THE NATURAL HISTORY OF PROPERTY

Natural Law Theories from Grotius to Hume

Stephen Buckle

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Except where otherwise acknowledged,
this thesis is my own work

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ABSTRACT

This essay examines the development of the major themes in the natural law account of property, and of the conceptions of social life and moral action on which they rely, from Hugo Grotius to David Hume. In the opening two chapters, the two main variants of modern natural law theory, those of Grotius and Pufendorf, are explained in some detail. Their understanding of natural law, as a science of morals grounded in human nature, is spelled out, and it is shown how this results in an understanding of property relations as a natural response to the changes in human circumstances wrought by increasing sophistication in human social life. It is a natural response because it reflects the requirements of human nature, such reflection being shown by the fact that it arises necessarily, through peaceful processes, from the recognition of the elemental moral realm of what is "one's own". In this sense property has a natural history; but it is also shown that, for these theories, the division between natural history and actual history is not sufficiently clearly drawn, an inadequacy which is well illustrated by problems in the account of the place of slavery in the account of property. But Pufendorf, at least, recognizes that the problem of slavery can be reduced if the principal incentive to voluntary enslavement, material necessity, can itself be overcome. In this way the problem of slavery can have an economic solution.

By carefully examining the implications of the basic notion of "one's own", which, following English practice, he calls property in one's person, Locke concludes both that slavery is always unacceptable (is unnatural) and that the origin of property in no way depends on consent. Rather, property is shown to be the inevitable consequence of human self-preserving action in a world given to us by God. Neither does material necessity provide a reason for enslavement: on the one hand, the right of charity of the poor against the surplus of the wealthy makes enslavement an avoidable option for the individual; and on the other, the productive power of improving labour is so great that, where a system of private property is established which secures the fruits of their industry to the industrious, necessity itself (and thereby slavery also) becomes avoidable for a whole society, by making even the worst off wealthier than the richest in a primitive economy.

Thus the question of property undergoes a significant shift. The concern of Locke's successors with political economy, and the manner in which this concern modifies their interest in slavery and necessity as serious problems for society shows the extent to which Locke's conclusions win the day. The question of what it is to have a social theory which is grounded in human nature becomes very pressing, however, because of difficulties perceived to
be generated by Lockean (and, more generally, all "self-love") theories of human motivation. Such theories were perceived as compromising the natural law stress on the naturalness of human social life. The issue hinges on the nature of obligation. Hutcheson (and, following him, Hume) defends an account of human motivation which allocates a central role to impartial benevolence, and which thereby offers an understanding of moral obligation independent of theological commitments. Hutcheson's programme runs into difficulties in its account of property, however, stressing the necessity of strict rule-following while at the same time providing general principles which threaten it. Hume's account of the source of our obligation to respect the rules of property (the cornerstone of justice) is explained as an attempt to overcome this tension, by adapting some Pufendorfian distinctions to account for different types of moral obligation, grounded in different aspects of human sociability. So, despite some well-established assumptions to the contrary, Hume can be recognized to be an important contributor to the natural law tradition. Together, he and Hutcheson pave the way for the more complete critical natural history of Adam Smith.
PREFACE

As is not uncommon, this thesis shows little evidence of the roots from which it grew. Its genesis lies in two related dissatisfactions - in a sense of the inadequacy of the philosophic method of conceptual analysis when applied to social phenomena; and in frustration at the distortion of theories of historical figures, usually due to a too-hasty determination to make them speak to our problems. To avoid misunderstanding, I should stress that I hope they can be made to speak to our problems, and that being clear about the meanings of our terms is indeed a worthy goal. But equally worthy is sensitivity to processes, to time and activity and the difference they make; and the need to see both intellectual and social phenomena in their appropriate contexts. In these respects, this thesis reflects an intellectual outlook which arose gradually, acquiring force by a slow progression, and which owes much to my former teachers, Ross Poole and Jim Baker, and to discussions and disputes with my brother Phillip.

But theses are not simply distillations of intellectual outlook - they have to be written; and to this end I am greatly indebted to the attentions of my gang of three - Knud Haakonssen, Thomas Mautner, and Jerry Gaus. Without their assistance - both academic and personal - this thesis would simply not have been written. I also owe a substantial debt to my original Ph.D. supervisor, the late Stanley Benn. Finally I must express my thanks to John Kleinig for his support and encouragement over a number of years; to Richard Campbell and Onora O'Neill; and also to Frank Jackson.

Concerning matters of a less academic nature, it is a pleasure to record the support and assistance of many relatives and friends. My greatest debts are to my parents for their different kinds of support, to Hedda Murray, Susanne Schulz-Fuhrmann and André Fuhrmann, Liz and Jack Smart, and Kim Sterelny. But I also owe much to Catherine and Alan Cunningham, Liz and Paul Dartnell, Jane and John Foulcher, Philippa Mein Smith, Debbie Trew, and Nicholas Watkinson; and to Jenny Gibson and my brother Peter. And also, of course, to the philosophers of the Research School. Finally, for the physical production of this thesis, I have to thank Hazel Gittins and Loraine Hugh for their typing, Michaelis Michael for his assistance in proof-reading, and especially Nona and David Bennett, not only for their typing, but also for their skill in transforming the Coombs computer into a docile servant.

Note on style: in order not to distort the meaning of the texts under consideration in this study, I have followed the practice of my authors in employing male nouns and pronouns throughout.
Even Philosophy went to Wrack by this moaping recluse Method of Study, and became as chimerical in her Conclusions as she was unintelligible in her Stile and Manner of Delivery. And indeed, what cou'd be expected from Men who never consulted Experience in any of their Reasoning ...?

David Hume
"Of Essay Writing"
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Chapter One

HUGO GROTlUS

I: Introduction

Towards the end of the Enquiry Concerning the Principles of Morals, in the appendix on justice, Hume remarks that

This theory concerning the origin of property, and consequently of justice is, in the main, the same with that hinted at and adopted by Grotius.1

To illustrate the connection, he includes a short quotation from Grotius's major work, De Jure Belli ac Pacis, first published in 1625. The passage in question runs as follows:

From these sources we learn what was the cause on account of which the primitive common ownership, first of movable objects, later also of immovable property, was abandoned. The reason was that men were not content to feed on the spontaneous products of the earth, to dwell in caves, to have the body either naked or clothed with the bark of trees or skins of wild animals, but chose a more refined mode of life; this gave rise to industry, which some applied to one thing, others to another.

Moreover, the gathering of the products of the soil into a common store was hindered first by the remoteness of the places to which men had made their way, then by the lack of justice and kindness; in consequence of such a lack the proper fairness in making division was not observed, either in respect to labour or in the consumption of the fruits.

At the same time we learn how things became subject to private ownership. This happened not by a mere act of will, for one could not know what things another wished to have, in order to abstain from them - and besides several might desire the same thing - but rather by a kind of agreement, either expressed, as by a division, or implied, as by occupation.2

As it stands, this passage tells us rather little about wherein lie the crucial similarities between the two theories. It seems to be no more than a potted history of the origin and

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2Hugo Grotius, De Jure Belli ac Pacis Libri Tres, trans. F.W. Kelsey, Carnegie Endowment for International Peace, New York: Oceana Publications (1964), Bk.II, chapter II, section ii.4-5. (Subsequent references to this work will be abbreviated. Thus this reference would appear as DJBP, II.II.ii.4-5.)
development of private property from primitive communistic beginnings. So, how are we to understand the connection? This may not seem too difficult a task, but the matter is complicated by the fact that Grotius was widely recognized as a fountainhead from which flowed a modern tradition of theories of natural law. So, in order properly to understand Hume's remark, we need to know whether he means to place himself with Grotius and the whole tradition he spawned, or with Grotius rather than with his successors. For both these reasons, it would be inadequate to seek to resolve this matter simply by comparing Humean with Grotian doctrines. It is necessary to understand something of the intellectual tradition stretching from Grotius to Hume. This essay will be concerned to sketch in the major elements of that tradition, in so far as it is germane to the theory of property. It will therefore be concerned with elucidating the main features of the modern theory of natural law, and with charting the continuities and discontinuities of the natural law tradition as it was taken up in England and (especially) Scotland.

It is important to point out, however, that by tracing the development of the theory of property in the natural law theories stemming from Grotius, this essay will have a focus both broader and narrower than the modern reader may expect. In the first place, the theory of property is not, for natural law, a matter which can be settled independently of other issues of moral and social philosophy. Rather, property is the first and most essential element of justice; justice is the pillar on which society rests; and society, in its turn, is necessitated by the essential features of human nature. The theory of property is thus inextricably linked with conceptions of human nature and society, of psychology and history, of action and obligation. All these will therefore be important matters for this essay.

In the second place, the focus on property will have a narrowing effect by separating out those philosophers who, despite their dependence on the Grotian tradition (to whatever degree), nevertheless have no place for a theory of property. Hobbes is the most notable member of this camp, the existence of which, according to Richard Tuck, reflects the fact that De Jure Belli ac Pacis "is Janus-faced, and its two mouths speak the language of absolutism and liberty". Tuck's claim has its limitations: it will be suggested below that Grotius's magnum opus is rather less two-faced than Tuck believes, and his contrast between absolutism and liberty ignores the fact that sometimes absolutism was seen as a key to liberty, by controlling the ravages of the nobility. However, his remark does neatly

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capture the fact that different aspects of Grotius's work produced political theories of markedly different kinds. The absolutist version produced no theory of property because absolutism needs no such theory: property is, on such views, just what the absolute ruler decrees. This essay will therefore be concerned only with the anti-absolutist strand of natural law theories.

As Tuck notes, there are two aspects of Grotius's thought where the anti-absolutist strain is most explicit: these concern the right of property and the right of resistance, those rights characteristically associated with the political thought of John Locke. Both these rights are recognized, however, by all the writers on the anti-absolutist side of the Grotian inheritance. This essay will not be concerned with the right of resistance, but it is worth remembering that the various theories of property to be considered are in each case part of a larger political theory which includes a right of resistance, and which is formulated in self-conscious opposition to absolutism - whether of a Hobbesian or of an older form (as, for example, with Filmer). The theory of property is part of a political theory of a fundamentally anti-absolutist stamp.

II: Natural Law and History

In opposition to some widespread assumptions, it will be shown here that the theories of property to be considered are evolutionary theories in an important respect. They are, in fact, characteristically part of a wider conception of the evolution of human society. The evolutionary character of society and of social laws is increasingly stressed by the later writers in this tradition, but it is important to recognize that this is more a matter of an increased level of self-consciousness (especially of methodological self-consciousness) than a new departure. For the earlier writers, principally Grotius's seventeenth-century descendants, the evolution of society and of social laws - including relations of property - is a genuine but not a self-conscious feature of their social theory. This is accurately caught in Duncan Forbes' remark, in his important book *Hume's Philosophical Politics*, that

> for none of these thinkers is the idea of social evolution at the centre of attention; nowhere is it dwelt on or elaborated for its own sake. However it is not a forced or distorted interpretation which points out how, for the natural law writers, as for Hume, government or 'civil society' is a purely human expedient which emerges with the development of society to meet human needs.\(^4\)

It is important to recognize this fact not least because it is so frequently denied.

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Natural law within the Grotian tradition is commonly understood as an essentially ahistorical enterprise. For example, Paul Foriers and Chaim Perelman, in a dictionary article on Natural Law, claim that

Grotius' method opened the door to the construction of a rational law no longer verified by experience but deduced abstractly, without considering "any particular fact", taking as initially given only the nature of man.

It may be that some of Grotius's methodological remarks were used to "open the door to" an anti-empirical form of natural law, but this is a rather loose expression - what we can be said to "open the door to" need not be part of either our intentions or our practices. It is not either part for Grotius. This will be shown in more detail in the following sections, where we shall have the opportunity to observe his method directly. At this stage, it is sufficient to consider one of his more important methodological remarks. There are, he says, two ways of establishing that something is "according to the law of nature":

Proof *a priori* consists in demonstrating the necessary agreement or disagreement of anything with a rational and social nature; proof *a posteriori*, in concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization. For an effect that is universal demands a universal cause; and the cause of such an opinion can hardly be anything else than the feeling which is called the common sense of mankind.

Ironically, of these two ways of establishing the law of nature, it was the *latter* which was seen as distinctively Grotian. As Forbes notes, the *a posteriori* approach "was the approach which Grotius seems to have been usually regarded as having made peculiarly his own", and for which he was stoutly criticised: his heavy reliance on authorities was seen as a major weakness. (Whether fairly or not will not be considered here, although it

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5 For perhaps the most recent example of this view, see Paul Bowles, "The Origin of Property and the Development of Scottish Historical Science", in *Journal of the History of Ideas*, XLVI: 2 (April 1985), pp.197-209.


should be noted that Grotius was not naive in his use of authorities.\footnote{Cf. DJBP, Prol.40: “Not that confidence is to be reposed in them without discrimination; for they were accustomed to serve the interests of their sect, their subject, or their cause. But when many at different times, and in different places, affirm the same thing as certain, that ought to be referred to a universal cause ...”}

If Grotius’s characteristic method was seen as the \textit{a posteriori} method, then it is difficult indeed to see how he could have opened the door to “rational law no longer verified by experience”. The fact that Grotius allows also the \textit{a priori} method does not establish the conclusion drawn by Foriers and Perelman. Even more important, however, Grotius’s practice of what he calls his \textit{a priori} method shows it to be not an “abstract deduction ... taking as initially given only the nature of man”. Rather, for Grotius and his successors, an essential role is played by their assumptions about history. Their method consists in showing that the acknowledged facts of human history are not arbitrary or accidental, but necessary. The \textit{a priori} method attempts to show the logic of history. This is not to say that it is devoted to elaborating laws of historical development (if such there are), but with elucidating what has been called the “logic of situations”.\footnote{Most notably by Karl Popper, in \textit{The Poverty of Historicism}, London: RKP (1957), esp. p.149: “There is room for a more detailed analysis of the logic of situations. The best historians have often made use, more or less unconsciously, of this conception: Tolstoy, for example, when he describes how it was not decision but ‘necessity’ which made the Russian army yield Moscow without a fight and withdraw to places where it could find food”.} Grotius’s \textit{a priori} method characteristically proceeds by showing how the facts of human nature, concretely realized in specific social situations (most commonly drawn from ancient history), so drastically constrain possible solutions to given problems that the particular outcome or outcomes can be seen to be inevitable. He could be said to hold the view that human history reveals the logic of the distinctively human situation.\footnote{To modern eyes, this sort of connection between logic and history looks like either fudging or the thin end of a Hegelian (or “historicist”) wedge. That it was not characteristically seen to be so in the period we will be considering can be seen in the remarkable statement of W. Duncan in his \textit{Elements of Logick} (1748), that “Logic may be justly stiled the history of the human mind in as much as it traces the progress of our knowledge from our first and simple perceptions”. (Quoted by Forbes, \textit{op.cit.}, p.15n.)} For this reason, I suggest, we can understand why it is that - especially in his earlier published work, \textit{Mare Liberum} - Grotius treats the law of nature as both innate and historical.

We shall examine some aspects of this treatment in the following section, and then show how such an understanding of natural law is implicit in the account of the origin and limits of property. For our purposes, there are two advantages to be gained from an investigation of the earlier work before turning to his later, more famous \textit{De Jure Belli ac
**Pacis.** Firstly, it will show Grotius's implicit commitment to a form of historical understanding as the manner of understanding appropriate to social phenomena such as property (a commitment which, although preserved in the later work, is less explicit). Secondly, it will show his explicit acknowledgement that the concept of property has itself evolved *pari passu* with this history. Grotius's account is, in short, what we would now describe as evolutionary in character. Recognizing this is the first step in coming to see that the historical science of society developed most notably in eighteenth century Scotland, and to which Hume is an important contributor, is a natural development of the Grotian natural law tradition, not a decisive break from it.

**III: Mare Liberum: The Law of Nature and the History of Property.**

In his early work, *Mare Liberum*, Grotius deploys a battery of arguments against the Portuguese, the public opponents of the principle of the freedom of the seas. The specific reasons for his concern with the freedom of the seas are well documented, and so will not be repeated here. The important matter is that he appeals to the law of nature as the highest tribunal. This law spells out the principles of natural justice, principles which are not arbitrary but which have a natural foundation. Defenders of the natural law are thus necessarily in opposition to those powerful men who

> persuade themselves, or as I rather believe, try to persuade themselves, that justice and injustice are distinguished the one from the other not by their own nature, but in some fashion merely by the opinion and the custom of mankind.\(^{14}\)

In fact, not only is the law of nature not arbitrary, it is so firmly grounded in nature that it cannot be ignored or denied, not even by the most powerful of authorities. Grotius points out, for example, that

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\(^{12}\) *Mare Liberum* was published in 1609, but the discovery of the unpublished treatise *De Jure Praedae Commentarius* in 1864 showed the former work to be, in all essentials, chapter XII of the latter. Nevertheless I have limited myself almost exclusively to the originally published piece, since the significance of Grotius for this essay is tied to his influence on subsequent writers. I have, however, availed myself of two different translations of *Mare Liberum*, one of which is part of the translation of *De Jure Praedae*. These two sources are: *Grotius on the Freedom of the Seas* (trans. R.V.D. Magoffin), Carnegie Endowment for International Peace, New York: Oxford University Press (1916) (hereafter cited as *ML*); and *De Jure Praedae Commentarius* (trans. G.L. Williams, with W.H. Zeydel), Carnegie Endowment for International Peace (Classics of International Law, No. 22), Oxford: Clarendon Press (1950) (hereafter cited as *DJPC*).

\(^{13}\) See, for example, James Brown Scott's "Introductory Note" to *ML*, pp.v-x.

\(^{14}\) *ML*, p.1.
It is also a fact universally recognized that the Pope has no authority to commit acts repugnant to the law of nature.\textsuperscript{15}

The importance of the law of nature is thus clear. But what does Grotius understand this law to be? It is, first of all, a divine creation: "the law of nature arises out of Divine Providence".\textsuperscript{16} This does not mean, however, that it is no more than a divine command, the command of an arbitrary divine ruler. Rather, the divine providence is shown in the internal constitution of our nature:

He had drawn up certain laws not graven on tablets of bronze or stone but written in the minds and on the hearts of every individual, where even the unwilling and the refractory must read them.\textsuperscript{17}

The model for the law of nature is thus not positive law of any kind, not even the tablets of stone of the Decalogue. Rather, the law of nature is a set of innate ideas. Its innateness guarantees its immutability, as another passage makes clear:

The law by which our case must be decided is not difficult to find, seeing that it is the same among all nations; and it is easy to understand, seeing that it is innate in every individual and implanted in his mind.\textsuperscript{18}

By consulting this innate law, human beings have created systems of positive justice. Of course, not all systems of positive law can be characterised as just (men of great wealth and power in particular are able to construct legal systems which ignore this innate law, observes Grotius\textsuperscript{19}), and hence attributable to providence. Nevertheless, Grotius must hold that providence will prevail, and so he concludes that positive law springs from the law of nature:

those very laws themselves of each and every nation and city flow from that

\textsuperscript{15}ML, p.46. It might be thought that this sort of remark, coming from a Protestant, ought not to be taken at face value. This would, however, be a mistake. Grotius's claim that the limit to the Pope's authority is "universally recognized" is clearly meant to remind Catholics of their own position. \textit{Mare Liberum} is, at least in intention, an attempt to persuade the learned world, Protestant and Catholic alike, of the insupportability of the Portuguese position.

\textsuperscript{16}ML, p.53.

\textsuperscript{17}ML, p.2.

\textsuperscript{18}ML, p.5.

\textsuperscript{19}ML, p.1.
Divine source, and from that source receive their sanctity and their majesty.\textsuperscript{20}

To say this, however, appears to create a problem: how is it that positive law, which is mutable, can flow from the immutable natural law written on our hearts? How is the mutable a product of the immutable? In one passage Grotius even appears to deny that it is. He says:

since the law of nature arises out of Divine Providence, it is immutable; but a part of this natural law is the primary or primitive law of nations, differing from the secondary or positive law of nations, which is mutable.\textsuperscript{21}

This passage separates the positive, mutable, laws of nations from natural law, which goes no further than the "primitive" law of nations. But the preceding passage states that the laws "of each and every nation and city", which cannot be anything but positive laws, all "flow from that Divine source". So the secondary, or positive, laws of nations, even if not identical to natural law, must nevertheless "flow from" that law. How is this possible?

The complete explanation of this matter will not be available until Grotius's account of the development of positive laws of property has been considered. In general outline, however, the answer can be obtained by considering what at first looks like a further complication: Grotius's acceptance of the ancient notion, shared by Latins and Greeks, that the law of nature was the historically original law, the law of the "Golden Age" before any positive laws existed. He speaks, for example, of

the primitive law of nations, which is sometimes called Natural Law, and which the poets sometimes portray as having existed in a Golden Age, and sometimes in the reign of Saturn or of Justice.\textsuperscript{22}

The implication here is not that in the "Golden Age" only the law of nature existed, because there was as yet no positive law, but that the rule of the law of nature was limited to that bygone age, and has now (in some sense) been replaced by the rule of positive law. Clearly this can be so only if the original natural law has somehow been incorporated into the subsequent positive law, or, as Grotius himself puts it, if positive law can be seen to "flow from" natural law. Grotius's remarks here are not, then, merely metaphorical, but to be taken as they stand: positive law can be seen as flowing from

\textsuperscript{20}ML, p.2.

\textsuperscript{21}ML, p.53.

\textsuperscript{22}ML, p.23.
natural law if there is a procedure which is itself sanctioned by natural law. This is indeed Grotius's position, as we can see from some of his remarks concerning the development of positive property laws. Despite the fact that "in the eyes of nature no distinctions of ownership were discernible" (which is to say, there was no ownership in the "Golden Age"), the development of positive laws of property was not contrary to nature because

The present-day concept of distinctions in ownership was the result, not of any sudden transition, but of a gradual process whose initial steps were taken under the guidance of nature herself.

These initial steps involved both the recognition that "a certain form of ownership was inseparable from use" and also the requirement that the law of property which thus arises must in some way reflect such inseparability. This latter requirement will be examined below. First it must be recognized that positive law arises in response to natural promptings, and reflects (that is, in so far as it is just) these promptings:

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

It is of course possible to have a variety of laws which could be plausibly regarded as "patterned after nature's plan". Equally clearly, however, not any positive law could plausibly be so regarded. If positive laws are not to be contrary to nature, then, they can allow of a measure of variation, but not of boundless diversity. Mutable positive law can thus be part of immutable natural law as long as it is recognized that the mutability of the former is not unlimited, and that the immutability of the latter does not imply a set of hard and fast rules, but a starting point attended with procedural constraints. Positive

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23 DJPC, p.227.

24 DJPC, p.228. Cf. ML, p.24: "the transition to the present distinction of ownerships did not come violently, but gradually, nature herself pointing out the way".

25 DJPC, p.228.

26 DJPC, p.229. Cf. ML, p.25: "When property or ownership was invented, the law of property was established to imitate nature".
law is part of natural law as long as it is “patterned after nature’s plan”. Grotius shows what is involved in following nature’s plan in his account of the development of property law in _Mare Liberum_. Elements of this account have so far been alluded to; it is now time to consider it in detail.

If we are to understand how property has arisen, Grotius points out, we must first recognize that the concept of property has itself undergone development. (The first step in understanding property, we might say, is to recognize that we are not dealing with a timeless concept.) The story of the origin of property is not a story of the spontaneous generation of the modern concept of property, arriving fully-fledged in an underprepared world. Rather,

it must be understood that, during the earliest epoch of man’s history, ownership [dominium] and common possession [communio] were concepts whose significance differed from that now ascribed to them. For in the present age, the term “ownership” connotes possession of something peculiarly one’s own, that is to say, something belonging to a given party in such a way that it cannot be similarly possessed by any other party; whereas the expression “common property” is applied to that which has been assigned to several parties, to be possessed by them in partnership (so to speak) and in mutual concord, to the exclusion of other parties. Owing to the poverty of human speech, however, it has become necessary to employ identical terms for concepts that are not identical. Consequently, because of a certain degree of similitude and by analogy, the above-mentioned expressions descriptive of our modern customs are applied to another right, which existed in early times. Thus with reference to that early age, the term “common” is nothing more nor less than the simple antonym of “private” [proprium]; and the word “ownership” denotes the power to make use rightfully of common [i.e. public] property.

Grotius’s point can be summarised as follows: the term “dominium” (commonly translated as “ownership” or “property”), which now is taken to mean private or exclusive property, did not always have this meaning. Instead, it originally meant the power to make use of what was not privately possessed. It identified a use-right. So, when we ask about the origin of ownership, or the origin of property, we need to understand whether we mean property in the developed modern legal sense (exclusive property), or property in its original sense of a use-right. There are then two separate questions we can ask: What

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27 Grotius goes even further, repeating “the accepted precept and rule that all things are supposed to be permitted which are not found expressly forbidden” (ML, p.55). His account of the development of property, however, implies a narrower, more directed rule. Nature does not simply allow what is not forbidden, but points out the general direction in which laws are to develop if they are not to violate nature.

is the origin of the use-right, and, How was the concept of a use-right transformed into the modern concept of exclusive property?

Grotius's answer to the first question is only alluded to in *Mare Liberum*, but is not the less important for that. Rather, his view that the natural world exists “for the use of mankind”^29^ is not considered there in any detail because, not only does he take it for granted, so also does his audience. That the world exists for the use of human beings, in so far as that use is necessary for their preservation, is a commonplace of natural law theories. As we shall see, Grotius gives a more explicit acknowledgement of this principle in *De Jure Belli ac Pacis*. We can see the long pedigree of the principle by considering an authoritative mediaeval source. In the *Summa Theologica*, Thomas Aquinas points out that

the order of the precepts of the natural law is according to the order of natural inclinations. Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances, inasmuch as every substance seeks the preservation of its own being, according to its nature; and by reason of this inclination, whatever is a means of preserving human life and of warding off its obstacles belongs to the natural law.^30^

With this principle in hand, we only need to recognize that “man is helped by industry in his necessities, for instance, in food and clothing”^31^ in order to see that an original right to use at least parts of the natural world is a necessary part of natural law. Grotius’s comparative silence on the matter is no more than a reflection of the extent to which this principle lies beyond dispute. He is quite happy to apply what he will later call the *a posteriori* method. He approvingly quotes Seneca: in the earliest ages,

... To all the way was open;  
the use of all things was a common right.^32^

^29^ *ML*, p.2.


^31^ *Summa Theologica*, I-II, Q.95, A.2; *op.cit.* p.56.

^32^ Seneca, *Octavia*, 402f; *DJPC*, p.228. Although Grotius does not, in *Mare Liberum*, describe his reliance on authorities as the *a posteriori* method, as he does in *De Jure Belli ac Pacis*, he is nevertheless already quite self-consciously adopting it *as* a method. He says: “Moreover, we ought not to be censured if, in our explanation of a right derived from nature, we avail ourselves of the authority and express statements of persons generally regarded as pre-eminent in natural powers of judgment”. (*DJPC*, p.226).
We can now turn to the second question: How does the original use-right develop into modern private property? Grotius gives a brief but revealing sketch of this process. In the "Golden Age" there was a universal use-right. Anything could be freely used by anyone for the purposes of their preservation. But some things, once used, cannot be re-used, or at least cannot be used without a diminution of their value. To some degree, using may amount to using up. To the extent that this is so, the initial user excludes the possibility of subsequent users. Where use amounts to using up, then, the exercise of the original use-right is in practice the exercise of an exclusive right. Where using does not amount to using up, but does result in a diminution of the possibility or extent of re-use, exercising the use-right approximates more or less closely to the exercise of an exclusive right. Some cases of exercising the original universal use-right can thus be regarded as the creation of de facto private property. Grotius puts it as follows:

there are some things which are consumed by use, either in the sense that they are converted into the very substance of the user and therefore admit of no further use, or else in the sense that they are rendered less fit for additional service by the fact that they have once been made to serve. Accordingly, it very soon became apparent, in regard to articles of the first class (for example, food and drink), that a certain form of private ownership was inseparable from use. For the essential characteristic of private property is the fact that it belongs to a given individual in such a way as to be incapable of belonging to another individual.\footnote{DJPC, p.228. A somewhat similar argument, which likewise stresses the inseparability of using an object from consuming the object itself, was employed by Aquinas in criticising usury. Aquinas says (\textit{Summa Theologica}, II-II, Q. 78, A.1) that *there are certain things the use of which consists in their consumption: thus we consume wine when we use it for drink, and we consume wheat when we use it for food. Wherefore in suchlike things the use of the thing must not be reckoned apart from the thing itself, and whoever is granted the use of the thing is granted the thing itself*. (\textit{op.cit.}, p.148).}

The very practice of exercising the original universal use-right thus gives rise to a form of natural private property. The creation of a positive law to recognize such forms of natural property will thus mirror nature itself, or "imitate nature".\footnote{ML, p.25.}

The recognition of the existence of private property led to the establishment of a law on the matter, and this law was patterned after nature's plan. For just as the right to use the goods in question was originally acquired through a physical act of attachment, the very source (as we have observed) of the institution of private property, so it was deemed desirable that each individual's private possessions should be acquired, as such, through similar acts of attachment. This is the process known as "occupation" (\textit{occupatio}), a particularly appropriate term in connexion with those goods which were formerly at the disposal of the
community.\textsuperscript{35} To illustrate the naturalness of the legal principle of occupation, Grotius refers to a famous example of Seneca's:

the equestrian rows of seats belong to all the Roman knights; yet the place that I have occupied in those rows becomes my own.\textsuperscript{36}

In this way, in the imitation of nature, the first principle of private property arises through the recognition of the consequences of exercising the original universal use-right. Once the implications of occupation have been recognized in a human community, an elementary form of private property has come into existence. The process which leads to the development of modern forms of property is thus underway.

Grotius's particular purposes in \textit{Mare Liberum} lead him away from considering the nature of this development in any detail. Since all forms of property acquisition depend, either directly or indirectly, on occupation,\textsuperscript{37} and since his main aim in this work is to show that neither the Portuguese, nor anyone else, can lay claim to the open sea because, unlike the land, it cannot be occupied, Grotius's concerns are both limited to the principle of occupation and preoccupied with its starting point. If, with respect to the sea, it is not possible to begin a process of occupation which in any way imitates nature, then clearly the law of nature does not allow that the sea can be occupied. Given these aims, it is not surprising that Grotius here limits himself to a few remarks on the manner in which the initial form of occupation leads to other, more extensive, forms of occupation. Nevertheless, what he does say is quite revealing. After pointing out that, because in some cases using involves using up, "a certain form of private ownership is inseparable from use", he goes on to show how this basic form of property is extended:

This basic concept was later extended by a logical process to include articles of the second class, such as clothing and various other things capable of being moved or of moving themselves. Because of these developments, it was not even possible for all immovable things (fields, for instance) to remain unapportioned, since the use of such things, while it does not consist directly in their consumption, is nevertheless bound up [in some cases] with purposes of consumption (as it is when arable lands and orchards are used with a view to

\textsuperscript{35}DJPC, p.229.

\textsuperscript{36}Seneca, \textit{De Beneficiis}, VII.xii; DJPC, p.229.

\textsuperscript{37}The nature of this dependence is an important feature of Adam Smith's jurisprudence, in which the development of the different rules of property is tied closely to the development of different stages of society.
obtaining food, or pastures for [animals intended to provide] clothing), and since there are not enough immovable goods to suffice for indiscriminate use by all persons.\(^{38}\)

Here we see, in brief, Grotius showing how the logic of historical situations leads to the extension of the notion of property to include new forms of occupation - in fact, to create a new, extended concept of occupation itself, since occupation in these later cases no longer requires physical attachment. The original principle - the use-right sanctioned by the natural law of self-preservation - is adapted and interpreted to meet the exigencies of particular factors and situations (such as the limited re-usability of some things, and pressures caused by limited amounts of usable land) as they come to bear. The "logical process" mentioned in the quotation is a process of reasoning\(^{39}\) conducted from within a historical situation, about that situation: i.e., a process which produces principles relevant to that situation, principles which will stand in need of revision as new situations arise. Grotius is quite happy to idealize history\(^{40}\) - a practice which, to some degree, no historical method can avoid - and this fact, together with the purposes of *Mare Liberum* referred to above, means that he provides no extensive historical investigations into the development of property. Nevertheless, human history is the stage on which the story of property unfolds.

Before turning to consider the account of property and its foundations in Grotius's mature work, it is worth noticing one factor which serves not only to encourage a historical approach to the elucidation of social relations such as property, but also to discourage extensive or detailed historical investigations of a modern kind. This factor is the role of providence. Providence is a historical notion, a reflection of the Judaeo-Christian idea of sacred history - the purposes of God are worked out, and thus shown in, the history of his people (whether Jews or Christians, but of course in characteristically different ways for Judaism and Christianity). For any social theory in which providence is to be accommodated, then, not only must history play an important role (thus

\(^{38}\)DJPC, p.228. (Square Brackets enclose additions by the translator.)

\(^{39}\)ML, p.24, translates the expression as "the process of reasoning".

\(^{40}\)ML, p.22: "It will be most convenient ... if we follow the practice of all the poets since Hesiod, of the philosophers and jurists of the past, and distinguish certain epochs, the divisions of which are marked off perhaps not so much by intervals of time as by obvious logic and essential character". Cf. DJPC, p.226: Property "will be very easily explained if ... we draw a chronological distinction between things which are perhaps not differentiated from one another by any considerable interval of time, but which do indeed differ in certain underlying principles and by their very nature". This strategy is - in fact, must be - adopted by all historical theories which aim to elicit stages of historical development.
encouraging the development or maintenance of historical social theories), but it must play a particular kind of role, a role which shows the providential logic of successive situations. The historical concerns of such theories will thus be idealized and thematic, showing the broad sweep of the providential hand, rather than highly detailed. Unlike much modern history, such theories will be concerned to show the forests rather than the trees. Keeping this in mind helps to explain why it is that even in De Jure Belli ac Pacis Grotius gives a historical account of human society, with sketches from history (where needed) to illustrate important principles, but without any great concern for examining historical detail. The contrast with later theories is quite marked: where providence is put aside, detailed histories become necessary to fill the breach. Having noted this, we can now turn to consider the more detailed foundation Grotius provides for natural law in his major work, De Jure Belli ac Pacis, and the nature of the account of property he builds upon it.

IV: The Foundation of Natural Law

Grotius’s ambitions in Mare Liberum have a markedly practical stamp. As a result, he devotes little space (and all of it in a preface) to explaining the foundations of natural law. As we have seen, he contrasts natural law with the doctrine of the arbitrariness of moral distinctions. Natural law is denied by all those who hold that justice and injustice are distinguished the one from the other not by their own nature, but in some fashion merely by the opinion and the custom of mankind.41

In contrast, natural law holds that justice is distinguished by its own nature. In so far as there is an “author” of nature, natural law can also be said to flow from this author. This is Grotius’s view. God, being “the founder and ruler of the universe”, and especially being therefore “the Father of all mankind”, is the author of the natural law itself. The natural law is the law of our nature, and so Grotius provides a thumbnail sketch of the main elements of our nature. God has, he says, given human beings

the same origin, the same structural organism, the ability to look each other in the face, language too, and other means of communication, in order that they all might recognize their natural social bond and kinship.42

41 ML, p.1.

42 ML, p.2; cf. Seneca, Epistles, xcv (quoted also by Pufendorf, De Jure Naturae et Gentium, III.iii.1.)
This point is not elaborated in *Mare Liberum*, but its importance can be seen with the benefit of hindsight, since it provides an early indication of the important role to be attributed to human sociability in Grotius's later work.

*De Jure Belli ac Pacis*, in sharp contrast to the restricted polemical purposes of *Mare Liberum*, aims at providing a “comprehensive and systematic” treatment of “the mutual relations among states or rulers of states”. It aims at providing the first complete treatise of this kind, the first to deal with “the whole law of war and peace”. Such a treatise cannot be concerned solely with the foundations of the natural law, but must include consideration “of treaties of alliance, conventions, and understandings of peoples, kings, and foreign nations”. In short, it must be a study of the foundations of natural law, and an empirical study of human history, of the particular sets of circumstances in which positive laws are produced, and against which they must be judged. The empirical study, as it relates to the institution of property, will be considered in the next section; here we will be concerned with the more detailed account Grotius provides in this later work of the foundations of the natural law.

As in *Mare Liberum*, Grotius's first concern in *De Jure Belli ac Pacis* is to show what natural law must deny. The opponents of natural law are all those who hold that there is no real or objective distinction between justice and injustice. To hold this is, for Grotius, to be sceptical about morality itself. For all such moral sceptics, Grotius chooses Carneades as mouthpiece, “in order that we may not be obliged to deal with a crowd of opponents”. Or, it would be more accurate to say, he chooses Carneades as a paradigm of the sceptic but without allowing him the role of mouthpiece. Instead, he settles for quoting Horace's thumbnail sketch, in the *Satires*, of the scepticism of the Academy.

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43 *DJBP*, Prol., 1-2.

44 Cf. *DJBP*, Prol., 55: “The French have tried ... to introduce history into their study of laws. Among them Bodin and Hotman have gained a great name ... their statements and lines of reasoning will frequently supply us with material in searching out the truth”. And cf. also Prol., 37-8, where Victoria and others are said to lack not only system, but also “the illumination of history”.

This is not too surprising, however, since there are no extant writings of Carneades (or of the other principal sceptic of the later Academy, Arcesilaus). Grotius's choice of Carneades as the paradigm of the sceptic depends on two famous orations made by Carneades in Rome: in the first, praising justice, showing its foundations in natural law; in the second, praising injustice, while reducing justice to mere expediency. Grotius thus describes him as having

attained to so perfect a mastery of the peculiar tenet of his Academy that he was able to devote the power of his eloquence to the service of falsehood not less readily than to that of truth.

To show the falsehood of Carneades' position, Grotius needs, firstly, to provide a natural foundation for justice, and, secondly, to show that this foundation is more than the purely expedient.

The first, or more general, of the sceptic's claims, summarised (for Grotius) by the poet Horace's line

And just from unjust Nature cannot know

This is the translation provided in DJBP. Cf. the translation of H. Rushton Fairclough, in Horace, *Satires, Epistles and Ars Poetica*, London: Heinemann (1926) (Loeb Classical Library): "Between right and wrong Nature can draw no such distinction as between things gainful and harmful, what is to be sought and what is to be shunned". The view being presented here is that, unlike the natural difference which exists between the gainful and the harmful (X is gainful, Y harmful, precisely because of their natural characteristics), there is no such natural difference between right and wrong. Typically, two kinds of conclusion are generated from this position: justice is said to be mere convention, or, alternatively, it is said to be, as Thrasymachus put it, "the interest of the stronger".

depends, according to Grotius's account of Carneades' main argument, on the claim that all human beings act solely from self-interest. Justice is, on this view, either a cloak for self-interest, or an expedient adaptation to it. Grotius takes it for granted that self-interest is the motivation of animals (and that therefore - we may conclude - there is

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47 DJBP, Prol., 5.


49 This is the main version. There is also a derivative version of the doctrine, which holds that, because most people most of the time pursue only their self-interest, one ought to pursue one's own interest also, since to fail to do so will be, in such an environment, simply to do oneself harm. See DJBP, Prol., 5.
indeed no justice natural to animals). If the sceptical denial of natural justice is to be met, then, it must be met by showing that human nature differs crucially from animal nature. This is Grotius’s response:

Man is, to be sure, an animal, but an animal of a superior kind, much farther removed from all other animals than the different kinds of animals are from one another; evidence on this point may be found in the many traits peculiar to the human species. But among the traits characteristic of man is an impelling desire for society, that is, for the social life - not of any and every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his kind; this social trend the Stoics called "sociableness". Stated as a universal truth, therefore, the assertion that every animal is impelled by nature to seek only its own good cannot be conceded.50

Grotius does admit that some animals other than human beings can also be impelled by motivations other than self-interest. His explanation for this need not detain us, since the notion of sociableness he has in mind is more than having some sorts of altruistic motivations, and more than what we might now call "sociability" - i.e., the enjoyment of the company of others. Rather, Grotius has in mind a special capacity for disinterestedness, for the framing of a general understanding, and for acting from general motivations. The mature man (and also, to a lesser extent, children and some animals) has "some disposition to do good to others", and this is indeed part of sociableness. But, in the relevant sense, sociableness is more than this:

The mature man in fact has ... an impelling desire for society, for the gratification of which he alone among animals possesses a special instrument, speech. He has also been endowed with the faculty of knowing and of acting in accordance with general principles. Whatever accords with that faculty is not common to all animals, but peculiar to the nature of man.51

The "impelling desire for society" here referred to is clearly more than an impelling desire for company. It is a desire for a social order, for being part of a culture: the mature man desires a society "organized according to the measure of his intelligence, with those who are of his kind". Sociableness in this sense is thus the foundation of human social organization, and the impelling desire for such organization is itself the source of law. Sociableness is therefore the natural foundation of law, the foundation of a law natural to human beings. The basic requirements of an organized social life are the basic principles of the natural law. Grotius sketches the main elements as follows:

50 DJBP, Prol., 6.

51 DJBP, Prol., 7.
This maintenance of the social order ... which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.\footnote{19}

The examination of all these elements is not to our purpose here, but this passage clearly indicates the important role played by the notion of “what is another's”, or, more generally, what can be said to be “one's own”. The passage shows that, for Grotius, sociableness does not imply the absorption of separate individuals into an amorphous social whole, but requires instead the clear delineation of what is one's own and what is another's, of what is due to each. Since founded in sociableness, then, natural law must give an account of the nature of one's own, and how it can be modified. Explaining the nature and development of what is one's own is, of course, the major concern of this essay.

How does Grotius's account of sociableness answer the second, the more specific, of the sceptic's two claims: that justice is not natural because it is merely expedient? Once again his discussion of the issue begins with a quotation from Horace's \textit{Satires}:

\begin{quote}
Expediency is, as it were, the mother of what is just and fair.\footnote{53}
\end{quote}

This view is, he says, “not true, if we wish to speak accurately”. It is not that it is simply

\footnote{52 DJBP, Prol., 8. Note that the final feature of the natural law listed here is the naturalness of \textit{punishing}. Locke's “strange Doctrine” (\textit{Two Treatises}, II. 8-9) of the natural right to punish is certainly not a new doctrine.}

\footnote{53 Horace, \textit{Satires}, I,iii.98; as translated in DJBP, Prol., 16. As a statement of the sceptical position Grotius wishes to attack, this passage will undoubtedly serve. But his use of it is nevertheless rather odd. Expediency is, as we have seen, one part of a larger sceptical position, in which a self-interested psychology of action is the cornerstone. This of course allows that, in a different context, expediency need not serve a sceptical purpose. Horace's context is one such case: he is making an Epicurean-style attack on the Stoic doctrine that all evils are all \textit{equally} evil. Expediency is thus appealed to as a way of differentiating degrees of evil: “Those whose creed is that all sins are much on a par are at a loss when they come to face facts. Feelings and customs rebel, and so does Expediency herself, the mother, we may say, of justice and right” (Fairclough, \textit{op.cit.}). The fundamental role allotted to expediency here is not part of an attempt to reduce justice, but to show what is its point. Hume's different use of this passage - as we shall see later - helps to underline this point. The misunderstandings he had to ward off also helps to show the risks implicit in invoking considerations of expediency: expediency is not always \textit{mere} expediency. This is certainly Hume's point when he says in his famous letter to Hutcheson (immediately after quoting this very passage from Horace), “I have never called justice unnatural, but only artificial” (Letter to Hutcheson, 17 September 1759: letter no. 13 in J.Y.T. Greig (ed.), \textit{The Letters of David Hume}, Oxford: O.U.P., 1932). For Hume the artificiality of justice is not evidence for its unnaturalness because justice arises \textit{necessarily}. (See \textit{Treatise}, p.484; cf. \textit{Enquiries}, p.307.) Grotius's point is much the same: justice, although expedient, is not \textit{mere} expediency because it arises necessarily from human sociableness.}

Expediency is, as it were, the mother of what is just and fair.\footnote{53}
false, more that it is misleading. He does accord an important place to expediency, but
the foundation of justice lies not in expediency but in human nature:

the very nature of man, which even if we had no lack of anything would lead us
into the mutual relations of society, is the mother of the law of nature.54

As for the positive law of specific human societies (which Grotius calls municipal law55),
it is a natural descendant of the law of nature, and hence is also founded in “the very
nature of man”, or nature itself:

the mother of municipal law is that obligation which arises from mutual consent;
and since this obligation derives its force from the law of nature, nature may be
considered, so to say, the great-grandmother of municipal law.56

Thus the law of nature and its descendants arise necessarily from “the very nature of
man”. Even if there were no advantage to be gained therefrom, that is, “even if we had
no lack of anything”, society would still arise, and with it the law of nature and positive
municipal law.57 However, human weakness implies that society is advantageous.
Natural law, although not founded in expediency, therefore is expedient:

The law of nature nevertheless has the reinforcement of expediency; for the
Author of nature willed that as individuals we should be weak, and should lack
many things needed in order to live properly, to the end that we might be the
more constrained to cultivate the social life.58

Not only is social life itself expedient, but political societies are formed directly because of
expediency. That is, they are formed precisely because they are advantageous:

expediency afforded an opportunity also for municipal law, since that kind of
association of which we have spoken, and subjection to authority, have their
roots in expediency. From this it follows that those who prescribe laws for
others in so doing are accustomed to have, or ought to have, some advantage in

54 DJBP, Prol., 16.

55 "Municipal law is that which emanates from the civil power". DJBP, I.I.xiv.1.

56 DJBP, Prol., 16.

57 "Even if no advantage were to be contemplated from the keeping of the law, it would be a
mark of wisdom, not of folly, to allow ourselves to be drawn towards that to which we feel that our
nature leads". DJBP, Prol., 18.

58 DJBP, Prol., 16. Cf. Hume’s account of the natural disadvantages of human beings, and of
the consequent advantages of society (Treatise, pp.484-5).
In this sense, positive municipal law has its roots in expediency. But both natural law
and its grand-child, municipal law, are therefore expedient without being \textit{ultimately}
founded in expediency. Rather, the ultimate foundation of the law of nature, and thus of
its descendants, lies in the natural sociableness of human beings.

Grotius's account of the relationship between natural law and expediency may appear to
be something of a storm in a teacup, but it has some important consequences. Firstly, the
positive side of his position - that natural law, even if not founded in expediency,
“nevertheless has the reinforcement of expediency” - implies that there is no conflict
between his natural law theory and those later “utilitarian” theories for which utility is a
function of a determinate (sociable) human nature; a nature which, in its turn, requires an
organized social life. Unlike Bentham's utilitarianism, the theory of David Hume is one
such theory, self-consciously worked out by Hume as a development of some basic
principles of natural law theory. Any stark contrast of natural law with all those theories
which make an appeal to utility is thus simplistic. Secondly, the fact that natural law is
not reducible to mere expediency means, most importantly, that laws are not suspended
in that situation where they are often inexpedient, in war. Grotius sees the claim “that
war is irreconcilable with law” as one of the characteristic elements of the denial of
natural law. He treats it as also similar to the more general view “that for those whom
fortune favours might makes right”; and both these are treated as “of like implication” as
the mere expediency thesis.\textsuperscript{60} For Grotius, all such views are implicit denials of natural
law, which, far from holding that all laws are suspended between combatants in times of
war, holds instead that there are laws of war governing specific sorts of belligerent
situations. To show what these laws are is a governing concern of \textit{De Jure Belli ac Pacis},
and it is for his stance on this matter that Grotius earned his reputation as an irenicist,
despite Rousseau's attack on him (as an apologist for the powerful) in \textit{On the Social}

\begin{itemize}
\item \textsuperscript{59}DJBP, Prol., 16.
\item \textsuperscript{60}DJBP, Prol., 3-4.
\end{itemize}
Of rather more immediate concern for many of Grotius's contemporary readers, however, was the provocative conclusion he drew from his account of the foundation of natural law in human sociableness. This is the famous *etiam si daremus* passage:

> What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.

Although an influential remark in the history of political philosophy, by affirming the possibility of at least a partially secularized political theory, its significance can be overrated, or misunderstood. It is certainly not the thin end of an atheistic wedge; it is, rather, a conclusion typical of the theological rationalism of the late sixteenth and early seventeenth centuries, a theory which met its most famous rejection in the philosophy of Descartes. Descartes developed his theological voluntarism in self-consciousness opposition to the *Metaphysical Disputations* of Francisco Suarez (1548-1617), one of the most famous of the rationalists. It is not surprising, then, to see that Suarez, in his work on natural law, should give the law of nature a degree of autonomy comparable to that which it enjoys in Grotius. In answer to the question, Whether God can grant dispensation from natural law?, Suarez argues in favour of the opinion that “those commandments which involve an intrinsic principle of justice and obligation are not liable to dispensation”. The most notable of those commandments of which this is true are the Ten Commandments, so Suarez adopts the conclusion that “none of the Commandments of the Decalogue admits of dispensation, even by the absolute power of God”. Moreover, Suarez does not present this as a bold and innovative thesis: in its favour he several times cites Aquinas, who had, he says, declared that “not even God is able to grant [such] a

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61 Grotius's reputation as a man of peace is a matter of course in Gunter Grass's recreation of the end of the Thirty Years War (in 1647), the earlier periods of which form an important part of the political background of Grotius's major work. See Gunter Grass, *The Meeting at Telgte* (trans. Ralph Manheim), Harmondsworth: Penguin Books (1983), pp.22-3, 87. For Rousseau's attack on Grotius, see especially *On The Social Contract*, Bk. I Ch. II: Grotius's “most persistent mode of reasoning is always to establish right by fact. One could use a more rational method, but not one more favourable to tyrants”. *On The Social Contract* (ed. R.D. Masters, trans. J.R. Masters), New York: St. Martin's Press (1978), p.47. Rousseau's objections are exaggerated, but not empty. However, it is not to our purposes to consider them here. It is worth noting that Locke's rather easy justification of killing in the state of war (see especially chapter 3 of the *Second Treatise*), is not contrary to Grotius's defence of law in the state of war, since, for Grotius, “by the law of nature it is permissible to kill in defence of property” (*DJBP*, II.I.xi).

dispensation; for He cannot act contrary to His own justness. 63

If God cannot change the natural laws, it is because he cannot do so justly. But if the natural laws cannot be justly changed by God, but must in fact be necessarily willed by him (because he cannot but be just), then it could be said, as Grotius does say, that the natural law would have "a degree of validity, even if we should concede ... that there is no God". In so saying, Grotius stresses that he is not denying the natural law a divine source:

> the law of nature of which we have spoken, comprising alike that which relates to the social life of man and that which is so called in a larger sense, proceeding as it does from the essential traits implanted in man, can nevertheless rightly be attributed to God, because of His having willed that such traits exist in us. 64

Thus it can be said that the obligations imposed by the law of nature are "in themselves" obligatory, because "it is understood that necessarily they are enjoined or forbidden by God". 65 But, we may ask, if God does not exist, would there still be an obligation to conform to the law of nature (since this law would be enjoined or forbidden by no author)? Grotius appears to accept that there would be, but in so doing he failed to satisfy Pufendorf and others, and thus helped to make the question of our obligation to obey the law central to the later natural law debates, as we shall see. Grotius himself seems rather untroubled on the matter - he is content to spell out, in very rationalistic terminology, the nature and foundation of natural law. We should now turn to examine this account.

What is the law of nature? It is, says Grotius,

> a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity. 66

To understand this passage, we must of course determine what Grotius means by "a dictate of right reason". (It is also worth remembering at this point that Locke was later

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64 DJBP, Prol., 12.

65 DJBP, I.I.x.2. (my emphasis).

66 DJBP, I.I.x.1.
to speak of "the Law of Nature, which is the Law of reason". Such dictates of reason are discerned by having "a quality of moral baseness or moral necessity". Exactly what such a quality would be Grotius does not say, but he gives an important clue when he adds that he has made it his concern

to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself.

So it seems that, by "a dictate of right reason", Grotius means what we cannot deny without doing violence to ourselves, specifically to our fundamental characteristic of sociableness.

It will also be remembered that the notion of sociableness is acknowledged by Grotius to be of Stoic origin. His elucidation of the relationship between the dictates of right reason and instinctive nature shows another element of affinity with Stoic (and other ancient) views. The law of nature has its beginnings in instinctive nature, but it is certainly not a mere cloak of rectitude over our instincts. Rather, reason is our highest characteristic good, and so the law of nature must in some way reflect our rational nature. Grotius approvingly quotes Seneca to this effect:

Just as in every case a nature, unless brought to its highest perfection, does not manifest its type of good, so the good of man is not found in man unless reason has been perfected in him.

The law of nature is, then, the law of our nature, and thus of rational nature: it is not merely the transformation of instincts into laws.

Nevertheless, it does not take our instinctive nature lightly. Grotius follows the account Cicero provides (but which is, in fact, shared by the Stoics and other ancient writers) on the relation between reason and our instinctive nature. In general outline, the account is as follows. All animals are, from birth, impelled by the "first principles of nature". These principles imply that the animal

has regard for itself and is impelled to preserve itself, to have zealous consideration for its own condition and for those things which tend to preserve it, and also shrinks from destruction and from things likely to cause

67 Two Treatises, I. 101.
68 DJBP, Prol., 39.
69 Seneca, Letters, cxxiv (XX.vii.11); quoted at DJBP, I.II.i.2, note 1.
This natural impulse of preservation gives rise to a “duty to keep oneself in the condition which nature gave to him”, and also to live “in conformity with nature”, and to reject what is “contrary” to nature. This is, however, only one’s “first duty”. If such a “first duty” was incorrigible, then the law of nature would amount to no more than a cloak of rectitude over the instinctive. But the quotation from Seneca suggests that the “first duty” is to be regarded as a kind of initial aproximation to the truth.

Grotius’s position can be spelt out a little more fully as follows. As human beings grow and develop the use of their reason, their initial instinctive principles are re-examined and, where necessary, recast in the light of reason. This is appropriate because the mind is more worthy than the body (and, or because, it is more truly characteristic of the nature of human beings). To live in conformity with nature thus requires our living in conformity with reason, the most important element of our nature:

there follows a notion of the conformity of things with reason, which is superior to the body. Now this conformity, in which moral goodness becomes the paramount object, ought to be accounted of higher import than the things to which alone instinct first directed itself, because the first principles of nature commend us to right reason, and right reason ought to be more dear to us than those things through whose instrumentality we have been brought to it ... in investigating the law of nature it is necessary first to see what is consistent with those fundamental principles of nature, and then to come to that which, though of later origin, is nevertheless more worthy - that which ought not only to be grasped, if it appear, but to be sought out by every effort.  

Such a shift - from an original, but lower, principle to a higher, but later - would not

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70 DJBP, I.II.i.1. Cf. passages from Cicero: “the first ‘appropriate act’ ... is to preserve oneself in one’s natural constitution” (III.vi.20 - spoken by Cato the Stoic); “every natural organism aims at being its own preserver, so as to secure its safety and also its preservation true to its specific type” (IV.vii.16 - spoken by Cicero in an approving account of the doctrines of “the ancients”). From Cicero, De Finibus Bonorum et Malorum, trans. H. Rackham, Loeb Classical Library, Cambridge, Mass: Harvard U.P., and London: Heinemann (1971).

71 DJBP, I.II.i.2-3. Cf. Cicero, De Finibus, IV.vii.16-17: The ancients affirm that, to better achieve the aim of preservation, “man has called in the aid of the arts also to assist nature; and chief among them is counted the art of living, which helps him to guard the gifts that nature has bestowed and to obtain those that are lacking. They further divided the nature of man into soul and body. Each of these parts they pronounced to be desirable for its own sake, and consequently they said that the virtues also of each were desirable for their own sakes; at the same time they extolled the soul as infinitely surpassing the body in worth, and accordingly placed the virtues also of the mind above the goods of the body. But they held that wisdom is the guardian and protectress of the whole man, as being the comrade and helper of nature, and so they said that the function of wisdom, as protecting a being that consisted of a mind and a body, was to assist and preserve him in respect of both”.
particularly deserve attention if it were not for the fact that the two principles are not only different but recommend different ends. The point of establishing a hierarchy of principles is, obviously, to show which principle is to be followed in the case of a conflict. In stressing the superiority of reason over instinctive nature Grotius thus is, as were the ancients, affirming that reason must triumph over mere passion.

It is necessary to be careful here, however, and to recognize that this does not in any way imply a fundamental opposition of reason and passion. Neither, therefore, does it imply the most common version of this oppositional psychology, the Platonic political metaphor of reason as the ruler over the unruly, anarchistic, passions. The account of the superiority of mind over body given above would not, of course, make sense if, in cases of conflict, reason did not have sway over the passions; did not direct them. But the relationship between reason and passion is not to be understood as opposing tendencies. Rather the relationship is that between knowledge and ignorance, or between the sighted and the blind. Cicero speaks of "wisdom" as being "the guardian and protectress of the whole man, ... the comrade and helper of nature", and, given Grotius's explicit approval of Cicero in this context, we can reasonably regard Grotius as following a similar line. Reason is, on this view, the natural guide of instinctive nature, the guide of the passions. The fundamental aims of instinctive nature - in particular the fundamental urge of self-preservation - are thus not denied by reason, but fulfilled. We act in conformity with our nature when we pursue our fundamental aims rationally instead of instinctively; with our eyes open to the relevant circumstances, rather than from blind internal imperatives. In this way we act more successfully; we successfully conform our actions to our natural ends. In this light we can understand why the law of nature, as a

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72 De Finibus, IV.vii.17 (part of the passage quoted in the preceding note).

73 Some instructive comparisons can be made with Hume's view. It is first necessary to recognize that Hume's famous dictum, that "Reason is, and ought only to be, the slave of the passions" (Treatise, p.415) is a potentially misleading account of his own psychology of action. His view could be described as making reason the guide of the passions, as does the Ciceronian view, in that his theory also is concerned to show that the passions are blind and can only be directed by reason. However, this would not do justice to the differences between his account and the Ciceronian (and more common ancient) view, since the latter, although not fundamentally oppositional, allows the possibility of conflict between reason and passion - a possibility denied by the former. The similarities between the two views are genuine - they both firmly reject the oppositional psychology of the political metaphor - but the differences can be summed up by observing that, on the Humean view, the passions are not only blind, but know themselves to be so: they therefore seek the help of the sighted. (The model of the blind person led by a guide dog is apposite in this case.) On the ancient view, the passions are blind (or near-sighted) but do not recognize themselves to be so; reason points out their errors but frequently has trouble convincing them of the fact. Conflicts are inevitable but not continual. (For a short account of the Humean psychology, see J.L. Mackie, Hume's Moral Theory, London: RKP (1980), section III (pp.44-50).)
dictate of right reason, is nevertheless in accord with the fundamental aims of our instinctive nature. The law of nature is the guardian of our natural tendency to preservation, and also to those tendencies which flow from it, whether specific cases like self-defence, or the more general tendency of sociableness which we have already discussed.

The law of nature is also a dictate of right reason because it is founded on the essential human trait of sociableness. Sociableness is, for human beings, a specific aspect of the more general phenomenon of the necessity of preservation. Because the law of nature has this determinate character, it "would have a degree of validity" even if there was no divine author of nature. Here we can usefully distinguish between the origin and the content of natural law. For Grotius, it can make no sense to speak of the origin of natural law without speaking of God, because God is its author. (It can make no sense to speak of the origin of A la recherche du temps perdu without speaking of Proust.) The content of natural law is, however, a different matter. God has made the world such that it has a determinate character, so we can discuss this character without discussing its author. (We can discuss Proust's text without speaking of Proust.) The elaboration of the law of nature is thus independent of theology, in the sense that the dictates of the law of nature are discovered by examining what the essential trait of sociableness requires.

What exactly does sociableness require? Grotius spells this out most succinctly in a passage concerned with the justifiability of force (part of the larger question, "Whether it is ever lawful to wage war"). After pointing out that "the first principles of nature" (that is, instinctive nature) are not opposed to the use of force, he goes on to consider the higher implications of our rational nature:

Right reason, moreover, and the nature of society ... do not prohibit all use of force, but only that use of force which is in conflict with society, that is which attempts to take away the rights of another. For society has in view this object, that through community of resource and effort each individual be safeguarded in the possession of what belongs to him.75

We see here that the implication of sociableness is not to merge all individuals into an undifferentiated social whole, but precisely to preserve the original distinctness of persons. Grotius employs two expressions in this passage to express the distinctness of others from ourselves: he speaks of "the rights of another" (a better translation would be "the right of

74 For the justifiability of self-defence, see DJBP, I.II.iii.; II.I.iii.

75 DJBP, I.II.i.5 (emphasis added).
another"), and of "what belongs to him". These two expressions are not quite identical in meaning, but they are closely related. Explaining them will explain the distinctive character of the natural law tradition stemming from Grotius's work.

What belongs to a person is what is one's own - in Latin, suum. The suum is a pre-legal notion (that is, prior to positive laws), as Grotius makes clear immediately following the above quotation. What belongs to a person is prior to private ownership according to positive law. Essentially it includes a person's life, limbs, and liberty: "It is easy to understand", he says, that society aims at preserving or protecting what belongs to a person

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\text{even if private ownership (as we now call it) had not been introduced; for life, limbs, and liberty would in that case be the possessions belonging to each, and no attack could be made upon these by another without injustice.}^{76}
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The suum is thus a set of essential possessions, understood by Grotius to be - at least - life, limbs, and liberty. The suum is what naturally belongs to a person because none of these things can be taken away without injustice. Reason and the nature of society thus dictate that the life, limbs, and liberty of individuals be protected. The law of nature is, in other words, ineluctably committed to the defence of the suum. Once it is allowed, further, that the suum can be extended, then the law of nature is likewise extended. Grotius hints at this extension in the immediately following passage: where there is no private ownership, but only the original suum,

Under such conditions the first one taking possession would have the right to use things not claimed and to consume them up to the limit of his needs, and any one depriving him of that right would commit an unjust act. But now that private ownership has by law or usage assumed a definite form, the matter is much easier to understand.\(^{77}\)

This is a most important passage. It shows that the suum necessarily gives rise to a use-right, since the preservation of life requires the using of natural resources. Since the use-right arises precisely because of the person's needs, it extends no further than the satisfaction of those needs. But, as we have seen in the Mare Liberum passage on the development of property, some kinds of use imply, or result in, using up. Thus the exercise of the use-right amounts, in important cases, to the operation of an exclusive right. The exercise of the use-right, which is no more than the satisfaction of needs,

\(^{76}\text{DJB} \text{P, I.II.i.5. Note the reference to "private ownership (as we now call it)" (my emphasis), which echoes the sensitivity to language already observed in Mare Liberum.}

\(^{77}\text{DJB} \text{P, I.II.i.5.}
thereby gives rise to a form of property. The necessity of recognizing publicly this form of property begins the institution of private ownership, so through this process the satisfaction of our needs comes to require the institution of private ownership. The suum has thus been extended: it comes to include not only life, limbs, and liberty, but also other socially recognized private possessions. Private property (as we know it) is the set of extensions to the suum, and for this reason private property laws become an essential part of the system of natural justice.

Not every positive law of property is part of (extended) natural justice, of course. The positive law must be the product of a just process, and such a process is a reflection of the fact that we naturally possess a justified power to act to preserve the suum. These moral powers Grotius brings to the fore in re-introducing the notion of rights.78 A right is the power to act rightfully, thus rights are the powers necessary for the just extension of the natural law. Grotius introduces them as follows:

There is another meaning of law viewed as a body of rights ... which has reference to the person. In this sense a right becomes a moral quality of a person, making it possible to have or to do something lawfully.79

Since the suum, and the rule of law, can only be extended through lawful actions, it is thus through the exercise of rights that the realm of law is extended. It is also through the possession of rights that the obligations of natural (and thus positive) law are limited. Each of these aspects can be considered briefly.

The exercise of rights is essentially concerned with the protection and extension of the suum. There is, however, another class of moral quality which promotes social goods other than the protection of the suum. Because Grotius sees such goods as "fitting" (and thus good but not obligatory) he describes these moral qualities as aptitudes. The stronger, suum-protecting qualities he calls faculties. These are the rights. Only moral faculties, or rights, give rise to legal rights, so they alone are the qualities which give rise to "justice properly or strictly so called". For this reason moral faculties can be called "perfect", whereas the moral aptitudes are "not perfect".80 The perfect moral qualities include the following:

power, now over oneself, which is called freedom, now over others, as that of the

78 For the earlier history of natural rights, see Richard Tuck, op.cit.
79 DJBP, I.I.iv.
80 DJBP, I.I.iv-viii.
father and that of the master over slaves; ownership, either absolute, or less than absolute, as usufruct and the right of pledge; and contractual rights, to which on the other side contractual obligations correspond.81

The imperfect moral qualities, on the other hand, are associated with those virtues which have as their purpose to do good to others, as generosity, compassion, and foresight in matters of government.82

Since only the perfect moral qualities extend the obligations of the law of nature, there can be no legal obligation to generosity, compassion, or the like. So, in Grotius's hands, the law of nature does not stipulate a morally exacting, or even morally demanding, social order. Rather,

it is not ... contrary to the nature of society to look out for oneself and advance one's own interests, provided the rights of others are not infringed.83

So, with his distinction between rights and imperfect moral qualities, Grotius limits the law of nature to the protection of the suum of each individual member of society, restraining it from requiring any positive acts of general benevolence. In this light, it is not surprising that laws of private ownership should be a central element in the natural laws which govern human society. However, these laws are not an arbitrary matter. There is a rational process which governs the just extension of the original right over one's own (the original suum, comprising life, limbs, and liberty) and its accompanying use-right, to the development of complex forms of private ownership. Grotius's account of this process, the historical development of property, will be examined in the next section.

Before turning to that task, however, a brief remark on the nature of the enterprise is in order. Since the history of the uses of a social institution can readily amount to no more than a catalogue of abuses, writing the history of property may seem a pointless task. But for Grotius there is a rational history of property - the natural history of property - which is the story of extensions to the suum by just processes. This latter history is thus simultaneously a justification of property. The important question then is, What is the relationship between the two histories? Rousseau's attack on Grotius in On The Social Contract...81

81 DJBP, I.I.v. Grotius thus places rights over slaves on an equal footing to rights to freedom. How he is able to do this (or, whether he is consistent in so doing) will not be considered here. It only needs to be pointed out that it is remarks such as these which help to earn the ire of Rousseau in On The Social Contract. Also, for Locke, of course, the natural liberty which the law of nature protects renders slavery unjustifiable.

82 DJBP, I.I.viii.1.

83 DJBP, I.II.i.6.
Contract shows that he thought Grotius guilty of collapsing the latter history into the former, thereby producing a mere apology for tyranny. Many of Grotius's successors are well aware of this issue, and attempt to deal with it in different ways. Hutcheson, on the one hand, distances his political enquiries from history; Adam Smith, on the other hand, employs his account of the distinctively moral standpoint to generate a critical history of social institutions, including property. Grotius's confidence in the manifest logic of history (that is, the degree to which the facts of human history are able to mirror natural history) is not a confidence so easily shared by his successors.

This aspect of the critical reception of Grotius's thought need not, however, concern us greatly here. This is because his more contentious uses of history do not include his account of the origin of private ownership of things. His treatment of the origin of private ownership of human beings - i.e. of slavery - is another matter, and for this reason many of his successors are greatly concerned with the question of whether the natural law account of property can allow slavery, or whether it renders it impossible. This question arises directly from Grotius's own concerns in his treatment of property. Although the historical character of Grotius's account of the origin of property has been stressed in the preceding sections, this is not of particular concern for Grotius himself: not because he lacked a historical story, but because he treated it as a matter of course. Both Mare Liberum and De Jure Belli ac Pacis offer only brief historical accounts of the origin of property simply because such an account could be taken for granted, and was not in any case the point of the account of property. It could be taken for granted because it is part and parcel of the classical accounts of the origin of human society, accounts on which he

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84Rousseau, op.cit. (Discussed briefly at note 61.) See especially his own footnote, quoting the Marquis d'Argenson: “Learned research on public right is often merely the history of ancient abuses, and people have gone to a lot of trouble for nothing when they have bothered to study it too much”. This is, Rousseau adds, “exactly what Grotius has done”. On The Social Contract, op.cit., Bk. I, Ch. II, p.47.

85We are inquiring into the just and wise motives to enter into civil polity, and the ways it can be justly constituted; and not into points of history about facts”. Francis Hutcheson, A System of Moral Philosophy (1975), in Collected Works, Hildesheim: Olms facsimile edition (1969), vol.VI, pp.224-5.

86This distinction, between natural history and actual history, is treated most directly by Adam Smith in Book III of The Wealth of Nations. Smith contrasts the “natural progress of opulence” with its actual progress from ancient times to modern commercial society. Such a distinction is necessary for the writing of a critical history of social institutions, which Smith attempts to carry out. See The Wealth of Nations, ed. R.H. Campbell, A.S. Skinner, and W.B. Todd, Oxford; O.U.P. (1976), Book III chapter I (the natural progress of opulence), and chapters II-IV (the actual progress of opulence in Europe).
frequently and explicitly calls.\textsuperscript{87} It is not the point of his account of property because - especially in \textit{Mare Liberum} - his aim is to show not just how property can be acquired, but also how it \textbf{cannot} (i.e., without injustice). His aim is to show the naturalness of appropriation, and also thereby its \textit{natural limits}. In \textit{De Jure Belli ac Pacis}, as in \textit{Mare Liberum}, Grotius denies the possibility of occupying the open sea. More importantly for our purposes, however, he also denies that the property of any person (understood as a set of extensions to the original \textit{suum}) can ever be so extended as to invade the \textit{suum} of another. This is because, in the world of developed property relations, the original use-right implied by the \textit{suum} is not lost, but is retained in the form of a general right of necessity. As we shall see, this right of necessity has far-reaching implications especially with respect to the possibility of slavery. These implications, not fully appreciated by Grotius, become the centre-piece of the political theory of John Locke in the \textit{Second Treatise}.\textsuperscript{88}

Perhaps one reason for failing to see that Grotius provides a historical account of the development of property is that the historical sources on which he calls are no longer regarded as historical documents. This should not deter us, however: to offer a historical account of the development of any phenomenon is not to offer an \textit{adequate} historical account. Our explanations can only ever be as good as our sources, so, if Grotius's sources include what are for us myths,\textsuperscript{89} then his historical explanations will not compel assent, and may perhaps seem bizarre. But this question, of historical adequacy, should not blind us to the type of explanation Grotius is offering. To produce an account based

\textsuperscript{87}See, for example, the brief account of the development of society in Horace's \textit{Satires} (I.iii.99ff) - a passage which Grotius refers to a number of times in the Prolegomena to \textit{DJBP}, and the detailed account of the history of society in Lucretius's \textit{De Rerum Natura} (v.925-1457). In \textit{DJBP}, unlike \textit{ML}, Grotius does not simply follow these classical sources, but blends them into an account based on the Book of Genesis.

\textsuperscript{88}To put the matter a little more accurately, it should be said that the problem for Grotius arises out of a tension in his doctrine of rights. The right of necessity, if it is to play any sort of role at all, needs to be understood as an \textit{inalienable} right. But Grotius's general doctrine of rights - that they are moral powers possessed by individuals - allows them to be freely alienated as if they are just like the ordinary possessions of individuals. For a more detailed account of Grotius's conception of a right, see Karl Olivecrona, \textit{Law as Fact} (second edition), London: Stevens & Sons (1971), Appendix 1 (pp.275-96).

\textsuperscript{89}I use the word "myth" here in its anthropological sense. Myth signifies not what is false (as in the more everyday sense) but what serves a special symbolic or religious purpose within a community. It is an outsider's (an observer's) term, but it is employed as a neutral or agnostic term. Myths may be historically accurate, or they may not; what makes myth myth is the purpose it is meant to serve.
on modern historical researches is not to provide a different kind of account, but a more sophisticated, more cautious explanation of the effects of changed circumstances. It is, among other things, to upgrade the data.90

Grotius's data, in De Jure Belli ac Pacis, comes, as he tells us, principally from "sacred history" - that is, the Book of Genesis - with supplementation from the "philosophers and poets" of the classical sources. He makes this explicit when explaining one aspect of his account. Contrasting his method there with that of Mare Liberum, he says:

This is what we are taught in sacred history; and it is quite in accord with what philosophers and poets, whose testimony we have presented elsewhere, have said concerning the first state of ownership in common, and the distribution of property which afterward followed.91

We should now turn to a direct consideration of Grotius's account of "the first state of ownership in common" and the subsequent distribution of property.

V: Property: Development and Limits

Grotius begins his chapter on property by considering "the division of that which is our own". This division, which is the suum, is itself divisible into two parts:

some things belong to us by a right common to mankind, others by our individual right.92

The story of the development of private property is a story of the creation of an individual right out of the "right common to mankind". To understand this transition it is first of all necessary to determine the nature of this "common" right. In an important passage, Grotius describes it as follows:

Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature. "All things", as Justin says, "were the common and undivided possession of all men, as if all possessed a common inheritance". In consequence, each man could at once take whatever he wished for his own needs, and could consume whatever

90This is just what is done by, most particularly, Adam Smith in his Lectures on Jurisprudence. Without wishing to labour this point too much, it is just this relation which Paul Bowles, op.cit., fails to see in his simple contrast between natural law and historical science. Whether successfully or not, natural law nevertheless characteristically aims at producing historical science.

91DJBP, II.II.ii.3.

92DJBP, II.II.i.1.
was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership; for whatever each had thus taken for his own needs another could not take from him except by an unjust act.\(^3\)

To illustrate this Grotius refers, as he did in *Mare Liberum*, to the example of the seats in the theatre, on this occasion giving the version employed by Cicero:

Although the theatre is a public place, yet it is correct to say that the seat which a man has taken belongs to him.\(^4\)

This passage shows that the original “right common to mankind” is the same as the use-right implied by the *suum*, which we have already encountered. The right is common to mankind in the sense that all have this right: it is not, however, a right to a common possession (in the sense of joint ownership). A common right in the latter sense would give more than a simple use-right, it would also give rights to control or limit the activities of others. Grotius gives no hint that the right common to mankind gives anything more than the right to use things for the purpose of one’s preservation (of satisfying basic needs), so he must mean only that this right is a right which everybody has. The quotation from Justin must, therefore, be treated with care. All things can be “the common and undivided possession of all men” only in a weak sense: only, in fact, in that sense Grotius refers to in *Mare Liberum* as the *original* meaning of “common” - i.e., not private.\(^5\) All things were thus “the common and undivided possession of all men” only in the sense that there was nothing which was a private possession. The “common inheritance” of all humanity referred to by Justin in the quotation thus refers to the same situation described by Seneca (and quoted in *Mare Liberum*) as

... To all the way was open;  
The *use* of all things was a *common* right.\(^6\)

That all things were originally the “common inheritance” of all humanity does not mean, then, that in the earliest ages of human history all human beings were to be regarded as joint owners of the earth: no such ownership then existed. Like all distinctive forms of ownership, joint ownership is the creation of a later historical age. The earth

\(^{3}\) *DJBP*, II.II.ii.1.

\(^{4}\) Cicero, *De Finibus*, III.xx.67. This is the translation provided in *DJBP*, II.II.ii.1. In *Mare Liberum* Grotius had employed Seneca’s version. (See the text to footnote 36 above.)

\(^{5}\) See *DJPC*, pp.226-7. (Text to footnote 28 above.)

\(^{6}\) *DJPC*, p.228 (cf. footnote 32 and text.)
was originally a common inheritance only in the sense that it could be used by all, and it is the "poverty of human speech" which sometimes obscures this from us. (This particular example of the poverty of speech is overcome by Pufendorf in his account of the origin of property.)

The original common inheritance of all humanity was the use-right implied by the *suum*. This use-right was the "universal right" which "served the purpose of private ownership". But the purpose of the original use-right was to satisfy human needs, to preserve the individual and the species, so this must have been the purpose of private ownership. Grotius is thus committed to holding that at least the first purpose of private ownership was to protect the things or actions necessary to preservation - in other words, to satisfy needs. Private ownership and the original use-right both have the purpose to guarantee (as far as possible) that "whatever each had thus taken for his own needs another could not take from him except by an unjust act". This does not, of course, preclude private ownership from serving additional ends as well, but it must at least serve this end. The later parts of this section show Grotius's recognition of this requirement in his discussion of the rights of necessity.

The more immediate question, however, is, If the original use-right served the purpose of private ownership, why was the introduction of private ownership necessary? Why should human beings have abandoned this original condition in which their needs were satisfied? Grotius's answer is that

This primitive state might have lasted if men had continued in great simplicity or had lived on terms of mutual affection such as rarely appears.98

Grotius appears to be of the opinion that, since the "terms of mutual affection" are so rare, they can be regarded as a historical accident. The norm is a rather limited degree of mutual affection, so it was the abandonment of the lifestyle of primitive simplicity which was the crucial factor in the development of private ownership. The abandonment of the simple life was the abandonment of the self-subsisting life: to satisfy the needs of all subsequently required the fair division of a heterogeneous and diversely produced product. But the normally limited degree of mutual affection, together with the logistical problems created by the spread of human population, made such a fair division unlikely. This is the kernel of Grotius's account. If we consider it in a little more detail we can see the use he makes of history - that is, of sacred history and the classical authors.

97 *DJPC*, p.227.

98 *DJBP*, II.II.ii.1.
For a modern example of the primitive simplicity of human life, Grotius turns, as do so many of his contemporaries, to "certain tribes in America"; but he calls on Tacitus and other classical authors to demonstrate that such simplicity was the original condition of human society. This original simplicity had a kind of moral purity about it, but this was a matter of "ignorance of vices rather than knowledge of virtue". For this reason the condition of original simplicity was not stable: the original state of innocence, having no knowledge of vice, could not resist it. Although the state of innocence had a somewhat idyllic character - "They lived easily on the fruits which the earth brought forth of its own accord, without toil" - it inevitably succumbed to a succession of different vices. Grotius's account of these vices is heavily dependent on the Book of Genesis, with again supplementation from ancient authors, especially Philo and Seneca. He identifies three main sources of corruption - knowledge of good and evil, rivalry, and ambition. Each of these is represented in passages of the Book of Genesis.

The first corruption, the knowledge of good and evil, is obviously centred on the story of the Garden of Eden. The symbol for this knowledge, says Grotius, "was the tree of knowledge of good and evil", and this knowledge was itself "a knowledge of the things of which it is possible to make at times a good use, at times a bad use". This would not appear to exclude much, but Grotius mainly has in mind the pursuit of frivolous enjoyments. He quotes an ancient source to this effect:

to the man who came after the first the craft and various inventions devised for the advantage of life proved not to be very useful; for men devoted their talents not so much to the cultivation of bravery and justice as to devising means of enjoyment.

This same indulgence in physical pleasures occurred again "after the world had been cleansed by the Deluge". There was on this occasion "a passion for pleasure, to which wine ministered". This rather surprising remark becomes clear if we remember that, after disembarking from the Ark with his family, Noah is shamed by being seen naked after becoming drunk. The wine comes from a vineyard planted by Noah after the Flood, so this event has a distinctively post-diluvian character. Grotius's reference to the "passion for pleasure, to which wine ministered" is thus not an abstract speculation, but a reference to what is for him a specific event in sacred history. Similarly, there are

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99 All the quotations in this paragraph are from DJBP, II.II.ii.1.

100 DJBP, II.II.ii.2.

101 See Genesis, IX.20ff.
references to specific Biblical narratives in the accounts of the other two sources of corruption.

The second form of corruption is rivalry, which grows into violence. Such rivalry is a result of the division of labour, and for Grotius it is shown to be so by the story of Cain and Abel:

The most ancient arts, agriculture and grazing, were pursued by the first brothers, not without some interchange of commodities. From the difference in pursuits arose rivalry, and even murder.102

This gave rise to an age of violence, an age swept away by the Flood. The principal destroyer of the harmony necessary for maintaining the original state prior to private property, however, was the third form of corruption:

Harmony ... was destroyed chiefly by a less ignoble vice, ambition, of which the symbol was the tower of Babel.103

How did ambition destroy harmony? We know that ambitions commonly cause rivalries, but Grotius has already dealt with rivalry. He must, therefore, have in mind a different factor. Since he immediately follows the above quotation with the remark that “presently men divided off countries, and possessed them separately”, we must conclude that he is here taking the story of the tower of Babel at face value. The aim of the story is to explain the division of humanity into separate nations with separate tongues, which through loss of understanding makes the avoidance of conflict so much harder. This division into nations and tongues, since it is a source of conflict, is understood as a curse on the human condition. The human ambition to achieve divinity is seen as the cause of divine punishment.104 In this way ambition can be seen as a separate cause of loss of harmony through the divine creation of separate nations. Only if Grotius is taking the Babel story seriously, in fact, is there reason for treating the separation of humanity into nations as the effect of ambition.

A final indication of the constant background presence of Biblical narratives is provided by Grotius’s remarks about the further division of lands after the separation of nations. After the division into countries, he observes,

there remained among neighbours a common ownership, not of flocks to be sure,

102 DJBP, II.II.ii.2.
103 DJBP, II.II.ii.3.
104 Genesis, X.11.
but of pasture lands, because the extent of the land was so great, in proportion to the small number of men, that it sufficed without any inconvenience for the use of many ... Finally, with increase in the number of men as well as of flocks, lands everywhere began to be divided, not as previously by peoples, but by families. Wells, furthermore - a resource particularly necessary in a dry region, one well not sufficing for many - were appropriated by those who had taken possession of them. This is what we are taught in sacred history ...¹⁰⁵

Not only do we have here the explicit reference to sacred history; we have also a significant reference to wells. Why should Grotius (writing long before archaeological discoveries in Mesopotamia and the Near East) connect the early history of human beings with arid regions of the world? The natural answer is that once again he has in mind the patriarchal narratives of the Book of Genesis. It even seems likely that the division of the land into the separate possessions of families, to which he refers above, is based on the story of Abram and Lot. Genesis tells us that, because their respective flocks had grown so large, there were numerous incidents of friction between their respective servants. Their solution was to divide the land of Canaan into separate western and eastern territories, with the two households restraining themselves within their respective territories.¹⁰⁶ Given the incidental clues (to wells, for example), and the other references to the Book of Genesis that we have discerned, it seems undeniable that Grotius's view, that “increase in the number of men as well as of flocks” led to the first division of land by families, is based on the story of Abram and Lot. So, once again we see that what may appear, to the modern reader, to be vague or speculative remarks about the early history of human society are in fact indirect references to what is for Grotius a historical source - the Book of Genesis. When Grotius tells us that his account is “what we are taught in sacred history”, we can take him at his word, and recognize that what he is trying to provide, in outline, is an account of those developments in human history which made the primitive system of common ownership impractical.

Grotius's summary of the causes of abandonment of common ownership is thus a summary of the significant events of sacred history (with gaps filled in by philosophers and poets):

From these sources we learn what was the cause on account of which the primitive common ownership, first of movable objects, later also of immovable property, was abandoned. The reason was that men were not content to feed on the spontaneous products of the earth, to dwell in caves, to have the body either

¹⁰⁵DJBP, II.II.ii.3.

¹⁰⁶Genesis, XIII.
naked or clothed with the bark of trees or skins of wild animals, but chose a more refined mode of life; this gave rise to industry, which some applied to one thing, others to another.

Moreover, the gathering of the products of the soil into a common store was hindered first by the remoteness of the places to which men made their way, then by the lack of justice and kindness; in consequence of such a lack the proper fairness in making division was not observed, either in respect to labour or in the consumption of the fruits.\textsuperscript{107}

Obviously all the details of this potted history are not simply extracted from the Book of Genesis - the problem of remoteness does not seem to be considered there at all - nor from any other single source. But it is important to recognize that Grotius is not making it up, nor saying what must have been. As already pointed out, the refined mode of life has numerous instances in Genesis; the division of labour is the story of Cain and Abel; and the lack of fairness in dividing pasture is the problem resolved in the story of Abram and Lot. Grotius is simply reminding us of what is for him the well-known history of the beginnings of human society, as described in the sacred book devoted to that subject.

The end of common ownership, made necessary by the factors referred to in the above quotation, is not, of course, the beginning of private ownership. It is, rather, the beginning of a process which culminates in private ownership. Before private ownership is achieved, the originally undifferentiated use-right in the earth is, as we have seen, transformed by agreement or division into the territories of first, nations, and secondly, households. The development of private ownership is a further stage in a sequence of divisions or agreements. Thus the factors which lead to the abandonment of common ownership are the same general factors which lead to the establishment of private ownership (even though these are quite distinct events):

At the same time we learn how things became subject to private ownership. This happened not by a mere act of will, for one could not know what things another wished to have, in order to abstain from them - and besides several might desire the same thing - but rather by a kind of agreement, either expressed, as by a division, or implied, as by occupation. In fact, as soon as community ownership was abandoned, and as yet no division had been made, it is to be supposed that all agreed, that whatever each one had taken possession of should be his property.\textsuperscript{108}

The problems of sharing out a common stock ("the lack of justice and kindness") eventually make even the more restricted forms of common ownership - those which arise

\textsuperscript{107} DJBP, II.II.ii.4.

\textsuperscript{108} DJBP, II.II.ii.5.
from the early divisions of the earth into the property of peoples or families -
unmanageable. The simple abandonment of such sharing creates a form of private
possession: every man now provides only for his own, principally by being left in
possession of flocks or land which no longer produce common goods. If this original
private possession is allowed to continue to exist (i.e., is not incorporated into a new
collective possession), then it can only be regarded as a private occupation. To allow it to
remain in private possession is to recognize, or tacitly to agree to, the legitimacy of such
possession, and thus to recognize it as private property through occupation. This is why
Grotius speaks of occupation as implied agreement, and why he says that "as soon as
community ownership was abandoned", but where no express division had been made, "it
is to be supposed that all agreed" that private possessions should be regarded as private
property. In modern terms, Grotius's position is that there is no morally relevant
difference between acts and omissions. To fail to object to a situation is tacitly to accept
it. The collapse of a system of sharing, actively or passively accepted by the concerned
parties, is the beginning of private ownership. To establish private ownership as a
socially recognized rule, an express agreement is perhaps the norm, but passive acceptance
of a state of affairs is itself to be regarded (can only be regarded) as a public act of
acceptance.

We can see, then, that for Grotius the fact or otherwise of an explicit original agreement
or contract is a matter of little importance. Private property arises in a series of steps,
steps which may or may not involve explicit agreements. It is no doubt preferable to have
explicit agreements wherever possible, since these more easily and more emphatically
satisfy the requirement that a publicly recognized act has occurred; nevertheless omissions
are to be regarded as acts of forebearing or abstaining, thus exhibiting the necessary
public character, and thus showing the fact of agreement, even without an explicit act.
Grotius's unconcern about whether explicit agreements occurred or not reflects not only
his treatment of omissions as effectively equivalent to actions, but two other factors as
well.

The first is perhaps the more theoretically significant: it is the fact that the suum
implies an original use-right, and "the enjoyment of this universal right then served the
purpose of private ownership". Or, to put it another way, private property stands in no
special need of justification, since it is a social institution developed to serve the same
purpose as the necessary purpose served by the universal original use-right. In the light of
this perspective, how property comes about can be regarded as a matter of only moderate
importance: what matters is just that property does come about as a natural response to
circumstances generated when human beings abandoned their original life of primitive
simplicity.
The second factor is his straightforward belief that the development of property was in fact a process involving a number of distinct events, some of which involved explicit agreements while others did not. The abandonment of primitive simplicity was, as we have seen, the simple seduction of human beings by tempting pleasures of a (not initially recognized) vicious character. The development of the division of labour, as indicated in the story of Cain and Abel, was, it seems, a matter of rivalry between the first brothers. The division and scattering of human beings into separate peoples was, as the story of the Tower of Babel shows, the consequence of excessive human ambition. All these are important elements in the story of the development of property, but none of them involve explicit agreements. They all indicate significant but not intended developments. The archetypal division of the land according to families rather than nations, however, is contained in the story of Abram's and Lot's division of the land of Canaan, and this is a specific agreement. So, for Grotius, the actual history of the development of property involves both explicit agreements and tacit acceptances of fait accompli. As we have already remarked, he is inclined to identify natural history with actual history; and when the sources of his history are sacred books this tendency is certainly not discouraged. The combination of these two factors, then - the purpose of property and its actual history - leads Grotius to regard the role of explicit agreements as an indifferent part of the natural history of property. The battles to be fought over this issue by subsequent philosophers are here not even imagined.

The important matter for Grotius in *De Jure Belli ac Pacis* is, as it was in *Mare Liberum*, that "the transition to the present distinction of ownerships did not come violently, but gradually, nature herself pointing out the way". Whether this transition was principally or even crucially a matter of explicit agreements is rather beside the point. What matters is that property relations have developed over time because such changes as were accepted were so accepted (tacitly or explicitly) because they were recognized to be in accord with the purposes of the original use-right: to effectively secure the preservation of human beings. The fact of their acceptance is important principally, it seems, because such acceptance is necessary if the history of the development of property is to be a peaceful, not a violent, process.

It is also worth noting at this point what may be an important difference in doctrine between *Mare Liberum* and *De Jure Belli ac Pacis*. In the earlier work, nature points

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109 *ML*, p.24; cf. *DJPC*, p.228: "the present-day concept of distinctions in ownership was the result, not of any sudden transition, but of a gradual process whose initial steps were taken under the guidance of nature herself".
the way to private ownership in a stronger sense than that to which the later work is committed. The argument of Mare Liberum, it will be remembered, was that the exercise of the original use-right, by using up consumable goods and thereby effectively excluding others from likewise using them, implied that “a certain form of private ownership was inseparable from use”. On this account, the largest role that can be accorded an explicit original agreement concerning consumables is the mere rubber-stamping of a natural fait accompli. In the later work, however, Grotius says only that the original use-right and later private property serve the same purpose. This allows a larger role for agreements: they must be constrained by the necessary purpose, but need not be a mere rubber-stamp. It is unclear, however, whether this represents a tension between the two works: it may be only that the later work is (innocently) silent on one feature of the original human state of primitive simplicity.

This completes the examination of Grotius’s account of the rise of property. No treatment of his views on property would be complete, however, if it failed to show how the original use-right, which “served the purpose of private ownership”, and thus out of which the institution of property grew, also operates to constrain private ownership in particular circumstances. Private ownership being, as we have seen, a set of extensions to the suum, it cannot justifiably conflict with the original use-right implied by the suum. By excluding all but the owner from free enjoyment of its product, however, systems of property will, if applied indiscriminately, exclude even those in dire necessity. The use-right to the fruits of the earth possessed by the necessitous would therefore be denied in such cases. This is to deny the natural purpose of private ownership (the preservation of human beings in sophisticated societies), so such a situation cannot be tolerated. The way of protecting the original use-right, and thereby the purpose of private ownership, is achieved in modern or developed societies through the recognition of a right of necessity.

For Grotius, the right of necessity takes two forms: “the right to use things which have become the property of another”; and “the right to such acts as human life requires”. Of these two, the former is the more important, since, unlike the latter

110 DJPC, p.228.

111 DJBP, II.II.ii.1.

112 DJBP, II.II.vi; discussed II.II.vi - II.II.xvii inclusive.

113 DJBP, II.II.xviii.; discussed II.II.xviii - II.II.xxiv inclusive.
(which Grotius seems to understand as a right to trade in necessities), it is "a question of what may be done against the will of an owner". So we shall turn first to consider this most important right of necessity.

Grotius introduces this issue by asking "whether men in general possess any right over things which have already become the property of another". He is well aware that this may seem an odd question to ask, but attributes its apparent oddity to a misunderstanding of the purpose which private property was intended to serve:

Some perchance may think it strange that this question should be raised, since the right of private ownership seems completely to have absorbed the right which had its origin in a state of community of property. Such, however, is not the case. We must, in fact, consider what the intention was of those who first introduced individual ownership; and we are forced to believe that it was their intention to depart as little as possible from natural equity. For as in this sense even written laws are to be interpreted, much more should such a point of view prevail in the interpretation of usages which are not held to exact statement by the limitations of a written form.

As Richard Tuck observes, Grotius employs this appeal to the original intentions of the founding fathers on a number of occasions. Nevertheless it is potentially misleading to describe this argument, as Tuck does, as an appeal to "interpretive charity". It is, I think, better understood as a reminder - to recognize the problem which the introduction of property was designed to solve, and which therefore supplies the natural limits of the right of property. It is not simply that we should assume that the founding fathers had the best or most appropriate intentions; rather we are forced to believe "that it was their intention to depart as little as possible from natural equity". And, because natural equity implies the original universal use-right, this right can never be denied. From understanding the point of first introducing private property,

114 DJBP, II.II.xviii.
115 DJBP, II.II.vi.1.
116 See Tuck, Natural Rights Theories, pp.79-80.
117 As Tuck acknowledges, the term is borrowed from Quine; ibid., p.80n.
118 On this reading, Tuck appears to be himself the first victim of the misleading potential of his own terminology, if we can apply what he says of a passage he treats "similarly" to the one we have quoted. He says of that passage: "In principle, Grotius was arguing, all our rights could be renounced; but interpretive charity requires that we assume that all were not in fact renounced" (p.80). Rather, I suggest, Grotius's view is that all our rights could not be renounced "without injustice". (See DJBP, I.II.i.5), or without doing violence to nature by ignoring the way she points out (see ML, p.24).
it follows ... that in direst need the primitive right of user revives, as if community of ownership had remained, since in respect to all human laws, - the law of ownership included - supreme necessity seems to have been excepted.\textsuperscript{119}

After noting that this principle in favour of necessity is recognized "even among the theologians" most notably by Aquinas\textsuperscript{120}

The reason ... is not, as some allege, that the owner of a thing is bound by the rule of love to give to him who lacks; it is, rather, that all things seem to have been distributed to individual owners with a benign reservation in favour of the primitive right.\textsuperscript{121}

Grotius needs to stress this because, by allowing the right of necessity to use what belongs to another, he may seem to be requiring that there exists a general duty of charity; that the welfare of others is our necessary concern. But we have already seen that he has denied just this:

It is not ... contrary to the nature of society to look out for oneself and advance one's own interests, provided the rights of others are not infringed.\textsuperscript{122}

The right of necessity to use things belonging to another is thus no more than a limit on the natural extent of property, since it captures those cases where the private owner's advancing his own interests infringes the rights of another. It is not to impose on the property holder a general duty to secure the welfare of the less fortunate. Grotius thus rejects the traditional adage that "Property has its duties"; an adage which seems to capture the most humane elements of the mediaeval world. Grotius's adage, if we are to treat it so, would not be without humane effect, but it would indicate nevertheless a less interdependent social world: "Property has its limits". This is not to suggest that Grotius err\textsuperscript{s in calling the limit to property "a benign reservation"}. It does guarantee that no one need be faced with the dilemma: if not starvation, then crime. Since it is a principle which operates only in situations of "direst need", Grotius stresses that it does not apply

\begin{itemize}
\item \textsuperscript{119}DJBP, II.II.vi.2.
\item \textsuperscript{120}See Summa Theologica, II-II, 2.66, A.7; op.cit., p.138.
\item \textsuperscript{121}DJBP, II.II.vi.4.
\item \textsuperscript{122}DJBP, I.II.i.6.
\end{itemize}
when the need is not genuinely serious; when, as he puts it, the necessity is avoidable. Further, it does not entitle the needy to take from another in equal need, and it is to be treated as a debt to be repaid if possible - it is not the simple abolition of the property-holder's right.

At this point Grotius also discusses another use-right which cannot be denied by the owner of property, even though it involves no necessity. This is the right of "innocent use", and holds wherever using the property of another "involves no detriment to the owner". This general right covers such important cases as the right to use running water, and the right of passage over land and rivers. This right of innocent use, like the above right of necessity, can be regarded as "a benign reservation in favour of the primitive right", since all such innocent uses are implied by the original use-right.

The second right of necessity is the right to such acts as human life requires. As already noted, Grotius appears to mean by this a right to engage in trade for the purpose of satisfying needs. This right concerns "acts indispensable for the obtaining of the things without which life cannot be comfortably lived". It does not require the same degree of necessity as the right to use things belonging to another, since in this case it is not ... a question of what may be done against the will of an owner, but rather of the mode of acquiring things with the consent of those to whom they belong. Nevertheless, necessity is not weakened too much, since it remains true that we are here dealing not with things which are superfluous and ministrant to pleasures only, but with things which life requires, as food, clothing, and

\[123\] DJBP, II.II.vii. This principle probably explains why both Hume and Adam Smith show no desire to consider the right of necessity, at least in terms of physical survival. Commercial society puts an end to economic necessity. On the other hand, Smith recognizes that it creates new kinds of spiritual necessity, and so he becomes a strong advocate of public education. For a discussion of these issues, see Donald Winch, Adam Smith's Politics, Cambridge: C.U.P. (1978), esp. pp. 72-80 and 113-120.

\[124\] DJBP, II.II.viii,ix.

\[125\] DJBP, II.II.xi. This right can be regarded as the converse of the rights of property which arise naturally wherever using results in using up (see the argument of ML). If there is no using up, then neither is their ground for exclusive use.

\[126\] DJBP, II.II.xii,xiii.
Most conspicuously, this general right includes the right to buy necessary goods, and at a fair price; surprisingly, however, it "does not oblige a man to sell what belongs to him", since "every one is free to decide what he will or will not acquire" - and, presumably, part with. The right to buy necessary goods cannot, however, oblige anyone to sell; as Grotius says it is "not ... a question of what may be done against the will of an owner". Presumably, the profit to be gained from sale is seen by Grotius as a sufficient consideration in these cases. The point of this right, then, seems to be simply to protect trade in necessities. It is directed against political authorities who try to restrict such trade, and is not directly an attempt to protect those in dire necessity. Nevertheless it remains connected to necessity: it is not a right to free trade per se, only a right to free trade in necessary goods, and to pay a fair price for them. It is not a right to economic laissez-faire.

For our purposes, the right to acts that human life requires can be set aside. One important point, however, needs to be made about the principal right of necessity, the right to use things belonging to another where necessity requires: this right makes one important form of slavery, self-enslavement because of poverty, quite unnecessary. Grotius allows that rights are transferable, and this prevents him from disallowing self-enslavement out of hand; that is, it prevents him from treating self-enslavement as a necessarily unjust act, as Locke was later to do. This does not mean (pace Rousseau) that he does not care about slavery. He condemns self-enslavement as a base act:

The basest form of voluntary subjection is that by which a man gives himself into complete slavery, as those among the Germans who staked their liberty on the last throw of the dice.

Nevertheless, he is forced to regard it as an unfortunate, but not an impossible act. It is not an impossible act principally because, for him, it does not violate the fundamental right of self-preservation. In a rather sympathetic assessment of slavery, he says

That is complete slavery which owes lifelong service in return for nourishment.

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127 DJBP, II.II.xviii.

128 DJBP, II.II.xix.

129 DJBP, II.II.xx.

130 DJBP, II.V.xxvii.1.
and other necessaries of life; and if the condition is thus accepted within natural limits it contains no element of undue severity. For the lasting obligation to labour is repaid with a lasting certainty of support, which often those do not have who work for hire by day.\(^{131}\)

Grotius’s account here is not adequate because it overlooks a crucial fact: although the slave has a lasting claim of support, he or she has absolutely no certainty that support will in fact be forthcoming. If the master chooses to ignore his side of the relation, the slave’s dependent condition leaves no comeback. Grotius recognizes this fact in the section immediately following that quoted above, but without, apparently, seeing the problems it causes for his own account of the slave’s situation. To answer the question, “To what extent the right of life and death may be said to exist in the right over slaves”, he says:

Masters do not have the right of life and death (I am speaking of complete moral justice) over their slaves. No man can rightly kill a man unless the latter has committed a capital crime. But according to the laws of some peoples the master who has killed a slave for any reason whatsoever goes unpunished.\(^{132}\)

The master, in other words, though he is not in possession of what is “properly called a right”, nevertheless has impunity in action. Here we can see clearly why, although Grotius does not “establish right by fact” as Rousseau later claimed\(^{133}\), he nevertheless earned the latter’s polemics. (If impunity in action can extend to power over the lives of others, what could possibly be gained by having a right?) The fact is that, because of the master’s impunity in action, the slave not only has no “certainty of support”, but is in a situation in which self-preservation is constantly under threat. The master’s impunity of action is a latent denial of the compatibility of the institution of slavery and the right of self-preservation.

Grotius accepts that the most powerful cause of acts of self-enslavement is the very necessity which he has recognized as founding a right to the use of things belonging to others. Considering the question whether enslaved parents are allowed to sell their children into slavery, he says:

Surely, if there were no other method of bringing up the children, the parents could adjudge to slavery, along with themselves, the offspring liable to be born to them, since under such conditions parents are allowed to sell children born free.

\(^{131}\)DJBP, II.V.xxvii.2. (emphasis added).

\(^{132}\)DJBP, II.V.,xxviii.

\(^{133}\)Rousseau, op.cit., Bk. I Ch.II (p.47).
But since this right derives its origin from necessity only, without such necessity the parents do not have the right to enslave their children to any one.134

But if without such necessity the parents lack the right to enslave the children, while with the necessity they do not have the need, since they then have the right of necessity to use things belonging to others, how can self-enslavement or the enslavement of one’s children ever be other than an unnecessary and unjust act? The right of necessity makes such enslavement unnecessary or avoidable; the insecurity of the right of self-preservation under slavery makes enslavement a deliberate exposure to the possibility of injury. Although Grotius is not recklessly insensitive to the vulnerability of slaves - he does allow that, “if the cruelty of the master is excessive, even those slaves who have voluntarily given themselves into slavery can take counsel for their welfare by flight”135 - his concessions are clearly inadequate. No slave has protection against the arbitrary violence of the master, yet no enslavement through necessity is ever reasonable. In allowing enslavement through necessity he has emptied the right of necessity to use things belonging to others of its principal significance. Conversely, if the right of necessity to use things is treated seriously (and if the right to such acts as life requires is expanded to include the right to those actions which safeguard one’s future), then the right of necessity becomes a genuine stumbling-block to any form of slavery. As we shall see, this is the course taken by Locke in the Second Treatise.

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This chapter has not attempted a complete account of the intellectual corpus Grotius bequeathed to posterity. The aim has been, rather, to identify some main themes which are taken up in various ways by his intellectual successors, and also to rebut a common misunderstanding of Grotius’s method. The misunderstanding concerns the nature of Grotius’s rationalism, and hence of the role of history in his thought. The law of nature he describes as “a dictate of right reason”, but he shows that he does not take this to imply the freedom to determine the nature of human laws wholly by abstract deduction. Rather, reason is a tool human beings use in specific situations and thus is the guiding principle behind necessary (unavoidable) historical developments. Reason is a historical

134 DJBP, II.V.xxix.1-2.

135 DJBP, II.V. xxix.2.
force, perceived historically. It was also pointed out that, although not reducible to expediency, the law of nature “has the reinforcement of expediency”. Unqualified contrasts between natural law theories and theories which stress the role of utility are thus simplistic; natural law theories typically allow a significant place for utility.\textsuperscript{136}

The main themes discussed here, which Grotius's successors take up in various ways, can be summed up as follows. Firstly, Grotius founds natural law on the natural “sociableness” of human beings. The \textit{limited} sociability implicit in this notion of sociableness is shown by Grotius's view that “it is not ... contrary to the nature of society to look out for oneself and advance one's own interests, provided the rights of others are not infringed”; and this limited sociability is behind his distinction between two sorts of moral qualities, perfect and imperfect. The former are “legal rights strictly so called”, whereas the latter are “aptitudes”, and are not enforceable. Secondly, he stresses that the original community of possession differed quite significantly from the modern notion of common ownership. Thirdly, and most importantly, private property is a late stage in a process of extensions to the \textit{suum} by adapting and developing the original use-right. For this reason property is, in the final analysis, a system designed for the better or more effective preservation of human beings, and so cannot frustrate the use-right of the needy. Systems of property thus have a necessary limit: they must recognize a right of necessity to use things belonging to others.

In this chapter I have said rather little about Grotius's doctrine of rights. For our purposes, the important matter is that property, being a species of right, is for Grotius a power to use things without injustice. By failing to see that this power cannot include use of other persons (as slaves) without emptying of all significance the fundamental right of self-preservation (and its corollary, the right of necessity), Grotius is led by his understanding of rights to accept the naturalness of the institution of slavery. Hobbes's acceptance of this doctrine guaranteed the centrality of this issue to later seventeenth century political theory. Most explicitly in John Locke, the question of the possibility of slavery, given natural property, is of crucial theoretical significance.

\textsuperscript{136}The most pronounced example of this is the explicitly utilitarian natural law theory of Richard Cumberland in \textit{De Legibus Naturae}. An implication of this chapter is that Cumberland's theory is not a deviation from "authentic" natural law.
Chapter Two

SAMUEL PUFENDORF

I: Moral Science and the Elements of Law

If Grotius's star shines only feebly in the modern philosophical firmament, that of Samuel Pufendorf not uncharacteristically suffers a total eclipse.¹ In the latter stages of the seventeenth century, however, matters were vastly different. Pufendorf was then the best known and, by and large, the most respected, writer on natural law, not least because he was recognized as an authoritative interpreter and defender (and, where appropriate, critic) of Grotius. Thus his main work, De Jure Naturae et Gentium, was described by Locke as "the best book of that kind" - better even than Grotius's²; and his shorter textbook, De Officio Hominis et Civis, was very widely used in courses on natural jurisprudence in the universities of Europe, and provided a model for many subsequent such books. Francis Hutcheson, for example, explicitly acknowledges his debt to Pufendorf in the preface to his own student textbook, written over seventy years later³; and the structural dependence of A Short Introduction to Moral Philosophy on De Officio can readily be discerned by a chapter-by-chapter comparison.

Despite such widespread acceptance, respect for Pufendorf was not universal. Possibly his sharpest critic was Leibniz, for whom Pufendorf was "a poor jurist and a worse philosopher."⁴ This is worth noting, not merely for the sake of recognizing the existence

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¹C.B. Macpherson's The Political Theory of Possessive Individualism: Hobbes to Locke, Oxford: O.U.P. (1962), can serve as an example here: Grotius receives only a dismissive footnote, but Pufendorf is not mentioned at all, even though this is a work concerned with the seventeenth-century intellectual context.


of a dissenting voice, but because an examination of Leibniz's main criticism of Pufendorf helps to reveal an important and influential feature of Pufendorf's account of natural law. Prior to carrying out this task, however, some remarks on the nature of Pufendorf's enterprise are in order.

Pufendorf's aim is to establish a science of morals. Although such a description of his work may invite misunderstanding, it is necessary to recognize this in order to see some distinctive features of his enterprise. By a science of morals Pufendorf does not mean (as the modern reader may take him to mean) a body of factual knowledge. He means rather a systematic body of knowledge, so that true moral principles may be established by demonstration. A moral science is a body of certain, demonstrable, moral truths. Thus Pufendorf speaks not only of "the certainty of the moral sciences", but also that "demonstration is possible ... in that moral science which treats of the goodness and evil of human actions."

There is, however, an important qualification to this claim, as will be shown below.

In treating moral science as a matter of systematic, demonstrative knowledge, Pufendorf employs the common seventeenth century notion of scientia, or systematic knowledge. This Latin term was translated into English as "science", and can be illustrated by a passage in Hobbes's Leviathan. In a short but important chapter, "Of the Several SUBJECTS of KNOWLEDGE", Hobbes distinguishes knowledge of fact from knowledge of relations. The latter kind of knowledge is called Science, and, he adds, "this is the Knowledge required in a Philosopher; that is to say, of him that pretends to Reasoning." This is the knowledge Pufendorf seeks to provide.

Like many of his contemporaries, Pufendorf was impressed greatly by the method of geometry or mathematics. He associated it with Descartes in particular, and with "the new way of philosophy" in general. He described this method as a matter of "deducing everything from fixed principles and hypotheses through the mathematical mode of demonstration". His attempt to apply this method, however, was stronger in theory than


7Quoted by Krieger (from Pufendorf's Eris Scandica), op.cit., p. 51.
in practice, especially in his later works. In the early work, *Elementorum Jurisprudentiae Universalis*, Pufendorf made a concerted attempt to produce a work as closely based on the mathematical method as the subject matter would permit. Beginning with definitions and "principles" he attempted to deduce conclusions which were necessarily true. For the discipline of law, the principles were of three kinds - axioms derived from metaphysics, or primary philosophy; axioms based on rational intuitions; and "experimental" principles, or observations. From these principles could be derived "propositions", and even, in some cases, a fourth set of judgements which lacked the certainty of the preceding principles. This method is mirrored in the structure of the *Elementorum*: it is divided into two parts, the first of which deals with definitions, the second with rational and experimental principles (axioms and observations). 8

In the later *De Jure Naturae et Gentium*, however, this method is "less explicit and less intrusive", as Krieger puts it. 9 The quasi-mathematical format has disappeared, and, although Pufendorf holds to the position that the moral sciences are indeed sciences, and thus admit of certainty, he allows a significant scope for uncertainty. That moral science is indeed capable of certainty is implicit in the term itself, for science is

that which we seek by means of demonstration, that is, a certain and pure knowledge, in every way and at all times constant and free from error. 10

Moral science manifests this certainty because

that knowledge, which considers what is upright and what base in human actions, the principal portion of which we have undertaken to present, rests entirely upon grounds so secure, that from it can be deduced genuine demonstrations which are capable of producing a solid science. So certainly can its conclusions be derived from distinct principles, that no further ground is left for doubt. 11

There are, however, two main aspects of moral science, of which this passage describes only one - "what is upright and what is base in human actions"; that is, that which

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8This account of Pufendorf's method is based on Krieger's (*op.cit.*, pp. 51-2.)

9*op.cit.*, p. 53.

10*DJNG*, I.ii.3.

11*DJNG*, I.ii.4.
"concerns the rectitude of human actions in their order according to laws". As we have seen, this branch of moral science gives certain knowledge - "no further ground is left for doubt". The second branch of moral science fails to produce this certainty. This latter branch concerns the successful management of one's own actions and those of others, with an eye to the security and welfare primarily of the public.

Pufendorf recognizes that this branch of moral science is a matter of prudence, as defined by Aristotle. He approvingly quotes Aristotle's definition of prudence in the *Nicomachean Ethics* ("a true rational and practical state of mind in the field of human good and evil") and in the same spirit quotes some features of Aristotle's account of the prudent man. He then sums up, using his own terminology, that the prudent man bases his conclusions concerning appropriate behaviour "upon axioms drawn from a keen observation and comparison of the customs of men and the events of human history". Pufendorf clearly accepts that from these axioms the prudent man gains moral knowledge, but because of the general reliability of the axioms, not from any presumed certainty concerning them:

These axioms, however, do not appear to be so firm that infallible demonstrations can be deduced from them.

He lists several factors which contribute to the fallibility of these axioms; for our purposes it is most appropriate to acknowledge one in particular. This factor is the natural limits of human knowledge. It contributes to fallibility in that "the wit of man often goes astray in the application of those axioms, because of unforeseen events which suddenly upset all calculations". For this and other reasons, he concludes:

Therefore, those who are engaged in the conduct of affairs do not endeavour to draw their plans to the nicety of demonstrations, but when they have used the wisest circumspection and a kind of divination, as it were, they leave the

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12 *ibid.*

13 *ibid.*

14 Aristotle, *Nicomachean Ethics*, Bk VI chap.v; quoted *ibid*. (The translation given in the text of *DJNG*, which I have reproduced here, is that of Welldon. Cf. The "List of Classical Authors and Translations", *DJNG*, p. 1369.)
If, as seems likely, Pufendorf means by "a kind of divination" no more than a kind of predicting, or perhaps (more weakly) conjecturing, then his account of conduct based on circumspection plus divination - a process which will "leave the outcome in the hands of fate" - exhibits some marked similarities with Locke's account of the central importance of probability in practical affairs, and therefore likewise of judgement. As for Pufendorf, for Locke one crucial factor is simply the natural limits of our knowledge, and it is for this reason that we must rely on probabilities:

Therefore as God has set some Things in broad day-light; as he has given us some certain Knowledge, though limited to a few Things ... So in the greatest part of our Concernment, he has afforded us only the twilight, as I may so say, of Probability, suitable, I presume, to that State of Mediocrity and Probationership, he has been pleased to place us in here.

Probabilities are themselves calculated by the faculty of Judgement, "which God has given Man to supply the want of clear and certain Knowledge in Cases where that cannot be had".

We have already seen that, like Locke, Pufendorf accepts the existence of demonstrable moral knowledge. This further similarity, that practical knowledge is nevertheless to a significant degree uncertain, being a matter of circumspection and divination (or judgement of probabilities), is for both a qualification on the former claim; there is certainty in practical affairs, but not in all practical affairs. We shall see below further similarities between Locke and Pufendorf - particularly on the nature of natural laws, including the question of innateness - and if, as is not unlikely, Pufendorf's views exercised some influence on the development of Locke's own, then we can begin to see why he (Locke) should have considered De Jure Naturae et Gentium to be "the best book of that kind".

15 DJNG, I.ii.4. He goes on to quote Aristotle again: "It is right, therefore, to pay no less attention to the undemonstrated assertions and opinions of such persons as are experienced or advanced in years or prudent, than to their demonstrations; for their experienced eye gives them the power of correct vision" (E.N. VI.xi, Welldon translation.). Aristotle's view here is rather stronger than Pufendorf's (more like Grotius's defence of the a posteriori method, in fact): Aristotle claims that prudence or experience gives correct vision, whereas Pufendorf holds only that it gives generally reliable, but fallible, conclusions.


17 ibid., IV.xiv.3.
Leibniz's judgement of Pufendorf stands in stark contrast. It can be explained as follows. In a short work, originally written in the form of a letter, entitled "Opinion on the Principles of Pufendorf", he discusses Pufendorf's shorter work, *De Officio Hominis et Civis*. His conclusion is that, despite its author being "a man long renowned for his merit", Pufendorf's work, "although it is not to be despised, has nonetheless need of many corrections in its very principles". In part, Leibniz's objections to Pufendorf can be seen as part of a wider dispute. Pufendorf's account of the foundations of natural law partly reflects the metaphysical opinions of Descartes, and, given Leibniz's opposition to Descartes's views on the relationship between the world and its creator, it is not surprising that Pufendorf's applications of these views should meet similar opposition.

The objection to Pufendorf which it is appropriate to consider here occurs in the final two sections of Leibniz's "Opinion". Leibniz charges that Pufendorf fails to give a defensible account of the efficient cause of the law of nature. He notes that Pufendorf defines law as "a command by which the superior obliges the subject to conform his actions to what the law itself requires". From this it follows that "all law is prescribed by a superior", and thus the state of nature, because it is a state without superiors, is a state governed by no (natural) law. In addition, such an account of law appears to provide no basis for criticising or opposing the actions that superiors in fact prescribe:

Now, then, will he who is invested with the supreme power do nothing against justice if he proceeds tyrannically against his subjects; who arbitrarily despoils his subjects ... who makes war on others without cause?

In Leibniz's eyes, then, Pufendorf's account of law, by basing law and thus justice on the command of a superior, renders the idea of justice empty. Even tyrannical acts, because

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18 G.W. Leibniz, "Opinion on the Principles of Pufendorf" (1706); in Patrick Riley (ed.), *The Political Writings of Leibniz*, op. cit., pp. 64-75.

19 *ibid.*, p. 65.

20 *ibid.*, p. 75.

21 Pufendorf, *De Officio Hominis et Civis*, I.ii.2. This is quoted in *ibid.*, p. 70, and is, apparently, Riley's own translation. Subsequent references to *De Officio* are to the translation of F.G. Moore, New York: O.U.P. (1927).

22 Leibniz, *op.cit.*, p.70.

23 *ibid.*
they proceed from the prescription of a superior, will become lawful or just acts. Neither can Pufendorf solve this problem by calling on the divine superior, because one must pay attention to this fact: that God is praised because he is just. There must be, then, a certain justice - or rather a supreme justice - in God, even though no one is superior to him ... Neither the norm of conduct itself, nor the essence of the just, depends on his free decision, but rather on eternal truths, objects of the divine intellect, which constitute, so to speak, the essence of divinity itself ... And, indeed, justice follows certain rules of equality and of proportion [which are] no less founded in the immutable nature of things, and in the divine ideas, than are the principles of arithmetic and geometry.  

In this passage Leibniz invokes a Platonic picture of the relationship between God and the creation in order to criticise Pufendorf. We have already seen that comparable views were held by Grotius and Suarez, so it comes as no surprise that Leibniz approvingly refers to Grotius’s etiamsi daremus passage:

Grotius justly observed ... that there would be a natural obligation even on the hypothesis - which is impossible - that God does not exist, or if one but left the divine existence out of consideration.  

Leibniz’s opposition to Pufendorf on this issue is thus tied to a standpoint which is very similar to Grotius’s. Given that Pufendorf explicitly rejects Grotius’s position, the proper evaluation of both Pufendorf and his opponents would require a consideration of Pufendorf’s likely reasons for being dissatisfied with the Platonic picture. This issue would, however, take us too far into the metaphysical disputes of the seventeenth century. We shall have to settle with noting that Pufendorf has powerful allies in this dispute. But it is not this difference of viewpoint alone that causes Leibniz to consider Pufendorf such a bad philosopher. For, as we have noted, Pufendorf is here following the lead of Hobbes and Descartes, and Leibniz does not, for the same reason, consider them bad philosophers, even though he is just as strict in his opposition to the same or related

\[ \text{24 ibid., p. 71 (emphasis added).} \]

\[ \text{25 ibid.} \]

\[ \text{26 See DJNG, II.iii.4-6, and also I.ii.6. Pufendorf’s view, in brief, is that there is a kind of necessity pertaining to natural law, but that it is a hypothetical necessity. It is hypothetical in so far as it is based on the free will of God, who need not have created rational and social creatures such as human beings. It is necessary because, having created rational social creatures, the conditions for their well-being become thereby fixed. So, although not eternal, the basis of natural law in divine voluntary actions does not imply that it is not founded in the social nature of human beings. Having allowed this much, however, it may seem odd that Pufendorf should object to passages such as Grotius’s etiamsi daremus passage. As we shall see, his dissatisfaction stems from his conviction that law must compel assent.} \]
doctrines in their work. (By such doctrines, Descartes, he says, “showed how great can be the errors of great men”. Pufendorf’s failings are, for Leibniz, compounded by the fact that not only does he hold to this “great error”, he also fails to hold to it consistently. He falls into a contradiction because on the one hand “he makes all juridical obligations derivative from the command of a superior” (the “great error”), while on the other

he states that in order that one have a superior it is necessary that they [superiors] possess not only the force [necessary] to exercise coercion, but also that they have a just cause to justify their power over my person.*

But this means that Pufendorf is committed to holding that “the justice of the cause is antecedent to this same superior, contrary to what has been asserted”. Leibniz concludes:

Well, then, if the source of the law is the will of a superior and, inversely, a justifying cause of law is necessary in order to have a superior, a circle is created, than which none was ever more manifest.29

In all this, it must be remembered, Leibniz is considering only Pufendorf’s short textbook, De Officio Hominis et Civis, and, as long as only this work is taken into account, his criticisms seem perfectly just. However, if we turn to consider Pufendorf’s remarks on the nature of law in general in De Jure Naturae et Gentium, a different picture emerges. From the latter work we can determine that Leibniz is quite right in pointing out that Pufendorf appeals to two different factors in explaining law - both power and justice - but quite wrong in thinking this commits Pufendorf to hopeless circularity. This is because the latter work shows Pufendorf to hold that law depends for its existence on the conjunction of two different elements. He employs the traditional notions of formal and material elements to describe the two kinds of element which comprise laws.

Laws are, for Pufendorf, moral entities, which means they are a specific kind of attribute given to things, an imposition or addition to physical things or relations by intelligent beings. Moral entities are impositions on the created order of material things.30 (Pufendorf’s account of “moral entities” has thus some marked similarities with Locke’s

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27 Leibniz, op. cit.

28 ibid., p. 73; the reference is to De Officio, I.ii.5.

29 ibid., pp. 73-4.

30 DJNG, I.1-5.
account of “archetype” ideas, especially that sort he calls “mixed modes”. Laws, as moral entities, have a material element, in that they reflect the created order of material things, and a formal element, which is the imposition itself. For this reason Pufendorf requires of law both the will of a superior, which is necessary for the act of imposition (the formal element), and just reasons for its imposition (reflecting the order of the material element). The reasons for imposition must be just reasons because, in considering law, Pufendorf is concerned with explaining “genuine” law, enactments which are just. An imposition has just reasons when it reinforces or protects the beneficial structure of natural states of affairs. The most important set of just laws are of course the natural laws. Unlike positive laws, their formal element lies only in the will of the divine superior. The justice of the material element is shown by the fact that, unlike positive law, natural law has a “necessary agreement ... with its subjects”. Natural law so harmonizes with the natural and social nature of man that the human race can have no wholesome and peaceful social organization without it; in other words, it has a natural benefit and utility from its own continued efficacy for the human race in general.

Pufendorf’s appeal to the twin elements of the will of a superior and the existence of just reasons in his account of law is thus not, pace Leibniz, a confusion or vacillation about the efficient cause of law, but an attempt to specify two different kinds of elements, both of which are necessary for the existence of law. We could perhaps say, for Pufendorf, that the will of a superior, without just reasons, is only coercion; while just reasons, without the will of a superior, are only reasons for law, but not law itself. (They are not compelling.) Leibniz’s judgement of Pufendorf’s account of law, by failing to look beyond the abbreviated account found in De Officio, is rather too hasty. Pufendorf’s account is more complex than his critic recognizes. Some of the main features of this account will be provided in the next section.

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31 Locke, Essay, III.v; especially III.v.12: “the Essences of the Species of mixed Modes ... are the creatures of the Understanding, rather than the works of Nature”. Pufendorf similarly refers to moral entities as “modes” (rather than “substances”) because they “do not exist of themselves”; and, although “some modes flow, as it were, from the very nature of the thing itself”, moral ideas differ in that they “are superadded by intelligent agency to physical things and modes” (DJNG, I.i.3). These matters are discussed in James Tully, A Discourse on Property: John Locke and his Adversaries, Cambridge: C.U.P. (1980), chapter 1, esp. pp. 16-18, 30-32.

32 DJNG, I.vi.18.
II: The Law of Nature

Pufendorf parts company with Grotius on the question of the ultimate foundation of the law of nature. The law of nature is not, he says, independent of the Divine Will. Therefore, neither is it properly to be called “eternal”, since God alone is eternal. It can be called “eternal” only in contrast to the changeability of positive law. In addition, although it is true that natural law can be correctly described, as a “dictate of right reason”, this does not mean that this law can have a “degree of validity” if God is left out of account. This is because if these dictates of reason are to have the force of laws, it is necessary to presuppose the existence of God and His providence, whereby all things are governed, and primarily mankind. God is necessary for law because, as we have seen, for Pufendorf all “law is the bidding of a superior”. Obligation, therefore, exists only where there is a superior. This means that there can be no natural law in the proper sense if God is left out of account: without a superior there is no “degree of validity” because there is no obligation.

Pufendorf’s position depends on denying the existence of any obligation where there is no law. His reason for holding this is, at least in part, because he denies that reason can of itself create obligations. Reason lacks moral power, or moral effect:

if we consider reason, in so far as it is not imbued with an understanding and sense of law, or a moral norm, it might perhaps be able to permit man the faculty of doing something more expeditiously and adroitly than a beast, and to supply sagacity to his natural powers. But that reason should be able to discover any morality in the actions of a man without reference to a law, is as impossible as for a man born blind to judge between colours.

The impotence of reason, its inability to produce moral effects, is most importantly an inability to create obligations, since obligations are moral effects. This is not to say

33 DJNG, I.ii.6.
34 DJNG, II.iii.13,19.
35 DJNG, II.iii.19.
36 DJNG, I.ii.6.
37 ibid.
38 See, for example, DJNG, IV.iv.9.
that reason has no part to play in the formation of obligations: in fact, it has a crucial role. Its importance in Pufendorf's scheme is often concealed by the fact that his notion of a superior is not reducible to mere physical superiority:

An obligation is properly laid on the mind of man by a superior, that is, by one who has both the strength to threaten some evil against those who resist him, and just reasons why he can demand that the liberty of our will be limited at his pleasure.39

Furthermore, because obligation has these two aspects, we can speak of two kinds of obligation (as long as we remember that obligation proper requires both): thus the threat of evil, because it secures bodily compliance, can be called "extrinsic" obligation; while the just reasons, because they "intrinsically affect the conscience of a man", can be called "intrinsic" obligations.40

This view has a great impact on later writers. For example, Francis Hutcheson distinguishes between two senses of obligation, one being "the inward sense or conscience" (intrinsic), the other being "a motive of interest superior to all motives on the other side", which motives "indeed must arise from the laws of a omnipotent being" (extrinsic).41 As the above quotation from Pufendorf indicates, however, Hutcheson is mistaken when he goes on to claim that, among others, Pufendorf is chiefly concerned only with the latter meaning, that is, with extrinsic obligation.42 This analysis of obligation is an important matter, although its importance will not become fully clear until we consider the question of obligation in the moral science of Hutcheson and Hume.

Of similar importance to the later writers is Pufendorf's insistence on the moral inertness of reason. His view is, at bottom, an old one, reflected in Aristotle's view that reason alone cannot move us to action: as he puts it, "intellect itself ... moves nothing".43 Understanding the development this view undergoes in the hands of the "moral sense" theories of eighteenth century Scotland is essential for understanding the major

39 DJNG, I.vi.9.
40 DJNG, I.vi.10.
41 Hutcheson, Short Introduction, p. 121.
42 ibid., pp. 121-2.
motivations of “moral sense” moral science. If we consider the quoted passage from Pufendorf carefully, we see first of all that reason is inert because it is essentially instrumental: reason can “permit man the faculty of doing something more expeditiously and adroitly than a beast”. If reason is purely instrumental, then clearly it cannot move us to action, even though it can show us, in given circumstances, how to act. As we shall see, this instrumental conception of reason is at the bottom of the “moral sense” school’s rejection of reason as the foundation of morals. Secondly, we can see that Pufendorf’s closing analogy almost invites a moral sense resolution of the issue. For reason to “discover any morality”, he says, “is as impossible as for a man born blind to judge between colours”. As in the physical world, then, where reason is blind without the initial input provided by the physical senses, so in the moral world reason is blind until enlightened by the activity of a prior appropriate form of sensing - moral sensing. Thus we see how easily the doctrine of moral sense can be grafted onto Pufendorf’s acceptance of the inertness of reason.

Pufendorf’s second departure from Grotius concerns the location of the laws of nature. Grotius treats the original unwritten laws of nature as innate ideas, but Pufendorf emphatically does not - even though he is prepared to accept the apparently innatist terminology which Grotius and many others had employed. (The law is, he allows, “written in the hearts” of men. In both doctrine and language he is thus a precursor of Locke, whose Essay has usually been regarded as the locus classicus of the attack on innate ideas.) If we consider Pufendorf’s rejection of innate ideas as the fundamental elements of natural law, we shall gain some important insights into the intimate connections between nature, reason, and history in his account of natural law.

For Pufendorf, natural law is not innate:

The common saying that that law is known by nature, should not be understood ... as though actual and distinct propositions concerning things to be done or to be avoided were inherent in men’s minds at the hour of their birth. But it means in part that the law can be investigated by the light of reason, in part that at least the common and important provisions of the natural law are so plain and clear that they at once find assent, and grow up in our minds, so that they can never again be destroyed, no matter how the impious man, in order to still the twinges of conscience, may endeavour to blot out the consequences of those precepts. For this reason in Scripture too the law is said to be “written in the hearts” of men. Hence, since we are imbued from childhood with a consciousness of those maxims, in accordance with our social training, and cannot remember the time when we first imbibed them, we think of this knowledge exactly as if we

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44 *De Officio*, I.iii.12; cf. *DJNG*, II.iii.13.
had had it already at birth. Everyone has the same experience with his mother tongue.\textsuperscript{45}

Natural law is thus that law which we inevitably come to accept in our social training. Social trainings vary, of course, so it is not any or every principle we come to accept in this manner that is a part of natural law. This would empty the notion of natural law of one of its characteristic elements: the denial that law is simply conventional, being founded in human nature. Only those precepts which are \textit{inevitably} acquired through social training are elements of natural law; such precepts are inevitably acquired because social life requires them. The necessities of social life found the principles of natural law. This law itself thus

so harmonizes with the natural and social nature of man that the human race can have no wholesome and peaceful social organization without it; in other words, it has a natural benefit and utility from its continued efficacy for the human race in general.\textsuperscript{46}

Natural law reflects the fact of human sociableness. Its efficacy for the human race is its necessity for any rationally organized social life.

It is important to show the connections between the idea of natural law as that law which is necessary for social organization and social harmony, and natural law as a “dictate of right reason”. Obviously, a law necessary for social harmony, but which nonetheless could be neither discovered nor achieved even if known, would be a law inapplicable to the affairs of human beings. The claim that the law of nature is a dictate of right reason is a denial of such possibilities. The law of nature does not require divine revelation to become known or effective in human affairs. Rather, it

\begin{quote}
can be discovered and understood from the mental endowment peculiar to man, and a consideration of human nature in general.\textsuperscript{47}
\end{quote}

Natural law “can be investigated by the light of reason”; and at least its “common and

\textsuperscript{45}\textit{De Officio}, I.iii.12. Cf. \textit{DJNG}, II.iii.13: “we do not ... feel obliged to maintain that the general principles of the law of nature came into and are imprinted upon the minds of men at their birth as distinct and clear rules which can be formulated by man without further investigation or thought as soon as he acquires the power of speech”. Note also Pufendorf’s use of language as an example of something natural but not innate. Hume, in what could be called his defence of the “naturalness” of the artificial virtues in \textit{A Letter from a Gentleman to his friend in Edinburgh}, also employs the example of language. Language, he says, is artificial (i.e., a human artifact) but not unnatural. Hume, \textit{Letter}, ed. E. C. Mossner and J.V. Price, Edinburgh: Edinburgh University Press (1967), p.51.

\textsuperscript{46}\textit{DJNG}, I.vi.18.

\textsuperscript{47}\textit{ibid.}
important provisions ... are so plain and clear that they at once find assent, and grow up in our minds, so that they can never again be destroyed". The most common and important provisions of the natural law are thus so widely recognized, and so firmly acknowledged, that they provide the basis for social interactions between human beings.

But what of the less common or important provisions of natural law? On this matter Pufendorf indicates that the requirement that natural law be a dictate of right (or "sound") reason means that the provisions of natural law need to be discovered by the more exacting process of rational inquiry. These provisions, not being immediately obvious to all (they do not "at once find assent") have to be discovered by reflection. This is achieved by rational inquiry which reflects a sensitivity to states of affairs in the world:

the dictates of sound reason are true principles that are in accordance with the properly observed and examined nature of things, and are deduced by logical sequence from prime and true principles.

Natural laws thus become established in human affairs (become recognized as natural law) through rational inquiry. Various principles might be recommended as being principles of natural law, but all such candidate-principles must be subjected to rational examination. For any such candidate-principle, its advocate's "appeal to reason" - that is, appeal to recognition by others as rational - "will be vain if he [the advocate] is unable to prove his assertions from principles which are legitimate and agreeable with the nature of things".

Pufendorf recognizes that the "nature of things" includes not only the nature of human beings as such, but also relevant physical and social facts:

There seems to us no more fitting and direct way to learn the law of nature than through careful consideration of the nature, condition, and desires of man himself, although in such a consideration other things should necessarily be observed which lie outside man himself, and especially such things as work for his advantage or disadvantage.

The natural law is a dictate of right reason in the sense that it is known rationally, that is, through a rational response to the specific circumstances of human social life. Some of

48 De Officio, I.iii.12.
49 DJNG, II.iii.13.
50 ibid.
51 DJNG, II.iii.14.
these laws are "so plain and clear that they at once find assent", but others are less obvious, and can only be recognized as such through rational enquiry. Thus natural law can be characterised as having a core which is immediately obvious to all, but as also having further layers which are worked out in the course of human history, as the particular exigencies of different human situations come to bear. In this sense, Pufendorf's theory of natural law reflects a historical conception of human society. This will be illustrated when we consider his account of property, with its account of the genesis of more extensive property relations from a limited starting point in the justified use of things for one's self-preservation.

Our immediate concern, however, is to spell out some of the basic features of the natural law. We have seen above that Pufendorf has not hesitated to stress the utility of natural law: "it has a natural benefit and utility from its continued efficacy for the human race in general", and a man learns the law of nature by discovering "such things as work for his advantage or disadvantage". This does not mean, however, that the law of nature is founded in utility (unless we very carefully restrict its meaning). It is more accurate to say, instead, that, as it is for Grotius, the law of nature is expedient even though not founded in expediency. This is because it is founded in the social nature of human beings, in their need for an organized social existence; and at bottom in the exigencies of their self-preservation. Utility is therefore a fact about natural law, but not its ultimate foundation. In the following passage, perhaps his most emphatic treatment of the matter, he leaves no room for doubt concerning the disutility of ignoring natural law:

not justice but injustice is supreme folly, which is of no general or lasting advantage even though a man's evil conduct may seem to him to succeed for a time.

Such temporary successes are ultimately bound to fail because they are not built firmly in sociability; they do not see that

all strength, indeed, comes from union with other men whom you may by no means hold together by your own strength alone ... the safety of every man, however powerful he be, would be uncertain so long as any one thinks it to be to his advantage for him to die.52

The utility of natural law lies in its accurate reflection of the fundamental elements of human sociability. The law is not itself reducible to utility: Pufendorf is quite at one with Grotius on this point. His remarks have a similar flavour to Grotius's, although they are a little more sympathetic to the purveyors of the contrary view:

52 DJNG, II.iii.10.
differences between the laws and customs of different peoples have undoubtedly given some men excuse for alleging that there is no such thing as natural law, and that all law has arisen from the convenience of individual states, and cannot be measured in any other way.\textsuperscript{53}

As exemplars of this viewpoint, he quotes the passage from Horace's *Satires* quoted by Grotius, and, also like Grotius, acknowledges Carneades as a famous advocate of this opposed point of view. He is more sympathetic than Grotius, however, because he implicitly acknowledges that this viewpoint can be the fruit not merely of evil motives, but of conceptual confusion. For there is a sense in which utility is not unjustly regarded as the foundation of natural law. The whole issue has been confused by the advocates of mere expediency, in that they "have imposed upon the less informed by employing the ambiguous word 'utility', which has a double use, as it is considered from different points of view". The two uses are as follows:

One kind is what appears to be useful to the depraved judgement of disordered affections, which centre upon advantages which are for the most part immediate and fleeting, and are little concerned with the future. The other kind is judged to be useful by sound reason which not only examines what lies before its very feet, but also weighs the future consequences.\textsuperscript{54}

The first kind can be called mere *apparent* (or short-run) utility, since the appearance of utility is rather misleading, the utility gained being an advantage which is outweighed by attendant disadvantages which emerge in the longer term. The latter kind, because it is "judged to be useful by sound reason" can be called *rational* (or *genuine*) utility, and since the core of the natural law is composed of such rational utilities (in dictates of sound reason which show the necessary advantages or disadvantages of various states of affairs), it is possible to say that natural law is based in rational utility. Thus it is not a mere accident that:

actions in conformity with the law of nature have ... this characteristic, that not only are they reputable, that is, they tend to maintain and increase a man's standing, reputation, and position, but also they are useful, that is, they procure some advantage and reward for a man, and contribute to his happiness.\textsuperscript{55}

So, for Pufendorf, there is at bottom no conflict between the demands of sociability and of a rational utility. When later writers, then, come increasingly to talk of utility - most

\textsuperscript{53}ibid.

\textsuperscript{54}ibid.

\textsuperscript{55}ibid.
conspicuously, writers such as Locke, Hutcheson and Hume - it is important not to jump to the conclusion that a new approach has emerged, that the important position occupied by considerations of utility indicates the emergence of a new, more calculative rationality in human life. Shifts in terminology are not per se shifts in thought: whether or not a new picture of human society emerges with the increased prominence of judgements of utility depends on the notion of utility being employed, and its implications for, presuppositions about, the nature of the social life proper (appropriate) to human beings.

What is this life? Like Grotius, Pufendorf acknowledges the primacy of individual self-preservation, but his conception of the social life proper to human beings is less individualistic than that of his predecessor. Concerning the former, Pufendorf is at one with both Grotius and the Stoic tradition in holding that nothing is more natural than the desire of self-preservation. He puts the matter as follows:

man has this in common with all beings which are conscious of their own existence, that he has the greatest love for himself, tries to protect himself by every possible means, and tries to secure what he thinks will benefit him, and to avoid what may in his opinion injure him.\(^5\)

Although he does not accept Grotius's defence of the a posteriori method as a legitimate means of establishing natural law,\(^5\) Pufendorf does not hesitate to marshall support from the best of ancient authorities on this point. He refers to Cicero, Marcus Aurelius, Seneca, and yet others in support of the naturalness of the desire of self-preservation. Of course, no appeal to ancient authorities is necessary to show the instinctiveness of the desire of self-preservation, but neither is the discovery of such an instinct of crucial value in settling whether or not this desire is natural in the requisite sense - that is, whether or not it is vindicated by the judgement of sound reason. Pufendorf is aware of this, and offers three arguments for the primacy of self-preservation.

The first could easily be misunderstood. At first blush it looks like nothing more than a reiteration of the original assertion. The passage in question runs as follows:

It should be observed ... that in investigating the condition of man we have

\(^5\)DJNG, II.iii.14.

\(^5\)DJNG, II.iii.7: After quoting Cicero and Aristotle in support of the a posteriori view - which holds that agreement can provide the key to the nature of natural law - he objects that this view “does not show at all why the law of nature was so constituted”, and it is “also in very truth a slippery statement, involving numberless obscurities”. The situation is not helped by limiting the measure of agreement to the best of men (as does Grotius), because there will be no basis for agreeing who are these best of men: “For what people, endowed with enough judgement to preserve its existence, will be willing to acknowledge that it is barbarous?”
assigned the first place to self-love, not because one should under all circumstances prefer only himself before all others or measure everything by his own advantage, distinguishing this from the interests of others, and setting it forth as his highest goal, but because man is so framed that he thinks of his own advantage before the welfare of others for the reason that it is his nature to think of his own life before the life of others.58

It might seem that Pufendorf is here saying that self-love comes first because, well, it just does. But to say this would be hopelessly to confuse right and fact,59 so it is worth asking whether a more charitable interpretation is possible. I think it is. Behind this passage I suggest we should see the Stoic maxim to live “according to nature”, a maxim which means not simply to do what we like, but to understand properly the nature of ourselves and our environment, so that our choices do not attempt the impossible by denying what we are, and thereby do violence to ourselves. (Grotius, it should be remembered, appeals to this principle when he says that acts contrary to natural law cause violence to ourselves.60) Natural law is the law of action for a being with a determinate nature, and as such must be attuned to this nature. It is not a law which regards the actions of some sort of “purely rational” being.61 On this interpretation, Pufendorf’s point is, then, that self-love must be accorded a central place in any workable ethical theory regarding human beings, or indeed beings like us. For this reason it is central to natural law.

Pufendorf’s second reason in support of the primacy of self-love is more readily understood. It is that recognizing the primacy of self-love reflects the undeniable good of being a responsible being, that is, of accepting responsibility for oneself:

it is no one’s business so much as my own to look out for myself. For although

58 DJNG, II.iii.14.

59 Cf. Rousseau’s strictures on Grotius for allegedly deriving right from fact, as discussed in chapter one.

60 DJBP, Prol., 39.

61 Natural law theories are thus, in an important philosophical sense, “pre-modern” moral theories in that they are wedded to a particular moral psychology, in contrast to the characteristically modern (post-Kantian) conception of moral agents as “noumenal choosers”. On this issue see in particular the writings of Alasdair MacIntyre, especially “How Moral Agents Became Ghosts, or how the history of ethics diverged from that of the philosophy of mind”, Synthese 53 (1982), pp. 295-312. See also, for a characteristic remark, his essay “Hume on Is and Ought”, reprinted in Against the Self-Images of the Age, New York: Schocken Books (1971), p. 124, where he says: “the virtue of Hume’s ethics, like that of Aristotle and unlike that of Kant, is that it seeks to preserve morality as something psychologically intelligible”. Whether or not MacIntyre’s account is fair, it allows us to stress that this also is something Pufendorf seeks (or, perhaps, takes for granted). It is also worth noting that the binding role played by moral psychology in theories such as Pufendorf’s is neglected by many commentators.
we hold before ourselves as our goal the common good, still, since I am also a
part of society for the preservation of which some care is due, surely there is no
one on whom the clear and special care of myself can more fittingly fall than
upon my own self. 

If we are to accept responsibility for ourselves, of course, one of the central tasks of social
organization will be to make it possible for us to act so as to preserve ourselves and our
vital interests. And this in turn requires that we have a clear understanding of what
constitutes ourselves and our vital interests. That is, there must be a notion of what is
“one's own”: of the suum and of its legitimate (necessary or rationally useful) extensions.
We shall return to this matter below: at this stage it is sufficient to note that Pufendorf's
commitment to the primacy of self-love shows that his notion of human sociableness is
(negatively) like Grotius's in that it is not a notion of absorption into a social whole.
Human sociability requires, in fact, that we recognize and respect our separateness as
individuals. (It is important to point out, however, that it requires us to recognize more
than this alone. Unlike some modern theories, it does not mean that “There are only
individual people, different individual people, with their own individual lives”.

This fact can serve to introduce Pufendorf's third reason for accepting the primacy of
self-love: far from being in conflict with sociability, the primacy of self-love shows
sociability to be necessary. It does so in this way: self-love is vital because of the very
fragility of human existence, and this fragility itself makes social life necessary. As Hume
would later put it, “society becomes advantageous” because of the “additional force,
ability, and security” it provides for individuals. Pufendorf puts it this way:

It is quite clear that man is an animal extremely desirous of his own
preservation, in himself exposed to want, unable to exist without the help of his
fellow creatures, fitted in a remarkable way to contribute to the common good,
and yet at all times malicious, petulant, and easily irritated, as well as quick and
powerful to do injury. For such an animal to live and enjoy the good things that
in this world attend his condition, it is necessary that he be sociable, that is, be
willing to join himself with others like him, and conduct himself towards them in
such a way that, far from having any cause to do him harm, they may feel that
there is reason to preserve and increase his good fortune.

62 DJNG, II.iii.14.

63 As Robert Nozick puts it. See Anarchy, State, and Utopia, New York: Basic Books (1974),
p.33.)

64 Hume, Treatise, p.485.

65 DJNG, II.iii.15.
Pufendorf’s account of sociability is thus distinctively less individualistic than Grotius’s. He does not, unlike Grotius, restrict sociability to respect for “the rights of another”, to the safeguarding for each individual of “the possession of what belongs to him.” Rather, he insists that

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

This stronger account of sociability probably reflects Pufendorf’s desire to debar Hobbesian conclusions. He argues against the “Hobbesian” position that “nature has ordained discord and not society between men”. In outline, his strategy is to argue that the “natural state of men” is not a state of war, since the desire for self-preservation implies a limit on natural liberty. He denies that “men have both the ability and the desire to harm one another.” But how does the desire for self-preservation imply a limit on natural liberty? It does not do so alone, but in conjunction with the further fact that “a state of nature and its rule presupposes a reason in man”; and reason, having in the state of nature “a common ... an abiding, and uniform standard of judgement” is able to show men “the nature of things, which offers a free and distinct service in pointing out general rules for living, and the law of nature”, especially “that peace to which his reason urges him.” Therefore the “Hobbesian” account of the state of nature is inadequate, because it is not the account of a state natural to a rational being: it “was not worthy of man or true to his life, being more suitable to the life of beasts, to the nature of which

66 DJBP, I.II.i.5.

67 DJNG, II.iii.15.

68 DJNG, II.iii.16. This is a quotation from a contemporary Hobbes critic, and represents a view which Pufendorf takes to be a distortion of Hobbes’s views as expressed in De Cive, i.2. Pufendorf wants to debar the view attributed to Hobbes; whether or not it is an accurate interpretation of Hobbes is another matter.

69 DJNG, II.ii.3.

70 DJNG, II.ii.6.

71 DJNG, II.ii.3.

72 DJNG, II.ii.9.
both reason and speech are foreign.\textsuperscript{73}

In order to show what sociability does require, Pufendorf formulates his own version of the “fundamental law of nature”:

it will be a fundamental law of nature, that ‘Everyman, so far as in him lies, should cultivate and preserve toward others a sociable attitude, which is peaceful and agreeable at all times to the nature and end of the human race.’\textsuperscript{74}

The requirement of this fundamental law can be determined by considering two matters: Pufendorf’s remarks on the general duties of humanity, and his discussion of Cicero on the nature of sociability. The general duties of humanity are those duties which are the expression of the sociable attitude. They are summarised by the stipulation that “a man should advance the interests of another man”. Pufendorf spells this out as follows:

A man has not paid his debt to the sociable attitude if he has not thrust me from him by some deed of malevolence or ingratitude, but some benefit should be done me, so that I may be glad that there are also others of my nature to dwell on this earth.\textsuperscript{75}

It is not sufficient, therefore, if we live peacefully in the privative sense of not injuring others, but otherwise looking out for ourselves. For Pufendorf the general duty of humanity requires an actively helpful policy to others. He maintains this strong position in his short textbook, where he says that the duties of human beings require “that any man promote the advantage of another, so far as he conveniently can”.\textsuperscript{76}

Pufendorf’s strong view on the requirements of sociability is echoed by later philosophers. Locke, often considered a philosopher of a strongly individualist stamp, advocates a version of it in the \textit{Second Treatise}, where he says the following:

Every one as he is bound to preserve himself, and not to quit his station wilfully; 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.\textsuperscript{77}

This is a most significant passage, since it shows that, for Locke as for Pufendorf, the

\textsuperscript{73} \textit{DJNG}, II.ii.4.

\textsuperscript{74} \textit{DJNG}, II.iii.15.

\textsuperscript{75} \textit{DJNG}, III.iii.1.

\textsuperscript{76} \textit{De Officio}, I.viii.1.

\textsuperscript{77} Locke, \textit{Two Treatises}, II.6.
requirements of sociability and of self-preservation are intimately linked. (The account of Locke as a "possessive individualist" overlooks this fact.) Hutcheson's views, as we shall see below, include an even stronger notion of sociability, in that the general good is not merely on an equal footing with the good of individuals, but occupies a pre-eminent position. His basic specification of the general duties of humanity is, however, directly comparable to Pufendorf's: since "we are formed by nature for the service of each other, and not each one merely for himself", therefore "mankind, as a system, seems to have rights upon each individual, to demand of him such conduct as is necessary for the general good."  

Pufendorf is able to find support for his position in a passage from Seneca:

> We are members of a great body. Nature has made us all akin; we are formed of the same elements and produced to the same ends. She has implanted in our breasts mutual affection, and made us apt for social intercourse. She has constituted justice and equity.

The nature of our social interdependence is brought out by Seneca with an architectural metaphor. He says this:

> Let us consider that we are born for the common good. Our human society is altogether like a vaulted stone roof, which would fall were it not held up by the natural thrust of stone against stone.

This metaphor has a famous subsequent employment. In order to catch the same feature, the interdependence of acts of justice, Hume also uses the metaphor of the vault in the 2nd Enquiry.

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78 There is a great deal of literature on this topic, spawned by C B Macpherson's The Political Theory of Possessive Individualism: Hobbes to Locke, Oxford: O.U.P. (1972). This is not the place to document this controversy; the main strands have been summarised in David Miller, "The Macpherson version", Political Studies, vol. 30 (1982), pp. 120-127.


80 Seneca, Epistles, xcv; quoted DJNG, III.iii.1.

81 ibid.

82 Hume, Enquiries, p. 305.
that each of us "may be glad that there are also others of our nature to dwell on this earth".

Pufendorf's observations on some Ciceronian remarks on sociableness help to clarify his position; but they also, I suggest, indicate a possible missed opportunity. The passages in question are concerned with a feature of human nature which for Cicero is a powerful indicator of human sociableness, but which Pufendorf regards as "less important", as "only among the secondary reasons of sociableness". Pufendorf accepts "the fact that nothing is sadder for man than continued solitude", but he does not accept Cicero's employment of this fact as evidence for human sociability. Cicero puts this view in a number of places. In *De Finibus* he observes that "no one would like to pass his life in solitude, not even if surrounded with an infinite abundance of pleasures." The view is repeated, more elaborately, in *De Officiis*. He notes there that even "every man of excellent genius", committed to the pursuit of "knowledge and learning",

would fly from solitude and look for a companion in his pursuits; and would desire sometimes to teach and sometimes to learn, sometimes to listen and sometimes to speak.5

From our rejection of the solitary life, he concludes, "it is easily perceived that we are born for communion and fellowship with man, and for natural association." For Pufendorf, however, this line of thought is not particularly satisfactory because human sociableness is an attitude towards others of a more purely practical kind: we call man a sociable creature because men are so constituted as to render mutual help more than any other creature"; the sociable attitude engenders "a mutual obligation". Sociableness is thus not significantly connected to the pleasure we gain from company, nor the pain of its extended absence. Pufendorf's view here is plausible enough, but it is nevertheless, I think, a missed opportunity. We saw above that the rational necessity of self-preservation was not grounded independently of the instinctive tendency to the same

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83 *DJNG*, II.iii.15.

84 Cicero, *De Finibus*, III.xx; quoted *ibid*.

85 Cicero, *De Officiis*, I.xliv; quoted *ibid*.

86 *De Finibus*, op. cit.; quoted *ibid*.

87 *DJNG*, II.iii.16.

88 *DJNG*, II.iii.15.
end. The mutual obligation of sociability could have been treated in like manner, by arguing that our natural pleasure in company, and pain at its extended absence, was a crucial aspect of our natural sociability by comprising a powerful natural motive\(^9\) to that end; a motive which at least helps to explain why "men are so constituted as to render mutual help more than any other creature." One way of developing such an account of the motivation to sociability would be by a psychology of action which accorded a central place to mechanisms of sympathy in human behaviour. This is, of course, the general approach taken by Hume and Smith; an approach which can thus be seen to be readily developed from the stronger view of sociability Pufendorf advances.

We are now in a position to consider how this account of sociability affects Pufendorf's view of the individual, and of the relation between the individual and society. This can be dealt with rather briefly, because one important element in this view will be considered in more detail below. We have already seen that, despite his stronger views on sociability, Pufendorf nonetheless insists on the primacy of self-love, in particular its practical aspect of self-preservation. In doing so he is following not merely Grotius, but a major strand of natural law thinking that stretches back to Aristotle and the Stoics. He has three reasons for insisting on this primacy: firstly, it is so central to instinctive human nature that no ethical theory can deny it and remain workable; secondly, it reflects the moral good of responsible independence; and thirdly, self-love does not conflict with sociability, but depends on the very foundation that shows sociability to be necessary. This foundation is the fragility of human existence.\(^{90}\) The primacy of self-love is thus an ethical principle of great importance, and is expressed in the notion of an inviolable realm which surrounds the individual and whatever is (or becomes) necessary for its continued existence. This realm is the realm of "one's own", the suum.

\(^{89}\) By "motive" I mean a motivating force. The relationship between motivations and obligations is a central part of the "Newtonian" theory of moral action begun by Locke, and further developed by Hume.

\(^{90}\) Pufendorf occasionally waxes quite lyrical about this fragility. He says, for example, "if you conceive a man who even in adult age is left alone in this world, and without any of the comforts and supports with which the ingenuity of men has made life more civilized and less hard, you will see an animal, naked, dumb, needy, driving away his hunger as best he can by roots and herbs, his thirst by any water he chances upon, the severity of the weather by caves, an animal exposed to the wild beasts, and alarmed when he meets any of them". The "natural state" is to be distinguished from community life in that "in the one there is the rule of passion, war, fear, poverty, ugliness, solitude, barbarism, ignorance, savagery; in the other the rule of reason, peace, security, riches, beauty, society, refinement, knowledge, good will" (De Officio, II.i.9). In these more colourful passages, Pufendorf seems to have forgotten that, against Hobbes, he urges that "the natural state of men ... is not one of war, but of peace", even if "this natural peace is but a weak and untrustworthy thing, and therefore ... a poor custodian of man's safety", since even in the natural state reason can determine general laws for living, pre-eminent among which is "that peace to which his reason urges him" (DJNG, II.ii.9,12).
Pufendorf does not provide a concise account of the nature and limits of "one's own", but we can see that his position is very similar to Grotius's. Thus he holds that not only do we naturally seek our own preservation, but we are legitimately entitled to resist threats to it, even when these spring from the actions of other persons (who are likewise justified in preserving themselves). Thus self-defence, even violent self-defence, is lawful, provided of course that the situation is one where "we cannot in any other way preserve our safety because of the aggression of another." Where other courses are open, of course, injury cannot be inflicted. In contrast to Grotius, he allows no right to punish in the natural state, but this is because "human punishment, in the proper sense of the word ... cannot fall upon those in natural liberty". This follows from his view that law requires the will of a superior: punishment requires legal sovereignty, but legal sovereignty does not exist in the natural state. Therefore, despite the absence of punishment in the natural state, violent retaliation against an injuring party is perfectly justified:

in such cases we cannot only proceed to seize the other's arms, raze or occupy his fortified places, keep him in perpetual bonds, and the like, but even put him to death, if we are satisfied that his freedom will only mean another threat against our existence, and that we can find no better way to avoid him. This procedure obviously achieves whatever punishment by a legitimate superior achieves; in the natural state this procedure is war. Pufendorf's denial of natural punishment is thus not a denial of the legitimacy of violent exaction of penalties or reparations, but a consequence of his theory of law. In both these cases - self-defence and exaction of penalties - the moral importance of the suum is shown by the fact that force is justified in preserving what is one's own.

The necessity of extending one's own to include things necessary for one's preservation means that such extensions are also necessarily legitimate, so, in the natural state, even though there is no property, there is nevertheless "indefinite" or "potential" property. This is a "right ... to things" which "has the same effect as dominion now has, that, namely, of using things at one's own pleasure". In another place he puts the same point:

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91 DJNG, II.v.1.

92 DJNG, VIII.iii.2.

93 ibid.

94 DJNG, IV.iv.3.
when at the creation all things were in common, man had the right to apply to his own ends those things which were freely offered for the use of all.\textsuperscript{95}

These remarks on the original power to use things “at the creation” are most important; they show some of the powers contained within the suum. So, if we are to come to an accurate understanding of Pufendorf’s conception of the suum (and of its relation to such other important concepts as rights, duties, and sociability), it is necessary to consider these quoted passages rather carefully, and to clarify them in the light of other passages from *De Jure Naturae et Gentium*.

In the first place, Pufendorf describes the legitimacy of using things as a right. This is best understood as a simplification on his part. This is because the notion of a right is a legal notion: he describes “right” as meaning either law, including “a body or system of homogeneous laws”, or (subjectively) as

the moral quality by which we legally either command persons, or possess things, or by virtue of which something is owed us ... Right ... directly and clearly indicates that a thing has been lawfully acquired and is lawfully now retained.\textsuperscript{96}

Being a matter of lawfulness, right, like law itself, requires the will of a superior. The natural state, however, being a state of natural liberty, is a state without superiors. How then can there be rights in this state? Pufendorf’s answer mirrors his treatment of property itself. Just as the original property in things in the natural state is only “potential” property, so the original right to use things in that state is no more than a “potential” or “indefinite” right:

God allowed man to turn the earth, its products, and its creatures, to his own use and convenience, that is, he gave men an indefinite right to them.\textsuperscript{97}

An “indefinite” right becomes a right in the fullest sense only through mutual consent or agreement:

assuming an original equal faculty of men over things, it is impossible to conceive how the mere corporal act of one person can prejudice the faculty of

\\textsuperscript{95} DJNG, I.i.16.

\textsuperscript{96} DJNG, I.i.20.

\textsuperscript{97} DJNG, IV.iv.4 (emphasis added). Cf. III.v.3: “A right to all things, precious to every human deed, must be understood not exclusively, but only indefinitely, that is, not that one man may claim everything for himself to the exclusion of the rest of mankind, but that nature does not define what particular things belong to one man, and what to another before they agree among themselves on their division and allocation”.


others, unless their consent is given, that is, unless [a] pact intervenes.\textsuperscript{98}

A pact is necessary because, without it, human actions do not have a moral effect, that is, they do not create obligations on the part of others.\textsuperscript{99} Obligations bind the will, and, where there is no superior, the will can be bound only by \textit{consenting} to be, because consent is a form of \textit{voluntary} submission of the will.\textsuperscript{100} Therefore rights, including rights to use things, arise through agreements wherever there is no established sovereign, or where the sovereign’s edicts do not extend. Pufendorf is at pains to point out, however, that agreements need not be express agreements: for example, property, like other rights, “presupposes absolutely an act of man and an agreement, whether tacit or express.”\textsuperscript{101} (In tacit agreements, consent is “inferred”: it “is not shown by the signs which men regularly make use of in their transactions, but ... is clearly to be gathered from the nature of the business and other circumstances.” An example of this is the case of a foreigner entering a country friendly to foreign visitors. The foreigner, provided he understands what the laws of the country are, by entering thereby shows “his willingness to conduct himself by the laws of that state.”\textsuperscript{102}) The position of human beings in the natural state, with respect to the created order, can, therefore, be summed up as follows:

man has by nature a faculty to take for his use all inanimate objects and animals. But that faculty, thus exactly defined, cannot properly be called a right, both because such things are under no obligation to present themselves for man’s use, and because, by virtue of the natural equality of all men, one man cannot rightfully exclude the rest from such things, unless their consent, expressed or presumed, has let him have them as his very own. Only when this has been done, can he say that he has a proper right to the thing.\textsuperscript{103}

\textsuperscript{98}\textit{DJNG}, IV.iv.5.
\textsuperscript{99}See \textit{DJNG}, III.v.3: “not every natural faculty to do something is properly a right, but only that which concerns some moral effect, in the case of those who have the same nature as I. Thus ... when a man takes inanimate objects or animals for his use, he exercises only a purely natural faculty, if it is considered simply with regard to the objects and animals which he uses, without respect to other men. But this faculty takes on the nature of a real right, at the moment when this moral effect is produced in the rest of mankind, that other men may not hinder him, or compete with him, against his will, in using such objects or animals”.
\textsuperscript{101}\textit{DJNG}, IV.iv.4.
\textsuperscript{102}\textit{DJNG}, III.vii.2.
\textsuperscript{103}\textit{DJNG}, III.v.3.
The original suum, then, includes no rights. It includes a natural faculty or power to take and use things, especially those things needed for preservation, but rights proper arise only through agreements between human beings. Pufendorf draws some important conclusions from this doctrine. Firstly, Hobbes is shown to be mistaken in holding that there is an original right to all things. Secondly, because rights arise as a result of agreements, and such agreements typically bind the other party to corresponding obligations, rights and duties are commonly (but not necessarily) correlative. The existence of an obligation entails the existence of another's right, but, although the existence of a right typically corresponds to another's obligation, this is not always the case. From a modern perspective, it is also worth noting that on this account rights function only weakly as a limit on, or bar to, specific kinds of social organization. Pufendorf's position is sharply different from modern libertarians like Nozick, and also different, though much less sharply so, from Locke. This latter difference will show up most clearly in the case of slavery.

On the question of rights, some matters need pointing out. The first is that, despite being themselves a social creation, Pufendorf's rights are nevertheless natural rights in an important sense. (The different senses of "natural" will be discussed in the next section.) They are natural in just the sense that the law of nature is itself natural: that is, they are either necessary to peaceful social existence, or possess a rational utility to that end. Their generation through agreements is no bar to such naturalness, for not only does the law of nature approve of all agreements "which have been introduced about things by men, provided they involve no contradiction or do not overturn society", it in fact requires agreements (tacit or express). With respect to the role of agreements in the development of property, for example, Pufendorf says that:

natural law clearly advised that men should by convention introduce the assignment of such things to individuals, according as it might be of advantage

104See DJNG, III.v.2-3, where Pufendorf discusses Hobbes's views in De Cive.

105DJNG, III.v.1: "when an obligation arises for one person, there springs up in another its corresponding right ... Although the opposite of the case does not always hold: that is, when one man has a right, there is at once an obligation in another; for instance, sovereigns have a right to exact punishment, but the criminal is under no obligation to undergo it". He goes on to say that correlativity can be achieved if we understand "right" in a certain way; he does not, however, argue that we need, or should prefer, to so understand the term.

106Nozick opens Anarchy, State, and Utopia with a strong statement of the natural rights of individuals, and then goes on to pose the question whether these rights preclude the possibility of a just political authority. See p.ix: "How much room do individual rights leave for the state?"
The right to property is natural, then, because it arises necessarily in human social life. The great advantages it provides in the peaceful management of that life make its introduction - that is, the agreement to introduce it - unavoidable.

By showing the naturalness of the right of property, however, Pufendorf does not mean either to justify unlimited private property, or to deny the rectitude of common possessions. He clearly believes that some things must become "proper" to individuals, a view which reflects his insistence that self-preservation is indeed rightly understood as self-preservation. Beyond this, however, he requires only that distinctions of possessions in particular societies must be clearly settled. The precise nature and extent of property rights is settled differently in different societies:

it was left to men themselves, to determine by the forethought of sane reason what measures must be taken to prevent discord from arising among mankind from the use of that right ... the manner, intensity, and extent of this power [over things] were left to the judgement and disposition of men; whether, in other words, they would confine it within certain limits, or within none at all, and whether they wanted every man to have a right to everything, or only to a certain and fixed part of things, or to be assigned his definite portion with which he should rest content and claim no right to anything else.108

Recognizing a natural right to property, or, in like manner, any other right which is natural in this sense, does not prescribe a particular form of society or polity. It does prescribe some necessary conditions, but these are rather weak. Slavery is a case in point. Pufendorf's doctrine of natural right does not remove the possibility of slavery - it only places limitations on how slavery can legitimately arise, and the amount of power legitimately exercised over a slave. The former of these limitations presupposes that there are no "slaves by nature", as the Greeks had held, because slavery arises only through "the intervention of some act of men".109 In this sense, slavery is not a natural but an adventitious state.110 The view "handed down from the Greeks", that there are "slaves-

107 DJNG, IV.iv.4. (In discussing this passage I have spoken of "agreements" rather "conventions" - as does the translation - in order to avoid begging any questions about Pufendorf's relation to Hume's notion of convention.)

108 ibid.

109 DJNG, VI.iii.2.

110 See DJNG, I.i.7: "That is an adventitious state which comes to men ... by virtue of some human deed".
by nature’, is unacceptable because, “if taken in so crude a form, [it] is directly at odds with the natural equality of men”\textsuperscript{111}; and such equality is a precept of natural law.\textsuperscript{112} Rather, slavery originates in consent, later being extended - justly or otherwise - through war.\textsuperscript{115} Pufendorf does not provide any historical support for this account of the origin of slavery, so perhaps he is considering only the origin of legitimate slavery, which, because it is the creation of a right over another person, must have originated in an act of will.\textsuperscript{114}

The second limitation, the power legitimately exercised over a slave, depends on Pufendorf’s view (presumably based on the doctrine of the natural equality of human beings) that the slave is not to be regarded as akin to a material object. Rather, the right to rule over slaves needs to be understood as akin to the rights of sovereigns over their subjects. Therefore “it cannot properly be said that the men themselves are alienated, but only the right to rule over them”. It is not a precept of the law of nature, but because “the brutality of many nations has gone to such lengths”, that typically slaves “are numbered among ... material possessions, and are treated not as subjects for their master’s sovereignty, but as objects for his violence.”\textsuperscript{115} In the same spirit Pufendorf denies the common doctrine that the slave, because his or her rights have been alienated, can be done no injury.\textsuperscript{116} In these ways, then, Pufendorf spells out the legitimate boundaries of the institution of slavery; that is, the extent to which it does not conflict with the law of nature. In identifying such limitations, he differs significantly from Grotius, who, despite regarding slavery as a base condition, nonetheless failed to provide any account of the “natural limits” of slavery. In contrast to Locke, however, he does not

\textsuperscript{111}\textit{DJNG}, III.ii.8.

\textsuperscript{112}\textit{DJNG}, III.ii.1.

\textsuperscript{113}\textit{DJNG}, VI.iii.5-6. Pufendorf’s reasoning in VI.iii.5, which concludes “Therefore, the origin of slavery was due to willing consent and not to war”, is extremely difficult to follow. Most of VI.iii.5 appears rather to be evidence for the contrary view.

\textsuperscript{114}This question, of the legitimacy of slavery, will be considered in section V below.

\textsuperscript{115}\textit{DJNG}, VI.iii.7.

\textsuperscript{116}\textit{DJNG}, VI.iii.8.
hold that slavery is incompatible with the natural liberty or equality of human beings.\textsuperscript{117} The important question of whether consent to slavery is ever necessary - agreement, it must be remembered, presupposes the use of reason\textsuperscript{118} - will be considered in section V, when we consider the impact of the right of necessity.

For Pufendorf, rights are best understood as a \textit{secondary} phenomenon. Unlike many modern theories which accord rights a pre-eminent position by treating duties as phenomena generated by rights, for Pufendorf rights are generated by agreements because such agreements are necessary for society, and thus reflect the fundamental duties of sociableness. It is therefore important to ask, how do such duties arise? In order to answer this question, it is first necessary to remember that, being a fundamental part of the law of nature, duties have both a formal and a material element. Pufendorf's short definition of a duty in \textit{De Officio} reflects this requirement:

\begin{quote}
duty is here defined by me as man's action, duly conformed to the ordinances of the law, and in virtue of obligation.\textsuperscript{119}
\end{quote}

In being conformed to "the ordinances of the law", duty is conformed to the will of a superior, so this part of the definition shows us the formal element from which duty is generated. The material element must therefore be sought in the obligation, which is distinct from the duty itself. (For Pufendorf, the difference appears to be that our duty is what we must do, whereas obligation is what binds the will, i.e. what compels us to do our duty.) The matter is complicated further by the fact that Pufendorf divides obligations into "intrinsic" and "extrinsic". Extrinsic obligation is, however, the formal element of obligation, the external law, so for the material element we need to fill out our understanding of duty we must examine the nature of intrinsic obligation. This, the material element of obligation, is that part of obligation which affects the conscience. It can even be described as a natural \textit{feeling} of obligation.\textsuperscript{120}

\textsuperscript{117}Locke does, of course, allow household servants - presumably these are not lifelong servants, but wage-labourers. If not, his position would not differ markedly from Pufendorf's. The form of slavery Locke has in mind, however, is not a slavery kept within specific limits, but the more thoroughgoing form of subjection he sees to be implicit in Filmer's defence of absolutism and denial of natural liberty in \textit{Patriarcha}.

\textsuperscript{118}\textit{DJNG}, III.vi.3.

\textsuperscript{119}\textit{De Officio}, I.i.1. (Translation slightly amended.)

\textsuperscript{120}The Humean overtones here are deliberate. As chapter V will argue, Hume is greatly concerned with \textit{intrinsic} obligation and motivation (although he does not use the term itself).
What is the source of such feelings? Pufendorf provides the answer in his account of sociability: "we called man a sociable creature because men are so constituted as to render mutual help more than any other creature."121 In the same vein he approvingly quotes Seneca: Nature "has implanted in our breasts mutual affection, and made us apt for social intercourse."122 This constitution, our natural mutual affection, is the source of the feeling we seek; hence Pufendorf is able to conclude that social life engenders "a mutual obligation."123 The point is that we are so constituted that we seek to assist, and be assisted by, other human beings, even in aiming only at our own preservation. This mutual help produces the recognition of mutual dependence, and therefore the recognition, in specific circumstances, that particular actions are required for the maintenance of a rational social order or harmony. This recognition, the experience of conscience, is the material element of obligation and also of duty, making duty more than the mere following of a rule.

Duties arise, then, through the natural mutuality of human life, sanctioned by law. The fundamental role of duties in Pufendorf's scheme - most visibly perceived in the structure of De Officio, which is divided up according to the various duties of human beings - reflects his stronger account of sociability. Duties are fundamental not merely because human beings live in groups, and need to do so, but because they have a social nature which ordains mutual intercourse.

The mutuality of social life is not, however, all of a piece. Although the sociable attitude is a general duty of humanity, the requirements of sociability fall into two distinct groups. This division reflects an important distinction in social life:

if a man does me no good turn, and does not join with me even in the ordinary duties, I can still live in all tranquility with him, provided he hurts me in no way. Nay, we desire nothing more than this from most of mankind, mutual assistance being rendered only within a limited circle. But how can I live at peace with him who does me injury ...

121DJNG, II.iii.16.
122DJNG, III.iii.1.
123DJNG, II.iii.15.
124DJNG, III.i.1.

Those general duties of humanity which are necessary for social peace are obviously vital, whereas those which enrich social life but are not absolutely necessary for social harmony
are less important. Failure to perform some duties threatens social life itself, while failure to perform others impoverished society but does not threaten it. The difference here can be put in terms of the necessity of protecting the suum. Because the suum must be protected for there to be social life at all, those duties which are concerned with protecting the suum are enforceable, i.e. they are appropriately enforced. Thus the appropriateness of enforcement can be used to distinguish between the two kinds of obligation: those requirements of sociability which reflect the primary necessity of protecting the suum differ from those which do not, in that the former can be legitimately enforced whereas the latter cannot. Pufendorf calls these requirements, respectively, perfect and imperfect obligations:

a thing may be owed us in two ways, either by a perfect, or by an imperfect obligation, to which a perfect and an imperfect right correspond respectively, [differing in that] damage which another is bound to restore can be done us only in things owed us under the first category, but not in things owed us under the second category.\(^{125}\)

It is noteworthy that Pufendorf also speaks here of perfect and imperfect rights. The distinction, and the terminology, is obviously adapted from Grotius, who, as we have seen, distinguishes perfect moral qualities (rights) from imperfect moral qualities (aptitudes). Grotius does not, however, speak of "imperfect rights"; that Pufendorf is prepared to speak this way shows his willingness to broaden the notion of a right, by detaching it from its legal foundation. This is a tendency reflected also in Locke and, especially, Hutcheson. Neither does Grotius speak of obligations as perfect or imperfect. Pufendorf's distinction here can be seen to lead to modern distinctions between law and morals; between what we can be compelled to do by others, on the one hand, and, on the other, what our own humanity should compel us to do, without external enforcement.

Putting the distinction this way is revealing, because it indicates that perfect obligations differ from imperfect in that, while the former have both an extrinsic and an intrinsic component (both a formal and a material element), the latter have only the intrinsic element. Imperfect obligation arises only within the agent, unaccompanied by any external power to compel action. As Pufendorf puts it:

these last duties ought to be performed upon a kind of voluntary impulse arising from a man's good nature, and [there is] no faculty to force him to perform them.\(^{126}\)

\(^{125}\) DJNG, III.i.3.

\(^{126}\) ibid.
The "voluntary impulse" here is the operation of the conscience, which we have already seen to be the source of intrinsic obligation. Imperfect obligation is centrally a matter of conscience, and this is shown by the appearance, in the quotation above, of that most distinctive of conscience-affecting words: the word "ought". Pufendorf explicitly identifies this word as capturing the essential quality of imperfect obligation; its capacity to inwardly bind the otherwise free (undirected) will of the human mind:

what the people *ought* to do is contrasted with what it *could* do, the word ‘ought’ being used for that less perfect obligation, whereby we are supposed to undertake the exercise of every virtue.\(^1\)

For Pufendorf, then, the word "ought" pre-eminently expresses the nature of imperfect obligation. When we come to deal with Hume and Hutcheson, we shall see that the word "ought", and the notion of obligation, are best understood in the light of this account of imperfect obligation, that is, as *intrinsic* obligation. Recognizing this is an important aid to understanding Hume’s treatment of our obligation to justice.

III: Kinds of Natural and Non-natural States

Before proceeding further, it is important to clarify some potential sources of confusion. Pufendorf makes an important distinction between natural and adventitious states. “The state of men,” he says, “is either natural or adventitious,”\(^2\) where an adventitious state is, as we have seen, a state which arises “by virtue of some human deed.”\(^3\) This appears to raise a problem. It has been argued that some kinds of human actions, because necessary for the harmony of society, are properly understood as natural, and so give rise to natural states of affairs. But these states of affairs arise by the actions of human beings, so they must be classed as adventitious states. The problem is that Pufendorf’s division of states into *either* natural *or* adventitious, if it is to be taken at face value, precludes this possibility. These states, of which property is one, cannot be both natural and adventitious, unless Pufendorf uses “natural” in more than one way.

This is in fact what he does, and he is well aware of the fact. He distinguishes three senses of “natural”: “the natural state can be considered ... either in relation to God the Creator, or in relation to individual men, as regards themselves, or as regards other

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\(^{127}\) *ibid.*

\(^{128}\) *De Officio*, II.i.2.

\(^{129}\) *DJNG*, I.i.7; cf. *De Officio*, II.ii.1.
men." As this remark suggests, the second and third senses can be regarded as variations on a common theme, so the economical course is to group them together in contrast to the first sense.

Pufendorf describes the first sense thus:

Viewed in the first way, the natural state of man is that condition in which he was placed by the Creator, when He willed that man should be an animal superior to all the rest. From this state it follows that man should recognize and worship his Author, and marvel at all His works; and also pass his life in a very different manner from the brutes. Hence this state is contrasted with the life and condition of the brutes.

In this sense, what is natural to human beings is what marks them off as creatures of a special kind. The idea is of what is properly appropriate to human beings, or human societies. In this sense of “natural”, then, any course of action which is a necessary response to the requirements of human sociability will be a natural course of action, and will produce natural states of affairs. It has been shown that, for Pufendorf as for Grotius, the development of property is just such a natural development. Therefore, in this first sense, property is indeed natural. It is also clear that, in this first sense, the opposite to a natural state is not an adventitious state (since many such natural states will also be adventitious), but an unnatural (in some senses, a “brutish”) state. To fail to be natural in this sense is to fail to be fully human, or fully appropriate to human life. Alternatively, it might be said that, since the natural state of human beings is a rational state, to fail to be natural in this sense would be to fail in rationality, and hence to be arbitrary. In this sense, then, the opposite of a natural state is an unnatural or an arbitrary state.

It is the second and third senses of “natural” which are appropriately contrasted to adventitious states of affairs. In the second sense, “natural” is understood in this way:

we can consider the natural state of man, if we imagine what his condition would be, if one were left entirely to himself, without any added support from other men, assuming indeed that condition of human nature which is found at present.... in this sense the natural state is opposed to a life improved by the industry of men.

Such a state, Pufendorf notes, is one “more wretched than that of any wild beast”, because of the weakness and vulnerability of human individuals, without the power of collective action. In this sense, property is clearly not natural, since

130 De Officio, II.i.2.

131 De Officio, II.i.3 (emphasis added).

132 De Officio, II.i.4.
it is generated by the appropriative acts of human beings, and is maintained by their mutual agreement (even if tacit). In its more sophisticated forms, it reflects the variety and extent of "the industry of men".

In this sense, then, property is not a natural, but an adventitious state. It is not, however, an unnatural or an arbitrary state of affairs.

The same is true of the third sense. In this sense,

we consider the natural state of man according as men are understood to be related to each other, merely from that common kinship which results from similarity of nature, before any agreement or act of man, by which one came to be particularly bound to another ... In this sense the natural state is opposed to the civil state.\textsuperscript{133}

In this sense, the natural state is the state of natural liberty, where "all men and individual men" are "bound to other men by nothing but the bond of a common humanity".\textsuperscript{134} Since property binds, or obligates, by an agreement of human beings, it is not merely the bond of a common humanity. Property is, rather, part of a civil state, a specifically social institution characteristic of civil society. So, in the third sense as in the second, property is not natural but adventitious. And, as also in the second, in this third sense it is equally misguided to conclude that, because it is not natural, it is therefore unnatural or arbitrary. The distinction of possessions is rather a necessary feature of the social life of civil societies, being an integral part of "a suitable order [for] mankind's existence".\textsuperscript{135}

Because of the various senses of the word "natural", then, property can be regarded as either natural or adventitious, depending on the sense of "natural" being employed. This is important for understanding Pufendorf, and also for understanding other philosophers who employ his distinctions for their own ends. Most notable among these is David Hume. In \textit{A Treatise of Human Nature}, Hume concludes that justice is not a natural, but an \textit{artificial} virtue. This is because it is among those virtues which "produce pleasure and approbation by means of an artifice or contrivance, which arises from the circumstances and necessities of mankind".\textsuperscript{136} These artificial virtues, being the result of artifice and contrivance, reflect both the "industry of men" and the agreements (or conventions)

\begin{footnotesize}
\begin{enumerate}
\item De Officio, II.i.5.
\item DJNG, II.ii.1.
\item \textit{ibid.}
\item Hume, \textit{Treatise}, p. 477.
\end{enumerate}
\end{footnotesize}
which are necessary to the social life. Hume's notion of an artificial virtue is thus that of a virtue characteristic of, in Pufendorf's terms, an adventitious state. Hume's distinction between the natural and the artificial is, in outline, the same as Pufendorf's distinction between the natural and the adventitious.

This can be supported by showing that Hume, in distinguishing the artificial from the natural, is careful to note that this is connected to only one sense of "natural", a sense which corresponds to Pufendorf's second and third senses. He is careful to point out that there is another sense in which justice is indeed natural. For this reason he insists that, although artificial, justice is not unnatural, nor is it arbitrary. Justice, he says in another place, is artificial as opposed to natural "in the same Sense" as "Sucking is an Action natural to Man, and Speech is artificial". The other sense is shown when, in denying an innate basis to natural law, Pufendorf says that natural law is natural in much the way that language is. Hume agrees that in this sense, justice, like language, is natural:

Justice, in another Sense of the word, is so natural to Man, that no Society of Men, and even no individual Member of any Society, was ever entirely devoid of all Sense of it.

This is because the sense of justice necessarily arises in the development of human society, and

In so sagacious an animal, what necessarily arises from the exertion of his

137 In his letter to Francis Hutcheson of 17th September, 1739, Hume stresses that he has "never called justice unnatural, but only artificial". His aim in this part of the letter is to resist Hutcheson's teleological notion of "natural" - it is, he says, "founded on final causes", which are "pretty uncertain and unphilosophical". He illustrates his preferred notion of "natural" with a quotation from Horace (Satires, I.iii.98) which stresses the role of utility in distinguishing the naturally good, concluding significantly that "Grotius and Pufendorf, to be consistent, must assert the same". See letter no.13 in J.Y.T. Greig (ed.) The Letters of David Hume (2 vols.), Oxford: Clarendon Press (1932). The letter is also printed in D.D. Raphael (ed.) British Moralists 1650-1800, Oxford: Clarendon Press (1969), vol. 2, pp. 109-10.

138 Treatise, p. 484.


140 De Officio, I.iii.12.

141 Hume, Letter, op.cit.
intellectual faculties may justly be esteemed natural.\textsuperscript{142}

This sense of "natural" is clearly Pufendorf's first sense, since the sense in which justice is artificial rather than natural is the sense which Pufendorf employs in showing that property is adventitious rather than natural. Rather then indicating a decisive break from the tradition of natural law, then, Hume's distinctions build on distinctions already established by Pufendorf. To underscore the connection, we need only consider Hume's concluding remarks to his first account of the artificiality of justice:

To avoid giving offence, I must here observe, that when I deny justice to be a natural virtue, I make use of the word natural, only as oppos'd to artificial. In another sense of the word ... no virtue is more natural than justice. Mankind is an inventive species; and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as any thing that proceeds immediately from original principles, without the intervention of thought or reflexion.

He then allows that it is not improper to describe the rules of justice as natural laws, provided this expression is understood in a particular way:

Tho' the rules of justice be artificial, they are not arbitrary. Nor is the expression improper to call them Laws of Nature; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species.\textsuperscript{143}

Pufendorf's account of the senses of "natural" shows such Humean remarks to be fairly orthodox, and not implicit criticism of established notions of the naturalness of natural law. We can also note in passing that, contrary to those interpretations of Hume which detect in his writings a scepticism which touches all human thought and practice, his discussion of, and distinctions concerning, the varieties of the natural and their opposites provides good reason for accepting that he has indeed a genuine desire "to avoid giving offence". There is no need or justification for looking for the sceptic's irony in such passages; they are most happily understood as the reiteration of concepts and distinctions already established in the intellectual world. In a later chapter, the nature of Hume's relationship to natural law will be considered more fully. This particular matter can be

\textsuperscript{142}Hume, \textit{Enquiries}, p.307; cf. DJNG, II.i.2, where Pufendorf ascribes the improvements generated in adventitious states to "the sagacity of men".

\textsuperscript{143}\textit{Treatise}, p. 484. Cf. also the concern in the second \textit{Enquiry} to play down the whole question (almost certainly evidence of Hume's frustrations over the misinterpretation of the \textit{Treatise}): "The word natural is commonly taken in so many senses and is of so loose a signification, that it seems vain to dispute whether justice be natural or not" (\textit{Enquiries}, p. 307). The preceding discussion shows that such remarks are not Hume's attempt to remove the facade of natural law from a basically utilitarian theory, as Macpherson claims. See \textit{The Political Theory of Possessive Individualism}, op.cit., p. 270.
summed up by observing that, by distinguishing between several senses of "natural", and thus allowing that, in different respects, property can be said to be both natural and adventitious, Pufendorf establishes a distinction with important subsequent employments. We can now turn to consider the character of the circumstances and actions which conspire to generate complex property relations from more simple antecedents.

IV: The Natural Necessity of Property

The vulnerability of human life requires the specification of the personal realm, the realm capable of suffering injury. This realm is called the suum. The necessity of using material things in order to preserve oneself, and the transferable nature of these things (they can be removed from one's possession by the action of others, without being destroyed in the process), requires that the suum be extended to include these things. The things thereby become proper to oneself, one's property. Such extension of the suum is necessary for the maintenance of peaceful social life, so in this sense the development of property is a natural process. Property is natural to human life.

In outline, this is Pufendorf's position. A more detailed exposition of his views thus appropriately begins by observing the nature and implications of human vulnerability:

Such is the constitution of man's body that it cannot live from its own substance, but has need of substances gathered from outside, by which it is nourished and fortified against those things which would destroy its structure.145

For this reason God has willed that human beings have a general power to use things. This power is unproblematic in so far as it concerns plants and other insensate things, since they are unable to "suffer any ill". The use of animals is admittedly a more delicate matter, but Pufendorf holds that human beings can without injustice use animals for their own ends since there is no moral community between human beings and animals. There is "no right of obligation ... between men and beasts", but a "practical state of

145DJNG, IV.iii.1.
146DJNG, IV.iii.3.
Nevertheless there are limits on how this power is to be used: cruelty is to be rejected (but not for the sake of the animals\textsuperscript{148}).

It has already been shown that the original power to use things is not to be understood as a right. Nevertheless it is a moral power, since it produces a moral effect, an effect on the legitimate actions of other human beings. Unlike most moral effects, however, which arise only as the result of an agreement, this effect arises directly from the original suum: since to take or destroy another's food, or even to prevent the other from gathering food, is to interfere with the fundamental necessity of self-preservation, and thereby to cause injury. However, if there is an original moral effect which precedes human agreements, then this must be expressible as an original moral relation between human beings, with respect to the physical world. Pufendorf recognizes this implication, and expresses it by saying that human beings had an original community of possession of all things. He is anxious that the nature of this original community not be misunderstood. He joins with Grotius in holding that the original community differed markedly from modern notions of common possession. This difference can be caught by distinguishing two kinds of community of possession, \textit{negative} and \textit{positive}.

Positive community is the developed notion of common ownership:

Common things, by the ... positive meaning, differ from things owned, only in the respect that the latter belong to one person while the former belong to several in the same manner.\textsuperscript{149}

For positive community, there is no difference "in the manner and force of dominion", only in "the subject in which it terminates". Private dominion, or property, "terminates" in one man, while common dominion, or positive community, terminates in several. Positive community thus has two important features. In the first place it cannot be changed without agreements. Since none of the co-owners

has a right extending, as it were, over the whole thing, but having power only

\textsuperscript{147}\textsc{Djng}, IV.iii.5. This implies, incidentally, that animals can use human beings for their ends without injustice as well. Pufendorf recognizes this implication. He does not hold that the beasts were created for human beings, a view not uncommon in the seventeenth century. On the general question of the relationship between human beings and animals in the thought of the period, see in particular Keith Thomas, \textit{Man and the Natural World: Changing Attitudes in England 1500-1800}, Harmondsworth: Penguin (1984).

\textsuperscript{148}\textsc{Djng}, IV.iii.6: "a useless and wanton destruction of animals tends to the hurt of all human society, and to the dishonour of the Creator and Author of such a gift".

\textsuperscript{149}\textsc{Djng}, IV.iv.2.
over a part of the thing, such part still remaining undivided, it is obvious that one person cannot of his own right dispose of the entire thing, but only of his share; and that if any decision is to be reached in the whole thing, the consent and authority of each person concerned in it must be secured.\footnote{150}

So, while individuals can renounce their shares in a positive common possession, positive community of possession cannot itself be abandoned without agreement. Changing to a system of private property in parts of the whole, for example, cannot occur without the consent of "each person concerned". (It should be noted that Pufendorf does not tell us whether, in such cases, tacit consent is possible.)

The second feature of positive community is that, like proprietorship, it presupposes the exclusion of others:

Positive community as well as proprietorship imply an exclusion of others from the thing which is said to be common or proper, and therefore presupposes more men than one in the world.\footnote{151}

Positive community is, in other words, a right shared by a group of human beings who are only a part of the entire population, the remaining portion being excluded from the possessions in question. Obviously, this means that positive community is not the original community of possession shared by all human beings in the earliest days of the Creation. The original community must therefore have been negative community:

Therefore, just as things could not be said to be proper to a man, if he were the only being in the world, so the things from the use of which no man is excluded, or which, in other words, belong to one man no more than to another, should be called common in the [negative] and not in the [positive] meaning of the term.\footnote{152}

The original community of possession, then, was negative community. Positive community, like private property, is a later development:

things were created neither proper nor common (in positive community) by any express command of God, but these distinctions were later created by men as the peace of human society demanded.\footnote{153}

To understand the nature of the original community of possession, we therefore need to
explain Pufendorf's concept of negative community. He describes it briefly in one passage as a state in which “all things lay open to all men, and belonged no more to one than to another”. He treats the matter rather more fully in another passage. In a state of negative community, he says,

things are said to be common, according as they are considered before the interposition of any human act, as a result of which [acts] they are held to belong in a special way to this man rather than that. In the same sense such things are said to be nobody’s, more in a negative than a positive sense; that is, that they are not yet assigned to a particular person, not that they cannot be assigned to a particular person. They are, furthermore, called ‘things that lie open to any and every person’.

Negative community is thus a thoroughly inclusive state. Unlike positive community, which presupposes the exclusion of some group of others, negative community necessarily excludes none. It is also necessary to see the import of Pufendorf's statement that in negative community things are not yet assigned to particular individuals. This is not merely to say that, as a matter of fact, there are no private owners. Rather, the “not yet” is the key to understanding negative community as community, and not merely as a state where there is no private property. A state without private property is not a state in which private property does not yet exist unless it contains within it the germ from which such property arises. This is just what negative community must contain, since it must reflect the fact that human beings can legitimately use things for their own preservation. Negative community is thus the state of the openness of the world to use and appropriation; there is an original negative community of things not because there is a mere possibility of using things (because they are not already owned), but because there is a moral necessity of such use. Negative community expresses the nature of the relationship between human beings and the world. It reflects the fact that, in an important sense, the world is for the use of human beings: in using the world for their own ends, human beings are not strangers (or trespassers) on a foreign soil. They are at home.

154 DJNG, IV.iv.5.

155 DJNG, IV.iv.2 (emphasis added).

156 It is important to recognize this feature of negative community, since it shows a difficulty in secularizing such a theory. The relation is not simply one of confronting a world of things. Therefore the question of appropriation of what is negatively common is not simply a matter of how unheld things come to be held, of how an unowned thing comes to be owned. This is ignored in, for example, Nozick's treatment of Locke's theory of appropriation in Anarchy, State, and Utopia, pp. 174 ff. (The character of Locke's original community will be discussed in the next chapter.)
sense that it is in any way under an obligation to submit. This is important for the proper understanding of the status of animals.)

The negative community that human beings originally had in the physical world can best be understood by analogy with the situation of invited guests at a buffet banquet.\textsuperscript{157} The food is for the guests, but no particular item is for any particular guest. Nor is the food as a whole only for the guests as a whole, since the guests do not first have to come to agree about who should get what. The guests do not each have a right, shared with others, to all the food provided. Rather, the food is just there \textit{for the taking}: each guest is free to take what he or she wishes, and wrongs nobody by so doing, provided what is taken has not already been claimed by someone else, and provided the taking itself involves no violence or injury. In such a situation, it is of utmost importance to have a clear understanding of what is necessary in order to have successfully removed some of the available food from its initial common status. Such successful removal must be publicly recognizable, in order to maintain peace, especially by preventing unintended violations of what is no longer common. At such a banquet, these matters are usually solved rather easily: placing food on a plate, and drink in a glass, are usually recognized as acts of removal. Whether the act is successful just because of the act itself, or because of the acceptance of the act as appropriate, is another matter. On the former understanding, the act is successful just because of its quality as an act. Successful removal, on this understanding, could be described as being due to the exercise of labour. On the latter understanding, the act is successful because it is \textit{seen to be} an appropriate solution to the problem, and so is not interfered with. On this understanding, successful removal could be described as being due to (tacit) agreement. These alternatives rarely trouble the guests at such functions, but the issue is an important one for those philosophers who, like Pufendorf, understand the original condition of human beings with respect to things to be a negative community. In fact, this problem of \textit{how to remove} anything from the original common, so that it can become the private property of individuals, is the central problem of an account based on negative community. The origin of private property is a question that can be raised no matter what the original relation of human beings to the world happened to be, but the question takes different forms according to the understanding of the original relation. If the original relation was one of no community whatsoever, but merely a number of human beings confronting a mass of things, then there is no question of how to \textit{remove} from a common. Instead there is the question of how to \textit{make} property out of nothing, as it were; how to make a moral relation out of an initially merely physical

\textsuperscript{157}A number of natural law writers employ this example. One possible source is the parable of the banquet in St. Luke 14:16-24.
relation. (It may even be asked: Is such a development possible?158) If the original relation was of a positive community - a relation which is best understood as akin to a legal partnership, where each partner has specific rights - then there is no way to remove from the common but by agreement.159 There is in such a case no issue about how to remove from the common. The important issue, if positive community is assumed, is, rather, how legitimate use is to be made, by individuals, of what is owned in common, without recourse to agreements.160

For Pufendorf the original community of possession is negative. The important issue in explaining the origin of property, then, is to explain the nature of “the steps of departure”161 from negative community. So we will now consider some important elements of this departure.

It is first of all important to note that “the steps of departure” from primitive community are indeed steps, and that these steps are not unnatural. They are steps because:

men left this original negative community of things ... not, indeed, all at once, and for all time, but successively, and as the state of things, or the nature and number of men, seemed to require.162

In so doing, they were not acting unnaturally, or contrary to natural law, for two distinct reasons. Firstly, the naturalness of negative community does not imply the necessity of preserving negative community:

158 The denial of community amounts to denying that the world can be regarded as, even in a weak sense, for us. Instead of being related to a world as guests at a banquet, we instead confront a world of things as strangers. From such a premise, it could then be argued that the rise of property reflects only the exercise of force over the world, and not the sophistication of an original moral relation. Thus the more pronounced forms of “environmental philosophy” could be seen as springing from a denial of any original community of possession.

159 DJNG, IV.iv.2.

160 That Locke sees the problem of how property in things arises as the problem of how to remove things from their original community I take as evidence for Locke's assuming an original negative community. But the matter will be discussed fully in the next chapter, where James Tully’s view that Locke’s theory is built on an original positive community will be considered. Locke speaks of removing from the common at Two Treatises, II.27,28,30.

161 DJNG, IV.iv.6, heading.

162 DJNG, IV.iv.6.
when we assert that by nature all things were negatively common, we do not mean that the law of nature commands us to maintain that state of things for all time, but only that things considered without any previous act of men were of such a nature that they belonged no more to one man than to another.  

Negative community is thus natural in the sense that it is not adventitious. As we have seen, there is another sense of "natural", in which some social institution or state of affairs can be natural even if adventitious. In this sense, an institution is a part of natural law because "sane reason, upon a consideration of the general state of social life, advises that this be set up and established among men". It is this sense of "natural" which is invoked to provide the second reason for the naturalness of the departure from negative community. The departure from negative community is natural because it is recommended by sane reason. In fact, sane reason recommends not only that negative community be left behind, but that it be left behind only in a series of steps, and not all at once. It recommends that negative community be left behind, and systems of property generated, in order to prevent rivalry and preserve peace among human beings:

And truly the peace and tranquillity of mankind, the maintenance of which is the first concern of the law of nature, made no uncertain suggestion as to what might be the most salutary arrangement by men in this regard. For after the human race had multiplied and acquired a cultural mode of life, the peace of men did not suffer that there should remain for every man an equal power over all things, that is, that all things should be open to all for the promiscuous use of every man ... Since innumerable conflicts could not avoid arising from the rivalry of many persons over the same thing, which could not suffice for all of them at one time, especially in view of the fact that such is the nature of the vast majority of things, that they can be of service to but one person at one time.  

The development of property was thus necessary in order to avoid quarrels and preserve peace. But this is not to suggest that the preservation of peace requires the total abandonment of all negative community at that time when it is necessary to abandon it with respect to some things. Rather, such a total abandonment would be pointless and arbitrary. Among other things, it would involve the appropriation of some things which, either by their natural abundance or because of some other features, ought not at any time to be appropriated. In particular, this is true of the air and the open sea.  

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163 DJNG, IV.iv.13.

164 DJNG, IV.iv.14.

165 DJNG, IV.iv.6.

166 DJNG, IV.v.2,9.
respect of the latter, of course, Pufendorf accepts the central doctrine of Grotius in *Mare Liberum*, a doctrine maintained also in *De Jure Belli ac Pacis*. So, negative community is to be abandoned progressively, as the need to maintain peace in the face of particular social developments dictates:

> when we say that reason suggested the departure from the community, we do not mean to imply that it was necessary for all things to pass under proprietorship at one moment, but only as considerations of men, of things, and of places required, and as the best means were found to remove causes of dispute.

Therefore natural law does not enjoin that everything should be made proper to individuals. Rather, it “enjoins the observance of whatever things work to the end of the dominion instituted”. Natural law enjoins proprietorship, but proprietorship is not thereby uniformly nor universally required across all human societies; rather, “proprietorship .... has been introduced as the peace of men seemed to require it”.

By holding that property arises in a series of steps which reflect prevailing circumstances in particular social situations, Pufendorf allows that the history of property is not everywhere the same. The nature and number of the steps from primitive negative community must vary according to the different circumstances of different human groups. Pufendorf does not draw back from this conclusion. The nature and extent of property is a matter for human beings to settle, by the use of sane reason to determine what is necessary for social peace:

> the law of nature approves all conventions which have been introduced about things by men, provided they involve no contradiction or do not overturn society.

Therefore, although natural law advises the introduction of property, it does so on the condition that it would rest with the judgement of men, whether they wanted all things to be proper or only some, or would hold some things indivisible and leave the rest open to all, yet in such a way that no one might claim them for himself alone.

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167 Pufendorf says, among other things, that “peaceful navigation of the ocean extends to all men and is free”, a principle which allows peaceful navigation for the purposes of trade (*DJNG*, IV.v.10); cf. also *DJBP*, II.III.iii, II.III.xiii.5, and of course *Mare Liberum*.

168 *DJNG*, IV.iv.13.


170 *DJNG*, IV.iv.4.
Having spelt out the importance of the fact that property arises in a series of steps, we need now to consider the factors which either require steps to be taken, or determine the order or character of the steps to be taken. The first of these factors Pufendorf adjudges to be the relative scarcity of necessary goods in the natural (i.e. primitive) state:

Most things which are of use to men immediately and are employed to nourish them and protect their bodies, are not produced everywhere by nature and without cultivation in such abundance that they fully suffice for everyone. Therefore, an occasion for quarrels and wars lay ready at hand, if two or more men needed the same thing, and individuals tried to appropriate for themselves the same thing, when it was not enough for all.

Property is then a solution to the quarrels and conflicts which arise over the allocation of relatively scarce goods. It is an institution which functions to preserve peace. This factor, says Pufendorf,

also shows the falsity of the old saying: 'Mine and thine are the causes of all wars'. Rather it is that 'mine and thine' were introduced to avoid wars.\footnote{DJNG, IV.iv.6.}

Further, if it was a primitive relative scarcity which caused the introduction of property, this puts the lie to the common view that there was an original Golden Age. The belief in such a time arises from nostalgia for the simple life. Pufendorf observes that the old have a tendency to praise the past, particularly the time of their own youth. So those who were forced by circumstances to abandon primitive simplicity for the more industrious life, with its property and developing refinement, “took such a change of habits very hard, and many a time longed for their nuts and idleness”. Later generations, remembering “this complaint of their forbears” (and not untouched by nostalgia themselves) thereby came to construct “those dreams about a Golden Age”.\footnote{DJNG, IV.iv.8.} Pufendorf thus adopts a position quite distinct from Grotius’s: for the latter, the idea of the Golden Age is employed uncritically in \textit{Mare Liberum} (although this could perhaps be regarded as a heuristic device), and the transition to property relations in \textit{De Jure Belli ac Pacis} is a response not to scarcity but to the inconveniences and quarrels which are seen as an unavoidable part of the collection and distribution of a product which is physically scattered, heterogeneous (and so not readily commensurable), and the fruit of unequal contributions.\footnote{See \textit{ML}, p. 23 (\textit{DJPC}, p. 227); \textit{DJBP}, II.II.ii.2-4.} Pufendorf does, however, recognize the role of this last factor, the
inequality of contribution of individuals to the creation of the consumable products. It is the second factor he recognizes in the development of property.

The physical necessities of life, even in the simplest of human societies, have to be collected; and, in more complex social orders, they have to be produced. So, to possess even the basic necessities of life, a society depends on the contributions of its members. This contribution is, of course, their labour. Social peace is not likely to be maintained if unequal expenditure of labour on the part of individuals is not reflected in some way in the allocation of resources. But the simplest way to maintain a rough parity between amount of labour expended and amount of returns - at least, one which avoids quarrels - is to institute a system of private property. This is especially so either for those things which are consumed by use (such as food), or for those exhaustible resources readily attributable to individuals (such as most mobile goods, and some kinds of immobile goods, for example, permanent dwellings). Pufendorf sums up the basic requirements of this factor thus:

most things require labour and cultivation by men to produce them and make them fit for use. But in such cases it was improper that a man who had contributed no labour should have right to things equal to his by whose industry a thing had been raised or rendered fit for service. Therefore, it was advantageous to peace among men that, as soon as men multiplied, there should be introduced dominion of mobile things, especially such as require labour and cultivation by men, and, among immobile things, dominion of those which are of immediate use to men, such as places for dwelling.174

In another passage, he points out the role of labour in the original acquisition of things. In the original negative community, he says,

the bodies of things belong to no one, but their fruits after gathering are proper .... An oak tree belonged to no man, but the acorns that fell to the ground were his who had gathered them.175

In providing an important role for labour, Pufendorf is advancing no new doctrine. Similar views are expressed by Grotius in *Mare Liberum*. He observes there that nature has willed that some things “through the industry and labour of each man became his own”.176 Nonetheless, it is not true for either that labour makes property. We have already seen the crucial role played by agreement in their theories. For Pufendorf,

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174 *DJNG*, IV.iv.6.

175 *DJNG*, IV.iv.13.

176 *ML*, p. 2.
although labour may be a necessary part of the process in which property is generated, property is a moral quality which can only be brought into existence by those actions which can have a moral effect.\textsuperscript{177} Property does not come into being as a result of labour pure and simple, as Locke and Hutcheson later contend.\textsuperscript{178} Rather, it depends on agreements, whether express or tacit:

although there appears to be some reason why ... things should belong to some men rather than to others [i.e. because of labour expended], yet the dominion of the one group, involving, as it does, the exclusion of the next, had to be confirmed at least by a tacit pact, which contained at the same time a tacit renunciation on the part of the rest; because, when things have been assigned one person, the rest of mankind do not care to advance any claim to them on the alleged ground that the earth, as the common home of men, has contributed to those same things their substance and nourishment.\textsuperscript{179}

So, should men fail to protest at particular acts of seizure or other forms of labour, they can be held to have tacitly renounced any claim to goods thus acquired, and have tacitly consented to the acquisition.

For “immobile things produced by nature without the labour of man, such as fields”, the situation differs in one important respect: unlike those things already considered, these are not scarce, but abundant. For this reason they come to be appropriated by individuals not all at once, but progressively. They become proper by occupation, and occupation is limited in extent because it is a matter of what can be used. In the case under consideration, that of fields, this limit is expressed in the equation of the extent of occupation with the extent of cultivation:

\textsuperscript{177}DJNG, IV.iv.1: “proprietorship and community are moral qualities which have no physical or intrinsic effect upon things themselves, but only produce a moral effect in relation to other men”. In A System of Moral Philosophy, Hutcheson stresses that “the difficulties of dealing with this subject”, that is, of understanding the genesis of property, “arise from some confused imagination that property is some physical quality or relation produced by some action of men”, whereas it is in fact a moral relation (System, Collected Works, vol.V, p.318; Emphasis added). Among his targets he may include Locke, who at one point in his treatment of the origin of property, considering the very example of the gathering of acorns employed above by Pufendorf, argues that the acorns must belong to the person nourished by them because “No Body can deny but the nourishment is his” (Two Treatises, II.28). The nourishment is undoubtedly a physical effect, but it is extremely hard, if not impossible, to see it as a moral effect - especially when it is remembered that not only honest gatherers, but also thieves, are equally well nourished by the acorns they come to consume.

\textsuperscript{178}Hutcheson argues that, if there is an original negative community, consumable goods can be appropriated “without consulting the rest of mankind ... Thus we need not have recourse to any old conventions or compacts, as with Grotius or Puffendorf, in explaining the original of property” (System, Collected Works, vol. V, p. 331).

\textsuperscript{179}DJNG, IV.iv.6.
regarding the immobile things produced by nature without the labour of man, such as fields, they were so extensive that they abundantly provided for the small number of early men, and for that reason at first only so much of them was occupied as men judged to be suitable for their uses, while the rest was left in a state of original negative community, so that every man who wished to was free in the future to take it ... fields should belong to those who cultivated them. 180

Here we can see in embryo Locke’s requirement that appropriation from the original community be limited by the capacity to use the things appropriated. For Locke, a man may appropriate anything as long as it stays “within the bounds, set by reason of what might serve for his use”. In this way also peace is preserved (as the natural law requires): “there could then be little room for Quarrels or contentions about Property so established”. 181 Applied to the land itself, the use-criterion limits appropriation, as it does for Pufendorf, to what is cultivated: “As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property”. 182 Unlike Pufendorf, Locke provides an explicit test for unsuccessful usage - the “spoilage condition”. However, although Pufendorf affirms what Locke denies by requiring a pact to generate the necessary moral effect, his pact has a similar effect to Locke’s spoilage condition because it has a necessary content. It affirms occupation by use, restricts occupation to what is used, and so leaves unclaimed land for future occupation:

hence it is understood that a pact was agreed upon, to the effect that such fields as had been assigned to one person by the express convention of the rest of men, or such as the rest could be held tacitly to have withdrawn from, in view of the fact that one man alone had been allowed to enjoy them in peace, while they had claimed for themselves other fields on the same basis - that such fields should belong to those who had cultivated them. And finally, that what was left should pass to those who would hereafter occupy the fields. 183

These passages show us the extent to which Pufendorf provides a foundation on which Locke builds his own theory of appropriation.

We can now also consider Pufendorfs relationship to Grotius. Pufendorf affirms that, apart from “what he [i.e. Grotius] adds against the accepted doctrines of our churches,
which have been already censured enough by others, he is in substantial agreement
with Grotius. He understands himself to be refining and clarifying Grotius's views,
thereby avoiding some of the latter's confusions. He sees his main contributions to be,
firstly, establishing a clear distinction between negative and positive community, and
secondly, providing an improved account of the necessity of a pact to establish property.
We shall consider some of his observations on these matters, since they serve to clarify
some aspects of his theory.

Commenting on Grotius's account of the original divine donation of the earth to human
beings, Pufendorf remarks as follows:

He says: ‘Soon after the creation of the world, and a second time after the
Flood, God conferred upon the human race a general right over things of a lower
nature’. This we accept in the sense that God allowed men a right to use the
things of this earth ‘in a general way’, that is, He did not determine at that same
time what things should be held individually, and what in common, but this He
left to the judgment of men, that they should dispose of the matter according as
it seemed to work for peace. But no credit should be given to any such idea as
that God at the beginning instituted a positive community, from which men
later withdrew on their own initiative, but rather, so far as it concerned God,
such things were left open to the uses of men.

This passage raises two important matters. Firstly, Pufendorf's interpretive strictures
here - that original community, established by divine donation, be understood negatively
rather than positively - should not be taken to signal a disagreement with Grotius.
Pufendorf makes it clear that Grotius's view implies negative community, but that his
predecesser's failure to make clear the difference between the two types of community
sometimes leads him into confusion. Thus he commends Grotius for recognizing that the
original community required human beings to live a simple life, to be “content to live
upon simple fruits”, etc, whereas refinement required the introduction of property.
Negative community implies this, whereas positive community does not, since the former
precludes the accumulation and division of a social product. Under negative community,
each person simply takes what he or she needs, whereas under positive community a
system of accumulation and distribution may be established by an express pact. Since
only such positive community depends on mutual affection, Pufendorf criticises Grotius
for thinking that the original community depended in any way on affection:

184DJNG, IV.iv.9.

185ibid.
But when he adds that community could have endured 'if men had lived on terms of mutual affection such as rarely appears', he confuses negative community with positive.\textsuperscript{186}

The second important matter is indicated by the denial of any original positive community, "from which men later withdrew on their own initiative". There is something a little odd about this remark, and attending to it will help to bring into clearer focus a feature of natural law theory. The oddity of the remark depends on the fact that positive community can only be withdrawn from by agreement: "if any decision is to be reached on the whole thing, the consent and authority of each person concerned in it must be secured".\textsuperscript{187} As we shall see below, this consent must be expressly given. So positive community can only be successfully withdrawn from in the earliest ages of human society, before the number and geographical extent of human beings made an express agreement of the entire human population impossible. Unless such an express agreement took place, then, contrary to the fact of positive laws concerning property, an original positive community of things (if such there was) would still be in force. To suppose an original positive community is thus to raise the possibility that distinctions of ownership by positive law are in fact not justified. And, given that this possibility can only be removed by supposing a primitive express agreement of which there is no apparent record, to suppose an original positive community calls sharply into question the entire edifice of the positive law of property. This would be, for Pufendorf, such a profoundly disturbing possibility that it may seem astonishing that he does not consider it. Rather, he appears simply to take it for granted that, if there was an original positive community, it no longer exists, it was withdrawn from successfully. Why does he accept this?

The answer, I suggest, lies right at the heart of the natural law enterprise, and is neatly caught in the seventeenth century conception of natural law as moral science. As was pointed out in section I, the idea of moral science is the idea of a systematic body of knowledge of the relations between moral phenomena, in just the way that physical science is a systematic body of knowledge of the relations between physical phenomena. As such, moral science depends, like physical science, on the reality of its phenomena. Natural law, as moral science, thus has the task of explaining the moral phenomena we in fact have. It is, in this way, a rather conservative enterprise. It does not ask: What sort of moral world ought there to be? It asks instead: What is the origin of the moral world

\textsuperscript{186} ibid.

\textsuperscript{187} DJNG, IV.iv.2.
This is what is at issue in the question concerning the origin of property. A natural law explanation of the origin of property is an explanation both of how property begins out of a state without property, and how the history of property is a natural (rational) process which leads to the distinctions of property we recognize. Pufendorf thus rules out the revolutionary possibility that there is in fact no private property, but a positive community, at the very beginning of his enterprise. By accepting the naturalness of law he thereby rejects the "sceptical" theories. Provided that we do not press the term too hard, we can say that a natural law theory is a "common sense" theory, in that it does not undermine the views widely established in a society.

Pufendorf sees his second main advance on Grotius's views to be the clarification of the nature and role of pacts in establishing property. He agrees with Grotius that a pact, whether express or tacit, is necessary to establish a moral relation between human beings, because moral effects depend on public acts. If there is no public act, there can be no moral effect, since in such cases "others were not able to know what a man wished to be his own, that they might refrain from it". Therefore, as Grotius puts it, "things at the first passed into proprietorship not by a mere act of will". An act of seizure is thus a necessary part of staking a claim to some unpossessed thing, but a pact is also necessary, in that the act of seizure is not of itself sufficient to create a moral effect, but does so when it is not resisted by others, or is expressly consented to by them. In explaining this, Pufendorf shows that, while a tacit pact is adequate for establishing property from negative community, positive community can not be generated without express consent. To establish property, he says:

there was need of an external act or seizure, and for this to produce a moral effect, that is, an obligation on the part of others to refrain from a thing already seized by some one else, an antecedent pact was required and an express pact, indeed, when several men divided among themselves things open to all; but a tacit pact sufficed when the things occupied at that time had been left unpossessed by the first dividers of things. For it is understood that these men agreed that those things which in the first division had not been assigned to a definite individual should pass to him who was the first to take possession of them.188

Property for immediate use arises out of negative community by a tacit pact of non-interference with acts of seizure, but more extensive and sophisticated forms of property (including, most importantly, positive community) arise out of a division, and this cannot occur without an express pact.

188 DJNG, IV.iv.9.
Pufendorf thus differs from the rather relaxed approach to explicit agreements exhibited by Grotius, an approach which reflects the latter's heavy reliance on sacred history. Pufendorf has no quarrel with sacred history, but he is led to his conclusions more by considerations of theoretical necessity than by the patriarchal narratives of the book of Genesis. This is not to say that he does not accord history an important place. We see that he does in his insistence that the character and extent of a system of property is entirely a matter for the human actors who produce it, as long as in producing it they act according to the rational necessities of the situation, rather than violently going against nature. His insistence that property arises not all at once, but in steps, is part of this requirement. Pufendorf's account of property, like that of Grotius before him, can be called natural (in that it arises necessarily according to the requirements of human sociableness) and historical (in being the product of human actions over time). Like Grotius, Pufendorf aims at producing a natural history of property.

V: Necessity, Slavery, and Industry

We can now turn to Pufendorf's treatment of the important question of the right of necessity. The task here is to inquire what force the necessity of safety has to free some act from the obligation of general laws, in particular, of general laws of property. That necessity has such a force is widely acknowledged:

The power of necessity is a phrase upon the lips of all men, because it lacks the restraint of law, and is understood to form an exception in all the rules of men, while it carries the right to do many things which, apart from it, were held to be forbidden.

Pufendorf accepts that there is such a right, but stresses that it cannot be taken for granted. It does not apply to all things, since the creation depends for its order on its laws. Exceptions may threaten or endanger this order, so they can only be allowed within specific limits. The nature of the limits which concern the property of others will be explained below.

Because the question at issue is whether there is a right of necessity which overrules positive laws of property, Pufendorf frames his discussion in terms of positive law. He

189 *DJNG*, II.vi.1. For Pufendorf, it should be noted, necessity affects not only safety but also honour. The complications caused by consideration of honour are, however, considered only in passing. They do not affect the matters to be discussed here, so can be safely left undiscussed.

190 *ibid.*

191 *DJNG*, II.vi.2.
holds that positive laws must be understood to make an exception in the case of necessity. This is because the legislators' positive actions must be understood in a particular way: these legislators,

since they had as their purpose the promotion through these laws and institutions of men's safety or convenience, are supposed always to have had before their eyes the weakness of human nature, and how man cannot help avoiding and repelling whatever tends to his destruction.

Extreme necessity is of course a paradigm case, so

most laws, and especially positive laws, are understood to make an exception of a case of necessity, or to lay no obligation, when such an obligation will be attended by some evil, destructive of human nature, or too great for the common constancy of mankind.¹⁹²

Why does Pufendorf hold that positive law must, in the general run of things, “make an exception of a case of necessity”? To explain his position, he focuses attention on the mind of the legislator(s): the legislators “had as their purpose the promotion ... of men’s safety or convenience”. If we ask, Why did the legislators have this purpose? (or, How do we know that they had this purpose?), Pufendorf's answer appears to be, Because we must believe that they did. That is, he seems to appeal to “interpretive charity”. This is a somewhat disturbing solution, in that it requires us to believe of the original legislators what may well not be true: law, in such an eventuality, is propped up by a convenient fiction, or noble lie. It is therefore worth looking at the matter a little more closely.

The strongest evidence for understanding Pufendorf to be employing a principle of interpretive charity is the following remark. He says:

it is presumed from the benevolent mind of the legislator, and from the consideration of human nature, that a case of necessity is not included under a law which has been conceived with a general scope.¹⁹³

This concern for “the benevolent mind of the legislator” does indeed look like interpretive charity. However, I shall argue that, in the first place, it is not, and, in the second, that, even if it were, nothing relevant hinges on the matter, because exceptions in the case of necessity can be established independently.

¹⁹² ibid. Pufendorf adds “unless such a case is included expressly, or in the nature of the matter”. It is not clear why such exceptions are permissible. Given that such laws ignore the “weakness of human nature”, do they not do violence to that nature? Pufendorf does not discuss the matter further: perhaps that is the best course here as well.

¹⁹³ ibid.
Firstly, in the above quotation Pufendorf is not relying on a principle of interpretive charity because it is not the benevolence of the legislator's mind which is being presumed. Rather, this is (for reasons which will be given below) taken to be a simple fact. What is being presumed is that, given the legislator's benevolent mind, and given also human nature, a particular conclusion follows - that necessity constitutes an exception to a law "which has been conceived with a general scope". The presumption, in other words, concerns the validity of a particular deduction from a set of premises which include a factual claim about the legislator's mind. The presumption is not about that mind (or state of mind). It is not, therefore, an instance of interpretive charity.

What of Pufendorf's other claim - that the legislator's purpose is "the promotion ... of men's safety or convenience"? This view can be treated in the same way as the one discussed above. It might appear at first sight to be a charitable presumption about the legislator's purposes. But once again there is no textual evidence to support this reading. Rather, the case is the same as the above - Pufendorf simply asserts that this is the legislator's purpose. It is clearly important to understand why Pufendorf makes this bold claim.

Why should the legislator's purpose be the promotion of safety and convenience? The short answer is that it is so because it must be; it cannot be otherwise. The legislator's purpose must be so because it follows "from the consideration of human nature". How can the consideration of human nature demonstrate the nature of the legislator's purposes? Before showing how this can be so, it should be noted that, if this can be successfully demonstrated, then we have established that the exceptions to general laws generated in cases of necessity can be derived directly "from the consideration of human nature". No special recourse to the legislator's mind is necessary, so it does not matter what we attribute, charitably or otherwise, to that mind. Pufendorf's view that the legislator's purpose is to promote safety and convenience is simply the view that law has this function - that is, that it in fact has this function, not merely that it ought to (but may not). It has this function because it does promote safety and convenience. The rule of law, while it does not guarantee the peace and safety of human society, nonetheless promotes such peace and safety. Of course, particular laws - especially those that proceed from despotism or tyranny - are quite able to destroy social peace and safety. So what reason is there to be confident that the rule of law in general has a peaceful tendency?

This question can be answered in two distinct but complementary ways. Firstly, laws (and indeed societies) are subject to the forces of natural selection. (Pufendorf would not have put it this way, of course, but his extensive knowledge of ancient history would
provide him with ample reasons for accepting the principle in question.) That is, laws are tested both internally by their subjects and externally by neighbouring societies. Laws which fail to adequately unify and organize the members of a society make that society easy prey when it comes into conflict with a society which, through more effective laws, has solved such problems. And laws which fail to gain the acceptance of the subjects of the laws are constantly subject to pressure for change through the non-compliance or otherwise dissenting activities of the subjects. In other words, those positively promulgated laws which have the highest survival value are just those laws which do promote the peace and safety of the members of the society. Laws with a high survival value, then, are those laws which so harmonize with human nature that "the human race can have no wholesome and peaceful social organization." Without them. That is, laws with a high survival value are, or approximate to, natural laws. So, although we are here dealing with positive laws, which need not be natural, we see that the social forces which produce such laws also provide a reason for believing that positive law will, in the main, conform to the patterns of natural law.

The second reason for holding that the rule of law has a peaceful tendency springs more directly from a consideration of the classical conception of human nature on which Pufendorf, like so many of his predecessors, relies. This conception is indicated by his stress on the social tendencies of human beings, and more specifically in his understanding of societies, and their laws, as the fruit of agreement between rational social beings. On this conception, apart from those (tacit) agreements which may be necessary to establish social institutions, institutions are maintained or revised as the result of rational politics. Such politics is

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the science of freedom, the public activity of free men, who come to agreement through discussion, compromise, conciliation and bargaining, through reconciling diverse interests and defining particular common interests.
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This process has a peaceful tendency because it reconciles diverse interests and serves to establish common interests. So, by understanding the social processes of law-making in this light, Pufendorf readily comes to accept the peaceful tendencies of the rule of law. These are the peaceful purposes of the legislator.

(It might be thought that, if the account of the legislator's mind is translatable without

194 *DJNG*, I.vi.18.

195 Eugene Kamenka, "Marxism and Politics", *Bulletin of the Australian Society of Legal Philosophy*, vol. 10 (no. 36, March 1986), p. 20. In this passage, Kamenka is offering an account of that "older tradition, deriving from Aristotle and revived in recent years by Bernard Crick" (ibid.).
distortion into an account of law itself, why does Pufendorf complicate - or apparently complicate - matters by this talk of the legislator's mind? A plausible answer to this is, I suggest, his concern to capture the (for him) necessary formal element of law - that it arises from the will of a superior. By speaking of the legislator, the superior will, Pufendorf is able to underline his view that laws are not merely eternal rational principles, but require the superior's coercive power to establish their obligatory character.)

The above brief account of the process of agreement through discussion, compromise, and so on, of rational beings is an important key to understanding Pufendorf's account of necessity, and the difference it makes. This is because, if law is the fruit of such a process, it is shaped by what such rational beings could be imagined to assent to. Thus we can understand not only why an exception is recognized in the case of necessity, since a rational view of human nature will include the awareness of its vulnerability to a wide range of possible misfortunes, not excluding those of human origin; we can also understand why necessity establishes a right; why the right has, in Pufendorf's account, what may otherwise appear to be a rather curious collection of limitations; and why Pufendorf is able to insist that even positive law, if it is to generate obligations, presupposes an important general principle. This principle is a further indication of a close link between positive law and natural law, so it should be considered before turning to Pufendorf's account of the right of necessity and its specific limitations.

The general principle presupposed by positive laws is this:

the nature of affirmative commands requires that, in order for a man to be obligated here and now to the performance of some act, they presuppose the opportunity, matter, and ability necessary for an action.197

This principle can be summed up as: obligation presupposes capacity. It is the same principle as that expressed in the Kantian dictum “ought implies can”. Pufendorf puts it in another passage thus:

to obligate ourselves it is required that we have the moral and physical faculty to perform some thing or action, in other words, that the performance is not

196 See, for example, De Officio, I.iii.7: “man is indeed an animal most bent upon self-preservation, helpless in himself, unable to save himself without the aid of his fellows, highly adapted to promote mutual interests; but on the other hand no less malicious, insolent, and easily provoked, also as able as he is prone to inflict injury upon another”.

197 DJNG, II.vi.2.
beyond our strength and no law forbids it.\textsuperscript{198}

It is the nature of affirmative commands to presuppose the moral and physical capacity to comply because it is in the nature of affirmative commands to \textit{obligate}. Affirmative commands are thus not merely imperatives, but are expressions of the will of a rational superior, in that they arise through the rational\textsuperscript{199} agreement of rational beings to establish legislative power. Obligation itself requires the capacity to comply because rational beings would not freely agree to subject themselves to laws they could not be capable of keeping. The most obvious example of such law is, of course, that which endangers or denies one's preservation, or, more commonly, those cases where, because of the specific circumstances, keeping or endeavouring to keep an otherwise acceptable law endangers one's preservation. Thus the various kinds of capacities ("opportunity, matter, and ability") necessary for obligation are always understood to be wanting, when something cannot be done unless I perish in the doing, for the casting away of love and care for oneself is classed among things which are impossible, and which surpass the ordinary constancy of men.\textsuperscript{200}

This passage helps to illustrate an important connection: to make an exception of necessity is to affirm the fundamental importance of self-preservation. Thus the principle necessary for positive laws to be obligating, that obligation presupposes capacity, is at bottom a commitment to the fundamental importance of self-preservation. The obligation of positive laws is therefore tied to their recognition of the fundamental importance of self-preservation. But the recognition of the fundamental importance of self-preservation is, as we have seen, one of the distinguishing marks of natural law. Therefore, to be obligating, positive law must not conflict with this most important feature of natural law. For at least all those natural laws which govern adventitious states, the same is true. (Such laws, since they concern only the social, not the cosmic, order, can be limited to human capabilities without threatening to undermine the order of creation.) This means that such natural laws likewise allow exceptions in the case of necessity:

But it should be observed, in connexion with those laws which cover the mutual duties of men, that there are certain precepts of natural law which presuppose

\textsuperscript{198}DJNG, III.vii.1.

\textsuperscript{199}See DJNG, III.vi.3.

\textsuperscript{200}DJNG, II.vi.2.
some human deed or institution, that, as any one clearly recognizes upon a consideration of its end, should not be extended to a case of extreme necessity; and therefore the same exception also is in the law.\textsuperscript{201}

The law of property, being a precept of natural law which presupposes "some human deed or institution," must therefore recognize exceptions in cases of extreme necessity. That is, it must be recognized that there is a right, arising out of necessity, to take from the property of others what is required for one's preservation. Pufendorf's account of the nature and extent of such rights can now be examined.

It was said above that, by recognizing that laws arise out of the free agreements of rational beings, we can understand both that necessity generates a right, and what the extent and limitations of this right are, especially in so far as it affects the property of others. First of all, the exception of the case of necessity can properly be said to generate a \textit{right} of necessity because it is a definite moral effect generated by rational agreement. This right has one general limit, a limit which reflects the primacy of self-love: it does not require that the situation of the necessitous be relieved if by so doing the giver is reduced to like necessity. As Pufendorf puts it,

\begin{quote}
I am not expected to give bread to a drowning person, if I myself need it ... Nor, if another is in danger of drowning, am I bound to draw him out, if I must perish in his place.\textsuperscript{202}
\end{quote}

In the case of rights over the property of others, Pufendorf recognizes a range of special restrictions. These exceptions are a rather heterogeneous lot, but reflect the limitations it is presumed that rational agents require in order to arrive at agreement. The most important constraint on what can be agreed upon in the case of necessity, with respect to the property of others, is that imposed by the reasons for establishing property in the first place. The exceptions to be allowed in the case of necessity must not be such that they frustrate the original point of property relations. The sorts of exceptions which can be generated by necessity can thus be determined only by keeping in mind the reasons for the introduction of ownership. Pufendorf therefore summarises the main reasons for property at this point. He says:

\begin{quote}
The most important advanced are, [1] that thereby the quarrels arising from the original community of ownership are avoided, and [2] that the industry of men is
\end{quote}

\textsuperscript{201}\textit{ibid.}

\textsuperscript{202}\textit{ibid.}
increased, in that each man has to secure his possession by his own efforts. Rights of necessity over the property of others must thus be limited by the necessity to avoid quarrels (and, more generally, to preserve peace), and by the necessity to secure the fruits of industry in the hands of the industrious.

The first reason for property is reflected in the fact that the right of necessity must be constrained by due process. The right does not, in the first instance, empower the necessitous simply to take from the goods of another. Rather, a man in need must first make a formal demand of the owner, and only if this is refused can he resort to more direct means. But even in this case he cannot simply take what he needs: he must, wherever possible, seek a court ruling in his favour. (This is not, of course, always possible: as Pufendorf observes, quoting an ancient proverb: "Necessity keeps no holidays".) Only if a court ruling cannot be gained; or if the relevant institutions refuse to recognize his case, can he resort to directly taking what he needs. In this situation, the right of necessity allows him to take what he needs from what is another's, without thereby committing a crime. Pufendorf spells out the implications of the right as follows:

a person may not himself lay hands at once on property owed him by another, but should demand of the owner that he hand it over to him of his own accord. If, however, the owner refuses of his own accord to meet his obligation, the power of ownership is by no means so great that property owed another may not be taken from an unwilling owner, through the authority of a judge in commonwealths, or, in a state of natural liberty, by the might of war ... But if such a precaution is not taken for the poor in some particular commonwealths ... would you have him die of hunger? Can any human institution have such power that, if another neglects to do his duty toward me, I must perish rather than depart from the customary and usual manner of procedure? I should not feel, therefore, that a man has made himself guilty of the crime of theft if when he has, through no fault of his own, fallen into extreme want [of the necessities of life] ... he should make away with them by violence or by stealth; and especially so if he intends to make good their value whenever a kindlier fortune may smile upon him.

This passage also indicates two other limitations on the right of necessity, limitations which reflect the constraint imposed by the second reason for property. These limitations

\[203\textit{DJNG},\ II.vi.5.\] As we shall see, with the increasing sophistication and productive power of modern societies, the second of these factors comes to be stressed, while the first diminishes in importance.

\[204\textit{DJNG},\ II.vi.2.\]

\[205\textit{DJNG},\ II.vi.5.\]
are, firstly, that the want should have arisen “through no fault of his own”, and, secondly, that the case for taking what is needed is considerably strengthened if the taker intends to restore what has been taken “whenever a kindlier fortune may smile upon him”. In a later passage Pufendorf adopts a stronger version of this second requirement, holding that “restitution must be made”, and castigates Grotius on the ground that the latter’s account of necessity implies that restitution need not be made (even though Grotius asserts that it must - i.e., his account is both inadequate and inconsistent). Pufendorf then proceeds to weaken this claim (presumably thinking of those who cannot - and therefore ought not - make actual restitution), by concluding that the seizer of another’s goods is thereby put under an obligation, but this obligation is “either of gratitude, or of making good the value of the object involved.” Clearly, this requirement serves to protect the industrious. It does so in two ways: by helping to prevent frivolous claims on the goods of another, since the obligation to repay where possible removes the incentive to make claims where there is no pressing need; and by minimising the extent to which claims on the goods of the industrious constitute permanent losses of their possessions, thereby minimising any disincentive to accumulate a surplus, a disincentive which would arise on a too-liberal interpretation of the right of necessity.

Similarly, the “no fault” limitation is designed to protect the industrious from the reckless and, especially, the idle. In this case the reason does not have to be inferred, since Pufendorf explicitly makes the connection:

A distinction should be made between the case in which a man fell under such necessity through no fault of his, and that in which his own sluggishness and negligence are to blame. Unless such a distinction is drawn, a right is apparently given to lazy scoundrels who have fallen upon want through idleness, whereby they may appropriate to themselves by force what has been secured by the labour of others; and so, since their idleness maintains their want, they put the industrious under the necessity of maintaining against their will such a useless herd.

This possibility is clearly intolerable. It would allow the incentive to industry to be completely destroyed. To allow such a possibility would transform the right of necessity from a safety-net for the victims of misfortune to a manacle on social development. Moreover, in this passage Pufendorf shows that there is no right of necessity of such an unrestricted scope: for rights depend on agreements, and, to be binding, agreements must

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206 DJNG, II.vi.6.

207 ibid.
be rationally consented to. But in this case any such consent is clearly lacking, since Pufendorf is only stating the obvious when he says that, in such a state of affairs, the industrious maintain the "useless herd" against their will. The consent of rational beings to maintain such a state of affairs is clearly unimaginable. So, by keeping in mind that the right of necessity, like all rights, depends on the agreement of rational agents, we see that Pufendorf's conclusion (which may otherwise seem damagingly ad hoc) faithfully reflects his commitments. He concludes: "the proper reply to lazy drones is that which the ant, as the fable has it, gave in the winter to the lazy grasshopper".208

In order to maintain the purpose of having property relations at all, then, these limitations on the right of necessity are unavoidable. That such, and perhaps other limitations are required also shows why Pufendorf must reject Grotius's view that in the case of necessity the original use-right revives. This is because, even though on such an interpretation it may be possible to exclude the claims of the lazy (although reasons would have to be provided), the other protective limitations Pufendorf requires could not be maintained. To allow the revival of the original use-right is to hold that in such cases there exist no longer any property holders at all. Since the other limitations presuppose that there are property holders, Grotius's interpretation makes them impossible. There could be no way of applying a method of due process, there is no owner to whom restitution need be made (or even gratitude owed), and there is no longer any way of applying the principle of the primacy of self-preservation, which allows that an owner is entitled not to give to another if that owner will thereby fall into necessity. Such a drastic cure will in many cases be worse than the disease. The lack of safeguards for the efforts of the industrious, the capacity to produce not only quarrels but lingering resentments which would constitute a permanent threat to peace, show that Grotius's attempted solution is contrary to natural law: it could not be accepted by rational beings reflecting on these possibilities. Despite its apparently ad hoc features., Pufendorf's account of the right of necessity is in fact more conformable to the requirements of natural law.

Having spelled out the nature and the extent of the right of necessity, we are now in a position to answer the important question: Does extreme necessity ever require self-enslavement? That is, are there any cases of dire necessity for which the only solution is self-enslavement, or does the right of necessity prevent such cases arising? Pufendorf, we have seen already, holds that slavery first arose through contract, that is, through

208 ibid. (The reference is, of course, to Aesop.)
instances of self-enslavement. Were such acts necessary? He clearly envisages one kind of case where he believes they were, for, in a passage where he refers to some Biblical cases of necessity, he remarks that “the man who had no further means of maintaining himself was supposed to sell himself into slavery”. We have seen, however, that the man who has no further means of maintaining himself has, through the right generated by necessity, no need to sell himself into slavery, provided the necessary limitations of that right are observed. Of these limitations, the only one which appears to be important here is that which requires that the man’s condition be no fault of his own. If the man is in need because he is lazy he is clearly not protected by the right of necessity. For such individuals, then, self-enslavement is indeed necessary, and therefore in this sense slavery has a natural origin. (It is not natural, however, in the sense that anyone could be a slave independently of human actions. In this sense of “natural”, human beings are all naturally free.)

There is, however, something curious about this conclusion. For it appears that the only cases where individuals are not protected by the right of necessity from having to enslave themselves are precisely those cases where the act of enslavement is least likely to be successful. If only the lazy must enslave themselves, only the lazy are available as slaves. What incentive is there, then, for anyone to take on a slave? Pufendorf’s answer would probably be as follows: Granted that only the lazy or incompetent are available as slaves, nonetheless under the proper direction - including a discipline “more rigorous” than that applied to a son - the slave can be made productive. He must say something of this sort, because he accepts that slaves arise from the ranks of the least industrious:

Our idea on the origin of slavery is as follows. When in early days men departed from their original simple manner of living and began to devote more efforts to the elaboration of life ... it is highly probable that the more sagacious and more wealthy invited the more sluggish and the poorer sort to hire themselves out to them.

Then, “when both parties came to realize the advantage of this”, there was established a permanent system of “goods for work”:

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209 DJNG, VI.iii.4.
210 DJNG, II.vi.5.
211 DJNG, VI.iii.2.
212 DJNG, VI.iii.1.
And so the first beginnings of slavery followed upon the willing consent of men of poorer condition; and a contract of the form of "goods for work": I will always provide for you, if you will always work for me.\footnote{DJNG, VI.iii.4. (emphasis added).}

Significantly, what is here explained is the origin of a particular form of the division of labour, including an uneven division of responsibility. What is not explained in this passage is the origin of a rightless state. This is not merely accidental. If Pufendorf is to account for the origin of slavery by contract, then what is contracted must be capable of rational consent, otherwise the contract would not be binding. A rightless state, subject to the arbitrary, including brutal, acts of a master is clearly not within the bounds of rational consent. (No rational being could consent to being made morally powerless, any more than being made physically powerless.) So Pufendorf must hold that slavery is not properly regarded as a state where one is denied the status of a moral being. This he does. As we have already seen, he insists that slaves are not owned by their masters as if they are merely physical objects: the relation of master to slave is rather that of sovereign to subject. Slaves alienate only the right to rule over them.\footnote{DJNG, VI.iii.7.} They remain beings capable of receiving an injury, and so masters do not escape duties towards their slaves.\footnote{DJNG, VI.iii.8.}

The fact of the matter is, of course, frequently worse than this, as Pufendorf acknowledges. The "brutality of many nations" leads to slaves being "numbered among ... material possessions".\footnote{DJNG, VI.iii.7.} That is, the power of the master becomes "extended to the point that not only the labour but also the body of the slave is understood to belong to his master".\footnote{DJNG, VI.iii.9.} Pufendorf is quite critical of such developments, but he is not so critical as to see these developments as a violation of what is natural (of what could rationally be agreed to). As a result, he ends up accepting that, even in the most severe versions of slavery, the children of slaves (who certainly are not guilty of laziness or incompetence, having had no opportunity to be either) are required, by the effectively necessitous condition of the mother (having nothing of her own with which to sustain them), to be enslaved as well.
This case shows us how far from the original agreement the institution of slavery has strayed. The original agreement of “goods for work”, was an arrangement advantageous to both parties. But the case under consideration gives no indication that the goods received by the slave mother are at all apportioned to her work-value, or even that she receives anything other than subsistence goods, since she is unable to accrue even that small surplus of goods necessary to support her child. The mother is kept in necessity, with no hope to provide for her children the opportunity of a better or even an alternative life. Without hope for something better, even for later generations, slavery becomes no longer a system of mutual advantage, but an avenue to despair for the enslaved. It is utterly implausible to imagine that such a one-way street could be agreed to by rational beings.

Nor is this surprising. For Pufendorf himself has to concede that his attempt to give slavery something of a human face is not successful. After comparing the master/slave relation to the sovereign/subject relation, he is forced to concede that there is a fundamental difference: the subject’s subjection to the sovereign is, properly conceived, a subjection to general laws; the slave, on the other hand, is subject simply to the master’s arbitrary will. The great disadvantage of slavery, he says, is that free men need obey only the state and its general laws, and need fear no punishment but what is defined in them, while in all else they hold it their special delight to suit their own will. But slaves serve one who is even a fellow citizen, are subject to his special orders, penalties, and restraints, and are forced to bear his harshness; which is all the more irksome the more frequent and intimate the contact between them. And this is all the harder because the laws of the state rarely come to the assistance of servants against their masters, save when their harshness comes to a head in some outrageous savagery.\textsuperscript{218}

This makes it quite clear that, except in the most extreme circumstances, the slave’s state is one not governed by law, but by the arbitrary will of the master. Therefore it is not comparable to the state of the subject under the sovereign, nor can it be understood as an agreement in which some rational advantage is embodied. Rather, the brutality which has been such a feature of the history of slavery must be seen as a permanent possibility, inherent in the nature of the master/slave relation itself. Pufendorf thus effectively shows that the institution of slavery is an institution of violence, not a law-governed condition. It therefore cannot be recognized by natural law.

So, not only are most forms of self-enslavement unnecessary, in that they arise from situations already protected by the right of necessity, but even those forms which are not

\textsuperscript{218}DJNG, VI.iii.10.
thus protected must also be rejected, since the state of slavery is a state contrary to natural law. This does not mean, of course, that the lazy and incompetent are spared any penalty, or that the right of necessity over the goods of others must be extended to include them. The latter cannot be, since, as we have seen, to do so would be to undermine the whole purpose of property relations. It has been shown that they cannot be compelled to enter slavery, willingly or otherwise, but it has not been shown that they cannot be compelled to enter some law-governed form of compulsory servitude. Such servitude, provided it is constrained within limits that prevent the violence of slavery, and avoid its perpetuity, may well be the only solution some societies can provide to overcome this problem. A controlled form of compulsory labour is undoubtedly better than simply outlawing the lazy or the economically incompetent, and would provide them with a stable status. Where no other solution is possible, such a system would not, unlike slavery, be contrary to natural law.

Of course, a far better solution would be to engineer a society in which laziness and incompetence could be avoided. The most obvious path to such an end would be to provide strong positive incentives to industry. Of course, a secure system of property is a necessary part of such incentives, as Pufendorf recognizes. But a rational science of domestic management and wealth creation, including a sensitive measure of the values of goods to facilitate commercial exchanges, is crucially important. The development of such a science could thus pave the way to overcoming the problem of necessity. Recognition of this possibility is an important feature of the social theories that arise after Pufendorf: as they develop an increasingly sophisticated appreciation of the productive powers of human labour and of commercial exchanges - an appreciation which leads to the new science of political economy - so the concern with the state of necessity, and of its rights, steadily diminishes. For this reason, the decline of special concern with the right of necessity in subsequent theories does not indicate a weakened concern for the well-being of the necessitous. Rather, it is the natural outcome of a strategy which was believed to provide a powerful - albeit indirect - solution to problems like poverty, and its presumed causes in laziness and carelessness. Commercial society has, for such theories, a built-in “maximin” tendency - it steadily improves the lot of the worst off.²¹⁹ This view is strongly defended by Locke in a famous passage, where he says that, in America, “a King of a large and fruitful Territory there feeds, lodges, and is clad worse than a day Labourer

Hume admits that commercial society must encourage avarice, but nonetheless holds that "the ages of refinement are both the happiest and the most virtuous". One reason for holding this to be so would be to see avarice as the cure for the vices that cause poverty, and so a small price to pay for a general improvement in the lot of mankind.

We can see in Pufendorf's work an awareness of some of these matters, especially his chapter on prices and money. He recognizes that there is a strong empirical connection between the absence of a money economy and the absence of civilization:

It is perfectly plain that those nations which are unacquainted with the use of currency have no part in the advances of civilization. This connection reflects the fact that in sophisticated societies simple ways of measuring the values of things no longer suffice. The "ordinary price" of a thing or action is

the aptitude of a thing or action, by which it can either medially or immediately contribute something to the necessity of human life, or to making it more advantageous or pleasant.

The ordinary price of a thing is thus its use-value. This way of measuring value did not long suffice for human life, however, since the division of labour made the different use-values of things, practically speaking, incommensurable. Therefore it became necessary for human beings to establish a means of measuring values:

In view of the fact that things subject to proprietorship differed in nature and did not afford the same service to human necessities ... therefore, by the agreement of men some measure had to be set upon things, according to which measure things of different nature could be compared to and made equal with each other.

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220 Locke, *Two Treatises*, II.41.

221 Hume, "Of Commerce", in *Essays Moral, Political, and Literary*, ed. T. H. Green and T. H. Grose, London (1882), vol. 1, p. 295: "it is requisite to ... animate [men] with a spirit of avarice and industry, art and luxury".


223 *DJNG*, V.i.11.

224 *DJNG*, V.i.4.

225 *DJNG*, V.i.1.
This measure of the value of things, because it is both established by agreement and the measure of the proper prices of other things, Pufendorf calls the eminent price. The eminent price needs a sensitive system of measurements of value, so to this end money is introduced. Because money measures the value of all goods, it has a stable value which does not decay with the spoiling or wearing out of particular goods. Money is thus "a sort of .... sponsor or surety" of value.226

In order to fulfil its function as a convenient medium of exchange, money must possess certain qualities: it must be durable, easily transportable, and scarce. (The last is necessary because scarcity allows "the values of many things" to be "compressed" into something of manageable size.) For these reasons the rare metals were established as the most appropriate forms of money: "it seemed the most convenient thing to the majority of nations to take the more noble and comparatively rare metals, such as gold ..., silver, and bronze".227 Thus the needs of sophisticated society generate a system of metal money, a system established by agreement, and which provides a stable measure of value.

This view of money is accepted by Locke in the Second Treatise, where he explicitly connects the invention of money to the sophistication of society.228 The two also agree on the nature of the just price. This is not a price which can be established independently of market forces; but neither is it simply the market price, irrespective of the factors which produce it. Rather,

it is a just price which is commonly set by those who are sufficiently acquainted with both the merchandise and the market.229

The just price thus admits of a certain "latitude", or variation; what it most importantly excludes is any price variations established by deception or extortion. Locke's treatment of the just price likewise treats it as a product of fair and informed market forces. Markets are neither essentially just nor essentially unjust. Fair markets, however, establish just

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226 DJNG, V.i.12.

227 DJNG, V.i.13.

228 Two Treatises, II.37.

229 DJNG, V.1.9.
Pufendorf's observations on price and money reflect his awareness of the importance of industry in human society. By securing the fruits of industry to the industrious themselves, a source of conflict is avoided. Such security is likewise a spur to increased industry, and thus a means by which the problems of necessity (including a major cause of slavery) can be overcome. His inheritors develop this increased concern with the fledgling study of political economy. They also show an accompanying decreased concern with the question of necessity and its rights, and thus also of self-enslavement, especially in the stable political climate of mid-eighteenth century Britain. At the end of the seventeenth century in England, however, political questions quite distinct from the problem of necessity bring the issue of slavery to the fore. And, whereas the Natural Lawyers hesitated from directly attacking slavery, even when, as I have argued, some of their fundamental principles required nothing less, the sharply different political climate in late-seventeenth century England encouraged a different tone altogether. The desire to avoid the perceived threat of political slavery ends vacillation about the acceptability of enslavement of all forms, including those forms generated by necessity. Locke holds unequivocally that the right of necessity, which he describes in terms of (a right of) charity, shows enslavement to be always unnecessary as well as unacceptable:

Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extreme want, where he has no means to subsist otherwise; and a Man can no more justly make use of another's necessity, to force him to become his vassal, by with-holding that Relief, God requires him to afford to the wants of his Brother, than he that has more strength can seize upon a weaker, master him to his Obedience, and with a Dagger at his Throat offer him death or Slavery.\(^{231}\)

In the next chapter, we shall see how Locke is able to reject slavery in all its forms by arguing that the obligation to preserve oneself requires that the suum be inalienable. This has some significant consequences for the account of property, but slavery does not loom large as an economic (rather than political) problem. For Locke, the problem of necessity is solved by rational industry.

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\(^{230}\) Locke's treatment of just price is contained in *Venditio*, published as an appendix to John Dunn's "Justice and the Interpretation of Locke's Political Theory", in *Political Studies*, vol. 16 (1968), pp. 68-87. (This fragment also refers to the fact that charity places on us more far-reaching demands than does justice.)

\(^{231}\) *Two Treatises*, I.42.
I: The Foundation of Natural Law

In the *Two Treatises of Government*, with which we shall be mainly concerned in this chapter, Locke frequently appeals to the law of nature as the foundation from which his principles are drawn, and with which his arguments accord. There is, it seems, no problem about our knowledge of this law: thus we are told that “the Law of Nature [is] plain and intelligible to all rational Creatures.” Although it is an unwritten law, “and so no where to be found but in the minds of Men”, it can nevertheless be plain to all because a man’s knowledge of it “is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by”. This relation is summed up in the statement that “the Law of Nature ... is the Law of Reason.” As such, the Law of Nature is a source of knowledge of the human condition which is distinct from, but in accord with, divine revelation. Thus Locke holds, in the *Second Treatise*, that natural reason and revelation provide alternative, independent justifications of the right of self-preservation:

> Whether we consider natural Reason, which tells us, that Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence: Or Revelation, which gives us an account of those Grants God made of the World to Adam, and to Noah, and his Sons, ‘tis very clear, that God, as King David says, *Psal. CVX.xvij*, has given the Earth to the Children of Men, given it to Mankind in common.

The precise nature of this grant in common to all mankind will be considered below. The important point here is that natural reason, and so natural law, enables us to arrive at conclusions concerning the human condition which are both plain to all who seek them out, and which are fully independent of divine revelation. Natural law is a system of natural knowledge which is the yardstick for assessing human actions and institutions and it is to this system that Locke appeals in formulating the doctrines of the *Two Treatises*. The frequent references to natural law in this work reflect, in both content and frequency, the fundamental position it allot to natural law.

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2*Two Treatises*, II.25.
When we turn to Locke's most famous work, An Essay concerning Human Understanding, published in the same year as the Two Treatises, we encounter a rather different state of affairs. References to the law of nature are extremely scarce - it is mentioned only three times in a work of considerable length. This is not to say that in this work, Locke denies any of the assertions concerning the nature or importance of natural law, but his remarks are not merely very few, they are also considerably more circumspect than the bold assertions of the Two Treatises. In the Essay only three claims are made about natural law. Firstly, we are told that such a law is generally acknowledged, because it follows from the knowledge of God's existence:

the existence of God, is so many ways manifest, and the Obedience we owe him, so congruous to the Light of Reason, that the great part of Mankind give Testimony to the Law of Nature.3

The Natural Law is thus not natural in the sense of being independent of any theological commitments; rather, it is what is known by natural methods, methods which likewise generate theological beliefs. Secondly, we are told that, by his attack on innate ideas, Locke is not thereby rejecting natural law. This is because

there is a great deal of difference between an innate Law, and a law of Nature; between something imprinted on our Minds in their very original, and something that we being ignorant of may attain to the knowledge of, by the use and due application of our natural Faculties.4

This second remark tells us rather more than the first. It not only affirms that the law of nature is the law of natural reason, as maintained in the Two Treatises, but draws out the implication that such laws are not innate: they are discovered.

The third remark concerning natural law is this: it belongs to one of three sorts of moral rule "to which Men generally refer, and by which they judge of the Rectitude or Pravity of their Actions." These three sorts of moral rule are the Divine Law, the Civil Law, and "The Law of Opinion or Reputation, if I may so call it" (which, in the first edition of the Essay, he had called the "philosophical Law").5 Natural law is part of the Divine Law, because this latter category refers to


4Essay, I.iii.13

5Essay, II.xxviii.6-7.
that Law which God has set to the actions of Men, whether promulgated to them by the light of Nature, or the voice of Revelation.\textsuperscript{6}

The law promulgated by "the voice of Revelation" is divine positive law; but the law promulgated by "the light of Nature" is the Law of Nature. Both these laws are properly regarded as Divine Law, because both are given by God, and rightfully given:

That God has given a Rule whereby Men should govern themselves, I think there is no body so brutish as to deny. He has a Right to do it, we are his Creatures: He has Goodness and Wisdom to direct our Actions to that which is best: and he has Power to enforce it by Rewards and Punishments, of infinite weight and duration, in another Life: for no body can take us out of his hands.\textsuperscript{7}

It is important to notice that in this passage two quite distinct reasons are given to show that God's rule over us is rightful: that he has the power to enforce it, \textit{and} that he has "Goodness and Wisdom to direct our Actions to that which is best." These two elements of God's rule are, respectively, its formal and material elements. Locke is sometimes guilty of leading us astray by forgetting, or downplaying, the material element of the law. This passage shows him to have recognized the importance of the material element, and it is not the only one in which he does so. We shall return to this matter below: here it is important simply to note that both elements are invoked.

The markedly theological language Locke employs here (and, of course, through his work) may help to explain why a careful Lockean scholar should have made an elementary factual error concerning the scope of Locke's "Divine Law". In the editorial introduction to his critical edition of the \textit{Two Treatises}, Peter Laslett makes the erroneous claim that, for Locke, "when it comes (II.xxviii.7-) to the description of the laws or rules which men actually refer their actions to, no natural law is mentioned." Because all actions are measured only by divine law, civil law, or the law of "opinion or reputation", Laslett concludes that "The Essay has no room for natural law."\textsuperscript{8} But, as we have seen, the "Divine Law" includes both divine positive law and natural law, so Laslett is quite mistaken. (The survival of such a straightforward factual error in the second edition of this work is very surprising.) Natural law is regarded by Locke as a part of divine law apparently because the obligation to obey such law depends directly on God. As Locke's first remark on natural law in the \textit{Essay} shows, it is the manner in which it is known

\begin{itemize}
\item \textsuperscript{6} \textit{Essay}, II.xxviii.8
\item \textit{ibid.}
\item \textsuperscript{8} Peter Laslett, Introduction to \textit{Two Treatises}, p. 81.
\end{itemize}
which distinguishes natural law. It is known by "the Light of Reason", but this does not imply that the obligation to obey it proceeds independently of the divine will. Rather, the formal and material elements of the divine will are the source of the obligation to obey natural law, and it is only because such knowledge of God is itself accessible to "the Light of Reason" that natural law is an independent (that is, independent of divine positive law) rule for human actions. Presumably Laslett has fallen into error by failing to keep in mind that, for Locke, natural law does not bind independently of knowledge of God's existence. Like Pufendorf, Locke rejects the "rationalistic" etiamsi daremus clause of Grotius; like Pufendorf, he bases the obligation to obey the natural law on formal and material elements of the divine will.

In the Essay, then, we see that Locke holds that natural law is part of the divine law; it is knowable by the use of our natural faculties, that is by reason, and so is not dependent on a doctrine of innate ideas; and we are obligated to obey this law because of the (naturally knowable) twin elements of the divine will. This is by no means a substantial harvest from a field as extensive as the Essay, especially when it is remembered that the original aim of the Essay was, apparently, to settle matters concerning "the Principles of morality and reveal'd Religion." Nevertheless, this much is sufficient to show that, as a matter of fact, the Essay does indeed accord a place to natural law.

It might be the case, however, that the Essay cannot consistently allow any room for natural law. A number of commentators have held that it cannot - most notably von Leyden in his editorial introduction to Locke's Essay on the Law of Nature - and he has

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9 From a marginal note by James Tyrrell to his copy of the Essay, quoted by R.S. Woolhouse, Locke, Brighton: Harvester Press (1985), p. 7. Locke himself remarks, in "The Epistle to the Reader", that the Essay had its beginnings when "five or six Friends meeting at my Chamber, and discoursing on a subject very remote from this [i.e. from the workings and extent of the human understanding], found themselves quickly at a stand, by the Difficulties that rose on every side." To resolve this, it was agreed that "before we set our selves upon Enquiries of that Nature, it was necessary to examine our own Abilities, and see, what Objects our Understandings were, or were not fitted to deal with" (Essay, p.7). The point of the Essay was therefore to determine whether or not the limited capacities and operations of the understanding were capable of generating, or discovering, moral and religious knowledge. The passages already quoted on natural law show that Locke's conclusion was in the affirmative. It is thus not inappropriate to complain that the Essay says so little on the matter. Locke's intentions appear to have been to conclude the Essay with an account of the principles of morality, but he abandoned the attempt - it remained in an unfinished and unpublished form in a paper entitled "Of Ethick in General". On this matter, see Wolfgang von Leyden's editorial introduction to John Locke, Essays on the Law of Nature, Oxford: Clarendon Press (1954), pp. 69-71. (The Essays will hereafter be cited as ELN.)
been followed in this conclusion by Laslett and John Dunn.\textsuperscript{10} Laslett and Dunn, however, do little more than reiterate von Leyden's conclusion, with a general approving reference to his discussion of the matter. So, although a detailed consideration of these issues would not be appropriate here, it will be useful to discuss briefly some of von Leyden's views. Specifically, von Leyden claims that two of the \textit{Essay}'s doctrines are stumbling blocks to consistently accepting the existence of natural law, and these "explain why Locke did not more fully discuss natural law in the \textit{Essay}. They are "his growing belief in hedonism, and his scepticism about language."\textsuperscript{11} The problem about language is clear enough: it is certainly not easy to see how the law of nature can be, as he says in the \textit{Second Treatise}, "plain and intelligible to all rational Creatures", when he holds, in the \textit{Essay}, that because of the "imperfection" and "abuse" of words, "in the interpretation of Laws, whether Divine, or Humane, there is no end," and that therefore even "in Discourse of Religion, Law, and Morality, ... there will be the greatest difficulty."\textsuperscript{12}

The other matter, concerning hedonism, is not, however, such an obvious problem. It has been recently argued by John Colman, for example, that Locke's hedonism is not at odds with his account of natural law. This is because, for Locke, moral qualities are not intuited by reason, even though justified by reason. Rather, "it is discursive reason working with data given in experience which finds out what the moral law demands".\textsuperscript{13} (As we shall see, Locke emphasises this in the fourth of his essays on natural law.) In Locke's account it is pleasure and pain, or the prospect of such, which is the mainspring of human action, and moral behaviour depends on rational reflection on how this pleasure is achieved, or pain avoided. There is no natural harmony of this-worldly interests, however; and so human beings sometimes show a lack of conviction in moral matters. Moral practices do not always measure up to moral professions. As Locke puts it,

\begin{quote}
if we will not in Civility allow too much Sincerity to the Professions of most \textit{Men}, but think their Actions to be the Interpreters of their Thoughts, we shall find, that they have \textit{no} such internal Veneration for these Rules, nor so \textit{full a}
\end{quote}


\textsuperscript{11}Von Leyden, \textit{op. cit.}, p. 75.

\textsuperscript{12}\textit{Two Treatises}, II.124; \textit{Essay}, III.ix.9 and III.ix.22. Cf. von Leyden's discussion of this point, \textit{op. cit.}, p. 73.

Persuasion of their Certainty and Obligation. The great Principle of Morality, 
To do as one would be done to, is more commended, than practised.\textsuperscript{14}

Such a lack of "internal Veneration" for moral rules would destroy morality itself, were it not for the other-worldly pleasures and pains of divine rewards and punishments. Hedonistic motivations to action are not inconsistent with natural law because "the true ground of Morality" is

the Will and Law of a God, who sees Men in the dark, has in his Hand Rewards and Punishments, and Power enough to call to account the Proudest Offender.\textsuperscript{15}

Von Leyden's view, that (if not an outright contradiction\textsuperscript{16} ) there is a tension between the hedonism of the Essay and the natural law doctrines scattered throughout Locke's work, discussed in most detail in the 1664 essays on natural law (not published by Locke), reflects his particular understanding of Locke's natural law doctrines. This view is summed up in his editorial introduction to the early essays. He says:

From what Locke has to say in his sixth essay it appears that he regards natural law as a set of commands proceeding from the will of God and that it is on this account that this law is righteous and binding. The position he adopts in that deep-reaching question of scholastic controversy concerning the essence of law is that of the Nominalists, represented by the so-called "voluntarist" theory, i.e. he adopts a legislative ethics. Yet ... his position shifts and inclines towards the "intellectualist" theory of the Realists, according to which law has its foundation in a dictate of Right Reason, in the essential nature of things, and is thus independent of will.\textsuperscript{17}

Dunn's understanding of the Essays on the Law of Nature appears to be strongly influenced by von Leyden (he certainly does not dispute the latter's interpretation), so, in like spirits, he remarks that the Essays "present the mind at work and not merely the

\textsuperscript{14} Essay, I.iii.7.

\textsuperscript{15} Essay, I.iii.6.

\textsuperscript{16} To hold a belief in an ultimate moral law, or law of nature, and to maintain that 'good and bad, being relative terms, do not denote anything in the nature of the thing, but only the relation it bears to another, in its aptness and tendency to produce in it pleasure or pain', is to express two doctrines which, if not altogether incompatible, are bound to produce vacillation and vagueness in the mind of him who holds them." Von Leyden, op. cit., p. 72. The internal quotation is from Locke's unpublished manuscript, "Of Ethick in General", section 7.

\textsuperscript{17} Von Leyden, op. cit., p. 51.
finished results of such work.\textsuperscript{18}

Such views are, I believe, mistaken. Locke does not shift from a voluntarist to a rationalist (or "intellectualist") account of natural law. Rather, he consistently maintains a voluntarist position (although he does not consistently maintain the same voluntarist position throughout). We can approach a proper understanding of Locke by considering John Colman's reply to von Leyden. Colman holds von Leyden to be mistaken, because Locke

\begin{quote}
does not waver between a voluntarist and an intellectualist theory of law, but consistently maintains the former. Nevertheless, it is true that Locke is not a voluntarist with respect to the content of the moral law. His voluntarism is strictly a theory of moral obligation.\textsuperscript{19}
\end{quote}

Colman is, I think, half right. But his distinction between moral obligation and the content of the moral law overdraws a distinction between two things which, if we are to understand Locke correctly, are best understood as different sides of the one coin. The distinction is best described as the distinction between the nature of obligation, and its extent. What Colman calls the theory of moral obligation is best described as the theory of the nature of obligation. The content of the moral law is how far this obligation extends - what things we are obligated to do, or to refrain from. Taken together, these two aspects of obligation constitute the law of nature. Although Locke devotes little attention to clarifying his views at this point, what he does say shows him to understand these two aspects of obligation in similar manner to Pufendorf - as the formal and material elements which jointly constitute obligation. The following discussion will spell out Locke's conception of these elements.

Our obligation to conform to the requirements of natural law derives from the will of God. This obligation has two aspects - its nature and its extent - and these correspond to the two elements of the divine will, the formal element and the material element. We have already met with these two elements in a passage from the \textit{Essay}. The formal element, which determines the nature of obligation, is God's power over his creatures. As Locke puts it in the \textit{Essays}, "it is the decree of a superior will, wherein the formal cause of a law appears to consist."\textsuperscript{20} But the formal element is not itself sufficient to constitute

\begin{itemize}
\item \textsuperscript{18} Dunn, \textit{op. cit.}, p. 21.
\item \textsuperscript{19} Colman, \textit{op. cit.}, p. 32.
\item \textsuperscript{20} Locke, \textit{ELN}, Essay I, pp. 111-3.
\end{itemize}
an obligation. We have to include an account of “what is and what is not to be done, which is the proper function of a law”. Because of these two elements, the law constitutes “all that is requisite to create an obligation.”

The second of these elements is the material element of the divine will. It is no easy matter to properly describe this element. The material element of the divine will is the content of the divine will, that is the creation itself. Not just the creation as a set of brute facts, however, because this would leave the divine purpose (part of the content of the will) out of account. So, the material element of the divine will can be called the teleology of the creation. With respect to natural law, the material element of the divine will is shown in a teleological understanding of human nature, which is that part of the creation to which natural law applies. (There is a natural law only in so far as there is human nature: “human nature must needs be changed before this law can be either altered or annulled ... natural law stands and falls together with the nature of man as it is at present.”) So the material element of the divine will is not a coercive will standing over and against the natural world; it is, rather, the natural world itself. Thus a voluntarist account of natural law which includes both formal and material elements in its account of the divine will is an attempt to subsume rationalism, not an attempt to deny it. It is for this reason that Locke can talk of natural law in terms strongly reminiscent of Cudworth: natural law “does not depend on an unstable and changeable will, but on the eternal order of things ... certain essential features of things are immutable, and ... certain duties arise out of necessity and cannot be other than they are.” The law of nature is “a fixed and permanent rule of morals, which reason itself pronounces, and which persists, being a fact so firmly rooted in the soil of human nature.”

Locke’s employment of such language makes it unsurprising that von Leyden and others should have been led into thinking that he here abandons his voluntarist beginnings. But Locke’s meaning becomes a little clearer when we consider a subsequent passage in the same essay. Although “certain essential features of things are immutable,”

this is not because nature or God (as I should say more correctly) could not have created man differently. Rather, the cause is that, since man has been made as

\[^{21\text{ibid.}, \ p. \ 113}\]

\[^{22\text{ELN, \ Essay \ VII, \ pp. \ 199, \ 201. \ Cf. \ von \ Leyden's \ introduction \ (p. \ 51): \ "the \ bonds \ of \ natural \ law \ are \ coeval \ with \ the \ human \ race."}\]

\[^{23\text{ELN, \ Essay \ VII, \ p. \ 199.}}\]
he is, equipped with reason and his other faculties and destined for this mode of life, there necessarily result from his inborn constitution some definite duties for him, which cannot be other than they are.\(^{24}\)

So, humankind was not necessarily made in a certain way (the divine will was unconstrained), but having been made has been made in a certain way. This is the material element of the divine will manifested in the world. God's formal will is necessary for there to be a created world at all; God's material will makes the world the kind of world it is. So, with respect to the law of nature, the formal foundation of the law is God's power over us. In this respect natural law depends on God's existence. This Locke stresses, as we have already seen in a number of passages. The material foundation of this law is human nature itself, that is, a nature "equipped with reason and his other faculties and destined for this mode of life." By keeping in mind that the divine will has both formal and material elements, then, we are able to see that Locke is consistently a voluntarist about natural law, and that this voluntarism covers, pace Colman, not only the nature of obligation, but also the content of the moral law (of obligation).

It was said above that, while Locke is consistently a voluntarist, his voluntarism is not itself always consistent. This is because he sometimes forgets the necessity of the material element. One passage where this appears to be the case is the passage in the Second Treatise where Locke holds that human beings are unreservedly subject to the divine will, because "they are his Property, whose Workmanship they are, made to last during his, not one anothers Pleasure."\(^{25}\) Having clarified the nature of the material element, we can now deal with this remark quite briefly. Since God is in control of his own creation, of course we are in his power, and in this sense can be said to last during his pleasure. But this in no way justifies arbitrary ("wilful") interventions in the course of the world; it merely emphasises our impotence before the divine will (whether manifested in miraculous interventions, or in the face of natural - created - forces). When we remember that the divine will is said by Locke to be not unstable and changeable, but manifest in "the eternal order of things", an order of things which necessitates certain duties because of the material constitution of the world\(^{26}\), we are quite entitled to conclude that God's "pleasure" is quite unlike our own, and does not extend to arbitrary (to "wilful") actions. It is not distinct from the divine purpose for the creation. So, while we can quite well

\(^{24}\)Ibid.

\(^{25}\)Two Treatises, II.6.

\(^{26}\)ELN, op. cit.
agree that we are made to last during God's pleasure, we are not entitled to conclude
from this (as Locke seems tempted to do) that we can have no complaint if God should
choose to dispose of us as we might choose to dispose of some unvalued possession.
(Neither are we entitled to conclude that a divine action of such a kind would be wrong.
If we hold the moral law to apply only to human beings - which, as we have seen, Locke
does - such an ascription of wrongdoing would just be misapplied. But we can hold the
moral law to apply only to human beings without abandoning grounds for complaint.
Such complaints could be of the form "If God were human, his actions would be wrong",
or "God does not treat us as well as he requires us to treat each other."

A second, and more complete, example of Locke forgetting the difference the material
element makes occurs in the seventh of the Essays on the Law of Nature. In countering
objections to his view that the binding force of natural law is eternal, Locke discusses an
attempted refutation of his view in the following way:

A proof that the binding force of the law of nature is not everlasting and
universal can be given in this way: namely be showing that, though by general
agreement it is a law of nature that every man should be allowed to keep his own
property, or, if you like, that no one may take away and keep for himself what is
another's property, yet at God's command the binding force of this law can
lapse, for this actually happened, as we read, in the case of the Israelites when
they departed from Egypt and journeyed to Palestine. To this we reply by
denying the minor premiss: for if God should order someone not to restore
something he has received on loan, the ownership of the thing itself, but not the
binding force of natural law, would cease; the law is not violated, but the owner
is changed, for the previous owner loses together with the possession of the thing
his right to it. In fact, the goods of fortune are never so much ours that they
cease to be God's: that supreme Lord of all things can, without doing wrong,
give of His property to anyone as He pleases by His sovereign will. 27

This will not do. Of course God can do whatever he pleases, without doing wrong, since
Locke has told us that the law of nature applies only to human actions. But from this it
follows that, in sharp contrast to the case with human beings, the assertion that God does
no wrong in performing a particular action is not any kind of moral judgement. In fact, it
is not a judgement of the relevant action at all, a fact which can readily be seen by
recognizing that it would be equally true to say of the action that, by doing it, neither did
God act rightly. Therefore, if Locke's ambition here is to justify the ways of God to
human beings, the attempt fails because the justificatory work in the argument is being
done by an equivocation on "without doing wrong". If Locke's aim here is not
justificatory, the remark that God does no wrong is no more than a reminder that certain

kinds of objects cannot possess certain kinds of qualities - best exemplified by the kinds of cases so beloved of a past generation of analytical philosophers, e.g. that numbers cannot be coloured.

The basic problem with the passage is, as previously, that Locke has forgotten the material element. It cannot be true that “the ownership of the thing itself, but not the binding force of natural law, would cease”. The binding force of natural law is not simply a reflection of God’s formal act of willing, but also of the matter of that will, manifested concretely in the world itself. The law “does not depend on an unstable and changeable will, but on the eternal order of things”28; it is, in fact, “a rational apprehension of what is right [that] puts us under an obligation.”29

Locke fails to recognize the importance of the material element in a number of other passages, but characteristically the passages are themselves sufficient to show the unacceptability of the oversight. He says, in one place, that

God has created us out of nothing and, if He pleases, will reduce us again to nothing: we are, therefore, subject to Him in perfect justice and by utmost necessity.30

Because of God’s power over us, it is indeed true that we are subject to him by utmost necessity, but if the natural law does not apply to God, what can it mean to say that we are subject to him in perfect justice? Without stressing the material element of the divine will, this can amount to no more than a reiteration of God’s power over us. Locke obviously wants to say more than this and we can clearly see as much from another passage in the same essay. He says:

since nothing else is required to impose an obligation but the authority and rightful power of the one who commands and the disclosure of his will, no one can doubt that the law of nature is binding on men.31

Obligation requires, then, not merely power but “authority and rightful power”. (This is a somewhat curious construction, since on at least some accounts “authority” means rightful power.) It also requires disclosure of the will of the authority, since without this

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28 ibid., p. 199.
29 ELN, Essay VI, p. 185.
30 ibid., p. 187.
31 ibid.
we could not know either the fact or the extent of the obligation. (In recognizing this requirement, Locke is showing that he too sees that obligation fails where capacity fails: that “ought” implies “can”. In the case of natural law, this disclosure of the will must be naturally knowable, which means that it must be discernable by “the light and principles of nature”, the light of reason. But a mere disclosure of will is not sufficient: the will disclosed must be of a kind which can be naturally recognized as one of rightful power, of perfect justice. This cannot be provided unless the material element of the divine will is kept in view.

At this point, however, we encounter a problem: how can the material element of the divine will, manifested in the structure and purposes of the creation, allow us to speak of God’s power as rightful, of his activity as perfectly just, when it has been stressed that the natural law applies only to human beings? Through the material element of the divine will - through the features of the world, including our own most important capacity of rational reflection on the world and our own place in it - we can come to an understanding of what is rightful power, and perfect justice, as regards ourselves. To do so is to come to an understanding of what the natural law requires. But the natural law regards only ourselves, So, even though notions such as rightful power and perfect justice indeed depend on the material element of the divine will, they do not in any way apply to the divine will. They cannot be employed to describe divine actions. On Locke’s own terms, such a conclusion seems irresistible. Is there any way around it?

Strictly speaking, I think there is not. The best approach, if we are to make any sense of Locke’s restriction of natural law to human beings, and his ascription of moral capacities, such as justice, to God, is to analyse such language as analogical. Divine volitions or actions display specific features which correspond more or less closely to features of human volitions or actions. The latter are subject to natural law, and so can be accounted just or unjust, right or wrong, etc. The former, although not subject to natural law, nevertheless by corresponding to actions that are so subject therefore correspond to acts which are just or unjust, right or wrong, etc. And the actions of the stable and unchanging divine will can be seen, by the light of reason, to correspond to those actions which, among human beings, are recognized as just and right. In this way it is possible to speak of divine volition and actions as if they were subject to natural law, even though they are not. So, despite the fact that God is not subject to the obligations imposed by natural law (he could not be, since he is subject to no superior will), the correspondence of divine volitions or actions with the goods apprehended by the light of reason enable us to speak of God’s justice, goodness, and so on. The necessary part played by the material element requires that we be able to speak this way, that our
judgements of divine actions, however poorly understood, show these actions not to be contrary to the principles embodied in the natural law. We have already seen that Locke does invoke considerations of divine goodness when filling out the ground of our natural obligations, even though he sometimes forgets them or mistakenly plays down their importance. We can conclude our treatment of this issue by showing some passages where he brings this feature to the fore, as (it has been argued) he needs to do.

It has already been noted that, in the *Essay concerning Human Understanding*, Locke justifies God’s right over us not merely by reminding us of the extent of our dependence on divine power, but also by pointing out that God “has Goodness and Wisdom to direct our Actions to that which is best”. A number of similar passages occur in the *Essays on the Law of Nature*. In the first essay, he speaks of the law of nature as not only the enactment of a superior power, but also “implanted in our hearts.” It is thus something we acknowledge as just, not merely a requirement of prudence. (In what manner this law is “implanted” shall be considered below.) Later on in the same essay, Locke defends the existence of the law of nature in two ways. Firstly, by appealing to Aristotle’s account, in the *Nicomachean Ethics*, of the function of human beings as “the active exercise of the mind’s faculties in accordance with rational principle”, he concludes that “man must of necessity perform what reason prescribes.” Secondly, the existence of the law of nature “can be derived from men’s consciences.” Locke illustrates this by quoting Juvenal: “no one who commits a wicked action is acquitted in his own judgement.” Both these arguments show the law of nature to be part of, or testified to by, our own nature as beings of a determinate kind. This nature is part of the manifestation of the material element of the divine will, and shows us to be judges of what is, and what is not, in accordance with the law of nature. We are not simply to be regarded as objects at the free disposal of an inscrutable omnipotence.

Most of the other passages where Locke invokes the material element of obligation occur in the sixth essay. This is not surprising, since the sixth essay is the one which directly addresses the question of our obligation to obey natural law. Several of these passages have already been quoted, so at this stage it will suffice if we settle for one more example.

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32 *ELN*, Essay I, p. 111.

33 *ibid.*, p. 113. The quotation from Aristotle (*E.N.* I.7) is from the translation of H. Rackham (1943), p. 20. (Editorial footnote, p. 113.)

34 *ibid.*, p. 117. The quotation (translated, apparently, directly by the editor) is from Juvenal’s *Satires*, xiii.2-3.
Not only is it the case, says Locke, that God's absolute power over us means that "we are bound to observe the limits He prescribes", but also "it is reasonable that we should do what shall please Him who is omniscient and most wise." The second part he seems to have added as something of an afterthought, but even if we treat it so, it nevertheless draws our attention to the material element of the divine will. God is "omniscient and most wise", and so when Locke appears to be invoking divine power alone as the source of obligation, this is not because power itself constitutes obligation, but because the power of "Him who is omniscient and most wise" is always rightful power (because it is always directed to what is best). Thus,

no one can oblige or bind us to do anything, unless he has right and power 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.

Right is not power simpliciter. The formal command of a superior is not itself sufficient to constitute obligation. (Without such commands, there can be no obligation - only reasons for action.) Rather, obligation requires both the superior's will, and the superior's right to command obedience through the justice and goodness of his (material) will. For Locke, both these are true of God, therefore God's rule over us is rightful. This rule is the "Divine Law" referred to in the Essay; and that part of the divine law which is knowable by the "light of Nature" (which, as we shall see, is the light of reason) is the law of nature. We are now in a position to determine the characteristics of this law.

II: The Characteristics of Natural Law

We have seen in the preceding section that, for Locke, natural law is ultimately grounded in the formal and material elements of the divine will. His view is thus of the same kind as Pufendorf's (although not influenced by Pufendorf - the Essays on the Law of Nature predate the publication of De Jure Naturae et Gentium). The terms in which he speaks of natural law show this similarity to be no accident - his conception of what natural law is, and what it is not, places him comfortably within the tradition delineated in the first two chapters. This is not to say that Locke makes no useful contribution to this tradition, merely recapitulating established doctrines. Quite the opposite is true: Locke makes a major contribution to spelling out the material foundation of natural law.

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35 ELN, Essay VI, p. 183.

36 ibid., pp. 181-3 (emphasis added).

37 Essay, II.xxviii.7.
He provides a general sketch of this in the early Essays, but the Essay concerning Human Understanding is a major, albeit incomplete (perhaps even misconceived) attempt to specify the material grounds of natural obligations. It would lead us too far away from the main purposes of this study to examine the doctrines of the Essay itself: we will rest content with the sketch offered in the Essays on the Law of Nature.

The orthodoxy of much of Locke's treatment of natural law in the early Essays can be shown by a brief summary. Firstly, as Grotius had done (and Pufendorf would shortly do), Locke identifies Carneades as the archetypal enemy of natural law. Carneades had held that there is "no law of nature, for all men ... are driven by innate impulse to seek their own interests", and in particular that there is no natural justice, "or, if it exists, it is the height of folly, inasmuch as to be mindful of the advantages of others is to do harm to oneself." However, "this most harmful opinion" of Carneades and his followers has ... always been opposed by the more rational part of men, in whom there was some sense of a common humanity, some concern for fellowship. This reply is an important one, for it identifies three typical features of natural law. The defenders of natural law against the sceptics are "more rational", have a sense of "common humanity", and a concern for "fellowship". In more characteristic terminology, this is to say that natural law is a "law of reason", or a "dictate of right reason"; it is founded in human nature; and this foundation implies, in some way, the necessity of social life, of "sociableness". We shall say something about each of these characteristics.

The law of nature is a dictate of right reason. Locke approvingly refers to this description of natural law in the second essay: "the law of nature is most often called

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38 This has been a commonplace amongst Locke scholars. The work of Colman, op. cit., is an example of a more sympathetic treatment. For a firm (but not argued) opinion that the attempt "is not in principle possible" see John Dunn, op. cit. pp. 25, 187. In making this claim Dunn cites the support of Hume's Dialogues concerning Natural Religion, and also von Leyden's writings - both the editorial introduction already referred to ("his seminal introduction", says Dunn (p. 187n.)), and in the article "John Locke and Natural Law", Philosophy, xxxi (1956), 23-35. Dunn's more recent treatment of the issue - in Locke, Oxford: O.U.P. (1984), chapter 3 - remains critical, but is less dismissive.

39 It was noted above (footnote 9 and text) that the aim of the Essay was to examine the sources of knowledge in order to determine their extent and limits, not for their own sake, but in order to resolve problems of morality and religion.

40 ELN, Essay VIII, p. 205. Von Leyden suggests (p. 204n.) that Locke's source is Grotius.

41 ibid.
right reason itself and the dictate of right reason.\textsuperscript{42} He is not entirely happy with the term, however, because it seems to reify reason and its dictates. Rather, reason is an activity which requires raw materials: "Nothing indeed is achieved by reason, that powerful faculty of arguing, unless there is first something posited and taken for granted."\textsuperscript{43} Therefore the description of natural law as a dictate of right reason can mislead, and so Locke expresses misgivings about such terminology. Natural law, he says, appears to me less correctly termed by some people the dictate of reason, since reason does not so much establish and pronounce this law of nature as search for it and discover it as a law enacted by a superior power and implanted in our hearts. Neither is reason so much the maker of that law as its interpreter ... nor indeed can reason give us laws, since it is only a faculty of our mind and part of us.\textsuperscript{44}

So, although the law is "in conformity with rational nature"\textsuperscript{45}, without which it would not be binding (and which also gives us a clue to what it is to be founded in human nature), nevertheless the role of reason is essentially to discover the law within us - to explicate and clarify what is in conformity with our nature as rational social beings. For this reason Locke tends to avoid speaking of natural law as a dictate of right reason. His position is similar to Pufendorf's, in that the requirements of natural law are worked out by human beings employing the process of reasoning. Unlike Pufendorf, however, he is gripped by a powerful metaphor, in which knowledge is an activity which brings objects out of darkness into light. Thus he speaks of reason as "the light of nature", and the fact that reason can search out this law means that the law is "discernable by the light of reason". Pufendorf, in contrast, speaks rather colourlessly of "sound reason"; terminology which, however, safely catches his meaning - that the law of nature comes to be known as the result of a process of ratiocination in which logical or moral pitfalls are avoided. Locke's metaphorical language invites the possibility that his understanding of the role of


\textsuperscript{43} \textit{ibid}.

\textsuperscript{44} \textit{ELN}, Essay I, p. 111.

\textsuperscript{45} \textit{ibid}. Cf. Essay VII, p. 191: violation of natural law is loathsome to "those who think rightly and live according to nature." This - Stoic - formulation has already been met with in Grotius and Pufendorf.
reason may be crucially influenced by the picture implicit in his language. Does this happen?

He is anxious to stress that it does not. He says:

while we assert that the light of nature points to this law, we should not wish this to be understood in the sense that some inward light is by nature implanted in man, which perpetually reminds him of his duty and leads him straight and without fail whither he has to go. We do not maintain that this law of nature, written as it were on tablets, lies open in our hearts, and that, as soon as some inward light comes near it (like a torch approaching a notice board hung up in darkness), it is at length read, perceived, and noted by the rays of that light. Rather, to hold that something is known by the light of nature is, he says, to hold only that it is known by the exercise of our own faculties:

we mean nothing else but that there is some sort of truth to the knowledge of which a man can attain by himself and without the help of another, if he makes proper use of the faculties he is endowed with by nature.

Despite his emphasis on this point, however, I suggest that there is some evidence that Locke is influenced by the implications of his metaphor. The influence is shown by his belief that what is investigated by reason must be within us - "implanted in our hearts"; "not written, but innate, i.e. natural"; "an inborn, i.e. natural, law." The metaphor invites such conclusions because, if knowledge is pictured as a process of casting light on objects that are indistinct or hidden in darkness, then knowing must be an activity of discovering what is already physically present. The metaphor thus encourages thinking of natural law as something within us. There is no need to think this way. One can hold that natural law is founded in human nature, or is in conformity with our nature, without holding that it is actually within us. If we think of natural law as the conclusion of sound reason, in much the way Pufendorf does, natural law is founded in, or is in conformity

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46 The impact of language on the nature of our understanding is a theme powerfully developed by Wittgenstein in the *Philosophical Investigations*, and which produced some of his most striking aphorisms: "Philosophy is a battle against the bewitchment of our intelligence by means of language" (I, 109); "A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably" (I, 115). Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe, Oxford: Basil Blackwell (1958).


48 *ibid.*

with, our nature (which is a rational nature), without necessarily being already within us. This can easily be illustrated. Our obligation to observe natural law depends on recognizing the existence of God. But the knowledge of God’s existence is not implanted within us, but arises (for Locke) from a rational apprehension of the order and design of the created universe. We are ourselves a part of this order, but this obligation is in conformity with our nature because our nature is rational, and because the obligation is rationally perceived. So the binding force of natural law, without which it is not a law at all,\textsuperscript{50} is not within us, but the result of reflection on the nature of the world and our position in it. Locke’s tendency to think of the law as, in some way, within us can be seen to be at least reinforced by his choice of metaphor.

By reinforcing the tendency to speak of natural law as “implanted”, Locke’s metaphor generates difficulties in his account of natural law. This is because he is at pains to establish that natural law is not a set of innate ideas in the mind: it is not “inscribed in the minds of men”; there are “no principles either practical or speculative, ... written in the minds of men by nature”.\textsuperscript{51} We might be tempted, given these remarks, to conclude that, for Locke, the law of nature is implanted in our hearts, but not in our minds. One problem with taking this course is that Locke himself blocks it off. He does not maintain a clear distinction between hearts and minds: he introduces his arguments against the “inscription” (in our minds) thesis by stating that the arguments “show that there exists no ... imprint of the law of nature in our hearts.”\textsuperscript{52} It is unlikely that there is any simple solution to the problem. We need not be overly preoccupied with it, however, since at least part of the problem arise through the obscurities of his metaphorical language. Clearly, he wants to deny that our knowledge of natural law is innate, a set of ideas “inscribed in the minds of men”. Rather, knowledge of natural law arises through the employment of our own rational faculty, reflecting on our sense-experience.\textsuperscript{53} This depends on our having the kind of constitution we have (which could be said to be “implanted” in us), so knowledge of natural law at least depends on what is implanted in us. In this way at least it is founded in our human nature. But natural law itself is only very misleadingly described as being within our hearts - it depends on what is within our

\textsuperscript{50}ELN, Essay I, pp. 111-3.

\textsuperscript{51}ELN, Essay III, pp. 137, 145.

\textsuperscript{52}ibid., p. 137.

\textsuperscript{53}ELN, Essay IV.
hearts, but is not itself within us. When he avoids metaphor Locke recognizes this. He acknowledges, for example, that natural law depends on reflection which regards both our own inner constitution, and also the purpose of the whole created order:

what it is that is to be done by us can be partly gathered by the end in view for all things ... Partly also we can infer the principle and a definite rule of our duty from man's own constitution and the faculties with which he is equipped.54

Here there is no talk of anything implanted within us. The law of nature is discovered by rational reflection, and in this sense can be called a dictate of right reason. In addition, the object of reflection includes our own constitution, and in this sense it is (partly) founded in human nature. Locke draws back from the view that our natural instincts are an accurate guide to the content of the law, however. It is mistaken, he says, to "seek the principles of moral action and a rule to live by in men's appetites and natural instincts", because such an approach cannot provide "the binding force of a law"; it is an approach which mistakenly holds that "that was morally best which most people desired."55 We have seen that Grotius is prepared to follow the Stoics on this matter, and hold that reason shows the essential rectitude of the most fundamental instincts. For Locke reason has a more critical role, so the foundation in human nature which is enjoyed by natural law is for him less a matter of instincts, and more strongly a matter of reflection on our situation in the universe.

For this reason Locke is not, in the Essays on the Law of Nature, entirely happy with the common doctrine that the natural law has its foundation in the necessity of self-preservation. He says, for example, that

if the source and origin of this law is the care and preservation of oneself, virtue would seem to be not so much man's duty as his convenience, nor will anything be good except what is useful to him.56

This is, he goes on, to found natural law in expediency - which is impossible, since such a "law" has no binding force:

whenever it pleases us to claim our right and give way to our own inclinations, we can certainly disregard and transgress this law without blame, though

54 ibid., p. 157.

55 ELN, Essay VIII, p. 213.

56 ELN, Essay VI, p. 201.
perhaps not without disadvantage.\textsuperscript{57}

However, if we take a larger view, thinking not merely of our private advantage and preservation, but considering both our constitution and its place within the divinely created order of things, we can see that self-preservation has a fundamental role because we come to recognize that we are under an obligation to preserve ourselves. (This doctrine is, of course, a lynch-pin of the argument of the Second Treatise.\textsuperscript{58}) The obligation to preserve ourselves does not justify all our instinctive forms of self-preserving behaviour; but it most notably affirms that self-preserving instinct which contributes to sociableness: a man "feels himself ... to be impelled by life's experience and pressing needs to procure and preserve a life in society with other men."\textsuperscript{59}

This section began by noting that Locke recognized sociableness as one of the fundamental principles of natural law. The passage above shows him to recognize that society is necessary for individual survival. However, like Grotius and Pufendorf, he sees that society is not simply something entered into by human beings for purely pragmatic or self-interested considerations. On the contrary: human beings are peculiarly fitted for social life. Sociableness is a part of human nature itself: a man is urged to enter into society by a certain propensity of nature, and to be prepared for the maintenance of society by the gift of speech and through the intercourse of language, in fact as much as he is obliged to preserve himself.\textsuperscript{60}

Whether his use of "urged" in this passage refers to an obligation or merely to natural instinct, it is clear that Locke sees sociable instincts as in accord with the dictates of natural law. This is indicated by the conclusion of the quotation: we are urged to enter into society as much as we are obliged to preserve ourselves. This is only slightly stronger than the doctrine of the Second Treatise, which holds that we are bound to preserve others as long as by so doing we do not impair our own preservation:

\textsuperscript{57}\textit{ibid.}

\textsuperscript{58}\textit{Two Treatises}, II.6: "Every one ... is bound to preserve himself". Locke also affirms a right of preservation (II.25), but, unlike the Essays, where right is sharply distinguished from law in a Hobbesian manner (\textit{ELN}, Essay I, p. 111; cf. Leviathan, chap. XIV.), in the Two Treatises the right of preservation appears to mean the freedom to do what the obligation implies. Cf. Thomas Mautner, "Natural Rights in Locke", \textit{Philosophical Topics}, vol. 12 (1982), pp. 73-7.


\textsuperscript{60}\textit{ibid.}, pp. 157-8. Cf., for example, \textit{DJBP}, Prol. 6-7.
Every one as he is bound to preserve himself, and not to quit his Station wilfully; 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.61

Although weaker than the above remark from the Essays, this passage from the Second Treatise indicates a stronger commitment to the social life than is found in Grotius, as we have seen.62 But however Locke orders the relationship between caring for oneself and caring for others, he is confident that the two obligations do not conflict: "the duties of life are not at variance with one another, nor do they arm men one against another." Stated more fully,

virtuous actions themselves do not clash nor do they engage men in conflict: they kindle and cherish one another. Justice in me does not take away equity in another, nor does the liberality of a prince thwart the generosity of his subjects. The moral purity of a parent does not corrupt his children, nor can the moderation of a Cato lessen the austerity of a Cicero.63

Abiding by natural law is thus the guarantee of social peace, the provision of a social environment in which the virtuous life can flourish. At least partly for this reason, Locke connects the observance of natural law to happiness: the law is about how to reach happiness.64 On such a view, the law is without point if a modicum of happiness is not possible. The nature of this modicum he outlines in the Essay, when he says that "the lowest degree of what can be called Happiness, is so much ease from all Pain, and so much present Pleasure, as without which any one cannot be content."65 The possibility of such contentment - even if not its durability - is obvious, since such contentment can, at least on occasions, be observed. Locke does not say this, of course, but his discussion of the question of happiness seems to take for granted some such common-sense approach. He is not interested in arguing for the pessimistic classical thesis that happiness does not

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61 Two Treatises, II.6.

62 DJBP, I.II.i.6.

63 ELN, Essay VIII, p. 213.

64 ELN, Essay V, p. 175: "... about how to reach happiness, that is, about the law of nature." Cf. Essay IV, p. 147: "that height of virtue and felicity whereto the gods invite and nature also tends."

65 Essay, II.xxi.42.
exist. If natural law is concerned with how to reach happiness, as Locke holds, then clearly it promotes utility. Locke holds that it does, but, as do Grotius and Pufendorf, he rejects the idea that the law is grounded in utility: "Utility is not the basis of the law or the ground of obligation." Rather, utility is "the consequence of obedience to it." Therefore the rightness of an action does not depend on its utility; on the contrary, its utility is a result of its rightness.

As we have seen, Pufendorf holds that there is therefore a particular kind of utility, what we have called a "rational utility", on which the law can be said to be grounded. Locke makes no such move, for the simple reason that he typically thinks of utility in terms of private interest. Part of his argument against founding law in utility is that to do so would be to destroy the benefits of society. Locke does not see this result, as we would be inclined to do, as a conflict between narrow and wider conceptions of utility. Rather, he simply concludes that utility, as a possible foundation for law, is thereby discredited.

In summary, then, we can see that Locke acknowledges the descriptions of natural law encountered in Grotius and Pufendorf, if in some respects his position tends to be rather more cautious and reserve. He affirms, against the Carneadean sceptic, that there is a natural law, a non-arbitrary law grounded (although not ultimately) in human nature. Since this nature is a rational nature, the law can also be said to be a dictate of right reason, as long as this is understood to mean that reason searches out or interprets the law, rather than invents it or dictates what it must be. And, since human beings are sociable creatures, by both nature and necessity, the natural law is also a law of sociability. It is not a law based on "utility" (on private interest), but it nonetheless serves the interests of all individuals. Similarly, it is not a law founded on private instincts of self-preservation, but there is a duty of self-preservation nonetheless, and a duty to preserve others wherever possible. (The relative importance of self-preservation is

66 In his Censor's Valedictory Speech, delivered in Oxford in 1664, Locke treats this classical doctrine (particularly common among the tragedians) respectfully but not seriously, by giving a funeral oration which holds that, since life is nothing but a miserable prison, a man "is best advised to make an end of himself" (as von Leyden puts it in his editorial summary, ELN, p. 218). Needless to say, this is not a doctrine we find in any of Locke's serious works!


68 ibid., p. 213.
greater in the *Two Treatises* than in the early *Essays*. Or so it seems - an accurate judgment of the matter is not easy, since explicit remarks are few and scattered."

He sides with Pufendorf in rejecting two Grotian doctrines. Firstly, he rejects Grotius's *a posteriori* defence of natural law. The general consent of men (even of the best of men) is no guide to the content of natural law. Secondly, he rejects Grotius's account of obligation, summed up in the *etiamsi daremus* passage. It is not the case that the natural law could have any degree of validity if God does not exist. The obligation to conform to the dictates of natural law depends on the divine will. It does not, however, depend on an arbitrary divine command, in the sense of a command (or commands) simply set over against the nature of the created world. Rather, as with Pufendorf, Locke's account of obligation, although not entirely consistent, depends on both formal and material elements of the divine will. Finally, although natural law can be said to be, in some sense, implanted in our hearts, it is not inscribed in our minds. The natural law is not a cluster of innate ideas, but is discovered by rational reflection on sense-experience.

This last point allows us to raise the problem of natural law and history. It will be argued in the next section that, in his account of property, Locke shows a historical conception of the development, or progressive uncovering, of natural law. Like both Grotius and Pufendorf, he has an essentially "two stages" conception of human social history: of primitive simplicity followed by developed society (the latter distinguished by a money economy). This is not to say that history has only two steps, because development and change is possible within each stage - especially, of course, in the latter. Before considering these matters directly in the next section, however, it is important to recognize that, by holding the knowledge of natural law to be the result of rational reflection on sense-experience, Locke has made the necessary space for a natural law account of society and social institutions in which historical development is an integral part. This is simply because sense-experience occurs over time: not merely in the
lifetimes of individuals\textsuperscript{69}, but also in the much larger time span of the history of human society. In the \textit{Essays on the Law of Nature}, Locke is not particularly concerned with the latter, so it is not considered directly. Indeed, he may well not have thought of the matter in these terms. But the two stages of social history which are so essential to the argument of the fifth chapter of the \textit{Second Treatise} clearly imply that significant changes in such circumstances - which means, significant changes in the content of sense-experience for whole societies in historical time - require that social rules undergo changes as a result of rational reflection on the implication of the new circumstances. Natural law, because discovered by reasoning about sense-experience, is thereby sensitive to historical epochs. Whether we conceive of natural law as a timeless law hidden in the nature of things (in the nature of the created order), as Locke does in the \textit{Essays}\textsuperscript{70}, or more simply as what reason determines as a result of its reflection on sense-experience, as he \textit{may} he doing in the \textit{Two Treatises}, the requirements of natural law are context-sensitive. In this sense, natural law is, for Locke as for Grotius and Pufendorf, a historical law, specifying different rules in different circumstances - especially, of course, in the different historical epochs.

Finally, rational reflection on sense-experience is, for Locke as for his contemporaries, something which can be done either rightly or wrongly. Reason does not merely construct plausible arguments for holding various beliefs, nor does it admit of antinomies. Reason is a chain which leads the mind from things known to things previously unknown, but now recognized:

reason is ... the discursive faculty of the mind, which advances from things

\textsuperscript{69}Locke is particularly aware of the influence of early childhood learning, and, like Pufendorf, sees the very earliness of the learning as the source of the mistaken belief that our knowledge of natural law is innate. He says: "opinions about moral rightness and goodness which we embrace so firmly are for the most part such as, in a still tender age, before we can as yet determine anything about them or observe how they insinuate themselves, stream into our unguarded minds and are inculcated by our parents or teachers or others with whom we live ... And at last, because in this way and without our notice these opinions have crept into our minds with but little attention on our part, striking roots in our breasts while we are unaware either of the manner or the time, and also because they assert their authority by the general consent and approval of men with whom we have social intercourse, we immediately think we must conclude that they are inscribed in our hearts by God and by nature, since we observe no other origin of them." \textit{ELN}, Essay III, pp. 141-3.

This shows, incidentally, that natural law is not necessarily learnt by rational processes. This need not disturb us: the important matter is that justification is achieved by rational reflection; that what we learn, however we learn it, is in accord with right reason.

\textsuperscript{70}This is shown most clearly in \textit{ELN}, Essay IV, pp. 149ff., where reason and sense-experience discover the design and purpose of the world created by God.
known to things unknown and argues from one thing to another in a definite and fixed order of propositions.\textsuperscript{71}

Alternatively, we have seen Locke think of reason as a light which dispels the darkness, which brings things previously hidden "to light". On such an understanding, reason leads to the truth. Reason is right reason as long as it is not false reason - i.e. as long as there are no logical or factual errors (whether admitted innocently or through corrupting special interests). So, to hold that natural law is known by reason and sense-experience, and that it is therefore a historically sensitive law, is not at all to cast doubt on what natural law requires (in any given time or place), nor on our capacity to know it. If we possess the facts, and make no fallacious inferences, we arrive at a clear and certain knowledge of what the natural law requires. The immediate task is to determine what this law requires with respect to property.

\section*{III: Property: Origins and Development}

By approaching Locke's treatment of property in the \textit{Second Treatise} through an examination of his views on natural law, one feature stands out as of peculiar importance. In contrast to the \textit{Essays on the Law of Nature}, the \textit{Two Treatises of Government} quite cheerfully accepts the legitimacy of self-interested self-preserving behaviour. Locke does not come to espouse an uncaring individualism - it remains our duty to preserve others, even though self-sacrifice is not to be commended - but self-preservation enjoys a priority which is denied it in the unpublished \textit{Essays}. In the explanation and defence of private property, such a shift cannot but be of momentous import. Private property fits far more happily into a scheme of life based on the injunction to look after the basic concerns of others after one has looked after one's own such concerns, than on an alternative scheme based on the injunction to regard equally the concerns of oneself and others. To explain this shift in Locke's thought is to find the key to his account of property, and of its importance in political society; to understand why an author anxious for anonymity nevertheless could have held that "property I have nowhere found more clearly explained, than in a book entitled, Two Treatises of Government."\textsuperscript{72}

The key insight which distinguishes the \textit{Two Treatises} from the early \textit{Essays} is that the productive capacity of human labour increases the supply of goods available for human life, and thereby improves human life. The attempt to satisfy needs is not a competition

\textsuperscript{71}ELN, Essay IV, p. 149.

\textsuperscript{72}Letter from Locke to his younger relative the Rev. Richard King, dated 25 August 1703. This letter is quoted and discussed by Laslett in his Introduction to the \textit{Two Treatises}, pp. 3-7.
for fixed resources, not a "zero-sum game"\textsuperscript{73}, as the Essays had perceived the matter:

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.\textsuperscript{74}

In the Two Treatises the picture could hardly be more different. Property arises, in accord with the dictates of natural law (which holds, among other things, that "Men, being once born, have a right to their Preservation"\textsuperscript{75}), directly through the labour of individuals\textsuperscript{76}. It does so, however, not because labour is an unpleasant activity which deserves compensation - although Locke was not unsympathetic to such considerations\textsuperscript{77} - but because labour is \textit{improvement}. It is purposeful activity, directed to useful ends, which therefore adds to the value of resources by increasing their productivity. The fifth chapter of the Second Treatise is full of such connections: "'tis \textit{Labour} indeed that \underline{puts the difference of value} on every thing"; in fact, "labour makes the far greatest part of the value of things, we enjoy in this World"; a conservative estimate is that "of the Products of the Earth useful to the Life of Man \underline{9/10} are the \textit{effects of labour}"\textsuperscript{78}. The appropriation of land by labour is an appropriation "by improving it", to leave some land unclaimed is to leave it available for another, to leave it "for his Improvement"; land already appropriated by another is not available to us because it is "already improved by another's Labour"\textsuperscript{79}, and so on. We misunderstand the doctrine of the origin of property through labour if we fail to recognize that, for Locke, labour is a rational (or purposeful), value-creating activity. Labour is not any exercise of energy on objects in the world - acts

\textsuperscript{73} For this way of putting the matter I am indebted to I. Hont and M. Ignatieff, "Needs and justice in the 'Wealth of Nations': an introductory essay", in \textit{Wealth and Virtue}, p. 41n.

\textsuperscript{74} \textit{ELN}, Essay VIII, p. 211.

\textsuperscript{75} \textit{Two Treatises}, II.25.

\textsuperscript{76} In contrast to Grotius and Pufendorf, Locke bypasses the question of consent altogether. This move is, of course, a crucial part of his critique of Filmer. This will be considered further below.

\textsuperscript{77} See, for example, \textit{Two Treatises}, II.34, where one who seeks to benefit by the fruits of another's labour thereby desires "the benefit of another's Pains, which he had no right to."

\textsuperscript{78} \textit{Two Treatises}, II.40, 42.

\textsuperscript{79} \textit{ibid.}, II.33, 34.
of destruction or mere amusement certainly do not qualify - but those actions directed towards the preservation or comfort of our being. One passage from the Second Treatise makes the connection in some detail:

As much Land as a Man Tills, Plants, Improves, Cultivates and can use the product of, so much is his Property ... 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.80

So, for Locke, labour is the activity of improving for the benefit of life, an activity commanded by God as the result of the Fall.81 Labour is the means whereby property is acquired, both because of the role human beings play in the larger purposes for the whole created order, and because labour is the improving, value-adding activity required by the duty to preserve oneself and others. These two aspects are neatly conjoined if we speak of labour as workmanship, the human role in the divine scheme.82 For convenience, this conception of human activity (labour) will be referred to as the "workmanship model". (It should be stressed, however, that the account of workmanship offered here is rather different - weaker in some of its implications - from the views of Tully and Dunn. The difference arises through the greater importance attributed to the material element of the divine will.)

By recognizing that, in his account of the origin of property through labour, Locke is invoking the workmanship model of human life, we can avoid a characteristic misunderstanding, and help to clarify a number of other features of Locke's account. Firstly, many commentators on Locke fall into error by placing too much weight on Locke's metaphor of appropriating things by mixing one's labour with things. It is certainly true that Locke treats the appropriative acts of individuals as a process by which things in common (things not yet private83) become private property by being mixed with, or joined to, something which is private (the labour of the bodies of particular

80 ibid., II.32.

81 See Genesis, 3:17-19 (God's curse on Adam): "cursed is the ground for they sake ... in the sweat of thy face shalt thou eat bread" (KJV).


83 That is, an original negative community. We shall return to this below.
individuals). But this whole picture depends on the workmanship model both by recognizing only improving activities as labour, and by presupposing an original community designed specially to meet the needs of the workmanship model. So it is a misconception to see Locke's account of appropriation as simply a matter of mixing “held” things with “unheld” things to form a larger group of (inexplicably) “held” things.\(^{84}\)

Secondly, the workmanship model helps us to put in a proper perspective Locke's important remarks about rationality and industry. The world is not to remain “common and uncultivated”, says Locke, because God gave the world to the use of the Industrious and Rational, (and Labour was to be his Title to it;) not to the Fancy or Covetousness of the Quarrelsom and Contentious.\(^{85}\)

The connection between industry and rationality in this passage is not, pace Macpherson, to be understood as the “assumption that unlimited accumulation is the essence of rationality”.\(^{86}\) While it is true that Locke places no limits on how much can be accumulated once primitive simplicity has been abandoned, he is not therefore committed to defending unlimited accumulation. Quite apart from his denunciation of covetousness, the scattered remarks in his unpublished manuscripts in particular show him to be concerned to limit the extent of industry, in favour of education, for the general social benefits such change would bring.\(^{87}\) But the workmanship model reminds us that Locke's concern is not accumulation \(\text{per se}\) (unlimited or otherwise), but \textit{improvement}. Accumulation and industry are rational in so far as they are improving activities. For Locke it is of course the case that, by and large, they \textit{are} improving activities. But this is nonetheless a contingent matter, and, where accumulation or industry do not improve (where they foster avarice or ignorance, for example), they are not defensible, not rational. We can see the positive side of this in the defence of private property itself.

\(^{84}\)I have in mind, of course, Nozick's account in \textit{Anarchy, State and Utopia}, pp. 174-5. It should be clear that the workmanship model precludes such examples as Nozick's can of tomato juice spilt into the sea. Onora O'Neill has effectively stressed the importance of the notion of improvement for Locke in her criticism of Nozick. See “Nozick's Entitlements”, \textit{Inquiry}, vol.19 (1976), pp. 476-9 in particular. It should be added that Nozick is of course not alone in failing to see the importance of the workmanship model.

\(^{85}\)Two Treatises, II.34.


\(^{87}\)This matter is thoroughly dealt with by John Dunn, \textit{op. cit.}, chapter 17. See especially the Locke MSS quoted at p. 231n. and pp. 235-6n.
This can be shown by comparing some passages in the *Second Treatise* with the passage quoted above from the *Essays on the Law of Nature*. In the *Essays*, to take for oneself was to reduce the stock available for others. In the *Two Treatises* this is not so. Appropriating does no harm:

Nor was this appropriation of any parcel of *Land*, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use. So that in effect, there was never the less left for others because of his inclosure for himself. For he that leaves as much as another can make use of, does as good as take nothing at all.\(^{88}\)

In this passage, appropriation does no harm because appropriation for use leaves the original bounty (available for others) intact. Some subsequent passages show that the effect of improvement is, in certain important respects, to improve the situation of even the unpropertied.

First of all, the power of productive labour, the source of appropriation, has to be fully grasped, if the value of appropriation itself is to be properly understood:

Nor is it so strange, as perhaps before consideration it may appear, that the Property of labour should be able to over-balance the Community of Land. For 'tis Labour indeed that puts the difference of value on every thing ... I think it will be a very modest Computation to say, that of the Products of the Earth useful to the Life of Man 9/10 are the effects of labour: say, if we will rightly estimate things as they come to our use, and cast up the several Expences about them, what in them is purely owing to Nature, and what to labour, we shall find, that in most of them 99/100 are wholly to be put on the account of labour.\(^{89}\)

Thus, the appropriation of the earth into private possessions in fact amounts to a productive act - an *expansion* of the available social resources. Private appropriation in accord with the requirements of the workmanship model is the path to a social bounty of goods. Of course, such a bounty cannot be effectively stored until there is a money economy, since property is limited to what is not spoiled. Only with the development of money, specifically gold - "a little piece of yellow Metal, which would keep without wasting or decay"\(^{90}\) - could a bounty be preserved.

Locke is perfectly aware that such a bounty, or social surplus, is not enjoyed equally,

\(^{88}\) *Two Treatises*, II.33.

\(^{89}\) ibid., II.40.

\(^{90}\) ibid., II.37.
but goes principally to the propertied. Thus the establishment of a money economy by consent is to consent to inequality of goods:

since Gold and Silver, being little useful to the Life of Man in proportion to Food, Rayment, and Carriage, has its value only from the consent of Men, whereof Labour yet makes, in great part, *the measure*, it is plain, that Men have agreed to disproportionate and unequal Possession of the Earth.\(^{91}\)

Nevertheless it is not the case that the inequalities produced by labour and subsequently entrenched (perhaps even extended\(^{92}\)) in a money economy leave the unpropertied untouched. Locke does not go into the causes, but he clearly sees some sort of “trickle-down” effect to operate. The bounty produced by the propertied extends to the unpropertied, thereby improving the condition of the latter, so that they actually benefit from the appropriative acts of the propertied. He believes that this is shown to be true by comparing the condition of the unpropertied in a money economy with that of the wealthiest members of a society where primitive community still reigns: among the “several Nations of the Americans ... a King of a large and fruitful Territory there feeds, lodges, and is clad worse than a day Labourer in *England.*”\(^{93}\) Therefore, since “in the beginning all the World was *America,*”\(^{94}\) the institution of private property, despite establishing, through a money economy, dramatic inequalities of wealth, is nonetheless advantageous to the worst off because of the productive power of labour such property establishes and protects.\(^{95}\)

This interpretation of Locke's account of appropriation enables us to properly grasp the importance of the two conditions he places on appropriation - these are the “spoilage”

\(^{91}\text{ibid.}, II.50.\)

\(^{92}\text{Locke does not, nor does he see any need to, argue that “the inequality created by the emergence of money was a faithful reflection of natural differentials in human industry” (Hont and Ignatieff, “Needs and justice”, in *Wealth and Virtue*, p. 39). Locke's concern is with the improvement of society, and with the fate of the poor as a result of such improvement. He has only minimally a conception of what Nozick has called a “patterned” conception of distributive justice (see *Anarchy, State, and Utopia*, pp. 155-60). For example, *Two Treatises*, I.42, shows that he regards inheritance as a just process - but it is not a process that preserves differentials of industry.}\)

\(^{93}\text{*Two Treatises*, II.41.}\)

\(^{94}\text{ibid. II.49.}\)

\(^{95}\text{Locke thus defends private appropriation on what we would now call “maximin” grounds. The activity is just because it is advantageous to the worst off. See John Rawls, *A Theory of Justice*, Oxford: O.U.P. (1972), section 26.}\)
condition and the “enough, and as good left for others” condition. We shall consider spoilage first. Locke restricts the application of this condition to the stage of primitive simplicity (the pre-money economic stage), where it prevents excessive accumulation:

It will perhaps be objected ... That if gathering the Acorn or other Fruits of the Earth, &c. makes a right to them, then any one may ingross as much as he will. To which I Answer, Not so. 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, 1 Tim. vi.17 is the Voice of Reason confirmed by Inspiration. But 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 he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.96

This passage neatly brings out the connection between the spoilage condition and the overall workmanship model. In the age of primitive simplicity, the workmanship model implies that accumulation be limited to what can be used without spoiling. The spoilage condition is not, then, an ad hoc condition simply added on by Locke in an effort to avoid undesirable consequences generated by a gap in the labour theory. Rather, the labour theory, properly understood (as workmanship), requires that accumulation be limited in this way.

With the advent of a money economy, the spoilage condition no longer applies, since surpluses stored in the form of money do not spoil or decay. (It is worth noting at this point the impact that Locke's mercantilist views on money and wealth have on the account of property in the Two Treatises. From a mercantilist point of view, money — that is, precious metal — just is stored-up wealth. As Adam Smith notes in one of his brief remarks on Locke’s writings on interest and money, “His notions were ... founded upon the idea that public opulence consists in money, tho’ he treats the matter in a more philosophical light than the rest [of the mercantilists].”97 But if we hold, with Smith, that “riches do not consist in money, but commodities”, and that “the consumptibility ... of goods is the great cause of human industry”,98 then we must conclude that, on the workmanship model, storing up money is not storing up wealth but a form of waste, of preventing the accumulation of wealth. If, as Smith holds, money “may be compared to the high roads of a country, which bear neither corn nor grass themselves but circulate all

96 Two Treatises, II.31.
98 ibid., LJ(B), 255.
the corn and grass in the country", then money is wasted unless it is used, and it is most useful - most efficient - where the proportion of money to goods is low.\textsuperscript{99} If wealth lies in "the great abundance of the necessaries of life", and not in money, then to store up money is to misuse it, to fail to employ it in the creation and circulation of wealth: "every unnecessary accumulation of money is a dead stock which might be employed in enriching the nation."\textsuperscript{100} Therefore we can see that the role played by money in Locke's account of property in the \textit{Second Treatise} depends on both the workmanship model and a mercantilist theory of money and wealth. The employment of a more modern economic theory would shift the emphasis away from money to the question of the most efficient usage of productive goods. In this way the workmanship model, with its anti-spoilage, anti-wastage implications, would be more effectively implanted.)

Since, for Locke, the spoilage condition operates to restrict accumulation in the stage of primitive simplicity, but not thereafter, it has been thought by a number of commentators that the same role is played, in the advanced money economy, by the "enough, and as good" clause. Robert Nozick, for example, speaks of this clause as "the Lockean proviso".\textsuperscript{101} Such views are, I believe, mistaken. The "enough, and as good" clause does not operate as a limit on appropriation; it is not a "proviso". To see why this should not be so, we need to begin by examining those passages where this clause occurs. It is introduced in a passage dealing with original accumulation in the stage of primitive simplicity:

\textit{Labour} being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.\textsuperscript{102} the "enough, and as good" clause here is not a proviso on legitimate appropriation because it is not a necessary condition for successful appropriation by labour, but a sufficient condition: wherever there is enough and as good left for others, there appropriation of the fruits of the earth is legitimate. And we know from the Book of Genesis that there was a bountiful provision for human needs in the original primitive state. Therefore appropriation in the state of primitive simplicity is indeed legitimate.

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\item \textsuperscript{99}ibid., LJ(B), 245.
\item \textsuperscript{100}ibid., LJ(B), 245, 258.
\item \textsuperscript{101}Nozick, \textit{Anarchy, State, and Utopia}, pp. 174-82.
\item \textsuperscript{102}Two \textit{Treatises}, II.27.
\end{itemize}
\end{footnotesize}
other words, Locke simply does not consider what might have been the case if, in the original primitive state, there was not "enough and as good left". He considers only the case where there was enough, since this is the relevant case for us: "in the beginning all the World was America."\(^{103}\)

We have also seen that this bounty is not impaired by appropriation; and the "enough, and as good" clause is used again in just this context:

Nor was this appropriation of any parcel of Land, by improving it, any prejudice to any other Man, since there was still enough, and as good left.\(^{104}\)

Since, as we have seen, the institution of a money economy entrenches inequalities which are justified by the observable fact that they are advantageous to the worst off, the appropriation of all available land by some to the exclusion of others is a matter of no import in itself. Even in those "parts of the World, (where the Increase of People and Stock, with the Use of Money) had made Land scarce"\(^{105}\) there is still enough and as good available, because the day-labourer is better off than the King in America. In other words, "enough, and as good" continues to be satisfied after the introduction of the money economy not because some things remain unappropriated, but because the appropriation of land and other resources increases the social bounty, so that even the day-labourer, the worst off, has enough and as good of those things necessary for his preservation - "Meat and Drink, and such other things as Nature affords for ... Subsistence."\(^{106}\)

Therefore, although it is true that no longer is there any land or goods left in common for others, this is of no significance because the money economy is justified by its enhanced productivity, and this productivity guarantees that there is enough and as good of the means of subsistence. The "enough, and as good" clause, in the passages quoted above, only regards either land or goods in common in so far as these are the means of subsistence - as they are in the pre-money economy. But in the money economy, no longer are these things necessary for subsistence. Rather, subsistence, even flourishing, for most people no longer depends on their being propertied, nor does it depend on the

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\(^{103}\) My account of this passage, and of the subsequent remarks on charity, owe a great deal to Jeremy Waldron's article "Enough and as good left for others", *Philosophical Quarterly*, vol.29 (1979), pp. 319-28.

\(^{104}\) *Two Treatises*, II.33.

\(^{105}\) *ibid.*, II.45.

\(^{106}\) *ibid.*, II.25.
existence of an unappropriated common, but on drawing wages sufficient for life's purposes. So the "enough, and as good" clause, in the stage of the money economy, is satisfied if wages are sufficient for a reasonable living. And, even for the day-labourer, they are.

Properly understood, then, the "enough, and as good" clause is a sufficient condition in Locke's account of property, and a sufficient condition which is itself sufficient for his purposes because it is always satisfied. From an initial bounty, the operations of a system of private appropriation through the improving acts of human labour thereby not only maintain, but actually increase, the supply of goods useful for human life - even for the worst off.

Even the most productive and humane of economic systems, however, is not immune to disruptions, whether these be private misfortunes or more general social catastrophes such as famines. So, as did his predecessors, Locke offers a solution to the problem of the necessitous. This solution has nothing to do with the "enough, and as good" clause, however. The foregoing account of the role this clause plays in Locke's theory implies as much. Rather, the solution to the problem of necessity is quite simply located in the right of charity which all men have against one another:

As Justice give every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extrem want, where he has no means to subsist otherwise.\[107\]

Locke's choice of language here - charity, like justice, gives a title to another's surplus - is not accidental. He does not conceive charity as a mere imperfect duty of humanity, but as "a Right to the Surplusage of ... Goods." For the needy person, such goods "cannot justly be denied him, when his pressing Wants call for it."\[108\] It must also be the case, for such a right to have any application at all, that charity must overrule justice. Otherwise considerations of justice could be employed to nullify every attempt to enforce the right of charity. Locke's own ranking of the virtues, which puts justice ahead of

\[107\]ibid., I.42.

\[108\]ibid.
charity\textsuperscript{109}, need not conflict with this. For justice is necessary for society to exist at all, whereas charity is necessary only in a limited number of cases. So there is no conflict in holding both that charity is less important than justice, but that, when it applies, it overrides justice. Such a position would be short on plausibility if charity had to be invoked in a large number of cases in order to maintain the social fabric. But this is clearly not the case, since, in the first place, the high productivity of the system of private appropriation keeps cases of necessity rare, and, in the second, Locke restricts the operations of charity to “extream want” or “pressing Wants”, where no other means of survival is available.\textsuperscript{110} The right of charity thus does not play a major role in Locke's system of justice. It must not be overlooked, however, since it does provide a buffer against extreme necessity. Locke's right of charity is, therefore, a version of the right of necessity acknowledged by Grotius and Pufendorf. Unlike, Grotius, Locke does not base this right on a revival of original community, nor, unlike Pufendorf, does he base it on what duties to the poor can be agreed upon by rational agents. Having resolved his earlier doubts about the legitimacy of self-preservation, Locke's version of the right of necessity is founded directly on the natural inclination to self-preservation. The reliability of this inclination, as a guide to action, is stated most forcefully in a passage in the \textit{Second Treatise}:

\begin{quote}
For the desire, strong desire of Preserving his Life and Being having been Planted in him, as a Principle of Action by God himself, Reason, which was the \textit{Voice of God in him}, could not but teach him and assure him, that pursuing that natural Inclination he had to preserve his Being, he followed the Will of his Maker.\textsuperscript{111}
\end{quote}

We are now in a position to sum up. The workmanship model, with its focus on human activity as a part of the larger divine purposes of the created order, in which the central role is performed by the improving effects of human labour, driven by the strong, divinely

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\item \textsuperscript{109}See Hont and Ignatieff, “Needs and justice ...”, \textit{op. cit.}, p. 38n, where Locke's MS note on “Moralists” is quoted: “Justice the greatest and difficultest duty being thus established the rest will not be hard. The next sort of virtues are those which relate to society and so border on Justice ... such as are Civility, Charity, Liberality.”
\item \textsuperscript{110}Cf. Locke's position in \textit{ELN}, Essay VII, p. 195: “we are not obliged to provide with shelter and to refresh with food any and every man, or at any time whatever, but only when a poor man's misfortune calls for our alms and our property supplies means for charity.” Our property can, of course, only supply means for charity when it is firmly secured by the rules of justice. (This passage from the \textit{Essays} is (mis)quoted by Hont and Ignatieff, \textit{op. cit.}, p. 37.)
\item \textsuperscript{111}\textit{Two Treatises}, I.86. (This passage, with its account of reason as “the Voice of God within”, brings out sharply the reliance on God's material will in Locke's theory.)
\end{itemize}
implanted, desire for self-preservation, is the foundation on which Locke builds his account of property in the *Two Treatises of Government*. By overcoming the limitations imposed by the static, or "zero-sum", picture of available resources found in the *Essays on the Law of Nature*, Locke is able to give a full and almost free rein to self-interested behaviour without generating pernicious consequences. In the stage of primitive simplicity, the spoilage condition implied by the workmanship model prevents the accumulation of those unusually large properties which generate waste. In the developed stage of a money economy, the productive capacity of labour guarantees that the initial bounty of God's provision for human beings is always maintained, so that no matter how scarce usable land becomes, there is always "enough, and as good" of the means of subsistence for all - in fact, there is more for even the worst off. This harmonious system is not immune to natural disasters and the like, however, so Locke, in common with his natural law predecessors, provides a safety net in the form of the right of charity, his version of the right of necessity.

Considered thus, Locke's theory of appropriation and prosperity is a significant achievement. But to portray it so is to overlook the central ideological achievement of the *Two Treatises* account of property. This lies in the fact that Locke's account of appropriation entirely avoids the appeal to consent, tacit or express, which was a part of the theories of both Grotius and Pufendorf, and which was (on the part of Grotius at least) so roundly criticised by Filmer. By avoiding the appeal to consent, Locke removed a source of embarrassment for the theories of original community, thereby providing a Whig defence of property against the arbitrary encroachments of monarchical power. (To understand this last point, it is necessary to remember that a theory of property premised on an original community is a theory which takes seriously the claims of all human beings to the bounty of the earth. Unless a Hobbesian path is followed - in which an original common is voluntarily given up in order to provide for individual safety through the protective power of the sovereign - theories premised on an original community provide a defence against such conclusions as monarchical possession of the earth, its fruits, and perhaps even subject human beings.)

Our concern here is not with seventeenth century English politics, but a consideration of Filmer's attack on Grotius, and Locke's response, will serve to clarify some important features of the Lockean theory. We will then be in a position to turn our attention to a much underrated feature of Locke's theory of appropriation: the "two stages" theory of history he employs, and the difference it makes. (Some implications of this historical element have, of course, already been indicated above.)
In his *Observations Concerning the Original of Government*, and again in *Patriarcha* ("a defence of the natural power of kings against the unnatural liberty of the people")¹¹², Filmer brings two arguments against the Grotian assignment of a role for consent in the origin of private property. The first is that, to be binding on all, consent must be unanimous, but such unanimity is not historically credible. Filmer observes ironically:

Certainly it was a rare felicity, that all the men in the world at one instant of time should agree together in one mind to change the natural community of all things into private dominion: for without such a unanimous consent it was not possible for community to be altered: for if but one man in the world had dissented, the alteration had been unjust, because that man by the law of nature had a right to the common use of all things in the world; so that to have given a propriety of any one thing to any other, had been to have robbed him of his right to the common use of all things.¹¹³

Whether or not unanimous consent is historically credible need not concern us greatly. This is partly because, as we saw in the opening chapter, Grotius’s account has a good deal less of a once-and-for-all character about it - being quite heavily dependent on the patriarchal narratives of the Book of Genesis - than is often supposed. Grotius’s account would work just as well if consent was achieved in and for different regions at different times. But we have also seen that the very question of consent is treated in a rather free-and-easy fashion by Grotius. Following Genesis, he holds that some innovations occurred as the result of agreement, others did not. Common ownership was abandoned, according to Grotius, because necessitated by changes in way of life. This abandonment gave rise to private property because such a system of property solved the problems at hand. But because private ownership is not merely a private relation, between an individual and a thing, but a social relation between individuals with respect to things, some public recognition of this relation is essential to its existence.¹¹⁴ It is in this context that Grotius speaks of consent, but even here the consent need not be an express act: property is established "by a kind of agreement, either expressed, as by a division, or implied, as by occupation." So consent is achieved even if no actual agreement is made between parties—all that is needed is that everybody respect each other's acts of occupation. When Grotius goes on to add, then, that when "as yet no division had been made, it is to be supposed that all agreed, that whatever each one had taken possession of should be his

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¹¹⁴Grotius, *DJBP*, II.II.ii.4-5.
property," he is not committed to holding that some meeting occurred of all living (adult, male) human beings. He is saying only that private property grew as the result of particular acts of occupation, which became established as a result of tacit acceptance by the other interested parties. He does not hold that, as Filmer puts it, all the men in the world agreed at one instant of time to change the original community of things. For Grotius, tacit agreement will do.

Why does Filmer fail to see this? The answer, I believe, lies in the fact that Filmer misunderstands the nature of the original community Grotius supposes. For Grotius, the original community was a state in which "each man could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed." It was not a state in which, as Filmer puts it, "man by the law of nature had a right to the common use of all things in the world." Rather, the original common state was one in which, by the law of nature, man had a common right (or, a right in common) to the use of all things in the world. The original community was, in other words, a community of equal right to things, not a state of positive community of things. The choice of expression here is of course not accidental. The community which Grotius imagines is that community which Pufendorf subsequently terms negative community. This is perhaps not too clearly indicated in De Jure Belli ac Pacis (and Filmer's writings predate Pufendorf's by some thirty years), but Grotius makes the same point in Mare Liberum, as we have noted - the original meaning of common property, he says, was not a matter of joint ownership but of absence of private property. If the original community is negative, then everything simply lays open for use. The important matter, as far as maintaining harmony is concerned, is that appropriative acts be publicly recognized. As long as there is a public act, then, the onus is not on the appropriator to make good his claim, but on the other interested parties to show that the appropriative act is, in some way, not successful. In such a scheme, agreement need only be tacit. For an original positive community, however, agreement is a much more important matter, because the onus is not on the non-appropriators to resist specific acts of appropriation. All men are joint-owners, and so their explicit consent is needed before any part can be removed from the common. It is not enough to presume that they have consented as long as they do not

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115 *DJB*, II.II.ii.5.

116 *DJB*, II.II.ii.1.

117 *Mare Liberum*, pp. 22-3.
object. If the original community was positive, then allowing that this community could be departed from without express agreement would be to fail to take seriously the ownership rights of the joint owners. Because Filmer takes for granted that, original community means a positive community, he requires that express consent is needed to justify departures from it. This assumption, with respect to the theory of Grotius, is mistaken, so his first criticism of the original community thesis, and the role consent plays in it, also misses the mark.

Before considering Filmer's second criticism of Grotian consent, it is useful to leap ahead briefly and relate Filmer's first criticism to some of Locke's remarks. Although it is not clear why he should have failed to do so, Locke makes no clear distinction between negative and positive community. Instead, he speaks rather carelessly of things belonging to all in common. He even attempts to illustrate original community by reference to "Commons, which remain so by Compact", without considering carefully whether the two kinds of common are the same. He apparently fails to see the importance of Pufendorf's distinction between the two kinds of community. In fact, it seems that, in the passages where he rejects the claimed necessity of an original agreement - "if such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him" - it is Filmer's conception of the original community thesis, not Grotius's or Pufendorf's, that he has in mind: and therefore these passages are to be understood as Locke's assertion of an original negative community against that version (Filmer's) which supposes that original community, if there was such a thing, was a positive common. Locke's theory is to be regarded, that is, as a defence of the established natural law position against an attack on it which misunderstands it. Although this defence does of course require some revisions to the established theory, we misunderstand the matter if we think Locke to be essentially engaged in reconstructing the theory in order to save it from a damaging attack. Filmer's attack is not damaging because it is premised on a misconception; and Locke's purpose is partially obscured because he has failed to avail himself of the conceptual tools, provided by Pufendorf (the negative/positive distinction), which facilitate the task. To hold that Locke is a negative community theorist is not, however, uncontroversial, so we will return to this matter below.

The second argument Filmer brings against Grotius is this: even if there was an original

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118 Two Treatises, II.28.

119 ibid.; and cf. also II.29.
consent, why should it bind posterity? He sees no reason why subsequent generations should not possess the freedom to choose available to their early forebears:

If our first parents, or some other of our forefathers did voluntarily bring in property of goods, and subjection to governors, and it were in their power either to bring them in or not, or having brought them in, to alter their minds, and restore them to their first condition of community and liberty; what reason can there be alleged that men that now live should not have the same power? So that if any one man in the world, be he never so mean or base, will but alter his will, and say, he will resume his natural right to community, and be restored unto his natural liberty, and consequently take what he please and do what he list, who can say that such a man doth more than by right he may? And then it will be lawful for every man, when he please, to dissolve all government, and destroy all property.\textsuperscript{120}

This argument fails for much the sort of reasons that applied to the first. Once again, Filmer sees agreement simply as a matter of express free choice, which can, apparently, be withdrawn from even by the initial agreeing party themselves, not to mention by any one of their descendents. Once again, the reason for this conception of agreement is Filmer's assumption that "original community" means positive community, with human beings as joint-owners of the earth. In fact, he must take it to be not simply an original community, but a permanent positive community of possession. He does not allow that the original common was simply given up by its joint-owners. (Given a Biblical perspective on such things, it is easy to see how such a view can arise - if the world was given in common to mankind by God, it is very inviting to understand such a gift not as a historical fact, but as timeless, as identifying a permanent condition of human life.\textsuperscript{121})

But Grotius's view, as we have seen, is that an original negative community of possession was given up because of a change in social circumstances, because men no longer wished to live the simple life to which common possession was tied. It was rational reflection on experience which showed that the original community no longer sufficed, and the agreement to abandon common property was no more than the (express or tacit) rational recognition of this fact. So it is not possible to withdraw from private property, once established, precisely because maintenance of a harmonious social order required such property. In other words, precisely because to withdraw from private property would be to endanger society at large, such withdrawal is contrary to the rational dictates of natural law. Filmer's argument depends on attributing to Grotius a doctrine of original


\textsuperscript{121}James Tully holds this to be true of Locke's view: the common right of all mankind "is not tensed". Certainly Locke's language is untensed, but whether this is a significant clue to a doctrine of timeless common possession is not so easily settled. See Tully, \textit{op. cit.}, pp. 60-1.
(and enduring) positive community which he just does not espouse. As James Tully points out, Filmer attributes to Grotius a cluster of doctrines which are in fact Hobbesian.\textsuperscript{122}

Locke does not directly consider this argument of Filmer's. Since his critique of Filmer in the \textit{First Treatise} is concerned almost in its entirety with Filmer's treatment of Adam's title, this is not surprising. (Perhaps Locke moved on to such issues in the lost parts of the \textit{First Treatise}.\textsuperscript{123}) And, of course, his bypassing of the entire consent issue in his account of original appropriation makes a direct reply to the argument unnecessary. But there is one feature of this argument which is noteworthy: it is that Filmer intimately connects the fate of government and property. The problem with allowing consent a role in the foundation of both government and property is, by the revocability of consent, to render both government and property unstable. If consent is the foundation of justice and politics, then "every man, when he please," can "dissolve all government, and destroy all property". This helps to bring into sharper relief Locke's political achievement: by removing consent from the establishment of property, he is able to secure property from such threats. And, although he allows that governments depend crucially on consent, by arguing that the "great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property",\textsuperscript{124} he is able to show that for the propertied, at least (with whom Filmer is of course centrally concerned), there is no motive to render government insecure. Thus, against Filmer, Locke is able to connect the fates of government and property in such a way that they are both made more secure.

To see the full extent of Locke's political achievement here, we need to consider a possible objection: what motive have the unpropertied for the preservation of government? Locke's answer to this neatly synthesizes several previously disparate strands in the natural law tradition. The unpropertied may indeed have no motive to preserve government, he could say, but this is a matter of little import, since, in a society

\textsuperscript{122}Tully, op. cit., p. 127.

\textsuperscript{123}See Locke's Preface to the \textit{Two Treatises}, p. 155: "Reader, Thou hast here the Beginning and End of a Discourse concerning Government; what Fate has otherwise disposed of the Papers that should have filled up the middle, and were more than all the rest, 'tis not worth while to tell thee".

\textsuperscript{124}\textit{Two Treatises}, II.124; cf. II.94: "Government has no other end but the preservation of Property."
whose government conforms to the "True Original, Extent, and End of Civil Government," there simply are no unpropertied. This is implied by his dictum that "every Man has a Property in his own Person." By this dictum Locke is not only able to show that, for all men alike, government is essential because it preserves property, but also able to conclude that, because this most fundamental of properties, like all property, does not depend on consent, neither can it be lost or even alienated. Under just government, then, men are neither enslaved by others, nor can they enslave themselves. That is to say, by natural law slavery is forbidden. So in one move Locke shows both that all men have a strong interest in preserving government because their own self-preservation enjoins it, and that slavery can play no role in a society regulated by just principles. He therefore denies the possibility of even self-enslavement through necessity, an issue which, as we have seen, had proved such an awkward matter for Grotius and Pufendorf. He is turns the close connection between government and property which Filmer had employed against Filmer's own conclusions; to show, among other things, that "Slavery is so vile and miserable an Estate of Man ... that 'tis hardly to be conceived, that an Englishman, much less a Gentleman, should plead for't." Being himself both an Englishman and a Gentleman, Locke is well fitted to show why slavery is intolerable; his account of property enables him to carry out the task.

We have already seen that Locke accounts for property without recourse to consent. In order to properly understand his position, two important factors need to be recognized. The first of these has been widely recognized: Locke uses the term "property" in a broad sense, to mean "Life, Liberty, and Estate," and not merely material goods. Also, because life and liberty are inalienable, he does not understand property to be a right of

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125 From the title-page of the Second Treatise. See the Laslett edition, p. 283, and notes on the history of the titles of the work, p. 284.

126 Two Treatises, II.27.

127 ibid., I.1.

128 See the title-page of the Essay, which shows the work to be "Written by JOHN LOCKE, Gent." This was added to the second and subsequent editions. See the Nidditch edition, p. 1, and notes, p. 2.

129 This is stated most explicitly at Two Treatises, II.87, but many other passages show a similar view. See Laslett's editorial note to this paragraph. In terms of Locke's political philosophy as a whole, the importance of this meaning of "property" has been most effectively stressed by Alan Ryan, "Locke and the Dictatorship of the Bourgeoisie", Political Studies, XIII (June 1965), pp. 210-30.
absolute control over things. Property is neither reducible to things, nor are the objects of property the objects of control. This is certainly at odds with modern usage, and even with the use of Grotius and Pufendorf. But it is not, for all that, evidence of a conceptual break with the natural lawyers, even though it is a terminological variation. It is not a conceptual break because, like Grotius and Pufendorf, Locke thinks of property as a matter of the *suum* and its extensions. This is the second important factor, and the key to understanding Locke's otherwise curious doctrine that every man has a property in his own person. It will be most appropriate, then, if we clarify this connection first. We will then be in a position to show more clearly how the different elements in Locke's theory fit together.

Locke introduces the idea of property in one's person as follows:

> 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.

A man has property in his person because his person (including any action which proceeds from his person) is properly his. It is properly his because he has an exclusive right to it: "no Body has any right ... but himself." This is exactly how Grotius speaks of the *suum*, the realm of one's own. As he says:

> "own" implies that a thing belongs to some one person in such a way that it cannot belong to any other person.

In Grotian terms, then, Locke's notion of a property in one's person is simply that we are each our own: we belong to ourselves in a way that we cannot belong to others. If we ask, In what way do we thus belong to ourselves?, we are seeking an answer to the question, What is it that is one's own? Grotius’s answer is this:

> By nature a man's life is his own, not indeed to destroy, but to safeguard; also

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130 This is noted by, among others, Hont and Ignatieff, "Needs and justice", *op. cit.*, p. 35. They also claim, with Tully (*op. cit.*, pp. 60-1), that Locke uses “property” to mean also a “common right to use.” Certainly Locke sometimes uses the term this way, but I shall argue that his notion of property in one's person will not do the political work it is obviously intended to do (in particular, to ban slavery) unless property is understood to be a right which excludes others. But it should also be mentioned that Tully is quite correct when he insists that for Locke property is not a right of “use, abuse and alienation” (*op. cit.* p. 61), although from this it does not follow that “it is a right of use only”. It is, rather, a right of exclusive possession.

131 *Two Treatises*, II.27.

his own are his body, limbs, reputation, honour, and the acts of his will.\textsuperscript{133} If we count body and limb as parts, or at least supports, of one's life, and recognize that the acts of our will can be redescribed as the freedom to act according to our will, then we can see that, for Grotius, the \textit{suum} can be reasonably described as life, reputation, and liberty. When the \textit{suum} is extended to include those things necessary for its survival, it becomes life, reputation, liberty, and estate. The strong similarity with Locke is evident. Provided we set aside the question of reputation (with which he seems little concerned), Locke's extended notion of property parallels closely Grotius's account of the \textit{suum}. We can now turn to show that the foundation of his account of property, the property in one's own person, is simply the central natural law concept of the (unextended) \textit{suum}: that one's life and liberty belong only to oneself, not to anyone else. This is not to say, however, that one's life is simply at one's free disposal. It is true for Locke, as for Grotius, that one's life is one's own "not indeed to destroy, but to safeguard," and that, consequently, one's liberty is not to be understood as negative liberty in the modern sense - the absence of any restraints - but as the freedom to pursue whatever courses of action are not in conflict with the safeguarding of one's life. In Lockean terms, to say that our life is our own to safeguard is to say that we have a duty to preserve ourselves: "Everyone ... is bound to preserve himself."\textsuperscript{134} The natural liberty which is our own is the freedom to act in whatever ways do not conflict with this duty, or with the associated duties of natural law: "The \textit{Natural Liberty} of Man is ... to have only the Law of Nature for his Rule."\textsuperscript{135} But in so far as this liberty is ruled by the law of nature (i.e. where the liberties in question are to act in accordance with the dictates of natural law, rather than simply not being in conflict with the law), such liberty has the force of a \textit{right}. This applies pre-eminently to the actions necessary for self-preservation: "Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence."\textsuperscript{136} The property in one's person is thus a dynamic relation, since its maintenance requires the acquisition of things necessary for its subsistence. The \textit{suum} must be extended - "mixed" with things - in order to be

\textsuperscript{133}Grotius, \textit{DJBP}, II.XVII.ii.1.

\textsuperscript{134}\textit{Two Treatises}, II.6.

\textsuperscript{135}\textit{ibid.}, II.22. The law of nature is sensitive to those acts of will in which we voluntarily bind ourselves. Thus, as long as a polity is consented to, all the laws of that polity are protected by the law of nature. Cf. II.57.

\textsuperscript{136}\textit{ibid.}, II.25.
maintained. It is because Locke has, in the back of his mind at least, the picture of the
necessity of extending the *suum* that he is so apt to employ the "mixing" metaphor. (It is
not to our purposes here to determine the quality of Locke's "mixing" arguments. Most
of them are quite strange, if we think that he is trying to show how a cluster - or "bundle"
of rights can be transferred from one object to another. But to see him as doing this is to fail 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. Some things do become
mine naturally because there are natural processes by which things become a part of me
- hence Locke's remarks that "The Fruit, or Venison, which nourishes the wild Indian ...
must be his, and so his, i.e. a part of him." It must be his, has become a part of him, since "No Body can deny but the nourishment is his." Of course Locke is trying to show the origin of a legal relation, but his commitment to natural law is, like Grotius's, a
commitment that legal relations arise by mirroring natural relations. As Grotius puts it,
"When property or ownership was invented, the law of property was established to
imitate nature." It will be argued below that Locke does not need to talk of "mixing"; that his argument works rather better if we consider directly the right to
preserve oneself which arises from the property one has in one's person.

At this point it is most appropriate to provide an independent line of support for the
claim that Lockes's notion of property in one's person is equivalent to the natural law
notion of the *suum*. This will also establish not only the conceptual continuity between
the natural lawyers' notion and the notion of property in one's person, but also a high
degree of terminological continuity between Locke's expression and that of his English
predecessors.

Karl Olivecrona has shown, in an important article, both the equivalence of the *suum*
and property in one's person, and also that the Latin "*suum*" was typically translated
into seventeenth century English as "propriety." For example, Hobbes discusses the
Scholastic adage, that justice is *suum cuique tribuere*, in this way:

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137 Many modern readers of Locke simply take it for granted that this is what he is doing, since
their own analyses of the concept of property show it to be a "bundle" of rights. See, for example,

138 *Two Treatises*, I.II, 26, 28.

139 *Mare Liberum*, p. 25; cf. *DJPC*, p. 229: "... this law was patterned after nature's plan."

140 Karl Olivecrona, "Appropriation in the State of Nature: Locke on the Origin of Property",
the ordinary definition of Justice in the Schooles [is] that *Justice is the constant Will of giving to every man his own*. And therefore where there is no *Own*, that is, no *Propriety*, there is no *Injustice*.141

So, for Hobbes, *suum* is what one's own, which is, what is one's propriety. (Hobbes's list "of things held in propriety" reinforces this connection. Things held in propriety are layered, as we have already seen the *suum* to be: "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 riches and means of living."142 This shows us also that Hobbes, like Grotius, includes social factors which Locke ignores.)

With exactly the same adage in mind, Locke affirms this connection between propriety and justice in the first edition of the *Essay*: "Where there is no *Property*, there is no *Injustice*, is a Proposition as certain as any Demonstration in Euclid".143 Both this passage and the one above support Olivecrona's view that "propriety" was used as the English word for *suum*.144 When we note the further fact that, in seventeenth century usage, "propriety" and "property" tend to be used interchangeably, with "property" becoming Locke's own preferred usage when revising his work,145 the equivalence between "*suum*" and "property", in his own writings at least, is thereby clear. Thus in all editions of the *Essay* subsequent to the first, the passage quoted above becomes "Where there is no *Property*, there is no *Injustice*",146 and in revising the *Two Treatises* Locke replaced "propriety" with "property" in some passages.147 Not in all, however: in the chapter on property in the *Second Treatise*, Locke says in one passage that by labouring on things one comes to "acquire a *Propriety in them*."148 Even the actual expression "property in

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142 *ibid.*, ch. XXX (Macpherson edition, p. 383.)

143 *Essay*, IV.iii.18n.


145 See Laslett's editorial introduction to the *Two Treatises*, pp. 101-2 and notes, and note to chapter five of the *First Treatise*.

146 *Essay*, IV.iii.18 and note.

147 See Laslett, *op. cit.*

148 *Two Treatises*, II.37.
one’s person” is prefigured in a work of Richard Baxter, published in 1680. Baxter speaks of a propriety in oneself which can be legitimately extended:

Every man is born with a propriety in his own members, and nature giveth him a propriety in ... his food and other just acquisitions of his industry.149

The equivalence between Locke’s notion of property in one’s person, and the natural lawyer’s notion of the suum is thus not surprising. We have seen that “suum” was commonly rendered into English as “property” or “propriety”; and that the idea of generating property in things through property in one’s person, the established idea of the necessity of extending the suum to include things requisite for its maintenance, is also observable in other political writers of the late seventeenth century, as we might reasonably expect. Locke’s doctrine of the property in one’s person is therefore something of a commonplace - an interpretation, shared by contemporaries, of a central doctrine of the modern natural lawyers.

It was suggested above that Locke’s talk of “mixing” one’s labour with things is a reflection of the idea of extending the suum to things - the suum laps over its original boundaries and mixes with parts of the world - but that Locke’s theory does not at all require (in fact can be better stated without) resorting to this metaphor. This should not be surprising, since, 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 others without doing an injury. Locke draws the conclusion that, because property in things is necessary for protecting property in one’s person, the right to preserve oneself extends to an exclusive right to use things, as long as such uses conform to natural law, to the duties generated by what has been called the workmanship model.150 And, since the workmanship model justifies self-preserving actions because they represent the minimum interpretation of the duty to improve the created order in accordance with divine purposes, the model also justifies more complete interpretations of this general duty. Therefore, since, for Locke, an extensive system of unequal private property linked to a money economy is in accord with a more complete interpretation of this general duty, limited rights of private property generated by the right of self-preservation can be extended to such extensive systems of property.

149 Baxter adds a propriety “in his Children” as well, but this is explicitly resisted by Locke in the Two Treatises. Cf. II.60-7, 170. This passage, from Baxter’s Holy Commonwealth, is quoted in Laslett’s editorial footnote to II.27.

150 See, in particular, Two Treatises, II.57.
We can apply this general line of thought to the individual case in the state of nature, thereby showing that "mixing" metaphors are not necessary or even useful. A man who by his labour acquires those things necessary for his preservation (and, no doubt, for the preservation of his family) acts in accordance with the duties imposed by natural law. He has a right to act this way, and does no injury to any other by so doing. No other can take these necessary things from him without doing him an injury. He thus has an exclusive right to them: "no Body has any Right ... but himself." Therefore, they are his property. That is all that need be said. Locke's "mixing" metaphor only complicates the issue; perhaps its principal achievement has been to lead astray so many of his readers.

We can now spell out Locke's fundamental doctrines on the right of preservation and its implications, and thereby show the intimate (and indeed ineluctable) connection between property and liberty (under natural law), and its implications for slavery in particular. To begin, it is necessary to consider Locke's assertion of the right of self-preservation in its context. Locke says this:

Whether we consider natural *Reason*, which tells us, that Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence: Or *Revelation*, which gives us an account of those Grants God made of the World to Adam, and to Noah, and his Sons, 'tis very clear, that God, as King *David* says, *Psal. CXV.xvj*, *has given the Earth to the Children of Men*, given it to Mankind in common.151

The world is given to mankind in common because it has been given to no one in particular (Locke is, of course, most concerned to deny that it has been given only "to Adam, and his Heirs in Succession, exclusive of all the rest of his Posterity") even though it has been given "to the Children of Men". It has already been pointed out that to give the world in common to all, in the sense of to no one in particular, is the original meaning of "common" identified by Grotius, and defined as negative community by Pufendorf. Locke's insistence on the world being in common is inseparable from his rejection of the Filmerian doctrine that the world is the private property of Adam and his heirs. There is an original community because "no body has originally a private Dominion, exclusive of the rest of Mankind." From such an original community, Locke is of course faced with the problem of how private property arises. It must arise because it is necessary - "there must of necessity be a means to appropriate ... before [things] can be of any use, or at all beneficial to any particular Man" - and, as we have seen, it arises through the improving acts of human labour and the beneficial effects of developed economies. Our concern at

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151 *Two Treatises*, II.25.
this point, however, is to show the political implications of an original community "given to Men for the Support and Comfort of their being."\(^{152}\)

We can best approach this by considering an important passage which appears to deny that the world is given to men in common, but that it (and all human beings as well) belongs to God. The passage has been referred to in passing, and runs as follows:

For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one anothers Pleasure.\(^{153}\)

It has already been pointed out that, because God's will is not changeable, but is materially embodied in the world, including in our own selves,\(^{154}\) our being made to last during God's pleasure must not be understood to mean that the laws of nature can be changed. Nor is it the case that, by being God's property, human beings cannot belong to themselves, or cannot successfully appropriate the earth and its fruits. This would be to deny the characteristic doctrines of the Second Treatise. Rather, Locke's point is this: we are God's property because we belong to God. We belong because we are God's creation, and are therefore subject to divine purposes. In the first place, then, to be God's property is simply to be subject to natural law. In the second place, however, to recognize ourselves as God's property is to recognize that we are not the property of anyone else. Because God has an exclusive right over men, no human being can have any such right. So Locke's concern here is not, despite the language of ownership, to enslave us, but to free them; to free them from each other through natural law. This is made clear by the views expressed both immediately before and immediately after the quoted "workmanship" passage:

The State of Nature has a Law of Nature to govern it, which obliges every one: and Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions ... And being furnished with like Faculties, sharing all in one Community of Nature, there cannot be supposed any such Subordination among us, that may Authorize us to destroy one another, as if we were made for one anothers uses, as the inferior ranks of Creatures are for

\(^{152}\)ibid., II.26.

\(^{153}\)ibid., II.6.

\(^{154}\)Especially in our "Reason", which is in mankind "the Voice of God", ibid., I.86.
Therefore the state that "all Men are naturally in" is a state of subjection to natural law alone. It is

a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.

Although a state of perfect freedom, however, the natural state of men is not without its inconveniences. In particular, the lack of an independent authority to which to appeal in order to settle disputes mean that, although "the *State of Nature, and the State of War*

... are as far distant, as a State of Peace, Good Will, Mutual Assistance, and Preservation, and a State of Enmity, Malice, Violence, and Mutual Destruction are one from another," there is always the possibility that disputes will lead to the state of nature breaking down, and giving way to a state of war. So, in order to prevent such a state of war arising, men establish political society:

To avoid this *State of War* ... is one great *reason of Mens putting themselves into Society*, and quitting the State of Nature. For where there is an Authority, a Power on Earth, from which relief can be had by *appeal*, there the continuance of the *State of War* is excluded, and the *Controversie* is decided by that Power.

This is all reasonable enough, but what of the state of perfect freedom? Is the liberty of the natural state simply abandoned in favour of security in the political state? Locke's answer is in the negative: the "*Natural Liberty of Man*" is exchanged for the "*Liberty of Man, in Society*". He is able to argue this for the following reason: men do not give up their liberty when they enter society because society is founded on consent, and therefore on a legislature which passes laws "according to the Trust put in it." Political society, rightly conceived, thus involves no subjection to "the inconstant, uncertain, unknown, Arbitrary Will of another Man." It can be understood not so much as generating a

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155 *ibid.*, II.6.

156 *ibid.*, II.4. Cf. II.22: "The *Natural Liberty of Man* is to be free from any Superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule."

157 *ibid.*, II.19.

158 *ibid.*, II.21.
superior, as a common, power - and therefore involves no diminution of freedom. Rather, it produces "Freedom of Men under Government", which is "to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it," and, outside the purview of such rules, "A Liberty to follow my own Will." To satisfy these conditions is to guarantee the "Liberty of Man, in Society".\(^{159}\)

It may be thought that here Locke is playing rather fast and loose: that the freedom of men under government, or the liberty of man in society, are simply terms which obscure the fact that they refer to a condition which is a kind of unfreedom. If, by "liberty", Locke means that condition of being free from all restraints which Isaiah Berlin has called "negative liberty"\(^{160}\), then Locke is certainly engaged in obscurantism. But in an important passage Locke shows himself to be aware of what has been called the "paradox of freedom"\(^{161}\) - that, to be maintained, freedom must respect those restraints which preserve and foster it. Freedom, he says, depends on law:

For Law, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes no farther than is for the general good of those under that Law. Could they be happier without it, the Law, as an useless thing would of it self vanish; and that ill deserves the Name of Confinement which hedges us in only from Bogs and Precipices. So that, however it may be mistaken, the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom: for in all the states of created beings capable of Laws, where there is no Law, there is no Freedom.\(^{162}\)

It is not law which is the enemy of freedom, but being "subject to the arbitrary will of another." And, as we have seen, the consent on which legitimate political society is built precludes any such subjection. So the liberty of man in society is genuine liberty.

It is most important for Locke to be able to maintain this, because such liberty is crucial to the exercise of the right of self-preservation. Without liberty, self-preservation cannot be effectively pursued, so much so that to lack, or give up, liberty is to lose the control necessary even for staying alive. Unfree men are simply at the mercy of others:

I have no reason to suppose, that he, who would take away my Liberty, would

\(^{159}\)ibid., II.22.


\(^{162}\)Two Treatises, II.57.
not when he had me in his Power, take away everything else.\textsuperscript{163}

From this it follows that

*Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joined with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together.*\textsuperscript{164}

In addition, no man can “forfeit his Preservation” because no man has the power to forfeit his own life - the right of self-preservation is built upon the duty to preserve oneself prescribed by natural law. Every man “is *bound to preserve himself*, and not to quit his Station wilfully.”\textsuperscript{165} The freedom under natural law therefore does not allow suicide, nor, most importantly for our purposes, does it permit self-enslavement. Locke is explicit on the matter:

A Man, not having the Power of his own Life cannot, by compact, or his own Consent, *enslave himself* to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. No body can give more Power than he has himself, and he that cannot take away his own Life, cannot give another power over it.\textsuperscript{166}

Nor, it need hardly be said, can a man be forcibly enslaved by anyone else. Since liberty is necessary for self-preservation, to deprive another of liberty is to exercise power over the life of the other, a power which one does not legitimately possess, since each and every man has a property in his own person. So, because men have power over their own lives only in order to preserve it (and improve it for the benefit of life - “for the Support and Comfort of their being”\textsuperscript{167}); and this power can be exercised only over their own lives (not of others), but must be exercised over their own lives (i.e. cannot be given up); Locke's twin doctrines of the right of self-preservation and the property in one's own person are able to preclude slavery altogether. According to Locke, no form of slavery can be tolerated in a political society which conforms to natural law. Slavery is, in its “perfect” form at least, “nothing else, but the State of War continued, between a lawful

\begin{footnotes}
\footnote{\textsuperscript{163}ibid., II.18.}
\footnote{\textsuperscript{164}ibid., II.23.}
\footnote{\textsuperscript{165}ibid., II.6}
\footnote{\textsuperscript{166}ibid., II.23.}
\footnote{\textsuperscript{167}ibid., II.26.}
\end{footnotes}
Conquerour, and a Captive", and, since one great reason for entering political society is precisely to avoid the state of war, the justification for political society is lost if it allows slavery to exist. This is contained in Locke's principle that "the great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property", since "by the general name, Property" Locke means to include, as we have seen, "Lives, Liberties, and Estates." To hold that the task of government is to preserve property is, therefore, to hold that the task of government is, among other things, to prevent the existence of all forms of slavery.

Although not to our main purpose in this study, one other observation is worth making here. A number of modern philosophers, concerned with the contemporary political question of the justification or otherwise of modern systems of private property, begin their enquiries by examining "traditional" arguments for property. Typically, Locke's "labour theory" is one of the theories thus considered. Such examinations of Locke from a modern perspective commonly go astray on two counts. One of these has been already indicated: the role labour occupies in Locke's scheme is only properly understood if it is seen as an improving activity in accord with the general requirements of the workmanship model. Many modern accounts go astray by failing to see this connection, and the difference it makes.

The second error is no less common, and is implicit in the preceding conclusion concerning property and slavery. It can be brought out thus: if slavery is excluded because of the property that all men have in their own persons, it can only be because this property cannot be alienated (voluntarily or otherwise). Further, if our appropriation of what is necessary for our subsistence (that is, leaving aside the questions of surpluses, and also of traded goods) depends on our duty to preserve ourselves, then neither will these appropriations be alienable. Thus Locke accepts that at least some property - in fact the fundamental form from which more extensive properties is derived - are not alienable. This is sufficient to set his concept of property apart from modern conceptions, the conceptions that the philosophers in question are concerned to assess. It is a mistake to assume, then, that Locke's arguments for property are

168 Ibid., II.24.

169 Ibid., II.124, 123.

170 We have already seen Nozick's treatment of property in Anarchy, State, and Utopia to be guilty of this error. But a more fitting example of this genre is Lawrence Becker's Property Rights.

171 The question of the legitimacy of punishment will of course complicate the issue, but it need not be considered in this context. The discussion here can be safely limited to innocent parties.
arguments for that cluster of rights which many modern philosophers regard as constituting property.

It is also, as we shall see, a mistake to believe that Locke's arguments are all arguments for a phenomenon distinct from modern property. Locke's account of property is a historical account in two senses: he deals not only with the advent of property, but with the elaboration and specification, over time, of the meaning of property relations themselves. Improving labour begins property in things in a historical sense - it starts a process of extension and elaboration (through rational reflection on sense experience) of an originally rather amorphous relation of *exclusively belonging to* into a complex and sophisticated notion of positive law in which a cluster, or bundle, of rights come to be accepted as constituting property. Furthermore, although Locke is committed to a development in the nature of property relations (this is not to say that such a development is a smooth, continuing process - in fact, his "two stages" theory may imply only two forms of property), he is not committed to the particular concept of property implicit in modern British property law. This can be easily indicated. In order to show that property allows a wide range of powers over things, he points out that

Property, whose Original is from the Right a Man has to use any of the Inferior Creatures, for the Support and Comfort of his Life, is for the benefit and sole Advantage of the Proprietor, so that he may even destroy the thing, where need requires.173

This passage shows that the workmanship model requires that even the widest powers a man has over a thing are constrained (or, better, directed174) by considerations of need or advantage. Wilful destruction is not within the purview of property right. Property is not, for Locke, a matter of absolute control over a thing. This is most important since, for a wide range of modern philosophers, such absolute control is seen to be the very essence of property right. Lawrence Becker, following the influential analysis by A.M. Honore175, calls the right of absolute control over a thing the right to the capital. It is

172Locke does use "property" to mean forms of common ownership as well, but in the chapter on property it is this meaning he has in mind. Every man has a property in his own person because "this no Body has any Right to but himself". Cf. also Pufendorf, *Djing*, IV.iv.2.

173Two Treatises, I.92 (emphasis added).

174ibid., II.57.

"the power to alienate the thing and to consume, waste, modify, or destroy it." 176 This right is the essential right because, in any list of the "bundle" of rights which can be discerned in the complex notion of property, the holder of the right to the capital holds the "fundamental" right:

One who has all the rights in the list save that of capital may own the thing in a derivative sense, but the one who has the right to the capital is "fundamentally" the owner. 177

If this is "fundamentally" what ownership is - and for Becker ownership and property are identical 178 - then it is no surprise that Becker should later come to the conclusion that arguments of a Lockean type, although they might establish some kind of rights, do not establish property rights. 179 Locke's arguments do not aim to establish the right Becker has "fundamentally" in mind. In fact, should we accept Becker's conception of property, we would be forced to conclude that Locke is not really talking of property at all. There is no need for such a drastic solution, however. It suffices to insist that Becker and Locke employ different concepts of property, so that the failure of Locke's arguments to establish Becker's concept of property is an unsurprising matter.

Making this difference clear is not without its uses. By focusing our attention on the nature of Locke's concept of property, we become better equipped to consider an important recent interpretation of Locke's thought. It has been argued above that the central meaning which we find in Locke's use of "property" is that of exclusive belonging. This allows "property" to have both a wide and a narrow meaning (as a number of commentators have noted regarding Locke's usage), depending simply on whether what is being referred to is all that is mine, what exclusively belongs to me, or what things (other than me) are mine. (This difference of scope can in its turn be related to the suum. The broad meaning identifies property with the suum and its extension; the narrow meaning limits the reference of "property" to the extensions of the suum only.) But the important matter here is that Locke must mean an exclusive right by his use of "property" because his arguments for political liberty and against slavery depend on it. The whole thrust of

176 Becker, op. cit., p.19.

177 ibid., p.20. It is not clear what Becker should intend by the scare quote here - does he intend to empty out the meaning?

178 ibid., p.18.

179 ibid., pp.40-1.
his account of the relation between government, property, and liberty is to guarantee that men belong only to themselves, that they can in no way be "subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man." To prevent such subjection, Locke sees the exclusive rights inherent in private property to be crucial. The same point is made in the *Essays on the Law of Nature*. In arguing against personal interest as the foundation of natural law, Locke is nonetheless anxious to stress that natural law aims precisely at protecting personal interest, in particular in protecting private property. He says:

We do not wish to be understood to say that the common rules of human equity 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 private 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.\(^{181}\)

In this passage we see exactly the same connections - between natural law, private property, individual liberty (in the necessity to pursue one's own advantage), and the general welfare - as we have seen in the *Two Treatises*. For Locke, private property is a bulwark against slavery, the keystone of political freedom and the key to general material prosperity.

It is thus no small surprise to find a recent interpretation of Locke's theory of property which denies that it is a defence of private property at all, but an argument for individual use-rights arising out of an original positive community. This is the burden of James Tully's book, *A Discourse on Property: John Locke and his Adversaries*. It would lead us too far astray of our main purposes to engage in a detailed examination of Tully's dense book, but, because of the very different picture he draws of Locke's position, a consideration of some of his views is inavoidable.

The very idea of an original positive community is rather odd, and especially so in the case of Locke's theory of property. This is because of some of the characteristics of positive community as Pufendorf describes it. He says, in the first place, that positive community, like proprietorship, implies "an exclusion of others from the thing which is

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\(^{180}\) *Two Treatises*, II.22.

\(^{181}\) *ELN*, Essay VIII, p.207.
said to be common.  

A positive community is a group of joint owners, marked off from an (in this respect) unpropertied remainder of humankind. Obviously, this could not be true of an original positive community, for in such a community there are no non-owners. Pufendorf's conception of a positive community is of a relation which could not have been the original relation between human beings and the earth. For Pufendorf, positive community, like private property, arises in the course of human history as the result of consent.

This introduces the second oddity. Since Locke's account of appropriation is designed to avoid recourse to consent, the explanation of his position by means of a relation which apparently arises through consent is quite unexpected. Tully is aware of this, however - he claims that Locke redefines positive community. We shall consider this "redefinition" shortly. But there is a further problem regarding the role of consent in Locke's theory if we take it as premissed on a kind of original positive community. This is the fact that changes to a system of positive community require consent by all owning parties (all human beings). In a system of positive community, says Pufendorf,

it is obvious that one person cannot of his own right dispose of the entire thing, but only of his share; and that if any decision is to be reached on the whole thing, the consent and authority of each person concerned in it must be secured.

It might not be clear why this passage should indicate a problem for Tully's interpretation of Locke, since Tully holds only that Locke's is an account of legitimate use, not of converting an original common into private property. There is indeed no problem concerning consent on this matter. The problem concerns, rather, the establishment of a money economy. In the pre-money stage, there is no problem about the specification of one's share: this is fixed by the necessity of preserving oneself. But the advent of money makes this no longer true. The money economy introduces possessions which go well beyond the original share, so, for the establishment of the money economy, "the consent and authority of each person concerned in it must be secured." Now it may be thought that there is no problem here, since Locke not only holds that money is introduced by consent, but also that "disproportionate and unequal

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182 DJNG, IV.iv.3.

183 Tully, op.cit., p.127.

184 DJNG, IV.iv.2.
Possession of the Earth is thereby consented to. The problem, however, is indicated by the fact that Locke clearly has in mind a tacit consent only. But it has been argued above that tacit consent, while it is well suited to the burdens consent must bear given an original negative community, does not seem nearly sufficient for dissolving (or even restructuring) positive communities. Filmer's argument, that abandonment of original community required an explicit and universal consent (and was therefore inconceivable), was dependent, it was argued, on positing an original positive community. If Locke also begins from an original positive community, then he is in need of a stronger form of consent than he provides - the departure from "natural shares" that is such a feature of the money economy is otherwise a prima facie case of unauthorised taking from joint owners. (At this point it is useful to remember Proudhon's famous remark, that "property is theft." Property is indeed theft when it is constituted by unauthorised departure from a positive common.) However, Locke does accord an important role to express consent in his account of property, since he holds that "in Governments the laws regulate the right of property", and since the establishment of governments requires express consent ("compact"). So, although "Labour, in the Beginning, gave a right of Property", the contemporary disposition of property is not explicable without recourse to express agreements. By establishing political societies in order to avoid the ills of the state of war, men have (among other things) "by Compact and Agreement, settled the Property which Labour and Industry began." But even such settling of property by consent remains vulnerable to a Filmerian criticism (if we suppose that it is this agreement which initiates the move away from "natural shares") since such a consent is not universal, but arises in particular parts of the earth as the need arises.

The idea of an original positive community, and the supposition of such a state in Locke's conception of the original common and the method of departure from it, is not, then, without its problems. Tully recognizes that positive community theories were subjected to telling criticism in the seventeenth century, but he holds that Locke was aware of these criticisms, and met them by redefining positive community. We need to examine Tully's account of this redefinition rather carefully. He says this:

185 Two Treatises, II.50.
186 ibid.
187 ibid. Locke shows that "compact" in his eyes refers only to express consent because he maintains, in this passage, that the value of money is established by "tacit agreement", that is, "without compact".
188 ibid., II.45
Locke's solution ... is to redefine positive community. Although the common belongs to everyone in the same manner, it belongs to them to use for the duty of acquiring the means necessary for support and comfort. Their inclusive rights refer to these means which are due to each. Thus, each right does not refer to every item on the common. Indeed, it does not refer to any item on the common but, rather, to items made from the common.\(^\text{189}\)

Tully's view that the original right to self-preservation in Locke's theory is an inclusive right (a right not to be excluded) is, I believe, quite misleading. This can be explained as follows. Locke envisages the original state of the world as a state of plenty. The natural bounty of the earth far exceeds the limited self-preserving needs of the first human beings (and their want of money prevents the long-term storing of wealth, so that needs do not expand), so the "economic problem" is simply a matter of gathering the acorns that have fallen from the Oak trees, or gathering apples from the trees in the wood.\(^\text{190}\) Since "in the beginning all the world was America," it follows that the principal concern of the first inhabitants was to limit their improving acts (cultivation, enclosure, etc.) to what was needed to "supply the Conveniences of Life." Whatever was beyond this was useless, so if cultivation, for example, had extended beyond needs, it would have been wasted effort, and would have been given up by it improvers, and allowed to return "to the wild Common of Nature."\(^\text{191}\) In such a situation of plenty, with everything lying ready to hand, as it were, how is being excluded from the common possible? The fact is, it simply is not possible - at least, not without enslaving, imprisoning, or otherwise denying the natural liberty of mankind. Men in natural liberty have no need for a right not to be excluded, since exclusion is not possible (without violating natural law). All they need is the right to take what is there for the taking. This is what the right of self-preservation entails. And, since what is taken can serve no self-preserving purpose if it is not secure from being taken away by others, the right of preservation requires also, to be efficacious, a right to exclude others from what is taken. But it is not itself an exclusive right, nor an inclusive. It is simply a right to act in a certain way, a way which neither includes nor excludes others. It can be described as a legitimate power to act in the ways necessary to preserve oneself; a legitimate power because, in exercising it, one does no wrong.

We are now in a position to see Tully's central mistake. Although the right to self-preservation is not an inclusive right, he correctly holds that it is a right to the means of

\(^{189}\)Tully, \textit{op.cit.}, p.127 (emphasis added).

\(^{190}\)\textit{Two Treatises}, II.28.

\(^{191}\)\textit{ibid.}, II.49,48.
preservation, and hence is not a right to particular items of the common. In fact, he says, “it does not refer to any item on the common.” Again he is correct to say this, but in so doing he is saying that the right to self-preservation implies that the original common is common in such a way that, while it is open to the use of all, it belongs to nobody. But that is exactly to say that it is negatively common. Once again, Tully is quite correct to hold that “the restructuring of common rights so their reference does not conflict is the answer to all the critics of positive community.” But if such a restructuring removes all reference to the actual items of the original common, the critics of positive community have been met by the assertion of negative community. This is Locke’s move; and, unwittingly, Tully shows it to be so.

Tully’s very detailed account of Locke’s theory of property deserves a more thorough treatment than can be accorded it here. Having shown that the claim that Locke posits an original positive community cannot be sustained, we shall have to settle for a rather brief consideration of its companion doctrine - that by “property” Locke means common property, not private property. Tully attempts to establish this equation by examining Locke’s reply, in the First Treatise, to Filmer’s argument that God’s grant to Adam of “Dominion” over every living thing (Genesis 1:28) made Adam monarch and proprietor of the whole world. Locke’s reply is two-pronged: that the passage in question concerns property alone; and that the grant given to Adam was not private but in common with all mankind. He puts it this way:

by this Grant God gave him not Private Dominion over the Inferior Creatures, but right in common with all Mankind; so neither was he Monarch, upon the account of the Property here given him.194

Locke’s point here is that, once we accept that the grant to Adam concerns property alone (and not sovereignty), we can also see that the property given to Adam was not private, but a right in common with others. This suggests that Locke is here using “property” in a broad sense to mean both “Private Dominion” and “right in common” - i.e., the sense we employ when distinguishing private property from common property. Tully, however, draws the remarkable conclusion that this passage shows that, for Locke, “property is not

192 Tully, op. cit.
193 ibid., p.61.
194 Two Treatises, I.24.
private dominion." The passage means only that the property *given to Adam* is not private dominion. Tully converts a historical into a conceptual point, and thereby lays the foundation for an ingenious but misleading interpretation.

In fact, the tendency to read a historical account of the origin and development of property as a conceptual analysis is possibly the most characteristic failing in interpretations of Locke's theory. This is not too surprising, since the ideological context of the *Two Treatises of Government* required that the question of the origin of property be discussed in detail. However, the preoccupation with origins should not obscure the fact that Locke, like Grotius and Pufendorf, attempts a natural history of property - an account of the natural causes that produce it, and of the subsequent developments that are necessitated by the natural duties to preserve and improve the whole created world. An inability to take off "analytical" spectacles when confronted with natural history has obscured from many modern philosophers the fact that when Locke speaks of the origin of property he is not thinking of a first principle from which *a priori* deductions can be made, but a historical beginning which is rational in the sense that it is a reflection of intelligent divine purposes and tailored to human ends, and which therefore develops naturally (predictably and non-violently) into more extensive and sophisticated systems of property through free and rational deliberation on changes in historical circumstances. It is therefore appropriate to conclude this section with a brief resumé of the history Locke provides in the fifth chapter of the *Second Treatise*.

In the beginnings of human society, God gave the world to mankind in common, for the support and comfort of their being. The earliest human beings, being not very numerous, enjoyed a great natural bounty which enabled them to immediately appropriate whatever they needed. Although such appropriations removed things from the original common, this was no injustice to anyone because things were common only in a "negative" sense - they belonged to nobody in particular, so simply became the property of whoever took them (for use). The bounds of any person's use were the bounds of what that person could legitimately appropriate, and such appropriations were legitimate because they were

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195 Tully, *op. cit.*, p.60.

196 Much of Tully's argument at pp.60-1 involves playing rather fast and loose. For example, he says that "Filmer calls private dominion 'property'" (whereas Locke calls dominion in common "property"). But this is not true. Filmer calls private dominion what Locke calls property, as Locke's text shows clearly: "this Grant of God gave *Adam* Property, or as our *A____* calls it, *Private Dominion*..." (1.23). This is clear evidence also that Locke does not restrict his use of "property" to mean only right in common.
taken for use. To take from what others had taken for use was thus to do them injury, to endanger their preservation. Such takings were not necessary (because of the natural bounty), and, because injurious, could be punished.

This state continued until men established, by agreement, money in the form of precious metals. This made a profound change. No longer was appropriation limited to immediate use, since the produce of labour could now be changed for metal which did not decay, and hence could be stored indefinitely. This made much larger properties possible, especially large estates which could produce a surplus that could be sold. The use of money thus greatly accelerated the rate at which land was occupied (by allowing large estates to develop), and thereby also allowed the development of great inequalities of wealth. This was no harm to the poor, however, since by working on the estates of the rich they could be better clothed and fed than was possible in the independent but poorer state in the pre-money society. The improvement in general living standards was due to the great increase in productivity through the liberation of the immense capacities of human labour from the constraints of satisfying only immediate needs.

The increase in the size of estates, and also of population, that the use of money made possible, also made land scarce in various parts of the world. Because it was scarce, land became more valuable, so the different societies settled on boundaries for their distinct territories, and began to establish legislatures in order to regulate the property of their members. So, although in some parts of the world a natural common may still obtain, in other parts of the world property has come to be regulated by laws established by governments.

Locke's account comes to a rather abrupt halt at this point, because he has fulfilled his purpose of sketching in the development of property from original appropriation to modern legal relations. He does not specify what these modern relations must be, since they are determined by the different legislatures. As long as the legislatures themselves are constituted by consent, they can pass laws concerning the nature and extent of property. Of course, no radical undermining of private property could be consented to, since the productivity of the system, and hence the wealth of the whole people, depends on maintaining the security of possessions. Nevertheless it is true that in such stable, developed societies, property becomes whatever the law makes of it. It must, in order to be property, remain exclusive possession, but the precise character and extent of the rights encompassed in property become a matter of (tacit) general agreement, entrenched in legal rules. In such societies property can become a "bundle" of rights. But Locke's account makes it clear that the original property we have in our persons, or the property
established in things for use in the early stages of human history, are no such thing. The establishment of civil government is the decisive move towards modern legal notions of property:

For in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions.\textsuperscript{197}

\textsuperscript{197}\emph{Two Treatises}, II.50. This passage should not be taken to imply that the establishment of government results in a “spill” - that property has to be renegotiated. Locke’s view is unlikely to have been different from Grotius’s: “it is to be supposed that all agreed, that whatever each one had taken possession of should be his property” (\textit{DJBP}, II.II.i.5). The remark (at \textit{Two Treatises}, II.45) that men “by Compact and Agreement, settled the Property which Labour and Industry began” supports this conclusion.
Chapter Four

FRANCIS HUTCHESON

I: Moral Science and Moral Sense

The rediscovery of the importance of the theological dimension of Locke's thought has led to the somewhat unexpected view that, in sharp contrast to earlier interpretations, Locke's influence on the political thought of the eighteenth century was of little significance. The interpretation of Locke's views provided in the preceding chapter, however, weaken this view in one important respect. Once it is recognized that Locke's theological doctrines have both a formal and a material aspect, it becomes possible, by concentrating attention on the material aspect, to produce secular (or at least overtly secular) versions of the original theory. Thus, for example, Locke's doctrine that we are God's property, if seen to be principally concerned to stress that we do not and cannot be the property of each other, can be transformed into a secular doctrine of individual rights - that the natural liberty of human beings is an inalienable right. Interpreted in this way, Locke's theory can once again be seen as a direct ancestor of some influential eighteenth century doctrines.

Quite apart from the reconsideration of questions such as Locke's influence on the eighteenth century in general, however, there is no doubt that Locke was seen as a thinker of considerable significance by the philosophers of the Scottish Enlightenment. Moreover, his influence on these thinkers was as an interpreter and defender of the modern natural law of Grotius and Pufendorf. Thus, as the case of Hutcheson shows, his labour theory of the origin of property was read as a theory of the manner of occupation of an original

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negative common. As such, Locke’s distinctive metaphor of appropriation through mixing part of oneself with things is passed over as unimportant, except as evidence of a regrettable confusion about the nature of property. The interpretation of Locke’s theory provided in the preceding chapter is in general agreement with such conclusions.

The conception of Locke’s theory as a contribution to natural law is supported most clearly by considering the work of Gershom Carmichael, an important transitional figure in the development of the social theory of the Scottish Enlightenment. His work has been called “the bond which connects the old philosophy with the new in Scotland”. As the first Professor of Moral Philosophy in the University of Glasgow, a position to which he was appointed in 1727 (having been a Regent in the same university since 1694), and the immediate predecessor of Francis Hutcheson, Carmichael introduced Pufendorf’s De Officio Hominis et Civis “into the centre of Scottish moral philosophy”. Given the profound influence that Pufendorf’s work was to enjoy in eighteenth century Scotland, this was itself a significant contribution. But Carmichael’s contribution did not stop there. His own lectures included significant amendments to Pufendorf’s views, and these were included as a commentary in Carmichael’s own editions of De Officio (Glasgow: 1718, and Edinburgh: 1724). This commentary achieved independent fame, as Hutcheson eloquently testifies: “that worthy and ingenious man the late Professor Gershom Carmichael of Glasgow, by far the best commentator on that book, has so supplied and

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2Note that Pufendorf holds that occupation “begins with the joining of body to body immediately or through a proper instrument”, and that “Therefore it is the customary thing, that occupancy of movables be effected by the hands, of land by the feet, along with the intention of cultivating it” (DJNG, IV.vi.8). Occupation thus requires physical contact, as does Locke’s labour principle; and the requirement that occupation of land requires the intention to cultivate is discernable in Locke’s understanding of labour as an improving activity: such labour is tilling, planting, improving, cultivating (see Two Treatises, II.32).


5See Moore and Silverthorne, op. cit., Wealth and Virtue, p. 75.

corrected \textit{De Officio} that the notes are of much more value than the text".\textsuperscript{7} The notes thus praised have a powerful Lockean component; as James Moore puts the matter, "Carmichael referred his readers repeatedly to improvements made by Locke on themes addressed by Pufendorf", improvements which consistently defended the individual against the power of the magistrate.\textsuperscript{8} (He was thus also concerned to protect Scottish society against the unsettling force of Jacobitism: "the perverse and malignant spirit which inspires evil citizens among us to unsettle the public happiness", and which "has no other source ... than ignorance of the true principles of natural law".\textsuperscript{9}) Carmichael's "improvements" of Pufendorf, then, were typically adaptations in a Lockean direction, and it is reasonable to suppose that it is such adaptations to which Hutcheson alludes in the above quotation. Certainly, for his part, Hutcheson makes liberal use of a number of Lockean concepts and distinctions, although his own political theory, especially in the later works, moves a long way from Locke's conclusions. This shift is implicit in his earliest work, however, because it reflects a consistent working out of his distinctive doctrines in moral psychology and moral epistemology, doctrines which were - at least in part - designed to rebut Lockean theses. They were, nonetheless, shaped by Lockean doctrines, in that Hutcheson's concern with moral psychology and epistemology is a direct response to Locke's investigations in the \textit{Essay}. The moral sense theory, as developed by Hutcheson and his contemporaries, is inconceivable without Locke's attention to the nature of moral goodness and the springs of moral action in the \textit{Essay}.

It is important to recognize this, not only because of the value of intellectually situating the theories of moral sense or moral sentiment which dominate moral philosophy in eighteenth century Scotland, but because the aims of such theories are thereby better understood. They arise as the result of the aim to develop a genuine science of morals, an aim which is itself a product of natural law theory. A brief sketch can help to show why this is so. We have already shown that Pufendorf suggests the possibility of a

\textsuperscript{7}Hutcheson, \textit{Short Introduction}, p. i.

\textsuperscript{8}Moore, "Locke and the Scottish Jurists", p. 4. The passage continues thus: "In his discussions of the state of nature, of the family, of master and servant relations, of the causes of civil society, of the duties of magistrates and the rights of subjects Carmichael amended Pufendorf's texts by notes, supplements and appendices which provided the reader with an understanding of the duties of man and the citizen which was much more insistent on the rights of individuals and less indulgent towards the power of magistrates than the text of Pufendorf; the authority most frequently invoked for these amendments was Locke's \textit{Second Treatise}.

demonstrative system of morals, in part at least because moral notions, and moral
institutions, are the products of human activity. Locke’s account of moral ideas as
archetype ideas is similar to Pufendorf’s account of moral entities, and similarly allows
the conclusion that a demonstrative system of morals is possible. In support of this
doctrine he gives a famous example (part of which has been already quoted in another
context): “Where there is no Property, there is no Injustice, is a Proposition as certain
as any Demonstration in Euclid”.10 But Locke recognizes that such a system of
demonstratively true propositions is not a moral science in any worthwhile sense, because
in such a scheme “the force of morality is lost and evaporates only into words disputes &
niceties”.11 Rather, the force of morality requires us to give an account of the psychology
of moral action, especially to answer the question, What is it that drives us to moral
action? Locke’s concern with this question, and, more generally, with such a science of
moral action, arises as a result of the kind of natural law theory we have been considering.

This can be outlined as follows. It has been stressed that the natural law theories show
an awareness of historical development, even if only a rudimentary one which divides
human history into simple and sophisticated societies. They therefore imply the possibility
of a kind of natural history of moral conceptions and social institutions. In this history,
the knowledge of the requirements of natural law comes about in history through rational
reflection on sense-experience. However, the natural history of morals is not merely a
history of moral knowledge, but of moral practice. The fact of moral practice shows that
there must be natural processes in us which move us to moral actions (even if, as the
history of immorality shows, they do not infallibly move us). The seventeenth century’s
new natural philosophy, with its characteristically dualistic metaphysics, denied that the
motive force of moral actions could be performed by reason, even though reason can
decide on directions, or means to ends. Rather, because action is bodily action, it requires
both reason and bodily forces or processes. So the rise of the new natural philosophy,
together with the established concerns and explanations of natural law theory, produced
the need for an account of the forces that move us to action, and to moral action in
particular. This conjunction produced, in other words, the distinctively eighteenth century
quest for the “springs” of action. This quest is nothing other than the attempt to work

10 *Essay*, IV.iii.18.

shows that Locke concurs with Berkeley’s critical assessment of the demonstrative system: “To
demonstrate Morality it seems one need only make a Dictionary of Words & see which includes
which at least. This is the greatest part & bulk of the Work.”
out in detail, with the aid of the new natural philosophy, the precise meaning of the natural lawyers' commonplace that the law of nature is founded in human nature.

The theory of the moral sense is one such attempt to provide an account of the springs of action in human nature. It is best understood if we see it against the background of Locke's account in the Essay, since it is a reaction to the perceived inadequacies of the Lockean theory. However, it would detract from the main purpose of this chapter to include such an account here, so I have offered a brief account of the Lockean theory and its reception in an appendix to this essay. Here we need only observe that the theory of the moral sense is first advanced by the third Earl of Shaftesbury. In his view, Locke's derivation of all human action from self-love, combined with his rejection of innate ideas, was a complete denial of moral virtue. Because, for Locke, virtue and vice are not "naturally imprinted on human minds", says Shaftesbury, he has denied that they are "anything in themselves". But virtue is something, and is innate in our minds, and is perceived by a special sense - the moral sense.

For Hutcheson, however, the case is rather different. Although he presents himself as a defender of Shaftesbury's doctrines, and identifies the self-love theory of morals as his polemical target - represented by Hobbes, and also by "the Author of the Fable of the Bees" - he does not see the doctrine of the moral sense as part of a defence of innate ideas. In fact, he explicitly denies that his account of the moral sense depends on a doctrine of innate ideas:

We are not to imagine that this moral Sense, more than the other Senses, supposes any innate ideas, Knowledge, or practical Proposition.

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13 The doctrine "That all the desires of the human Mind, nay of all thinking Natures, are reducible to Self-Love, or Desire of private Happiness" is the doctrine of "the old Epicureans", now "revived by Mr. Hobbes, and followed by many better Writers." Hutcheson, An Essay on the Nature and Conduct of the Passions and Affections, with Illustrations on the Moral Sense (1728), introduction to the Illustrations, in Collected Works, vol.II, pp.207-8.


Not surprisingly, then, Hutcheson shows little concern to criticise Locke, even though the latter founds morality on self-love. This is not, for Hutcheson, sufficient to make Locke (or even Hobbes, for that matter) an enemy of morality. The self-love theory fails, not because it undermines morality, but because it provides an account which does not measure up to the facts. It is forced to provide tortuous stories for the most simple and familiar of unselfish acts. In treating of "our Desires or Affections", the self-love theorists have been forced to make "the most generous, kind, and disinterested of them, to proceed from Self-Love, by some subtle Trains of Reasoning, to which honest Hearts are often wholly Strangers".16

Not only does Hutcheson detach the doctrine of moral sense from innate ideas, his account of moral perception has many Lockean echoes. As we shall see, the perception of moral qualities is explained with the aid of language quite reminiscent of Locke's account of the perception of secondary qualities. This has prompted the view that he "deploys a Lockian epistemology" to counter the self-love account of morality.17 If true, this would be a little ironic, since Locke's own theory is itself one such. The claim has not gone unchallenged.18 But it is certainly true that there are Lockean elements in Hutcheson's theory; and, if we employ Locke's account of the perception of secondary qualities as a guide to Hutcheson's account of moral perception, we can approach an understanding of Hutcheson's position, and see also that the doctrine of moral sense is strengthened by being detached from innatist doctrines. This will be shown in the next section.

16 Preface to Essay, op. cit., p. vi; see also Introduction to Illustrations, op. cit., p. 209.


In this context, Hutcheson's rejection of innate ideas needs to be stressed. This is not because it shows him to be a "Lockean". (Pufendorf also denies that moral knowledge arises from innate ideas. See, for example, De Officio Hominis et Civis, Liii.12.) Rather, it shows us how not to understand his account of moral ideas in terms of "concomitant ideas". On this issue see, in particular, Norton, "Hutcheson's Moral Realism", op.cit. Norton's case for regarding Hutcheson as anti-Lockean is, I think, rather overdrawn. The dissatisfactions Hutcheson registers concerning "those, who after Mr. LOCKE have rejected innate Ideas" (Inquiry, p.81; 4th edition, pp.78-9) are of two kinds: he objects to the careless conclusions drawn from this doctrine (Inquiry, p.81), and he shows the frustrations of the moralist at the intricate but, practically speaking, useless theorizings of the epistemologist (Essay, p.198). He does not show any affection for innatist doctrines.
Despite denying that morality is founded in self-love, Hutcheson does not assert that acting morally is contrary to our self-interest. In fact, he notes that many self-love theorists, in their efforts to support their hypothesis, point out the various ways in which moral actions serve our interests. But even if it is true that our moral actions serve our interests, it does not follow that these actions are founded in, or motivated by, considerations of self-interest. Concerning the efforts of these “ingenious speculative Men, in their straining to support an Hypothesis”, he says:

Allow their Reasonings to be perfectly good, they only prove, that after long Reflections, and Reasoning, we may find out some ground, even from Views of Interest, to approve the same Actions which every Man admires as soon as he hears of them.

Here we see a familiar natural law theme, only in a different dress. Principles of morals are not founded in private interest, but nevertheless morality is not contrary to private interest. This is because moral principles are founded in human nature. The new twist, however, is that the sociable principles of morality are founded not in the instinct of self-preservation, not in self-love, but in a fundamental sociable principle of human nature - the benevolent affections of the moral sense.

To suppose a fundamental principle of benevolence in human nature cannot help but have profound consequences for the theory of natural law, especially concerning the nature of our obligation to obey it. For, if we naturally approve of, and are motivated to pursue, benevolent courses of action in ourselves, and to reward them in others, there appears to be less need to call on the divine power to enforce moral behaviour. It seems that the true ground of morality is not simply “the Will and Law of a God, who sees Men in the dark, has in his Hand Rewards and Punishments, and Power enough to call to account the Proudest Offender”. Rather, human nature itself has, if not a fundamentally moral character, at least a fundamental moral principle enlivening it. This makes it possible to explain moral practices without referring to the laws of a superior, whether human or divine. Hutcheson deliberately sets out to explain “how we acquire more particular Ideas of Virtue and Vice, abstracting from any Law, Human, or Divine”. For Hutcheson, the moral sense provides a foundation for natural law which implicitly sets aside (at least in

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19 Introduction to Illustrations, op. cit., p. 209.

20 Inquiry, p. 125.

21 Locke, Essay, I.iii.6.

22 Inquiry, p. 266.
the ideal case\textsuperscript{23}) the purely formal obligation to follow the requirements of natural law. Instead, natural law is made to depend on the material element as embodied in our moral sense. To set aside formal obligation, however, is to concede that natural law does indeed have “a degree of validity”, even if it is allowed that “there is no God, or that the affairs of men are of no concern to Him”. The development of the doctrine of the moral sense thus rehabilitates the Grotian conception of an obligation to obey the dictates of natural law that is independent of belief in God. Hutcheson draws back from holding that this (material) obligation is sufficient to ensure obedience, given the weaknesses of our nature and the limits to our understanding, so the laws of a supreme being are still necessary in the end. However, God’s role is reduced to patching up the system where it shows weaknesses, rather than providing the necessary coercive power which makes the recognition of obligation effective. In the general run of things, this task is obviated by the operations of the moral sense.

If it should then be further argued that, although natural law does require, to be efficacious, a coercive power in those cases where natural motivation fails, this coercive power can be found in the operations of a civil power which itself is established entirely by human action, then the way is open for an account of natural law in which God’s power is no longer necessary. Thus we are able to see both how Hume’s theory develops out of Hutcheson’s, and one way in which it can be seen as a return to a Grotian theory. But this is to provide a merely tantalising sketch. To properly understand the impact of the theory of moral sense, it is necessary to spell out just what this sense is, what it recommends, and the consequences it has for the account of natural law and the obligation to obey it. This is the task of the next section. We will then be in a position to see how Hutcheson attempts to build a theory of rights and of property from this base, and to recognize a central problem which the account of moral sense creates for the theory of justice - a problem which Hume’s account of justice is designed to solve.

II: Moral Sense and Moral Sensibilia

Hutcheson develops his account of the moral sense indirectly, by first arguing for a sense of beauty. He holds that our aesthetic responses to objects depend on a form of distinctively aesthetic perception, and therefore on a sense of beauty. “Were there no Mind with a Sense of Beauty to contemplate Objects”, he says, “I see not how they could

\textsuperscript{23} The formal element is required in Hutcheson’s full account because in real cases it is true that our moral sense can be weak, our selfishness “grown strong”, and our understanding weak - see \textit{Inquiry}, p. 268.
be call'd beautiful". After developing this thesis, that there is a sense of beauty natural to the human mind, he then offers a parallel account of the moral sense. His method here is not mere idiosyncracy, nor is it an attempt to "buy" acceptance of a less plausible thesis by tying it to one more plausible. Rather, the parallel is, for Hutcheson, an important ingredient of his general "sentimentalist" (i.e. anti-rationalist) position - that not only do we perceive directly the beauty of objects, we also perceive the beauty of actions, which latter beauty we denote as moral virtue. Judgements of moral goodness have their foundation in the perception of a peculiar kind of beauty: moral beauty. It is appropriate, then, that we follow Hutcheson's order of exposition, and consider the foundations of aesthetic judgments before turning to consider the foundation of moral virtue in the moral sense.

Beauty is one idea amongst a number commonly neglected by philosophers:

The only Pleasure of Sense, which our Philosophers seem to consider, is that which accompanies the simple Ideas of Sensation: But there are vastly greater Pleasures in those complex Ideas of Objects, which obtain the Names of Beautiful, Regular, Harmonious.

Since the pleasures of sense play a vital part in shaping the courses of action we naturally pursue, this neglect is rather surprising, so Hutcheson sets himself to remedy the fact. But it is important also for us to notice that in this, and in succeeding, passages, Hutcheson employs characteristically Lockean concepts. Thus he contrasts simple with complex ideas, and employs a broad notion of pleasure to bring out the attractive (or distasteful) features of a very wide range of our sensory experiences. This extends to his treatment of the sense of beauty and the moral sense, where his language invites an explication in terms of the Lockean account of secondary qualities. Whether such an explication is, in the final analysis, a correct account of Hutcheson's views has been challenged by David Fate Norton in a number of works concerned with Hutcheson's epistemology. Norton holds that this epistemology, when carefully examined, shows Hutcheson to have adhered to a distinctive Scottish epistemology for which a theory of concomitant ideas functioned

24 Inquiry, p. 15.

25 The anti-rationalism of the sentimentalists - by whom I mean to include all the moral sense philosophers and their explicitly sentimentalist successors (most notably Adam Smith) - is simply their denial that reason can alone provide a sufficient explanation for moral phenomena. The rationalists (Cudworth, Clarke, Wollaston, in particular), they argued, could explain the nature of the good, but could not explain moral obligation. This will be considered in more detail below.

26 Inquiry, p. 7.
as an alternative to the Lockean corpuscularian account with its emphasis on primary and secondary qualities. This issue is a difficult one, and is perhaps best not entered into here beyond observing that, although Hutcheson may have held to an epistemology of a much less Lockean colour than is often supposed, there is ample textual evidence to support a compatibility thesis: that Hutcheson did not view his account of the senses as a competitor with Locke’s views. His willingness to employ important elements of the account of primary and secondary qualities supports such a possibility.

The fact of our recognition of the beauty of objects shows us “That there is some sense of Beauty natural to Men”. Beauty itself is an “Idea rais’d in us”, and the sense of beauty is “our Power of receiving this Idea”. However, despite the fact that our idea of beauty is always the idea of the beauty of an object, we go astray if we suppose that our idea arises because of something in the object which is itself beautiful. Rather, beauty is not understood to be any Quality suppos’d to be in the Object, which should of itself be beautiful, without relation to any Mind which perceives it: For Beauty, like other Names of sensible Ideas, properly denotes the Perception of some Mind; so Cold, Hot, Sweet, Bitter, denote the Sensations in our Minds, to which perhaps there is no resemblance in the Objects, which excite these Ideas in us, however we generally imagine that there is something in the Object just like our Perception.

This is precisely the manner in which, for Locke, our ideas of secondary qualities differ from our ideas of primary qualities. The former, unlike the latter, do not resemble the “Patterns [which] do really exist in the Bodies themselves”. The secondary qualities are always connected to “the Perception of some Mind” because they are powers in (or of) objects:

27See the works referred to in footnote 18, and also note the remarks there on one aspect of Norton’s thesis.

28Inquiry, p. xvii. Of course, thus put, Hutcheson’s view is not adequate. That we perceive some things as beautiful no more establishes a distinct sense of beauty than perceiving some things to be green establishes a distinct sense of greenness. Hutcheson would not, however, be worried by such an observation. At bottom, what matters for him is not so much the constitution of our sense-organs (he does not suppose that the sense of beauty, or the moral sense, are discrete sensory apparatuses like our external senses, our sense-organs); rather, his point is that beauty, and moral virtue, are, like colours or sounds or tastes, perceived, and are therefore ideas which correspond to specific qualities in (or of) objects or actions.

29Inquiry, p. 7.

30ibid., p. 14.

31Locke, Essay, II.viii.15.
Powers to produce various Sensations in us by their primary Qualities, i.e. by the Bulk, Figure, Texture, and Motion of their insensible parts, as Colours, Sounds, Tasts, etc.  

Beauty can thus be understood in much the same way as the familiar (Lockean) account of the secondary qualities of objects. Most importantly, like all such qualities, it must be perceived, or sensed. Hutcheson’s decision to speak of a sense of beauty, rather than speaking more simply of beauty as sensed, is for reasons of convenience:

It is of no consequence whether we call these Ideas of Beauty and Harmony, Perceptions of the External Senses of Seeing and Hearing, or not. I should rather chuse to call our Power of perceiving these Ideas, an INTERNAL SENSE, were it only for the Convenience of distinguishing them from other Sensations of Seeing and Hearing, which men may have without Perception of Beauty and Harmony.

The sense of beauty can properly be called a sense because, like all senses, it is independent of the will; in sensing “the Mind ... is passive”. That is, it has not Power directly to present the Perception or Idea, or to vary it at its Reception, as long as we continue our Bodys in a state fit to be acted upon by the external Object.

Thus a sense is nothing more than a “Determination of the Mind” to receive impressions of a specific sort. The sense of beauty is our (passive) ability, the “determination”, or constitution, of our mind to perceive beauty in the objects of our experience. Hutcheson goes on to add that beauty is essentially a matter of “Uniformity amidst variety”, that the experience of beauty is that particular pleasure we derive from the recognition of uniformity amidst variety; and that it is generally excited by “Forms, Proportions, Resemblances, Theorems”.

Once we have recognized that there is this sense of beauty, we very quickly can come to see that it is not the only “internal sense”. Quite the contrary:

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32 *ibid.*, II.viii.10. In this passage Locke does say that secondary qualities “in truth are nothing in the Objects themselves”, but this must be regarded as a slightly careless formulation. The secondary qualities are powers of objects because they are reducible to specific configurations of the primary qualities, and thereby cause in us the ideas they do.

33 *Inquiry*, p. 8.

34 *ibid.*, p. 2.

35 *ibid.*, p. 17 and *passim*.

36 *ibid.*, p. xvii.
If the Reader be convinc'd of such Determinations of the Mind to be pleas'd with Forms, Proportions, Resemblances, Theorems, it will be no difficult matter to apprehend another superior Sense, natural also to Men, determining them to be pleas'd with Action, Characters, Affections. This is the moral Sense.  

Thus we arrive at the moral sense. It is that passive ability of the mind to perceive the moral goodness of actions, characters, and affections. Moral goodness can be understood as those qualities of actions, characters, and affections which cause an observer to approve of them. The "Notion of pleasing a moral Sense" is the notion that

    certain Affections or Actions of an Agent, standing in a certain Relation to other Agents, is approved by every Observer, or raises in him a grateful Perception, or moves the Observer to love the Agent.  

There can, then, be no explication of moral goodness, of "the Notion of pleasing a moral Sense", which excludes reference to an observer. If moral goods are understood as comparable to secondary qualities, this is what we should expect. Secondary qualities are not simply in the objects themselves, but are, as Locke stresses, powers in objects to produce the relevant "Idea" in an appropriately placed observer.  

Does this mean that moral goodness is simply in the (moral) eye of the beholder? Some accounts of the matter appear to imply as much, and Hutcheson has been taken to mean so. Hume, most notably, in a letter to Hutcheson in 1740 (a passage apparently extracted from the then forthcoming third book of the Treatise), compares "vice and virtue" to

    sounds, colours, heat and cold, which according to modern philosophy, are not qualities in objects but perceptions in the mind.  

Although Hume apparently thought it so, this is not Hutcheson's position, nor is it Locke's. It is not that the secondary qualities are perceptions in minds rather than qualities in (or perhaps, of) objects. It is the ideas of secondary qualities that are perceptions in minds, but so are the ideas of primary qualities. The secondary qualities are qualities of objects, but qualities which, unlike primary qualities, do not "resemble" the ideas they generate in the perceiving mind. Therefore, accounts of secondary qualities

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37 ibid.

38 Illustrations, sections II and III; in Essay, op. cit., p. 252.

39 Locke, Essay, II.viii.10.

must take account of the perceptions of a mind in order to show what the idea of a
secondary quality is like. The account of primary qualities need not do this, since the
ideas resemble the qualities themselves. But it does not follow from this that secondary
qualities are merely in the mind; rather they are in the object, being specific
configurations of the primary qualities, as Locke says above. In like spirit, Hutcheson
speaks of beauty and harmony as "being excited upon our Perception of some primary
Quality."  

So the proper account of beauty and, indeed, other forms of internal sensing, requires a
part to be played by both object and perceiving mind. Undoubtedly, some of the
confusions that have arisen concerning the proper understanding of secondary qualities,
and our ideas of them, can be traced to Locke's occasional carelessness in explaining them.
But it is nonetheless clear that Hutcheson at least wanted to avoid the Humean
interpretation in his own account of beauty and virtue. He stresses this in later
formulations of the theory. In the 1738 edition of the Inquiry he says

The Quality approved by our moral Sense is conceived to reside in the Person
approved, and to be a Perfection and Dignity in him ... The Perception of the
Approver, tho' attended with Pleasure, plainly represents something quite
distinct from this Pleasure; even as the Perception of external Forms is attended
with Pleasure, and yet represents something distinct from this pleasure. This
may prevent many Cavils upon this Subject.*  

And in A System of Moral Philosophy he stresses that

Tho' the approbation of moral excellence is a grateful action or sensation of the
mind, 'tis plain the good approved is not this tendency to give us a grateful
sensation. As, in approving a beautiful form, we refer the beauty to the object;
we do not say that it is beautiful because we reap some little pleasure in viewing
it, but we are pleased in viewing it because it is antecedently beautiful. Thus,
when we admire the virtue of another, the whole excellence, or that quality
which by nature we are determined to approve, is conceived to be in that other;
we are pleased in the contemplation because the object is excellent and the
object is not judged to be therefore excellent because it gives us pleasure.43

Despite thus stressing the reality of beauty and virtue, however, it may seem that one
particular feature of an account couched in terms of secondary qualities, or heavily
dependent on such an account, will vitiate any anti-sceptical conclusions drawn from
it. (To produce such conclusions being, of course, Hutcheson's intention). The problem is


this: although they are powers possessed by objects, these powers are the effect of the primary qualities, and, most importantly, they produce ideas in us which do not resemble those (patterns of) primary qualities. Rather, the ideas of secondary qualities seem to be the product of a thoroughly contingent relation between the primary qualities of objects and our perceptual capacities, a relation which naturally leads us to believe that objects are coloured, etc., in just the way they are extended or solid. Therefore it may well be concluded that secondary qualities are not part of an anti-sceptical moral theory, because such qualities are "deceitful". Hume's relative, Henry Home, Lord Kames, in fact does speak of secondary qualities of objects as deceitful. But if moral virtue, because akin to secondary qualities, is deceitful, is not this to undermine morality after all? So, on such an account, what can remain of natural law?

At this point Kames calls on the providential teleology of the workmanship model. We are made for a certain providential purpose, and as long as this purpose is not violated, the precise relation, or resemblance, between our ideas of objects and the qualities of the objects themselves is a matter on which sceptical arguments cannot gain a foothold. Given the similarities of doctrine and purpose of his and Hutcheson's moral theories, we can reasonably safely allow Kames's argument to serve for Hutcheson as well.

Kames grounds his argument on a Lockean view of the purposes of human life, and thereby of the bounds of knowledge:

It was not intended that man should make profound discoveries. He is framed to be more an active than a contemplative being; and his views both of the natural and moral world are so adjusted, as to be made subservient to correctness of action rather than of belief.

From this we may conclude that secondary qualities are not deceitful because they do not cause us to act wrongly, even though we may be quite mistaken about the nature of, for example, coloured surfaces. So, despite widespread false beliefs about the precise nature of secondary qualities, man is not thereby in the least misled. On the contrary, the ends of life and action are better provided for by such artifice, than if these perceptions were more exact copies of their objects. This is because, for example, colours enable us to

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45 *ibid.*, p. 152.

46 *ibid.*, pp. 152-3.
distinguish more easily between objects, thus facilitating the carrying out of particular
courses of action. But the hand of Providence is displayed most clearly in the fact that
the secondary qualities do more than facilitate our practical purposes: they enrich all
aspects of our experience. Kames stresses the difference that colours make to our world:

Colour in particular is a sort of visionary beauty, which nature has spread over
all her works. It is a wonderful artifice, to present objects to us thus differently
distinguished: to mark them out to the eye in various attires, so as to be best
known and remembered: and to paint on the fancy, gay and lively, grand and
striking, or sober and melancholy scenes: whence many of our most pleasurable
and most affecting sensations arise.\(^4\)

For Hutcheson, moral experience satisfies both of these features. Not only does it, in the
strongest way possible, facilitate our practical purposes - since, by being necessary for
social life, it is also necessary for self-preservation - it is also at bottom a sort of beauty,
since moral perception is the perception of the beauty of action.

Given the providential framework, with its supposition that human beings are intended
to be active rather than contemplative beings, we can see that an account of moral virtues
and vices in terms of (or, as comparable to) secondary qualities does not undermine
morality. Although our ideas of secondary qualities, because they do not resemble the
dispositions of primary qualities in the objects that cause them, may be said to be
“deceitful”, nevertheless moral phenomena involve no deceit because morals is not so
much a matter of correct beliefs about the nature of the world as of appropriate action
within it. (If we take the providential teleology out of the picture, we are left with the
bare fact of inconsistencies between the beliefs we naturally depend on for acting within
the world, and the beliefs we arrive at through study and reflection: a conflict, that is,
between natural beliefs and philosophy. This is the position Hume finds himself in; his
solution is to offer a philosophy of human nature in which “moderation” and “mitigated
scepticism” play central roles. This will be considered in the next chapter.)

This section has been principally concerned to show what Hutcheson understands the
moral sense to be. Some brief remarks on what the moral sense enjoins, or approves of, is
necessary in order to show the impact that the doctrine of the moral sense has on the
theory of property (and of politics in general) Hutcheson develops from a Lockean
starting-point.

What does our moral sense lead us to approve? Hutcheson’s answer is very simple:

\(^{47}\)\textit{ibid.}, p. 154.
'tis plain that the primary objects of this faculty are the affections of the will, and that the several affections which are approved, tho' in very different degrees, yet all agree in one general character, of tendency to the happiness of others, and to the moral perfection of the mind possessing them.48

Benevolence is the affection of the will which desires the happiness of others, so benevolence lies at the heart of all moral action:

some sort of benevolent affections, or some dispositions imagined to be connected with them, are the natural objects of approbation.49

This means, significantly, that we have a natural tendency to approve, and therefore also reward (in others) and perform (ourselves) benevolent actions. For this reason Hutcheson is led to endorse important elements of a politics of virtue, rather than of rules. This is implicit in his early works, but becomes more explicit in the later ones. In the System, for example, he accepts that the duties of the citizens cannot be spelt out in detail, but can (in fact, must) be determined by the virtuous (benevolent) citizenry themselves:

It is superfluous to heap up common-place maxims, well known, but of difficult application to particular cases; a good man's heart will always be zealous for the interest of any innocent association for a publick interest, in which, by the Divine Providence, he is engaged; and will look upon this situation of his fortunes as the voice of God directing him to that part of his fellows who should be more peculiarly the objects of his affectionate concern.50

Such a shift away from a rule-based system of politics is indeed odd for a theory which is worked out within the framework of natural law. For his intellectual inheritors, Kames and (especially) Hume, it was, particularly with regard to that realm of justice properly or narrowly conceived (the realm of property relations), not merely odd but quite unacceptable. This will be a major concern of the next chapter.

A further oddity (at least to modern ears) stems from Hutcheson's programme of deriving the more complex moral notions, including that of obligation, from the moral sense. Since the moral sense naturally approves of benevolence, Hutcheson concludes that we have an obligation to be benevolent.51 This seems strange because it appears to violate

49 ibid., p. 63.
51 Inquiry, pp. 249-50.
the principle that "ought" implies "can": obligation binds the will, but, while the will can effectively govern our actions, it often has little influence over our states of mind. If we do not feel benevolence, there is little that can be done about this by an effort of will. So, while it is unproblematic to speak of an obligation to beneficence, benevolence seems a different matter altogether. However, Hutcheson's willingness to speak of an obligation to benevolence is not, I suggest, evidence of confusion on his part. Why it is not will become clear when we consider the question of obligation more fully in the next chapter, in order to explain some famous Humean remarks on obligation.

III: Rights, Property, and Political Constitution

It has been pointed out above that the doctrine of the moral sense is able to ground an account of natural law in which formal obligation plays no part; an account in which we can explain "how we acquire our more particular ideas of Virtue and Vice, abstracting from any Law, Human, or Divine." Such an account can be called a naturalistic account, in that it requires no appeal to any particular set of religious or metaphysical beliefs. By relying on no more than the moral sense and the implications which ordinary (non-metaphysical) reasoning recognizes as flowing from it, Hutcheson grounds his system in the observation that

many have high Notions of Honour, Faith, Generosity, Justice, who have scarce any Opinions about the DEITY, or any Thoughts of future Rewards; and abhor anything which is Treacherous, Cruel, or Unjust, without any regard to future Punishments.\(^52\)

In this way he thus sharply differs from Locke on the question of the foundations of morals; and, as already indicated, the essential selflessness of the moral sense allows it to provide a direct foundation for human sociability:

In the same manner we are determin'd to common Friendships and Acquaintances, not by the sullen Apprehensions of our Necessitys, or Prospects of Interest; but by an incredible variety of little agreeable, engaging Evidences of Love, Good-nature, and other morally amiable Qualities in those we converse with.\(^53\)

Since human sociability is the foundation of the natural law, the moral sense is also the ultimate foundation of natural law. The natural law is a system of "maxims, or rules of conduct" derived from the moral sense. It is derived naturally from the moral sense both

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\(^{52}\)ibid., p. 128.

\(^{53}\)ibid., p. 257.
because it derives necessarily, and because it does not depend on any supernatural commitments. It is, rather, moral philosophy which, by reflecting on the approbations of the moral sense, establishes what is the content of natural law. The moral-sense-approved maxims of conduct are established

as far as it can be done by observations and conclusions discoverable from the constitution of nature, without any aids of supernatural revelation: these maxims, or rules of conduct are therefore reputed as laws of nature, and the system or collection of them is called the LAW OF NATURE". 54

It is rather odd that Hutcheson should speak of the moral sense as explaining our particular ideas of virtue and vice, without reference to a law, and then to call the system of such ideas the law of nature. The laws which the law of nature is independent of, however, are the commands of any agent (hence the reference to laws “Human, or Divine”), the formal element of a voluntarist account of obligation or law. The moral sense can thus produce laws of nature if and only if such laws are not voluntaristically conceived; and indeed Hutcheson's are not. This is sufficient to dissolve the paradoxical character of Hutcheson's remarks about law and the moral sense. Futher, we shall see below that Hutcheson's commitment to the moral sense implies a strong commitment to individual judgement, such that, in dire circumstances, particular rules can (indeed must) be set aside. Thus the rules of conduct which comprise the natural law, although not merely rules of thumb, are nonetheless not indefeasible. (We have seen a hint of this position already, in Hutcheson's appeal to “the good man's heart” in the passage quoted at the end of the previous section.)

The natural law provides an account, based on the moral sense, of the particular obligations of social life. But Hutcheson does not speak much of obligations at all: he points out that from the moral sense “we derive our Ideas of RIGHTS”, 55 and then proceeds to explain natural law largely in terms of rights. It would be a grave mistake to conclude from this, however, that Hutcheson thus provides what would now be called a “rights-based” theory. Rather, since the moral sense shows that “some sort of benevolent affections” are the foundation of all moral goodness, Hutcheson’s account of rights has a distinctively utilitarian character:

Whenever it appears to us, that a Faculty of doing, demanding, or possessing any thing, universally allow'd in certain Circumstances, would in the whole


55 Inquiry, p. 277.
tend to the general Good, we say that any Person in such Circumstances, has a Right to do, possess, or demand that Thing. And according as this Tendency to the publick Good is greater or less, the Right is greater or less.\(^5\)

By speaking here of rights as faculties, Hutcheson shows his indebtedness to Grotius and Pufendorf. As a "faculty", a right is a power to act with a moral effect, and, since for Hutcheson there is only one moral effect, the tendency to the general good, rights are powers to enhance the general good.

Therefore, Hutcheson speaks of rights that are "greater" or "less" than others. Unlike some modern conceptions, Hutcheson's rights are unashamedly hierarchical. Although greater rights do not necessarily override lesser rights, they are nevertheless more important; and the greatness of any right is inversely related to its separability from the general good. Those rights which are not separable from the general good are Perfect rights:

The Rights call'd perfect, are of such necessity to the publick Good, that the universal Violation of them would make human Life intolerable; and it actually makes those miserable, whose Rights are thus violated. On the contrary, to fulfill these Rights in every Instance, tends to the publick Good, either directly, or by promoting the innocent Advantage of a Part.\(^5\)

The observance of these rights is therefore essential for achieving the general good, and as a result compliance with these rights must be enforced. So, in exercising a perfect right the use of force is justified. Hutcheson's justification is simply consequentialist:

as to the general Consequences, the universal Use of Force in a State of Nature, in pursuance of perfect Rights, seems exceedingly advantageous to the Whole, by making every one dread any attempts against the perfect Rights of others.\(^5\)

In other words, perfect rights are those moral powers which tend to the general good, and because enforcing, or "violent Defence, or Prosecution",\(^5\) of them further tends to the general good, perfect rights are enforceable. Thus Hutcheson adapts Pufendorf's distinctions to his own ends.

What are these rights that are so closely tied to the general good? Hutcheson gives a short list:

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\(^5\)ibid.

\(^5\)ibid.

\(^5\)ibid., p. 278.

\(^5\)ibid., p. 277.
Instances of perfect Rights are those to our Lives; to the Fruits of our Labours; to demand Performance of Contracts upon valuable Considerations, from men capable of performing them; to direct our own Actions either for publick, or innocent private Good, before we have submitted them to the Direction of others in any measure; and many others of like nature. Of these four rights, the first is a right to life, the last a right to natural liberty, while the second and third are rights to acquisition and contract. Given that acquisition and contract are those forms of free action which are, for the purposes of physical preservation at least, perhaps the most important kinds of liberty, we can see that Hutcheson's short list of perfect rights can be explained in terms of Locke's right of original property in oneself (i.e., to life and liberty), from which all other properties (estate) are derived. In Hutcheson's later work, the debt to Locke is made clear by his remark that "each man is the original proprietor of his own liberty". But it is also implicit in the earlier work. This debt can, of course, be traced back to Grotius and Pufendorf, since we have seen that the idea of being proprietor of oneself reflects the central notion of the suum. (Grotius, in fact, holds that promising itself depends on our being proprietors of our actions; but it is important to remember here as well that he means that our actions belong to us, are part of our suum.) It is necessary to stress the debt to Pufendorf at this point, since Hutcheson accepts the distinction between natural and adventitious rights, and therefore accepts that the rights to "the Fruits of our Labours" and to "demand Performance of Contracts" are not natural but adventitious. (They both arise as a result of "some previous act of man." These rights are the most important elements of justice, of giving to each his due, so we see that, for Hutcheson, justice is essentially concerned with adventitious rights. (This is equivalent to saying, in Humean language, that the virtues of justice are artificial; although Hume's reasons for saying this are more explicitly connected to motivational matters, as we shall see.)

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60ibid., p. 278.


63DJB, II.XI.i.3.

64Pufendorf, De Officio, II.ii.1.

65In the Inquiry, Hutcheson does not address this matter; but in the System his distinctions are a straightforward application of Pufendorf. See System, vol 1, pp. 293ff.
The second major category of rights are the Imperfect rights. These are rights because, like all rights, they “tend to the improvement and increase of positive Good in any Society”. Nevertheless they are not perfect rights because they “are not absolutely necessary to prevent universal Misery”. Their violation does not deprive human beings of any good they previously enjoyed, but “only disappoints Men of the Happiness expected from the Humanity or Gratitude of others”. From this it follows “That a violent Prosecution of such Rights would generally occasion greater Evil than the Violation of them”. Imperfect rights, therefore, despite tending to the general good of society, cannot be justly enforced. Furthermore, such acts as kindness, to which there is an imperfect right, are impossible to enforce. Kindness enforced is kindness no longer: as Hutcheson puts it, it “would cease to appear amiable”. Imperfect rights are most frequently adventitious, since they are usually appropriate to quite specific situations shaped by human actions. Hutcheson’s examples suggest this much:

Instances of imperfect Rights are those which the Poor have to the Charity of the Wealthy; which all Men have to offices of no trouble or expense to the Performer; which Benefactors have to returns of Gratitude, and such like.

Hutcheson spells out one aspect of the distinction between imperfect and perfect rights in a way that gives it something of a modern flavour. Roughly, the former are not enforceable because they correspond to omissions of positive goods, whereas the latter are enforceable because they involve commissions of actual evils. Hutcheson’s account only roughly corresponds to this modern distinction because he is as concerned with motivations as with actual performances. The violation of imperfect rights is best tolerated, he says, because it “only argues a Man to have such weak Benevolence, as not to study advancing the positive Good of others, when in the least opposite to his own”. In contrast, the violation of perfect rights cannot be tolerated because it

argues the injurious Person to be positively evil or cruel; or at least so immoderately selfish as to be indifferent about the positive Misery and Ruin of others, when he imagines he can find his Interest in it.

Violating the former shows merely “a weak Desire of publick Happiness, whereas

66 Inquiry, p. 279.
67 ibid.
68 ibid.
69 ibid., pp. 279-80.
violating the latter shows the violator to verge on being "entirely negligent of the Misery of others". Any such persons must be restrained in their actions, because such neglect of the condition of others shows them to be, at best, neglectful of the moral sense on which all social affections are based, and on which social life itself depends.

Hutcheson's third kind of right is the most removed from the general good. His account of this right helps to show the important differences between his general understanding of rights, and those of more recent defenders of rights. This third kind of right he calls an "External" right. It is best understood as a degenerate perfect right: perfect because "using Force in pursuance of it" is justified; degenerate because the right has lost its connection with the general good. In the System this right is referred to as "rather a shadow of right than any thing deserving that honourable name", and, although this and other remarks in the later work are perhaps stronger than those in the Inquiry, nevertheless much the same attitude seems to be manifest in the two works. The very choice of name for this right suggests as much: the point seems to be that the rights in question are "external" because they are no more than the shell or husk of a right. They have the outer appearance of a right, and must in the ordinary run of things be treated as a right; but they remain a defective or degenerate sort of right, lacking the heart appropriate to rights - the tendency to promote the general good. External rights are rights which have lost their telos. To say, however, that a right can lose its telos, but yet remain a right, may seem rather odd. There are, however, two reasons for putting it this way. Hutcheson mentions only one of these, but the second seems implicit in his own examples. They can be brought out by examining his account of these degenerate rights.

External rights are enforceable rights which conflict with imperfect rights: they arise

when the doing, possessing, or demanding of any thing is really detrimental to the Publick in any particular Instance, as being contrary to the imperfect Right of another.

Why then should these external rights be observed? Firstly, violations of imperfect rights, as already observed, "give no Right to force", so the fact of such violations alone provides no ground for interfering with or denying external rights. Secondly, although

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70 ibid., p. 280.


72 Inquiry, p. 280.

73 ibid., p. 282.
each individual external right is detrimental to the general good, honouring external rights as a whole is just the opposite:

the universally denying Men this Faculty ... would do more mischief than all the Evils to be fear’d from the Use of this Faculty.\textsuperscript{74}

So, although it is always "more humane and kind" not to exercise one's external rights, nevertheless the denial of such rights would be "vastly more pernicious".\textsuperscript{75}

Why should this be so? The answer can be gleaned from the types of examples Hutcheson provides. He says:

Instances of external Rights are these; that of a wealthy Miser to recall his Loan from the most industrious poor Tradesman at any time; that of demanding the Performance of a Covenant too burdensome on one side;\textsuperscript{76}

and so on. The significant feature of these examples is their specificity. The problem is not, for example, with contracts \textit{per se}, but with contracts of a particular sort. The specificity of the examples is not surprising, however, if we recognize that they are all undesirable special cases of desirable general rules. That loans should be repaid, and that covenants should be fulfilled, are both unexceptionable general rules, without which transactions between human beings, and thus a particular form of social life, could not be maintained. But both allow special cases which are anything but worthwhile, such as those quoted above. Moreover, if a general rule is to be socially efficacious, the parties governed by it cannot unilaterally decide whether or not it is binding in any particular case. To fail to require this would be to render the rule unenforceable. This would of course undermine completely even such perfect rights as "to demand Performance of Contracts". Consequently, all the undesirable special cases of important general rules must be treated, not on their own merits, but in the light of the relevant general rule. This is the situation with external rights. They are special cases of more general perfect rights; those cases which conflict with imperfect rights. Because of this, they remain enforceable rights: to deny them is impossible without simultaneously denying perfect rights. The vital importance of perfect rights to social life is the fundamental reason why the denial of external rights would be "vastly more pernicious" than their acceptance.

(This line of argument, however, is clearly at odds with the trust in the virtuous citizenry he shows in the quotation from the \textit{System} at the end of Section II. A fully-

\textsuperscript{74}\textit{ibid.}, pp. 280-1.

\textsuperscript{75}\textit{ibid.}, p. 282.

\textsuperscript{76}\textit{ibid.}, p. 281.
fledged politics of virtue would have to significantly weaken, perhaps even abolish, external rights. The seriousness of the problem here is seen when it is recognized that the benevolent affections of the moral sense prompt us to act in opposition to external rights. For his critics, particularly Kames and Hume, this is precisely the point where Hutcheson’s theory is most unsatisfactory: the sense of duty is essential for maintaining justice, but the moral sense does not ground the sense of duty. A separate foundation for duty must therefore be found.\(^77\)

It was mentioned above that Hutcheson’s notion of external rights would help to show how different is his conception of rights from some characteristically modern conceptions. Some of these differences can now be indicated. Firstly, it is necessary to point out that all notions of rights have some conception of a good as their *telos*, or point. Clearly, the point of Hutcheson’s rights is to promote the general good. But to conceive of their point so broadly not only allows a rich variety of rights, it also ensures that, provided the general good can be accurately specified, all rights will in *general* be in harmony with one another. They are not in harmony only in those specific cases where external rights are generated. But external rights are rights which *ought not to be exercised* (because it is always “more humane and kind” not to exercise them). Therefore Hutcheson’s rights either work harmoniously together to promote the general good, or, where they do not, ought not to be exercised.

Many modern notions of rights tend to be quite different. One rather blunt formulation puts it this way: “Individuals have rights, and there are things no person or group may do to them (without violating their rights)”.\(^78\) On an account such as this, the point of rights is obviously much narrower than Hutcheson’s: they aim at nothing larger than preventing interference to discrete individuals. Not only, then, do they not aim at any *social* good, not aim at providing a mutually supporting harmonious system, they in fact tend to assume the absence of any such harmony: my right to X is intended to protect me from the effects of your actions, including you exercising your right to Y. In this scheme, then, the exercise of rights is not an activity that aims to promote social harmony, but may even engender conflicts. And, since the point of rights thus conceived is not the promotion of any social good, there will be little likelihood of finding rights which ought not to be exercised.

\(^77\)See Kames’s complaints about Hutcheson’s inadequate treatment of duty and justice, in *Essays, op. cit.*, pp. 55-7; and Hume’s account of the artificiality of the sense of duty in *Treatise*, pp. 477ff.

Because, on Hutcheson's view, perfect rights are those rights which are necessary for the general good, perfect rights cannot come into conflict. As he puts it, "there can be no Opposition of perfect Rights among themselves". Nor can perfect rights conflict with imperfect rights. This does not mean that Hutcheson is being overly optimistic about social harmony. Rather, as the preceding account of the relationship between perfect and external rights implies, any otherwise perfect right which conflicts with an imperfect right is ipso facto an external right. Thus there is no conflict of perfect and imperfect rights. (It is, however, difficult to see why Hutcheson should also claim that "external Rights cannot be opposite among themselves".)

We should now turn to the important question of the alienability of rights. For Hutcheson, some rights are alienable, others are not. A right is alienable if it satisfies two conditions:

(i) the alienation must be possible;

(ii) the alienation must "serve some valuable Purpose".

The first condition shows that the "Right of private Judgement, or of our inward Sentiments, is unalienable", since we cannot conform our thoughts to anyone else's will. The second condition makes freedom of worship inalienable, and also implies an inalienable right to liberty:

a direct Right over our Lives or Limbs, is not alienable to any Person; so that he might at Pleasure put us to death, or maim us.

Hutcheson has here introduced the central inalienable right of Locke's political theory. It is the inalienable natural right to liberty, the right implied by having property in one's person. For Hutcheson, as for Locke, its crucial function is to ban slavery. In contrast to Locke, however, Hutcheson does not refer to a fundamental right of self-preservation. We may suppose that this is deliberate, that his commitment to the general good renders self-
preservation, as distinct from the preservation of the species, no longer a fundamental right. This supposition is strengthened by the fact that, having asserted the existence of the right to liberty, Hutcheson immediately introduces another right which is precisely the opposite of a right of self-preservation. This further right may well require that we surrender power over our very lives to the authority of others:

We have indeed a Right to hazard our Lives in any good Action which is of importance to the Publick; and it may often serve a most valuable end, to subject the direction of such perilous Actions to the Prudence of others in pursuing a publick Good; as Soldiers do to their General, or to a Council of War.84

He adds “so far this right is alienable”, thereby showing that this “Right to hazard our Lives in any good Action” can lead to the over-riding of the general “Right over our Lives or Limbs”.

We see here, then, Hutcheson accepting a basic Lockean concept, but then immediately reshaping it to fit his fundamental commitment to advancing the general good. This is a pattern repeated in a number of aspects of Hutcheson’s political theory. Two of these will be considered here: the foundation of property, and the formation of a civil polity from a state of nature. For our purposes, the account of property is particularly significant, because Hutcheson’s account includes elements that his successors were anxious to incorporate in their own theories, and because it simultaneously threatens to undermine the stability of property - a matter which all preceding and subsequent natural law writers were anxious to preserve.

Hutcheson’s account of property is strongly indebted to both Locke and Pufendorf. From Locke he takes over the stress on the importance of labour, and the non-necessity of any original agreement, but he discards many of the more metaphysical or religious components of Locke’s theory - he does not ground property in an original property in one’s person (even though, as we have seen, he allows an original propriety in one’s liberty), nor is property established by things becoming “part of oneself”.85 (In fact he castigates those who understand property as a “physical quality or relation” rather than a

84 ibid.

85 See Two Treatises, II.26.
moral quality. Neither does he appeal to the divine command to Adam to labour. In practice, he returns to the narrower conception of property employed by both Grotius and Pufendorf of property in things (Locke's "estate"); and his affinities with Pufendorf are further shown by his explicit acceptance that the original community of things was a negative community, and by close parallels in the treatment of necessity. These parallels can be attributed to the fact that Pufendorf's implicit dependence on a rational consensus in settling the nature and limits of the right of necessity is quite congenial to Hutcheson's approach, since it builds in the flexibility and concern for practical effectiveness implicit in the moral sense concern for establishing the general good.

This leads to a theory of property which, perhaps even more than does Locke's, stresses the significance of "Labour and Industry." The difference is not that Hutcheson places a greater value on labour than Locke - indeed this is scarcely possible, since for Locke "labour makes the far greatest part of the value of things, we enjoy in this World." In fact, Hutcheson's estimation of the value of labour appears to be taken directly from Locke, as the following passages show. Locke says:

I think it will be but a very modest computation to say, that of the Products of the Earth useful to the Life of man 9/10 are the effects of labour.

Hutcheson finds no reason to dispute this "modest Computation". He says:

That we may see the Foundation of some of the more important rights of Mankind let us observe, that probably nine Tenths, at least, of the things which

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86 *System*, vol.1, pp. 318, 346; and vol. 2, p. 12. Since, for Hutcheson, property is a kind of right, it is a moral quality "competent to some person" (vol. 1, p. 253), and is therefore founded in justice, that is, in the law of nature (vol. 1, pp. 346-7). Perhaps Pufendorf can be blamed for part of the problem Hutcheson sees in Locke. He says: "Ownership then is the right by which the substance, so to speak, of a thing belongs to a man" (*De Officio*, I.xii.3.).


88 This is also sufficient, he holds, to show that no original agreement was necessary to establish property. In the *Inquiry*, he does not consider the nature of the original community, but in the *System* he stresses that, because of the original negative community, there was no need for an original agreement (as in Pufendorf) nor for an explicit parental grant (as in Filmer). See *System*, vol. 1, pp. 330-1.

89 *Inquiry*, p. 284.

90 *Two Treatises*, II.42.

91 *ibid.*, II.40.
are useful to Mankind, are owing to their *Labour* and *Industry*.92

The difference between the two theories lies in the fact that Hutcheson seeks no further justification for property. But how does the value or usefulness of labour provide a foundation for property? For Hutcheson, it does so simply by providing a justification for rights which protect and encourage "*Labour* and *Industry*". These rights are property rights. Of course, if this is what property rights are, it follows that in any situation where the protection or promotion of industry is not necessary, then neither is property.93 Hutcheson implicitly accepts this, observing that property becomes necessary at that particular stage in human history,

when once Men become so numerous, that the natural *Product* of the Earth is not sufficient for their Support, or Ease, or innocent Pleasure.94

There is thus no question, for Hutcheson, of property being necessary for, or implied by, the eating of an acorn or an apple in the wild.95 Property is only necessary, and thus generally arises, where there is scarcity, and thus *competition for resources* - whether natural or generated by industry.

The chief cause of this scarcity is population increase. With more mouths to feed, but with only a fixed stock of resources,

a necessity arises, for the support of the increasing *System*, that such a *Tenour* of Conduct be observ'd, as shall most effectually promote *Industry*; and that Men abstain from all Actions which would have the contrary effect.96

General benevolence works to this end; and the strong ties of blood and friendship, and the desire for honour, all work together to support it.97 But these are not enough. For all such mutually supporting passions and affections are undermined where any person is not confident of securing "the Fruits of his own innocent Labour". Where the fruits of industry are not protected,

92 *Inquiry*, p.284.

93 Of course, property may still exist in such situations, but for other reasons: for example, as a relic of a bygone system of economic organization.

94 *Inquiry*, p.284.

95 Cf. *Two Treatises*, II.28.

96 *Inquiry*, p.284.

97 *ibid.*
it exposes the *Industrious* as a constant prey to the *Slothful*, and sets *Self-love* against *Industry*.\(^98\)

So, without the adequate protection of the fruits of industry, all social endeavour is in vain. The necessity of industry for both individual and social good thus renders property also necessary. We have discovered, therefore, “the Ground of our *Right of Dominion* and *Property* in the *Fruits* of our *Labours”*. We cannot do without property, because without this right “we could scarce hope for any *Industry*, or anything beyond the *Product* of uncultivated Nature”.\(^99\) Further, the value of such industry will only be partially achieved if there is not only protection for, but also unhindered disposal of, any surplus beyond our needs. Thus Hutcheson derives, from the one principle, the rights to accumulate, to trade, to donate, and to dispose by testament.\(^100\) His view appears to be not only that incentives for industry require protection over the fruits of industry, but that such incentives (and thus society’s material well-being) are maximized when power over the fruits of industry is itself maximized. The important role assigned to industrious activity in promoting the general good of society leads Hutcheson to advocate a system of property constrained only by the operations of the moral sense. This means that, as Thomas Horne puts it,

> his property theory is both an explicit defence of inequality and an effort to educate those in polite society to the moral, political and economic virtues that would justify their eminence.\(^101\)

Such justifying virtues are, as they are for Locke, the effective promotion of industry and productivity so that the general good is promoted. The pre-eminence of some is simply a pre-condition for the betterment of all.

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\(^98\) *ibid.*, p.285.


\(^100\) *Inquiry*, p.286. On the matter of testamentary succession, Adam Smith takes exception to Hutcheson’s rather breezy derivation. Smith points out that testamentary succession is a late and sophisticated development in the history of property, and that this is so because the necessity of maintaining an incentive for industry is satisfactorily achieved by having the property pass to those who had (or who could be perceived to have had) a significant hand in the development and maintenance of the property. Such legal succession, which normally favours next-of-kin, can thus even be invoked to challenge the validity of testaments. See Smith, *Lectures on Jurisprudence*, LJ(B), 156. (Although typically going to next-of-kin, such forms of legal succession are, however, founded “not so much on account of their relation to the father as on account of the labour they had bestowed on acquiring them”.)

Limitations on how far the institution of property can itself be extended are dealt with in the same way:

as property is constituted to encourage and reward industry, it can never be so extended as to prevent or frustrate the diligence of mankind.\textsuperscript{102}

Hutcheson has particularly in mind preventing any person or society from acquiring a right in “a vast tract of land quite beyond their power to cultivate.” If property is not thus limited, “the caprice or vain ambition of one state might keep half the earth desolate, and oppress the rest of mankind.”\textsuperscript{103} His commitment to facilitating and protecting industry thus leads Hutcheson to bar appropriations where they are not useful. So, although his reasoning is rather different from Locke’s, his conclusions are very similar.

On the place of property in civil society, however, Hutcheson’s conclusions differ significantly from Locke’s. In part this difference is more apparent than real, since Locke’s doctrine that the protection of property is the end of government does not imply that the protection of our property in things (estate) is the end of government. Nevertheless the protection of such things is an important concern for Locke, whereas for Hutcheson the end of government is the promotion of the general good. Therefore property in things, like other rights, is protected by government as long as, or to the extent that, it promotes the general good. (In practice, of course, this extent is quite considerable.) What constitutes this general good is always open to the reassessment of moral agents employing their moral sense. Thus,

our moral Sense, by a little reflection upon the Tendencies of actions, may adjust the Rights of Mankind.\textsuperscript{104}

The rights of mankind bind, then, only in the general course of events. Where necessity or emergency requires, they can - indeed must - be set aside.\textsuperscript{105} Necessity itself is determined by the moral sense, and thus by those agents in the relevant situation. The implications of this view extend well beyond merely property in things, to the justification and extent of political powers. As a result, the twist that Hutcheson gives to the meaning

\textsuperscript{102}\textit{System}, vol.1, p.326.

\textsuperscript{103}ibid., pp.326-7. Adam Smith employs the same reasoning to reject entails, “the greatest of all extensions of property”. Entail is precisely a system which frustrates industry, so “upon the whole nothing can be more absurd than perpetual entails” (LJ(B), 186-8).

\textsuperscript{104}\textit{Inquiry}, p.288.

\textsuperscript{105}ibid., p.298.
of the Lockean notion of a trust is of profound significance. In order to show this, it is first necessary to consider how the civil polity arises.

For Hutcheson, the advantages of civil polity are clear, and so the motives for entering into it are unexceptionable. Nevertheless, he accepts that it has to be created by human beings from a pre-civil condition. In this respect he is at odds with his moral sense precursor, Shaftesbury. Shaftesbury's dismissive remark that "the learned have such a fancy for this notion, and love to talk of this imaginary state of nature"\(^{106}\) reflects his view that political society is instinctively natural, not the result of artifice. For Hutcheson, the moral sense is the foundation of sociability, but civil polity is not thereby instinctive. He accepts the reality of the state of nature, treating civil government as an artifice.\(^{107}\) But he also stresses that, if we lacked the moral sense, our natural state would be "universal War, according to Mr. HOBBS".\(^{108}\)

How then is civil government constituted? Hutcheson's account is Lockean in structure, but with significant modifications. Firstly, government is constituted by men transferring "their alienable Rights to the Disposal of their Governours, under such Limitations as their Prudence suggests".\(^{109}\) These alienable rights include, significantly, the right to punish and the right to war, and provide the foundation for the Magistrate's right to punish.\(^{110}\) The limitations of prudence are simply the limitations any people choose to place on their government, or, to put it another way, those alienable rights the people choose to retain themselves. Even where they do not require such limitations, however, the government remains limited by the inalienable rights of the people. Thus

> there can be no Government so absolute, as to have even an external Right to do or command every thing.\(^{111}\)

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\(^{107}\) This acceptance is made explicit in the *System*, vol. 1, pp.280ff. In the *Inquiry* he refers to it twice (p.278 and p.303), but neither occasion is directly connected to the question of the formation of government.

\(^{108}\) *Inquiry*, p.303.

\(^{109}\) *ibid.*, p.287.

\(^{110}\) *ibid.*, p.278.

\(^{111}\) *ibid.*, p.294.
In fact, where a government does invade inalienable rights, the people can exercise their right of resistance. However, this right may be either perfect or external, depending on whether the exercise of the right would do a net good or a net harm. So, although “Unalienable Rights are essential Limitations in all Governments”, and such rights are protected by the people’s right of resistance, nevertheless there are circumstances where this protective right ought not to be exercised. Thus considerations of the general good constrain even the right of resistance. Hutcheson’s position, in contrast to Locke’s is that the “appeal to God” needs to be tempered by an appeal to our moral (good) sense.

The civil government is instituted by the people with an eye to

promoting the publick Good, and of defending themselves against mutual or foreign Injurys.113

This therefore constitutes the end of government, and any government is a trust designed to achieve this end. Not only is a government a trust, an institution designed to achieve a particular worthwhile end, it must also, in Hutcheson’s scheme, be itself an object of trust by the people. He says:

in all states this tacit Trust is presuppos’d... that the Power conferr’d shall be employ’d according to the best Judgment of the Rulers for the publick good.114

This judgement is not simply a matter of determining how best to work within the Constitution of the polity, but allows, in cases of necessity, even Constitutional violations. Hutcheson is, however, anxious to stress that such violations cannot be allowed except in the direst necessity. He does this by drawing a parallel with the people’s right of resistance:

in Cases of extreme Necessity, when the State cannot otherwise be preserv’d from Ruin, it must certainly be Just and Good in limited Governours, or in any other Persons who can do it; to use the Force of the State for its own preservation, beyond the Limits fix’d by the Constitution, in some transitory Acts, which are not to be made Precedents. And on the other hand, when an equal Necessity to avoid Ruin requires it, the Subjects may justly resume the Powers ordinarily lodg’d in their Governours, or may counteract them .... These Necessities must be very grievous and flagrant, otherwise they can never over-balance the Evils of violating a tolerable Constitution, by an arbitrary act of Power, on the one hand; or by an Insurrection, or Civil War, on the other. No Person, or State can be happy, where they do not think their important Rights

112 ibid., p.295.
113 ibid., p.287.
114 ibid., p.295.
are secur'd from the Cruelty, Avarice, Ambition, or Caprice of their Governours. Nor can any Magistracy be safe, or effectual for the ends of its Institution, where there are frequent Terrors of Insurrections.\textsuperscript{115}

Even given his concern to limit this "right of necessity", Hutcheson has given the conception of government as a trust a twist that Locke certainly had not envisaged. His rulers, unlike Locke's, have to be prepared to exercise political virtues which can undercut the Constitutional foundations of the state. Although he insists that the possession of such virtues ("superior Wisdom, or Goodness\textsuperscript{116}") cannot itself provide the foundation for a government - can give "no right to Men to govern others"\textsuperscript{117} - this is only because no Assumer of Government, can so demonstrate his superior Wisdom or Goodness to the satisfaction and security of the Governed, as is necessary to their Happiness.\textsuperscript{118}

Not only does this allow that divine government, unlike human government, can be founded on wisdom and goodness; it also shows just how far Hutcheson's commitment to the benevolent and utilitarian moral sense undercuts and refashions a \textit{prima facie} Lockean political theory.

* * *

For Hutcheson's intellectual successors, this was an unacceptable legacy. While, on the one hand, the doctrine of the benevolent moral sense provides a firm foundation for human sociability, on which the law of nature rests, on the other hand it champions the judgement of benevolent individuals to such an extent that almost all social rules become defeasible. Hume's reaction is to preserve the moral sense's role in founding sociability, but to stress its limitations. Human benevolent affections have only a very limited extent,\textsuperscript{119} and therefore in all matters of justice it is most important to insist on the

\textsuperscript{115}ibid., pp.298-9.

\textsuperscript{116}ibid., pp.299-300.

\textsuperscript{117}ibid., p.300.

\textsuperscript{118}ibid., p.299.

\textsuperscript{119}Hume's most famous remark bearing on this matter concerns the "avidity... of acquiring goods and possessions for ourselves and our nearest friends", an avidity which "is insatiable, perpetual, universal, and directly destructive of society." (\textit{Treatise}, pp.491-2).
necessity of "the steady prosecution of the rule", not on the contextual judgements of the moral sense. For Hume, then, the most pressing political task is to find a firm foundation for that sense for which the moral sense can not adequately account - the sense of duty.

Hume's religious scepticism also leads him to abandon another feature of Hutcheson's theory - its providential teleology. (Indeed, in the *System* in particular, this teleology is most explicit, with its enquiry - in Book I Part II - into the supreme good of human nature.) Thus, for Hume, the question of what is natural to human beings, and therefore also of what is properly regarded as the law of nature, must be reviewed. In a letter to Hutcheson, written before the publication of the third book of the *Treatise*, he indicates the crucial methodological difference between his own and Hutcheson's enquiries into the law natural to human beings. He says there:

I cannot agree to your sense of natural. It is founded on final causes; which is a consideration, that appears to me pretty uncertain and unphilosophical. For pray, what is the end of man? Is he created for happiness or for virtue? For this life or for the next? For himself or for his Maker? Your definition of natural depends on solving these question, which are endless, and quite wide of my purpose.

In the next chapter, we will examine Hume's attempt to ground the sense of duty without resorting to an "unphilosophical" conception of nature, or of the law of nature.

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120 *Treatise*, p.497.

Chapter Five

DAVID HUME

I: Introduction

The preceding chapter provides a sketch (filled out in the Appendix) of how the concern for a psychology of action adequate to the requirements of natural law - that is, a theory of action which is both firmly founded in human nature, and which shows sociability as an essential expression of that nature - leads to the rejection of the "selfish" aspect of Locke's psychology of action, while retaining its hedonism. By broadening the sources of pleasure to include the perception of beauty, and by providing an account of virtue in terms of the beauty of actions or characters, the theory of the moral sense attempts to provide a foundation for human sociability, as an adequate natural law theory must. But sociability is more than the mere desire for, or enjoyment of, human society. It also requires a social order which reflects the measure of human intelligence; and, of the elements of this order, it is justice - which most essentially means the rules of property - which is of most importance. But justice requires the following of a rule regardless of its consequences in particular cases (in Hutcheson's language, it requires the recognition of external rights), and where these consequences are contrary to benevolence the Hutchesonian moral sense theory cannot account for our obligation to justice. It cannot explain our sense of justice, which is our sense of duty.

In the second of his Essays on the Principles of Morality and Natural Religion (published in 1751), entitled "Of the Foundation and Principles of the Law of Nature", Hume's older relative Henry Home, Lord Kames, argues that the law of nature is founded in human nature, as do all the natural law writers, and concludes from this that, for a complete account of natural law, "it will be necessary to trace out human nature with all the accuracy possible."¹ This leads him to give an account of the principles of human action, and, in order to account for our recognition of the beauty of the actions of free agents, and of the characters of such agents, a recognition which leads us to praise and, in appropriate circumstances, to emulate them, he defends the reality of the moral sense. However, he criticises all previous accounts of this moral sense, including Hutcheson's, for the reason already given. He then goes on to give an account of justice, and of our

¹Kames, Essays, p. 42.
obligation to justice, which attempts to overcome the shortcomings of the previous theories. One important insight of this account is later taken up by Adam Smith - the negativity of the virtue of justice.²

The main (but by no means the only) target of Kames's Essays is Hume's Treatise, published just over ten years earlier. But Kames does not attack Hume for abandoning natural law, nor does he see him as outside the context of the natural law debate. In fact, he sees "the author of the treatise upon human nature"³ as a contributor to the same debate. And, when we consider the nature of Hume's constructive programme - in the second and third books of the Treatise - it is easy to see why he should have thought so. For Hume shows himself there to have the same positive programme as Kames: an account of the principles of action (as part of a more complete account of the constitution of the human passions, which are themselves the mainsprings of all human action), together with an account of the nature and origins of justice, with special attention to the nature of our obligation to obey its rules - the latter following a short section which both defends the moral sense and accepts that alone it cannot provide a complete account of our moral obligations. It is not surprising, then, that Kames should have considered Hume to be a contributor to the development of an adequate account of natural law. I shall argue in this chapter that Kames was correct in thinking so.

To claim Hume as a contributor to natural law, however, seems to fly in the face of some well established conceptions of Hume the philosopher. Of these, the conceptions of Hume as the Newtonian philosopher who introduced experimental reasoning into moral subjects⁴, or as the sceptical destroyer of all established philosophy, are here the most pertinent. So, before defending the natural law interpretation of Hume - mainly by showing why he should have described his theory of justice as akin to that of Grotius, and by showing in what way justice is artificial rather than natural - it will first be necessary to show how, or to what extent, a natural law interpretation is compatible with these established conceptions.

²ibid., pp. 59-61. Cf. Smith, The Theory of Moral Sentiments, ed. D.D. Raphael and A.L. Macfie, Oxford: Clarendon Press (1976), II.ii.1.9 ("Mere justice is, upon most occasions, but a negative virtue"), and II.ii.1.5. The negativity of justice lies in the fact that the moral sense (for Kames), or propriety (for Smith), recognizes the evil of injustice, rather than the good of justice.

³Kames, Essays, p. 57.

⁴As the title-page of the Treatise announces - Treatise, p. xi.
At this point it is appropriate to acknowledge that, in defending a natural law interpretation of Hume, I am following a lead established by Duncan Forbes in *Hume's Philosophical Politics*[^5], and owe a general debt to that work. Particular debts will become more clear along the way. But the task itself, of reconciling, as far as possible, the various conceptions of Hume's philosophy, can now be turned to. The picture of Hume as the Newtonian philosopher presents fewer problems for our interpretation, so it is best considered first.

II: The Newtonian

Hume owes his reputation as the Newtonian philosopher to his intention, expressed on the title-page of the *Treatise*, "to introduce the experimental method of reasoning into moral subjects". At a rather superficial level, this intention leads Hume to engage in the "thought experiments" of the *Treatise*; more importantly, it is reflected in a self-conscious methodology, involving in particular commitments to the principle of parsimony, and to grounding all conclusions firmly in experience. To illustrate the latter first. In the *Abstract* he (indirectly) describes his overall aim in these terms:

\[
\text{tis at least worth while to try if the science of man will not admit of the same accuracy which several parts of natural philosophy are found susceptible of.}^6
\]

To secure this end, the author of the *Treatise*

proposes to anatomize human nature in a regular manner, and promises to draw no conclusions but where he is authorized by experience. He talks with contempt of hypotheses ...[^7]

This final remark echoes Newton's statement in the *Opticks* that "hypotheses are not to be regarded in experimental philosophy"[^8]. Reconciling it, however, with what Hume actually *does* say about "hypotheses" in the *Treatise* (where, particularly in Book II, he uses it in much the way we would use a term like "theory"[^9]), requires a good deal of charity in interpretation. His intention, however, is essentially to reject *a priori*


[^7]: *ibid.*, p.646.


[^9]: *ibid.*
principles. An example of this can be found at the end of the *Enquiry concerning Human Understanding*, where the ancient maxim, *ex nihilo, nihil fit*, is dealt a summary execution: it "ceases to be a maxim, according to this philosophy". The same requirement, that all knowledge be grounded firmly in experience, is not to be restricted to natural enquiries, but must occur in morals as well. This is succinctly expressed in the 2nd Enquiry:

Men are now cured of their passion for hypotheses and systems in natural philosophy, and will hearken to no arguments but those which are derived from experience. It is full time they should attempt a like reformulation in all moral disquisitions; and reject every system of ethics, however subtle or ingenious, which is not founded on fact and observation.

The method to be followed requires, according to the *Treatise*, "a cautious observation of human life ... in the common course of the world." The fruit of such labour will be a new science:

Where experiments of this kind are judiciously collected and compared, we may hope to establish on them a science, which will not be inferior in certainty, and will be much superior in utility to any other of human comprehension.

These remarks give us an indication of the nature and aims of Hume's "experimentalism". Hume's other significantly Newtonian principle is parsimony, or as he usually describes it, simplicity. In the opening sections of Book II of the *Treatise*, he observes that

we find in the course of nature, that tho' the effects be many, the principles, from which they arise, are commonly but few and simple, and that 'tis the sign of an unskilful naturalist to have recourse to a different quality, in order to explain every different operation.

He adds that, because this principle is so rarely observed, "moral philosophy is in the

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10 For a more detailed discussion, see Passmore, chapter 3.


12 *Enquiries*, pp.174-5.

13 *Treatise*, p.xix.

14 *ibid*.

15 *ibid.*, p.282; cf. also p.473, for example.
same condition as natural, with regard to astronomy before the time of *Copernicus*.\(^{16}\) The same principle is invoked in Book III to defend the account given of the role of sympathy in moral judgements.\(^{17}\) In the *Abstract*, the task of natural philosophy is described as finding “those few simple principles, on which all the rest depend.\(^{18}\) and, by showing that “all the operations of the mind must, in a great measure, depend” on the three principles of the association of ideas; further, “tis the use he makes of the principle of the association of ideas”, showing it to be one of those few simple principles, that can “intitle the author to so glorious a name as that of an *inventor*.\(^{19}\) Once again, however, perhaps the clearest statement is in the 2nd *Enquiry* (which, unlike the *Treatise*, also attempts to display a simplicity of intellectual structure). The account of the role of utility in the social virtues is there justified on the ground that

> It is entirely agreeable to the rules of philosophy, and even common reason; where any principle has been found to have a great force and energy in one instance, to ascribe to it a like energy in all similar instances. This indeed is Newton’s chief rule of philosophizing.\(^{20}\)

Despite these remarks, it should be noted that Hume is not lacking in a measure of agreement with critics of the Newtonian passion for simple principles. Berkeley had seen as a weakness of Newtonian science its encouragement of “that eagerness of the mind, whereby it is carried to extend its knowledge to general theorems”,\(^{21}\) and in the 1st *Enquiry* Hume allows that moralists, in their “search for some common principle” on which moral sentiments might depend, “have sometimes carried the matter too far, by their passion for some one general principle”.\(^{22}\) It is probable that Hume has in mind the type of objection raised by Hutcheson against the determination of some moral theorists - particularly Mandeville - to ground all moral distinctions in self-love. For Hutcheson, the

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\(^{16}\) *ibid.*

\(^{17}\) *ibid.*, pp.578,580,588.

\(^{18}\) *Abstract*, in Hume’s *Treatise* (2nd ed.) p.646.

\(^{19}\) *ibid.*, pp.661-2.


\(^{21}\) Berkeley, *Principles of Human Knowledge*, para.106. Quoted by Passmore, p.44.

\(^{22}\) *Enquiries*, p.15.
drive for simplicity causes a blindness to the relevant facts. As he puts the matter in the Preface to his *Essay on the Nature and Conduct of the Passions*:

Some strange love of simplicity in the structure of human nature ... has engaged many writers to pass over a great many simple Perceptions which we may find in ourselves.²³

We have to presume that Hume has this *caveat* in mind, when, in the 2nd *Enquiry*‘s appendix on self-love he remarks that the “selfish hypothesis” in morals arises from a determination to reduce all appearances to a single cause:

All attempts of this kind have hitherto proved fruitless, and seem to have proceeded entirely from that love of *simplicity* which has been the source of much false reasoning in philosophy.²⁴

That this remark should be seen within the rather limited context suggested, rather than as indicating a wider methodological commitment - as is the case with Berkeley, for example - is necessitated by what would otherwise be a directly contradictory remark only a few pages later in the same appendix. Hume says there that, “if we consider rightly of the matter”, we would prefer his own view to the “selfish hypothesis” because it “has really more *simplicity* in it, and is more conformable to the analogy of nature”.²⁵ This shows that Hume does not, after all, back away from the search for parsimonious explanation, but continues to adhere to what he calls “Newton’s chief rule of philosophizing”.

Hume’s Newtonianism, then, consists chiefly in what he saw to be the major elements of the experimental method - the search for simple general causes, and the determination to found all doctrines on fact and observation. Thereby a moral science could be developed with the same levels of accuracy as - but with much greater utility than - the philosophy of nature. This moral science would be founded on the science of human nature, because human nature is “the capital or centre of these sciences”. In fact,

There is no question of importance, whose decision is not compriz’d in the science of man; and there is none, which can be decided with any certainty, before we become acquainted with that science. In pretending therefore to explain the principles of human nature, we in effect propose a compleat system of the sciences, built on a foundation almost entirely new, and the only one upon


²⁴ *Enquiries*, p.298.

²⁵ *ibid.*, p.301.
which they can stand with any security.\(^{26}\)

Hume’s Newtonianism, then, is his commitment to what he took to be the central features of Newton’s method, in order to produce a new moral science grounded firmly in human nature.

Our concern here is not to evaluate his practical conformity to these stated ideals, but to determine whether there is any inconsistency - or even incongruity - between these ideals and the natural law tradition. The first clue that there is not is provided by Hume himself in the paragraph immediately following the passage quoted above. For, although his talk of building on a new foundation may suggest he is attempting to tread a course hitherto untrodden, he acknowledges that he is in fact engaging in an enterprise already underway; initiated by “some late philosophers in England, who have begun to put the science of man on a new footing”.\(^{27}\) These “late philosophers” (not then all dead, incidentally) are acknowledged in a footnote: they are “Mr. Locke, my Lord Shaftsbury, Dr. Mandeville, Mr. Hutchinson, Dr. Butler, &c.”\(^{28}\) This list is something of a “mixed bag”, as Duncan Forbes notes.\(^{29}\) However, the surprising absences are not, pace Forbes, Berkeley, Descartes and Malebranche. Quite apart from the latter pair not being English (and hence being a possible embarrassment to Hume’s use of this group of philosophers to exemplify his claim, much developed in his later Essays,\(^{30}\) that “the improvements in reason and philosophy can only be owing to a land of toleration and of liberty”;\(^{31}\) all three fail to conform to the requirements of the experimental method, as understood by Hume. Descartes’ search for “clear and distinct ideas” rather than for empirical evidence, Malebranche’s occasionalism about causes, and Berkeley’s rejection of simple general explanations - all these are sufficient to rule out these philosophers. But Forbes is right in stressing the omission of Hobbes: although Hobbes’s conclusions hardly commend his inclusion in a list intended to show the virtues of a land of liberty, his method is

\(^{26}\)Treatise, p.xvi.

\(^{27}\)ibid., p.xvii.

\(^{28}\)ibid.

\(^{29}\)Hume’s Philosophical Politics, pp. 8-9.


\(^{31}\)Treatise, op.cit.
adequately experimental. Hume has, in all probability, a simple reason for this omission: 
Hobbes is rather too early a figure to illustrate Hume's view that moral philosophy, in the 
modern as in the ancient world, comes to flourish "at the distance of above a whole 
century" after the establishment of a new natural philosophy. This would allow him to 
class Hobbes as a typical precursor - i.e., providing important illuminations, but tainted 
by misconceptions.

For present purposes, however, the important thing about this list is that, with the 
exception of Mandeville, it is not a list of philosophers antipathetic to the natural law 
tradition. Hume's support for the experimental method in morals is not, therefore, ipso 
facto opposition to natural law. In fact, many philosophers deeply embedded in the 
natural law tradition explicitly avow either the advantages, or even the necessity, of the 
new experimental science. This can be readily illustrated by the views of Hutcheson, for 
our purposes the most instructive member of Hume's list of "late philosophers". Not only 
does Hutcheson see no barrier between natural law and experimental philosophy, he 
positively identifies the method proper to natural law theory to be the development of a 
science of human nature by the employment of what can only be called experimental 
method. In the Short Introduction, he describes the task of natural law as follows:

All such as believe that this universe, and human nature in particular, was 
formed by the wisdom and counsel of a Deity, must expect to find in our 
structure and frame some clear evidences, showing the proper business of 
mankind, for what course of life, what offices we are furnished by the providence 
and wisdom of our Creator, and what are the proper means of happiness. We 
must therefore search accurately into the constitution of our nature, to see what 
sort of creatures we are ...

How should we conduct this search? Hutcheson clearly has in mind an empirical 
investigation:

Now the intention of nature with respect to us, is best known by examining what 
these things are which our natural senses or perceptive powers recommend to us, 
and what the most excellent among them? ...

In this art, as in all others, we must proceed from the subjects most easily 
known, to those that are more obscure; ... and therefore don't deduce our first 
notions of duty from the divine Will; but from the constitution of our nature,

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32 ibid., p.xvi.

33 Hutcheson, Short Introduction, p. 2.
which is more immediately known.\textsuperscript{34}

The same commitment to empirical enquiry, as a necessary feature of natural law theory, is shown in the \textit{System}. In the opening paragraph of that work, Hutcheson asserts that

\begin{quote}
The intention of moral philosophy is to direct men to that course of action which tends most effectually to promote their greatest happiness and perfection;\textsuperscript{35}
\end{quote}

and that the proper method to be followed is

\begin{quote}
as far as it can be done by observations and conclusions discoverable from the constitution of nature, without any aids of supernatural revelation: these maxims, or rules of conduct are therefore reputed as laws of nature, and the system or collection of them is called the LAW of NATURE.\textsuperscript{36}
\end{quote}

It may be thought, that since the publication of both of these Hutchesonian works post-date Hume's \textit{Treatise}, the views just canvassed represent a hasty defence against the inroads of Newtonian philosophy. We cannot rule out the possibility of a Humean influence on Hutcheson's account in these works of the method appropriate to natural law. But there is no compelling reason to think this, because Hutcheson's views are not atypical. This can be shown by considering the case of George Turnbull.

In 1740, the year of publication of Book III of Hume's \textit{Treatise}, Turnbull published his \textit{Principles of Moral Philosophy}. In this work he announced his aim to be to "vindicate" human nature, "by reducing the more remarkable appearances in the human system" to "general laws", and avoiding any hypotheses which are not grounded firmly in experience. Moral philosophy is not, however, just a system of facts discovered by observation, but, like natural philosophy, is a matter of experiments and reasonings from experiments. Failure to follow this method generates "mere" hypotheses. Given all this, it should then come as no surprise to the reader to be referred to Newton's \textit{Principia}.\textsuperscript{37} These methodological remarks are amplified in another work, published the following year. Significantly, this is Turnbull's translation of one of the well-known natural law texts of

\textsuperscript{34}ibid.

\textsuperscript{35}\textit{System}, vol. 1, p. 1.

\textsuperscript{36}ibid.

\textsuperscript{37}The quotations are from George Turnbull, \textit{Principles of Moral Philosophy}, London (1740), ii, iv, 19, 20, 22. My own source is Forbes, \textit{op.cit.}, p.1; and on whose account I have relied heavily in this paragraph.
the period, Heineccius' *Methodical System of Universal Law*, together with the translator's annotations and an appended discourse on the nature and origin of moral and civil laws. This final discourse is described by Turnbull, in the Preface to the *Methodical System*, as "an attempt to introduce the experimental way of reasoning into morals, or to deduce human duties from internal principles and dispositions in the human mind". These duties are those universal laws which underlie all civil laws: they are the natural law.

Far from being inimical to natural law, then, Hume's espousal of the experimental method is an enthusiasm shared with writers firmly in the natural law tradition. The natural jurists seem to have had much the same reaction to the new experimental method as the philosophers of nature (the physical scientists): that is, an enthusiastic adoption of a more refined method which promised more accurate results, and therefore greater possibility of success in achieving their end: an accurate specification of the rules of conduct appropriate to human life. We can see, then, that the common picture of Hume the Newtonian philosopher does not of itself rule out or even discourage understanding Hume as a contributor to the natural law account of human society.

A shared enthusiasm for the experimental method should not, however, blind us to an important difference between Hutcheson and Turnbull, on the one hand, and Hume, on the other, as to just what the experimental method involves. Both Hutcheson and Turnbull speak of an enquiry into the constitution of our nature, and by this mean the task of discerning the extent and limits of characteristic human powers and excellences, so that the specific requirements for human happiness can be determined. What is envisaged can perhaps be described, rather broadly, as a biological enquiry to determine the nature of the *telos* of human beings. Their experimental method is thus a method for determining a final cause. As we have seen, Hume objects to the role that final causes play in Hutcheson's scheme, so his conception of the experimental method is much more like the modern conception of social science. To properly conduct the "science of man" we must eschew all concern with ultimate principles. Instead,

We must therefore glean up our experiments in this science from a cautious observation of human life, and take them as they appear in the common course.

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of the world, by men's behaviour in company, in affairs, and in their pleasures.  

Hume does not always appear to be consistently anti-teleological, however. For example, his famous remark that "reason is, and ought only to be the slave of the passions"\(^\text{41}\) shows him to remain under the influence of a conception of human nature which goes beyond the merely observable to a conception of a harmoniously functioning system with its own distinctive telos.

If such elements of teleology in Hume's philosophy could be discarded (as nothing more than regrettable but unimportant lapses on Hume's part), so that the difference between Hume's experimental method and that of his contemporaries was precisely the absence or presence of any teleological elements, this would not be sufficient to mark off Hume from natural law. For, while many of the natural law writers have very markedly teleological theories, all do not. This is most obviously the case with Grotius, a fact which might provide one clue to Hume's willingness to see himself as, in at least one area, Grotius's intellectual heir. But this also shows us that not only does Hume's espousal of experimental method fail to separate him from the natural law writers, but also that even the distinctive character of his version of this method so fails.\(^\text{42}\)

III: The Sceptic

An adequate treatment of Hume as a sceptic is a much more difficult matter. This is principally because, in one sense or other, scepticism is very close to the heart of Hume's philosophy. As a result, no attempt to get to grips with Hume can avoid conclusions about the nature or extent of his scepticism; and, as interpretations vary, so do accounts of this feature itself. This remains true of recent work on Hume, although there is in this work a discernable tendency to treat Hume's scepticism as an overrated matter. The reason for this is not hard to find. For most of this century, Hume interpretation has been part of the self-justification of positivism. Hume, accorded the stature of a precursor of positivism, has been studied mainly by positivists. Not surprisingly, such interpreters have concentrated their attention on those parts of Hume's philosophy which were most

\(^{40}\)Treatise, p. xix.

\(^{41}\)ibid., p. 415 (emphasis added).

\(^{42}\)According to a recent commentator, Hume's Newtonianism has been considerably overrated. Although Hume does of course invoke Newtonian principles, as we have seen, Peter Jones concludes that "Hume's own philosophical reflections led away from Newton". Hume's Sentiments: Their Ciceronian and French Context, Edinburgh: Edinburgh University Press (1982), p. 19.
relevant to their concerns. So, Hume interpretation has begun with a preconceived view of its object, and, by selective attention, the philosopher has been found to fit the preconception. The first important step towards an adequate understanding of Hume, then, is to free him from his posthumous role of positivist saint.

The second, no less important, step is to remove the spectacles ground out by post-Kantian philosophy: the conception that philosophy consists of a core - composed of logic, metaphysics, and epistemology - which is then applied to other, more practical, areas of endeavour. Applied to Hume, this has two important consequences. Firstly, it identifies the core of Hume's philosophy to be the first book of the *Treatise* (and, if one is prepared to slum it a little, the *1st Enquiry* as well), and so helps to reinforce the monument to the positivist saint. Secondly, because Hume's sceptical metaphysics is conjoined with a decidedly non-sceptical philosophy of morals, politics, and "criticism", a fact which shows us that Hume's larger philosophy is not the application of a sceptical core to practical affairs, this very modern conception of philosophy has encouraged the view that, where he is not being a sceptical metaphysician, Hume is being either a charlatan (his principles swept away by his "love of literary fame", his self-confessed "ruling passion"\(^44\)) or the victim of confusion. In either case, his overall corpus cannot be considered a great philosophy; Hume may himself, however, be regarded as a great philosopher if we charitably restrict our attention to what is after all the core of his work: the *Treatise*, Book I.

By remembering that Hume was not a precocious positivist, nor a pupil of the modern philosophical curriculum, recent Hume scholarship has, to a substantial degree, liberated itself from the grip of these distorting preconceptions. Most importantly, it has recognized the necessity of dealing with Hume's work as a whole, and so has returned attention to those works, or parts of works, which have suffered neglect. Although it would be a gross oversimplification to suggest that this has resulted in a consensus, nonetheless there is a distinct tendency to the conclusions that the extent of Hume's scepticism has been overrated, and its nature misunderstood. Once we understand the nature of Hume's own brand of scepticism, we can also understand why it has a more limited - or, perhaps better, a much less *damaging* - effect than we would otherwise expect.

\(^43\) That is, aesthetic judgement. See *Treatise*, pp. xv-xvi.

\(^44\) As he says in "My Own Life", in *Essays*, op. cit., vol. 1, p. 8.
The important difference between the meaning of scepticism in Hume, and modern employments of the term, is well described by John Wright. He says:

the present-day notion of scepticism leaves no room for an understanding of the sense in which Hume himself is a sceptic. Hume is a sceptic because he thinks that our fundamental beliefs about reality and our inferring procedures cannot be derived solely from scientific investigation; rather, he thinks that they derive from man as a natural organism.\(^{45}\)

This might seem to be beside the point, but this is because we easily tend to overlook the important difference that

Philosophical scepticism as it appears in the writings of David Hume is not primarily a philosophy of knowledge (a philosophy of science) nor a philosophy of nature (a general metaphysic): it is a philosophy of man. Hume was mainly interested in the philosophy of knowing in so far as it tells us about the knowing being himself.\(^{46}\)

In the same spirit, we can add that he was also interested in the philosophy of action (that is, in the eighteenth century sense, moral philosophy) in so far as it tells us about the active being himself. Thus, Wright concludes,

Instead of being primarily interested in justified or true belief he is interested in the source of belief as such. Instead of being primarily interested in right action he is interested in the source of action as such.\(^{47}\)

This last remark is something of an oversimplification, because Hume is very interested in virtuous action. But it correctly points to the fact that Hume is concerned with virtuous actions as a species of actions, not simply as a method of enquiry into the nature of the good, and so his moral philosophy is centrally concerned with the source of virtuous action. Hume’s philosophy of man, and thus his philosophy of knowing, is sceptical because it shows us both that we hold mutually contradictory beliefs, and that we employ opposed principles in arriving at different, but equally indispensable, beliefs.\(^{48}\)

Thus understood, Hume’s scepticism is by no means at odds with another important


\(^{46}\)ibid., p. 30.

\(^{47}\)ibid., p. 32.

\(^{48}\)ibid., p. 31.
aspect of his philosophy which has recently been emphasised - his Ciceronian humanism.49 One remark of Hume's which is often invoked to support the Ciceronian connection come from the letter to Hutcheson quoted at the end of the preceding chapter. Speaking of Cicero's *De Officiis*, he says, "I had, indeed, the former book in my eye in all my reasonings."50 (This particular remark needs to be treated with great caution, however, since the reasonings referred to are not Hume's life work, but at most the *Treatise* - and perhaps only Book III.) More solid connections with Cicero, however, can be seen in Hume's stress on the social dimensions of human life, the unacceptability of a destructive "total" scepticism, and thus the need for a more limited form of scepticism which encourages moderation in the conduct of one's life.51 But it is most important to remember that even this limited scepticism, although obviously an important feature of Hume's philosophy, will not alone explain it. As we shall see, we get a good deal closer to an adequate understanding of Hume once we fill out the notion of "moderation" with its common eighteenth-century content. We can illustrate the inadequacy of limited scepticism alone as the key to Hume by considering a recent interpretation which follows just this strategy.

At one point, Hume distinguishes "true philosophers" by their "moderate scepticism".52 Remarks such as these, especially those recommending "mitigated" scepticism in the *1st Enquiry*,53 have encouraged David Miller, in a recent book, to see mitigated scepticism as a thread running through Hume's corpus.54 If we restrict ourselves to Hume's explicit remarks about such scepticism, this turns out to be a rather unenlightening hypothesis. In the *1st Enquiry*, Hume distinguishes two kinds of mitigated scepticism. I shall consider the second of these first. He describes it as "the limitation of our enquiries to

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49 This is particularly emphasised by Peter Jones, *op. cit.*

50 *Letter of 17 September, 1739; op. cit.* Ramsay's painting of Hutcheson nicely catches an important difference between the two, as Hume emphasises in this letter: in the portrait, Hutcheson holds a copy of Cicero's *De Finibus*.

51 These are all stressed by Jones, *op. cit.*, pp. 29-43.

52 See *Treatise*, p.224.


such subjects as are best adapted to the narrow capacity of human understanding.\textsuperscript{55} This does give us a clue to the rather neglected question of the purpose of Hume's metaphysical scepticism - as, in part, a demonstration of the inevitable absurdities that arise when we fail to observe the narrow limits of our understanding - but it achieves little more. As it stands it fails to distinguish Hume from Locke, who is not normally classed as a sceptic. Perhaps more importantly, neither does it suggest that a practising sceptic of this sort, one who does keep within the necessary bounds of human understanding, will espouse any sceptical views, of even the mildest sort, on topics that fall within those bounds. Those unimaginative souls who spend their lives without expressing anything more than the most down-to-earth views on commonplace subjects, would, in all probability, qualify as mitigated sceptics of this sort. More pertinently, in Hume's own case the requirements of this form of mitigated scepticism would be satisfied by his essays on morals, politics, and aesthetics even if they expressed not a single sceptical viewpoint. The subject matter alone almost guarantees conformity to this brand of scepticism. So, this type of mitigated scepticism does help to explain why Hume wrote essays on morals, politics, and aesthetics. But it does not help to explain why those essays express the views they do.

The other form of mitigated scepticism is of rather more interpretive value, but equally cannot stand alone as an explanatory device. This form of scepticism is simply the maintenance of an undogmatic spirit. Hume describes it as the recognition that "there is a degree of doubt, and caution, and modesty, which, in all kinds of scrutiny and decision, ought for ever to accompany a just reasoner."\textsuperscript{56} This is a principle which Hume not only avows in the concluding section of the \textit{2nd Enquiry}, but also clearly practises there.\textsuperscript{57} (Equally, however, he appears to forget it in the concluding paragraph of the \textit{1st Enquiry}, where, on the basis of his main epistemological principles, he recommends a biblioclastic orgy which, as John Passmore has observed, ought not to exclude the \textit{1st Enquiry} itself.\textsuperscript{58})

\textsuperscript{55} \textit{Enquiries}, p.162.

\textsuperscript{56} \textit{ibid.}

\textsuperscript{57} \textit{ibid.}, p.278.

Independently of these cases, however, this form of scepticism is not especially helpful in understanding Hume. Once again it does provide some insights, but not of any precise detail. It does, for example, show why Hume came to feel more at home with the polite essay than the more traditional type of academic treatise, developing the former into a sophisticated and flexible mode of moral discourse, capable of attracting an intelligent salon and coffee-house readership as well as philosophers and men of letters.\(^5\)

It also helps to explain a good deal of his practice in the more political essays at least, where he undermines the more pretentious claims of Whig and Tory alike, normally settling for a more restricted middling position of some sort. Hume says, in a letter to Kames, speaking of his essay “Of the Protestant Succession”, that “the conclusion shows me a Whig, but a very sceptical one”.\(^6\) Nevertheless, these essays can be explained at least as well by stressing, as Duncan Forbes does, Hume’s commitment to the version of moderation made famous by the third Earl of Shaftesbury.

It will be remembered that Shaftesbury is included among those “late philosophers in England, who have begun to put the science of man on a new footing” listed in a footnote to the introduction of the Treatise.\(^1\) In his Characteristicks, Shaftesbury described a political outlook characteristic of “men of moderation”. Forbes summarizes the qualities of such men as follows:

> men who were too secure of their temper and who possessed themselves too well “to be in danger of entering warmly into any cause, or engaging deeply with any side or faction”.\(^6\)

The politics of such men he describes as being

> the science of men united in society and dependent on each other. This science was modern in style, suited to the circumstances and interests of a modern, commercial society, informed by the new scientific method and the predominantly secular outlook.\(^6\)


\(^1\) Treatise, p.xvii.

\(^6\) Forbes, op.cit. p.91.

\(^6\) ibid. cf. Treatise, p.xv.
Not only can we see that such a view would be temperamentally suitable to Hume; we can see that he has the concept frequently in mind in his *Essays*, for example when he speaks of the necessity of moderating the zeal of party-men, also observing that "moderation is not to be expected in party-men of any kind" and so on. More importantly, we are also able to explain some of Hume's most spectacularly unsceptical views, such as his great optimism about the benefits to be secured by the development of commerce and the refinement of the arts in general. Hume is so far from being any sort of sceptic on the blessings that flow from commerce and refinement in the arts that it is tempting to charge him with "enthusiasm" (a quality which, in another context, he attributes to, among other things, hope, a warm imagination, and ignorance! This would be quite unfair, however, since "enthusiasm" involves a blindness to argument which is certainly not characteristic of Hume. Nevertheless it is true not only that in these economic writings Hume's great optimism renders any, even the most mitigated, of sceptical tags simply inappropriate - his main thesis is "that the ages of refinement are both the happiest and the most virtuous", it is also the case that Hume lacked even the misgivings of the other leading figures of the Scottish Enlightenment. Certainly he was far less the sceptic here than Adam Smith, despite the latter's posthumous co-option as the most optimistic of advocates of commercial development.

Hume's great optimism about the benefits to be achieved through development of commerce and refinement of the arts in general is clearly at odds with mitigated scepticism in the sense under consideration. His views here show none of the "degree of doubt, and caution" he advocates. So, even the figure of Hume the *mitigated* sceptic is inadequate to explain this not unimportant aspect of Hume's thought. An adequate

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64 Cf. Adam Smith's eulogistic remarks in his letter to William Strahan immediately after Hume's death, that Hume's "constant pleasantry was the genuine effusion of good-nature and good-humour, tempered with delicacy and modesty, and without even the slightest tincture of malignity" etc.; in Hume, *Essays*, vol. 1, p.13.


66 *ibid.*, p.121. See also pp.126,162,184n,300,464,469,475,478.

67 "Of Superstition and Enthusiasm", *ibid.*, p.145.

68 "Of Refinement in the Arts", *ibid.*, p.300.

69 Cf. Forbes, op.cit., pp.87-8. For a particular example, compare Hume's untroubled optimism on the effect of the arts on martial spirit (*Essays*, p.304), with Smith's views on martial spirit and standing armies after "refinement". This matter is discussed by Donald Winch, *Adam Smith's Politics*, pp.103-20.
explanation would need to invoke the more complex figure of Hume the man of "moderation", which incorporates the virtue of mitigated scepticism, but is not limited to it. Also, we can see that the modern, secular style of such a man accords quite well with the figure of Hume the Newtonian. So we can now turn to consider how Hume's Newtonianism and scepticism both contribute towards a philosophy of human life, that is, a philosophical defence of human practice.

In so far as Hume is to be seen as a Newtonian, he is not sceptical. The commitment to retain only those principles which are firmly grounded in experience or reasonings from experience is not a commitment to scepticism, despite the inevitability of its generating many conclusions which, to the 18th century world in particular, are of a decidedly sceptical cast. It is, rather, a commitment to a rigorous methodology, a methodology which itself is not without epistemological commitments: there is hardly a point to restricting our methods of enquiry to experience and its fruits unless there is genuine benefit to be gained thereby. And Hume's own explicit intention, of establishing a science of human nature which will provide the only secure foundation for "a compleat system of the sciences", can hardly make sense if the methods appropriate to establishing such a science do not of themselves admit of some security.

Nevertheless the security Hume offers us is rather thin. We trust to experience, he says, not because we have any sound arguments for doing so - in fact, we cannot have any such arguments, since our reasonings are themselves uncertain - but because we have no choice in the matter. We are simply compelled by nature - that is, by our nature - to believe in the reality of our experience. Some of the most famous passages of Book I of the Treatise assert just this. In his discussion of "the sceptical philosophy", Hume points out that the sceptic still continues to reason and believe, even tho' he asserts, that he cannot defend his reason by reason; and by the same rule he must assent to the principle concerning the existence of body, tho' he cannot pretend by any arguments of philosophy to maintain its veracity. Nature has not left this to his choice, and has doubtless esteem'd it an affair of too great importance to be trusted to our uncertain reasonings and speculations. We may well ask, What causes induce us to believe in the existence of body? but 'tis in vain to ask, Whether there be body or not? That is a point, which we must take for granted in all our reasonings.

Perhaps more importantly for Hume's philosophy as a whole, it is also a point which we

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70Treatise, p.xvi.

must take for granted in all our practice. This point is made in a famous, but much underestimated, passage in the Conclusion to Book I, where Hume takes up the sceptical problem as his own problem. He there describes the melancholy condition to which scepticism reduces him (by heating his brain!). It is “to fancy myself in the most deplorable condition imaginable, environ’d with the deepest darkness, and utterly depriv’d of the use of every member and faculty”. Fortunately, this is a passing condition. Nature, particularly in the guise of ordinary life, provides the solution:

Most fortunately it happens, that since reason is incapable of dispelling these clouds, nature herself suffices to that purpose, and cures me of this philosophical melancholy and delirium, either by relaxing this bent of mind, or by some avocation, and lively impression of my senses, which obliterate all these chimeras. I dine, I play a game of back-gammon, I converse, and am merry with my friends; ... Here then I find myself absolutely and necessarily determin’d to live, and talk, and act like other people in the common affairs of life.

Thus it is that nature, through the common affairs of human life, provides the effective foundation for all our thought and practice. As Hume puts the matter in the 1st Enquiry, “custom ... is the great guide of human life”. This is not a remark made merely in passing: his adherence to this principle is illustrated not merely by the numerous appeals he makes to it throughout his writings, with their stress on the superior rationality of practice; it is also implicit in his various accounts of the “artificial” virtues - of justice, promises and contracts, and allegiance to government. It is shown in both his concern for economic issues in Part II of the Essays, and also in the use he makes of history in writing his own History of England. His rather summary dismissal of “any fine imaginary republic, of which a man may form a plan in his closet”; and his stress that justice is a

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72ibid., p.269.

73ibid. It is important to recognize here that by “determin’d” Hume does not mean an act of will. He means precisely the opposite: he is compelled by nature to, he cannot help but, live, and talk, etc.

74Enquiries, p.44.

75See especially Treatise, p.569: “The practice of the world goes farther in teaching us the degrees of our duty, than the most subtile philosophy, which was ever yet invented”. Cf. also Treatise, pp.547,552,558; Enquiries, pp.201n.,230,236,269; Essays, pp.126,185,292, 295,374,447-451,460. Cf. also Adam Smith’s Lectures on Jurisprudence, which further develop this line of thought.

slow growth\textsuperscript{77} which reflects the particular “convenience and necessities of mankind”,\textsuperscript{78} and which “acquires force ... by our repeated experience of the inconveniences of transgressing it”;\textsuperscript{79} all these can stand as examples of his commitment to ordinary life as the foundation on which human life, including reliable human knowing, depends. It is also necessary to keep this foundation in mind when interpreting his frequent stresses on the role of utility in the 2nd Enquiry. It is clear that he does not invoke utility, as do modern utilitarians, as an abstract principle by which any existing social institution or practice is to be judged. Rather, social institutions necessarily reflect utility because they are based on useful or practical considerations, because only such considerations are efficacious in ordinary life. He supports this by observing that even system-builders, when confronted with the task of providing rules for human life, have to resort to utility as their ultimate justification, \textit{despite} the requirements of their systems.\textsuperscript{80}

This very compressed summary of some characteristic Humean doctrines provides a rough picture of what has been called Hume's philosophy of common life.\textsuperscript{81} Hume's claim in the Preface to the Abstract, that in all matters of common life our knowledge is securely based, because in all such matters we can make “an appeal to the people, who in all matters of common reason and eloquence are found so infallible a tribunal”, can serve as a motto for this philosophy.\textsuperscript{82} Thus understood, as a philosophy which stresses the superior rationality of human practice, Hume's philosophy of human nature fits rather nicely with the implicit commitment to rational practices, and thus to historical development, we have seen to be implicit in natural law accounts of human social


\textsuperscript{78}\textit{Enquiries}, p.195.

\textsuperscript{79}\textit{Treatise}, op.cit.

\textsuperscript{80}\textit{Enquiries}, op.cit.


\textsuperscript{82}\textit{Abstract}, in \textit{Treatise}, p. 644. The happy situation in common life is contrasted with the very unhappy situation in metaphysics and theology, where we must depend on the judgement of the few, “whose verdict is more apt to be corrupted by partiality and prejudice.” Also, as he says in a letter to his friend Gilbert Elliot of Minto in 1751, in these abstract endeavours, “nothing there can correct bad Reasoning but good Reasoning: and Sophistry must be oppos'd by Syllogism” (quoted by Norton, \textit{David Hume}, p. 192.)
institutions. Kames's implicit acceptance of Hume as a contributor to this tradition further testifies to the conclusion.

Others of Hume's contemporaries, however, saw his views as essentially sceptical, and as therefore directly antithetical to natural law. His account of the artificiality of the virtue of justice (including rules of property, fidelity (promise-keeping), and allegiance to government), and of the greater importance of the artificial, rather than the natural, virtues, was a focus for this particular charge. This is well shown by one of the charges brought against Hume in a pamphlet circulated in Edinburgh in 1745, as part of a successful campaign to prevent his appointment to the Chair of Moral Philosophy in the University there. The pamphlet charges him

> With sapping the Foundations of Morality, by denying the natural and essential Difference betwixt Right and Wrong, Good and Evil, Justice and Injustice; making the Difference only artificial, and to arise from human Conventions and Compacts.\(^{84}\)

The following two sections will be concerned with the justice of this charge. It will be argued that, by characterising some virtues as artificial, Hume is not showing sceptical conclusions or even intentions, but simply adapts Pufendorf's distinction between natural and adventitious states in order to solve the twin problems of the origin of justice and of our obligation to observe the rules of justice.

He is therefore responding to a problem within the natural law tradition (a problem which arises as a result of the attempt to provide a psychology of action adequate to the requirements of natural law doctrines), and seeks to solve it by employing conceptual resources already available within that tradition. The next section will be concerned with whether or not Hume can be seen to have destructive intentions, and will consider some aspects of his relationship to Grotius in particular. The subsequent section will show how the artificiality of justice is derived from Hume's Newtonian project to establish the efficient causes of moral entities, by determining what "original instincts", if any, give rise to the rules of property and the other elements of justice.

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\(^{83}\) *Treatise*, p. 590.

IV: Artificial Virtues: Hume's Intention

Philosophical commentators on Hume's division of the virtues into "natural" and "artificial" often content themselves with spelling out the explicit features of the distinction. To go no further than this, however, is to fail to to ask why Hume should have thought this distinction important, or what sort of impact he intended (or hoped) his distinction to have on his readers. The two questions are not unrelated; rather, they focus on different aspects of the same general issue. This issue, of Hume's intentions, is a necessary part of the effort to come to an adequate understanding of Hume's philosophy in general, and Book III of the Treatise in particular. In this section, two matters which throw light on Hume's intentions will be considered.

The first can be dealt with rather briefly, because it poses in a fairly general way a problem which, in finer detail, will be considered further in the next section. This is the question of the somewhat curious structure of Book III itself. The book opens with a short part, entitled "Of Virtue and Vice in General", in which it is argued (following the titles of the two sections contained therein) that moral distinctions are not derived from reason, but derive instead from a moral sense. The first section rehearses a set of arguments against the views of the ethical rationalists, such as Clarke and Wollaston, views which explained moral goodness as conformity with some abstract rational relation. It concludes with an "observation" which Hume admits he "cannot forbear adding" - the famous (and, as I shall endeavour to show, in some respects undeservedly famous) "is-ought" passage. The second section, however, is quite surprising. It quickly reaches its main conclusion - that because moral distinctions are perceptions, they are impressions rather than ideas; which means that "Morality, therefore, is more properly felt than judg'd of" - it then immediately stresses how little is gained by this result. The "in a manner, infinite" number and variety of our moral duties itself shows this to be so, since

'tis absurd to imagine, that in every particular instance, these sentiments are produc'd by an original quality and primary constitution.

85 Cf. Francis Hutcheson's arguments against the same views in his Illustrations on the Moral Sense, published with the Essay on the Nature and Conduct of the Passions (1728), Collected Works, Vol.II.

86 Treatise, p.469.

87 ibid., p.470.

88 ibid., p.473.
Such a supposition would render all moral education unnecessary, making moral behaviour purely instinctive. Its absurdity lies in its implication that we are pre-programmed to respond appropriately to the greatly diverse and variable situations which call for moral assessment and action. Hume notes that such a view runs directly counter to those principles of simplicity which the experimental method champions. As he says,

Such a method of proceeding is not conformable to the usual maxims, by which nature is conducted, where a few principles produce all that variety we observe in the universe, and everything is carry'd on in the easiest and most simple manner.  

So the conclusion reached above, that morality derives from a "moral sense" - a primary impulse or constitution - is of rather little value. Rather, to explain moral notions successfully,

'Tis necessary ... to abridge these primary impulses, and find some more general principles, upon which all our notions of morals are founded.

Hume proposes that these "more general principles" may be found in "the designs, and projects, and views of men", since these "are principles as necessary in their operation as heat and cold, moist and dry". However, since it is usual for us to set our own activities "in opposition to the other principles of nature" simply because they are our own, the fruit of our choices and actions, it follows that to locate general principles of morals in human activity is, in one sense at least, to deny them a natural foundation. Any moral distinctions founded in human social practices can be called artificial rather than natural virtues.

In Part II, entitled "Of Justice and Injustice", Hume attempts to establish that many of our accepted virtues are artificial in the sense outlined. These include not only justice (by which he means, first and foremost, abstaining from the property of others), but also promise-keeping, allegiance to government, laws of nations (what would now be called international justice), and the (for him) characteristically female virtues of chastity and modesty. By grounding these virtues in human social practices, Hume arrives at two important conclusions. The first of these, that it is not individual acts but the whole system of such acts that has value, will be considered below. The second of these is the

89 ibid.

90 ibid.

91 ibid., pp.474-5.
central role of reason. The "designs, and projects, and views of men" all essentially involve the employment of reason. In fact, when Hume returns, in Part III, to consider the natural virtues, those which are founded simply on a "primary impulse", he devotes much of the opening section of that part to stressing the greater practical importance of reason and the artificial virtues founded on it: it is by reason that we "determine all the great lines of our duty". This unexpected stress on the role of reason in a work which begins by denying a foundation in reason to its subject matter is best explained, I believe, by attributing to Hume a complex purpose. The full complexity of this purpose will become more clear below. At this point, we can describe Hume's purposes as being first of all to "show his colours" on an issue that had generated much debate among his older contemporaries, by plumping for the "moral sense" position against the rationalists. Secondly, and most importantly, he intends to show that, whatever the original foundation of morals, the role of reason is central in settling many issues concerning the most important aspects of morals. His position is thus a compromise between the moral sense and rationalist views.

In Part III, on the natural virtues, Hume is certainly not without his ambitions, but, in contrast to Part II, these are fairly limited. The matter is over-simplified by Mackie, who suggests that in Part III

Hume turns to the natural virtues, having rather oddly dealt first with those aspects of morality which are the more puzzling from his general point of view, and only later coming to more straightforward matters.

Hume's procedure is not puzzling if we see Part II as the central point of the third book, with Part III being more necessary for the sake of completeness, for "rounding-off" a work which aims at providing a complete account of human nature, than for any vital didactic purpose. Hume's overall philosophic programme requires that his writing on morals should have the character of a complete system. His main purpose, however, is both more limited and more precise: to show that those virtues most necessary to society are not natural in the sense of being grounded in some primary impulse, but are generated by the employment by human beings of the non-metaphysical reasonings of everyday life. They are due to (rational) artifice, and hence are artificial.

This brings us to our second problem concerning Hume's intentions. What impact did Hume seek to have on his readers by his stress on the artificiality of justice, fidelity,

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92 *ibid.*, p.590.
allegiance, chastity and modesty? As we have already seen, in the opinion of the pamphlet circulated against him in 1745, he had sapped the foundations of morality, and had denied the "natural and essential Difference betwixt Right and Wrong". Was this part of his intention? Selby-Bigge, in his introduction to the Enquiries, has no doubts on the matter. He remarks there of Hume that

In the Treatise he insisted vigorously, though not very intelligibly, that justice was not a natural but only an artificial virtue, and it is pretty plain that he meant to be offensive in doing so.94

Selby-Bigge offers only a casual observation in support of this claim, but some reasons can be given to support it, especially if we remember that Hume includes the female virtues of chastity and modesty among the artificial virtues. To show why this should be worrying, at least, we need to recognize one important feature of the artificial virtues. Hume explicitly discusses this feature when considering the case of justice. It is the Hutchesonian issue of external rights, couched in characteristic Humean fashion as a problem of motivation.

Hume stresses that, although the whole system of justice is beneficial to society, nevertheless it is true that "a single act of justice is frequently contrary to public interest", in fact it "may, in itself, be very prejudicial to society".95 When we consider the examples he offers here - for example, a beneficent man who restores a fortune to its rightful owner, a miser or a seditious bigot, "has acted justly and laudably, but the public is a real sufferer"96 - the Hutchesonian connection is clear. But the disturbing moral Hume draws is as follows: if justice, or any of the other artificial virtues for that matter, depends for its value not on the effects of each virtuous act, but only on "the mutual assistance and combination of its corresponding parts",97 then there appears to be no reason for being more virtuous than the next man or woman. Certainly there is no reason for the conscientious pursuit of such virtues, at least in the sense of pursuing virtue whatever the circumstances. The practice of the artificial virtues is a conditional matter. This has a particularly dire consequence for the female virtue of chastity, not only because Hume's (male) readers would have been anxious to defend their households against the

94 Enquiries, pp.xxvii-xxviii. (emphasis added).

95 Treatise, p.497.

96 ibid.

97 Enquiries, p.305. Hume's analogies of the vault and the wall in this passage are instructive, and show the Stoic influence on his treatment of justice. See chapter 2 above.
advocacy of any doctrine likely, or believed to be likely, to encourage licentious behaviour; but also because, in contrast to justice and allegiance, violations of chastity have both a constant motive in natural pleasure and an ease of opportunity. Clearly, to add to these factors a theory of virtue which places no value in each particular instance of chastity is to create an environment particularly encouraging to the libertine! (Was Hume himself suspected of such impurity? He was noted for his enjoyment of female company, and it is perhaps significant that in his short autobiography he should point out that it was in the company of modest women that he “took a particular pleasure”!)

These observations help to show why Hume did offend some of his readers. But whether he sought to offend, and even whether such offence was a reasonable response, are quite distinct issues. I shall argue that, although it may well be that Hume sought to be provocative in labelling the relevant virtues “artificial”, he did not seek to offend. His later treatments of the issue suggest rather that, in the Treatise, he failed fully to appreciate the strength of the public reactions. Having once had his fingers burnt by an adverse public reaction, his later formulations show a pronounced anxiety to avoid offence.

Before turning to consider these formulations, one thing should be recognized. This is that Hume’s attempt to produce a theory of the origins of justice which does not include any appeals to divine purposes, etc., cannot itself be considered a source of offence. Hutcheson, as we have seen, had already argued that by appealing only to the constitution of our nature, more particularly to the moral sense, the law of nature could be determined without reference to any law, human or divine. But this view is itself new only in its details: in its general outline it is simply the rationalist version of natural law as advocated by Grotius, Suarez, and others, and most famously captured in Grotius’s etiamsi daremus passage. Of course, this position did not enjoy widespread support; but it seems fanciful to imagine that its reassertion could be considered offensive.

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98Cf. Enquiries, pp.238-9; Treatise, 570-3.

99a My Own Life”, in Essays, op.cit., p.8. There is certainly a positive side to Hume’s view here (not merely self-defence). Cf. “Of the rise and Progress of the Arts and Sciences”, Essays, p.194: “What better school for manners, than the company of virtuous women; where the mutual endeavour to please must insensibly polish the mind, where the example of the female softness and modesty must communicate itself to their admirers, and where the delicacy of that sex puts every one on his guard, lest he give offence by any breach of decency”.

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Hutcheson, differs from that of Hume. This is in the fact that the former, unlike the latter, do accord at least some recognition to the divine will; they certainly do not deny either God's existence, or his concern for human affairs. Hume's position here is however a good deal more difficult to determine than is often supposed. For, on the one hand, a system of morals which has no need to call in God to patch up deficiencies in the system does not thereby deny the existence of a divine being; it may well show the simple fact that the constitution of nature is indeed a fully interlocking system, and therefore works harmoniously without the need of a cosmic repairman. If God's existence is not denied in such a theory, the absence of appeals to divine activity can be attributed to the complete efficacy of the original divine creative act. Significantly, although interpretations of Hume's views is at this point very difficult, it is not impossible to attribute such a position to him. Although he avoids, as far as possible, any appeals to God in his moral theory, this is not because he denies outright the existence of a Deity. In fact, on at least one occasion we see quite the opposite. The standard of morals, he says in the *Enquiry concerning the Principles of Morals*,

> arising from the internal frame and constitution of animals, is ultimately derived from that Supreme Will, which bestowed on each being its peculiar nature, and arranged the several classes and orders of existence.100

This is just the position of Grotius. Whether or not Hume's views were considered acceptable by his contemporaries, then, there seems to be no warrant for regarding them, as does Selby-Bigge, as deliberately offensive. His position is, at bottom, a commonplace of natural law: that justice arises from, or reflects the requirements of, human sociability. The rules of justice are necessary for the establishment of a social order which, as Grotius puts it, is "consonant with human intelligence."101

We have so far considered the matter of Hume's views. Is there any good reason for seeing his particular terminology as offensive? I suggest there are two quite distinct reasons for concluding the opposite: Hume's initial apprehensions about his distinction, and, once offence had been clearly caused, his efforts to remove the perceived cause without changing the distinction itself. A third, more general, factor can also be invoked, although it will not be investigated further here: Hume's frequently repeated ambition "of

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100 *Enquiries*, p.294. (Conclusion of Appendix I: "Concerning Moral Sentiment").

being esteemed a friend to virtue".\textsuperscript{102} If we can take it at face value, this would be a curious ambition to find in a man who sought to offend his readers! It is also well worth noting that Hutcheson, in his \textit{Short Introduction to Moral Philosophy}, allows that the notion of a moral law can be called artificial because it is not innate,\textsuperscript{103} but "formed upon observation".\textsuperscript{104} Hutcheson also refers to moral distinctions which are the "Effect of Art" in his \textit{Essay}.\textsuperscript{105}

To turn now to the first type of reason for believing Hume to be innocent: his obvious apprehensions about the terminology when he introduces it. This is clear from an attentive reading of the \textit{Treatise} itself, where, when he first introduces the distinction, in Section II of Part I ("Moral distinctions deriv'd from a moral sense"), Hume stresses the difficulty in defining the word "Nature": "than which there is none more ambiguous and equivocal".\textsuperscript{106} He then distinguishes three senses of the term, and argues that in one of these senses, virtue is not clearly natural. In the other two senses it is indeed natural. In any case, at the end of the following section (Part II Section I: "Justice, whether a natural or artificial virtue"), Hume again stresses how the distinction is to be taken: when the naturalness of justice is denied, this is only "natural" in the third sense, natural as opposed to a human construction. His reason for reiterating this point is his desire "to avoid giving offence",\textsuperscript{107} and he goes on to add that "tho' the rules of justice be artificial, they are not arbitrary". He then concludes the section with the following crucial remark:

\textsuperscript{102}Letter to Francis Hutcheson, 17 Sept. 1739. Quoted here from D.D. Raphael, \textit{British Moralists 1650-1800}, Oxford: Clarendon Press (1969), vol. 2, sect.630. For other indications of Hume's friendliness to virtue cf. \textit{Essays}, pp.151-2 and p.219n.; the conclusion of the \textit{Treatise}, where Hume includes himself among "lovers of virtue", seeks to show the nobility of his theory, and concludes with his analogy of the anatomist and his service to the painter (pp.619-21); also his defence in the \textit{Letter from a Gentleman} that, like Hutcheson, he "concurs with all the antient moralists" against the modern (op.cit., p.30), but does not, either in fact or intention, undermine morality.


\textsuperscript{104}\textit{Short Introduction}, p.110.


\textsuperscript{106}\textit{Treatise}, p.474.

\textsuperscript{107}\textit{ibid.}, p.484. (My emphasis).
Nor is the expression improper to call them *Laws of Nature*; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species.\(^{108}\)

Since the law of nature is, for Hume's predecessors, those necessary laws of human conduct, necessary because they are grounded firmly in human nature, Hume's formulation here is a perfectly adequate account of a non-voluntarist version of natural law, such as we find in Grotius. His cautious expression here reflects his desire to avoid being misunderstood it is not hesitation over the use of the term, nor does it indicate a drastic thinning-out of the notion of natural law.

Further evidence for Hume's early worries over his terminology can be found in the letter to Francis Hutcheson to which we have already referred. In the letter it appears that he seeks, among other things, to clear up a confusion of Hutcheson's on precisely the point at issue: "I have never called justice unnatural", he says, "but only artificial".\(^{109}\) He then offers what can only be a simultaneous explication and defence of his position. He quotes a line from "one of the best moralists of antiquity", the poet and satirist Horace: "atque ipsa utilitas justi prope mater et aequi".\(^{110}\) This can be roughly translated as "usefulness can be said to be the mother of justice and right". It may be thought that this is indeed a sceptical principle to which Hume is appealing: that justice is, after all, a matter of mere expediency. However, if we carefully consider the passage from the *Satires*, we can see that this is not Hume's intention.

Horace's point in this passage is not sceptical or reductionist, but to demonstrate that an awareness of the relevant facts of human existence is the key to a more sensitive moral and legal code than that implied by the Stoic paradox that all offences are equal.\(^{111}\) We may even interpret him as providing an empirically minded protest against the plausible

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\(^{108}\) *ibid.*


\(^{110}\) *ibid.*

\(^{111}\) H. Rushton Fairclough (trans. and ed.), *Horace: Satires, Epistles, and Ars Poetica*, London: Heinemann (1942), Loeb Classical Library, introduction to *Satires* I.iii, pp.30-1. It is worth noting here that, by following Horace, Hume is opposing Cicero (see *De Finibus*, iv,19,55). This can serve as a cautionary reminder to those modern interpreters of Hume who see him as a latter-day Ciceronian. Although Hume tells us, in the very next paragraph of this letter, that "Upon the whole, I desire to take my catalogue of virtues from Cicero's *Offices*", and that "I had, indeed, the former book in my eye in all my reasonings" (Raphael, *op.cit.*; letter no.13), this quote from Horace indicates that the Ciceronian connection can be overdone. (It does, however, provide support for a more general "antient" connection.)
foolishness of a priori reasoning; which is, as I have argued above, a characteristically Humean position. In fact, we can see Horace as making two distinct points, both of which, I suggest, have a Humean character. The first is that the Stoic view is too crude because repugnant to common sense:

Those whose creed is that all sins are much on a par are at a loss when they come to face facts. Feelings and customs rebel, and so does Expedience herself, the mother, we may say, of justice and right.112

This we can call the negative thesis. The second is a positive thesis, in the sense that it shows how social institutions develop in response to changes in human circumstances, or, in more modern language, how moral and legal codes reflect human social evolution. In making this point Horace relies on the speculative account of social evolution provided by Lucretius.113 It is well worth quoting at some length, since it helps to show what Hume saw to be important about his own account of justice. Horace says this:

When living creatures crawled forth upon primeval earth, dumb, shapeless beasts, they fought for their acorns and lairs with nails and fists, then with clubs, and so on step by step with the weapons need had later forged, until they found words and names wherewith to give meaning to their cries and feelings. Thenceforth they began to cease from war, to build towns, and to frame laws that none should thieve or rob or commit adultery... If you will but turn over the annals and records of the world, you must needs confess that justice was born of the fear of injustice.114

In other words, the primitive history of human life is a history of violence, until the increasing sophistication of human life led to the recognition that rules of justice were necessary in order to safeguard social advances, and to make further developments possible. We have seen that accounts of this sort are a commonplace of the main natural law theories, with their account of the development of rules of property as societies develop from primitive simplicity to more complex forms of social interdependence. Hume does not himself tell such a story in the Treatise (he may have resisted this partly because of doubts about the reliability of the usual sources), but equally he takes for granted that there is some such story to tell. His insistence that justice is a gradual development indicates this well. In the 2nd Enquiry he gives the following instructive example:

suppose, that several distinct societies maintain a kind of intercourse for mutual

112 Horace, op.cit., p.41.

113 ibid., p.41n. (In De Rerum Natura, v. 780ff.)

114 ibid.
convenience and advantage, the boundaries of justice still grow larger, in proportion to the largeness of men's views, and the force of their mutual connexions. History, experience, reason sufficiently instruct us in this natural progress of human sentiments, and in the gradual enlargement of our regards to justice, in proportion as we become acquainted with the extensive utility of that virtue.115

It is in this sense that Hume agrees with Horace's claim that utility is the mother of justice. Justice is a historical development, made necessary by and for changes in society. The utility of justice is shown most emphatically by the negative case, that without justice society would simply collapse. So, for Hume, the historical growth of justice shows that we do not have any pre-rational impulse to be just, but learn its value over time as we perceive its utility. In this sense, then, he sees utility to be the mother of justice, and for this reason he sums up the matter, in this letter to Hutcheson, by saying that, not only is utility the mother of justice, but "Grotius and Pufendorf, to be consistent, must say the same".116 They must say the same because their own accounts show justice to be a historical development, and therefore a matter of utility.

This is a provocative claim, since Grotius explicitly resists Horace's view that usefulness (or expediency) is the mother of justice. However, part of the problem here is the very ambiguity of the word "nature" of which Hume complains in the Treatise. For Grotius, after stressing that justice is founded in nature, albeit rather remotely, being three degrees removed - "nature may be considered, so to say, the great-grandmother of municipal law" - nevertheless concedes that there is no opposition between nature and expediency. Rather, "the law of nature... has the reinforcement of expediency", and so "those who prescribe laws for others in so doing are accustomed to have, or ought to have, some advantage in view".117 Grotius is opposed to utility to the extent that utility is opposed to nature. For Horace, such opposition is inevitable, and his reason for so thinking provides a clue to why Hume should have agreed. He says:

Between right and wrong Nature can draw no such distinction as between things gainful and harmful, what is to be sought and what is to be shunned.118

115Enquiries, p. 192.

116Letter to Hutcheson, op. cit.

117DJBP, Prol., 16.

118Horace, op. cit.
Although a little unclear, the point of this remark seems to be that we are not directly led by nature to seek justice, whereas we are led by nature to seek what is clearly gainful and avoid what is harmful. Or, to put it another way, we have no natural motive, no original instinct, to pursue justice. This is exactly the point Hume makes in the Treatise when arguing for the artificiality of justice, and which, despite terminological changes, remains essential to his account of justice in both the Essays and the 2nd Enquiry.¹¹⁹

The important conclusion to be drawn here is that Hume's characterisation of the virtue of justice as artificial does not indicate a new, more sceptical, theory of this virtue. Hume's theory grounds justice in sociability in just the way his natural law predecessors do; his insistence that it is grounded in utility is not the denial of sociability, but an insistence on it. This accords well with Hume's own explanation of the matter in the Letter from a Gentleman, where he stresses the long and respectable pedigree of his opinions: like Hutcheson, "he concurs with all the antient Moralists"¹²⁰ in his treatment of moral matters. His further remark in this place, that in the Treatise the author (i.e. himself)

seems sensible that he employed Words that admit of an invidious construction; and therefore makes use of all proper Expedients, by Definitions and Explanations, to prevent it¹²¹

is perfectly in line with what we do find in the Treatise. In the light of these observations, there also seems to be no good reason for doubting Hume's insistence that his is an inoffensive doctrine. As he puts it in the Letter (again speaking of himself in the third person),

by the artificial Virtues he means Justice, Loyalty, and such as require, along with a natural Instinct, a certain Reflection on the general Interests of Human Society, and a Combination with others. In the same Sense, Sucking is an Action natural to Man, and Speech is artificial. But what is there in this


¹²⁰Letter, op.cit., p.30. Cf. Enquiries, pp.170-1, where this matter is also discussed, and where "the elegant Lord Shaftesbury" is mentioned as one "who, in general, adhered to the principles of the ancients". In "Of the Rise and Progress of the Arts and Sciences", Essays, p.191, Shaftesbury is classed among "some of the more zealous partizans of the ancients". This last passage is significant because it clearly shows the status of ancient opinions: Shaftesbury and others criticised some modern manners by adopting the standpoint of the ancients.

Doctrine that can be supposed in the least pernicious? In subsequent statements of his position he took a more "moderate" course: without altering the distinction, he sought to remove the offence by removing its source in the troublesome terminology. So, in the essay "Of the Original Contract", first published in 1752, we see Hume distinguishing between two kinds of moral duties. The distinction is the same as in the Treatise, but the offending terminology is absent:

All moral duties may be divided into two kinds. The first are those, to which men are impelled by a natural instinct or immediate propensity, which operates on them, independent of all ideas of obligation, and of all views, either to public or private utility ...

The second kind of moral duties are such as are not supported by any original instinct of nature, but are performed entirely from a sense of obligation, when we consider the necessities of human society, and the impossibility of supporting it, if these duties were neglected.

Our primary instincts are too unruly to conform to the stringent requirements of justice, loyalty, and allegiance; these requirements are founded on, and require for their performance, an established recognition of "the general interests or necessities of society". This is exactly the view that led Hume, in the Treatise, to call justice, etc., artificial, but in this essay justice and fidelity are described only as "natural duties".

The tactic of the Enquiry concerning the Principles of Morals, published in 1751, is similar, but does not exhibit such a complete break with the language of the Treatise. In the body of this work, justice is argued to be entirely dependent on utility. For example, public utility is the sole origin of justice, and ... reflections on the beneficial consequences of this virtue are the sole foundation of its merit.

This is the position of the Treatise, but once again the terminology has been revised. the doctrine of the artificiality of justice makes only a timid appearance in a footnote to an

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122 ibid., p.31.


124 ibid., p.456.

125 ibid., p.455.

126 Enquiries, p.183.
appendix. In the text to this footnote, it is worth noting that justice is classed as natural because it arises necessarily, a point made in the Treatise, but there treated as less important than the fact that it arises as the result of rational artifice. In the 2nd Enquiry the roles seemed to have been reversed. Firstly we are told that justice arises necessarily in human life, and

In so sagacious an animal, what necessarily arises from the exertion of his intellectual faculties may justly be esteemed natural.127

The footnote then adds a toned-down version of the distinctions made in the Treatise:

Natural may be opposed, either to what is unusual, miraculous, or artificial. In the two former senses, justice and property are undoubtedly natural. But as they suppose reason, forethought, design, and a social union and confederacy among men, perhaps that epithet cannot strictly, in the last sense, be applied to them ... But all these disputes are merely verbal.128

Hume's final disclaimer here is a far cry from the confident young man who, despite some caveats in the text, could boldly ask, in the title to one of the sections of the Treatise, "Justice whether a natural or artificial virtue?"

It should now be clear that, in avoiding as far as possible what was perceived to be the offensive language, Hume behaves in a way that is extremely odd for a man seeking to offend. We can only conclude the opposite: that, anxious to be esteemed a friend of virtue, he was upset to be seen as one of its enemies. He therefore did his best to remove the unfortunate choice of terms which created this misunderstanding, and sought to emphasize the respectable character of his work. Thus we see him stressing, in the 2nd Enquiry, that by basing justice entirely on utility, he is not introducing a new doctrine, but making more obvious, more visible, what is in fact the foundation employed, in the last resort, by "the writers on the law of nature". These authors "assign, as the ultimate reason for every rule which they establish, the convenience and necessities of mankind".129 The same impulse leads him, I suggest, to make the remark with which this essay opens: that his theory of justice "is, in the main, the same with that hinted at and adopted by Grotius".130 To emphasize the point, he includes the longish quotation

127 ibid., p.307.

128 ibid., pp.307-8n. (Emphasis added to last sentence.)

129 ibid., p.195.

130 ibid., p.307n.
from Grotius which shows the historical, (in his terms) utility-dependent character of the explanation of property in *De Jure Belli ac Pacis*.\textsuperscript{131}

There remains, then, no reason for thinking Hume to have had any sceptical or offensive purpose in describing the important virtues of justice, fidelity, and allegiance as “artificial”. Nevertheless, Grotius and his immediate successors saw no need for such a description. We need to understand why Hume *did*. This will be the task of the next section.

V: Artificial and Natural Virtues

In the preceding section, it was argued that Hume’s division of the virtues into natural and artificial cannot be interpreted as a division between genuine and purely imaginary, or false, virtues. It is not a separation of the real virtues from the mere pretenders. This is not to say that Hume is not concerned with such a separation - indeed his treatment of the “monkish virtues” in the 2nd Enquiry, where he argues that it is just to “transfer them to the opposite column, and place them in the catalogue of vices”,\textsuperscript{132} is exactly such an operation. Rather it is to stress that the natural/artificial distinction is neither intended for, nor capable of doing, this work. The “monkish virtues” are, according to Hume’s philosophy, neither natural nor artificial virtues, and therefore are not virtues at all.\textsuperscript{133}

If we are to take Hume’s distinction at face value, then - as a distinction between those virtues which are always morally good, independently of any particular circumstances, and those which, because they are a rational response to the exigencies of particular circumstances, only have value *given* those circumstances, and only achieve their end when part of an interdependent system of like actions - we are still left with the problem of explaining why he saw this distinction as a distinction between the *natural* and the

\textsuperscript{131} ibid., *DJBP*, II.II.ii.4-5.

\textsuperscript{132} *Enquiries*, p.270.

\textsuperscript{133} David Miller, op.cit., p.120, fails to recognize the philosophical impetus behind Hume’s view here. Indeed, his philosophy/ideology distinction (really an epistemology/unexamined assumption distinction; see pp.12-13) prevents understanding, both in this particular case, and, I suggest, of Hume’s philosophy in general. Miller has, I believe, been led astray by asking the wrong kind of question, a question shaped by concerns and assumptions far different from those which occupied philosophy in 18th century Scotland.
artificial. Why not, more simply, put the matter in terms of the simple and the complex; or of the individual and the social? After all, he allows, both in the Treatise and the 2nd Enquiry, that justice, because necessary to, or inseparable from, human life, can be correctly understood as natural. Why then does Hume not esteem it natural? What is it about a virtue founded in reason and reflection that leads him to feel uncomfortable about calling it a natural virtue?

To answer this question we need to understand Hume's view of virtue in general. This is, in some respects at least, a difficult task, since in the Treatise Hume says rather little that bears directly on the topic, and what he does say there has often proved more of an obstacle than an aid to interpretation. The problems can, however, be significantly reduced if we first consider the structural problem of Treatise Book III - that is, if we first answer the question, Why does Book III have the structure it has? Attempting to answer this question is particularly pertinent here because Hume's general remarks on morality are very largely contained in the brief first part. If we understand the role of Part I in Book III as a whole, we then become capable of conducting our further enquiries more sensibly by knowing where to look for their solution.

It was suggested above that in Book III Part I Hume is principally concerned to "show his colours" on a dispute that would have been familiar to his readers, the moral sense/reason controversy. He also wants to insist that, despite being manifestly the correct viewpoint, the moral sense theory is not a sufficient explanation of our moral convictions. In fact, it shows some of our convictions to be rather paradoxical - most obviously, those concerning justice. The task of Part II, Hume's principal contribution in the area of moral theory, is to remove these paradoxes. This interpretation of the place of Part I in Book III has the important consequence of showing that Part I owes its brevity not to its lack of import in Hume's views as a whole, but to its relation to his main purpose in Book III. This purpose, to resolve a problem generated by moral sense theory, requires no more than a brief introduction, a general outline of that theory, in order to pose the problem to be discussed in the body of the work. Thus moral sense theory figures hardly at all in the main features of the new theories or explanations developed, despite (or because of) the fact that it is as a contribution to moral sense theory that the work is offered. This should not seem strange: most work in philosophy, as in most areas of intellectual endeavour, can be characterised as being within a particular paradigm and as such tend not to discuss the paradigm. This is despite the fact that, in order to explain

the author's philosophical commitments, nothing is more important - more germane to
the task - than explaining the paradigm. (We become philosophically educated by coming
to understand the paradigms which underlie debates, and thereby overcome the
strangeness which at first afflicts us, and continues to afflict non-participants. We come to
see the point of asking whether, for example, there can be a “private” language, or
whether machines can think, or how many angels can dance on the head of a pin. In all
such cases, we can only understand if we know what is not being discussed.)

If, as suggested here, the purpose of the *Treatise* Book III Part I is principally to situate
the discussion, we know that we can clarify remarks by Hume that are opaque or obscure
by consulting other moral sense writers, or by considering central features of the moral
sense viewpoint. This needs to be done carefully, of course, for the moral sense defenders
are not all of a piece, and Part III of *Treatise* Book III clearly shows that Hume is aiming
not simply at adopting the moral sense view, but at sophisticating it. He aims to explain
the notion of moral sense in terms of the operation of the more general psychological
principle he calls *sympathy*. As long as this is kept in mind, then, we can interpret
some of Hume's less transparent remarks by considering them in the light of other moral
sense theories. And, just as importantly, we can employ the same insights to educate our
approach to the 2nd *Enquiry*; for, although the term “moral sense” does not appear in the
later work, nevertheless the same commitment to an ultimate foundation for morals in
“sentiment” or feeling, rather than reason, is retained - and this, as *Treatise* Book III
Part I shows, is Hume's original ground for preferring the moral sense view. Furthermore,
if Hume's commitment to the moral sense paradigm was a factor many of his earlier
readers overlooked, we would also expect him to attempt to make this commitment (and
his other non-sceptical commitments, for that matter) more visible in his later work. This
is exactly what we do find. It will be brought out more clearly in the succeeding
discussion.

Even a cursory reading of the opening section of Book III of the *Treatise* shows that
Hume's argument against the possibility of founding morals in reason is that moral

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135 This is especially clear in the Conclusion, pp.618-21, and pp.611-2. The final sentences of the
*Treatise*, where the importance of the anatomist is stressed, also implies the necessity of an accurate
moral psychology. The principle of sympathy is designed to provide this, as Book II shows.

136 Hume does speak of a “finer internal sense”, *Enquiries*, p.170 (rather surprisingly
Hutchesonian language).
notions move us to action. This reason alone cannot do, because it is "the discovery of truth or falsehood", no more and no less. Therefore reason is essentially passive. It cannot function as an ultimate end; it can only help us to select the best means to any given end. Ends themselves are ends only in so far as they are desired states, so all ends are founded in passions, and reason is the instrument to their effective achievement. Thus, as the famous dictum from Book II puts it, "reason is, and ought only to be the slave of the passions". The same point, put less colourfully, is "that reason alone can never be a motive to any action of the will". If the reference to "motive" here seems odd, it must be stressed that by "motive" Hume does not, in fact cannot, mean a reason for action. What he means is motive force, what pushes or pulls us into action. Modern philosophers tend to understand "motive" as meaning "reason for action". This is something Hume must deny; and where this is not adequately recognized the result is much confusion. The classic case will be considered below.

If reason alone cannot influence the will, it follows that morals cannot be founded in reason alone, because moral notions do influence the will:

as reason can never immediately prevent or produce any action by contradicting or approving of it, it cannot be the source of the distinction betwixt moral good and evil, which are found to have that influence ... Moral distinctions, therefore, are not the offspring of reason. Reason is wholly inactive, and can never be the source of so active a principle as conscience, or a sense of morals.

It is important to emphasize Hume's description of morals here as an active matter. We misunderstand Hume if we fail to see the intimate connection between morality and action. His distinction between the anatomist and the painter at the close of the Treatise perhaps runs counter to this; and it is worth noting Hutcheson's complaint to Hume of the want, in the Treatise, of "a certain warmth in the cause of virtue". It appears that Hume did later accept the legitimacy of this complaint, for the 2nd Enquiry

137 Treatise, p.458.

138 ibid., p.415.

139 ibid., p.413.

140 ibid., p.458.

141 cf. Essays, p.244.

142 Hume, letter to Hutcheson, op. cit.
not only manifests a good deal of warmth in the cause of virtue, it also contains a passage which undermines the anatomist/painter distinction. Even though he points out that his concern in the *Enquiry* is "more the speculative, than the practical part of morals", he nevertheless allows that "the end of all moral speculations is to teach us our duty". He adds:

> Extinguish all the warm feelings and prepossessions in favour of virtue, and all disgust or aversion to vice: render men totally indifferent towards these distinctions; and morality is no longer a practical study, nor has any tendency to regulate our lives and actions.

The context of this passage prevents us from treating it as necessarily Hume's view. However, it seems likely that it is; and, if so, it implies that even the writer on morals cannot properly extinguish all warm feelings on the matter. Moreover, those warm feelings which naturally arise in connection with morals do so because of the active nature of morals itself. Hume hints at this connection when he goes on to speak of "that which renders morality an active principle and constitutes virtue our happiness, and vice our misery". What is this connection between activity on the one hand, and happiness or misery on the other? Quite simply, it is that we are moved to action by the sensations of (or the prospects of) pleasure and pain. As Hume says, "the chief spring or actuating principle of the human mind is pleasure or pain". Desires and aversions, happiness and misery, are real or imagined pleasures or pains which we see to be connected either to ourselves or others. If, as is the case, it is passion and not reason that moves us to action, and pains and pleasures are the source of passions, then it is pains and pleasures which move us to action. In Hume's language, pains and pleasures are motives to action.

It follows from this that moral motives must be pleasures or pains of a particular sort:

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143 *Enquiries*, pp.177-8.

144 *ibid.*, p.172.

145 *ibid.*

146 He describes it as a "specious" view, and puts aside its resolution to Appendix I. This appendix does, I think, imply that the speciousness of this passage is not mere speciousness.

147 *Enquiries*, p.173.

148 *Treatise*, p.574.

"Morality, therefore, is more properly felt than judg'd of." The subject matter of morals, for Hume, is the actions or characters of human beings, so moral approbation is precisely the feeling of pleasure generated by the contemplation of a character or action. It is important to note here that by "contemplation" Hume means recognizing the "principles in the mind and temper", the "qualities or durable principles", which the character or action exhibits. He stresses feeling in order to bring out what it is that moves or activates us; but what we approve of in any act of moral approbation is the durable motives displayed by others. Hume is not trying to reduce morality to "mere" feeling; he is attempting to explain the psychological mechanisms of moral reality. He puts it as follows:

We do not infer a character to be virtuous, because it pleases: But in feeling that it pleases after such a particular manner, we in effect feel that it is virtuous. The case is the same as in our judgements concerning all kinds of beauty, and tastes, and sensations. Our approbation is imply'd in the immediate pleasure they convey to us.

This leaves us with a difficulty, however. What makes approbation, in any particular case, moral approbation? We know that it must be a pleasurable feeling generated by contemplation of a character or action. But clearly this is not sufficient. For many manifestly non-moral, even immoral, characters or actions can generate pleasure by contemplation. Hume does not give a direct answer to this particular problem; but it is not difficult to imagine what he would say. In fact he indicates an answer in another of his short summaries of the basic facts of moral psychology. He says:

virtue is distinguished by the pleasure, and vice by the pain, that any action, sentiment or character gives us by the mere view and contemplation.

In the immediately following sentence, he speaks of the reaction produced in us by an action viewed from "the general view or survey". I shall suggest that the expressions "the

150 ibid., p.470.
151 cf.Hume to Hutcheson, letter no.16; Raphael, op.cit., p.111.
152 Treatise, p.477; letter no. 13, op.cit.
153 Treatise, ibid.
154 ibid., p.471.
155 ibid., p.475.
general view or survey", and "the mere view and contemplation", have the same meaning, and that that meaning is disinterested contemplation. The pleasure which is moral pleasure, then, is the pleasure caused by an action or character, independently of any advantages or disadvantages which accrue to the observer; pleasure caused by the action or character considered for its own sake. Self-interest or advantage cause us to feel pleasure at actions or characters which benefit us; the pleasure which is moral approbation is that pleasure caused by any such actions, etc., considered apart from such interest or advantage.

The interpretation of Hume at this point depends a good deal on the connection with the moral sense writers argued for above. Hume's remarks do suggest the type of interpretation offered, but it is Hutcheson who frequently stresses that considerations of interest and advantage can contaminate our moral perceptions, or over-rule them. Moral perceptions themselves are entirely disinterested. For example, moral good is, he says,

our Idea of some Quality apprehended in Actions, which procures Approbation, and Love toward the actor, from those who receive no Advantage by the Action.\(^\text{156}\)

For this to be possible, that is, for disinterested contemplation to produce pleasure, moral qualities must exhibit a kind of beauty. It is this beauty of the action or character which in turn motivates our actions. Hutcheson spells this out clearly:

The AUTHOR of Nature has much better furnished us for a virtuous conduct, than our Moralists seem to imagine ... He has made Virtue a lovely Form, to excite our pursuit of it; and has given us strong Affections to be the Springs of each virtuous action.\(^\text{157}\)

Hume denies our benevolent affections the strength Hutcheson accords to them: his important principle of limited benevolence is a deliberate backing away from Hutcheson's strong benevolence, without going over to the opposition camp of those who base morals on self-love.\(^\text{158}\) (His principle is, in other words, a medium between extremes - just what we would expect from a man of "moderation").

We are now in a position to sketch in the general outlines of the moral sense view of the

\(^{156}\)Hutcheson, Inquiry, p. 111.

\(^{157}\)ibid., p.xiv-xv.

\(^{158}\)For Hume, this latter camp includes not only Mandeville, but also Hobbes and Locke, both of whom, he says, "maintained the selfish system of morals" (Enquiries, p.296). In this view he is certainly at one with Shaftesbury (cf. Norton, op.cit., pp.34-5); Hutcheson appears to be committed to much the same conclusions, but he appears somewhat hesitant about specifically including Locke (cf. Inquiry, p. 81).
nature and practice of morality. It must be stressed that, for Hume in particular (because of his concern for the efficient causes of action), the task of moral philosophy includes not only an account of what morality is, but of why we do it - why morality is a practice characteristic of human beings. So an important part of the following sketch is to show the nature and causes of a characteristic form of human behaviour.

Firstly, as the above quotation from Hutcheson shows, what the moral sense perceives (or, what we sympathetically respond to) is the beauty of certain kinds of characters or actions. Moral goodness is a species of beauty. Thus it is no accident that Hutcheson should write an *Inquiry concerning Beauty and Virtue*, or that Hume occasionally speaks of beauty as a genus, divided into the two species of moral and natural: he employs expressions such as, for example, “beauty whether moral or natural”,159 and “if we compare moral beauty with natural”.160 These are not examples of a theoretically innocent eighteenth century idiom, but part and parcel of the moral sense view. (The rationalists, as far as I have been able to determine, do not speak of moral beauty, but rather more directly of moral good and evil.161) Moral actions are founded on the apprehension of a species of beauty. The apprehension of beauty moves us to action because pleasure is the mainspring of human action, and, as Hume puts it in *A Dissertation on the Passions*, “the very essence of beauty consists in its power of producing pleasure.”162

Hume follows Hutcheson in seeing moral and aesthetic perception as akin to the perception of secondary qualities. However, as we saw in the previous chapter, Hume differs from Hutcheson in the account he offers of secondary qualities, placing them firmly in the mind of the observer. This difference is preserved in his account of beauty, as we would expect. The beauty of a circle, he says, “is only the effect which that figure produces upon the mind, whose peculiar fabric or structure renders it susceptible of such sentiments.163 From the point of view of moral philosophy, however, differences about the precise location of perceptions of moral beauty are not of great importance. What matters

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159 *Enquiries*, p.165.

160 ibid., p.291.

161 See the writings of Samuel Clarke and William Wollaston included in Raphael, *op.cit.*, vol. 1.


is that beauty is perceived, and predictably so. Thus Hume can be in complete agreement with Hutcheson's confident assertion that we know an object is beautiful because, whenever we perceive that object, we perceive the beauty. Such pleasures as the perception of beauty, he says, "will as necessarily strike the Mind, as any Perceptions of the external Senses." \(^{164}\)

This conception of beauty, including moral beauty, as akin to the secondary qualities of colour, taste, etc., differing only in being perceived by what may be called a "finer internal sense" \(^{165}\) rather than by another external sense-organ, has a significant implication. All ideas of secondary qualities, and thus of moral goodness itself, require for their realization perception by an appropriate perceiver. Thus the moral sense theorists occasionally speak of the role of a spectator in moral determinations; and, as pointed out above, since the moral viewpoint is a disinterested viewpoint, it becomes possible to think of settling moral disputes by appealing to the impartial spectator. \(^{166}\) Adam Smith takes up this challenge in *The Theory of Moral Sentiments*, providing an account of moral good, and of our motivations to pursue moral courses of action, in terms of the complex constitution of the impartial spectator of human affairs.

Of more immediate importance here, however, is the fact that any theory of moral goodness which assigns a central role to the perceptions of a mind must insist on at least the uniformity of the disinterested perceptions of the relevant minds if the public, or social, character of the moral world is to be retained. This may seem an impossibly stringent requirement, but it is noteworthy that with respect to the classical secondary qualities the requirement is readily accepted. Sugar is sweet, fire engines are red, and so on. So, since for Hume moral beauty is akin to the more familiar secondary qualities of physical objects, we would expect him to acknowledge the existence of the relevant kind of uniformity in human minds, or human nature; and that moral beauty and deformity can therefore be recognized as real features of characters and actions, and the motives underlying them. This is precisely what we do find him asserting. In a "philosophical" footnote to his essay "The Sceptic", he says this:

> Were I not afraid of appearing too philosophical, I should remind my reader of

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that famous doctrine, supposed to be fully proved in modern times, “That tastes and colours, and all other sensible qualities, lie not in the bodies, but merely in the senses”. The case is the same with beauty and deformity, virtue and vice. This doctrine, however, takes off no more from the reality of the latter qualities, than from that of the former; nor need it give any umbrage either to critics or moralists. Tho' colours were allowed to lie only in the eye, would dyers or painters ever be less regarded or esteemed? There is a sufficient uniformity in the senses and feelings of mankind, to make all these qualities the objects of art and reasoning, and to have the greatest influence on life and manners. And as 'tis certain, that the discovery above-mentioned in natural philosophy, makes no alteration on action and conduct; why should a like discovery in moral philosophy make any alteration?167

Here we see Hume not only adopting the secondary quality model, but also accepting two important consequences - the uniformity of the relevant perceptions, and their undiminished reality. The parallelism between natural beauty and virtue is also indicated. Thus Hume fully accepts the implication of the moral sense/secondary qualities model, that moral approbation is founded in the perception of moral beauty, in the perception of the beauty of particular actions or characters by any disinterested observer.

We can now return to the task of spelling out the general features of the moral sense view of morality and moral action. The starting point, that moral distinctions are founded on a moral sense, is the view just explained that morality begins with the perception of moral beauty. Beauty itself, whether moral or natural, is simply a pleasing perception. This does not mean that beauty is arbitrary - far from it, for what is pleasing to any sense is itself not arbitrary. Particular combinations of colours are hard on the eye; some sorts of repetitive sounds are so hard on the ear that they disturb our equilibrium - crying babies, for example.168 For Hutcheson, natural beauty requires uniformity amidst variety; Hume is more circumspect, but agrees, in an important essay, that there is a standard of taste. Both agree that acts of benevolence in particular are pleasing to any disinterested observer.

167“The Sceptic”, Essays, p.219n. It is important to point out here that, although this essay and the three accompanying it - “The Epicurean”, “The Stoic”, and “The Platonist” - are literary, or imaginative, constructions of the four different positions, rather than Hume’s own view, there is good reason for taking this particular essay as a literary device precisely for airing his own views. And there is particular reason for taking this part of the essay to represent Hume’s views, because the text which this footnote is commenting on includes a passage - six sentences long - which is identical to a paragraph of the 2nd Enquiry, pp.291-2. This passage is in part quoted above as the text to footnote 164. It also needs to be noted that Hume errs in his footnote, suggesting that all sensible qualities lie in the senses, according to the “famous doctrine”. This is not true. Shape and size, for example, are primary sensible qualities, and hence remain firmly in the object.

168Cf. Karnes, Essays, p.43: “a spreading oak, a verdant plain, a large river, are objects which afford great delight. A rotten carcase, a distorted figure, create aversion, which in some instances, goes the length of horror”.
Now it has already been pointed out that, for Hume, "the chief spring or actuating principle of the human mind is pleasure or pain". In fact, this view is essential to moral sense theories as a whole, and reflects their Lockean provenance. Pleasure moves us to action because what pleases is attractive - which is to say, we are attracted to it. It is important to stress that there is no equivocation here. The point is simply that we are creatures of a determinate nature, who by being pleased by particular objects or events, are attracted to them, and thus seek to secure or preserve or repeat them. We pursue what pleases us, and thereby are moved to action. In like manner we seek to avoid what is painful, what disturbs us or causes us unease. But many things please or pain us simply because of their impact on our private interests. These pleasures or pains, and hence these interests, are not specifically moral pleasures or pains, since morality is essentially disinterested. All and only our disinterested perceptions, and the pleasures or pains that arise from them, give no pre-eminence to our private ambitions, and thus display the public character necessary for the moral viewpoint. Therefore all and only disinterested perceptions are moral perceptions, and all and only disinterested pleasures are moral pleasures. Furthermore, because pleasures or pains are the chief springs or actuating forces of the mind, and thus the causes of actions, they are the motives - which is to say, the motive forces - for actions. Moral actions being those actions which have moral motives, they are simply those actions where the motive force is an attraction to a moral pleasure based in a disinterested perception. Benevolent acts, for example, are moral acts because benevolence is a moral motive: it is that motive force which is generated by the disinterested, pleasing perception of the happiness of others. It is only because the disinterested perception of the happiness of others is pleasurable to us that we have a motive to perform benevolent acts. Therefore, without such pleasures there can be no moral motivation.

This is a vitally important conclusion, but its importance does not become clear until we recognize the relationship between motivation and obligation in the moral sense outlook. This is best achieved by considering Hutcheson's account of obligation. An obligation, he says, is

a Determination, without regard to our own Interest, to approve Actions, and to perform them; which Determination shall also make us displeas'd with our selves, and uneasy upon having acted contrary to it.

169 *Treatise*, p.574.

The first half of this definition is the definition of moral motivation - the disinterested motive to approve and perform certain actions; and the latter half is simply a consequence of the former. Where we act contrary to our disinterested motive, it is because this has been outweighed by a stronger, (self) interested one. But the stronger motive, despite outweighing the weaker, does not destroy it; and, once the stronger motive has been successful in moving us to a self-interested action, this motive typically dissipates. Thus we are left with the disinterested motive alone, and, where the self-interested act has cut off the possibility of the disinterested act, the disinterested motive remains, but without means of its satisfaction. Consequently, we remain "uneasy", or "displeas'd with our selves". If this account is correct, then we can see that by "obligation" Hutcheson means simply moral motivation. Obligation is the push or pull on us we feel by perceiving the pleasing character - the beauty - of the disinterested action. I have already pointed out that it is because disinterested actions are pleasing to us that benevolence is a moral motivation. So, if obligations are, for Hutcheson, moral motivations, he must see benevolence as an obligation. This he does: "there is", he says, "naturally an Obligation upon all Men to Benevolence". (The word "naturally" here is most significant, as we shall see below.) The important consequence of the identity of moral motivation and obligation is this: since, as was argued above, without the pleasing perception of moral beauty there can be no moral motivation, then, likewise, there can be no obligation.

The significance of this conclusion is brought out rather better by a little rephrasing. First of all, the pleasing perception of moral beauty, moral perception, is the task carried out by the moral sense. Thus without reference to a moral sense, there can be no explanation of obligation, that is, no meaning can be given to the word "ought". All theories of morals which attempt to found moral distinctions purely in reason, or abstract rational relations, make no reference to moral sense. So these theories, when they introduce the word "ought", have introduced a new relation which they cannot explain. But a moral theory without obligation is no moral theory at all, since morality is a practical matter, and it is precisely the obligation which is the motive force - the action-making element - in moral practice. So through "this small attention" we are able to see "that the distinction of vice and virtue is not founded merely on the relations of objects,

\[171^{\text{ibid.}}, \text{p.267.}\]

\[172^{\text{For Hume, obligation is motivation simpliciter. Thus he talks of natural obligation and moral obligation. This does not affect the matter here, however. For a discussion of this matter, see E. Sapadin, "Hume's Law, Hume's Way", in David Hume: Bicentenary Papers (ed. G.P. Morice), Edinburgh: Edinburgh University Press (1977); and Marcia Baron, "Hume's Noble Lie: An Account of his Artificial Virtues", Canadian Journal of Philosophy XII: 3, pp.540-1.}\]
This should sound familiar. It is, in fact, a summary of Hume’s famous “is-ought” passage at the end of *Treatise* III.I.i. By seeing this passage in the light of the moral sense view in general, we can see that Hume is not asserting a fact/value, or a fact/interpretation, or any other comparable dichotomy, whether or not there is anything to be said for such distinctions. Hume’s point in this passage is, rather, that if we are to explain morality, we must explain why it moves people to action. The gap he identifies is a gap between obligations or motivations (and therefore actions) on the one hand, and facts or values on the other. The essential passivity, or, the instrumentality, of reason, guarantees the failure of the rationalist theories. Reason is a tool we use, thus our use of it cannot be explained by reason. This is perhaps rather crude, but I think it is close to Hume’s view. The rationalist theories fail because they cannot explain why some beings are moral, that is morally active, beings. Another way of putting this point would be to say that any adequate moral philosophy must include a moral psychology, a psychology of moral action.

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173 *Treatise*, p.470.

174 Not only is Hume not saying that every “ought” conclusion should have an “ought” premise, it is also important to remember that Hume has very little interest in moral exhortation. He is interested in moral advice, but he sees this as a matter of either pointing out the beauty of virtue, or employing good reasoning to correct bad reasoning about the actual relation of means and ends.

175 Cf. Sapadin, *op. cit.*, pp. 214-7. Sapadin rightly stresses that when Hume contrasts “is” statements and “ought” statements he means just that. “X is a tree”, “X is good”, “X is the right thing to do” are all as they appear to be, “is” statements - and thus are to be distinguished from “ought” statements and the new relation the latter introduce.

176 Thus the larger commitments of moral sense moral philosophy place it in sharp opposition to much modern moral philosophy, with the latter’s sharp separation of moral issues from questions of moral psychology. See especially R.M. Hare, *The Language of Morals*, Oxford: O.U.P. (1952), pp. iii-iv.

It is worth adding here that, from a moral sense viewpoint, the modern separation of moral philosophy from moral psychology can only impoverish, or even harm, both endeavours. In particular, it is inviting to suggest that, as with earlier “rationalisms”, the notion of moral obligation is the casualty. Hence the belief, expressed in different ways and to different ends by both Alasdair MacIntyre (*After Virtue*, London: Duckworth (1981)) and Bernard Williams (*Ethics and the Limits of Philosophy*, London: Fontana (1986)), that modern morality lacks intelligibility. If the lack of a moral psychology is the problem here, one option for reconstruction would be to return attention in moral philosophy to the moral conscience, and thereby to rehabilitate moral obligation itself. One recent work which does return attention to questions of conscience is Basil Mitchell, *Morality: Religious and Secular*, Oxford: Clarendon Press (1980).
It was mentioned above that Hume’s “is-ought” passage is undeservedly famous. This is for the quite simple reason that Hume there does little more than follow Hutcheson. In both the *Inquiry concerning Beauty and Virtue*, and also in the *Illustrations upon the Moral Sense*, Hutcheson charges the rationalists with being unable to explain “ought”, “must”, “should”, and so on. Hume follows in Hutcheson’s footsteps, rehearsing the latter’s argument against the rationalists, before settling down to his main concerns of justice, government, etc. But this is not all. Karnes, another adherent to the moral sense view, in his *Essays* criticises both Hutcheson and Hume for failing to provide an adequate account of these very terms. The explanation of “ought” and comparable words is a typical concern of the moral sense writers, and is so because the question of how morality moves us to action is the question the ethical rationalists cannot answer, and which the moral sense philosophers all see as the crucial advantage of their position. Hume’s “is-ought” passage is undeservedly famous, then, because it is no more than a neat encapsulation of a view common to all the moral sense writers.

Kames’s criticisms of Hume and Hutcheson have just been mentioned. If we consider the nature of these criticisms, particularly of Hutcheson, we can gain a useful foothold on the key problem of moral sense theory; the problem which Hume’s doctrine of artificial virtue is designed to solve. So to those criticisms we will now turn.

The objection to Hume need not detain us here: he is criticised simply on the ground that sympathy won’t do the job - it is “far too faint a principle to control our irregular appetites and passions”. The criticism of Hutcheson, however, is very instructive, and enables us properly to understand the problem that justice (in particular) poses for moral sense theory, and why Hume should resort to calling it an artificial virtue.

The failing of Hutcheson’s account of obligation, according to Kames, is that it does not measure up to the facts:

this account falls far short of the whole idea of obligation, and leaves no distinction betwixt it and a simple approbation or disapprobation of the moral sense; feelings that attend many actions, which by no means come under the notion of obligation or duty.  

177 *Inquiry*, pp.266-75; *Illustrations*, in *Essay*, pp.229-30, 244, 246, 252, 262, 269, in particular; the same general issue is also considered in the *System*, vol. 1, p.264.


179 *ibid.*, p.57.
In particular, Hutcheson’s problem is this: he

founds the morality of actions on a certain quality of actions, which procures approbation and love to the agent. But this account of morality is imperfect, because it excludes justice, and everything which may be strictly called Duty. The man who, confining himself to strict duty, is true to his word, and avoids harming others, is a just and moral man; is intitled to some share of esteem, but he will never be the object of love or friendship.180

Kames’s point is that justice (principally “avoiding harm to others”) is an essential part of morals, but the moral sense theory cannot explain our obligation to justice, since justice is without moral beauty. This is what he means by saying the just man (qua just man) “will never be the object of love or friendship”. Objects of love or friendship are pleasing perceptions, and the just man is not a pleasing perception (no matter how displeasing a perception the unjust man is) because he acts solely according to duty, not from any benevolent motive.

But if justice does not procure the approbation of the moral sense, why is justice approved of at all? What is our motive to just actions? This amounts to the Hutchesonian problem of why we should recognize the “external” rights. Hume shows this to be so by employing Hutcheson’s own examples of external rights:

when I relieve persons in distress, my natural humanity is my motive; ... But if we examine all the questions, that come before any tribunal of justice, we shall find, that considering each case apart, it wou’d as often be an instance of humanity to decide contrary to the laws of justice as conformable to them. Judges take from a poor man to give to a rich; they bestow on the dissolute the labour of the industrious; and they put into the hands of the vicious the means of harming both themselves and others. The whole scheme, however, of law and justice is advantageous to the society [and to every Individual]; and ’twas with a view to this advantage, that men, by their voluntary conventions, establish’d it.181

The advantage, and thus the virtue, of justice, is not in dispute in Hume’s theory. The problem is that, because of the lack of moral beauty of many individual acts of justice, the moral sense theory is, with respect to justice, in the same apparent position as the rationalist theories are with respect to morals in general - the obligation to justice is left unexplained. And the fact that individual men and women are moved to perform just

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180 ibid., pp.55-6.

181 Treatise, p. 579. The addition in square brackets is Hume’s manuscript amendment to the first edition. See Nidditch’s textual notes, Treatise, p.672. Also note in the first sentence of this passage the use of “motive” where it can only mean “motive (or driving) force”, the sense I have argued for throughout section V.
acts, including those which are entirely lacking in moral beauty, shows that there is a felt obligation which has to be explained. People do feel a force that moves them to just actions. But there is no natural force - no "original instinct" - available to do this job. Justice is artificial because there is no natural force - no natural obligation - which moves us to perform just actions. It is, however, a real virtue because it is founded on a real obligation. We can say that it must be so founded, simply because justice exists. Hume's task is to explain how this real obligation arises.

The immediate obligation to perform acts of justice is simply determined: it is the sense of justice, or the sense of duty. But this sense is not the bottom of the matter, since it can only exist where justice already exists. It cannot be the original instinct to perform acts of justice. The original instinct, or natural obligation, to any virtuous act must be "some motive to produce it, distinct from the sense of its morality." The problem of the motivation to justice is that there is no such distinct motive to just acts. Hutcheson appealed to a more extensive benevolence, the good of mankind as a system, to solve this problem, but for Hume this is no remedy, because "that is a motive too remote and too sublime to affect the generality of mankind." He adds:

In general, it may be affirm'd, that there is no such passion in human minds, as the love of mankind, merely as such, independent of personal qualities, of services, or of relation to ourself. In fact, the partiality of our affections restricts even our benevolence to a fairly limited sphere. But the natural insecurity of external goods, in particular, makes a system of justice absolutely necessary to the security of society. How then is this obstacle to justice overcome? Not by any natural, i.e. original, means:

In vain should we expect to find in uncultivated nature, a remedy to this inconvenience; or hope for any inartificial principle of the human mind, which might control those partial affections, and make us overcome the temptations arising from our circumstances.

Since no inartificial means is effective to establish justice, but social harmony requires that justice be established, artificial means must be created. Reason must be employed to provide a solution to the problem. Rational reflection on the natural instability of the

182Treatise, p. 479.
183ibid., p. 481.
184ibid., p. 488.
possession of external goods, and on the great advantages that flow from overcoming this instability and securing to individuals the fruits of their industry, as one important ingredient in the “additional force, ability, and security” which social life provides for us,\textsuperscript{185} shows the necessity of, and motivation for, establishing rules of property. In this way, justice becomes established despite the absence of a natural motive to just acts:

The remedy, then, is not deriv’d from nature, but from artifice; or more properly speaking, nature provides a remedy in the judgment and understanding, for what is irregular and incommodious in the affections.\textsuperscript{186}

For Hume, then, justice is an artificial virtue because it is founded in rational reflection concerning the necessary supports for the social life, the latter being itself necessary because of the great advantages it procures for human life. But this is simply to hold that justice is a dictate of right reason, because it is necessary for sociability and self-preservation. Hume’s position is, in other words, just that of the natural lawyers. Justice is an artificial virtue because, as Pufendorf and Hutcheson put the matter, property is an adventitious, not a natural, state. The advantages that property procures for social life are so considerable that the establishment of property cannot be resisted: it is thus a necessary development. For this reason Hume says it is not improper to call property a law of nature - its overwhelming utility makes it inseparable from the species. Property, or justice, is for this very reason an artificial virtue. It is not the fruit of some original instinct in human nature, but is introduced into human society because of its utility. For the same reason it is, as we have seen, a slow growth over time. Justice is a historical construction.

The slow growth of justice is not only the fact that the establishment of stability of possessions begins, by convention\textsuperscript{187} rather than explicit agreement, in a particular place at a particular time, and then spreads to other parts of human society as its advantages become clearly apparent; it is also a slow growth in that the specification of the rules of justice does not happen all at once, but develops according to the natural workings of the human mind, through either the natural association of ideas, or rational reflection on the utility of particular innovations. Thus Hume accounts for the four main rules of property: occupation, prescription, accession and succession. The case of prescription is the most

\textsuperscript{185}ibid., p. 485.
\textsuperscript{186}ibid., p. 489.
\textsuperscript{187}See the Appendix for some further remarks on conventional practices.
interesting of these, for immediate purposes, because not only does prescription require the passage of time before it can arise (it is not a rule established a priori, which is then applied as it comes to bear on particular cases), but it is in fact caused by the effect of time on the human imagination itself. Hume uses this fact as evidence for the development of property through the natural workings of the human mind (even though we possess no original instinct to recognize distinctions of property). He says:

Possession during a long tract of time conveys a title to any object. But as 'tis certain, that, however every thing be produc'd in time, there is nothing real, that is produc'd by time; it follows, that property being produc'd by time, is not any thing real in the objects, but is the offspring of the sentiments, on which alone time is found to have any influence.\(^{188}\)

The particular rules of property, arising as they do from the natural workings of the human mind, arise necessarily and therefore naturally. Because they are not invented in advance of the specific circumstances which give them an application, they arise over time, as the exigencies of human life require. In this sense Hume shows property to have a natural history.

* * *

In this chapter I have argued that there is no bar, and much support, for accepting Hume's claim that his theory of property is, in the main, the theory of Grotius; and that therefore Hume can be recognized to be a contributor to the tradition of modern natural law theories of justice. The familiar figures of Hume the Newtonian and Hume the sceptic do not bar such an interpretation; and, once the intellectual problematic confronted by Book III of the \textit{Treatise} is understood, the rather curious structure and distinctive concepts developed in it can be are seen to be quite conformable to the natural law heritage. In particular, the doctrine of the artificiality of justice is not a rejection of natural law, but an attempted solution to a problem generated by the moral sense theory's conception of the psychology of action. The attempted solution is, further, a traditional solution in that it stresses that justice is adventitious, arising because it is required for the secure establishment of human social life. Finally, Hume's theory is the theory of Grotius, rather than of Pufendorf, as a result of its moral sense commitments. The theory of the moral sense is an attempt to secure the natural law doctrine of sociability against the threat perceived to be implied by "selfish" psychology of Locke's \textit{Essay}, and it pursues this attempt by providing an account of human nature which renders any \textit{formal} obligation to follow the dictates of natural law simply otiose.

\(^{188}\textit{ibid.}, p. 509.$
Hutcheson is quite explicit about this, and Hume’s Newtonian ambition to rely only on
efficient causes reinforces this, and leads him to offer a recognizably Hutchesonian account
of (material) obligation as our disinterested motivation to approve and perform
benevolent actions. In this way, he grounds moral obligation and the law of nature firmly
in the soil of human nature itself, in the natural workings of the human mind, as the
theory of natural law requires.
EPILOGUE

A more complete study than this would first turn to Hume's economic and political essays to show how his new form of naturalism applies to specific questions of social organization and policy, and then to the History of England, where, inter alia, Hume seeks to demonstrate the veracity of his principles through a case history of his own society. In this way, an account of the detail and coherence of Hume's position could be elucidated, thereby overcoming the fact that Hume himself did not attempt a systematic account of the development of social institutions.\(^1\)

The first attempt at such a systematic account of human society and its development, from its very beginnings in the psychological construction of human nature, is provided by Adam Smith, the principal heir to Hume's social philosophy. Although unfinished, Smith's scheme is sufficiently developed to show what it is to provide a natural history of property that is adequately grounded in the psychological constitution of human nature, and to show that such a history is a critical history. Beginning from a short sketch of the springs of human action in The History of Astronomy,\(^2\) in which he adapts and extends Locke's homeostatic model\(^3\) to explain the roots of all human epistemic enquiry, Smith builds an account of the necessary sociability of human beings and of the development of the main stages of the societies thus produced.

Briefly, the account is this: our natural sympathetic responses to the feelings of others, combined with the individual's homeostatic drive, produces an urge towards a collective equilibrium. Our social nature expresses itself in the pleasure we gain from "mutual

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\(^1\)The most complete attempt at this is Duncan Forbes, Hume's Philosophical Politics. An attempt to map in detail the theoretical foundations of this type of enterprise in Hume's own epistemological principles has more recently been provided in Donald Livingston, Hume's Philosophy of Common Life. For a discussion of some of the relevant issues, see David Fate Norton, "History and Philosophy in Hume's Thought", in D.F. Norton and R.H. Popkin (eds.), David Hume: Philosopher-Historian, Indianapolis: Bobbs-Merrill (1965).


\(^3\)See Appendix.
sympathy”, the agreement of sentiments between ourselves and others. In order to maintain a shared viewpoint, and thus to preserve such pleasures, we are led to construct an impartial spectator of human affairs, by whose imagined responses we judge the actions of ourselves and others, individually and collectively. From the spectator's responses we develop our systems of law and morals, and are able to examine the development and state of our own society from this viewpoint, seeing to what extent both social changes and social realities are explicable in terms of the in situ judgements of the spectator. Where such realities are not explicable, or when we can see that, although once they were, they are so no longer, we are able to critically evaluate and modify the legal structure of our society. The spectator's viewpoint is natural because it arises necessarily through natural mechanisms; it is historical because it always operates within the constraints of particular social circumstances; and it is critical because it transcends the operations of self-interest, and also because it checks the effects of specious principles by reconsidering them in the light of experience. Particularly in the Lectures on Jurisprudence, and to a lesser extent in The Wealth of Nations, Smith shows his critical natural history at work. Writ large in the history of societies and social institutions, the spectator's task is described by Smith as “the science of a legislator”.

In light of the subsequent history of British political thought, at least, the further elaboration of a critical natural history seems to have been too difficult a task. On the one hand, theories of the natural history of society lost sight of the possibility of a critical perspective, and effectively identified rationality with history. Thus Edmund Burke established the conservative strand in British politics. On the other hand, critical theories of society lost sight of a positive role for history, coming to see it only as an inherited amalgam of irrationality and error. In this spirit Bentham set about British legal structures, and spawned a long line of Philosophic Radicals. For the most significant later employment of a critical natural history, we have to turn to Germany, to a theory which combines detailed historical researches with a critical perspective built on a restrictive account of the springs of action - the historical materialism of Karl Marx.

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5 In The Wealth of Nations, as pointed out in chapter one, Smith distinguishes between natural history and actual history, thereby creating the space for a critical perspective. The existence of such a perspective in Smith's work is frequently overlooked by his modern apostles. The best corrective to this oversight is provided by Donald Winch, Adam Smith's Politics.

6 Smith, The Wealth of Nations, IV.ii.39 For the most complete account of this science, see Knud Haakonssen, The Science of a Legislator: the Natural Jurisprudence of David Hume and Adam Smith.
APPENDIX

The Psychology of Moral Action: Locke's Theory and its Reception

For Locke, happiness and misery are the two great springs of human action.\(^1\) Happiness, he says in the *Essay*, "every one constantly pursues, and *desires* what makes any part of it".\(^2\) This happiness which we pursue is a simple relation between pleasure and pain:

\textit{Happiness} ... in its full extent is the utmost Pleasure we are capable of, and \textit{Misery} the utmost Pain: and the lowest degree of what can be called \textit{Happiness}, is so much ease from all Pain, and so much present pleasure, as without which any one cannot be content.\(^3\)

Furthermore, pleasure and pain are the source of our valuations:

Now because Pleasure and Pain are produced in us, by the operation of certain Objects, either on our Minds or our Bodies; and in different degrees: therefore what has an aptness to produce Pleasure in us, is that we call \textit{Good}, and what is apt to produce Pain in us, we call \textit{Evil}, for no other reason, but for its aptness to produce Pleasure and Pain in us, wherein consists our \textit{Happiness} and \textit{Misery}.\(^4\)

Since we always pursue our happiness, this means that we also pursue what is good. Human action naturally is directed at achieving pleasure, a reasonable predominance of which (over pain) is happiness, and this is the pursuit of natural goodness. (*Moral* goodness, a particular species of natural goodness, we shall turn to shortly.)

What is it that prompts us to pursue happiness? This may seem a foolish question -

\(^1\)He says just this in “Of Ethick in General” - see Colman, op. cit., p. 179. Colman goes on to argue that Locke shifts “from a quasi-mechanistic theory of the ‘springs’ of action to a hedonistic theory of reasons for action” (pp. 179-80). This is, I think, mistaken. Locke's account of the springs of action is an account of the \textit{causes} of action, but it is not thereby a denial of reasons. Unlike Colman, Locke does not operate with a sharp distinction between reasons and causes; rather, he accords reasons a role in a causal story. (He does separate rational from "mechanistic" accounts, but because the latter are defined as excluding rationality, not because they are causal. See *Essay*, I.iii.14.)

\(^2\)\textit{Essay}, II.xxi.43.

\(^3\)\textit{Essay}, II.xxi.42.

\(^4\)\textit{ibid.}
after all, what is more reasonable than to pursue the greatest happiness or pleasure, the
greatest good, that is available to us? The question is not foolish, however - it is one
thing to show that happiness is, of all possible ends, the most desirable, quite another to
show that we therefore (or even in fact) pursue it. The question requires an answer to
the more general question, What is it that moves us to action? By what means do human
beings act? As a psychological question (rather than a physiological one), it is to ask:
What determines the will? Locke's original answer to this question was, simply, that the
will is determined by its apprehension of the greatest good in view. But in the second
edition of the Essay he offers a different solution:

> what is it that determines the Will in regard to our Actions? And that upon
second thoughts I am apt to imagine is not, as is generally supposed, the greater
good in view: But some (and for the most part the most pressing) uneasiness a
Man is at present under. This is that which successively determines the Will,
and sets us upon those Actions, we perform.5

As a psychological phenomenon, this uneasiness of the will is simply desire: "This
Uneasiness we may call, as it is, Desire; which is an uneasiness of the Mind for want of
some absent good".6 But, if desire is the want of an absent good, is not the account of
action in terms of the uneasiness of the will equivalent to the account it replaces, that the
will is determined by the apprehension of the greatest good in view? The difference,
Locke holds, is this:

> I am forced to conclude, that good, the greater good, though apprehended and
acknowledged to be so, does not determine the will, until our desire, raised
proportionably to it, makes us uneasy in the want of it. Convince a Man never
so much, that plenty has its advantages over poverty; make him see and own,
that the handsome conveniences of life are better than nasty penury: yet as long
as he is content with the latter, and finds no uneasiness in it, he moves not; his
will never is determin'd to any action, that shall bring him out of it.7

The revised account thus differs in two respects. It both shows that human action is not
always directed to the greatest good (although it is always directed to a limited good),
and it provides an efficient cause for human action. This efficient cause is, in fact, the
flight from pain, because uneasiness is a kind of pain. Locke comes close to explicitly
asserting this when he says that "All pain of the body of what sort soever, and disquiet of

5Essay, II.xxi.31.

6ibid.

7Essay, II.xxi.35.
the mind, is *uneasiness*. In another passage he implicitly identifies uneasiness as painful:

whilst we are under any *uneasiness*, we cannot apprehend ourselves happy, or in the way to it. Pain and *uneasiness* being ... inconsistent with happiness; spoiling the relish, even of those good things which we have ... And therefore that, which of course determines the choice of our will to the next action, will always be the removing of pain ... as the first and necessary step towards happiness.

Locke's psychology of action thus hinges not so much on the pursuit of pleasure as on the flight from pain. This flight is of course a flight towards pleasure, but the actual motivating force, what "determines the will", is the attempt to escape present pain. The pursuit of happiness, or of the greatest good, is thus something of a haphazard affair: a zig-zagging, on-again, off-again, process. (The zig-zagging is partly a function of our limited knowledge - a theme of great importance in the *Essay* - since our perception of our good will not always be accurate; but it is the perception, rather than the genuine good, which plays a role in our behaviour. The account of action in terms of uneasiness, however, provides a further reason for allowing misperceptions to be efficacious. This is because it seems reasonable (and true to our experience) to hold that, the greater the unease, the more pressing the need to act, and hence the greater possibility of acting on insufficient reflection. The proverbial inadequacies of hasty action are to the point here. The account of action in terms of unease implicitly recognizes the problems of hasty, misdirected actions.)

Locke's account of the efficient cause of human action therefore weakens the case for allotting a major role to the final cause which, he tells us, "when I first published my thoughts on this Subject, I took ... for granted". If motivated by unease, human actions aim only haphazardly at the greatest good. Locke's revised psychology of action thus weakens the supports of the "workmanship" model, with its strong teleology. This is not to say, of course, that it fatally or decisively weakens those supports. Locke is almost certainly aware of ways of reconciling mechanistic and teleological types of explanation. Most importantly, his close association with Boyle is unlikely to have left him unaware of the latter's views on efficient causes and teleology. According to Boyle, ends can be either *sought* by purposive actions, or *served* by non-purposive causes. An explanation in terms

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8 *Essay*, II.xxi.31.

9 *Essay*, II.xxi.36.

10 *Essay*, II.xxi.35.
of efficient causes is compatible with a teleological explanation as long as the end in question is served. It does not have to be sought. Locke’s shift, in his account of action, from the pursuit of the greatest good to unease is a shift from a necessarily teleological explanation to a possibly teleological one. As long as uneasiness serves to realise the greatest good, it remains an explanation compatible with teleology. The problem is that there is no guarantee that unease will reliably serve this end. It may serve this end in the long run, or in the general course of events, and it may serve the end better than any other conceivable motivation for the actions of free rational agents, but it nevertheless does not infallibly and harmoniously serve this end.

However, that the psychology of natural actions does not enable us to unfailingly pursue the greatest good is not a problem to which Locke has no answer. He would argue that, by reflecting on the nature and order of the world, we are able to recognize that the world has a designer, and that this designer has not only power, but legitimate power over his creatures. Once we see that we are subject to “the Will and Law of a God, who sees Men in the dark, has in his Hand Rewards and Punishments, and Power enough to call to account the Proudest Offender”,11 we recognize that there is one class of pleasures and pains which, although distant, are unavoidable, and that these therefore have an overriding significance. It should be stressed here that moral goodness has an overriding significance not because moral goods are intrinsic goods, nor because they are qualitatively different from other natural goods. Moral goodness is just the pleasure afforded by the rewards attached to conforming to the laws which express the divine will.12 The overriding significance of moral good or evil is simply the overriding significance (the unparalleled uneasiness excited by the contemplation) of the pleasures or pains in the hands of the “God, who sees Men in the Dark”.

Locke recognizes, however, that even the contemplation, or at least awareness, of such ultimate happiness or misery is not always sufficient to determine the will; and that moral practices therefore do not always measure up to moral professions.13 However, although

11 Essay, I.iii.6.

12 Locke distinguishes between natural and moral good in “Of Ethick in General” on just these lines. Moral good “draws pleasure or paine after it ... by the intervention of divine power.” Quoted in Colman, op. cit., p. 168.

13 Essay, I.iii.7.
men have no natural veneration for moral rules, they can learn to take pleasure in virtue. So, even though, as Locke says in a famous passage, “The Mind has a different relish, as well as the Palate”, and that therefore “the Philosophers of old did in vain enquire, whether Summum bonum consisted in Riches, or bodily Delights, or Virtue, or Contemplation”,  men through education can be “made alive to virtue and can taste it”. As several passages in his writings on education suggest, the (admittedly rocky) path to this state depends on the natural sociability of human beings, especially their desire to be esteemed by others. Because children are, from a very early age, “sensible of Praise and Commendation”, and “find a Pleasure in being esteemed, and valued”, they come to care about those things which will win them approval - at first for the sake of approval, but later simply for the things themselves. At first “the Objects of their own Desires are made assisting to Virtue”, and from being “in Love with the Pleasure of being well thought on” they can come to be “in Love with all the ways of Virtue”. In this way a self-centred psyche - concerned only with its own pleasures - can come to care for wider social goods for their own sakes. Given the necessity of society for human survival, as well as for the peculiar pleasures it affords a nature which has a strong inclination to sociability and the social life, this kind of adaptation is not the oppression of a naturally free spirit, but a rational development which supports human ends. For this reason Locke is able to say that the preoccupation with self-interest has “always been opposed by the more rational part of men, in whom there was some sense of a common humanity, some concern for fellowship”. The concern with virtue for its own sake is an integral part of this sense of common humanity.

By constructing the disinterested love of virtue from an originally self-regarding

14 ibid.

15 Essay, II.xxi.55.

16 Commonplace Book entry “Ethica” (1693); quoted by Colman, op. cit., p. 206.


18 Locke speaks of the necessity and pleasure of the social life in terms which obviously owe a good deal to Grotius and Pufendorf: God put Man “under strong Obligations of Necessity, Convenience, and Inclination to drive him into Society, as well as fitted him with Understanding and Language to continue and enjoy it” (Two Treatises, II.77).

19 ELN, Essay VIII, p. 205.
psychology this theory has an important implication. In the *Essay*, Locke holds that there are three "Laws that Men generally refer their Actions to, to judge of their Rectitude, or Obliquity". These three laws are the Divine Law, the Civil Law, and the "Law of Opinion or Reputation". As mentioned in chapter three, the Divine Law includes both special divine positive laws, and also natural laws. The Divine Law specifies strict moral rectitude—what are duties, and what sins. The Civil Law determines which actions are criminal. For this law, unlike the former, actions are measured by rewards or punishments imposed not by God but by the force of the Commonwealth. The third law concerns virtue and vice. The content of this law may be no different from the Divine Law, as Locke observes:

Vertue and Vice are names pretended, and supposed every where to stand for actions in their own nature right and wrong: And as far as they really are so applied, they so far are co-incident with the divine Law abovementioned.

The Law of Opinion is not, therefore, a law whose content is inferior to, or necessarily distinct from, the provisions of natural law. But it is nonetheless distinct from natural and other divine law because it is marked out by what men happen to believe, whether or not this is grounded in right reason. The law of opinion is constituted by the established beliefs of particular societies, and so varies from society to society. Virtue and vice, in this sense, are constituted by being judged praiseworthy or blameworthy:

this is visible, that these Names, Vertue and Vice, in the particular instances of their application, through the several Nations and Societies of Men in the World, are constantly attributed only to such actions, as in each Country and Society are in reputation or discredit. Nor is it to be thought strange, that Men every where should give the name of Vertue to those actions, which amongst them are judged praise worthy; and call that Vice, which they account blamable: Since otherwise they would condemn themselves, if they should think any thing Right, to which they allow'd not Commendation; any thing Wrong, which they let pass without Blame. Thus the measure of what is every where called and esteemed Vertue and Vice is this approbation or dislike, praise or blame, which by a secret and tacit consent establishes it self in the several Societies, Tribes, and Clubs of Men in the World: whereby several actions come to find Credit or Disgrace amongst them, according to the Judgment, Maxims, or Fashions of that place ...

That this is the common measure of Vertue and Vice will appear to any one, who considers, that though that passes for Vice in one Country, which is counted

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20 *Essay*, II.xxviii.7.


22 *Essay*, II.xxviii.10.
a Vertue, or at least not Vice in another; yet every-where Vertue and Praise, Vice and Blame, go together.\textsuperscript{23}

The Law of Opinion, then, unlike the other two laws, is distinguished not by the nature of its formal obligation - the power which enforces it - but by the manner of its generation, and by its lack of a formal obligation. It comes about because certain practices are considered praiseworthy, and it is maintained by the efficacy of praise and blame. There is no constituted or legitimate authority which establishes it, and hence it is doubtful whether it can appropriately be called a law. Locke's attempt to justify his terminology, that there is a Law of Opinion forgets that rightful authority is necessary for a formal obligation. He argues that this Law of Opinion must indeed be a law because it effectively motivates compliant behaviour. But this only shows that there is some material obligation - some inward consciousness of the desirability of praise, and of the necessity of avoiding blame - which effectively motivates human actions. On Locke's own terms, there is no rightful authority which enforces this "law", and so it is not, properly speaking, a law governing human actions.\textsuperscript{24}

Nevertheless, as he observes, the "Law of Opinion" does effectively motivate; in fact, as the passages on the education of children show, it is the pre-eminent motivation for human action. Human practice conforms to this "law" in fact, even if it properly should conform to the provisions of the Divine Law (or, to a lesser degree, of the Civil Law). So it is of great practical importance that the Law of Opinion not vary to any significant extent from the provisions of the other two laws. The Law of Opinion is necessary to support, to generate adherence to, the Divine Law in particular, since the remoteness of the latter's rewards and punishments (in the future life) leaves it most vulnerable to abuse. In fact, Locke's account of the development of virtuous conduct through the child's simple desire to please shows that the Law of Opinion is a crucial support for the law of nature, where their provisions coincide, and, where they do not, it is a powerful obstacle to the pursuit of natural justice.

It is thus important to ask, When can we expect the provisions of the two laws to coincide? The answer would appear to be, At least in those cases where a particular rule is necessary for human social life itself. But this is just the feature which characterises natural law itself - as Pufendorf says, natural law is distinguished by the fact that "the

\textsuperscript{23} \textit{Essay}, II.xxviii.10-11.

\textsuperscript{24} See \textit{Essay}, II.xxviii.12, and Colman, \textit{op. cit.}, p. 170.
reason for [it] is sought from the condition of mankind as a whole”; it “so harmonizes with the natural and social nature of man that the human race can have no wholesome and peaceful social organization without it”. In like manner, Hume speaks of the laws of nature as “what is common to any species, or even ... what is inseparable from the species”. This very necessity of natural law will make it at least unlikely that the Law of Opinion, despite allowing a great variety of views concerning the farther reaches of virtue and vice amongst the “Clubs of Men in the World”, will readily allow conceptions of virtue and vice of great variation in those matters covered by the provisions of natural law. So the dependence of the law of nature on the Law of Opinion, in order to secure compliance on a broad scale, is not a matter for great concern, since the Law of Opinion will commonly support the rational dictates of the natural law. (It will not always do so, of course - and Locke’s fascination with New World practices is a concern with just this issue.)

If, at this point, we were to revise the account of natural law so that it would require no formal element in order to be obligatory, but would instead derive its obligating force directly from the material element, the constitution of human nature itself, then we would have opened up the possibility that, because the Law of Opinion can generate the rational dictates of the natural law, then the natural law itself could be generated by the pre-reflective, or semi-reflective, practices presupposed by the Law of Opinion. By recognizing the distinction between the context of discovery (or generation) and the context of justification, we would be able to give an account of the development of dictates of right reason, natural laws, from pre-reflective, or conventional, practices. This is one of the principal elements of Hume’s account of justice. In this light, it appears to be no accident that Hume speaks the language of virtues and vices (rather than the more common jurisprudential language of rights and duties) in his account of justice, that most “perfect” of rights, and that he should stress the role of “opinion” in his account of the maintenance of a just social order.

We have shown how, despite a psychology of action which shows all human beings to aim only at their own pleasure (albeit rather indirectly, by fleeing painful uneasiness),

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26 Hume, *Treatise*, p. 484.

Locke is able to show how the desire for praise presupposed by the Law of Opinion can lead to a disinterested pursuit of the sociable maxims of natural law. This last aspect of his thought was, however, rather overlooked by his contemporary critics. We have also noticed that when he comes to speak of the suum, what is one's own propriety, he offers a narrow account. Even Hobbes, seen by many as attempting to undermine the good relations of mutual trust on which society relies,\textsuperscript{28} recognized the importance of distinctively social elements. "Of things held in propriety", he says, "those that are dearest to a man are his own life, and limbs", but the next most important, for most men at least, are "those that concern conjugall affection".\textsuperscript{29} In contrast, Locke, when he speaks of one's propriety, speaks only of life, liberty, and estate. This is despite the fact than men are "under strong Obligations of Necessity, Convenience, and Inclination" to enter into society, and are adapted for the sociable life.\textsuperscript{30} Admittedly, Locke does not talk about different levels of propriety, and perhaps if he had this matter could have been reasonably resolved. But as things stand, his contemporary critics are able to charge him with failing to understand the full ramifications of the fact that human beings are social beings, and that the story of the origins of political society, property, etc, is, even at its most atomic, the story of the interactions of human families.

This is argued most forcefully by Lord Bolingbroke. Bolingbroke stresses the intimate interconnection of natural law and sociability, a connection he sees Locke to have loosened or overlooked.

He does not, however, challenge the central role Locke accords to self-love. In an important passage in his collected "fragments" of essays, he says that:

There is a sort of genealogy of law, in which nature begets natural law, natural law sociability, sociability union of societies by consent, and this union by consent the obligation of civil laws. When I make sociability the daughter of natural law, and the granddaughter of nature, I mean plainly this. Self-love, the original spring of human actions, directs us necessarily to sociability.\textsuperscript{31}

\textsuperscript{28}The most entertaining, at least, of such critics of Hobbes was John Eachard, who satirises Hobbes's views on human nature in \textit{Mr. Hobbs's State of Nature Considered, in a Dialogue between Philautus and Timothy} (1672), Liverpool: Liverpool University Press (1958).

\textsuperscript{29}Hobbes, \textit{Leviathan}, ch. XXX; Macpherson edition, pp. 382-3.

\textsuperscript{30}\textit{Two Treatises}, II.77.

For failing to see how important is sociability, just how intimate is its connection with the self-love which founds natural law; by representing mankind, in other words, "like a number of savage individuals out of all society", Locke, one of "our best writers", has reasoned "both inconsistently, and on a false foundation".\(^2\) Human beings are, and always have been, social creatures, not solitary individuals, even in the rudest or most primitive of states, and even though their actions all spring from self-love.

Locke's most radical critic, however, is his own pupil, the third Earl of Shaftesbury. In his main work, *Characteristics of Men, Manners, Opinions, Times*, and in particular in his letters, Shaftesbury denounces the attempt to derive moral practices from self-love. It is, he believes, to abolish sociableness and morality, and to replace it with mere self-interest.\(^3\) Against such accounts he stresses both the strength of the social passions, and their irreducibility to any hidden principles of self-love. He suggests that even social disorder can be traced to the strength of the social passions:

> For my own part, methinks, this herding principle, and associating inclination, is seen so natural and strong in most men, that one might readily affirm 'twas even from the violence of this passion that so much disorder arose in the general society of mankind.\(^4\)

The irreducibility of the social passions is affirmed by the crucial doctrine of the moral sense. The importance of the moral sense doctrine for the later natural law theorists is difficult to overstress, providing as it does the cornerstone of a psychology of action in which the social passions are at the heart. Sociability is, for them, constructed directly from the social passions. This is shown by Hutcheson's defence of Shaftesbury's doctrine.


> "Such words as courage, friendship, love, and public interest, words which seem to denote altruistic acts or tendencies, are found to mean, on Hobbes's view, nothing different from their apparent opposites, for all acts and tendencies are similarly motivated and hence all are at bottom alike."

\(^4\) Shaftesbury, *Characteristics*, I, 75. Hume records his indebtedness to Shaftesbury for stressing this point. In the earlier versions of his essay "Of the Dignity or Meanness of Human Nature", he says, "I shall observe, what has been prov'd beyond Question by several great Moralists of the present Age, that the social Passions are by far the most powerful of any, and that even all the other Passions receive from them their chief Force and Influence. Whoever desires to see this Question treated at large, with the greatest Force of Argument and Eloquence, may consult my Lord SHAFTSBURY'S Enquiry concerning Virtue". (*Essays, op. cit.*, I, 154n.)
of the moral sense, a doctrine that there is a fundamental benevolent principle in human nature. In Hutcheson's terms, we are so constituted that we perceive

an immediate natural Good in the Actions call'd Virtuous; that is, That we are determin'd to perceive some Beauty in the Actions of others, and to love the Agent, even without reflecting upon any Advantage which can in any way rebound to us from the Action.\(^{35}\)

Of course, if it is believed, as Bolingbroke and many others obviously did believe, that self-love, properly understood, itself generates social affections, and generally drives us to the social life, then there will be no special incentive to abandon the self-love account in favour of a moral sense theory. This will be so even if the latter is able to capture some of our intuitions about how we see ourselves to be affected by the actions, or the fortunes or misfortunes, of others. A well-worked out theory of the springs of action can survive specific weaknesses if it is thought to offer a unifying account of human action. If the alternative theory is itself seen to embody seriously implausible assumptions, then the established theory is, by default, all the more preferable. For Bolingbroke, this is the case with respect to the self-love theory: the moral sense alternative requires committing oneself to discredited or absurd views. In a passage in his Essays on Human Knowledge, clearly aimed at Shaftesbury, he rejects any appeal to a moral sense, "for to assume any such natural instinct is as absurd as to assume innate ideas, or any other of the Platonic whimsies".\(^{36}\)

In holding this, Bolingbroke is mistaken; but it is nonetheless understandable that he should have perceived there to be a close connection between the two doctrines. This is because Shaftesbury himself obviously sees a close connection between them. Whether this is because he sees the objects perceived by the moral sense to be innate ideas, or for some other reason, cannot be resolved here. But he at least regards innate ideas as a bulwark of true morality against the self-love theorists, the enemies of morality. For this

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\(^{35}\)Hutcheson, An Inquiry concerning Beauty and Virtue, second edition (1726), facsimile edition, New York: Garland (1971), p. 115. That Hutcheson's purpose is to defend Shaftesbury's doctrine in the Inquiry is shown by the sub-title to the first edition (1725): in this work, "the Principles of the late Earl of Shaftesbury are explained and defended." Although this sub-title was dropped from later editions, this is not because of a change of heart by Hutcheson. Shaftesbury remains "that ingenious Nobleman", and his works a model of humane learning, as one observation in the Inquiry (second edition, p.xxi) stresses:

To recommend the Lord SHAFTESBURY'S Writings to the World, is a very needless Attempt. They will be esteemed while any Reflection remains among Men."

\(^{36}\)Bolingbroke, Works, III, p. 399.
reason, Shaftesbury fiercely criticises Locke's rejection of innate ideas, holding it to be a rejection of moral virtue itself. So, although Shaftesbury sees Hobbes as a manifest enemy of morals, by his reduction of all virtue to self-interest, Locke's account of morals in terms of experience and custom makes him a more dangerous, because more insidious, enemy:

It was Mr Locke that struck the home blow: for Mr Hobbes' character and base slavish principles in government took off the poison of his philosophy. "Twas Mr Locke that struck at all fundamentals, threw all order and virtue out of the world and made the very ideas of these ... unnatural and without foundation in our minds.

This is so because virtue, according to Mr Locke, has no other measure, law, or rule, than fashion and custom; morality, justice, equity, depend only on law and will ... And thus neither right nor wrong, virtue nor vice, are anything in themselves; nor is there any trace or idea of them naturally imprinted on human minds. Experience and our catechism teach us all.37

For Hutcheson, however, the case is rather different. Although he presents himself as a defender of Shaftesbury's doctrines, and identifies the self-love theory of morals as his target - represented by Hobbes,38 and also by "the Author of the Fable of the Bees"39 - he does not see the doctrine of the moral sense as part of a defence of innate ideas. In fact, he explicitly denies that the moral sense depends on any doctrine of innate ideas:

We are not to imagine that this moral Sense, more than the other Senses, supposes any innate ideas, Knowledge, or practical Proposition.40

Not surprisingly, then, Hutcheson is little concerned to criticise Locke, even though the latter founds morality on self-love. This is not, for Hutcheson, sufficient to make Locke (or even Hobbes, for that matter) an enemy of morality. The self-love theory fails, not

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38 The doctrine "That all the desires of the human Mind, nay of all thinking Natures, are reducible to Self-Love, or Desire of private Happiness" is the doctrine of "the old Epicureans", now "revived by Mr Hobbes, and followed by many better Writers." Hutcheson, An Essay on the Nature and Conduct of the Passions and Affections, with Illustrations on the Moral Sense (1728), introduction to the Illustrations, in Collected Works, vol. II, pp.207-8.

39 Inquiry, sub-title to first edition (1725).

because it undermines morality, but because it does not measure up to the facts. It is forced to provide tortuous stories for the most simple and familiar of unselfish acts. In treating of “our Desires or Affections”, the self-love theorists have been forced to make “the most generous, kind, and disinterested of them, to proceed from Self-Love, by some subtle Trains of Reasoning, to which honest Hearts are often wholly Strangers”.\footnote{Preface to \textit{Essay}, \textit{op. cit.}, p. vi; see also Introduction to \textit{Illustrations, op. cit.}, p. 209.}
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