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Hugo Grotius and Private Property [1]

Billy Christmas

The institution of private ownership is typically thought to give an owner the right to exclude all other persons from her property. [2] There is an endless supply of work in normative philosophy and social science which seeks to justify or vindicate such exclusionary practices based upon the support it provides to an extended system of social cooperation, security, and prosperity, such as is enjoyed by an increasing number of people to this day. [3] Such work can be viewed as potential consequentialist justification for the overall practice of private property. However, when it comes to the deontological justification for the precise *structure* of private property, matters become more difficult.

Private ownership is often viewed as a bundle of rights: [4] various rights to both use the owned object, and exclude others from use of the owned object. The former rights of use do not appear to call for such urgent deontic justification as the right to exclude. There are any number of plausible reasons to think persons can use parts of the world for their ends that immediately come to mind. Any account of human survival or flourishing requires us to be permitted to impress our will upon the natural world. However, the right to exclude others from doing this appears—at first blush—to run directly *counter* to that intuition. The right to exclude others, which is essential to private property, empowers owners to stop people from using particular parts of the world *altogether*. How is it that

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1 - I am thankful to Ben Bryan, Richard Epstein, Éric Fabri, Carmen Pavel, Mario Rizzo, David Schmidtz, as well as an anonymous reviewer of *Raisons politiques* for very helpful feedback on earlier drafts of this paper.

2 - I use "private ownership", "private property", and "full liberal ownership", interchangeably.

3 - There is of course a perhaps equal volume of work attacking it.

4 - For early uses of the bundle of sticks metaphor for property, see John Lewis, *Law of Eminent Domain*, Chicago: Callaghan & Co., 1900 [2nd ed.], p. 56; Benjamin N. Cardozo, *Paradoxes of Legal Science*, New York: Columbia University Press, 1928, p. 129. The metaphor was famously given more precise formulation in Anthony (Tony) M. Honoré, "Ownership", in Anthony Gordon Guest (ed.), *Oxford Essays in Jurisprudence*, London: Oxford University Press, 1961. For critique see James E. Penner, "The 'Bundle of Rights' Picture of Property", *UCLA Law Review*, 43, 1996, pp. 711-820; Daniel Attas, "Fragmenting Property", *Law and Philosophy*, 25, 2006, pp. 119-149. The debate between bundle theory and property essentialism is too expansive to properly document here, but for a recent overview see Katrina Wyman, "The New Essentialism in Property", *The Journal of Legal Analysis*, 9:2, 2017, pp. 183-246.

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a person can have the right to exclude others, not only from uses of their property which harm them, but from any use whatsoever?

Many political philosophers take exclusion as an essential characteristic of private property for granted, and simply ask how it ought to be distributed. [5] However, this paper attempts to demystify the right of exclusion that is essential to private ownership. It does so through the lens of the work of one important property theorist, Hugo Grotius. Grotius himself was perplexed as to how exclusion could be justified by historical accounts of natural law and natural rights, and eventually concluded that it must be justified by social contract: the idea that we would all rationally consent to being bound by such a property system justifies the system, along with the political authority used to enforce it. My thesis, however, is that Grotius was mistaken to think that he needed to lean on a social contract to justify the right of exclusion. Grotius's account of the universal right to unilaterally *use* natural resources—which did not depend upon a social contract—presumes a natural right to exclude others to the extent necessary for use. That right to exclude extends with use. Moreover, use often extends far enough that the exclusion required to protect it is identical to that which characterises private ownership. Grotius's account of primitive property therefore in fact contained a theory of unilateral appropriation.

The intention of this paper is to clarify the proper application of Grotian natural rights, namely that Grotius's own application of them was mistaken. The truth of my conclusion draws into question those accounts of rights which rely on a strong dichotomy between use and ownership. Those theories fall broadly into two camps: Lockean and Kantian.

Lockeans argue that whilst a natural right to liberty can explain why we may unilaterally *use* external resources, it does not justify our *ownership* of them. At this point, they invoke parallel egalitarian principles for the distribution of ownership. Since liberty itself cannot justify unilateral ownership, ownership must be justified (and distributed in accordance with) equality. [6]

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5 - See Karl Widerquist & Grant McCall, *Prehistoric Myths in Modern Political Philosophy*, Edinburgh: Edinburgh University Press, 2017, for criticism of this tendency. This approach is common to all accounts of liberal distributive justice. However, the matter becomes complicated when one considers how rights to property have to be divided between the state and citizens for states to have the power to enforce property rights, and to sustain a particular distribution. Robert Nozick astutely observed that if what the state is distributing is private property, then it has very limited powers to *re*distribute it, since owning something entails excluding others from taking it for other purposes. See Robert Nozick, *Anarchy, State, and Utopia*, New York: Basic Books, 1974, pp. 153-164; cf. Roderick T. Long, "Robert Nozick: Philosopher of Liberty", *The Freeman: Ideas on Liberty*, 52:9, 2002, pp. 30-33. Indeed, some authors explicitly note how the idea of private property should be done away with for distributive justice to be satisfied, with no one necessarily fully owning anything. See Joshua Cohen, "The Economic Basis of Deliberative Democracy", *Social Philosophy & Policy*, 6:2, 1989, pp. 25-50, esp. p. 49; John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership,* New York: Oxford University Press, 1994.

6 - Lockean though it is, it is a minority view among Lockeans limited to those self-identifying as "left-libertarian". See Peter Vallentyne, "Introduction: Left-Libertarianism—A Primer", in Peter Vallentyne & Hillel Steiner (eds.), *Left-Libertarianism and its Critics: The Contemporary Debate*, New York: Palgrave Macmillan, 2000; Hillel Steiner, "Corrective Rights", in Mark McBride (ed.), *New Essays on the Nature of Rights*, Oxford: Hart Publishing, 2017.

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Kantians argue that a natural right to use external resources can only justify a very primitive kind of property, and in order justify the sort of exclusion required of private property, political authority must be convened. Many in the latter group also count as members of the former insofar as they call for an egalitarian distribution of property after the convention of a political authority. [7]

I will first go over the main steps in Grotius's account of primitive property, then I will highlight where Grotius stumbles in finding a natural justification for private property, and resorts to social contract. I will then give an account of private property that is grounded in the jurisprudential literature and show how Grotian use-rights do not differ in kind from private ownership, but rather, that private ownership is just a particularly expansive kind of use-right.

Hugo Grotius and Primitive Property

In *Mare Liberum*, [8] or *The Freedom of the Seas*, Hugo Grotius seeks to defend the right of all peoples (particularly the Dutch) to navigate the seas for the purposes of trade. In his later work, *De Jure Belli ac Pacis*, or *The Law of War and Peace*, [9] he defends the right of individuals and states to use force to defend their rightfully held property and territory, respectfully. Both texts had an important impact on the discourse of empire at the time, [10] and continue to be important sources of international law to this day. [11] Central to the right of all people to engage in seafaring trade was that the oceans were not reducible

7 - Helga Varden, "Kant's Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature", *Kantian Review*, 13:2, 2008, pp. 1-45; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, Cambridge: Harvard University Press, 2009; "Possession and Use", in James E. Penner & Henry Smith (eds.), *Philosophical Foundations of Property Law*, New York: Oxford University Press, 2013; Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State,* Princeton: Princeton University Press, 2009, ch. 2; "Nations, States, and Territory", *Ethics*, 121:3, 2011, pp. 572-601; "Provisional Right and Non-State Peoples", in Katrin Flikschuh & Lea Ypi (eds.), *Kant and Colonialism: Historical and Critical Perspectives*, Oxford: Oxford University Press, 2014; "Property Rights: Natural or Conventional?", in Jason Brennan, Bas van der Vossen & David Schmidtz (eds.), *The Routledge Handbook of Libertarianism*, New York: Routledge, 2018; "Unilateral Appropriation and Territory", unpublished chapter (http://www.law.nyu.edu/sites/default/files/upload_documents/Stilz_NYU.pdf); Louis-Philippe Hodgson, "Kant on Property Rights and the State", *Kantian Review*, 15:1, 2010, pp. 57-87; Japa Pallikkathayil, "Deriving Morality from Politics: Rethinking the Formula for Humanity", *Ethics*, 121:1, 2010, pp. 116-147; Mathias Risse, *On Global Justice*, Princeton: Princeton University Press, 2012, ch. 5; Rafeeq Hasan, "The Provisionality of Property Rights in Kant's Doctrine of Right", *Canadian Journal of Philosophy*, 48:6, 2018, pp. 850-876; Thomas Sinclair, "The Power of Public Positions: Official Roles in Kantian Legitimacy", in David Sobel, Peter Vallentyne & Steven Wall (eds.), *Oxford Studies in Political Philosophy*, vol. 4, Oxford: Oxford University Press, 2018.

8 - Hugo Grotius, *Mare Liberum*, trans. Ralph Van Deman Magoffin, Oxford: Oxford University Press, 1916 (1608).

9 - Hugo Grotius, *De Jure Belli ac Pacis*, J. Barbeyrac & R. Tuck (eds.), Indianapolis: Liberty Fund, 2005 (1625).

10 - See Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000*, Cambridge: Cambridge University Press, 2014.

11 - See Hedley Bull, Benedict Kingsbury & Adam Roberts (eds.), *Hugo Grotius and International Relations*, Oxford: Oxford University Press, 1992.

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to private ownership or sovereign territory in the way land and chattels were, and hence must remain in common or *res communis*. Likewise, central to the right of states to protect and defend their territory was an account of how they legitimately acquire territorial sovereignty that was roughly analogous to the way in which individual property entitlements arise. Important to both projects, then, was an account of private property, common property, and national territory. [12] Grotius used a natural law method to develop a sophisticated account of property that was self-consciously grounded, at least in spirit, in the Roman law of *occupatio*. [13] Grotius has therefore become an important figure in natural law or natural rights approaches to property and justice. [14]

Grotius believed that in a state of nature—that is, prior or anterior to the convention of any political authority such as a state—private property could not be justified. However, he did believe that something resembling private property would justly exist in that state; a kind of *primitive property*. This section will go through Grotius's account of primitive property, highlighting the four key components to it. We can then go on to look at why he thought this was as far as property rights could go in a state of nature, and why he was mistaken.

The Grotian account of primitive property can be summarised thus: he believed that in a state of nature, common ownership of the Earth implied that any person could unilaterally use the Earth's natural resources. This right of use was not Hobbesian, i.e. coming into direct conflict with a like right in each other person, but rather, it correlated with duties of non-interference in others. However, he understood private property to give one the right to exclude others from resources even after one had relinquished possession of them. One could sit on the ground thereby excluding others from that patch, but when one gets up and moves on, one could not so exclude others from sitting there. Likewise, one could eat apples growing in a wild orchard, but one could not stop others from eating apples from the same tree. The property rights one could acquire a state of nature were therefore very spatially and temporally stunted.

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12 - Though his account of our original, natural rights in a state of nature is the same in both texts, the account of private property given in *Mare Liberum* was far less developed, and substantively different from that given in *De Jure Belli ac Pacis*. Grotius vaguely invoked convention and expediency in the earlier work, and then pivoted to consent in the later. The thesis of this chapter is that he should have made more of the earlier view, rather than pivoting to the later one. The Grotian view that I am critical of here, then, is the one expressed in *De Jure Belli ac Pacis*.

13 - Andrew Fitzmaurice, *Sovereignty, Property and Empire...*, *op. cit.*, p. 96. Also corroborated by Grotius's frequent appeal to Justinian for authority throughout *De Jure Belli ac Pacis*.

14 - See Richard Tuck, *Natural Rights Theories: Their Origin and Development,* Cambridge: Cambridge University Press, 1979, ch. 3; Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*, Grand Rapids: Eerdmans, 1997, ch. 6; John Salter, "Hugo Grotius: Property and Consent", *Political Theory*, 29:4, 2001, pp. 537-555; "Grotius and Pufendorf of the Right of Necessity", *History of Political Thought*, 26:2, 2005, pp. 285-302; Mattias Risse, *On Global Justice*, Princeton: Princeton University Press, 2012; Anna Stilz, "Unilateral Appropriation and Territory", unpublished chapter (http://www.law.nyu.edu/sites/default/files/upload_documents/Stilz_NYU.pdf).

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The four key components to Grotius' theory of primitive property can be distilled from the following passage of *De Jure Belli ac Pacis*:

> Almighty GOD at the Creation, and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World. *All Things*, as *Justin* has it, *were first in common, and all the World has, as it were, but one Patrimony*. From hence it was, that every Man converted what he would to his own Use, and consumed whatever was to be consumed; and such a Use of the Right common to all Men did at that time supply the Place of Property, for no Man could justly take from another, what he had thus first taken to himself; which is well illustrated by that Simile of *Cicero, Tho' the Theatre is common for any Body that comes, yet the Place that every one sits in is properly his own.* [15]

There are four key points to take away from this passage:

(1) Common ownership grounds a universal use-right.

(2) Use-rights become vested when exercised.

(3) Use-rights are regarded as a kind of primitive property right.

(4) Use extends somewhat beyond mere physical connection.

I will go through each of these points to show how they contribute to his theory of primitive property. Later we will see how they contain the kernel of a theory of unilateral appropriation.

1. Grotius believed that the world's resources were originally commonly held by all of humanity. ("Almighty GOD at the Creation, and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World. *All Things*, as *Justin* has it, *were first in common, and all the World has, as it were, but one Patrimony*.") This was a common view among natural law theorists, and represented a radical departure away from collectivist, status-based social thought, and towards individualist, liberal equality. Robert Filmer, for example, famously defended patriarchy and monarchy on the pretence that God originally gave the Earth to Adam, to be inherited by his son, etc. [16] Every person having, in one way or another, an equal claim to the Earth represents the radical notion that there is no natural authority. [17] Not everyone who believed in the common ownership of Earth, however, agreed precisely on the nature of that common ownership.

Samuel Pufendorf, for example, understood the original common ownership of the earth as ownership by the community as a whole. Consequentially, he argued that the disposition of the world's resources was subject to communal consent. Some kind of social contract was therefore not only

15 - Hugo Grotius, *De Jure Belli ac Pacis*, *op. cit.*, § II.II.II (italics in original).

16 - Robert Filmer, *Patriarcha: of the Natural Power of Kings*, London: Richard Chiswell, 1680.

17 - Also see Locke's remarks about why, even *if* one person did own the whole world, they would still not have authority over all the others, in his *Two Treatise of Government*, London: Everyman's Library, 1986 (1689), §§ 1.23, 1.42.

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required before there could be any private property, but before there could be use of natural resources whatsoever. He said that:

> we cannot apprehend how a bare corporal Act, such as Seizure is, should be able to prejudice the Right and Power of others, unless their Consent be added to confirm it; that is, unless a Covenant intervene. [18]

Under this account of common ownership, everything comes after the social contract. But Grotius thought there was a lot going on prior to it.

Grotius's notion of common ownership was, rather than communal ownership, a kind of *non*-ownership: no person or group having any specific property rights over any part of them. Given that no person had any special or specific claim to any part of the natural world, anyone was permitted to use any part of it that they might choose in the attainment of their ends. ("*All Things... were first in common...* From hence it was, that every Man converted what he would to his own Use.") Each person had "the privilege of lawfully using common property". [19] One needed no permission to unilaterally make use of the natural world, and use it in the attainment of one's ends. Occupying land with one's body, consuming whatever naturally grew, felling trees for fire logs, etc. [20] For Grotius, the whole point of God's gift of dominion over the natural world is that we use it for our self-preservation, so we do not need to get approval from the community before we do that, because we already have the relevant permission from God. [21] Locke, likewise was concerned that if agreement had to be sought before anyone could obtain subsistence, then "man [would have] starved, notwithstanding the plenty God had given him". [22]

2. The right to use the world that Grotius takes to be entailed by common ownership is not Hobbesian liberty, giving me the right to do what I want, and giving you the right to do whatever you can to stop it. [23] Rather, it is correlated with duties in others that render each person's use-right compatible

18 - Samuel von Pufendorf, *De Jure Naturae et Gentium, libri octo*, vol. 2, trans. C. H. & W. A. Oldfather, Oxford: Clarendon, 1934 (1672), § IV.V.4. Also see footnote 25, below.

19 - Hugo Grotius, *Mare Liberum*, *op. cit.*, § V.3.

20 - On the two rival accounts of common ownership, see Richard Schlatter, *Private Property: The History of an Idea,* London: Allen & Unwin, 1951, p. 145; John Salter, "Hugo Grotius: Property and Consent", art. cit., p. 547, in which the difference between communal ownership and non-ownership is parsed as one between positive community and negative community.

21 - Though Grotius did believe that the truths of natural law would hold even if there were no God (cf. the Prolegomena to *De Jure Belli*).

22 - John Locke, *Two Treatise*, *op. cit.*, II.V.28; cf. Anthony Fressola, "Liberty and property: Reflections of the Right of Appropriation in the State of Nature", *American Philosophical Quarterly*, 18:4, 1981, pp. 315-322, esp. p. 315; G. A. Cohen, *Self-Ownership, Freedom, and Equality*, Cambridge: Cambridge University Press, 1995, p. 98; Murray N. Rothbard, *The Ethics of Liberty*, New York: New York University Press, 1998, ch. 8.

23 - Thomas Hobbes, *De Cive*, ed. Howard Warrender, Oxford: Clarendon Press; *Leviathan*, ed. Noel Malcolm, Oxford: Oxford University Press, 2012 (1651).

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with everyone else's. [24] Whilst everyone is initially free to use whichever part of the world they might choose to for their ends—given that original common ownership is understood as non-ownership—once a person does engage in some use of a resource, no one else may engage in any use thereof that might interfere. ("[N]o Man could justly take from another, what he had thus first taken to himself.")

In H. L. A. Hart's useful terminology, [25] initially, each person's use-right is *naked* – that is, unprotected by any duties in others to forbear from actions which might interfere with its exercise. [26] However, once that naked liberty is exercised in a particular way, say, by picking an apple from a tree to eat, one's liberty to eat that apple becomes *vested* by a duty in others not to interfere with one's eating it. Whilst one remains at liberty in the naked sense to help oneself to further apples thereafter, until one actually initiates such action, others are also at liberty to do the same, in a naked sense. Whoever initiates a particular use first, gets to carry on that use unmolested until they quit it. If one eats half the apple and discards it, others may then come and eat the remains themselves without violating any right. One's naked liberty to use natural resources is vested in particular ways when one exercises it in that particular way, and ceases to be so when one so ceases to exercise it. [27]

3. It is for this reason that Grotius regarded the universal use-right as a kind of property right. ("[S]uch a Use of the Right common to all Men did at that time supply the Place of Property, for no Man could justly take from another, what he had thus first taken to himself.") But Grotius was adamant that this primitive property right was not the same as a private property right. The former is more transient and spatially stunted. William Blackstone elucidates the Grotian account of primitive property thus:

> For, by the law of nature and reason, he, who first began to use [a resource], acquired therein a kind of transient property, that lasted so long as he was using it, and no longer... Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it wold have been unjust, and contrary to the law of nature, to have driven him by force: but the instant the he quitted the use or occupation of it, another might seize it, without injustice. [28]

24 - Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", *The Yale Law Journal*, 26, 1917, pp. 710-770.

25 - H. L. A. Hart, *Essays on Bentham*, Oxford: Oxford University Press, 1982, pp. 171-173; cf. Hillel Steiner, *An Essay on Rights*, Oxford: Blackwell, 1994, pp. 75-76, pp. 87-91.

26 - Though, it is not *completely* so unprotected. We will return to this issue below.

27 - Mattias Risse's claim, then, that in a Grotian state of nature there are "only liberty rights" with no accompanying claim rights, is mistaken. What Risse should have said is that there are no claim rights *beyond* those necessary to vest each person's liberty right to use natural resources, whilst exercising it. Mattias Risse, *On Global Justice*, Princeton: Princeton University Press, 2012, p. 96.

28 - William Blackstone, *Commentaries on the Laws of England in Four Books*, vol. 1, Philadelphia: J. B. Lippincott, 1893 (1753), § II.I.

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A use-right that others are duty-bound to respect is a kind of *property* right because it gives its holder a right of exclusion over a particular range of objects or spaces. When one uses a patch of ground to rest, no other person may use that patch of ground in a way that would interfere with the use one is already making of it—one may exclude others from making such uses of that particular patch of ground. [29] Any use of a resource requires *some* exclusion because it is going to be rival with *some* other use thereof. [30] Therefore if that use is rightful, then exclusion of any interfering use is also rightful. [31] However, this property right is purportedly *primitive* because it does not extend, spatially or temporally, far enough to be considered a *private property right*. One's right to a thing extends no further than one's actual use thereof—one has no right to exclude others from using parts of it not implicated in one's use, nor from using it once one has concluded one's use. This is what Grotius regarded as the stumbling block to private property.

4. However, it is crucial to note that what constitutes use of a resource, for Grotius, is *somewhat* spatially and temporally extended. When he refers to use, he means something more substantive than mere physical contact between a resource and one's physical body. Immanuel Kant argued that the duty to respect somebody else's possessions in a state of nature—to the extent that one is in fact duty-bound to do so—is a simple implication of one's duty not to assault them. When someone is physically attached to an object, such as by holding it or wearing it, to interfere with that object necessarily entails interfering with their body. [32] This kind of possession Kant referred to as "empirical possession". [33] But a Grotian use-right goes beyond this: abstaining from interfering in someone else's use of a resource goes beyond respecting the physical integrity of her body. Grotius uses the example of theatre seats, referring to Cicero ("*Tho' the Theatre is common for any Body that comes, yet the Place that every one sits in is properly his own*"). One's use of a theatre seat goes beyond one's physical contact with it; one's claim to it survives trips to the toilet, to the bar at the interval, etc. He also refers to one's use of animal skins for clothing and caves for shelter. A Grotian right to use a cave for shelter does not permit others come in so long as they do not assault you, else they could transform the cave in ways which, though making no contact with your body, stopped you from being able to use it *as* shelter (damaging it so rain gets in,

29 - Tuck likewise understood the Grotian universal use-right as being "not categorically dissimilar" to private property, because both involved the right to exclude others. Richard Tuck, *Natural Rights Theories…*, *op. cit.*, p. 61.

30 - John Salter, "Hugo Grotius: Property and Consent", art. cit., p. 544; cf. Hillel Steiner, "The Structure of a Set of Compossible Rights", *The Journal of Philosophy*, 74:12, 1977, pp. 767-775; Hillel Steiner, *An Essay on Rights*, *op. cit.*, pp. 74-101.

31 - Pufendorf agreed, but normatively inverted the argument: since all use requires exclusion, and all exclusion requires consent, all use requires consent. Samuel von Pufendorf, *De Jure Naturae et Gentium*, *op. cit.*, §§ IV.IV.9, IV.IV.13.

32 - Immanuel Kant, *The Metaphysics of Morals*, trans. Mary J. Gregor, Cambridge: Cambridge University Press, § VI.248; Arthur Ripstein, *Force and Freedom…*, *op. cit.*, p. 94.

33 - Immanuel Kant, *The Metaphysics of Morals*, *op. cit.*, § VI.250.

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or so that it becomes impossible to move around inside, for example). If it were merely a right to physical, bodily integrity, which, technically, protected one's empirical possessions, he would not have been so illustrative about the kinds of ways in which persons in a state of nature enjoy this right. Though the universal use-right may well be connected to personal, bodily rights, [34] he consistently describes it as a use-right, not a physical-connection-right that is the mere application of rights to one's physical body. [35] Grotius's account of use, then, is akin to Kantian intelligible possession: the kind of possession that is not instantiated merely by physical connection and which is intelligible to other actors. [36] The moment someone removes their body from their theatre seat, it does not become fair game; it is still "in use", and anyone acquainted with theatre-going can tell that a person does not abandon their claim to their seat when their body is no longer in contact with it. [37] Grotius's application of the use-right is, however, limited to primitive forms of use: direct consumption, personal use, etc. We will discuss this bounding of intelligible use later.

The fact that use-rights do indeed extend beyond mere physical contact is key to understanding why they can ground private property and not merely primitive property. Before we get to that, however, we need to clarify exactly what private property is.

Private Property

A common caricature of private property in the philosophical literature is well expressed by Blackstone: private property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe". [38] This caricature is, as caricatures are, misleading in a useful way. The typical view of private ownership in the jurisprudence literature is that the exclusionary aspect of private property *is* essential to it, but the nature of that exclusion is overstated if it is taken at Blackstone's literal word. It is the working concept of private ownership that I intend to now elucidate, not in order to vindicate this as the correct conception, but rather to show how Grotius's account of original rights actually permits individuals to unilaterally appropriate resources—that is, to acquire private ownership over them—without recourse to communal consent.

34 - Grotius says that "our Lives Limbs, and Liberties had... been properly our own, and could not have been (without manifest Injustice) invaded." (*De Jure Belli*, *op. cit.*, § I.II.III).

35 - Though, Salter seems to dissent. (John Salter, "Hugo Grotius: Property and Consent", art. cit., p. 544).

36 - As Anna Stilz parses it, intelligible possession is "a form of possession that does not require us to physically hold a thing in order for us to [be] wronged by someone else's use of it without our consent." Anna Stilz, *Liberal Loyalty...*, *op. cit.*, p. 42.

37 - Eric Mack, "Self-Ownership and the Right of Property", *The Monist*, 73:4, 1990, pp. 519-543, esp. pp. 528-529; A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge: Cambridge University Press, 2001, p. 239.

38 - William Blackstone, *Commentaries on the Laws of England in Four Books*, *op. cit.*, § II.I.

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In a seminal piece on private property, A. M. Honoré argued that ownership consists of eleven juridical "incidents", namely, the right to possess, the right to use, the right to manage, the right to income, the right to capital, the right to security, transmissibility, absence of term, prohibition of harmful use, liability to execution, and residuary character.[39] All these particular rights form the bundle of rights, bound together into what is often called "full liberal ownership". The right of possession—the first of the eleven in the list—is understood as a right to have exclusive control over the owned thing.[40] This right of exclusive control is open ended. One's exclusive control is protected in control towards a certain in or for a certain purpose. When one is said to "take control of the vehicle", this generally implies that one is keeping the car on the road. Or when a leader in a crisis "takes control of the situation", she typically navigates out of the crisis somehow. The kind of control that is assigned to an owner in virtue of her right of exclusive control is not teleological in this sense. As Hillel Steiner puts it, "one *controls*... a thing inasmuch as what happens to that thing—allowing for the operation of physical laws—is determined by no person other than oneself".[41] The right of exclusive control an owner has is open-ended, and not contingent upon them using their property for some specific range of ends.[42] The right to exclude, under the standard view, is not a function of any particular right to use one's property in any particular way, but is rather *independent* of any particular use-right. In J. E. Penner's words, it gives one "a protected sphere of indefinite and undefined activity".[43]

David Schmidtz has argued that an appropriate metaphor for private property is not a bundle of sticks, but rather a tree, with the trunk representing the right to exclude, and the branches representing the other various incidents.[44] If some of the branches are cut off, the tree is still a tree; a different tree perhaps, but a tree. Likewise, if one, for example, did not have the right to the full rental income from one's land, or to build structures over twenty stories high upon it, one does not *thereby* cease to be the land's owner, even if one may not own it in the fullest possible sense. If one takes away the trunk of the tree, one is left with a bundle of branches. Likewise, if one takes away the right to exclude, one is left with a bundle of various use-rights. The trunk unites and incorporates the branches into a single tree,

39 - Anthony (Tony) M. Honoré, "Ownership", in Anthony Gordon Guest (ed.), *Oxford Essays in Jurisprudence*, *op. cit.*, pp. 123-124.

40 - *Ibid.*, pp. 113-115.

41 - Hillel Steiner, *An Essay on Rights*, *op. cit.*, p. 39, fn. 44; cf. John Christman, *The Myth of Property...*, *op. cit.*, p. 128.

42 - Though, of course, they may not use it to harm other people, hence the incident of prohibition of harmful use.

43 - James E. Penner, *The Idea of Property in Law*, Oxford: Clarendon Press, 1997, p. 72.

44 - David Schmidtz, "Functional Property, Real Justice", keynote address, Berlin: European Liberal Forum, November 2009, p. 7; "Property and Justice", *Social Philosophy & Policy*, 27:1, 2010, pp. 79-100, p. 80; "Property", in George Klosko (ed.), *The Oxford Handbook of The History of Political Philosophy*, Oxford: Oxford University Press, 2011, pp. 599-600.

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just as the right to exclude unites and incorporates the various rights into an instance of ownership. [45]

Whilst exclusion is therefore taken to be essential to ownership, where Blackstone's remark begins to look like a caricature is when one recognises that this right of exclusion cannot be, and is seldom taken to be, absolute. The freedom an owner has with regards to her property, while unconnected to any particular use thereof, is never unlimited. One may not exclude other parties from effecting literally *any* physical change to one's private property because in a complex and ecological environment, that would prohibit far too much. [46] Private ownership cannot come with the kind of total exclusion that political philosophers take it to, [47] nor can that exclusion—whatever its extent—be completely divorced from use. [48] If one land-owner, *A*, has the right to exclude her neighbouring land-owner, *B*, from causing *any* physical change whatsoever to *A*'s property, *B* is not going to be able to do almost *anything* with her own property, and vice versa. Not only will *B*'s cultivation of crops alter the composition of the soil and the disposition of the water table in such a way as to effect some degree of physical change to *A*'s land, but *B*'s mere walking around on her land will reflect photons from the sun onto *A*'s land. The problem, as Penner notes, is that "[n]othing in the world is naturally of exclusive interest only to the one most closely associated with it". [49] Each property owner needs some "elbow room" within which to use their own property, this means that their rights to exclude others can never be totalising, so that the overall set of property rights facilitates activity in relation to property, rather than blockades it. [50]

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45 - It is this aspect of ownership, however, that I will contest. I believe that a right of exclusion can be sufficiently expansive without it being independent of the other use-rights.

46 - Richard Epstein, "Property Rights, State of Nature Theory, and Environmental Protection", *New York University Journal of Law and Liberty*, 4, 2009, pp. 1-35.

47 - It is *critics* of private property, rather than its defenders, however, that take it to include total exclusion. E.g. Peter Railton, "Locke, Stock, and Peril: Natural Property Rights, Pollution, and Risk", in Mary E. Gibson (ed.), *To Breathe Freely: Risk, Consent, and Air*, Totowa: Rowman & Allanheld, 1985; David Sobel, "Backing Away from Libertarian Self-Ownership", *Ethics*, 123:1, 2012, pp. 32-60; cf. David Friedman, *The Machinery of Freedom: A Guide to Radical Capitalism*, La Salle: Open Court, 1989 [2nd ed.], p. 168; Matt Zwolinski, "Libertarianism and Pollution", *Philosophy and Public Policy Quarterly*, 32:3/4, 2014, pp. 9-21. This picture is somewhat complicated by the fact that left-libertarians often defend a total-exclusion account of self-ownership. They do so, however, following G. A. Cohen's definition of self-ownership that he himself was staunchly critical of. E.g. Hillel Steiner, *An Essay on Rights*, *op. cit.*, pp. 231-236; G. A. Cohen, *Self-Ownership, Freedom, and Equality*, Cambridge: Cambridge University Press, 1995. For a critique of the deployment of a total-exclusion account of self-ownership, see Jason Brennan & Bas van der Vossen, "The Myths of the Self-Ownership Thesis", in Jason Brennan, Bas van der Vossen & David Schmidtz (eds.), *The Routledge Handbook of Libertarianism*, *op. cit.*

48 - Stilz insists on such a divorce, arguing that whilst a primitive property right can protect one's ongoing and extended possessions, it cannot ground ownership because ownership just presumes a right that is entirely independent of actual use or possession. Anna Stilz, "Property Rights: Natural or Conventional?", in Jason Brennan, Bas van der Vossen & David Schmidtz (eds.), *The Routledge Handbook of Libertarianism*, *op. cit.*, pp. 250-251.

49 - James E. Penner, *The Idea of Property in Law*, *op. cit.*, p. 72.

50 - Eric Mack, "Elbow Room for Rights", in David Sobel, Peter Vallentyne & Steven Wall (eds.), *Oxford Studies in Political Philosophy*, vol. 1, Oxford: Oxford University Press, 2015.

In a landmark nuisance case, Judge Baron Bramwell made the following remarks:

> There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is that, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without submitting those who do them to an action... It is as much for the advantage of one owner as of another, for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live. [51]

The scope of that elbow room may be set through Paretian cost-benefit analysis, as Epstein describes [52] or simply by social convention, as J. W. Harris describes, [53] but I will not discuss those details any further here. The crucial point is that one's right to exclude is open-ended inasmuch as it is not tied to any particular use, but it is not unlimited inasmuch as there are some boundary crossings by others which are permitted.

We now turn to Grotius's reasons for invoking the need for communal consent to legitimise private property.

Use, Exclusion, and Ownership

Grotius believed that the universal use-right alone could not ground private property because it did not give one the right to recover possession of a resource after one had physically detached oneself from it. However, for uses that extend beyond mere empirical possession, the use-right permitted one to recover physical possession so long as one's intelligible possession had not been relinquished. Whilst Grotius clearly had an account of use that went beyond mere physical contact, he arbitrarily cut it short of the most extensive kinds of intelligible possession, protection of which would be functionally identical to private property. Crucial to seeing why Grotius's move to communal consent is unnecessary, then, is noting that his account of use already constitutes narrowly-bounded intelligible possession, that there is reason to release those bounds somewhat, and that the exclusionary rights that come with such uses are extensive enough so as to characterise the user as the owner, even if that exclusionary right is not independent of the use-right.

51 - *Bamford v. Turnley*. 122 ER 25 Vol. 122, 1862.

52 - Richard Epstein, "Possession as the Root of Title", *Georgia Law Journal*, 13, 1979, pp. 1221-1243; "Property Rights, State of Nature Theory, and Environmental Protection"; cf. Daniel Russell, "Self-Ownership as a Form of Ownership", in David Schmidtz & Carmen Pavel (eds), *The Oxford Handbook of Freedom*, Oxford: Oxford University Press, 2016.

53 - J. W. Harris, "Ownership of Land in English Law", in Neil MacCormick & Peter Birks (eds.), *The Legal Mind: Essays for Tony Honoré*, Oxford: Clarendon Press, 1986, p. 160.

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On Grotius's view, whilst one could pick an apple and eat it without fear that another could justly snatch it from you before you got to take a bite, one could not pick a bushel of apples and store them somewhere for later. If another person found the stash and helped themselves, one would have no right to stop them. Likewise, one could lie on a patch of ground and enjoy the shade cast by a tree, but once one got up and walked away, one could not then stop others from lying on the same patch. Grotius believed that in a state of nature there was no right to recover possession, and that such a right was essential to private property. [54] At risk of labouring the point, Grotius considered rightful use to be constituted not merely by empirical possession, but also intelligible possession, yet he thought use-right gave one no right to recover empirical possession once it had been relinquished. My claim is that so long as intelligible possession has not been relinquished, one may recover empirical possession.

In order to justify private property, Grotius says that "a certain Compact and Agreement" was necessary. [55] The putative liberty that each person had to use resources, the empirical possession of which had been relinquished by others, had to be consensually and permanently waived, in order to vest the first user's liberty to keep using it after empirical possession was relinquished.

The key to understanding why this move is unnecessary is considering the possibility that private ownership could include an *extensive* right of exclusion without that right being *independent* of the other use-rights included therein. And, moreover, there is no reason to bound intelligible possession in the way Grotius does. Grotius only considers fairly primitive uses of resources, and hence concludes that only fairly primitive rights of exclusion can thereby be justified. When we consider more extended uses of resources—one's which are imminently familiar to our notions of what constitutes an ongoing use of a natural resource—we see that the rights of exclusion that accompany them can extend so far as to become functionally identical to those which characterise private property. As is obvious enough, Grotius's conception of the state of nature, within which he sought application of the universal use-right, involved a pre-propertarian and pre-political form of sociality. However, it is important to note that this form of sociality is also *prelapsarian*. [56] He imagined persons in this society having primitive and short-term goals of mere survival and simple leisure, living "at their Ease on what the Earth, untilled, did naturally afford them".

Having primitive and modest desires, the kinds of uses persons in a state of nature put resources to were very limited. Given that the right to exclude that persons have in this state is limited to what is necessary to protect use, these limited uses came with limited exclusionary protection. However, where uses of resources are more extensive—the kind befitting a more complex form

54 - Hugo Grotius, *De Jure Belli*, *op. cit.*, §§ II.II.II, II.II.VI; John Salter, "Hugo Grotius: Property and Consent", art. cit., p. 544.

55 - Hugo Grotius, *De Jure Belli*, *op. cit.*, § II.II.II.5.

56 - *Ibid.*, § II.II.II; Andrew Fitzmaurice, *Sovereignty, Property and Empire…*, *op. cit.*, pp. 94-98.

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of civilisation—and require long-term intelligible possession, these exclusion rights must extend with those uses. [57] My thesis is that the rights to exclude that come with the use of land for agriculture, for example, are sufficiently extensive so as to be functionally identical to the right of exclusion that characterises private ownership. The view that, in order to be sufficiently extensive to characterise private property, a right of exclusion must be independent of particular use-rights is therefore mistaken, and a Grotian account of use-rights can offer a more-than-primitive account of property.

Where our use of a resource is rival with almost any other use of that same resource, our use of it gives us an ownership-style exclusion rights. Consider such uses of natural resources as the agricultural cultivation of land. When a person tills the soil of a half-acre of land and plants seeds, this activity is not ceased—intelligible possession is not relinquished—when the aspiring farmer goes and gets some rest for the night before returning the following day. So long as we are taking use to be more than merely physical contact—as Grotius did, and we ought to—the farmer is still using the land whilst she is resting, because the project upon which her use of the resource supervenes is ongoing. The next morning, then, she has the right to recover empirical possession of the land in virtue of her right to not be interfered with in her ongoing use of natural resources, in accordance with the universal use-right. Moreover, with regards to agricultural use land, there are almost no other uses that other persons can make of that land without interfering in the farmer's own use. Therefore, the right of exclusion that comes attached to the use-right permits the farmer to exclude others from making almost any use of her land, just as she would if she had private ownership of it. In this case, then, a use-right is functionally identical to private ownership. The only difference is that the right to exclude is not independent of the use-right but, rather, parasitical upon it. It is nonetheless sufficiently expansive so as to characterise her rights as the land's owner. Consider the kinds of rights to exclude that would come with the use of land for building oneself a home. The kind of uninterrupted, private access that constitutes what constitutes a home mean that this kind of land-use ought also come with expansive, but not unlimited, rights to exclude others, that are characteristic of private property. [58]

57 - Adam Smith understood the principle of occupation to be malleable to any mode of interaction with natural resources, and not just primitive one: "[T]he laws of occupation vary according to the periods of human society. The four stages of society are hunting, pasturage, farming, and commerce... According to these stages occupation must vary... Among savages property begins and ends with possession, and they seem scarce to have any idea of anything as their own which is not about their own bodies... But property receives its greatest extension from agriculture." Adam Smith, *Lectures on Justice, Police, Revenue and Arms*, ed. Edwin Cannan, Oxford, Clarendon Press, 1869 (1763), pp. 107-109.

58 - As agriculture becomes more common relative to huntergathering, other engagement with the environment also becomes more long-term and fixed to particular areas. Longer-term investment in land for food production entails similar investment for dwelling and leisure. Such more long-term uses must also be protected by the same exclusion rights that come with short-term uses. Thanks to Richard Epstein for pressing this point.

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Of course, there are *some* uses of the land that others could make without violating her use-right. They may walk across it, carefully avoiding trampling cultivated areas; they may, for example, look upon the land and enjoy the view of it; fly planes over it; send Wi-Fi frequencies across it, etc. These "uses" of the land by others are permitted because they do not interfere with her use, yet they are also the kinds of uses of land owned by others that are typically deemed permissible, and *not* at odds with the farmer's ownership. This account of original appropriation, in fact, illuminates how me might answer difficult boundary-related questions, such as: "Would the farmer have a right to the oil reserves in the ground, deep below her field?" The answer must be in the negative. But, no one else may access them in a way which interferes with her agricultural use of her land—that is, not without her approval. [59]

The right of exclusion that comes with such uses of land give the user a significant sphere of freedom with regard to that land. If they are free to exclude others from doing anything with it that interferes with the use of it for agriculture or for residence, this gives them space to engage in an even wider array of uses of it. Once you have the right to exclude others from trampling your crops, interfering with the composition of the soil, permanently casting shadows on the crops, etc., one also has the action-space to raise cattle, eat, sleep, sing, write, paint, raise a family, etc. on that land. [60]

It is precisely these kinds of long-term uses of property—agricultural and real estate development—that we would expect persons moving out of a prelapsarian state to engage in, for the purposes of securing their more long-term projects and producing a surplus to trade. Why Grotius limits the use-right to those uses relevant to prelapsarian society remains mysterious. Indeed, the justification Grotius gives for the use-right in the first place—that it is the application of our basic right to life, limb, and liberty [61] in the context of the common patrimony of the Earth—also supports allowing it to cover these more extensive uses that serve self-preservation and freedom. Indeed, Grotius is acutely aware of the expediency of protecting more extensive uses of resources that permit investment and a division of labour, hence his committing such a large part of his treatise to the question of it.

In the earlier work, *Mare Liberum*, Grotius gestures toward the kind of justification for private property that I am arguing for. There, he says that the primitive property rights people had in consumables was, by "the process of reasoning... next extended to" more and more kinds of goods as they were brought into use on humankind's journey out of the prelapsarian state and

59 - Murray N. Rothbard, "Law, Property Rights, and Air Pollution", in Murray N. Rothbard, *The Logic of Action Two: Applications and Criticism from the Austrian School*, Cheltenham, Edward Elgar, 1997 (1982), pp. 153-157.

60 - For further details of a use-based conception of ownership see Billy Christmas, "Rescuing the Libertarian Non-Aggression Principle", *Moral Philosophy and Politics*, 5:2, 2018, p. 305-322; "Incommensurability and Property Rights in the Natural Environment", *Environmental Politics*, 26, 2017, pp. 502-520, esp. pp. 512-516.

61 - Hugo Grotius, *De Jure Belli*, *op. cit.*, § I.II.III.

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into civilisation.[62] This transition he characterised as happening not "violently, but gradually, nature herself pointing out the way".[63] He saw this extension as taking place between the rights persons had over resources whose use presumed their consumption (wild fruit, etc.) and resources that were similarly connected to their user, such as clothing, chattels, animals, etc. He seemed to see it as vaguely natural that the exclusion that came with use-rights should extend along with that right, as the uses persons put natural resources to grow in their spatio-temporal reach.[64] There is nothing in Grotius to tell us why it should not extend further still to things like land, buildings, and capital. And, indeed, there is much that tells us why it should.

Conclusion

Grotius's account of our original rights in a state of nature offers a theory of original appropriation, but not the one he intended. A pre-emptively correlative account of the relationship between use and exclusion demystifies how such a broad right of exclusion, such as that which characterises ownership, can be justified by a universal right to unilaterally make use of external resources. The asymmetry of intuitions regarding the morality of using versus excluding is revealed to be a chimera. The pervasiveness of the notion that the right to exclude must be independent of the use-rights it is bundled with in ownership has contributed to this chimera. The justification for free use *is* a justification for exclusion, and sometimes that use is extensive enough so as to come with a right of exclusion extensive enough for it to be indistinguishable from private ownership. There is, therefore, no need to invoke the consent of the community in order to justify the acquisition of private ownership through such uses.

This conclusion ought to give pause to those accounts of natural rights that hinge on a strong dichotomy between use and ownership. In particular, it ought to make left-libertarians question the materially egalitarian conclusions they draw in theorizing distributive justice. Left-libertarians take, like Grotius, the common patrimony of the Earth to entail we are each free to use external resources, but that we must compensate the community for any appropriation we make out of the commons.[65] The compensation represents the concretion of the egalitarian side of left-libertarianism as a theory of distributive justice. However, if our natural equality permits us to unilaterally use natural resources, then we may also acquire ownership of it through the appropriate means. It ought also give pause to those Kantians who roughly share Grotius' conviction

62 - Hugo Grotius, *Mare Liberum*, *op. cit.*, § V.7.

63 - *Ibid.*

64 - Marcelo de Araujo, "Hugo Grotius, Contractualism, and the Concept of Private Property: An Institutionalist Interpretation", *History of Philosophy Quarterly*, 26, 2009, pp. 353-371, esp. p. 358.

65 - Peter Vallentyne, "Introduction: Left-Libertarianism—A Primer", in Peter Vallentyne & Hillel Steiner (eds.), *Left-Libertarianism and its Critics...*, *op. cit.*

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that only very primitive property rights, if any, can be acquired in a state of nature and that therefore a political authority must be instituted that hypothetically has the consent of those under its authority to create private property rights in a way that actually places duties upon those subject to them. [66] Contrarily, the rights are already there pre-politically and hence do not require political convention to *create* them. [67]

I hope this foray into the work of thought of Grotius sheds light on the relationship between use and ownership in a way that is informative to debates over property and justice.

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Résumé

Grotius et la propriété privée

Hugo Grotius a montré qu'un système fondé sur la propriété privée pouvait émerger, avec justice, en s'appuyant sur l'accord de ceux qui y vivent. Il a adopté ce point de vue parce qu'il ne voyait pas comment les droits, prétendument primitifs, d'utiliser les ressources naturelles dont dispose chacun à l'état de nature pouvait à eux seuls justifier une propriété privée pleine et entière. Plus précisément, le droit d'exclure des tiers de la propriété de son bien, qu'il considérait comme essentiel à la propriété privée, ne pouvait pas être justifié par l'ensemble des droits originaires qu'il pensait appartenir à des personnes se trouvant à l'état de nature. De nombreux théoriciens des droits naturels ont suivi Grotius dans cette erreur. La nécessité d'un commun accord peut être évité si l'on reconnaît que tout droit d'usage comporte nécessairement un droit d'exclure d'autres. De plus, le droit d'exclusion, au sens large, qui caractérise la pleine propriété libérale peut, dans certains cas, être rattaché aux droits d'usage du fait que ces utilisations sont elles-mêmes très vastes. La propriété privée peut donc émerger par un usage unilatéral, sans recours à un commun

66 - Arthur Ripstein, *Force and Freedom*..., *op. cit.*, ch. 4 & 6; Anna Stilz, *Liberal Loyalty*..., *op. cit.*, ch. 2; "Unilateral Appropriation and Territory", *op. cit.*

67 - Bas van der Vossen, "Imposing Duties and Original Appropriation", *Journal of Political Philosophy*, 23:1, 2015, pp. 64-85.

accord. Le récit des droits naturels de Grotius ne devrait donc pas être utilisé pour soutenir les approches théoriques du contrat social en matière de propriété et de justice.

Abstract

Hugo Grotius and Private Property

Hugo Grotius famously argued that a system of private property could only justly emerge by the agreement of those living within it. He took this view because he could not see how the supposedly primitive rights to use natural resources that each person has in a state of nature could, on their own, justify fully fledged private ownership. More specifically, the broad right to exclude others from one's own property that he considered to be essential to private property could not be justified with the set of original rights he ascribed to persons in a state of nature. Many natural rights theorists have followed Grotius in this error. The need for communal agreement can be avoided, however, when one recognises that any use-right necessarily includes *some* right to exclude others. Moreover, the extensive right of exclusion that is characteristic of full liberal ownership can, in certain cases, come attached to use-rights where those uses are themselves extensive. Private property can therefore emerge through unilateral use, without recourse to communal agreement. Grotius's account of natural rights, then, ought not be used to support social contract theoretic approaches to property and justice.

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