its first province beyond Italy. The conquest of large parts of Spain and North Africa soon followed. We should also keep in mind that while Ulpian here differentiates *ius naturale* from *ius gentium*, Gaius identifies them as did Cicero and Aristotle insofar as to be natural is to be common or universal. See Aristotle, *Rhetoric*, Book I, Chapter 13, 1373b.

to possession, use, exchange, etc.⁴²⁸ As was said, in the classical period *dominium* as absolute ownership (or lordship) did not originally represent a mere *right* or a bundle of *rights*, with respect to ownership.⁴²⁹ Rights talk was reserved for those who did not exercise the supreme power (*potestas*) associated with the *dominus*.⁴³⁰ In Chapter Two, I quoted Ulpian (*Digest* 7.6.5) to make my point: “the *ius* of using and taking the crop can only be attributed to the man who has the usufruct; the *dominus* of an estate does not have it, since anyone who enjoys ownership of something does not have a separate *ius* to use it and take its produce.” We also find a similar sentiment in Gaius (*Digest* 39.2.19), where he writes: “in the *stipulato domni infecti*, the claim of those who are absent in good faith is not to be ignored... whether they are *domini*, or whether they have a *ius* in the matter—such as a creditor, a usufructuary or a superficiary.”⁴³¹ For Ulpian and Gaius, to

428 That is to say, whereas classical law made a clear distinction between *dominium* and factual possession (*possessio*), this distinction faded in the dominate and all but completely collapsed in vulgar law. “The disintegration of classical *dominium* was not confined to its mingling with *possessio*,” writes Ernst Levy. “The antithesis between *dominium* as the essentially total right of control and the limited rights others might have in the thing did not survive either.” Levy, *West Roman Vulgar Law*, 34.

429 For a detailed discussion of what constitutes a rights-based theory of property, see Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), particularly Chapters 3 and 8.

430 “The [Roman] Father predominated; he became what he was: chief, political soldier, and hence Law or Right (as imposed on the vanquished in the ordering of victory: the sharing-out of booty and the reassignment of places—primarily land),” writes Henri Lefebvre. He “reorganized [the world] according to his power and rights, Property and Patrimony at once magistrate and priest, [he] thus reconstituted the space around him as the *space of power*.” Lefebvre, *The Production of Space*, 243. See also David Harvey’s discussion of the role of space in value in Harvey, *The Limits to Capital* (New York: Verso, 1999), 337ff.

431 Richard Tuck expresses confusion over these quotes, for they make *ius* and *dominium* seemingly mutually exclusive. If I have a right to eat an apple from the tree, they seem to say, then I don’t own the tree, for if I did own it, a right would not be necessary. Exasperated, Tuck exclaims: “This caused great confusion later, as surely a proprietor had the right to take his own crop!” Although there certainly was *conflation* in later periods, for reasons attributable to changing material conditions and forms of social organization, the *confusion* here is Tuck’s. For him *ius* and *dominium* are gradations of control, which he conceptualizes in the language of passive and active rights: a passive right is merely *ius*, whereas an active right will “tend to have at its heart the idea of the individual’s sovereignty within the relevant section of his moral world...to stress the importance of the individual’s own capacity to make moral choices, that is to

have *dominium* is to have full power or control over a particular part of one's *world*. That is to say, there is an important (sub-legal) element of *place* in this idea of *dominium*, initially rooted within the family and subsequently within the concrete community, but always exercised as command or power over an inhabited social space. The demise of absolute *dominium* and thus of the immediacy of absolute space, is the shaking loose, Hegel might say, of individuality from its rootedness in nature, in the earth, which gives rise to an abstract space of right.⁴³² *Dominium* and *ius* do not collapse in this period as much as the former dissolves into the latter, and the individual as *dominus*, father, master, citizen, etc. thus dissolves into universal personhood or the abstract bearer of rights.

The result of this simultaneous decline in absolute *dominium* and rise of personality is twofold: first, the supersession of the natural element of private command over one's place in a religiously and socially infused world; and, second, and relatedly, the increasing prominence of contractual relations,⁴³³ and the practice of mere *traditio* in

say his *liberty*”—i.e. a combination of both *ius* and *dominium*. The former right is thus a “right to be given or allowed something by someone else,” while the latter, according to him, entails that I have greater, if not complete, control (*dominium*) over that to which my (active) right relates. This is, however, a misunderstanding, for Tuck is reading a liberal understanding of rights back into the distinction. We can find this in his translation of Ulpian and Gaius's claims, when he writes “surely a proprietor had the right to take his own crop!” Contra Tuck, “proprietor” is not an adequate English translation of *dominus*, for it presupposes the rights he is seeking to clarify. In short, Tuck is led to a contradiction for he does not consider *dominium* as a determinate power in non- or pre-judicial terms. See Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1998), 10, 6-7.

432 As Richard Dien Winfield writes, “the desecralization of nature is a precondition of abstract right.” See Winfield, “Translator's Introduction,” in Joachim Ritter, *Hegel and the French Revolution*, translated by Richard Dien Winfield (Cambridge, MA: MIT Press, 1982), 12. On the concepts of absolute and abstract space, see Lefebvre, *The Production of Space*, 48-49, 251-53. It is the latter, abstract space that will serve as the space of accumulation, according to Lefebvre.

433 *Traditio*, we will remember, was the most relaxed method of acquisition legitimate under natural law or *ius gentium*, for it originally applied only to unessential “objects”, i.e. those things not deemed essential to the stability of the family and community. This distinction ended in the Justinian Code, which made all corporal objects transferable by *traditio*. Tuck notes development toward contractual, or what he calls bilateral, relations in a quote from him I used in Chapter Two: “The Emperor was now someone with whom all citizens had bilateral relationships, and who claimed to be able to intervene in their

economic exchange.⁴³⁴ As Hegel writes in the *Philosophy of Right*: “Entailed family property contains a moment which is opposed to the right of personality and hence of private property. But those determinations which concern private property may have to be subordinated to higher spheres of right,” which are more rational.⁴³⁵ With the *dominus* uprooted, the universal shape of lordship and bondage is now expressed in the abstract space of law’s reign (lordship) over the world of persons (bondage).⁴³⁶ It is the *rule of law*. But the law has a source: the will of the emperor, we find in the *Institutes* (1.2.6): “what the *princeps* has pleased to ordain, has the force of law.” In the world of persons writes Hegel, arises a person, an emperor, who takes himself to be absolute and standing above all other persons like a god on earth is “lord and master of the world” (*PS* §482). In this spiritless state, even the government (*die römische Weltherrschaft*) belongs to the emperor.⁴³⁷ Thus follows, and necessarily so, the “destructive power” (*zerstörenden*

social and economic life in a wide variety of ways. The consequence is easy enough to understand: *dominium* came to be seen as another kind of *ius*, not as something outside the area of *iura*...it was a *ius* because it was constituted by a gift from the Emperor to his tenants.” Tuck, Tuck, *Natural Rights Theories*, 10-11. See also Ernst Levy, *West Roman Vulgar Law*.

434 As we saw in Chapter Two, *dominium* was limited to acquisition in civil law, particularly to those *res* acquired through *manicpatio* or *in iure cessio*. The distinction between *res* subject to *manicpatio* and those subject to mere *traditio*, for example, depended on their relative importance for security or economic and agrarian sustainability in the community. As Jolowicz writes, *res mancipi* applies to those “things which are most important in a settled community which is both agricultural and warlike: the land, the slaves and beasts with which it is worked... Such things must not pass from hand to hand as less important things may.” Jolowicz, *Historical Introduction to the Study of Roman Law*, 137-38

435 Hegel *Philosophy of Right*, §46. See also Allen Wood’s excellent footnote (to §62) on this point. *Ibid.*, pp. 410-11.

436 As Harris writes: “So it is in the Roman world, not in True Spirit, that we can see the *universal* shape of Lordship and Bondage. The whole world is in bondage to the ‘abstract Self’ of the Law. Stoic ‘freedom’ is precisely the freedom that arrives at the thought of its ‘independence’ within this universal servitude.” Harris, *Hegel’s Ladder II*, 234.

437 “Die römische Weltherrschaft wurde so einem einzigen zuteil.” Hegel, *Vorlesungen*, 377. Sibree’s translation of this passage takes too many liberties with technical terms: “the world-wide sovereignty of Rome became the property of a single possessor.” Hegel *Philosophy of History*, 311. Cf. Chapter One, Section 1, where I discuss the legal pluralism that emerged with England’s international and

Gewalt) and “monstrous excesses” of *tyranny*; a development that will find its echo in Hegel’s analysis of the French Revolution and the terror that followed in the final section of “Culture”.⁴³⁸

III. Culture and the Phenomenology of Colonialism

I opened this chapter with a quote from Adam Smith on the world-historical significance of the “discovery” of the Americas. Hegel was, of course, very familiar with the writings of Smith, and himself considered European contact with the Americas to be significant. He called it one of the three *Haupterscheinungen*—the other two being the “revival of learning and the flourishing of the fine arts”—that represented the end (*Auflösung*) of the Middle Ages and thus what he calls the “blush of dawn” (*Morgenröte*), which precedes the “sun” of the Reformation. He writes of the “urging of spirit *outwards*—that desire on the part of man to become acquainted with *his* world. The chivalrous spirit [*Rittergeist*] of the maritime heroes of Portugal and Spain opened a new way to the East Indies and discovered America.” Unlike the outward directedness of the Greek state, which brought about its downfall, Hegel views this modern phenomenon as a “progressive” development. He quickly adds, however, that it “involved no transgression of the limits

colonial relations insofar as the King had an absolute prerogative that excluded parliament from jurisdictional powers within the colonies, creating a bi-lateral relation between king and colonists wherein the king was absolute “lord and proprietor.”

⁴³⁸ In his Jena lectures of 1805-06, Hegel writes of tyranny: “This force is not despotism, but *tyranny*, pure, terrifying dominance. But it is *necessary* and *just* to the extent to which it *constitutes and maintains the state as a real individual entity*.” *Realphilosophie*, Vol. I, 239, cited in Lukács, *The Young Hegel*, 310.

of ecclesiastical principles or feelings.”⁴³⁹ That is to say, the colonialism that materialized from this *Rittergeist* did not affect, or contribute to the development of, European spirit.⁴⁴⁰

As I wrote in the Introduction, while Hegel dismisses the impact of modern European colonialism on the Germanic, i.e. Protestant European, spirit, he attributes great significance to the colonialism of the Greek and Roman worlds.⁴⁴¹ In both we find the middle period of their triadic historical division to be precisely one of conquest and colonialism.⁴⁴² When spirit, however, reaches its final world-historical phase in the Germanic world (represented predominately by Protestant German states, Scandinavia,

439 Hegel, *Philosophy of History*, 410-11.

440 It should be noted, however, that in the *Philosophy of History*, Hegel does celebrate the originary heterogeneity and internalization of otherness involved in the founding of the Greek, Roman, and even Germanic world. That is to say, as with the Greek and Roman worlds, Hegel acknowledges the heterogeneity of the origins of the Germanic: “The Germans... began with self-diffusion [*aus sich herauszuströmen*]*—deluging the world, and overpowering in their course the inwardly rotten, hollow political fabrics of the civilized nations. Only then did their development [Entwicklung] begin, kindled by a foreign culture, a foreign religion, polity and legislation. The process of culture [bilden] they underwent consisted in taking up foreign elements and reductively amalgamating them with their own national life. Thus their history presents an introversion—the attraction of alien forms of life and the bringing them to bear upon their own.*” Hegel, *Philosophy of History*, 341-42. Unlike the Greek and Roman spirits, however, he does not recognize the colonialism of its later periods to be significant.

441 He writes: “This history of Greece exhibits at its commencement this interchange and mixture of partly homesprung, partly quite foreign stocks... Every world-historical people, except the Asiatic kingdoms—which stands detached from the grand historical catena—has been formed in this way. Thus the Greeks, like the Romans, developed themselves from a *colluvies*—a conflux of the most various nations.” Hegel, *Philosophy of History*, 226.

442 Of the Greek world, Hegel writes: “We have, then to distinguish three periods in Greek history: the first, that of the growth of real individuality; the second, that of its independence and prosperity in external conquest (through contact with the previous world-historical people); and the third, the period of its decline and fall, in its encounter with the succeeding organ of world-history.” Of the Roman world, he writes: “The *first period* comprehends the rudiments of Rome, in which the elements which are essentially opposed, still repose in calm unity; until the contraries have acquired strength... In this vigorous condition the state directs its forces outwards—i.e. in the *second period*—and makes its debut on the theatre of general history; this is the noblest period of Rome—the Punic Wars and the contact with the antecedent world-historical people... The Roman empire now acquired that world-conquering extension which paved the way for its fall.” Hegel, *Philosophy of History*, 224; 281-82.

and England),⁴⁴³ Hegel switches gears, characterizing its middle period (stretching from Charlemagne to the Reformation), not as an *external* experience of inter-national conflict and domination, but as an *internal* opposition of theocracy and feudal monarchy. As for the contact Europeans *did* have with other nations in this period, from the Crusades to world-wide colonial project up through Hegel's time, they too are considered to be of an internal nature, as an "internal evolution."

In the Crusades, indeed, and in the discovery of America, the Western World directed its energies outwards. But it was not thus brought in contact with a world-historical people that had preceded it; it did not dispossess a principle that had previously governed the world. The relation to an extraneous principle here only *accompanies* the history [*Die Beziehung nach aussen begleitet hier nur die Geschichte*—does not bring with it essential changes in the nature of those conditions which characterize the peoples in question, but rather wears the aspect of internal evolution.⁴⁴⁴

Colonialism and conquest, we might say, merely open up the terrain upon which the Germanic spirit logically unfolds.⁴⁴⁵ And we are told elsewhere that the spirit (*Geist*) of the New World "expire [*untergehen*] as soon as [European] spirit approached it," and that "the aborigines, after the landing of the Europeans in America, gradually vanished

443 These nations are opposed to the "Romantic" nations of Italy, Spain, Portugal, and partly France, for they are still Catholic. See Hegel, *Philosophy of History*, 419ff. Hegel writes: "With them the inner life is a region whose depth they do not appreciate; for it is given over 'bodily' to particular [absorbing] interests, and the infinity that belongs to Spirit is not to be looked for there. Their inner most being is not their own. They leave it as an alien and indifferent matter, and are glad to have its concerns settled for them by another. That other to which they leave it is the Church." *Ibid.*, 421.

444 Hegel, *The Philosophy of History*, 342.

445 I speak of colonialism and conquest here, rather than mere "discovery," for that is what Hegel wrote in the original German, although the translator leaves "conquest" (*Eroberung*) out of his translation. The German reads: "Allerdings hat auch die Abendwelt in den Kreuzzügen, in der Entdeckung und Eroberung von Amerika sich ausserhalb begeben..." Hegel, *Werke 12: Vorlesungen über die Philosophie der Geschichte* (Frankfurt: Suhrkamp, 1982), 413.

[*untergegangen*] at the breath [*Hauch*] of European activity.”⁴⁴⁶ This vanishing would seem to explain the somewhat unusual comment above that “an extraneous principle here only *accompanies* [*begleitet*] the history.” This idea is reinforced elsewhere when Hegel writes that “the English in North America...have not been blended with the aborigines, but have dispossessed them; whereas in the case of the settlers in Greece the adventitious and autochthonic elements were mixed together.”⁴⁴⁷ That is to say, the colonial experience here was not significant, for European contact with other nations essentially led to what amounts to genocide; they merely expired.⁴⁴⁸

Thus the Christian World has no absolute existence outside its sphere, but only a relative one which is already implicitly vanquished [*das an sich überwunden*], and in respect to which its only concern is to make it apparent that this conquest has taken place. Hence it follows that an external reference [*die Beziehung nach aussen*] ceases to be the characteristic element determining the epochs of the modern world.⁴⁴⁹

For Hegel, then, the development of rational consciousness at work in modern colonialism is compelled by an internal necessity, rather than an external one. Europe’s “relation to other countries and periods” in modern colonialism is “entirely different from that sustained by the Greeks and Romans,” Hegel explains, because “the Christian world is the world of completion,” the “grand principle of being is realized,” and “the end of days is fully come.”⁴⁵⁰ This ‘end of days’ is not, however, a terminal point, but rather the

446 Ibid., 81.

447 Ibid., 228.

448 “The original nation having vanished or nearly so, the effective population comes for the most part from Europe; and what takes place in America, is but an emanation from Europe.” Ibid., 82.

449 Ibid., 342.

beginning of a new phase of spirit that roughly dates to the Christianization of earthly lordship initiated by Constantine's conversion—institutionalized in the Holy Roman Empire—and whose logical unfolding (up through the French Revolution and the subsequent Terror) is placed by Hegel under the rubric of “Culture” or *Bildung*. Culture, as we know, constitutes the middle section of “Spirit” (VI), wherein the emergence of subjective freedom and the *objectification* of spirit through the work of self-consciousness results in the production of *objective* or “real Spirits” in nations.⁴⁵¹

Objective spirit will, in the *Encyclopaedia* and *Philosophy of Right* (1821), become the sphere of an extensive analysis of the necessary conditions, mediating institutions, and ethical centrality of the state—as well as an analysis of the *structural* necessity of colonial expansion—but such an account is not yet forthcoming in the *Phenomenology*.⁴⁵² This fact notwithstanding, we are still dealing here with relations of law and right, prompting Harris to rightly suggest that “Spirit” should be read as a *phenomenology of law*.⁴⁵³

450 Ibid., 342.

451 See Manfred Riedel's discussion of the evolution of objective spirit in Hegel's work in Riedel, *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy*, translated by Walter Wright (Cambridge: Cambridge University Press, 1984), chapter 1. See *PS* §484 and *The Philosophy of History*, 73-79, for a discussion of the work of self-consciousness. For Hegel's talk of “real Spirits” [*realer Geister*], see the *PS* §441.

452 I call this a *structural* theory of modern colonialism, because it is an account of the systematic entailment of the expansionary logic of capitalism, or the “inner dialectic of civil society,” which will be the subject of the following chapter. See Hegel, *Philosophy of Right*, §243ff. Cf. Hegel's analysis of Greek colonialism in the *Philosophy of History*, 232-33. See also Albert O. Hirschman, “On Hegel, imperialism, and structural stagnation,” in *Essays in Trespassing: Economics to Politics and Beyond* (CUP, 1981), 167-176; Tsenay Serequeberhan, “The Idea of Colonialism in Hegel's Philosophy of Right,” *International Philosophical Quarterly*, 29:115 (1989): 301-318; Gabriel Paquette, “Hegel's Analysis of Colonialism and Its Roots in Scottish Political Economy,” *Clio* 32:4 (2003): 415-432; and Norbert Waszek, *The Scottish Enlightenment and Hegel's Account of “Civil Society”* (Dordrecht: Kluwer Academic Publishers, 1988).

453 “Beginning with Ethical Law (or Custom), we move through Positive (Roman) Law to Natural Law and arrive finally at Moral Law.” With the latter, he adds, “we shall have completed a circle

As we saw above (Section 2.3), the rise of the rule of law, personality, and thus the recognition of abstract right is discussed by Hegel in “Legal Status” (VI A c), and historically coincides with the Roman Empire. In this shape of consciousness, substance is external to or alienated from the abstract self, which, seeking content, appropriates the world (which it itself produced) and universalizes it in the recognition of legal right, or more specifically, property right. In this development we move from the finite, subjective, and abstract model of the lordship and bondage struggle to the objective, social, and concrete model of relations of right that follow.⁴⁵⁴ Here, law becomes lord and the multitude of persons becomes bondsmen, who have but an abstract relation, i.e. a non-spiritual relation, to the tyrannical emperor that holds their plurality of abstract selves together through brutal negativity. As Hegel writes in the *Philosophy of Right*, the “principle of the *self-sufficient and inherently infinite personality* of the individual [*des Einzelnen*], the principle of subjective freedom, which arose...in an external form (which was therefore linked with abstract universality) in the *Roman* world,” but will only come to find its “inward form in the *Christian* religion.”⁴⁵⁵ And with the coming of Christianity, the lord of the world is no longer found in the person of the emperor, but in the Christian god, and the Stoicism and Skepticism of “Legal Status” find their truth in the unhappy consciousness of (Christian) culture; the self-estrangement of spirit.

because the last shape of singular Reason was the Law-Testing Reason of Kant’s Categorical Imperative.” Harris, *Hegel’s Ladder II*, 147.

454 “What was for Stoicism only the *abstraction* of an *intrinsic* unity is now an *actual* world. Stoicism is nothing else but the consciousness which reduces to its abstract form the principle of legal status, an independence that lacks the Spirit of life.” *PS* §479.

455 Hegel, *Philosophy of Right*, §185.

One issue that I have not yet discussed, but which is used by Hegel as a criterion for assessing the achievement of self-consciousness freedom in the history of spirit, is the issue of slavery, which existed in Greece, Rome, but is said by Hegel to have been overcome in the Germanic world.⁴⁵⁶ “Slavery does not cease until the will has been infinitely self-reflected,” writes Hegel, “until right is conceived as appertaining to every freeman [*der Freie*], and the term freeman is regarded as synonym for man [*der Mensch*] in his generic nature as endowed with reason.”⁴⁵⁷ Being endowed with reason is not, for Hegel, a biological or empirical given, so, unlike with Fichte, we need to recognize more than merely the human form in the other. Reason, as we saw (Section 2.3), is a social and historical achievement, and with only a slight modification of the Aristotelian idea of natural slavery, Hegel argues that slavery can be an educative process toward its realization for those still in a ‘natural condition’, be they individuals or nations. “It was not so much *from* slavery as *through* slavery that humanity was emancipated,” he claims.⁴⁵⁸ Thus, for example, the enslavement of black Africans has been “the occasion of the increase of human feeling,” and an “advance from the merely isolated sensual existence.”⁴⁵⁹

456 “The German nations, under the influence of Christianity, were the first to attain the consciousness, that man, as man, is free: that is *it freedom of Spirit* which constitutes its essence.” Hegel, *Philosophy of History*, 19.

457 Ibid., 255.

458 Ibid., 406. See also footnotes 6 and 34 above.

459 Ibid., 98, 99, 96. It is an essential principle of slavery, writes Hegel, “that man has not yet attained a consciousness of his freedom, and consequently sinks down to a mere Thing—an object of no value. Among the Negroes moral sentiments are quite weak, or more strictly speaking, non-existent.” Ibid., 96.

Hegel, of course, never traveled to Africa and his information about it is taken from the texts generated by European colonialism itself. Those texts also speak of great centers of highly developed civilizations recognizable by European standards, but Hegel finesses this contradictory bit of data by (categorically) carving out those civilizations and appropriating them to the European spirit. He does this by dividing Africa into three parts: “Africa proper” or “the Upland”, “European Africa”, and Nile region. The latter is essentially Egypt, “which was adapted to become a mighty centre of independent civilization, and therefore is...isolated and singular in Africa.”⁴⁶⁰ What he calls “European Africa” runs along the northern coast: “a magnificent territory, on which Carthage once lay—the site of the modern Morocco, Algiers, Tunis, and Tripoli.” This, Hegel adds, “*must [sollte und musste] be attached [herüberziehen] to Europe.*”⁴⁶¹ Those lands in Africa that exhibit (for Europeans) no recognizable major civilizations fall into the category of “Africa proper.”⁴⁶² It is from Africa proper—which he admits Europeans know little about—that Hegel extrapolates the “peculiar African character”: “The Negro [*der Neger*]...exhibits the natural man in his completely wild and untamed state [*Wildheit und Unbändigkeit*] ...there is nothing harmonious with humanity to be found in this type of character. The copious and circumstantial accounts of Missionaries confirm this...”⁴⁶³

We see, then, that by definition any civilization in Africa that reflects high cultural development, and thus reason, is categorically excluded from Africa proper. A

460 Ibid. 92.

461 Ibid., 92.93.

462 Africa proper, “as far as history goes back, has remained—for all purposes of connection with the rest of the World—shut up...the land of childhood, which lying beyond the day of self-conscious history, is enveloped in the dark mantle of night.” Ibid., 91.

463 Ibid., 93.

similar logic is used with African slavery: enslavement proves *ipso facto* that the slave has not yet become conscious of his or her freedom; the fact of slavery is its justification. The contradictions present within this and similar analyses are only revealed in the experience of Christian colonialism, when those who, according to Hegel, have become self-conscious of their freedom, act on the presuppositions to which Hegel has given voice in their encounters with non-European peoples. It is in this context that we can situate the Valladolid and similar debates and the arguments for private punishment, but before I interject these two examples, we should keep in mind some of the components of European objective spirit that are at stake here: these include, for example, juridical concepts of political authority, war, sovereignty, the state, property and exchange, and personality, which, in turn, have a dialectical relation to evolving understandings of morality, epistemology, historical development, as well as religious and national identity.⁴⁶⁴ Hegel's brilliance was to recognize the dialectical and historical nature of these concepts, and make them central to his system and methodology—albeit in varying degrees of consistency—which is why my criticisms of Hegel on the subject of colonialism are immanent in nature.

My intention in this chapter, then, is not merely to show that Hegel was mistaken in regarding the experience of modern colonialism as insignificant for the development of European objective spirit. Although I raise the example of the Valladolid Debate in the following, I hope that my argument in Part I—regarding, for example, Locke's theories of the state of nature, property, natural rights, and sovereignty, which emerged from the imperatives of accumulation—has contributed to this general thesis as well, insofar as

⁴⁶⁴ Hegel, of course, has acknowledged this in his treatment of the conquests and colonialism of the Greek and Roman worlds.

they were subsequently institutionalized in Anglo-American law and political ideology, i.e. within what Hegel would call the objective spirit of a nation of the Germanic world. One might argue that Hegel was merely saying that after the recognition of the principle of free personality (of which almost all of the above juridical concepts could be viewed as derivations) every development thereafter was simply the working out of its incomplete realizations. Thus, we can think of the entire development of European objective spirit as the realization of this principle and therefore as an “internal” process.⁴⁶⁵ We must only remind ourselves that, according to Hegel’s own argument, it was in *Roman* law (and as a consequence of Roman imperialism and colonialism) that personality arose, not the law of the Germanic, i.e. Christian world. Thus what is distinctive about the latter, what makes it Germanic rather than Roman, is *how* that principle was realized, and this, I argue, cannot by any account be called “internal”. For those who make a similar argument, yet move the establishment of the principle of free personality from the Roman Empire to the Reformation, equally problematic questions arise as we will see in the following two juridical examples.

Regarding the question of personality, I believe the example of the Valladolid and earlier debates instigated by reports of abuse and terror in the colonies—discussed in Chapter Two, Section 3—are fairly straight forward. The Valladolid debate, for example, was initiated by the protestations from Las Casas and others regarding Spain’s “infernal methods of tyranny”⁴⁶⁶ in the colonies that Sepúlveda famously rejected Vitoria’s claim

⁴⁶⁵ “It must be nearly one and a half millennia since the freedom of personality began to flourish under Christianity and became a universal principle of part—in only a small part—of the human race.” Hegel, *Philosophy of Right*, §62.

⁴⁶⁶ Las Casas, *The Devastation of the Indies*, 31.

(in his *Relectio de Indis* (1539))⁴⁶⁷ that indigenous peoples had *personality*, which in Vitoria's terms is the capacity to exercise *dominium*, public and private, i.e. the capacity for ownership (*dominium rerum*) and political sovereignty (*dominium jurisdictionis*).⁴⁶⁸ It was Las Casas who sparred with Sepúlveda, and based upon his years of experience among the Amerindians, argued that the latter had "excellent, subtle, and very capable minds" and were "endowed by nature" with "monastic, economic, and political" prudence, i.e. they were capable of reason and it was reflected in their social institutions and practices.⁴⁶⁹ Vitoria too had argued that indigenous peoples were rational: "This is self-evident, because they have some order (*ordo*) in their affairs: they have properly organized cities, proper marriages, magistrates and overlords (*domini*), laws, industries, and commerce, all of which require the use of reason."⁴⁷⁰ If they were not rational, that would be another matter, for "irrational creatures clearly cannot have any dominion, for dominion is a legal right (*dominium est ius*)," and irrational creatures "cannot have legal

467 As the chronology makes clear, Vitoria's work was not the result of the Valladolid debate, but rather was a response to an earlier yet similar one that arose from the reports of Spanish abuse in the colonies by Antonio de Montesinos. In response, King Ferdinand sent Alonso de Espinal on a fact-finding mission to the colonies, which only confirmed Montesinos's report. Ferdinand then set a group of theologians to work on producing legislation that would mitigate the abuses, resulting in the Laws of Burgos (1512), which clearly did not end the abuse or the debate.

468 "That is to say, whether they were true masters of their private chattels and possessions, and whether there existed among them any men who were true princes and masters of the others." Vitoria, *On the American Indians*, 1.1 §4, in *Political Writings*, 239.

469 Las Casas, *Obras Escogidas*, 5 vols, ed. Juan Pérez de Tudela (Madrid: Biblioteca de Autores Españoles, 1957-58), Vol. III, 3.4; selected and translated in *Witness: Writings of Bartolomé de Las Casas*, 100. Las Casa also writes: "not all barbarians are irrational or natural slaves or unfit for government. Some barbarians, in accordance with justice and nature, have kingdoms, royal dignities, jurisdiction, and good laws, and there is among them lawful government." Las Casas, *In Defense of the Indians*, 42.

470 Vitoria, *On the American Indians*, 1.6 §22, in *Political Writings*, 250. , Vitoria takes his lead from Aristotle's definition of civil life. See Aristotle, *Politics* 1328b 6-22.

rights.”⁴⁷¹ He concludes that “before the arrival of the Spaniards these barbarians possessed true dominion, both in public and private affairs,” for rationality, as evidenced in the structures of social and political life, rather than Christian faith, is the true basis of *dominium*.⁴⁷²

Less evident, but perhaps more important, is how the resolution of the political and theological crisis over the status of non-European and non-Christian rationality and personality not only sets limits to the jurisdictional claims of Popes or Monarchs, as ‘lords of all the world’ (*orbis dominus*), but establishes a principle of secular jurisdiction. As we saw in Chapter Two (Section 2), the above stance by Vitoria—on the natural capacity for rights of property and jurisdiction—was originally articulated by Aquinas in the context of the Franciscan poverty debate, although Aquinas’s intention was to only address the pressing issue of property. In that theological crisis, Aquinas defended the conservative economic interests of the Church against the radical implications of apostolic poverty, yet, I argued, ironically weakened the reach of the Church’s authority by bestowing greater *natural* liberty and private *dominium* to individuals, thus supporting the kind of natural rights-based constitutionalism of the conciliarists.⁴⁷³ And as I noted before, this concession on the issue of property was counterbalanced by an absolutist conception of sovereignty the likes of which had not been seen since the Roman Empire; a development that fits well with Hegel’s account of the tyrannical repercussions that follow from the rise of abstract right. Thus, although the Church of the thirteenth and

471 Ibid., 1.4 §20, p. 247.

472 Ibid., 1.6 §23, p. 251.

473 See Tuck, *Natural Rights Theories*, 24. These, of course, were also to influence the natural rights and constitutional theories of the seventeenth and eighteenth centuries.

early fourteenth centuries recognized individuals as having a natural *dominium* as a way to stave off the Franciscan challenge, it simultaneously opened the door to the question of *secular*, not just civil—as Bartolus and the conciliarists had argued—public *dominium* or *dominium jurisdictionis*, which Vitoria and Las Casas would answer in the crisis arising from Spanish colonialism. That is to say, in the case of Vitoria, it was not just a critique of temporal ecclesiastical rule that delimited a space of rule, i.e. in the *civitas*, free from direct Church authority: He was giving an argument for legitimate secular rule, first, by the aforementioned recognition of personality and the public and private rights it entails, and, second, by constricting both monarchical and ecclesiastical rule from usurping the *dominium* of secular and non-Christian nations discovered by the ever-expanding Spanish and Portuguese colonial expeditions. This recognition and limitation, we saw, left only (just) war as a legitimate means to establish any extra-European jurisdiction.⁴⁷⁴

Thus, in addition to the quite radical extension of personality to “barbarians” by Las Casas and Vitoria, the latter also established a principle of secular jurisdiction whose realization would soon take root on European soil. Such secularization represented, for Hegel, one of the two forms of alienation (or self-opposed conditions of spirit) described in the dialectic of “Culture,” for the secularization of objective spirit not only represents an alienation of personality in the *actual* world of social institutions (privately in property and publicly in state power), but this actual world becomes opposed to the world of pure consciousness (faith). For Hegel, it is only through the Reformation that these opposed worlds are reconciled; a reconciliation incompatible with Catholicism whose Church

⁴⁷⁴ See Vitoria’s “On the Laws of War” and “Letter to Miguel de Arcos” in *Political Writings*, 295-327; 331-33.

embodies externality, sensuousness, and perpetual alienation.⁴⁷⁵ Indeed, the experience of the French Revolution and subsequent terror in the eighteenth century was, according to Hegel, not only because the French secularized their republic, but because they were still Catholic: “Thus liberalism as an abstraction, emanating from France, traversed the Roman world; but religious slavery held that world in the fetters of political servitude. For it is a false principle...that there can be a revolution without a Reformation.”⁴⁷⁶ And just as revolution and terror are said to be the result of secular republics and unreformed Catholics, so too, Hegel hints, is colonialism:

While the rest of the world are urging their way to India, to America—straining every nerve to gain wealth and to acquire a secular dominion which shall encompass the globe, and on which the sun shall never set—we find a simple *monk* looking for that specific embodiment of Deity which Christendom had formerly sought in the earthly sepulcher of stone, rather in the deeper abyss of the Absolute Ideality of all that is sensuous and external—in the Spirit and the Heart...⁴⁷⁷

The claim here that Protestantism, as the internalization of the principle of free personality manifest in individual conscience, dissolves the tendency of abstract right to direct both individual and nation outward toward sensuous and thus deficient satisfaction of their alienated personalities, will, of course, fall victim to a great historical irony. Besides the structural contradictions that necessarily arise from decidedly capitalist property relations whose elusive resolution is continually sought through expansion—a

475 “The ecclesiastical piety of the period displays the very essence of superstition—the fettering of the mind to a sensuous object, a mere thing—in the most various forms:—slavish deference to *authority*; for spirit, having renounced its proper nature in its most essential quality [having sacrificed its characteristic liberty to a mere sensuous object], has lost its freedom, and is held in adamantine bondage to what is alien to itself.” Hegel, *Philosophy of History*, 413.

476 Hegel, *Philosophy of History*, 453. See also Lukács, *The Young Hegel*, 457-65.

477 Hegel, *Philosophy of History*, 414.

point Hegel will come to recognize in his later *Philosophy of Right*—we find that the Protestant response to the above Catholic limitations of European colonial jurisdiction to just war is the privatization of just war in the form of an unmediated and thus terroristic personality, acting on its own self-certain sense of absolute freedom.

IV. Freedom, Terror, and Private Punishment

At the very end of his learned disputation on the legitimacy of non-Christian personality and secular jurisdiction, which systematically eliminated all claims to European *dominium* over the non-European world, Vitoria gives this refreshingly honest admission of what is at stake:

The conclusion of this whole dispute appears to be this: that if all these titles were inapplicable, that is to say if the barbarians gave no just cause for war and did not wish to have Spaniards as princes and so on, *the whole Indian expedition and trade would cease*, to the great loss of the Spaniards. And this in turn would mean a huge loss to the royal exchequer, which would be intolerable.⁴⁷⁸

To soften the blow of this apparently dire conclusion for the accumulative processes so necessary to the economy of the Spanish empire, Vitoria gives four rather unrealistic reasons why all is not lost: (1) trade can continue, for “the barbarians have a surplus of many things which the Spaniards might exchange for things which they lack”; (2) there are still uninhabited areas that do not fall within the sphere of barbarian jurisdiction and thus can be claimed; (3) taxes can legitimately be levied on the trade between the Spain

⁴⁷⁸ Vitoria, *On the American Indians*, 3.8, §18, in *Political Writings*, 291.

and the colonies, “since the sea passage was discovered by our prince, and our merchants would be protected by his writ”; and, (4) once enough barbarians are converted to Christianity of their own free will there would be both expedient and lawful reasons to not “abandon altogether the administration of those territories.”⁴⁷⁹ I say these are unrealistic, because they do not take into consideration economic and jurisdictional competition from other rising colonial powers. As we saw in Chapter Two, Grotius’s first published work was a challenge to the premise of Vitoria’s claim of Spanish rights to the sea (based on the right by first occupation, which both Vitoria and Grotius recognized) and Locke developed his labor theory of property to counter jurisdictional claims by mere factual occupation. But both Grotius and Locke rejected Vitoria’s claim that only just war could establish legitimate political jurisdiction as well as his claim that colonists could not punish indigenous peoples for violating natural law.⁴⁸⁰ The latter is, of course, Locke’s “strange doctrine,” which states that “*in the State of Nature, every one has the Executive Power of the Law of Nature*” (II §13) and thus “*hath a Right to Punish the Offender*” (II §8), as well as seek reparations (II §11). As I argued in previous chapters, this private right to punishment was explicitly formulated by both Grotius and Locke in the context of Dutch and British practices of colonization in order to justify, on grounds different than that of the neo-Thomists, processes of usurpation and accumulation. What I would like to demonstrate in the following is how Hegel’s analysis of absolute freedom in the *Phenomenology* is compelling when applied in this context.

479 Ibid., 291-92.

480 As noted in Chapter Two, Grotius acknowledged that this is “contrary to the Opinion of Vitoria, Vazquez, Azorius, Molina, and others, who seem to require, towards making a War just, that he who undertakes it be injured himself...or that he has some Jurisdiction over the Person against whom the War is made.” Grotius, *The Rights of War and Peace*, Book II, Section XL, Chapter XX, 1024.

Hegel's analysis of absolute freedom and terror constitutes the final section of "Culture" in the *Phenomenology* (IV B III) and represents the conflagration of alienated personality—which in the Enlightenment produced a materialist metaphysics, an empiricist epistemology, and, perhaps most importantly, an abstract utilitarian ethics—that will experience terror as "fruit of its deeds" (*PS* §580).⁴⁸¹ As mentioned, culture is defined by a dual form of alienation: "On the one side, actual self-consciousness, through its externalization, passes over into the actual world, and the latter back into actual self-consciousness. On the other side, this same actuality—both person and objectivity—is superseded; they are purely universal" (*PS* §485). Personality, we might say, is alienated in each, and each are alienated from each other, forming an equilibrium in the alienation of opposites (whose antipodes are *actual* and *pure* consciousness). The self is thus doubled or split between the world of the immediate and singular self, whose relations are spiritless, and the world of the universal or eternal self of the beyond, which is the realm and refuge of absolute spirit. The self of the former is similar to the self of "Legal Status" insofar as its renunciation of its being-for-self makes it experience its world as alien world, of "which it must now take possession [*sich bemächtigen*]" (*PS* §488). That is to say, the self of *actual* consciousness actualizes itself in its alienation, but in so doing produces *both* itself and its world, with the former subsequently seeking to appropriate the latter. In this process of alienating actualization, the self of culture becomes universal, but unlike the universality expressed in "Legal Status", the "universality which counts here...is one that has made itself what it is and for that reason is *actual*" (*PS* §488). Thus,

481 See Merold Westphal, *History and Truth in Hegel's Phenomenology* (Atlantic Highlands, NJ: Humanities Press, 1998), 168.

the actualized self of culture has become universal insofar as it “molds” itself through culture (*Bildung*), producing the intrinsic (second) nature shared by others in their national cultural and juridical institutions. This process of acculturation, the engendering of a universal objective essence within the self, was not yet present in “Legal Status.”

This opposition of actual and pure consciousness is unstable, as are all conditions of alienation, and we will see that the Enlightenment, as the development of “pure insight,” exacerbates their opposition to the breaking point. But this development is slow in coming, for actual selves remain long captive within feudalistic political and economic relations; state power (*Staatsmacht*) and wealth (*Reichtum*), while objective moments in actual consciousness, are slow to develop their independence and universality in true sovereignty and capitalism, for the conflict between state power and capital, monarchy and bourgeoisie, must first work itself out.⁴⁸²

Although the *actual* self is transitory its *thought* is universal, and thus within the opposition of *actual* and *pure* consciousness we find an additional distinction within the latter. That is to say, while pure consciousness is the realm of faith (*Glaube*), it is also the

482 The particular interests of what Hegel calls the *ignoble* consciousness within the “various classes and ‘estates’” still hold tug apart these two essences, for it “sees in the sovereign power a fetter and a suppression of its *being-for-self*, and therefore hates the ruler...It sees, too, wealth, by which it attains to the enjoyment of its own self-centered existence, only the disparity with its permanent *essence*; since through wealth it becomes conscious of itself merely as an isolated individual...” (PS §501). While the ignoble consciousness does not recognize itself in the otherness of government and wealth, the noble consciousness (the courtier) does and through flattery rather than resistance becomes empowered. Yet this noble act of identification (and obedience) becomes inverted insofar as service to the common good supposedly represented by the monarch (Louis XIV?) is self-serving, insofar as serving the monarch becomes the pursuit of its wealth, i.e. the monarch exists only in name, fails to achieve the union of the universal and particular, and in its privatization has become indistinguishable from wealth. “While, therefore, the noble consciousness behaves as if it were *conforming* to the universal power,” writes Hegel, “the truth about it is rather that in its service it retains its own being-for-self, and that in the genuine renunciation of its personality, it actually set aside and rends in pieces the universal Substance” (PS §513). The independence that what thought would be gained through the identification with the monarch has now become a relation of dependency, private gain and the public service thereby suffer inversion and collapse: “What is learnt in this world is that neither the actuality of power and wealth, nor their specific concepts, ‘good’ and ‘bad’, or the consciousness of ‘good’ and ‘bad’ (the noble and ignoble consciousness), possess truth...each is the opposite of itself” (PS §521).

realm of “pure insight” (*reine Einsicht*).⁴⁸³ The latter, as rational self-consciousness and self-certain universality—the “natural light of reason”—elevates the self out of the contradiction, inversion and collapse of the public and private virtues in what Lukács has called the “gradual bourgeoisification of absolute monarchy.”⁴⁸⁴

Pure insight is the “*self*-consciousness of Spirit as essence; it therefore knows essence, not as *essence*, but as absolute *self*...[and] therefore seeks to abolish every kind of independence other than that of self-consciousness” (*PS* §536). But as we saw with Sense-Certainly and Stoicism, pure insight lacks content; it calls upon every self to “*be for yourselves* what you all are *in yourselves—reasonable*” (*PS* §537)—the true motto of the Enlightenment—but this reasonableness is the mere *form* of rational insight or critique and thus it must level and negate everything that confronts it in order to give itself content. In the realm of pure consciousness, this means the critique of the practices of faith—a rational critique purging faith of its historical claims and objects, i.e. its positivity—reducing the latter to sheer yearning for its truth in a beyond; a condition which Hegel thinks pure insight dangerously shares in the form of a ‘not yet’.

The self as rational insight, as negativity, obtains its positive objectivity in the world of things through its newly found concept, “the Useful” (*Nützlichkeit*), and will thus set out overcome the alienation of actual and pure consciousness insofar as the latter

483 Their commonality with relation to actual consciousness is threefold: “First, each is *an intrinsic being on its own account*, apart from all relationships; second, each stands in relationship to the *actual* world in an antithesis to pure consciousness; and third, each is related within pure consciousness to each other” (*PS* §530).

484 Lukács, *The Young Hegel*, 492.

will take possession of the former, i.e. the world of culture.⁴⁸⁵ The realization of this form of absolute externalization or objectification, which in its concept of utility renders all the world a function for itself, is absolute freedom (*absolut Freiheit*). Yet the “itself” of consciousness here is still universal; its will is a general will (*allgemeiner Wille*). Its utilitarianism is abstract, for in “the *being-in-and-for-itself* of the Useful *qua* object, consciousness recognizes that its *being-in-itself* is essentially a *being-for-another*” (PS §583). In recognizing this, the “undivided Substance of absolute freedom ascends to the throne of the world without any power being able to resist it” (PS §585). In the realm of objective spirit, this means that culture must conform to the rational and universal essence of the self or face destruction, i.e. that every institution must be reflective of it, must become subject to rational justification, and that all “social groups or classes” must in the end be abolished. The self in absolute freedom is thus a revolutionary self that sets out to tear down all of the institutions that do not conform to it, but “its purpose is the general purpose, its language universal law, its work the universal work” (PS §585). As in Rousseau’s conception of the general will, sovereignty in absolute freedom is popular but indivisible, incapable of being broken up into various bodies or branches of government—“legislative, judicial, and executive powers” (PS §588)—or embodied in particular individuals or groups of people, without harm. For this, writes Hegel, “would restrict the being of personality to a branch of the whole, to one kind of activity and being” and representative government is no solution either, for even then unmediated pure personality thinks itself “cheated out of *reality*, the reality of itself making the law and accomplishing, not a particular work, but the universal work itself” (PS §588). The

485 It is in this utility that “pure insight achieves its realization and has itself for its object, an object which it now no longer repudiates...” PS §580.

adherence to this abstract universality becomes fanatical and terroristic, according to Hegel, for the self can only negate, which includes negating its greatest antithesis: “the freedom and individuality of self-consciousness itself” (*PS* §590), i.e. other selves.

The sole work and deed of universal freedom is therefore *death*, a death too which has no inner significance or filling, for what is negated is the empty point of the absolutely free self. It is thus the coldest and meanest of all deaths, with no more significance than cutting off a head of cabbage, or swallowing a mouthful of water (*PS* §591).

Thus, the self in absolute freedom as an unmediated pure self-identity becomes the “fury of destruction” or disappearing (*die Furie des Verschwindens*). “This was a time of trembling and quaking and of intolerance towards everything particular,” writes Hegel in the *Philosophy of Right*. “For fanaticism wills only what is abstract, not what is articulated, so that whenever differences emerge, it finds them incompatible with its own indeterminacy and cancels them [*hebt sie auf*].”⁴⁸⁶

As we well know, terror as political phenomenon is not unique to any particular nation or historical period,⁴⁸⁷ but I would argue with Hegel, that the terror of absolute

486 The entire quote reads: “The form [of freedom] appears more concretely in the active fanaticism of both political and religious life. An example of this was the Reign of Terror in the French Revolution, during which all differences of talents and authorities were supposed to be cancelled out [*aufgehoben*]. This was a time of trembling and quaking and of intolerance towards everything particular. For fanaticism wills only what is abstract, now what is articulated, so that whenever differences emerge, it finds them incompatible with its own indeterminacy and cancels them [*hebt sie auf*]. This is why the people, during the French Revolution, destroyed once more the institutions they had themselves created, because all institutions are incompatible with the abstract self-consciousness of equality.” Hegel, *Philosophy of Right*, §5, *Zusatz*.

487 The evidence of widespread terror and genocide in the *Protestant* colonies, both in their establishment and in their management, is so overwhelming that I have not bothered to make the case. As Tocqueville said of the American colonists’ decimation of the Amerindians, it “is impossible to destroy men with more respect for the laws of humanity.” He was actually referring to non-violent legal means of the American colonists, but the sentiment holds in the case of rational terror as well. He writes: “The Spaniards were unable to exterminate the Indian race by...unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the

freedom is far less common and is indeed unique to modernity.⁴⁸⁸ That is to say, the terror of absolute freedom, or what we might call a kind of enlightened (natural rights-based) utilitarianism, can only emerge after several of the historical developments I have discussed above: (1) the development of legal personality, insofar as the individual as *person* is uprooted and universalized into the abstract space of rights; (2) the related development of recognition (and equality) in law; (3) the experience of autonomy through the recognition of one's will in the world; (4) the realization that one's will is universal insofar as it is rational; (5) the recognition that sociality and intersubjectively is somehow integral to reason; (6) the recognition that reason is integral to freedom; (7) the recognition that reason and freedom are somehow integral to rights; (8) the development of rights being appropriated to the individual, i.e. subjectivized, insofar as the individual as rational now takes itself to have *natural* rights via its participation in reason; (9) the development of political sovereignty (through the alienation of personality) to its complete form in the modern period, so it can then be internalized or appropriated by the individual in a form of popular (or moral) sovereignty; and, finally, (10) the experience of extreme alienation under capitalism, which becomes so systemic that freedom becomes the actualization of the concept of utility. This is not a complete list, nor is it phrased in terms that would be acceptable to Hegel, of course, but I find these to be adequate shorthand descriptions of a few of the necessary developments that cumulatively

eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.” Alexis de Tocqueville, *Democracy in America*, translated, edited, and with an introduction by Harvey C. Mansfield and Delba Winthrop (Chicago and London: University of Chicago Press, 2000), 355.

488 Harris would disagree insofar as he argues that Hegel's analysis shows that “*the Terror*” in the *Phenomenology* is absolutely unique, not, of course, because of its historical or national setting, but rather “because there can never again be enlightened community that believes in the natural goodness and rationality of all citizens, and is led by that to Hobbesian discovery of universal suspicion.” Harris, *Hegel's Ladder II*, 408, footnote 13.

constitute the shape of natural-rights (abstract) individualism operative in seventeenth-century colonialism, and justifications of colonialism—rather than a recapitulation of what we, as readers of the *Phenomenology*, understand the development of the modern self to be.

We can begin to relate Hegel's analysis of absolute freedom in the *Phenomenology* to the kind of colonizing experience that Grotius and Locke were contemplating by first turning to Hegel's attempt to differentiate European colonialism from its counterparts in past world-historical spirits. Although, as we saw above, Hegel has hinted at a potentially causal relation between alienation and a colonialism that strains "every nerve to gain wealth and to acquire a secular dominion which shall encompass the globe"—to be contrasted with Luther's turn away from what was "sensuous and external" and toward the inwardness of the "Spirit and the Heart"—he does not theorize its moments within a phenomenology of right or in the *Phenomenology* itself.⁴⁸⁹ Instead we find Hegel, in the *Philosophy of History*, admiring the "maritime heroes of Portugal and Spain," for their "chivalrous spirit [*Rittergeist*]." For Hegel, it is the death-defying entrepreneurial spirit of modern colonizers who, as in war, "hazard both property and life," which thus "exalts their gain and occupation above itself, and makes it something brave and noble." The sea, writes Hegel, "gives us the idea of the indefinite, the unlimited, and infinite," which we then reflect into ourselves, but its appearance of being "boundlessly innocent" conceals its "dangerous and violent element." "To this deceitfulness and violence," he writes, "man opposes merely a simple

⁴⁸⁹ This is, of course, predictable given his categorical presupposition of the principle of freedom in the Christian world.

piece of wood; confides entirely in his courage and presence of mind; and thus passes from a firm ground to an unstable support, taking his artificial ground with him.”⁴⁹⁰

For Hegel, the concept of absolute freedom arises precisely with the demise of the concept of utility: “withdrawal the form of objectivity of the Useful has...already taken place in principle and from this inner revolution there emerges the actual revolution of the actual world, the new shape of consciousness, *absolute freedom*” (PS §582), wherein the “the object and the [moment] of *difference* have...lost the meaning of *utility*, which was the predicate of all real being” (PS §584). That is to say, the individual consciousness has now collapsed into universal consciousness (i.e. as citizen participating in the general will) and the “difference” that could produce an object to which the former could be opposed has now vanished and with it the utility that related that object to itself.

Hegel’s critique of absolute freedom is a critique of what he sees to be the problem of Rousseau’s general will, while his critique of “utility” is something of a critique of utilitarian individualism, and both are related. As James Schmidt writes: “The category of utility views the world as an entity whose ‘being-in-itself’ consists of its ‘being-for-another’: the world has meaning only insofar as it serves the purposes of another. But this ‘other,’ Hegel argues, cannot be an individual subject pursuing particular projects, but rather must take the form of a ‘universal Subject’ possessing a ‘general will, the will of all *individuals* as such’ [PS §584].”⁴⁹¹ For Hegel, the particular withdraws into the universal and in so doing becomes permeated with negativity. Schmidt argues, rightly I believe, that Hegel’s concept of utility is intended to apply to

490 Hegel, *Philosophy of History*, 90-91.

491 James Schmidt, “Cabbage Heads and Gulps of Water: Hegel on the Terror,” *Political Theory*, 26:1 (Feb., 1998), 21.

Rousseau's idea of the "will of all," which is a mere aggregate of individual interests.⁴⁹²

Yet the general will, in Hegel's argument, is not just the sublation of the individual will, but the cancellation of the concept utility as well.

According to Hegel, the brunt of absolute freedom's destructiveness was felt by the political and legal order of the state (i.e. the monarchy, nobility, and church) and its mediating institutions (such as guilds)—"all social groups or classes which are the spiritual spheres into which the whole is articulated are abolished" (*PS* §585)—in the name of popular sovereignty and equal citizenship.⁴⁹³ Although this revolution also constituted the universal *person* as property owner (i.e. personality and abstract right) and destroyed feudal economic relations, opened up Church lands and noble properties to appropriation, etc., Hegel gives little attention to this dimension of private (property) right, focusing instead upon the relationship of the citizen to the nation, or the sphere of public right.⁴⁹⁴ I believe it is this emphasis that enables Hegel to drop talk of utility altogether in his analysis of absolute freedom, but it is precisely the sphere of private property right that I have in mind in the colonial context. We should also note that Hegel will reverse this emphasis in his analysis of the French Revolution as he develops his theory of civil society. "The problem which has been raised through the Revolution by

492 "There is often a great deal of difference between the will of all and the general will. The latter considers only the general interest, whereas the former considers private interest and is merely the sum of private wills." Rousseau, *On the Social Contract*, in *The Basic Political Writings*, translated and edited by Donald A. Cress (Indianapolis: Hackett Publishing Company, 1987), Book II, Chapter III, 155.

493 "After [the French Revolution] made freedom for all, as men, the principle of right (*Recht*), all institutions and positive laws which contradict it lose by the process of historical necessity, every legitimate claim to validity, and in Hegel's view, this is true objectively as well as historically." Ritter, *Hegel and the French Revolution*, 52.

494 See Harris, *Hegel's Ladder*, Vol II, 389-92. See also Marx's brilliant discussion of this process in Marx, *Capital*, Vol. I, chapter XXVII, 671-85.

the demand for political freedom,” writes Ritter, “consists in finding the legal form of freedom and, that is, in developing a legal order which accords with the freedom of selfhood and does it justice, and enables the individual to be himself and achieve his human determination.”⁴⁹⁵ Hegel’s philosophical response to the threat of individual freedom and equality permeating the structure of the state is to depoliticize it, to relegate to the sphere of civil society (*die bürgerliche Gesellschaft*), and ethically intervene in that sphere through the necessary (previously threatened) spiritual masses within the totality of the state (a point I return to in Section 4 of the following chapter).⁴⁹⁶ That is to say, he will find this legal form of freedom in capitalism.

Returning to my thesis, we know that for Hegel the fury of destructiveness (as the actualization of the general will), which follows from absolute freedom can only come to an end with the realization of the moral point of view. “In the discussion of morality that follows” absolute freedom and terror, writes Schmidt, “the opposition between general will and particular will is internalized within the conscience of the individual in the form of the struggle between moral law and individual inclination.”⁴⁹⁷ As Hegel says, spirit is “thrown back to its starting point, to the ethical and real world of culture” (*PS* §594), recoiling at the horror absolute freedom has wrought and discovering a newfound respect for death as its lord and master. This also means the reinstatement of the “spiritual masses of spheres to which the plurality of individual consciousnesses are assigned” (*PS* §593).

495 Ritter, *Hegel and the French Revolution*, 49-50.

496 *Ibid.*, 58.

497 Schmidt, “Cabbage Heads and Gulps of Water,” 24. See also Allen W. Wood, *Hegel’s Ethical Thought* (Cambridge: Cambridge University Press, 1990), chapter 10.

If we were give *Hegelian* reading of terror in the colonies, it should be located in the shape of *moral consciousness* (particularly in *conscience*) in the *Phenomenology*. It is within this absolutely self-certain shape that “absolute freedom as a despotic negative is reintegrated within a more comprehensive concept of the positive freedom of universal and equal rights.”⁴⁹⁸ Thus, we can think of the “artificial ground” of our maritime heroes as *conscience*, for it is in conscience that the general will has been sublated, giving rise to the individual’s absolute entitlement to determine the right and the good.⁴⁹⁹ We could therefore say that the Protestant colonists in the colonial state of nature, in the absence of the spiritual masses of objective spirit, relied on their (formal) conscience, which “in the majesty of its elevation above specific laws and every content of duty, puts whatever content it pleases into its knowing and willing. It is the moral genius which knows the inner voice of what it immediately knows to be a divine voice” (*PS* §655).⁵⁰⁰ Hegel says that this “divine worship” is “essentially the divine worship of a *community*” (*PS* §656), but in the state of nature, this community is abstract.⁵⁰¹ And, as Harris reminds us, “the dominance of Utility continues in a sublated way. I must *use* the order of Nature for the rational purpose of actualizing the Moral World-Order.”⁵⁰² Such actualization in its most immediate form, we find, is morally-sanctioned and unlimited individual *accumulation*,

498 Harris, *Hegel's Ladder, Vol II*, 401.

499 For Hegel’s distinction between *formal* and *true* conscience see Hegel, *Philosophy of Right*, §137.

500 “*Conscience* expresses the absolute entitlement of subject self-consciousness to know *in itself* and *from itself* what right and duty are, and to recognize only what it thus knows as the good; it also consists in the assertion that what it thus knows and wills is *truly* right and duty.” Hegel, *Philosophy of Right*, §137.

501 In the *Philosophy of Right*, Hegel speaks of the state as an “earthly divinity” (§272, *Zusatz*), and “the march of God in the world” (§258).

502 *Ibid.*, 417.

for there is no conflict between the individual good and the general good, according to Hegel: “what the individual does for himself also contributes to the general good; the more he has made provision for himself, not only is there a greater possibility of his being of service to others” (PS §645). Thus, if we were to differentiate Hegel’s account of terror in the *Phenomenology* from the terror we find in the colonies, it could be argued that absolute freedom and terror of the former has returned, yet this time in the shape of (formal) *conscience* that has been uprooted from the ethical substance of the state. In the colonies, it ascends the throne unopposed, we might say, for in “the strength of its own self-assurance it possesses the majesty of absolute autarky” (PS §646).

Hegel, like Hobbes, believes the state of nature to be a state of war, albeit more a war for recognition than for self-preservation. In the *Philosophy of Mind*, he argues that “the fight for recognition pushed to the extreme... can only occur in the natural state, where men exist only as single, separate individuals; but it is absent in civil society and the State because here the recognition for which the combatants fought already exists.”⁵⁰³ As discussed in previous chapters, there are two possibilities for this ‘natural state’; either the recognitive struggle of the individual is antecedent to the state or is somehow outside it, most likely in the sense of the inter-national state of nature as war. In the case of the latter, Hegel writes that “each person... makes himself into absolute power, regards himself as absolutely free, real and for himself as opposed to some other which is universal negativity. In war this is granted to him; it is crime *on behalf of the universal*

503 Hegel, *Philosophy of Mind*, §432, *Zusatz*.

interest, its purpose is the maintenance of the whole against the enemy who would destroy it.”⁵⁰⁴

Here we have an example of the fury of destruction of absolute freedom, but in service of the universal interest of a distinct community which is purportedly under existential threat. In the context of modern colonialism, no such threat exists and the universal interest that is served is that of law itself, according to Grotius and Locke. And, very generally speaking, the Protestant colonialist, unlike the Catholic, need not appeal to the external authority of Pope or monarch to carry out a (just) war in the name of natural law or to avenge its transgression, for they, as individuals, are its judges and executioners. Like the abstract personality of Roman law, Protestant colonizers recognized themselves as participants in something like the formal universalism of natural law, yet unlike Roman personality, the execution and authority of law no longer depends on an outside agent (emperor or sovereign), for substance is no longer external to or alienated from the self. They are already in the world of pure insight that reconciled, however temporarily, this (actual) world with the (pure) world of the beyond and in their immediate self-certainty and infinite judgment feel empowered with a subjective right of private punishment. Hegel attributed the development of absolute freedom in civil society to the individualized tyranny of the general will; the individual’s purpose thus became the “general purpose, its language universal law, its work the universal work” (PS §585). In Protestant colonialist theory, law is “writ in the Hearts of all Mankind,” i.e. in *conscience*, but the legitimacy of law is universal reason and thus articulated, to

504 Hegel, *Realphilosophie*, Vol. II, 26f; cited in Lukács, *The Young Hegel*, 415.

generalize quite a bit, as natural rather than divine law.⁵⁰⁵ Thus, unlike Hegel's claim that it is only in war that individuals are "granted" absolute freedom by the state, in Grotius and Locke the right to interpret and execute the law, which I take to be essential to absolute freedom, is antecedent to the state and present within the individual, enabling what Marx called the "Christian character of primitive accumulation."⁵⁰⁶ We are already familiar with Locke's "strange doctrine," which was essentially appropriated from Grotius, who writes: "Is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals..."⁵⁰⁷

Although much more could be said on this point, for I have only outlined it in the most general of terms, I would like to close with a thought on that quintessential concept of Enlightenment alienation, *Nützlichkeit*. For Hegel, the self achieves positive objectivity in the world of things by becoming *thing-like*, but consequently *thing-like* for others: "its *being-in-itself* is essentially a *being-for-another*" (*PS* §583). This seems an apt description of that development (in early capitalism) when *self-dominium* was interpreted as self-ownership, and one's rights and labor became the property of one's person; i.e. the possessive individualism that culminated in Locke, for whom "Life,

505 Both Grotius and Locke viewed natural law as God's law insofar as it was expression of God's will, although Grotius does give that famous caveat that natural law would be valid "even if we were to suppose...that there is no God [*etiamsi daremus...non esse deum*]. Grotius, *The Rights of War and Peace*, Vol. III, 1748. In the *Second Treatise*, §11 Locke claims that natural law was "writ in the Hearts of all Mankind." The phrase "law written in their hearts" is from Paul, *Romans* 2. 14-15. Hegel's understanding of conscience is obviously complex and I will not address it here. See *PS* §§632-71. See also *PS* §633 for a nice summary of the three selves of Spirit: legal, cultural, and moral.

506 Marx, *Capital*, Volume I, Chapter 31, 705.

507 See my discussion in Chapter Three, Section 3.

Liberty, and Estate” (II §§87, 123) are all property.⁵⁰⁸ As we saw in Chapter One, in Locke’s early *Essays on the Law of Nature*, there exists a duty to work, as a commandment from God to subdue the earth, but it is not yet connected with property and thus utility. This would change in the *Two Treatises*: “God, by commanding to subdue, gave Authority so far to *appropriate*. And the Condition of Humane life, which requires Labour and Materials to work on, necessarily introduces *private possessions*” (II §35). And, we should remember that because Locke is now thinking in terms of commodities, appropriation “does not lessen but increase the common stock of mankind” (II §37). This is well and good, but it does not seem to reflect the *insatiable* negativity of absolute freedom. There is nothing here that appears to entail expansion or the revolutionary annihilation of all that might resist its conversion to utility. For this, Locke must ransack the kingdom of faith, for the expansionary logic of capitalism, while perhaps felt, was not yet developed enough to make its law explicit for Locke, as it would for Hegel in the *Philosophy of Right*. Locke, therefore, theorizes the necessity of expansion as a *duty*; since God gave the world to humankind for its utilization, it “cannot be supposed that he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational” (II §34). Thus is born a duty to colonize and, when combined with the right of private punishment, to exterminate those who resist the appropriation of land into the agricultural economy. There is perhaps no better example of this than Vattel’s Lockean argument in his *The Law of Nations* (1752), which we encountered in the previous chapter. Every nation, Vattel argued, “is obliged by the law of nature to cultivate the land that has fallen to its share,” and those “nations... who

⁵⁰⁸ I list several examples of possessive individualism in Locke’s near predecessors and contemporaries in Chapter One, Section 4.

inhabit fertile countries, but disdain to cultivate their lands...are wanting to themselves, are injurious to all their neighbors, and deserve to be extirpated as savage and pernicious beasts.”⁵⁰⁹

⁵⁰⁹ And those “others, who, to avoid labour, choose to live only by hunting and their flocks... Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands.” Emerich de Vattel, *The Law of Nations*, Book I, Chapter VII, §81, 35.

Chapter Five

On Jurisdiction and Colonialism in Hegel's *Philosophy of Right*

My objective in the previous chapter was to demonstrate, first, that the juridical self-understanding of Western European (or “Germanic”) spirit is less European than Hegel supposed insofar as the dialectical development of private or subject right, jurisdiction, and personality, although *immanent* in the development of (world) Spirit, was not “internal” in the context of objective (national) spirits.⁵¹⁰ My critique was, in short, that Hegel had failed in his text to account for the phenomenology of colonialism—best understood as a *phenomenology of right (Recht)*—as an integral moment in the development of modern spirit.⁵¹¹ This critique was also indirectly targeted at those Hegelian or Hegelian-Marxist readings of modern colonialism as a *Herrschaft und Knechtschaft* struggle for recognition, which make Europeans the placeholder of the *Herr* and the colonized the placeholder of the *Knecht*. My objection to these admittedly rather loose applications of this shape of conflicted self-consciousness was that insofar as

510 This is true of every shape of consciousness (from person to nation), for each has an other from which it is self-alienated and by which it appropriates content, at least until ultimate reconciliation in absolute spirit. Said another way, Hegel's view of world history as the actualization of the concept of freedom—with its moments of universality, particularity, and singularity—has been problematically represented by the historical terms of the Greek, Roman, and Germanic worlds, the latter including the entire history of the Christianity.

511 On a related thesis that modern colonialism was central to the generation of international law and state sovereignty, see Anghie, *Imperialism, Sovereignty and the Making of International Law*.

colonialism is essentially a juridical struggle, i.e. one mediated by right, it is a phenomenon generally within the realm of culture and particularly within the *rule of law*. That is to say, the experience of modern colonialism is subsequent to both the actualization of self-consciousness and the emergence of spirit as reason—as the identity of consciousness and self-consciousness, being and thought.

Although there is a great diversity of thought within the modern natural law tradition, I simply employed the categorical distinction between what I have referred to on the most general level as the Catholic (or neo-Thomist) and Protestant theories espoused by Vitoria, Grotius, and Locke. The major difference here being the justificatory means of establishing right or usurping private and public *dominium*, for the Catholics employed a just war theory wherein the interpretation and execution of law resided in the (monarchical or ecclesiastical) sovereign and was enforced collectively as inter-national war, while the Protestants employed a theory of private punishment, wherein the interpretation and execution of the law resided in the person and was enforced privately (due to the incorporation of the post-Reformation concept of conscience).⁵¹² While the former was a reaction to the experience of terror in the Spanish and Portuguese colonies, the latter—viewed as the incarnation of absolute freedom—led to a rationalized terror not unlike the terror Hegel *did* analyze in the *Phenomenology*.

⁵¹² Cf. Hannah Arendt's analysis of "totalitarian lawfulness." She argues that totalitarianism's "identification of man and law, which seems to cancel the discrepancy between legality and justice that has plagued legal thought since ancient times, has nothing in common with the *lumen naturale* or the voice of conscience, by which Nature or Divinity as the sources of authority for the *ius naturale* or the historically revealed commands of God, are supposed to announce their authority in man himself. This never made man a walking embodiment of the law, but on the contrary remained distinct from him as the authority which demanded consent and obedience." Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace & World, 1966), 462-63. I am, of course, arguing that Locke's "man" was indeed "a walking embodiment of the law." I will discuss Arendt's insightful analysis of terror in my Conclusion.

Thus, I argued (and this was the *second* objective of the previous chapter) that Hegel’s account of rational terror applied to the experience of modern colonization and, in light of my first critique, this is due to the essential relation between the two insofar as both were examples of absolute freedom and the actualization of the concept of utility (within a burgeoning capitalist economy).⁵¹³ This, I said, was most explicit in Protestant colonialist theory and practice—which is consistent given the differing concepts of the person, property, labor, and value, as well as the varying economic conditions within the Spanish, Dutch, and British empires (See Chapter Three, Section 2)—and came to full fruition in Locke’s work.

I conclude my thoughts on the previous chapter with a final claim that Hegel is actually much closer to the Protestant natural law tradition on the question of right (in the state of nature) than is usually supposed—a point that indeed converges with the above notion of “absolute autarky.” It is often thought, for example, that Hegel’s philosophy of right is hostile to the Protestant argument for private punishment and its subsequent justification for the nonconsensual establishment of a right over persons (sovereignty), for there can be no rights in a state of nature and private punishment is merely revenge (*Rache*) by a subjective will, which rather than cancel (*Aufheben*) a wrong, merely produces another.⁵¹⁴ Such a reading is completely consistent with both doctrines of right,

513 In his *System of Ethical Life*, Hegel discusses a pre-modern form of absolute freedom and terror (havoc): “When culture has demolished inorganic nature long enough and has given determinacy in every respect to its formlessness, then the crushed indeterminacy bursts loose, and the barbarism of destruction falls on culture, carries it away, and makes everything level, free, and equal. In its great magnificence, havoc occurs in the East, and a Genghiz Khan and a Tamerlane, as the brooms of God, sweep whole regions of the world completely clean” Hegel, *System of Ethical Life*, 133.

514 By definition, for Hegel, private punishment is an oxymoron. If it is private, it cannot be punishment (*Strafe*). Peter Stillman considers Hegel’s purported rejection of private punishment as one of

yet Hegel provides an *exceptional exception* within his own, which relates sympathetically (although not explicitly) to Locke’s “strange doctrine.” I call it an “exceptional exception,” for it not only stands out as an exception to Hegel’s standard theory of punishment, but stands out as an exception in world history as well: I refer here to Hegel’s idea of the hero (*Held*) or world-historical individual (*weltshistorisches Individuum*) and their right to private conquest, punishment, and all other violations of custom and moral principle.⁵¹⁵ Unaware of their true role in history, these heroes are said to be the agents of world-spirit (*Geschäftsführer des Weltgeistes*) and carrying out its will (*Wille des Weltgeistes*), which lies within them, yet beyond their time.⁵¹⁶ “Private revenge,” writes Hegel, “is distinct from the revenge of heroes, knightly adventurers, etc., which belongs to the period when states first arose” (PR §102).⁵¹⁷ Hegel’s classic examples of such heroes are Alexander the Great, Julius Caesar, and Napoleon, but we

his three main critiques of liberal rights. See Stillman, “Hegel’s Critique of Liberal Theories of Rights,” *The American Political Science Review* 68 (1974): 1086-92.

515 Hegel seems to suggest that the hero’s action in such circumstances is truly virtuous. In contradistinction to mere rectitude, true virtue seems to suggest a higher form of deviation from the norm in uncertain conditions: “Within a given ethical order whose relations are fully developed and actualized, virtue in the proper sense has its place and actuality only in extraordinary circumstances, or where the above relations [of ethical demands and the individual’s “craving to be something special (*Besonderes*)”] come into collision.” Hegel, *Philosophy of Right*, §150. In this case, the actualization of the ethical depends on individual discretion, for which Hegel gives Hercules as an example.

516 “They may be called Heroes, inasmuch as they have derived their purposes [*Zwecke*] and their vocation [*Beruf*], not from the calm, regular course of things, sanctioned by the existing order [*System*]; but from a concealed fount—one which has not attained to phenomenal, present existence [*Dasein*—from that inner Spirit, still hidden beneath the surface, which, impinging on the outer world as on a shell, bursts it in pieces, because it is another kernel than that which belonged to the shell in question.” Hegel, *Philosophy of History*, 30. And in language that will resonate even more with Marx’s philosophy of history, Hegel adds: “This was the very Truth for their age, for their world; the species next in order [*nächste Gattung*], so to speak, and which was already formed in the womb of time.” Ibid. Cf. Marx, Preface, *A Contribution to the Critique of Political Economy*, in *The Marx-Engels Reader*, edited by Richard C. Tucker (New York: Norton, 1978), 5.

517 In the *Zusatz*, Hegel adds: “In a social condition in which there are neither magistrates nor laws, punishment always takes the form of revenge; this remains inadequate inasmuch as it is the action of a subjective will, and thus out of keeping with its content.” *Philosophy of Right*, §102.

will see that it equally applies to those maritime heroes we encountered in Chapter Four, who acted as the sharp end of the colonialist spear.

Hegel's account of world-historical heroes is problematic on its own terms, and is something of an *ad hoc* attempt to fill the international interstices of right generated by his failure to systematically address problems of right in modern colonialism. Although these world-historical heroes are acting as individuals on their subjective passions and interests, which might—and in Hegel's examples always do—contradict extant custom and law, the ultimate justification of their selfish actions, through the *cunning of reason*, is the founding of states.⁵¹⁸ This is consistent with his claim in the *Philosophy of Right*: “Within the state, heroes are no longer possible: they occur only in the absence of civilization. The end they produce is rightful, necessary, and political, and they put it into effect as a cause [*Sache*] of their own” (*PR* §93, *Zusatz*).⁵¹⁹ Yet as the above examples of Alexander, Caesar, and Napoleon demonstrate, Hegel includes not only the founders of states—“when states first arose”—but the builders of empires as well.⁵²⁰ A sympathetic

518 “It is the absolute interest [*Interesse*] of Reason that this moral Whole [*sittliches Ganze*] should exist; and herein lies the justification [*Recht*] and merit [*Verdienst*] of heroes who have founded states [*Staaten gegründet*]*—*however rude [*unausgebildet*] these may have been.” Hegel, *Philosophy of History*, 39. See also the *Philosophy of Right*, §350, where Hegel writes: “This right is the *right of heroes* to establish states.”

519 He continues: “The heroes who founded states and introduced marriage and agriculture admittedly did not do this as their recognized right, and these actions still appear as [a product of] their particular will. But as the higher right of the Idea against the state of nature, this coercion employed by heroes is a rightful coercion, for goodness alone can have little effect when confronted with the force of nature.” *Ibid.*

520 A more appropriate example, one would think, are Romulus and Remus, the purported founders of Rome whom Hegel discusses in the *Philosophy of History* as robbers (*Räuber*) rather than heroes, reserving the latter—*römische Helde*—for those confronting the enemies of Rome. See Hegel, *Philosophy of History*, 283-290. Hegel does, however, speak of the founders of Greece in heroic terms in his *Vorlesungen über Ästhetik*: “The Greek heroes step forth in a pre-legal age, or they are themselves the founders of states, so that right and social order, law and custom [*Sitte*], proceed from them, and actualize themselves as their individual work, remaining connected to them...he appears as an image of this perfect, self-dependent force and strength of right and justice, for whose actualization he undertakes countless

reading might be that, although not founders, we could think of these imperialists as *saviors* insofar as the existence of state could only be secured through (colonial and imperial) expansion; an option Hegel hints at in his discussion of Caesar and Napoleon—and is actually an accurate description of his philosophy of the state in the *Philosophy of Right*—but explicitly rejects when he says their acts “involve a general principle of a different order from that on which depends the permanence (*Bestehen*) of a people or state.”⁵²¹ Despite this ambiguity, what is quite remarkable about Hegel’s claim here—regardless of whether one interprets his heroes as state-founders, as imperialists, or both—is that he speaks of a *Heroenrecht*, a *right* of heroes, just as in the quote above where he speaks of their actions as being *rightful* (*rechtlich*). As we will see, everything else in Hegel’s political philosophy runs against this possibility. Whether it is war, conquest, or colonialism, all are *rightless* conditions or returns to a state of nature (*Naturzustand*) for Hegel—except for this one, which is clearly an exceptional means to appropriate modern colonialism into his system.⁵²²

tribulations and labours by free choice and his own arbitrary will.” Hegel, *Vorlesungen über Ästhetik*, Vol. I, 240-41; cited in Allen Wood, “Notes” in Hegel, *Philosophy of Right*, 436-37.

⁵²¹ Hegel, *Philosophy of History*, 29. In a letter to a friend, Hegel writes this of Napoleon’s battle in Jena: “There is no better proof than the events occurring before our eyes, that culture is triumphing over barbarism and the intellect over spirit-less mind.” *Briefe von und an Hegel*, Vol. 1, edited by J. Hoffmeister (Hamburg: Felix Meiner Verlag, 1952), 137; cited in Shlomo Avineri, “Hegel and Nationalism,” in Walter Kaufmann, ed., *Hegel’s Political Philosophy* (New York: Atherton Press, 1970), 110.

⁵²² I have not yet encountered in the secondary literature an interpretation of Hegel’s heroes in the context of establishing extra-national jurisdiction, and am unfamiliar with any literature engaging the problems which the *right* of world-historical individual poses for Hegel’s larger philosophy of right. Habermas, however, articulates well the contradiction in Hegel’s account of world spirit within his larger thesis that Hegel, in the context of the French Revolution, has tried to philosophize a revolution without revolutionaries. His critique is thus applicable here: “The contradiction contained in the construction of the world spirit, which is by no means a dialectical one, thus consists in the following: on the one hand, in order to guarantee the realization of the revolutionary demand of history, a subject must be substituted for history, which invents the ultimate aim of history as an abstract universal, in order to then actualize it. On the other hand, this universal must not have the character of a theoretically predesigned plan; it is therefore degraded to a self-subsistent being of natural origin, which only ‘comes to itself’—is realized—after it has

Pedagogical coercion, or coercion directed against savagery and barbarism [*Wildheit und Rohheit*], admittedly looks like a primary coercion [i.e. a crime]...But the merely natural will is in itself a force directed against the Idea of freedom as that which has being in itself, which must be protected against this uncivilized [*ungebildeten*] will and given recognition within it. Either an ethical existence [*Dasein*] has already been posited in the family or state, in which case the natural condition referred to above is an act of violence against it, or there is nothing other than a state of nature, a state governed entirely by force, in which case the Idea sets up a *right of heroes* against it.⁵²³

This is an extraordinary move by Hegel, which brings him very close to the private punishment argument of Grotius and Locke, and in one sense goes beyond it. In the latter, individuals must discernibly violate some precept of *ius gentium* (such as preventing individuals from cultivating uncultivated land) to warrant punishment.⁵²⁴ For Hegel, it

objectified itself in the course of history.” Habermas, “Hegel’s Critique of the French Revolution, in *Theory and Practice*, translated by John Viertel (Boston: Beacon Press, 1973), 138.

523 Compare this clearly colonialist rendition of the hero, who negates the wrong of barbarism and savagery, with the description of imperialist heroes in the *Philosophy of Mind*, wherein the objects of the latter’s labour have already somehow elevated themselves above the natural condition: “...spiritual activity is directed to an object which is active in itself, an object which has spontaneously worked itself up into the result to be brought about by that activity [elsewhere thought to be external to the object], so that in the activity and in the object, one and the same content is present. Thus, for example, the people and the time which were moulded by the activity of Alexander and Caesar as their object, on their own part, qualified themselves for the deeds to be performed by these individuals...” Hegel, *Philosophy of Mind*, §381, *Zusatz*.

524 Fichte could be added to this list as well. Although constraints of space prevent me from a thorough inclusion of his doctrine of right, I will just say a few words here about his idea of *Urrecht* and the right of coercion. An *Urrecht* or original right for Fichte is similar to abstract right in Hegel. It is the formal right contained in the concept of the person. A person, according to Fichte, is an individual that, as a rational being, cannot but posit itself as having free efficacy (First Theorem). Free efficacy entails the existence of a sensible world within which that efficacy is exercised. The positing of that world entails the positing of other rational beings, who themselves have free efficacy (Second Theorem). The positing of other similarly rational individuals with free efficacy logical entails a relation of right (*Rechtsverhältniss*) between them, which as briefly discussed in the previous chapter, means that the concept of the person is a relational concept (Third Theorem). This relation of right entails that all others recognize me as a rational and free individual just as I recognize them as such, which means that all members of the rational community are bound and obligated to recognize each other’s sphere of freedom or free efficacy in the world, i.e. the *Urrecht*, which is entailed by my status as person. This is a *law of right* to which all must submit. (Cf. Kant’s law of right, *Metaphysics of Morals*, 389 (6:232).) To violate this law of right entails a right of coercion on the part of others: “The ground of my right of coercion is the fact that the other person does not subject himself to the law of right” (89). The right of coercion entails—and here we find the

seems, just the mere existence of people living without a state, which would be the criterion of barbarism, is considered an act of violence against the Idea of freedom. Their mere existence produces a right in those who (in a family or state) will and *must* conquer them.⁵²⁵ And if this juridical claim of heroes is not enough to draw a substantial connection to the Protestant theory under discussion, Hegel argues elsewhere in the *Philosophy of Right* (§§350-51) that certain modes of production are an activating cause of the *Heroenrecht* in defense of the absolute right of the Idea. As with Locke, agriculture is the measure of man: “The same determination [i.e. the *Heroenrecht* and general judgment of world spirit] entitles civilized nations to regard and treat as barbarians other nations which are less advanced than they are in the substantial moments of the state (as with pastoralists in relation to hunters, and agriculturalists in relation to both of these), in the consciousness that the rights of these other nations are not equal to theirs and that their independence is merely formal” (*PR* §351).⁵²⁶

parallels with Grotius and Locke begin—my right to be both judge and executioner of the law: “each person has the right to *judge* [*urteilen*] whether or not the law applies to a particular case” (88). Fichte then makes an important distinction that he says “recent treatments of the doctrine of right have for the most part overlooked” (89), which is that if the violator of another’s original right actually subject him or herself to the universal law of right, they will then will the punishment and thus its content is determined by the actual violation, i.e. the amount of reparations, etc. If the violator clearly does not recognize this universal law, then any violation of it gives the victim “the right to annihilate completely the violator’s freedom, to cancel altogether the possibility of ever again entering the community with him in the sensible world. Thus the right of coercion is infinite...” (89-90). Thus, Fichte concludes, “the factor that determines the limit of the right of coercion cannot be given...in an external tribunal; the ground for deciding the issue lies within the conscience of each person” (91).

525 This reasoning is also clearly evident in Hegel’s pedagogical understanding of the enslavement of non-Europeans in the *Philosophy of History*, which we encountered in the previous chapter. This idea is reiterated by Hegel in the *Philosophy of Right*: “But if someone is a slave, his own will is responsible, just as the responsibility lies with the will of a people if that people is subjugated... Slavery occurs in the transitional phase between natural human existence and the truly ethical condition; it occurs in a world where a wrong is still right. Here, the wrong is valid [*gilt*], so that the position it occupies is a necessary one” (§57, *Zusatz*).

526 Cf. Fichte’s argument: “If a nation has no government—and thus is not a state—then an adjoining state has the right either to subjugate it, or to force it to establish a constitution, or to drive it

The clear problems with trying to square this position with the rest of Hegel's philosophy of right (analyzed in greater detail below) is perhaps one of the reasons that his early fragment *System of Ethical Life*, breaks off precisely when he is to discuss "education and colonialism."⁵²⁷ Hegel's political theory in general is purported to be a critique of both the natural individualism of natural law theory and the formalism of Kant and Fichte's subjective idealism, insofar as individual freedom and right are argued to only be possible within the ethical substance (i.e. mediating institutions that concretize intersubjective recognition) of the state. To posit an absolute right in a state of nature (either in an international or pre-state condition) is buck the Hegelian system, we might say. This *Heroenrecht* is, however, Hegel's attempt to solve what I have previously called the most pressing problem facing all of modern theorists of colonialism, i.e. the legitimate establishment of extra-national or colonial *jurisdiction* (and in the case of Locke, *private property*, which is its first necessary condition). The means of establishing jurisdiction in the colonies—be it public or private, war or punishment, occupation or labor—is simultaneously the grounds for legitimate jurisdiction, and thus of right, within the colonizing nation-states themselves, for the operative principles are universal.⁵²⁸ The success or failure of one, as I wrote in my Introduction, entails the success or failure of the other. In his *ad hoc* concoction of the right of a world-historical individual—which

away from its vicinity. The reason for this is the following: whoever cannot guarantee the security of the other's rights has no rights of his own. Hence, such a nation would be an outlaw, devoid of all rights." Fichte, *Foundations of Natural Right*, §7, 323. See also *Ibid.*, §1.

⁵²⁷ See Hegel, *System of Ethical Life*, 176-77. See also H. S. Harris, "Introduction," to the same, 72-73.

⁵²⁸ This is true even if we assume that all states were originally founded through violence, for the legitimacy of future regimes, political or proprietary, in the *modern* state do not resource such origins in their rational legitimizing discourses of public and private right.

may appear as “divine legislation of a beneficial kind or as violence and wrong” (*PR* §350)—Hegel has attempted to shore up this demand for juridical symmetry, while simultaneously circumventing (unanswerable) questions concerning the social-historical achievement and rational consistency of this unique right.

In my discussion of Hegel’s structural-economic argument for colonialism in the following, we find the *Heroenrecht* to already be a bit *altmödisch*, more suitable to the private nature of the establishment of right and processes of accumulation in the colonies of a foregone era.⁵²⁹ This is not to say that the idea of an absolute right of world history is dropped altogether, for Hegel (as we saw in the above quote) merely transfers it to the state, yet we find that the problem of establishing jurisdiction is still not solved. As his analysis throughout the *Philosophy of Right* demonstrates, colonialism is now an imperative, not of the Idea of freedom or of cultural modernization, but of a capitalist system that structurally generates both poverty (rabble) and over-production (crisis); resulting in a condition in which “the absolute bond of the people, namely ethical principle, has vanished, and the people is dissolved.”⁵³⁰ And the philosophical justification of property right, contract, and the markets of civil society, does not extend to the extra-national and thus extra-jurisdictional consequences to which the actualization of capitalism tends. That is to say, Hegel’s justificatory strategy with respect to the

529 As noted in Chapter Three, Section 1, a large percentage of early colonization in North America was carried out by joint-stock companies, including the first successful British colony in Jamestown in 1607.

530 Hegel, *System of Ethical Life*, 171. One might argue that the Idea of freedom is indeed here at work insofar as (1) this is the universal at work behind the backs of the individual historical actors, and (2) the expansion of capitalism brings with it liberal and economic rights previously absent. This would be a very neo-liberal reading of Hegel, for whom the proletariat and overproduction are ethical failings of the state, and the sphere of arbitrary choice in civil society only contributes to freedom to the degree to which it is mediated and only a moment within the concrete universality of the state.

juridical foundations of civil society is inapplicable to the jurisdictional problems they engender. Thus it is unsurprising, albeit disappointing, that the “right” of the state to colonize (in an attempt to satiate the insatiable appetite of civil society), and the collision of rights that colonization gives rise to, falls into a world-historical state of exception: “In contrast with such a people in whose deeds world spirit manifests itself,” writes Hegel, “the rights of other peoples are of no account; grievous though it may be to watch how it tramples them under foot, it fulfills its role.”⁵³¹

After a discussion of abstract right, contract, and his critiques of the state of nature and the social contract, which lead Hegel to advocate a colonialist solution to the endemic problems of civil society, we find that even if we were to accept Hegel’s diminution of the legitimacy of national right in the name of a higher, supra-national right (i.e. the absolute right of the Idea of freedom) two immanent and interrelated problems remain. First, the structural solution of colonialism represents an infinitely regressive tendency (in terms of spirit) and disintegrating force (in terms of jurisdiction) within the ethical state itself; and, second, the Germanic world spirit is not limited to one state, thus multiple personalities at the international level can lay claim to the judgment of history, i.e. their rights *do* matter in Hegel’s terms. Even Hegel’s idea, at the end of the *Philosophy of Right*, that *one* nation can rise above all considerations of right, law, or justice, still leads to a collision of rights in the international sphere, and international

531 Hegel, *Lectures on Natural Right and Political Science: The First Philosophy of Right*, translated by J. Michael Stewart and Peter C. Hodgson (Berkeley: University of California Press, 1995), §164, 307-08. Hegel goes on in the same paragraph to describe his *Herrenrecht*: “Individuals who take the lead in such a people and at such a time, even if they act in an immoral fashion by despising the rights of others, are nonetheless responsible for its being executed [i.e. the right of world spirit]. Here the absolute idea of spirit has absolute right over everything else.” Ibid. Cf. *Philosophy of Right*, §§345-48. Unlike many commentators, Adriaan Peperzak realizes the significance of Hegel’s silence on the juridical consequences of colonialism and the rights of the colonized. See Adriaan T. Peperzak, *Modern Freedom: Hegel’s Legal, Moral, and Political Philosophy* (London: Kluwer Academic Publishers, 2001), 465-66.

capitalist competition will only reproduce the structural contradictions of civil society on a global scale. Although Hegel's analysis of society's tendency toward impoverishment, class divisions, and extra-national expansion (that impinge upon individual freedom rooted property ownership and social recognition) are enlightening and prophetic, we find that despite these merits, Hegel does not and, indeed, can not produce a philosophical justification of colonial jurisdiction.

I. The Idea of Freedom and the Will

The philosophy of right, according to Hegel, is the science of the Idea (*Idee*) of freedom, wherein 'idea' is understood as the unity of both the concept (*Begriff*) and the actualization of right.⁵³² The Idea of right as freedom forms a circle, which Hegel quite beautifully describes as "the round of movement, in which the concept...gives itself the character of objectivity and of the antithesis thereto; and this externality which has the concept for its substance, finds its way back to subjectivity through its immanent dialectic."⁵³³ This immanent dialectic was the movement of spirit up through Reason and the rise of personality, the phenomenological history of the emergence of the concept and actualization of right as experienced by consciousness and recounted in the

532 See Hegel, *Philosophy of Right*, §1, and Hegel, *Logic: Being Part One of the Encyclopaedia of the Philosophical Sciences (1830)*, translated by William Wallace (Oxford: Oxford University Press, 1975), §213. I have amended the translation throughout insofar as *Begriff* will be translated here as "concept" rather than "notion." Kant defines right as "the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom." Kant, *Metaphysics of Morals*, 387 (6:230).

533 Hegel, *Logic*, §215. On the notion of the idea as a circle, see *Philosophy of Right* §2 and Hegel, *Logic*, §§15-16.

Phenomenology. That is to say, in the *Phenomenology* we have an account of the “coming into being” of right, whereas in the *Philosophy of Right* this process is “taken as given,” i.e. the Idea of right is taken as the starting point of the latter text, for it presupposes its conceptual development and actualization accounted for in the former.⁵³⁴

The sphere of right and thus of actualized freedom is the realm of objective spirit, which is roughly the equivalent of “Culture” in the *Phenomenology*. Beginning with the *Encyclopedia of the Philosophical Sciences* (1817), Hegel employs a more rigid tripartite division of spirit into subjective, objective and absolute realms. The realm of subjective spirit, we know, has the form of self-relation or *being-in-itself* and is, although free and universal, still indeterminate as ideal or merely potential (*Möglichkeit* or *dynamis*). In the realm of objective spirit, of which the *Philosophy of Right* is Hegel’s most systematic study,⁵³⁵ spirit has the form of necessity and actuality (*Wirklichkeit* or *energeia*) and is thus *being-for-itself*; it has objectified and alienated itself through the labor of self-consciousness in social institutions that enable recognitive relations of right—its ‘second nature’. It has, we might say, particularized its universal potentiality, giving a positive form to freedom that was previously only negative or abstract.⁵³⁶ This becoming or

534 This is what Hegel means when he writes that the Idea of right is the beginning of the philosophical science of right, but that the “proof” (i.e. actualization) of that Idea precedes it. “Hence the concept of right, so far as its coming into being is concerned, falls outside the science of right; its deduction is presupposed here and is to be taken as *given*.” Hegel, *Philosophy of Right*, §2. See also Hegel, *Philosophy of Mind*, §483-87.

535 Hegel gave specific lectures on the philosophy of right seven times, beginning in Heidelberg (1817-1818) and ending in Berlin in 1831, which were cut short due to his death. The original Heidelberg lectures were only discovered about 25 years ago and have now been published with the additions from his second set of lectures in Berlin (1818-1819) as *Lectures on Natural Right and Political Science*. The only edition of the *Philosophy of Right* published in Hegel’s time is from 1821, which constituted an edited version of the third set of lectures from Berlin.

536 In the *Phenomenology*, we saw that this took the shape of *personality* in the Roman world, a reference Hegel will continue to use in the *Philosophy of Right*. Greek *Sittlichkeit* seems to have an

actualization of spirit in an objective world still exhibits a division within spirit, for it does not yet know itself to be that world; the ideality of subjective spirit is not yet in union with the actualizations of objective spirit. Their unification is performed by spirit's appropriation of itself as world back into its subjective moment through self-knowledge: it becomes *in-and-for-itself* by fulfilling the Delphic calling "Know thyself," and the apparent opposition of (subjective) freedom and (objective) necessity vanishes. Absolute spirit, that is to say, is absolute (self-) knowledge. In the context of the ethical life of the state, this means the individual submits to the law it now knows to be the objectification of its own spirit and thereby achieves, and can *only* achieve, freedom in the state. Becoming absolute, spirit has thus completed its movement from universality (subjective), through self-differentiation into actual worlds (objective), and back into itself in its final, reflective moment (absolute).

This is where we begin in the *Philosophy of Right*; that is to say, although Hegel begins Part One of his text with abstract right, it is presupposed that this is now only a moment (of particularity) within the ethical whole of the state, which is itself a singularity. I have already referred to the sphere of right as the sphere of actualized freedom, i.e. the *second nature* of objective spirit, but not yet given its "point of departure," which for Hegel is the *free will*. Freedom, Hegel famously writes, "is just as much a basic determination of the will as weight is a basic determination of bodies" (*PR*

ambiguous position between subjective and objective spirit. The principle of freedom exists, but as we saw in Chapter Four, it has not yet been particularized in persons (and property right). It exists as a nation and thus as a world, exhibiting a certain "beautiful" harmony in its customary life, but it is an empty universality—a world of "self-consciousness in general" (*PS* §447). The Greek spirit is reason—as the unity of consciousness and self-consciousness—but it is not yet *right*. See Hegel, *Philosophy of History*, 250-56.

§4, *Zusatz*), and it is from the free will that right is deduced (*PR* §§1-33). Thus, to know right is to know freedom, and to know freedom is to know the will.

As we saw in Chapter Four, to think is to appropriate and, for Hegel, thinking and willing are not separate faculties, but rather different attitudes (*Verhalten*); namely, the theoretical and the practical, with the former contained within the latter. As for the theoretical, when I think of an object, I penetrate it and appropriate it to myself; its content becomes “essentially and immediately mine,” dissolving the oppositional moments of subjectivity and objectivity (*PR* §4, *Zusatz*). In this case, as we saw in the previous chapter, the “I” is empty or pure negativity; it is devoid of individualizing characteristics, producing something of a smooth space within which the content of the objects of my thought can merge as one with it. The practical attitude, although beginning with such (unifying) appropriative thought, posits a difference (between itself and the world) in its actions insofar as it determines *itself*—although such difference itself belongs to the practical will.⁵³⁷ Yet, writes Hegel, “even if I let go of these determinations and differences, i.e. if I posit them in the so-called external world, they still remain mine: they are what I have done or made, and they bear the imprint of my mind [*Geist*]” (*PR* §4, *Zusatz*).

If we were to compare this claim with the epistemic reading of Locke’s idea of property in Chapter One, we find that the “imprint of *Geist*” left by having “done or made” something is similar Locke’s “mixing” and “joyning” of one’s self to an object through practical activity. For Locke, we remember, property is the simple mode of the

⁵³⁷ “In so far as I am practical or active, i.e. in so far as I act, I determine myself, and to determine myself means precisely to posit a difference.” *Philosophy of Right*, §4, *Zusatz*. Cf. Hegel, *Lectures on Natural Right and Political Science*, §§3-4.

active power that causes it, so the “properties” of objects we observe in the world don’t “belong” to the object, but rather to the active power that was able to produce that quality in the object—and “the will,” writes Locke, “is also but a power.”⁵³⁸ Thus the blackness of a charred tree, for example, is not a property of the tree, but rather a property of the fire whose active power produced it. Its end, we could say, belongs to the fire, and as Hegel writes, “the ends to which I am impelled belong to me” (*PR* §4, *Zusatz*). The same principle is at work in our labour or practical activity, according to Locke, which changes the qualities of objects in the world, yet the true *appropriative moment* is, as in Hegel, the theoretical: “whatever change is observed, the Mind must collect a Power somewhere, able to make [or account for] that Change.”⁵³⁹ For Locke, writes Max Milam, “men possess their rights epistemologically as well as practically; indeed, they possess them practically only because they possess them epistemologically.”⁵⁴⁰ This is why one must always question reductive comparisons of Locke and Hegel on property, as found in the texts of Karl Olivecrona encountered in Chapter One, and the more sophisticated work of Allen Wood, who can still claim: “Locke bases property right on labor. Hegel bases it on something more abstract: on will.”⁵⁴¹

538 *Essay*, Book II, Chapter 11, §14.

539 *Essay*, Book II, Chapter 21, §4, 235. This is why labour is for Locke an act of privatization, in the commons or the state of nature, for labour puts a “distinction between them and the common,” having “added something to them more than Nature” Locke, *Second Treatise*, §28.

540 Max Milam, “The Epistemological Basis of Locke’s Idea of Property,” 412.

541 Allen Wood, *Hegel’s Ethical Thought* (Cambridge: Cambridge University Press, 1990), 95. Olivecrona’s error is repeated by others, of course. See Jeremy Waldron in his *The Right to Private Property* (New York: Clarendon Press, 1988), Chapter 6. Peter Stillman makes the same claim as Wood, when he writes that for Hegel, property results from a mental act; the person decides that he wishes the thing and wills it—“I want it,” “this is mine.” Hegel’s person claims property by willing it; by contrast, Locke’s natural man is entitled to property when he mixes his labor with the natural object.” Stillman,

But I am getting ahead of myself, so let me say a few more things about freedom and will before getting to the specifics of abstract right and thus property. We have encountered the triadic understanding of the will in the previous chapter—and its moments were already described a bit above—for they are the moments of the concept.⁵⁴² Its first moment is pure self-reflection and indeterminacy (i.e. negativity), whose negative freedom is exercised only destructively.⁵⁴³ The second, determinate moment is a cancellation (*Aufheben*) of the previous abstract moment insofar as the will becomes particular (though it too remains abstract until the third); it wills something. The third moment is the unity of the first two, which constitutes the true freedom of the will: “*particularity reflected into itself and thereby restored to universality*” (PR §7).⁵⁴⁴ To reflect this particularity into itself is to give itself content, yet this content is still only immediate: “Thus, the will is *free only in itself or for us* [i.e. only *potentially free*], or it is in general the will in *its concept*. Only when the will has itself as its object [*Gegenstand*] is it *for itself* what it is *in itself*” (PR §10). That is to say, the will is *immediate* because the content of the will is at this point still *natural*, i.e. determined by particular drives, desires, etc., and thus achieves not true self-determination, but *Willkür*, or will as mere

“Property, Freedom and Individuality in Hegel's and Marx's Political Thought,” in *Property*, edited by J. Roland Pennock and John W. Chapman (New York: New York University, 1980), 133.

542 See Hegel, *Logic*, §163.

543 “Only in destroying something does this negative will have a felling of its own existence [*Dasein*].” *Philosophy of Right*, §5. We witnessed this destructiveness in “absolute freedom” and Hegel uses the same rhetoric of the *Phenomenology* to describe it here—“its actualization can only be the fury of destruction” (PR §5)—even referencing the “Reign of Terror in the French Revolution” as its concrete form in the *Zusatz*.

544 “Freedom is to will something determinate, yet to be with oneself [*bei sich*] in this determinacy and to return once more to the universal.” *Philosophy of Right*, §7, *Zusatz*.

choosing.⁵⁴⁵ It is only through a (self-) reflective moment that the will can stand above such natural determinacy—overcoming the conflict between form and context—by taking itself as its object.⁵⁴⁶ Only then can the free will become truly infinite, or infinite in its actuality (*PR* §22), which is another way of saying it is “*the free will which wills the free will*” (*PR* §27).

Right, in general, thus arises or comes into being when the free will wills itself, which is another way of saying that it is freedom as Idea or the completion of that circular “round of movement” I wrote of at the beginning of this section. In this dialectical movement of the development of the Idea, however, right takes on different shapes—moving from the abstract to the concrete. These include the familiar shapes of abstract right (*abstraktes Recht*), morality (*Moralität*), and the ethical life (*Sittlichkeit*), with the latter subdivided into family, civil society, and the state.

Before turning to abstract right in the *Philosophy of Right*, it is helpful to make explicit the difference Hegel sees between the laws of nature and the laws of right, as well as introduce Hegel’s critique of state-of-nature theorizing. The former is taken up in a long *Zusatz* in Hegel’s Preface, in which he argues that the laws of nature are self-validating, external to us, and gain nothing from our cognition of them, whereas any moment of reflection will expose the laws of right to be less than absolute and, indeed,

545 “Since this content, which is necessary *in itself* as an end, is at the same time determined as a possible content in opposition to free reflection, it follows that arbitrariness is *contingency* in the shape of will.” *Philosophy of Right*, §15. Cf. Kant, *Metaphysics of Morals*, 374-75 (6:213). See also Hegel’s discussion of Kant and *Willkür* in Hegel, *Natural Law*, 75ff.

546 “Reflection, the *formal* universality and unity of self-consciousness, is the will’s *abstract* certainty of its freedom, but it is not yet the *truth* of this freedom, because it does not yet have itself as its content and end, so that the subjective side is still something other than the objective.” Hegel, *Philosophy of Right*, §15.

historical, for they have their basis in spirit.⁵⁴⁷ Thus, while our notion of a law of nature may be wrong, it does not affect the law or bring it into conflict, but the same cannot be said of the law of right, for in the latter we are participants rather than mere observers; subjects rather than mere objects. “The laws of right are something *laid down*, something *derived from* human beings.”⁵⁴⁸ Our reflective scrutiny of the law of right thus becomes a moment within it—the rationality of right must be recognized as our rationality for us to take on its obligations—so our investigation should be rigorous or scientific.⁵⁴⁹ As we know from the *Phenomenology*, this means that our “exposition should preserve the dialectical form and should admit nothing except in so far as it is comprehended [in terms of the concept], and is the concept.”⁵⁵⁰

Although the laws of nature and the laws of right are thus in some ways distinct or opposed—insofar as the *thinghood* of nature is opposed to *free* spirit—natural right and abstract right are not, for right can only arise in freedom and nature is not free.⁵⁵¹ Hegel thus advocates replacing the term natural right (*Naturrecht*) with abstract right as it

547 Greek *Sittlichkeit* is an example of the beautiful failure to make such a distinction insofar as “customary morality, laws assume the form of a necessity of Nature.” Hegel, *Philosophy of History*, 251-52.

548 Hegel, “Preface,” in *Philosophy of Right*, 13, *Zusatz*.

549 *Ibid.*, 14.

550 Hegel, “Preface,” *Phenomenology*, §66, 41.

551 See Hegel, *Philosophy of Right*, §42. “The nature of Spirit may be understood by a glance at its direct opposite—Matter.” Hegel, *Philosophy of History*, 17. We must always be careful, of course, about saying that anything stands *opposed* in Hegel’s system, for such opposition usually only a moment within a larger whole, and so it is with nature and spirit. Although consciousness negates the externality of nature, it is “Nature which is posited by spirit and the latter is the absolute *prius*. Spirit which exists in and for itself is not the mere result of Nature, but is in truth its own result; it brings forth itself from the presuppositions it makes for itself, from the logical Idea and external nature, and is as much the truth of the one as of the other, i.e. is the true form of the spirit which is only internal, and of the spirit which is only external, to itself.” Hegel, *Philosophy of Mind*, §382, *Zusatz* (I have altered the translation, replacing “mind” with “spirit”).

relates to persons and with the “philosophical doctrine of right” or “doctrine of objective spirit” as it relates to the science of right.⁵⁵² This is a corrective response to the well-known ambiguity of the word “nature”, which Hegel addresses it in his early lectures:

The expression ‘nature’ contains the ambiguity that by it we understand [1] the essence [*Wesen*] and concept [*Begriff*] of something [and] (2) unconscious, immediate nature as such. So by ‘natural law’ has been understood the supposed legal order valid by virtue of immediate nature; with this is connected the fiction of a ‘state of nature’ [*Naturzustand*], in which authentic right or law supposedly exists. This state of nature is opposed to the state of society, and in particular to the state [*Staat*].⁵⁵³

Hegel then criticizes the problematic conclusion that some draw from this ambiguity, namely that individual freedom is somehow essentially given and thus the state can only be an “artificial evil” or unjust constraint on the essential nature of freedom that exists antecedent to the state. Hegel’s reply is, of course, that there can be no right in the state of nature,⁵⁵⁴ since spirit has not yet become self-referential and free, thus the “artificial” nature of the state, rather than being an “evil”, is precisely the “second nature” that is necessary for, and produced by, the development of freedom and the realization of right.⁵⁵⁵

The notion that, in relation to his needs, man lived in *freedom* in a so-called state of nature...is mistaken. For a condition in which natural needs as such were immediately satisfied would merely be one in which spirituality was immersed in nature, and hence a condition of savagery and unfreedom; whereas freedom consists solely in the reflection of the

552 Hegel, *Lectures on Natural Right and Political Science*, §2, 52.

553 Hegel, *Natural Law*, 52-53.

554 “One cannot speak of an *injustice of nature*...for nature is not free and is therefore neither just nor unjust.” Hegel, *Philosophy of Right*, §49.

555 See Riedel, *Between Tradition and Revolution*, 59-64.

spiritual into itself, its distinction from the natural, and its reflection upon the latter.⁵⁵⁶

In his early *Natural Law* essay, Hegel criticizes the various methodological schools of thought that arise from the ambiguity of *natural law*, arguing that all previous scientific approaches to it must be “denied all significance” for they “no more possess the purely positive than they do the purely negative, but are mixtures of both.”⁵⁵⁷ Among these approaches he includes two types of empiricism (pure and scientific), and one type of formalism (applicable to Kant and Fichte)—reflecting the shapes of Sense-Certainty, Perception, and the Understanding found in the *Phenomenology*—all of which have an incomplete comprehension of the absolute.⁵⁵⁸ The critical question for Hegel is how their principle of universality admixes or opposes empirical perceptions, and his main targets are the scientific empiricism of modern natural law theory, whose *a priori* is (selectively) based upon the *a posteriori*, and the formalism of subjective idealism, whose “universality...is totally empty”⁵⁵⁹ Since I have already discussed Hegel’s critique of formal or “empty” idealism in the previous chapter (Section 2.3), I focus my comments here on Hegel’s critique of scientific empiricism, which gives rise to the “fiction” of the state of nature.⁵⁶⁰

556 Hegel, *Philosophy of Right*, §194, *Zusatz*, 230.

557 Hegel, *Natural Law*, 57.

558 Cf. Hegel’s critique of empiricism and formalism in his *Logic*, §§37-60. See also, Hegel’s “Preface” in the *Phenomenology*, §§47-72.

559 Hegel, *Natural Law*, 68. “Formalism can extend its consistency so far as is generally made possible by the emptiness of its principle, or by a content which it has smuggled in; but thereby it is in turn entitled to exclude what lacks completeness from its apriorism and its science, and proudly revile it as ‘the empirical’.” Ibid. 62.

Contra Fichte, Hegel argues that “natural law bears directly on the ethical, the mover of all things human; and, insofar as the science of ethics has an existence, it is under the necessity of being one with the empirical shape of the ethical, a shape equally necessary.”⁵⁶¹ As with pure empiricism, the universality of scientific empiricism is a perversion, for it de-spiritualizes the organicism of the whole, fixing its determinacies (i.e. individuals) and delimiting them from each other. Having rendered what it perceives into a multiplicity, it must then (necessarily) impose universality upon them to bring them into unity by arbitrarily elevating one of their qualities: “Such qualities, taken up out of the multiplicity of the relation into which the organic is fragmented by empirical or inadequately reflective perception and put into the form of a conceptual unity, are what knowledge of this kind calls essence and purposes.”⁵⁶² Thus we have a multiplicity of determinacies, emptied of their fundamental relatedness, and abstractly posited as having essential qualities, or even one quality or purpose, which they all share. In the science of natural law, this is the *state of nature*.⁵⁶³

Empiricism thereby strips itself of the ability to distinguish between the accidental and the necessary, and is thus prone to read back into this original natural condition

560 Hegel’s critique of the pure emptiness of Kantian morality is certainly exaggerated. For a good analysis of Hegel’s critique, see Allen W. Wood, *Hegel’s Ethical Thought*, chapter 9; and Kenneth R. Westphal, “Kant, Hegel, and Determining our Duties,” *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics*, 13 (2005): 335-354.

561 Hegel, *Natural Law*, 58.

562 *Ibid.*, 60.

563 “If we think away everything that someone’s obscure inkling may reckon amongst the particular and the transitory as belonging to particular manners, to history, to civilization, and even to the state, then what remains is man in the image of the bare state of nature, or the abstraction of man with his essential potentialities; and we have only to look in order to find what is necessary. What is seen to be connected with the state must therefore also be abstracted, because the chaotic picture of the necessary cannot contain absolute unity but only simple multiplicity, atoms with the fewest possible properties...” *Ibid.*, 63-64.

whatever qualities or purposes are in need of rationalization at the time, be it freedom, justice and cooperation or unfreedom, natural authority, and competitiveness.⁵⁶⁴ That is to say, in this “fiction of the state of nature” the “desired outcome is presupposed.”⁵⁶⁵ What is particularly pernicious about this conceptual confusion, for Hegel, is that this atomistic origin leads to the theorization of a mechanistic state as its “formless and external harmony.” Even if there is an absolute, such as God or Hobbes’s sovereign, posited behind this unity, “this ideal still remains something formal, merely hovering over the multiplicity, not penetrating it.”⁵⁶⁶ Hence, the rise of the spirit-less concept of the social contract, in both the empiricist and formalist accounts, and with it a conception of “mechanical necessity” to enforce the general will, as we find in many natural-law theorists, including Fichte.⁵⁶⁷ For Fichte (and Locke, for that matter) the state is a necessary entailment of the need for each individual to secure their space of freedom, but again, for Hegel this is a merely the *a priori* imposition of unmediated unity on a multiplicity—a state based on the Understanding (*Verstandes-Staat*). The *absolute* can only be recognized in the production of our second nature, in the objective realizations of spirit in the nation and our acculturation, which insinuates the universal into the particular

564 Hegel finds the Hobbesian qualities on this list to be the necessary outcome of state-of-nature theorizing somehow precluding the pity of Rousseau’s savage man and the sociality tradition. “They are only related as many and since the many are many for one another but without unity, they are destined to be self-opposed and to be in absolute conflict with one another. The separated energies of the ethical sphere must, in the state of nature or in the abstraction of man, be thought of as engaged in a war of mutual destruction.” Hegel, *Natural Law*, 64-65.

565 Hegel, *Natural Law*, 65.

566 Ibid., 66. See also Hegel, “The German Constitution,” in *Hegel’s Political Writings*, translated by T. M. Knox (London: Oxford University Press, 1964), 161.

567 Fichte, *Foundations of Natural Right*, §14, 126-27. See Hegel’s critique of Fichte in *Natural Law*, 83ff.

and vice versa—a state based on Reason (*Vernunftstaat*). Within this state of reason ethical relationships “are entirely determined by the whole and form a structure in which no joint and no ornament has been independently present *a priori*, but each element has been brought about by the whole and is subservient to it.”⁵⁶⁸

II. Right, Property, and Contract

As noted above (Section 2), the Idea of freedom is presupposed to have been achieved at the beginning of the *Philosophy of Right*. Yet the state as an ethical totality does not merely do away with the earlier, insufficient forms of right; rather the state preserves them within itself, including the sphere of abstract right and arbitrary choice. Thus, the will in its individuality (*Einzelheit*) as *person* is perpetually reproduced as a necessary abstract moment within the concrete whole.⁵⁶⁹ The person knows itself in its particularity as “infinite, universal, and free” (PR §35). This knowledge of my freedom, my ability to abstract myself, my “I”, from all determinacy gives rise to my capacity for right, which is *personality* (*Persönlichkeit*). Personality is, however, still formal and subjective, thus standing opposed to the “outside” nature through which it must actualize

⁵⁶⁸ Ibid., 128. We will see that the practical realization of the “structure” Hegel is speaking of is the capitalist system as an *inorganic* sphere of freedom that reconciles the subjectivity of physical necessity and enjoyment with the objectivity of work and possession through the mediating universality of *value*—and that both its subjective and objective moments will find a higher reconciliation (and domestication) within *organic* totality of the ethical state.

⁵⁶⁹ Cf. Hegel, *Philosophy of Mind*, §485. See also Hegel, *Lectures on Natural Right and Political Science*, §§11-14. Hegel was aware, of course, that personality was incompletely realized in the Roman world insofar as it was still within a society of traditional hierarchies and a slave economy. He writes that “the *right of persons* in Roman law...regards a human being as a person only if he enjoys a certain status...[hence it is] merely an *estate* [*Stand*] or condition [*Zustand*].” Hegel, *Philosophy of Right*, §40.

itself: “Personality is that which acts to overcome [*aufzuheben*] this limitation and to give itself reality—or, what amounts to the same thing, to posit that existence [*Dasein*] as its own” (PR §39). The most immediate form of the existence of right is, of course, property, which establishes an “external sphere of freedom” (PR §41) as well as serves as the basis of recognition by others (in my status as property owner) and vice versa.⁵⁷⁰ What the person can will as their property is limitless in the external world of things (*Sachen*)—i.e. external to free spirit—for a thing has no subjectivity, making it “external not only to the subject [i.e. the person], but also to itself” (PR §42, *Zusatz*).⁵⁷¹ The one caveat being, of course, that such things are not already the property of another, i.e. that they be *res nullius*. Another way of saying this, which relates to the above comparison with Locke, is that a thing becomes mine when it “acquires my will as its substantial end (since it has no such end within itself)” (PR §44), which is more than merely exercising “external power over something [which] constitutes *possession*” (PR §45). In making my will the substantial end of a thing I make my will *objective* to myself: “I, as free will, am an object to myself in what I possess and only become an actual will by this means [which] constitutes the genuine and rightful element in possession, the determination of *property* [*Eigentum*]” (PR §45).⁵⁷² Since my will is personal, the property of that will is

570 Cf. Fichte, *Foundations of Natural Right*, §5, where he writes: “According to the proof carried out above, the rational being posits itself as a rational individual—from now on we shall refer to this as *the person*—by exclusively ascribing to itself a *sphere for his freedom*” (53).

571 See Kant, *Metaphysics of Morals*, 378 (6:223).

572 Objectifying my will also makes it objective for others, which is the necessary condition of mutual recognition. Cf. Hegel, *Philosophy of Mind*, §§489-91, *Lectures on Natural Right and Political Science*, §§18-20, and Fichte, *Foundations of Natural Right*: “As soon as the human being is posited as being in relation to others, his possession is rightful only if it is recognized by the other; and only in this way does his possession acquire an external, *shared* validity, a validity that—at this point in the analysis—holds only for him and for the other who recognize it. Only in this way does the *possession* become *property*, i.e. something individual...All property is grounded in reciprocal *recognition*...” (117). In this

personal or *private* property. And since private property is the only means of objectifying my will, which is necessary for my status as person, every person must have private property (*PR* §49, *Zusatz*).⁵⁷³ Hegel is quick to add, however, that the equality of persons is not the same as the equality of their property, for the particulars concerning what and how much one owns is irrelevant to the question of whether or not one has objectified one's will in at least *some* thing.

For Hegel, property consists of three types of relationships (between the will and its object): acquisition (positive), use (negative), and alienation (infinite in contract). The objectification of my will, we remember, must take practical and theoretical form for it to be recognizable to myself and others: "My inner act of will which says that something is mine must also become recognizable by others. If I make a thing mine, I give it this predicate which must appear in it in an external form, and must not simply remain in my inner will" (*PR* §51, *Zusatz*).⁵⁷⁴ Original acquisition has three aspects. First, there is

context of original acquisition, Kant would say that we can gain no more than "provisionally rightful possession," until might in the future "be made into rightful possession through being united with the will of all in a public lawgiving," i.e. until it is institutionalized in civil law. Kant, *Metaphysics of Morals*, 410 (6:257).

⁵⁷³ Hegel additionally claims that "it is a *duty* to possess things as *property*, i.e. to be a person." Hegel, *Philosophy of Mind*, §486, 242.

⁵⁷⁴ In his *Foundations of Natural Right*, Fichte seems to argue against this when he reasons that the "part of the sensible world that is known to me and subjected to my ends—even if only in thought—is *originally* my property" (106). This claim appears to divorce the practical from the theoretical, allowing a merely inward determination to be a sufficient basis for property, yet Fichte insinuates an important distinction which Hegel takes up in his early lectures but is dropped in the 1821 edition. Fichte writes: "What has not been modified but only thought by the rational being and brought into conceptual alignment with his world becomes modified, precisely by not having been modified" (105). That is to say, "refraining from a particular activity [is] itself an activity," which we might think of as a "modification of the whole" (105). And in an example that goes against many agrarian-centric arguments intended to justify dispossessing hunters and gatherers, Fichte writes: "Think, for example, of an isolated inhabitant of a desert island who sustains himself by hunting in the island's woods. He has allowed the woods to grow as they might, but he knows them and all the conveniences they afford for his hunting. One cannot displace or level the trees in his woods without rendering useless all the knowledge he has acquired (thus robbing him of it)...without disturbing the freedom of his efficacy" (106). That is to say, the hunter wills that the woods

simply *physical seizure*, which he calls the “most complete mode of taking possession,” yet which is “merely subjective, temporary, and extremely limited in scope” (PR §55), since it relies on my physical presence. Second, there is the option of actually transforming the object in the Lockean sense. In this case, the object “receives an independently [*für sich*] existing [*bestehende*] externality” (PR §56) which makes my physical presence no longer necessary. This method is “most in keeping with the Idea, inasmuch as it combines the subjective and the objective” (PR §56).⁵⁷⁵ Lastly, there is the designation or declaration of one’s will to ownership through a representative sign, but this is “not actual in itself” and is thus “highly indeterminate in its objective scope and significance” (PR §58).⁵⁷⁶ We might say that physical occupation is more practical than

stay as they are, although he could will them otherwise, for he knows how they contribute to his freedom. To restrain one’s self from modifying the trees is to modify them, i.e. to give them a substantive end. In such a case one would have to talk to the hunter to see “what he wills to possess exclusively for himself, for this is the only way to cancel the uncertainty that, in consequence of the law of right, ought to be canceled” (115). Now Hegel makes a similar point in his 1817/18 lectures: “The mere use of land for hunting or pasture or of the seashore for fishing, etc., does not, properly speaking, impose a form on it, but it does involve the will to employ it for one’s use, and genuine use involves the declaration of this will.” Hegel, *Lectures on Natural Right and Political Science*, §21, 70. In the context of abstract right, then, Hegel is in agreement with Fichte, yet Hegel then makes the extraordinary move of sympathetically invoking *ius gentium*: “Civilized peoples may [take] possession of the land that is merely used for grazing and hunting [and] use it for agriculture, saying that the nomad and the huntsman do not wholly possess the land and that it is only the imposition of form, i.e., the cultivation of the soil, that yields possession properly speaking. However, the nomad does have the abstract right to make whatever use he wills of his ownership in land. It is only *jus gentium* that makes the imposition of form the most complete mode of use and gives the most advanced, more civilized peoples, who use the land better, a right to it—a right that does not, however, derive from personality.” Ibid.

575 Hegel gives the example of tilling soil, cultivation, and raising animals. In his 1817-18 lectures on right, Hegel specifically invokes the Roman idea of *specificatio* to describe this type of possession, which as we saw in Chapter Two, was one of three legitimate means of acquisition under *ius gentium* according to Roman law. Hegel, *Lectures on Natural Right and Political Science*, §19, 67. The other two were *occupatio* and *traditio*, or simple exchange.

576 Hegel notes that the sign is also evident in the other two forms of acquisition, myself being the sign in occupation, and the changed form being the sign in *specificatio*. See §58, *Zusatz*. Kant also lists three aspects of original acquisition, but imposing form on the object of possession is not one of them. Kant’s are taking possession (*possessio phaenomenon*), giving a sign (*declaratio*), and appropriation (*appropriatio*). That latter is “the act of a general will (in idea) giving an external law through which

theoretical and that signs of ownership are more theoretical than practical, leaving the alternation of the object's form as the most complete unity of both the practical and theoretical, which is why it is "most in keeping with the Idea." This, as we have seen, is very similar to Locke's account.⁵⁷⁷

Hegel defines *use* as 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 [*Bestimmung*]" (PR §59). Its destiny is to be nothing else than a use *for me*: "if I have the whole use of the thing, I am its owner; and beyond the whole extent of its use, nothing remains of the thing which could be the property of someone else" (PR §61, *Zusatz*). This absolutist or complete theory of property precludes any bundle-of-rights theories of ownership where some such rights are exercised by others (prior to or beyond contractual relation).⁵⁷⁸ It is from this ground that Hegel criticizes the Roman distinction between *usufruct* and *dominium*, and along the

everyone is bound to agree with my choice," which I interpret as an act putting all others under an obligation to respect your claim "this is *mine*." Kant, *Metaphysics of Morals*, 411 (6:258-59).

⁵⁷⁷ In his discussion, Hegel addresses a question that often nags Locke's account of property, although Hegel addresses it through an engagement with Fichte. The question is this: if my practical will changes the form of an object, but not its matter, do I possess only the form, or both the form and the matter? Fichte used the example of the crafting of a cup of gold, saying that others are free to use the substance as long as they do not destroy the form—his "handiwork" (PR §52, *Zusatz*). Hegel calls this "hair-splitting": "I take possession of a field and cultivate it, not only the furrow is my property, but the rest as well, the earth which belongs to it. For I wish to take possession of this matter as a whole" (PR § 52, *Zusatz*). Kant views the possession of the substance in many things as a logical entailment of possession of the accidents: "Anything else that is so connected with a thing of mine that another cannot separate it from what is mine without changing this also belongs to me," and even gives the example of "gold plating." Kant, *Metaphysics of Morals*, 420 (6: 269). When it comes to land, Fichte explicitly disagrees: "Land is humanity's common support in the sensible world" and the "earth in particular...cannot be owned," therefore "the agriculturalist's right to a particular piece of land is nothing more than the right to cultivate products entirely by himself on this land." Fichte, *Foundations of Natural Right*, 198-90. Cf. Kant, *Metaphysics of Morals*, 419-20 (6:269). See also Hegel, *Lectures on Natural Right and Political Science*, §19, where Hegel criticizes Fichte's claim that "matter belongs to God"

⁵⁷⁸ Such as with *iura in re aliena*. *iura in re aliena* include *usufructus* and other *iura ad rem* or *iura personam*. See my discussion in Chapter Two, Section 1.1

same lines we saw argued by Richard Tuck in the previous chapter (See footnote 431). The example Hegel gives is from the *Institutes* (2.4), which states that “usufruct is the right to use and enjoy the fruits of another’s property provided that its substance is conserved,” but that under certain circumstances the usufruct can revert to the owner, i.e. that the owner is not conceived of as having a right of usufruct in the first place.

As with Tuck, Hegel presumes that Roman property is synonymous with a complete set of rights (*iura*) associated with its use, and thus any deviation from this presumption is considered a confusion on the part of the jurists: For him, the separation of “the right to the *whole extent of the use* of a thing and *abstract ownership*” results in a madness of personality (*eine Verrücktheit der Persönlichkeit*)” (PR §62). This move by Hegel is somewhat curious, for the thrust of his analysis of the social and juridical transformations in the Roman Empire was precisely to acknowledge the importance of the rise of abstract personality—which simultaneously recognizes the juridical institutions that pulled in the opposite direction. That is to say, the emergence of abstract personality was evidence of an ongoing process of uprooting religious and customary relations of power and control (to the earth, by birth, or in the family), assimilating them into the abstract space of universal right; all that was solid was *beginning* to melt into the air. A similar process was at work in the Reformation with the desacralization of the sensuous and the interiorization of the sacred. Yet Hegel here dismisses the evidence of this conceptual development—in, for example, the transformations and downfall of “*res mancipi* and *nec mancipi, dominium Quiritarium*” etc.—as merely “distinctions within

property itself” that are “unconnected with any conceptual determination of property” (PR §62).⁵⁷⁹

Hegel’s idea of the madness of personality appears anachronistic for a few reasons. First, as I have argued, *dominium* was not synonymous with *property right* in Roman law, thus the separation of the right of *usufruct* from *dominium* is not inconsistent. This same distinction resurfaced in feudal law after the revival of the *Corpus Juris* and the contorted attempts to apply it to property relations of the day. I am referring here to the feudal concepts of *dominium directum* and *dominium utile*, which Hegel speaks of, and which I discussed Chapter Two (Section 2). Hegel is right to see a connection between the Roman and feudal distinctions and he is also right in noting that the latter blur the use/ownership distinction of the former, almost taking the form of co-ownership or what I called *divided dominium*. This did indeed happen over time, and necessarily so for the development of capitalism. Yet, if we follow Hegel’s logic using his criterion of absolute ownership, this would mean that there was a madness of personality from the Roman world up through modernity, for we find this so-called impurity in both Roman and feudal law—or, more accurately, we could say that there was no corruption at all, for Hegel’s idea of complete ownership (i.e. an exceptionless *plena potestas in re*) did not fully exist in Roman law and it is difficult to find a time when there ever existed a type of ownership more complete than that in Roman *classical* law (despite their *iura in re aliena*).

⁵⁷⁹ Joachim Ritter doesn’t make much of this move by Hegel, seemingly absolving him of the charge of anachronism insofar as he writes that Hegel “takes up the question of what becomes of the foundation of right [in Roman law] with the advent of political revolution and the emergence of civil society. In this upheaval the concepts of Roman law are melted down and filled with the substance that belongs to the contemporary world.” Ritter, “Person and Property: On Hegel’s Philosophy of Right, Paragraphs 34-81,” in *Hegel and the French Revolution*, 127.

The second and related problem with Hegel's account is that he seems to think that the rise of natural or abstract right in the Roman Empire is synonymous with the rise of *subjective* right—right or *ius* here being understood as emanating from a power, faculty or the will of the person, rather than as a term in objective law or justice.⁵⁸⁰ Earlier in his text, Hegel speaks of the “conceptual poverty” of the Roman distinction between the rights of persons and the rights of things, for “personal right is in essence a *right of things*... This right of things is the right of *personality as such*” (PR §40). This is, of course, unsupported by Roman jurisprudence and the historical record, for it not only universalizes personality (contra Roman law), but it seems to smuggle in a modern notion of subjective right. That is to say, Hegel appears to want to collapse these two types of rights, which in more modern terms would be a combination of a *ius in personam* (in that it is attached to a particular person under *obligatio*), and a *ius in rem* (in that there is a correlative duty for all, not merely for those with whom I have a contractual relation).⁵⁸¹ While there is no consensus among contemporary historians concerning the origin of subjective rights, there is a consensus that it arose sometime between the twelfth and

580 As Tierney writes, “Roman jurisprudence had no conception of human rights or natural rights inhering in all persons by virtue of their humanity.” Brian Tierney, “Natural Law and Natural Rights: Old Problems and Recent Approaches,” *The Review of Politics* 64:3 (Summer, 2002), 392. I discussed a similar distinction in the context of Olivecrona's interpretations of Locke, which I claimed he conflated. When Ulpian writes that “Justice is the continuous and lasting determination to assign to everyone their *ius*,” he did not mean that justice is to *recognize* the inherent subjective rights of individuals, but rather that a just outcome of a dispute is when everyone is assigned what they deserve, what is their own (*ius suum*). This is the meaning of Aquinas's claim: “*Ius* is the object of justice.” See Tuck, *Natural Rights Theories*, 13-14. See also Brian Tierney's excellent discussion in his *Idea of Natural Rights*, Chapter 5.

581 We find this subjectivist reading in Austin's definition of *ius ad rem*: “Rights *in rem* may be defined in the following manner—‘rights residing *in persons* and availing against other persons generally.’” Austin, *Jurisprudence*, 4th ed., emphasis added; cited in Albert Kocourek, “Rights in Rem,” *University of Pennsylvania Law Review and American Law Register*, 68:4 (June, 1920), 322.

fourteenth centuries.⁵⁸² With came the medieval distinction between *ius ad rem* (right to a thing) or *ius in personam* and *ius in re* (right in a thing)), which were formerly *actiones*.⁵⁸³ This later classification made those earlier rights of *ususfructus* (against those who exercise *dominium*), for example, into subjective powers or properties of the person. Since Hegel deduces property from personality, he wants to collapse the *iura in re aliena* and *dominium* distinction, making the later a right of the person thus making ownership complete or absolute and subject only to a single individual will.⁵⁸⁴ This move toward convergence also means that Hegel must also exclude the Roman category of *actiones*: “the right of actions concerns the administration of justice and has no place in this classification” (PR §40). Hegel’s dismissal of *actiones* is again evidence that he is reading a subjective understanding of right back into the Roman legal code, for what he is now calling rights (*iura*) were classified as *actiones*: *actiones in personam* and *actiones*

582 For a concise overview of the debate, see Brian Tierney, “The Idea of Natural Rights: Origins and Persistence.”

583 As Tuck writes, “the notion of a *ius ad rem* would have been utterly incomprehensible to the Roman jurist.” Tuck, *Natural Rights Theories*, 14. I discuss the Roman category of *actiones* below.

584 For a discussion on the how the Roman concept of *dominium* was misappropriated and instituted in the Napoleonic Code via the modern natural lawyers, particularly Grotius, see Shael Herman, “The Uses and Abuses of Roman Law Texts,” *The American Journal of Comparative Law*, 29:4 (Autumn, 1981), 671-690. Of particular interest is the view of Jean Gaudemet, who writes: “It is often said that Roman property was ‘absolute’ and that its holder enjoyed the rights over his asset. Without doubt, Justinian’s Institutes (II 4,4) speak of a ‘full power over the thing’ and the interpreters of Roman law have analyzed the right of property as the right to use the thing, to receive fruits from it, and to dispose of it either by alienating it or even destroying it. But these analyses, which can invoke the support of certain Roman texts, are above all the work of modern interpreters who, from the 16th until the 19th century, wanted to find in Roman law the expression of their individualistic conception of a right to absolute private property.” Gaudemet, *Le droit privé romain* (Paris: Librairie A. Colin, 1974), 75-75; cited in Herman, “The Uses and Abuses,” 673. This view is shared by Pelczynski who rightly notes that Hegel’s conception of abstract right “is really the natural law of the seventeenth and eighteenth centuries, which was based on the revival of Roman law.” Z. A. Pelczynski, “Political community and individual freedom in Hegel’s philosophy of state,” in *The State and Civil Society: Studies in Hegel’s Political Philosophy*, edited by Z. A. Pelczynski (Cambridge: Cambridge University Press, 1984), 66.

in rem.⁵⁸⁵ Finally, although Hegel collapses the above Roman classification in light of a modern conception of subjective right, the object of rights in his reformulation turns out to be rather pre-modern. One might think that Hegel would subsume these categories into a modern *ius in personam* and thus relegate talk of ‘rights to things’ to a subcategory of the right of persons, but Hegel does the opposite;⁵⁸⁶ appearing to conflate possession and property, for only the latter gives rise to right and that right (through its recognition by others) has correlative obligation only for other persons.⁵⁸⁷

585 “In the *actiones in personam* the defendant is sued for *dare, facere, praestare oportere* (= to give, to do or to perform something), in the *actiones in rem* the plaintiff affirms that the corporal object he claims is his or that he has a certain right over the adversary’s property. The former actions lie against the person obligated by a contract or a wrongdoing, the latter may be brought against any person who withholds the thing involved from the plaintiff.” Adolf Berger, *Encyclopedic Dictionary of Roman Law, Transactions of the American Philosophical Society* 43:2 (1953), 346. And as Frederick Pollock writes: “The description of legal duties and rights as being *in rem* or *in personam* is usually and correctly said to be unauthorized by classical Latin usage. Roman lawyers spoke of ‘*actiones*,’ not ‘*jura*,’ being *in rem* and *in personam*. But it should be remembered that in Roman usage ‘action’ included what we now call a ‘right of action’, any determinate claim to some form of legal redress. ‘Action’ was defined as a man’s right of obtaining by process of law what is due to him, not as the process itself.” Frederick Pollock, “Divisions of Law,” *Harvard Law Review*, Vol. 8, No. 4 (Nov. 26, 1894), 192.

586 “Admittedly, only a person is obliged to implement the provisions of a contract, just as it is only a person who acquires the right to have them implemented. But such a right cannot therefore be called a personal right; rights of *every* kind can belong only to a person, and seen objectively, a right based on contract is not a right over a person, but only over something external to the person or something which the person can dispose of, i.e. always a thing.” Hegel, *Philosophy of Right*, §40.

587 Alan Ryan interprets this move thus: “My will cannot occupy another person; hence Hegel sees in a right a relationship of occupancy between a person and a thing which other persons are called on to acknowledge. This is contrary to the utilitarian tendency to say that all rights are *jus ad personam* on the ground that *jus ad rem* is simply a right good against an indefinite number of persons as opposed to a right good against some specific person or persons. And this is important because it makes the relationship of possessing important in a way it simply cannot be for any utilitarian writer.” Alan Ryan, “Hegel on work, ownership and citizenship,” in *The State and Civil Society*, 185. Contra Ryan, if right is a relation of recognition between free wills, I need not “occupy” a person to have a relation of right with them. Their recognition of my property right is recognition of the fact that my will has become the substantial end of an object—and I need not “occupy” that object for this to happen. My property elicits a correlative obligation (or even a duty, see §238, *Zusatz*) in the other to respect my person and thus my right. We need not think of rights as something “in” an object to emphasize the importance of possession; this is already done by Hegel’s argument that my will only becomes objective to myself and others through property, a point very different from that of utilitarianism.

In addition to the claim that use is inseparable from ownership, Hegel makes the more defensible claim that use becomes universal, not just subjectively through ownership, but objectively in its *exchange value* or what he simply calls *value*.⁵⁸⁸ It is in the value of a thing that its “true substantiality is *determined* and becomes an object [*Gegenstand*] of consciousness” (PR §63), which, quite significantly, means that the true substantiality of an object is determined by its capacity for exchange. For when Hegel writes that I own the value as much as I own the use, he is saying that I own both the (abstract) exchange value and the use value of a thing. “If one considers the concept of [exchange] value,” Hegel rightly notes, “the thing [*Sache*] itself is regarded merely as a sign, and it counts not as itself but as what it is worth” (PR §63, *Zusatz*). Since my ownership of value is a product of my will, its exchange involves the products of another’s will, and this relation “of will to will is the true and distinctive ground in which freedom has its *existence*,” according to Hegel. Why? Because ownership is no longer limited to those objects that I seize, transform, or declare to be mine: Through exchange, property becomes mediated “by means of another will, and hence within the context of a common will,” which is the sphere of contract (*Vertrag*).⁵⁸⁹

588 That is to say, within the relations that constitute the reality of economic life there arises an ideality or, as Hegel writes in *Natural Law*, a “relative identity of the opposed determinacies,” which is *value*. “Through the identity into which the real aspect of the context of the relations is posited, possession becomes property, and particularity in general, even living particularity, is simultaneously determined as universal, and thus the sphere of law is constituted.” *Ibid.*, 95. See Hegel’s analysis of value in his *System of Ethical Life*, 121.

589 “In contract, I have property by virtue of a common [*gemein*] will; for it is the interest of reason that the subjective will should become more universal and raise itself to this actualization. Thus, my will retains its determination as *this* will in a contract, but in community with another will. The universal will [*allgemeine Wille*], on the other hand, appears here as yet only in the form and shape of community [*Gemeinsamkeit*].” Hegel, *Philosophy of Right*, §71, *Zusatz*.

Contractual exchange is thus the actualization of my freedom as a person insofar as I am recognized in this exchange as a property owner and thus a member of a community of persons. The union (*Gemeinsamkeit*) of wills in civil society—i.e. that realm of social labor and contractual exchanges of value equivalents, which generate obligations *qua* persons—is not, however, the type of union present in the state, which is non-contractual. That is to say, Hegel draws a stark line between the contractual world of the capitalist economy (as a mere *societas*) and the non-contractual natural of the state (*civitas*). Any attempt to apply a contract of arbitrary wills (*Willkür*) to the state must either ignore or seek to undermine its political authority, ethical significance, and cognitive infrastructure in non-contractual institutions, and represents a step back into the feudalistic blurring of property and sovereignty.⁵⁹⁰

Social-contract theorists' first mistake, according to Hegel, is to assume that individual free will (and all of its conceptual entailments) can somehow be antecedent to the state, while their second mistake is to take the commercial contract of civil society and apply it to the state: "The intrusion of this [contractual] relationship...into political relationships has created the greatest confusion in constitutional law and in actuality" (PR §75).⁵⁹¹ Both mistakes stem from the misguided notion that the individual, as "primary and supreme," should serve as one's methodological starting point and therefore the state

590 See Hegel, *Philosophy of Right*, §277, Hegel, *Philosophy of History*, 428, and Hegel, "The German Constitution," in *Hegel's Political Writings*, 181. See also Habermas, "The Classical Doctrine of Politics in Relation to Social Philosophy," in *Theory and Practice*, 41-81, and Seyla Benhabib, "Obligation, contract and exchange," in *The State and Civil Society: Studies in Hegel's Political Philosophy*, edited by Z. A. Pelczynski (Cambridge: Cambridge University Press, 1984), 159-77.

591 "If the state is represented as a unity of different persons, as a unity which is merely a community, this applies only to the determination of civil society. Many modern exponents of constitutional law have been unable to offer any view of the state but this." Hegel, *Philosophy of Right*, §182, *Zusatz*.

should be understood as merely *instrumental* for the individual.⁵⁹² The subjective will of the individual certainly has its place (in civil society), and the freedom of the individual is certainly a primary concern of Hegel's political thought, but one cannot, according to Hegel, begin with the abstract individual and, through aggregation, constitute the universal will and *Sittlichkeit* of the state: "the arbitrary will of individuals [*Individuen*] is not in a position to break away from the state [*vom Staat zu trennen*], because the individual is already by nature a citizen of it" (*PR* §75, *Zusatz*). That Hegel speaks here of "breaking away" or separating (*trennen*) from the state is interesting—and not only because most social-contract theorists speak of the contractual *origins* of the state or employ the contract as an idea of reason—for it could be a reference to the breaking away (via revolution) in France or the separation (via independence) in the North American colonies, which raises some questions. Before I address these, however, let me first present the core of Hegel's critique.

Hegel's central charge is that the institutions of mutual recognition that enable the realization of personality and individual free will (and self-consciousness itself), which are presupposed in a contractual relation, cannot arise in isolation; they presuppose a community. While this community does reflect the union of wills as a *Gemeinsamkeit*, and thus a certain form of arbitrary freedom of choice, *right* inevitably gives rise to *wrong* [*Unrecht*] and the cancellation of wrong requires a type of justice that can only be found beyond the sphere of personal interests; a type of justice that exacts punishment

⁵⁹² See Hegel, *Natural Law*, 70. Rousseau sees the task of cultivating the universality of citizenship, a step Hegel finds wanting in the social contract tradition, to be that of the legislator, who will "change human nature, to transform each individual (who by himself is a perfect and solitary whole), into a part of the larger whole from which this individual receives, in a sense, his life and his being," Rousseau, *On the Social Contract*, Book II, Chapter VII, 163. See Williams, *Hegel's Ethics of Recognition*, 276-80.

rather than vengeance. It requires, in short, “a will which, as a particular and subjective will, also wills the universal as such” (PR §102, *Zusatz*). This is the immanent development of subjectivity or the *moral point of view*—i.e. the move from person to subject—which rises above the will of abstract right to *ein höherer Boden*. Hegel summarizes this development thus: “The immediacy which is superseded in crime thus leads, through punishment – that is, through the nullity of this nullity – to affirmation, i.e. to *morality*” (PR §104, *Zusatz*).⁵⁹³ In morality, whose fullest development is *conscience*, the will (as noted above) becomes both in- and for-itself, thus actualizing freedom. Yet as Hegel writes in his *Natural Law* essay, formal morality “is the ethical life of the bourgeois or private individual,”⁵⁹⁴ by which he means that subjectivity achieves a moral universality, but the content of that universality is still determined by the *interests* of private (bourgeois) individuals.⁵⁹⁵ For Hegel, moral autonomy must (*pace* Kant) be mediated and must find its substance (*pace* Fichte) in the life (i.e. the customs, religion, institutions, values, etc.) of the state and in institutionally embedded forms of mutual recognition for it to achieve substantive freedom.⁵⁹⁶ Thus abstract right and morality must find union on a higher level.⁵⁹⁷

593 Or, in greater detail: “In property, the will’s determinacy is *abstract possession* [*das abstrakte Meinige*] and is therefore located in an external thing [*Sache*]; in contract, it is possession *mediated by will* and merely held in *common*; in wrong, the will of the sphere of right in its abstract being-in-itself or immediacy is posited as contingency by the individual will, it [i.e. the will’s abstract determinacy] has been overcome to the extent that this contingency itself, as reflected *into itself* and *identical with itself*, is the infinite and inwardly present contingency of the will, i.e. its *subjectivity*.” Hegel, *Philosophy of Right*, §104.

594 Hegel, *Natural Law*, 114.

595 “Hence all that is left for duty itself, in so far as it is the essential or universal element in the moral self-consciousness as it is related within itself to itself alone, is abstract universality, whose determination is *identity without content* or the abstractly *positive*, i.e. the indeterminate.” Hegel, *Philosophy of Rights*, §135.

We have seen that natural law theorists like Locke argue that property, contract, and even money can exist in a state of nature and that the *social contract* is the creation of a government for the purpose of regulating these pre-existing forms of right. Government is thus a voluntary creation in order to secure the realm of individual freedom within which individual interests can be pursued. Yet Locke, among most other natural law theorists, does not differentiate society and the state, and the conceptual directionality of Locke's account appears to be the reverse of Hegel's. As Hegel writes, "there are always only two possible viewpoints in the ethical realm: either one starts from substantiality, or one proceeds atomistically and moves upward from the basis of individuality [*Einzelheit*]. This latter viewpoint excludes spirit, because it leads only to an aggregation, whereas spirit is not something individual [*nichts Einzelnes*] but the unity of the individual and the universal" (*PR* §156, *Zusatz*). Sympathetically read, Hegel's point is compelling: each shape of right, from personality to moral subjectivity, only finds its completion in its sublation, thus the actualization of each presupposes the actualization of all, which is why the state is an ethical totality only insofar as it simultaneously preserves and mediates such difference within itself, completing the circle—the "round of movement" of the immanent dialectic of the concept—of the ethical Idea, of which the

596 For interpretations that (rightfully) takes forms of institutionalized mutual recognition to be the implicit foundation of Hegel's critique of the social contract, see Williams, *Hegel's Ethics of Recognition*, chapter 12; and Alan Patten, "Social Contract Theory and the Politics of Recognition in Hegel's Political Philosophy," in *Beyond Liberalism and Communitarianism: Studies in Hegel's Philosophy of Right* (edited by Robert R. Williams (New York: SUNY Press, 2001), 167-184.

597 "The unity of the subjective with the objective good which has being in and for itself is *ethical life*...For whereas morality is the form of the will in general in its subjective aspect, ethical life is not just the subjective form and self-determination of the will: it also has its own concept, namely freedom, as its content. The sphere of right and that of morality cannot exist independently [*für sich*]; they must have the ethical as their support and foundation. For right lacks the moment of subjectivity, which in turn belongs solely to morality, so that neither of the two moments has any independent actuality. Only the infinite, the Idea, is actual." Hegel, *Philosophy of Right*, §141, *Zusatz*.

state is its actuality. “The development of immediate ethical life through the division of civil society and on to the state, which is shown to be their true ground, is *scientific proof* of the concept of the state, a proof which only a development of this kind can furnish” (PR §256). The truth of each can only be found in the actualization of the whole, for the philosophical science of right can only begin once the actualization of the Idea of right (in the state) has already *taken place*—its proof is its completion.⁵⁹⁸

Concerning Locke’s account of the social contract, Hegel would say that he is presupposing a type of individual that could only have taken shape in the ethical life of the state; from the *person* as property owner to the *subject* of the moral life (and *conscience*). Such individuals are the creation not the creators of the state for the latter is present within them.⁵⁹⁹ As Hegel writes in reference to Rousseau’s *Emile*, those “pedagogical experiments in removing [*entziehen*] people from the ordinary life of the present and bringing them up in the country...have been futile, because one cannot successfully isolate a people from the laws [*Gesetzen*] of the world” (PR §153, *Zusatz*).

This brings us back to Hegel’s aforementioned language of “breaking away” or “separating” (*trennen*) from the state, for if we read Locke’s state of nature as a juridical concept that applies to the colonial context, is it still the case that there can be “only two possible viewpoints” from which to understand the development of spirit?⁶⁰⁰ Even if one

598 See Hegel, *Philosophy of Right*, §2, and the beginning of Section 2 above.

599 “If the state is confused with civil society and its determination is equated with the security and protection of property and personal freedom, the interests of individuals [*der Einzelnen*] as such becomes the ultimate end for which they are united; it also follows from this that membership of the state is an option matter. But the relationship of the state to the individual [*Individuum*] is of quite a different kind. Since the state is objective spirit, it is only through being a member of the state that the individual [*Individuum*] himself has objectivity, truth, and ethical life.” Hegel, *Philosophy of Right*, §258.

disagrees with my reading of Locke, the historical experience of the British colonists “breaking away” from the mother country and establishing an independent *constitutional* government, together with the fact that Hegel, following Smith, argues that colonies should eventually become independent, will perhaps give us pause.⁶⁰¹ Indeed, in the colonial context, the critique that state-of-nature and social-contract theorists are presupposing their individuals to already be both persons and subjects loses its teeth. Of course they have such a presupposition, we might reply, but they do so legitimately.

Hegel’s reply would probably be that the rise of a Protestant nation in the former British colonies is not yet a true state, for it would still lack ethical substance (*Sittlichkeit*) and has not actualized the Idea of right. Hegel’s *methodological* claim that there are “only two possible viewpoints in the ethical realm” is therefore not refuted by the presence of *subjects* in the colonies who realize a social contract, for their subjectivity is not yet actualized in the ethical substance of the state; and such ethical substance has still not been shown to arise from contract. That said, does the fact that in the colonies the formation by *subjects* of a (largely capitalist) civil society precedes the formation of a state, contrary to the history of all states heretofore, make any difference?⁶⁰² And if we grant Hegel’s methodological point, and grant as well that *Sittlichkeit* cannot be

600 I will concentrate on the independence struggle of the British colonies and the establishment of the U.S. Constitution in the following. We could perhaps read the following comment by Hegel as the “breaking away” or “separation” in the context of the French Revolution: “Consequently, when these abstractions [i.e. the arbitrary will of individuals] were invested with power, they afforded the tremendous spectacle, for the first time we know of in human history, of the overthrow of all existing and given conditions within an actual major state and the revision of its constitution from first principles and purely in terms of *thought*; the *intention* behind this was to give it what was *supposed* to be a purely *rational* basis.” Hegel, *Philosophy of Right*, §258.

601 See Hegel, *Philosophy of Right*, §248, *Zusatz*.

602 “Civil society is the difference which intervenes between the family and the state, even if its full development occurs later than that of the state.” Hegel, *Philosophy of Right*, §182, *Zusatz*.

accounted for by contract, is it possible for ethical substance to emerge from a civil society itself instituted through contract? I ask these questions because Hegel's critique of the social contract and the state-of-nature theories that inform it, is often interpreted as a complete refutation of the modern natural rights tradition, because the latter's methodological starting point—the individual in the state of nature—is almost always considered to be the pre-social individual of classic natural law theory, rather than the colonial subject of modern natural rights theory. While this does not affect Hegel's methodology (as starting from the ethical substance of the state), it does blunt the critique of modern natural rights theorists that they are falsely attributing personality and even subjectivity to their individuals in a (colonial or international) state of nature. Hegel would probably not deny the existence of subjective freedom among the colonists in North America, for example, although he would say that they are merely subjects and not true citizens. This point is potentially relevant for Hegel's philosophy of the state and of history, for Hegel's state is a colonizing state and its colonies—which return to the principle of the family, by his own account—themselves become states, which in turn colonize. Thus the colonial “state of nature” operative, I have argued, in the modern natural rights tradition, will repeat itself ever more frequently and indeed become the dominant condition of state-formation in capitalist modernity—be it in the earlier colonialist phase of settlement or the later imperialist phase of conquest that imposes a constitutionalist regime. The question of the legitimate establishment of right and, subsequently, of jurisdiction in this modern state of nature will thus continually reassert itself. That Hegel unquestionably felt the need to answer this question is evidenced by the philosophical gymnastics he performs with the *absolute right of world spirit*.

To return to my question concerning the possibility of ethical substance emerging from a civil society explicitly instituted through contract, Hegel's answers in the affirmative: "As far as the Idea of the state itself is concerned, it makes no difference what is or was the *historical* origin of the state in general...In relation to scientific cognition...these are questions of appearance, and consequently a matter [*Sache*] of history" (*PR* §258). That said, Hegel would differentiate a social contract from a constitution, for the former is a product of mere *Willkür* and no different from the commercial contract (as an exchange of value equivalents), while latter is already the "organism of the state," having differentiated itself (in the separation of powers, for example) in objective actuality (*PR* §269).⁶⁰³ We could say that a written constitution is, for Hegel, merely the articulation of the *actual* constitution of the state, which is why, for him, "a constitution is not simply made: it is the work of centuries" (*PR* §274, *Zusatz*). And as if addresses Locke's state of nature: "No constitution can therefore be created merely by subjects."⁶⁰⁴ This would appear, for example, to exclude the U. S. Constitution from being a true constitution.

Having said this, how are we to reconcile Hegel's above comment on *Emile* with the claim in the *Philosophy of History* that "America is...the land of the future," a "land

603 According to Hegel, "the constitution should *not* be regarded as *something made*, even if it does have an origin in time. On the contrary it is simply that which has being in and for itself, and should therefore be regarded as divine and enduring, and as exalted above the sphere of all manufactured things." Hegel, *Philosophy of Right*, §273. And as Hegel writes in the *Philosophy of History*: "In a constitution the main feature of interest is the self-development of the *rational*, that is, the *political* condition of a people; the setting free of the successive elements of the Idea; so that the several powers in the state manifest themselves as separate—attain their appropriate and special perfection—and yet in the independent condition, work together for one object, and are held together by it—i.e., form an organic whole." Hegel, *Philosophy of History*, 46-47. Cf. Hegel, *Philosophy of Right*, §274, *Zusatz*.

604 My translation of "Keine Verfassung wird daher bloß von Subjekten." Hegel, *Philosophy of Right*, §274, *Zusatz*.

of desire [*Sehnsucht*] for all those who are weary of the historical lumber-room [*Rüstkammer*] of old Europe,” who will “abandon the ground [*Boden auszuscheiden*] on which hitherto the history of the world has developed itself”?⁶⁰⁵ Hegel implies here that, unlike the child raised in the countryside, where the “laws of the world” still insinuate themselves, the colonists in the “New World” can escape them. We could interpret Hegel as implying that the “ground” upon which history has developed is the *Sittlichkeit* of the European state, which while still operative for a young citizen raised in the countryside, is dissolved and reconstituted in a different (albeit still Protestant) form on the shores of another country: “these parts of the world [i.e. the colonies in America and Australia] are not only relatively new, but intrinsically so in respect of their entire physical and *geistigen* constitution”⁶⁰⁶ With this in mind we can see why America is logically the *land of the future*, according Hegel, for while it has not yet developed as a state in Hegel’s terms, the logic of capitalism makes the development of a state inevitable (a point I return to momentarily). And it is only when statehood is achieved, in the sense of the development of a national spirit, that the United States will become a subject in the theater of world history.⁶⁰⁷

As argued above, Hegel does not exclude the development of *Sittlichkeit* out of what he would call the contractual order of a merely “external” state or civil society and, indeed, his account of the development of North America accords well with a social-

605 Hegel, *Philosophy of History*, 86.

606 Ibid., 80-81.

607 “In fact it is world-historical only in so far as a *universal principle* has lain in its fundamental element—in its grand aim: only so far is the work which such a spirit produces a moral, political organization.” Hegel, *Philosophy of History*, 75. This point is made throughout Hegel’s “Introduction” in the *Philosophy of History*.

contract narrative, particularly that of Locke. Hegel writes that the colonists in North America were “industrious Europeans, who betook themselves to agriculture” and

the basis of their existence as a united body lay in the necessities that bind man to man, the desire of repose, the establishment of civil rights, security and freedom, and a community arising from the aggregation of individuals as atomic constituent; so that the state was merely something external for the protection of property. From the Protestant religion sprang the principle of mutual confidence of individuals.⁶⁰⁸

Hegel does not believe that the United States is a genuine state, for its republication constitution presents a merely “subjective unity” in the president, who presides over a civil society that has developed as far as the capacity to administer justice (the second moment of civil society), and perhaps as far as attending to the welfare of individuals as a whole (the third moment of civil society), but no further.⁶⁰⁹ The “fundamental character of the community,” writes Hegel, is the “endeavor of the individual after acquisition, commercial profit, and gain; the preponderance of private interest, devoting itself to that of the community only for its own advantage.”⁶¹⁰ And so it is in matters of religion as well, for although North America is largely Protestant, it has become so sectarian, so prone to an absurd degree of factionalism as to become merely private: “the affairs of religion are regulated by the good pleasure for the time being of the members of the

608 Hegel, *Philosophy of History*, 84.

609 “If the principle of regard for the individual will is recognized as the only basis of political liberty, viz., that nothing should be done by or for the state to which all the members of the body politic have not give their sanction, we have, properly speaking, no *constitution*.” Hegel, *Philosophy of History*, 43.

610 *Ibid*, 85.

community.”⁶¹¹ We find that Marx clearly echoes this assessment in his essay, “On the Jewish Question.”⁶¹²

Hegel takes the quite extreme view that the social contract is little more than the commercial contract, while a state’s constitution is the articulation of what the national political organization has already fully become, i.e. a state, which is why he argues that the “political condition of North America, the general object of the existence of the this state is not yet fixed and determined.”⁶¹³ What is remarkable about Hegel’s account is, however, his analysis of why the development of a true state in the colonies has thus far failed to materialize and, relatedly, how its political condition will eventually come to be determined. Concerning the latter, Hegel argues that a “real state and a real government arise only after a distinction of classes has arisen, when the wealth and poverty become extreme, and when such a condition of things presents itself that a large portion of the people can no longer satisfy its necessities in the way in which it has been accustomed.”⁶¹⁴ In other words, a state only arises when the opportunities for internal colonization (or in this case, proximate colonization of neighboring non-state indigenous political societies) have been exhausted, giving rise to internal expropriation and pauperization that result in economic and ethical crisis; a crisis which must be resolved,

611 Ibid.

612 “The infinite fragmentation of religion in North America, for example, already gives it the external form of a strictly private affair. It has been relegated among the numerous private interests and exiled from the life of the community as such.” Marx, “On the Jewish Question,” in *The Marx-Engels Reader*, edited by Robert C. Tucker (New York: Norton, 1978), 35.

613 Hegel, *Philosophy of History*, 85. Earlier in the *Philosophy of History*, Hegel describes the “political condition of a *people*” to be the self-development of the “rational”. See Hegel, *Philosophy of History*, 46. See also Williams, *Hegel’s Ethics of Recognition*, chapter 12.

614 Ibid.

we find, via external colonization. In short, the state does not arise until it must become a colonizing or imperialist state; its territorial sovereignty only becomes actualized the moment it must be transcended.⁶¹⁵ The development of a true state in the colonies had been thwarted because the opportunity for it to colonize is “constantly and widely open,” and thus the “chief source of discontent is removed.”⁶¹⁶ This is the background to Hegel’s famous claim: “Had the woods of Germany been in existence, the French Revolution would not have occurred.”⁶¹⁷

We could then say that although the “New World” of America may be the future insofar as it falls outside the purview of Hegel’s world-history of states, Hegel’s philosophy of the modern state is, as I will explain in greater detail the following section, a state condemned to perpetually reach beyond its borders, thus the case of the British colonization (and in turn, the North American colonization that follows) is the norm rather than the exception—and as Marx writes, it is “in the colonies, where alone exist the men and conditions that could turn a social contract from a dream to a reality.”⁶¹⁸

615 The German states were not unified until forty years after Hegel’s death, but it took the new German Empire only about twelve years before it started its (non-European) colonial efforts—efforts thwarted, however, after WWI.

616 Ibid., 86.

617 Ibid. It is also the essence of Marx’s theory of primitive accumulation In *Capital*, although he identifies a contraction in the colonies (an “anti-capitalist cancer”), which Hegel does not. A point I will return to in the Conclusion. Habermas invokes this claim by Hegel in his study of the role of natural law in the French Revolution and American independence struggle, yet whose significance in the context of the latter is thought to have little import for Hegel’s philosophy (and for Habermas’s own); In short, Habermas takes Hegel at his word that, since America is “the future”, it is not of philosophical concern, historical or otherwise. “While the French Revolution becomes the key to the philosophic concept of World History for him, Hegel would like to exclude North America entirely from philosophical consideration, as a mere land of the future.” Habermas, “Natural Law and Revolution,” in *Theory and Practice*, 86. To be fair, Habermas does not see British colonization as philosophically significant because he does not see any revolutionary element to the so-called liberal understanding of natural law in the colonialist political ideology, which led to American independence, unlike the Rousseauian interpretation that informed the French Revolution.

That the United States would in a little more than a hundred years after Hegel's death conquer Germany and impose upon it a republican constitution, while surely abhorrent to Hegel, is arguably the realization of a process that he indeed identified (however vaguely) in his analysis of the modern state and the "inner dialectic" of capitalist society.

III. Civil Society and the Necessity of Colonization

In a fragment from his Berne period (1793-96), Hegel spoke of a concern that would inform his political philosophy for the remainder of his life: "In the states of the modern world, security of property is the axis around which all legislation revolves and to which most of the rights of the citizenry pertain....It would be important to study how many of the strict rights of property would have to be sacrificed if a republic were to be introduced permanently."⁶¹⁹ Hegel never did answer this question, never faltered in his commitment to those "strict rights of property," and in the end committed himself to a theory of the state that would always be compelled beyond itself so as to accommodate the structural effects of a capitalist system that set those property rights in motion. Although Hegel, to his credit, was ground-breaking in his analysis of capitalism's structural contradictions, ethical deprivations, and tendency toward expansion, he still attempted to couch his state in the rhetoric of a perfect community: "independent states are primarily wholes which can satisfy their own needs internally" (*PR* §332). Thus,

618 Marx, *Capital*, Vol I, XXXIII, 718.

619 Cited in Lukács, *The Young Hegel*, 43.

while we are told the state is an organic whole, spiritual individual, concrete universality, the completion of the circle that is the movement of the Idea, etc., we are also and paradoxically informed that it cannot solve self-generated problems with its own resources.⁶²⁰ We are reminded of Rousseau’s comment that states generally have “a kind of centrifugal force” that makes them expand, but that some states have been “so constituted that the necessity for conquests entered into their very constitution, and that, to maintain themselves, they were forced to expand endlessly.”⁶²¹ So it is with Hegel’s state and he is explicit about the reasons why. That is to say, Hegel’s advocacy of colonialism is not a momentary lapse or marginal idea; his extra-territorial solution is the logical consequence of his theory of civil society, and it is present throughout thirty-plus years of his political philosophy. Hegel is also fully aware of the alternatives put forth by Rousseau, Kant, and Fichte—i.e. international federalism (or cosmopolitanism), international trade, and a closed national economy—and has rejected each as a viable solution to the endemic problems of Civil Society.

Hegel’s analysis of Civil Society is the mid-point of Ethical Life (*Sittlichkeit*), situated between The Family and The State, and is divided into three moments: (A) The System of Needs, or the mediating system of production, trade, and consumption, or need

620 See Herbert Marcuse, *Reason and Revolution*, 201ff.

621 Rousseau, *On the Social Contract*, in *The Basic Political Writings*, Book I, Chapter IX, 168. Unlike Hegel, Rousseau does not articulate systemic reasons for this colonization, neither in the *Social Contract* nor in his *Discourse on Political Economy*, where Rousseau attributes expansion to the desires and greed of individuals, the state being one of them: “If one examines how the needs of a state grow, one will find that this often arises in the same way as do those of private individuals: less by a true necessity than by an increase in useless desires, and that expenditures are increased for the sole reason of having a pretext for increasing income.” Rousseau, *Discourse on Political Economy*, in *The Basic Political Writings*, 130. Similar to Hegel, Rousseau reasons that colonization should be determined by the needs and welfare of the people—“there being enough land for the maintenance of its inhabitants”—and the establishment of both liberty and equality to the extent that no citizen must fall under the control of another. *Ibid.*, Book I, Chapters X and XI.

satisfaction; (B) The Administration of Justice, which actualizes the universal freedom (of right) present in the previous moment through the cancellation of the infringements of property right (through law and a judicial system); and (C) The Police and the Corporation, which is tasked with the responsibility of addressing systemic contingencies that threaten the common interest. Put another way, The Administration of Justice is a legal and judicial system that seeks to mediate and unify the subjective particularities of economic life by ensuring that rights are respected and that wrongs are cancelled, and that while The Police and the Corporation share a similar responsibility, they exercise it at the general level of *welfare*, rather than the particular level of *right*: “good laws will cause the state to flourish, and free ownership is a fundamental condition of its success. But since I am completely involved in particularity, I have a right to demand that...my particular welfare should also be promoted...this is the task of the police and the corporation” (PR §229, *Zusatz*).⁶²² This is a structural consideration at the level of what Hegel calls “*universal functions [allgemeinen Geschäfte] and arrangement of public utility [gemeinnützigen],*” which demand public oversight (PR §235). The oversight carried out The Police (*Die Polizei*) can include market adjustments through price-setting on basic foodstuffs, quality inspections, the provision of basic services related to transportation (street lights, bridges, etc) and public health (PR §236) and the regulation of education (PR §239) and religion.⁶²³ More importantly, however, are the macroeconomic concerns, bringing us to the topic of colonialism.

⁶²² As Hegel writes, “welfare is not the good without *right*. Similarly, right is not the good without welfare.” Hegel, *Philosophy of Right*, §129, *Zusatz*. Without the actualization of welfare, Anatole France’s quip—“The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread”—might indeed be applicable to Hegel’s Civil Society.

Hegel's explicit discussion of colonialism, which falls under the responsibility of *Die Polizei*, constitutes a paragraph no more than a sentence long and a *Zusatz* only a half-page longer.

This extended link also supplies the means necessary for *colonization* – whether sporadic or systemic – to which the fully developed civil society is driven, and by which it provides part of its population with a return to the family principle in a new country, and itself with a new market and sphere of industrial activity (*PR* §248).⁶²⁴

The “extended link” Hegel refers to is constituted by the trade routes of the maritime heroes discussed in Chapter Four, which Hegel mentions in the preceding paragraph.⁶²⁵

From my discussion in Chapter Four, we know that Hegel saw colonialism as a significant component in the development of states throughout history and his account of why states colonize is general enough to apply to almost all of them.⁶²⁶ As he writes in the *Zusatz* to §248: “The increase of population alone has this effect; but a particular factor is the emergence of a mass of people who cannot gain satisfaction for their needs by their work when production exceeds the needs of consumers.” Shortly thereafter,

623 See Hegel, *Lectures on Natural Right and Political Science*, §120 for a more detailed list.

624 Hegel has a very similar description of colonialism throughout his lectures on the philosophy of right, although the above notably contains a reference to the return to family or immediate spirit, which is absent earlier. See Hegel, *Lectures on Natural Right and Political Science*, §120.

625 “Through this supreme medium of communication, it also creates trading links between distant countries, a legal [*rechtliche*] relationship which gives rise to contracts; and at the same time, such trade is the greatest educational asset and the source from which commerce derives its world-historical significance.” Hegel, *Philosophy of Right*, §247. Adriaan Peperzak rights claims that “this sentence contains the seeds for an entire treatise, which remains unwritten, although Hegel’s logic seems to demand it.” Peperzak, *Modern Freedom*, 466. In his earlier lectures on the philosophy of right, Hegel writes: “It is also a distinctive feature of the sea that it imbues the commercial class with the dimension of courage; over against the principle of one’s own utility, profit, and enjoyment, danger enters on the scene, and this gives rise to a courage, an indifference in regard to this end itself. For this reason the satirists of old were unjustified in the strictures they passed on an adventurous spirit.” Hegel, *Lectures on Natural Right and Political Science*, §120, 216-17.

626 See Gabriel Paquette, “Hegel’s Analysis of Colonialism and Its Roots in Scottish Political Economy,” for a discussion of some of the slight differences in Hegel’s account of the economic triggers for colonization.

Hegel makes reference to the colonialism of ancient Greece, and we find a similar account in his *Philosophy of History*, where colonialism is generally attributed to over-population and over-production.⁶²⁷ What is significantly modern about Hegel's account of colonialism in the *Philosophy of Right*, and particularly problematic for the stability of the state, is the specific and necessary character of the "system of needs" in modern Civil Society (*Die bürgerliche Gesellschaft*) that gives rise to it.

We have already noted how property owners come to form a common will through contract, for the means of the realization of my ends become, through contracts, the will of others (objectified in property). "In civil society," writes Hegel, "each individual is his own end...But he cannot accomplish the full extent of his ends without reference to others; these others are therefore means to the end of the particular [person]. But through its reference to others, the particular end takes on the form of universality, and gains satisfaction by simultaneously satisfying the welfare of others" (*PR* §182, *Zusatz*). Thus, in civil society—or "the *external state*, the *state of necessity* and of the *understanding*" (*PR* §183)—persons "make themselves *links* in the chain of this *continuum*," albeit unconsciously:⁶²⁸ while they set out to actualize their merely selfish

627 "In consequence of the long repose enjoyed by them, the population and the development of the community advanced rapidly; and the immediate result was the amassing of great riches, contemporaneously with which fact great want and poverty make their appearance. Industry, in our sense, did not exist; and the lands were soon occupied. Nevertheless a part of the poorer classes would not submit to the degradations of poverty, for everyone felt himself a free citizen. The only expedient, therefore, that remained, was colonization. In another country, those who suffered distress in their own, might seek a free soil, and gain a living as free citizens by its cultivation. Colonization thus became a means of maintaining some degree of equality among the citizens; but this means is only a palliative, and the original inequality, founded on the difference of property, immediately reappears." Hegel, *Philosophy of History*, 233.

628 Cf. Marx: "In this community, the objective being of the individual as proprietor, say proprietor of land, is presupposed, and presupposed moreover under certain conditions which chain him to the community, or rather form a link in his chain." Marx, *Grundrisse*, translated by Martin Nicolaus (New York: Penguin Books, 1993), 496.

ends—thus giving expression to their particularity and formal freedom—their production, exchange, and consumption of *values* is incorporated or universalized into a rational system of interdependence with its own laws to coordinate them.⁶²⁹ It is what Hegel, in his *Natural Law* essay, calls an “infinite intertwining,”⁶³⁰ in which particularity gives rise to universality and arbitrariness gives rise to reason.

In the privatized and marketized life of civil society, subjective needs and their satisfaction are mediated by “activity and work” (*PR* §189), but both needs and their satisfaction are not merely given; they multiply, differentiate, and condition each other: “Needs and means, as existing in reality, become a *being* [*Sein*] for *others* by whose needs and work their satisfaction is mutually conditioned... This universality, as the *quality of being recognized*, is the moment which makes isolated and abstract needs, means, and modes of satisfaction into *concrete*, i.e. *social ones*” (*PR* §192). Hegel’s point here is that needs and labor become objective (alienated) and abstractly universal in civil society, insofar as both become objects (*being*) conducive to circulation or exchange as (universal) value equivalencies. The satisfaction of my needs (end), which are potentially infinite, can only be satisfied through another’s labor (means). My labor is the imposition of form or the penetration of the object with my will (substantial end) that, belonging to

629 “Through the identity into which the real aspect of the context of the relations is posited [i.e. value], possession becomes property, and particularity in general, even living particularity, is simultaneously determined as universal, and thus the sphere of law is constituted.” Hegel, *Natural Law*, 95. See Hegel’s analysis of value in his *System of Ethical Life*: “This pure infinity of legal right, its inseparability, reflected in the thing, i.e., in the particular itself, is the thing’s equality with other things, and the abstraction of this equality of one thing with another, concrete unity and legal right, is *value*.” Hegel, *System of Ethical Life*, 121. See also Hegel, *Philosophy of Right*, §63, 92-93.

630 Hegel, *Natural Law*, 94. “The concept of this sphere is the real *practical* realm; on the subjective side, feeling or physical necessity and enjoyment; on the objective side, work and possession. And this practical realm, as it can occur according to its concept (assumed into indifference), is the formal unity or the *law* possible in it. Above these two is the third, the Absolute or the ethical.” *Ibid.*, 99.

me, I exchange for my own need satisfaction (through contract), which in turn serves the need satisfaction (consumption) of others: “In furthering my end, I further the universal, and this in turn furthers my end” (*PR* §184, *Zusatz*). Their means are my ends and my ends are their means and each is mediated by the universal (value): “By a dialectical movement, the particular is mediated by the universal so that each individual, in earning, producing, and enjoying...thereby earns and produces form the enjoyment of others” (*PR* §199).⁶³¹ Yet this dialectic also frustrates the universal through the creation of overproduction and a lack of consumption capacity, in turn driving civil society “to go beyond its own confines and look for consumers...in other nations,” which are less developed (*PR* §245), and establish colonies.

Thus, the total integration of individuals into the economic system, which exhibits rationality, also subjects individuals to contingencies beyond their individual control, from unemployment generated by the mechanization of production to the elimination of sectors of production due to changes in demand (which are fickle, because they are based on *social* needs).⁶³² The most problematic consequence of such contingencies is the poverty produced by the aforementioned dialectic of overproduction and unemployment.⁶³³ Poverty is more than merely want, for the individual’s needs have been

631 See Lukács’s excellent discussion in *The Young Hegel*, particularly chapter 5.

632 The increasing abstraction of production, for example, “makes work increasingly mechanical, so that the human being is eventually able to step aside and let a machine take his place” (*PR* §198). That is to say, the division of labor into ever more abstract parts of production facilitates their replacement by machines. While Hegel’s tone is rather benign here—the worker simply “steps aside” as if he or she will now get some relief—he is much more straightforward in his earlier lectures: the result of the “introduction of new machinery” is that “manual workers lose their jobs.” Hegel, *Lectures on Natural Right and Political Science*, §120.

633 “When the activity of civil society is unrestricted, it is occupied internally with *expanding its population and industry*...[but] the *specialization* and *limitation* of particular work also increase, as do likewise the *dependence* and *want* of the class which is tied to such work; this in turn leads to an inability to

conditioned and universalized in a capitalist economic system that can no longer satisfy them. That is to say, capitalism takes away “the natural means of acquisition, and also dissolves the bond of the family in its wider sense as a kinship group” (PR §241), leaving individuals stripped of their means for a livelihood in both the natural condition and the institutions of objective spirit.⁶³⁴ By “natural means” I interpret Hegel to be saying that there is no longer a condition in which the rights of free appropriation described in Section 3 above would apply; acquisition in civil society can only take place through exchange, via the will of others, i.e., there is no longer such a thing as *natural* resources or *res nullius*.⁶³⁵

Poverty can arise as a systemic consequence of initial inequalities. “The *possibility of sharing* in the universal resources... is *conditional* upon one’s own immediate basic assets (i.e. capital) on the one hand, and upon one’s skill on the other” and these can be exacerbated by other contingencies, which “necessarily result in *inequalities in the resources and skills of individuals*” (PR §200).⁶³⁶ Thus, an unequal

feel and enjoy the wider freedoms, and particularly the spiritual advantages, of civil society.” Hegel, *Philosophy of Right*, §243.

634 As Hegel writes in his 1817/18 lectures: “As born within civil society, individuals are [dependent] on these resources for the actualization of their right to live [and] have to accept them as the inorganic and external conditions governing such right. The whole community [*das Allgemeine*] must therefore make provision for the poor...” Hegel, *Lectures on Natural Right and Political Science*, §118. Contingencies cannot be countered with more contingencies, however, for the want is universal and thus charity, for example, is no solution (PR §242).

635 On resources, see Hegel, *Philosophy of Right*, §199 and §170. In light of his argument for colonialism, Hegel makes an interesting reference in his earlier lectures, which could either be interpreted as a slip or an admission that all colonialism is usurpation: “the whole earth is occupied,” he writes, and individuals “have in consequence to rely on civil society,” Hegel, *Lectures on Natural Right and Political Science*, §118.

636 “The spirit’s objective right of particularity, which is contained within the Idea, does not cancel out the inequality of human beings in civil society—an inequality posited in nature, which is the element of inequality—but in fact produces it out of spirit itself and raises it to an inequality of skills, resources, and even of intellectual and moral education.” Hegel, *Philosophy of Right*, §200. One is

starting point (in capital and skills) becomes magnified within the capitalist markets of civil society. The existence of class inequality (and estates) is acceptable and even necessary, according to Hegel, yet poverty presents a more fundamental problem: first, because property ownership is necessary for freedom, and, second, because poverty can lead to the formation of a rabble (*Pöbel*), which can “rebel against the rich, against society, the government, etc” (*PR* §244, *Zusatz*). The rabble is essentially radically disconnected from the formal universality of the market, yet still physically present in the state with socialized needs, but no means to satisfy them: a moment of difference remains and conflict thus arises.⁶³⁷

Hegel was insightful to see that even the most efficient market economy could not fully satisfy the material needs of all, and indeed that such an economy has the structural tendency to produce poverty and social exclusion (the rabble). This is why civil society is not considered fully rational, and why the state as a totality is thought necessary to counter its endemic problems. That said, charity, which is too contingent and deprives individuals the honor of work (*PR* §245), market interventions, which are only micro-attempts to solve a macro-problem, and public works, which only engender further

reminded of Rousseau’s assertion that “natural inequality imperceptibly manifests itself together with inequality occasioned by the socialization process. Thus it is that the differences among men, developed by those circumstances, make themselves more noticeable, more permanent in their effects, and begin to influence the fate of private individuals in the same proportion.” Rousseau, *Discourse on the Origin of Inequality*, in *Basic Political Writings*, Book II, 67. Rousseau continues: “although man had been free and independent, we find him, so to speak, subject, by virtue of a multitude of fresh needs, to all of nature and particularity to his fellowmen, whose slave in a sense he becomes even in becoming their master; rich, he needs their services; poor, he needs their help; and being midway between wealth and poverty does not put him in a position to get along without them. It is therefore necessary for him to seek incessantly to interest them in his fate and to make them find their own profit, in fact or in appearance, in working for his....All these are the first effect of property and the inseparable offshoot of incipient inequality.” *Ibid.* 67-68.

⁶³⁷ Marx describes the rabble thus: “a class in civil society that is not of civil society, a class that is the dissolution of all classes...” Marx, ‘A Contribution to the Critique of Hegel’s ‘Philosophy of Right’,” in *Critique of Hegel’s Philosophy of Right*, translated by Annette Jolin and Joseph O’Malley (Cambridge: Cambridge University Press, 1970), 141.

overproduction (*PR* §245), all fail or are ethically unacceptable as solutions to the endogenously generated problems of capitalism. And this is a problem, not only for the satisfaction of material needs, but for the exercise of subjective freedom, which is a necessary moment within the state as an ethical totality and precisely the sphere of freedom, which is supposed to harness the destructive tendencies of subjective freedom witnessed in the French Revolution.

Colonialism is, then, for Hegel, the only way *out*: “Thus civil society in general lacks the power to eliminate poverty. It can find help only in a power that is not its own, in the ownership of land. This is not something civil society has within itself; rather, it must look to something other. This shows the necessity of colonization.”⁶³⁸ Nature (as land) keeps returning and necessarily so, which brings us back to Hegel’s interesting but unanalyzed comment that colonialism represents “a return to the family principle in a new country” (*PR* §248), whose “precondition” we find in the previous paragraph is “the earth, the firm and *solid ground*” (*PR* §247). The family, we know, is the *immediate* or *natural* ethical spirit (*PR* §157), whose pre-legal principle of unity (in feeling and love) is no longer present in the state (*PR* §158, *Zusatz*).⁶³⁹ It contains “moments of subjective particularity and objectivity universality in *substantial* unity” (*PR* §254), yet in civil

⁶³⁸ Hegel, *Philosophie des Rechts: Die Vorlesung von 1819/20 in einer Nachschrift*, edited by Dieter Henrich (Frankfurt: Suhrkamp, 1983), 198; cited in Frederick Neuhouser, *Foundations of Hegel’s Social Theory: Actualizing Freedom* (Cambridge, MA: Harvard University Press, 2000), 173. Raymond Plant argues that colonialism is simply about new markets for overproduction, not land per se. I think this is mistaken. For Hegel, land ownership was the first step for reintegrating the poor, since ownership is essential to personhood. See Raymond Plant, “Economic and Social Integration in Hegel’s Political Philosophy,” in *Hegel’s Social and Political Thought*, edited by Donald Philip Verene (New Jersey: Humanities Press, 1980), 83-87.

⁶³⁹ In the *Phenomenology*, we are told that family life is immediate, elemental and negative ethical life (*PS* §458)

society, it disintegrates, for the rise of individual personality ruptures its natural unity, whose collective recognition, while also property ownership, was only collective and by way of the father (*PR* §171).⁶⁴⁰ Thus a return to the principle of the family represents regression to a pre-civil society natural unity from which the progression and development of (individual) self-sufficiency will have to begin anew. I interpret Hegel's reference to the solid ground of the "earth" as a metaphor for the *immediacy* of ethical life in the family as well as the "natural" or *immediate* form of material reproduction, insofar as labor—and Hegel surely implies agricultural labor—produces the means of subsistence (i.e. use values), but not exchange values.

Hegel's reference to a return to the family principle in colonialism is consistent with endorsement of settlement colonies over conquest, for the latter does not produce opportunities for labor and the "spiritual" benefits it affords, but rather increases surpluses, leaving structural unemployment and the social threats of poverty unresolved. Before I turn to two important questions regarding Hegel's commitment to colonialism, namely, (1) is it successful by his own standards; and (2) is his justification of it plausible, I should first address those who do not see Hegel as committed to colonialism at all. A. S. Walton and Richard Bellamy have argued, for example, that Hegel is only (implicitly) referring to the economic and colonial conditions of England, and since he is clearly critical of the English economy and state, he does support colonization as a solution to its problems.⁶⁴¹ There are there reasons I believe this interpretation is mistaken.

⁶⁴⁰ "*Entailed family property* contains a moment which is opposed to the right of personality and hence of private property." Hegel, *Philosophy of Right*, §46.

⁶⁴¹ See A. S. Walsh, "Economy, utility and community," in *The State and Civil Society*, 244-61, and Richard Bellamy, "Hegel and Liberalism," in *Rethinking Liberalism* (London: Pinter, 2000). See also

First, while it is true that Hegel makes several references to England in his discussion of colonialism and economics generally, it is also true that he (like Marx after him) looked to England as a case study for what a capitalist economy in the (underdeveloped) German states might look like in the future.⁶⁴² Second, throughout his lectures on the philosophy of history and the philosophy of right over the years, Hegel always invokes colonialism as a logical necessity, and never once limits colonialism as an economic solution to any particular state. Third, although it is most often in his lectures on the *philosophy of the right* that Hegel articulates the structural necessity of colonialism—and it is here that more commentators turn—it is only in his *philosophy of history* that a justification for that colonialism is given, and the evidence for Hegel's commitment in the latter is explicit and plentiful. So, in the belief that Hegel actually did advocate colonialism, I return to those two questions.

First, does colonialism successfully fulfill its goal of alleviating poverty and the problem of overproduction and therefore shore up the universal rationality of the state of which civil society is moment?⁶⁴³ If we were to disregard the problems of jurisdiction, we

Ian Fraser, "Speculations on Poverty in Hegel's *Philosophy of Right*," *The European Legacy* 1:7 (1996): 2055-68.

642 In Walton and Bellamy's defense, the one instance where I am aware of Hegel specifically discussing English colonization, he criticizes it. This, I believe, is Hegel faithfully following his own logic, which is that the policies that he has advocated throughout his lectures on the philosophy of right are unsuccessful. Hegel writes: "The proposed withdrawal of the surplus poor by colonization would have had to take away at least a million inhabitants if it was to be likely to have any effect. How could this be achieved? For another thing, the empty space thus produced would very quickly be filled in the same way as before if laws and circumstances remained otherwise the same." Hegel, "The English Reform Bill," in *Hegel's Political Writings*, translated by T. M. Knox (London: Oxford University Press, 1964), 308.

643 Or, as R. L. Perkins asks: "Does not Hegel's manifest inability to find a solution to the problem of poverty indicate his failure as a social philosopher in the terms of his own philosophy which has as its purpose the systematic inclusion of the totality which would mean the overcoming of all contradiction and alienation?" R. L. Perkins, "Remarks on the Papers of Avineri and Pöggler," in *The Legacy of Hegel*,

could see how settlement colonies successfully remove the poor and thus quite literally removes the problematic effects that poverty poses, and if war was necessary to establish the colonies (a relation Hegel never discusses), perhaps surpluses could be disposed of as well. This is a temporary solution in one sense, but in another sense is no solution at all. The temporary solution is for the political instability that arises from poverty (i.e. the rabble), yet the dialectic that produces poverty remains unchanged and will continue to reproduce more poverty and more overproduction, for which colonialism is no solution at all.⁶⁴⁴ As for the question of trade generated by the colonies, we should remember Hegel's own admission that the population of the colonies returns to the principle of the family and thus falls outside of civil society, hence frustrating the goal, at least in the near term, of reintegrating the poor into labor and commodity markets. Finally, there is the question of the state's ability to domesticate civil society. Hegel is very clear that although capitalism integrates individuals into a unity of (objective) interdependence and giving space for arbitrary (subjective) choice, it must be kept in check, i.e. mediated, by the (absolute) ethical state: "Ethical organization can remain pure in the real world only if the negative is prevented from spreading all through it, and is kept to *one* side."⁶⁴⁵ The failure to do this in practice is a terrorizing freedom witnessed in the French Revolution, which can permeate and thus destroy all of the state's mediating institutions, and the

edited by O'Malley (Nijoff, 1970), 220; cited in Plant, "Economic and Social Integration in Hegel's Political Philosophy," 86-87.

⁶⁴⁴ Again, see his comments in his "The English Reform Bill," 308. See also Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972), chapter 5; Richard Teichraeber, "Hegel on Property and Poverty," *Journal of the History of Ideas*, 38:1 (Jan. – Mar., 1977): 47-64; and Raymond Plant, "Economic and Social Integration in Hegel's Political Philosophy," 83-87.

⁶⁴⁵ Hegel, *Natural Law*, 99.

failure to do so in theory gives rise to the idea of the social contract.⁶⁴⁶ If the state must continually colonize to satisfy the needs of civil society, does it not become instrumentalized in a way similar to what Hegel found so objectionable in social contract theory?⁶⁴⁷ By any standard, we find that Hegel's commitment to colonialism as a solution to the endemic problems of a capitalist economy is unsound.

This leads us to the second question, which I let Frederick Neuhouser pose:

“[A]part from the very serious question of how imperialism could be compatible with the freedom of the original inhabitants of colonized lands, Hegel's proposed remedy is at best a temporary solution, one that can work only as long as there are uncolonized portions of the earth. How, after that, could Hegel's vision of the fully rational social order be actualized?”⁶⁴⁸ This is a question of justification, for it involves a collision of rights, if not now, then eventually. Yet, we have seen that Hegel attempts to bypass the collision of rights question by invoking the *Herobenrecht*, and the same absolute right of world history has granted at the national level, for the Germanic world the right to trump the rights of others, just as it granted the Romans the right to conquer the Greeks. Thus, even if the world was fully occupied, Germanic nations could, from the perspective of world spirit,

646 An additional problem for Hegel is that the state that continually colonizes is perpetually reintroducing the element of nature into its objective spirit, which purportedly represents spirit's transcendence of nature. Although not referencing Hegel, Lefebvre could be when he writes: “Space in the sense of the earth, the ground, has not disappeared, nor has it been incorporated into industrial production; on the contrary, once integrated into capitalism, it only gains strength as a specific element or function in capitalism's expansion.” Lefebvre, *The Production of Space*, 325.

647 While colonization is situated at the structural level of general welfare rather than that of subjective interests, one of Hegel's central objections to the social contract is its instrumentalization of the state: welfare still falls within civil society, so could we see colonization as the instrumentalization of the state in service of civil society in general? Or said another way, could the colonizing state become merely an instrument for providing the objective means for the actualization of little more than the subjective freedom of civil society?

648 Frederick Neuhouser, *Foundations of Hegel's Social Theory*, 173-74.

legitimately usurp the sovereign powers of existing non-Germanic states and annex their land.⁶⁴⁹ But what of competing Germanic states? In the *Philosophy of Right*, Hegel asserts that the *absolute right* of world spirit is granted to a *single* nation, which becomes “the *dominant* one in world history for this epoch, *and only once in history can it have this epoch-making role*” (*PR* §347). The absolute right of this nation raises it above all considerations of right, law, and justice (*PR* §345). Even if we were to grant Hegel his absolute right of world history, this would only absolve one nation from the collision of rights problem, for “civilized nations” in general are granted the *Heroenrecht* at the national level to conquer “barbarians of other nations which are less advanced than they are” for the “rights of these other nations are not equal to theirs” and their “independence is merely formal” (*PR* §351). Each of these “civilized nations” could thus only colonize nations with pre-modern economies, but since the endemic problems of civil society persist, this is an increasingly finite prospect. And given that each new colony has the potential to itself become a colonizing state, as we saw in the case of the former British colonies in North America, the space for unjust accumulation and settlement—by absolute right of world history of a *single* nation or by the *Heroenrecht* of modernized nations generally—will grow smaller ever faster.⁶⁵⁰ Thus, even granting Hegel his world-historical arguments, in the end, he still lacks a plausible philosophical justification for

649 Ariaan Peperzak does not view Hegel’s absolute right of world history as an attempt to justify the colonization of nations that lack European state-forms: “Does [Hegel], then justify conquests, exploitation, and colonialism? No, instead of justifying such actions, he shows rather why they happen.” How one can interpret Hegel’s assertion that these actions are *rightful*, i.e. in accordance with the *right* (and, indeed, duty) of world history, without taken it for a justification is absurd. See Peperzak, *Modern Freedom*, 613.

650 Again, it took Germany just over a decade after the unification of its member states to begin colonization in the early 1880s.

the establishment of extra-national jurisdiction, which attempts, yet fails, to solve the perpetual and endemic problems of a capitalist economy.

Concluding Remarks

The two main protagonists of this story have been Locke and Hegel, whose philosophies of right and of state have more often been coupled to accentuate their differences, than to demonstrate their commonalities. My original intention was to continue the tradition of the former, but I have, to my surprise, probably done more of the latter. This story played out in the context of modern colonialism and the questions of the establishment of private right and political jurisdiction that it raised; it was a context I did not begin with, but to it I was inevitably led.⁶⁵¹ “Thus in the beginning all the world was *America*,” wrote Locke, and “America is therefore the land of the future,” replied Hegel, as if capitulating to capitalism’s dehistoricization of its own origins.⁶⁵² We might say that in Locke, the colony is the modern *res nullius*, that space of natural appropriation and accumulation from which a social contract can take root among modern subjects—and it is in this context that Locke’s “state of nature” as a juridical concept is applied. For Hegel, however, the colony is the natural condition which the modern state must overcome, but toward which its civil society is logically compelled. Locke was writing in an early agrarian phase of capitalism and embraced colonialism’s post-feudal possibilities

651 “The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the aboriginal population, the beginning of the conquest and looting in the East Indies, the turning of Africa into a warren for a commercial hunting of black skins, signaling the rosy dawn of the era of capitalist production. These idyllic proceedings are the chief momenta of primitive accumulation. On their heel treads the commercial war of the European nations, with the globe for a theatre.” Marx, *Capital*, Vol. I, chapter XXXI, 703.

652 Locke, *Two Treatises of Government*, §49, and Hegel, *Philosophy of History*, 89.

of private accumulation and political individualism, while Hegel, witnessing capitalism's socially disintegrating tendency toward increasingly abstract labor and structural poverty, sought mediation and political reconciliation. The logic of capitalism he himself identified was too powerful, however, and his failed attempt to appropriate it into his system, to render it ethically justifiable, adds him to Kant's list of "sorry comforters."⁶⁵³ For both our protagonists, the colony is capitalism's modern "state of nature," which capitalism itself produced—and reproduces over and over again.

I began this project with a rereading of Locke's theory of the origin property, which not only suffered much abuse and caricaturing at the hands of commentators, but has rarely been situated in perhaps its most important context: modern colonialism and the competing justificatory grounds for the establishment of jurisdiction among Catholic and Protestant colonial powers. My interpretation of Locke's "property" and his metaphors of "joining" and "fixing" one's labor in an object, demonstrated that he had incorporated both practical and theoretical dimensions in his account. The practical was, of course, the labor that transforms the object. If we were to remain at the level of the practical, however, Locke's account would surely be puzzling and lead philosophers like Robert Nozick to ask "why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?"⁶⁵⁴ But origin of property has, for Locke, a theoretical or epistemic basis as well. Laboring on objects puts a "distinction between them and the common," having "added something to them more than Nature" (II, §28), which is property, but since a property is the simple mode of the

653 See Immanuel Kant, "Perpetual Peace: A Philosophical Sketch," in *Political Writings*, edited by Hans Reiss (Cambridge: Cambridge University Press, 1996), 103.

654 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 174-75

active power that causes it, the “property” or “distinction” one gives to an object belongs not to the object, but to the active power that produced it, i.e. the person. This epistemic component allowed Locke to speak of “property” in a pre-legal sense.

This, we found, is not unlike Hegel’s account, for whereas Locke speaks of a distinction, Hegel speaks of a difference or determination: “even if I let go of these determinations and differences, i.e. if I posit them in the so-called external world, they still remain mine: they are what I have done or made, and they bear the imprint of my mind [*Geist*]” (*PR* §4, *Zusatz*). The imprint of my *Geist* is the objectification of my will in an object, which has imposed form and made it my substantial end (*PR* §44). And there is nothing in Hegel’s theory of property to say that persons do not have an “absolute right of appropriation” (*PR* §44) in a state of nature, as long as they are *persons*. That is to say, although this right cannot be exercised *within* Hegel’s state—for its resources are no longer natural, but social—it is a universal right of personality grounded in the historical achievement of free will, which is both legitimate and operative in a colonial state of nature. Indeed, although Hegel does not make this point explicit in his description of the return to natural spirit in the colonies, it is implicitly there and consistent with his philosophy of right. Unlike Locke, however, the legitimacy of one’s possessions will only translate into legitimate property through social recognition which is actualized in law. For Locke, then, the state is consensual or contractual, but property is not, whereas for Hegel, property is consensual and contractual, but the state is not.

Locke’s establishment of the private means of property accumulation beyond the state was, however, only half the battle, for unless the British colonists were to limit themselves to uninhabited lands, the nonconsensual establishment of public *dominium* by

private means would also be necessary, and so Locke incorporated the “strange doctrine” of Grotian private punishment. Vitoria’s political and theological work left only just war as an option for dispossessing and enslaving indigenous peoples, so Grotius and Locke privatized it in Protestant fashion, making individual *conscience* the ultimate judge and the individual colonist its ultimate executioner. Rereading the modern natural law tradition from the perspective of European colonization made me realize the significance of this argument, for I could now not help but read Locke as responding to the challenges (i.e. limitations) the neo-Thomist philosophers, particularly Vitoria, had posed in recognizing what Vitoria called the *dominium*, public and private, of non-European, i.e. their (rational) personality. Locke’s theory of property addressed private *dominium*, but it was only via private punishment that “*one Man comes by a Power over another*” (II §8) without consent, and neither of these private means were premised on the non-recognition of the other’s personhood.

Turning to Hegel, I then posed the same questions to his philosophy of right and realized, to my surprise, the significant function of the world historical individual or hero in the nonconsensual establishment of jurisdiction or at least its initial conditions, i.e. the elimination of pre-modern forms of economic and political association. Most commentators are so taken by Hegel’s references to the world-historical figures of Alexander the Great, Julius Caesar, and Napoleon, that they overlook the lesser, but much more numerous colonialist heroes. Locke’s Protestant colonialists are indeed Hegel’s heroes, who transcend the state’s distinction between internal legitimate (i.e. rightful) force and external force (i.e. war) unbounded by right. It is to them that falls the responsibility to traverse the interstices of right beyond the nation-state and actualize

Hegel's idea of modernity in the name of the absolute right of world spirit.⁶⁵⁵ And it is to them that Hegel turns as a way to exclude from his *Phenomenology* a phenomenology of colonialism, for unlike Locke's colonialists, they are not bound by conscience or the respect of persons, do not give rise to a collision of rights, and thus do not initiate a dialectic worthy of inclusion in the developmental narrative of Western European spirit. To address this absence in Hegel's *Phenomenology*, I attempted to identify where we might situate such a dialectic, and then applied his analysis of absolute freedom and terror to the experience of modern colonialism, which dwarfed the bloodshed of the French Revolution and can only be excluded in bad faith.⁶⁵⁶

What Hegel suppressed in his *Phenomenology*, reemerged in his *Philosophy of Right*, and although his justifications for colonialism are unpersuasive, his identification of the logic of capitalist expansion which triggers it was prescient, and it fell to Marx to develop. Most importantly, perhaps, was Marx's demonstration that the contractual relation of wage labor was an exchange of *non-equivalents*, giving Hegel's cursory

655 For a good discussion of Hegel's concept of modernity, see Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, translated by Frederick Lawrence (Cambridge, MA: MIT Press, 1990), 23-44.

656 Although specifically analyzing the terror of twentieth-century totalitarianism, Hannah Arendt's analysis resonates well with the actualization of the absolute freedom and self-certain, unmediated conscience: "Terror is the realization of the law of movement; its chief aim is to make it possible for the force of nature or of history to race freely through mankind....Terror as the execution of a law of movement whose ultimate goal is not the welfare of men or the interest of one man but the fabrication of mankind, eliminates individuals for the sake of the species, sacrifices the 'parts' for the sake of the 'whole'." Arendt, *Origins of Totalitarianism*, 465. There is perhaps no better description of the self-annihilating process of the constitution of a 'second nature' reflective of the universal abstraction of persons, rights, and value, i.e. of utility, in early colonial capitalism, which violently negates and uproots everything in the name and abstract space of a universal community of (natural) law. Throughout her brilliant study Arendt consistently, albeit mistakenly, presupposes that modern natural law theorists merely *anticipated* or *foreshadowed* the logic of terror and tyranny manifest in nineteenth-century colonialism and twentieth-century totalitarianism, rather than capturing and rationalizing the capitalist and colonial conditions of their own time.

remarks on the inevitable tendency toward inequality and poverty a firm foundation.⁶⁵⁷ Yet Marx, somewhat surprisingly, did not take up Hegel's theory of colonialism, and I conclude my remarks on this point. Although Marx gives a brilliant analysis of modern colonialism in his final chapters of the first volume of *Capital*, it is merely as a sphere of primitive accumulation, i.e. he does not develop an account of its enduring structural necessity in modern capitalism. Nor is such a necessity discussed in his journalistic and political writings, where Marx often commented on the *normative* gains of colonialism as a process of cultural modernization.⁶⁵⁸ "The role of imperialism and colonialism, of geographical expansion and territorial domination in the overall stabilization of capitalism is unresolved," writes David Harvey. "A comprehensive and irrefutable answer to the problem Hegel so neatly posed so many years ago has yet to be constructed."⁶⁵⁹ That is to say, Marx saw colonialism as an early and necessary stage of capitalism's development—that of primitive accumulation,⁶⁶⁰ which is eventually said to

657 In addition to the analysis of capital itself, Marx, Pelczynski writes, "narrowed down the meaning of civil society, he reversed its relation to the state, and he dehistoricized the idea." Z. A. Pelczynski, "Nation, civil society, state: Hegelian sources of the Marxian non-theory of nationality," in *The State and Civil Society*, 275.

658 See *Karl Marx on Colonialism & Modernization*, edited by Shlomo Avineri (New York: Doubleday, 1968). A classic example is from the *Communist Manifesto*: "The bourgeoisie has subjected the country to the rule of the towns. It has created enormous cities, has greatly increased the urban population as compared with the rural, and has thus rescued a considerable part of the population from the idiocy of rural life. Just as it made the country dependent on the towns, so it has made barbarian and semi-barbarian countries dependent on the civilized ones, nations of peasants on nations of bourgeois, the East on the West." Marx and Engels, *Communist Manifesto*, in *The Marx-Engels Reader*, 477.

659 Harvey, *The Limits to Capital*, 415.

660 Harvey gives the following list of processes that fall under primitive accumulation in Marx: "These include the commodification and privatization of land and the forceful expulsion of peasant populations; the conversion of various forms of property rights (common, collective, state, etc.) into exclusive private property rights; the suppression of rights to the commons; the commodification of labour power and the suppression of alternative (indigenous) forms of production and consumption; colonial, neo-colonial, and imperial processes of appropriation of assets (including natural resources); the monetization of exchange and taxation, particularly of land; the slave trade; and usury, the national debt, and ultimately

be exhausted—but on the question of its necessary recurrence in, for example, the form of neo-colonialism or imperialism, Marx remained silent.⁶⁶¹

In Western Europe, the home of Political Economy, the process of primitive accumulation is more or less accomplished. Here the capitalist regime has either directly conquered the whole domain of national production, or, where economic conditions are less developed, it, at least, indirectly controls those strata of society which, though belonging to the antiquated mode of production, continue to exist side by side with it in gradual decay.⁶⁶²

Capitalism is by its nature universal, so once it encompassed the globe, displacing pre-modern modes of production, according to Marx, it would collapse and the true universal class (i.e. Hegel's rabble) would have its day (and appropriate the alienated essence of the *Gattungswesen*). The difficulty with Marx's analysis is its presupposition of the finitude of (primitive) accumulation, i.e. accumulation based on processes beyond the exploitation of labor, and his underestimation of the state's ability to reassert itself and temporarily stave off crises of over-accumulation. The latter led to the Marxist theories of imperialism, most famously in the work of Lenin and Rosa Luxemburg, while the former has led to David Harvey's theory of accumulation by dispossession.⁶⁶³ Harvey's thesis is explicitly derived from Hegel's insight into colonialism's "spatial fix" for the crises of civil society, and persuasively accounts for several contemporary forms of accumulation,

the credit system..." David Harvey, *The New Imperialism* (New York: Oxford University Press, 2005), 145.

661 As Albert Hirschman writes: "Marx and Engels emphasized the expansive vigor of capitalism... But the idea that capitalism had to open up markets in nonindustrial countries in order to escape from domestic stagnation or crises is simply not found in their works..." Albert O. Hirschman, "On Hegel, imperialism, and structural stagnation," in *Essays in Trespassing: Economics to Politics and Beyond* (Cambridge: Cambridge University Press, 1981), 170.

662 Marx, *Capital*, Vol. I, Chapter XXXIII, 716.

663 Arendt considers imperialism to be "the first stage in political rule of the bourgeoisie rather than," as Lenin had asserted, "the last stage of capitalism." Arendt, *The Origins of Totalitarianism*, 138.

such as: the depletion of the global commons: biopiracy; patenting of life forms; massive devaluations of national economies and the appropriation of their national assets; privatization of domestic state assets; and old-fashioned imperialism, all of which again give rise to the justificatory problems encountered by Vitoria, Locke, and Hegel, which remain unresolved, or indeed unresolvable.

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