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## ‘To Bestow Stability upon Possession’

Hume’s Alternative to Locke

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### 1. Bottom-Up Theories

Against the view that property is wholly the creation of public law, some legal and political theorists have endeavoured to conceive of it as something grown and developed from the bottom up, independently of any sovereign or legislative determination.

Among modern theorists, Richard Epstein is a partisan of this conception. ‘No system of property rights,’ says Epstein, ‘rests on the premise that the state may bestow or deny rights in things to private persons on whatever terms it sees fit.’ Rather, he says, ‘the correct starting point is the Lockean position that property rights come from the bottom up.’<sup>1</sup> The modern democratic state, by contrast, defines itself in opposition to any theory positing these individual entitlements as ‘pre-political,’ i.e. as existing prior to the creation of the state. Instead, in Epstein’s account of the modern democratic view, ‘property rights are arbitrary assemblages of rights that the state creates for its own instrumental purposes, and which it can undo almost at will for the same instrumental ends.’<sup>2</sup> Epstein thinks we should reject this top-down view. Property rights are not a gift of the state, he says; they have legal standing quite apart from human rule. To see matters aright, we have to be prepared to turn the tables on the modern state and go back to something like a Lockean account of the constraining force of property.

Does it have to be Lockean? I don’t mean that ‘Lockean’ is a bad thing for a conception to be. I spent the best years of my life exploring and elaborating John Locke’s theory of property and Locke’s political theory generally.<sup>3</sup> And Locke’s theory of property has proved attractive to generations since it was published in 1689. Locke saw property rights as rights that could be generated and sustained by individuals through their labour and exchange; and these rights, he thought, could be recognized in a human community without the benefit of any

<sup>1</sup> Epstein 2011, 99.

<sup>2</sup> Epstein 2011, 63.

<sup>3</sup> Waldron 1981; 1982; 1983; 1984; 1988, ch. 5; 2002; 2005.

edicts of positive law. In Locke's system, property was generated by the unilateral action of appropriators and cultivators approaching unowned resources without any authorization. The rights arose morally out of what they decided, on their own motion, to do. They were indeed generated, as Epstein puts it, from the bottom up. And all that people needed from positive law, on this account, when they set up a legal system to overcome certain difficulties in the state of nature, were principles of private law to recognize and accommodate the existence of property rights that were already well established and to facilitate their circulation.<sup>4</sup> 'The reason why men enter into society,' says Locke, 'is the preservation of their Property,' and that, as he said, presupposes that people already have property and that property is neither the work nor the plaything of public law.<sup>5</sup>

It is, as I said, an attractive theory, to a certain sort of mentality. What sort of mentality? Well, liberal, certainly, on account of its individualism and the orderly rights-structure that it generates. Capitalist, obviously, on account of its consecration of industry and markets and its acceptance of the resultant economic inequality. And above all, the Lockean account appeals to an anti-statist mentality—or rather, not anti-statist in any anarchist sense (though there have been Lockeans of that stripe as well), but to any political sensibility that is suspicious of state action, any political sensibility that wishes to regard property rights as a prior constraint on government, relegating the state to the status of a service-apparatus: the state doesn't invent property, it exists in order to sustain it.

For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society which was the end for which they entered into it; too gross an absurdity for any man to own.<sup>6</sup>

All these features, all these facets of its appeal, are what have led many law professors to present the Lockean account in the early pages of their textbooks as the epitome of a bottom-up approach to the origin of property. It is easily understandable for their students; Locke's labour theory is a good way into the subject; and depending on the professor's own political predilections, it can be presented either as an unhelpful founding myth or as a reasonable (though no doubt still mythic) account of the origin of the system that their students are to study. So far so good.

Professor Epstein implies that the natural alternative to a top-down theory has to be Lockean.<sup>7</sup> Is that right? Should we designate Locke's theory as the only game in town, once we reject a top-down statist view of property?

Surely not, for even in Locke's own time, his theory that property was created by individual labour was controversial. Part of that controversy was admitted by Locke himself in his confrontation, early on in chapter 5 of the *Second Treatise*, with theories that based the origin of property on universal consent. Locke's response

<sup>4</sup> Locke 1689b, II, §222.

<sup>5</sup> Locke 1689b, II, §138.

<sup>6</sup> Locke 1689b, at II, §138.

<sup>7</sup> Of course there were lots of contemporary top-down theories: Hobbesian theories, Filmerian theories of the divine right of kings. And perhaps one can also put theories of universal consent in this category too, since although they are not necessarily statist, they presuppose something like a general will in the establishment of property rights.

was brusque: 'If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.'<sup>8</sup> But that is, in effect, a controversy between Locke's bottom-up theory and a kind of top-down view, albeit one that looks to the consent of the whole community, rather than the action of the state. It has in common with the statist theory that it presents private property as a creation of the general will.

However, even if we restrict ourselves to bottom-up views, Locke's theory is still one among several, and admitted by him to be rather counter-intuitive.<sup>9</sup> What was particularly controversial was his claim that property in land was created unilaterally by individuals tilling and cultivating land—and doing so laboriously, mixing their labour with a portion of the earth itself. It was understood that this was one conception among many, that is, one conception among many others of this bottom-up kind. Its main rival was the theory of first occupancy, which claimed that men acquired property in some portion of the earth by occupying it, living on it, whether that occupancy involved physical cultivation or not.<sup>10</sup> This face-off, between Locke's labour theory and the theory (held by Samuel Pufendorf, for example)<sup>11</sup> that based property on occupancy, had considerable implications for how European incursions into America were regarded.<sup>12</sup> On the Lockean account, the Europeans found lands that native Americans roamed over and from time to time established fleeting settlements on, but not land which they had cultivated, not land that they had taken into their possession as property by labour, in the sense designated by Locke's philosophy. So that land was available for appropriation and cultivation by the European intruders. On the other side, it could be held that, even if there was no cultivation (and many denied the factual premiss of Locke's account), the Native Americans had taken possession of this land by occupancy, and their living upon it and their use of it as a hunting ground established for all practical and moral purposes that it was theirs.<sup>13</sup> The controversy about native

<sup>8</sup> Locke 1689b, II, §27.

<sup>9</sup> Locke 1689b, II, §40: 'Nor is it so strange as, perhaps, before consideration, it may appear . . .'

<sup>10</sup> Tully 1980.

<sup>11</sup> Von Pufendorf 1673, ch. 12. Note however that Pufendorf presents his theory of first-occupancy in a nominally top-down frame, namely as a principle establish by universal consent:

at first, while the Human Race was but of a small Number, it was agreed, That whatever any one did first seize should be his, and not be taken from him by another; provided however, that he only possesses himself out of the common Store of what is sufficient for his private Service, but not so as to destroy the whole Fund, and so prevent a Stock for future Uses. But afterward, when Mankind was multiply'd, and they began to bestow Culture and Labour upon those Things which afforded them Food and Raiment; for the prevention of Quarrels; and for the sake of good Order, those Bodies or Things also, which produced such Necessaries, were divided among particular Men, and every one had his proper Share assign'd him, with this general Agreement, That whatsoever in this first Division of Things, was yet left unpossess'd, should for the future be the Property of the first Occupant. And thus, God so willing, with the previous Consent, or at least by a tacit Compact of Man, Property, or the Right to Things, was introduced into the World.

<sup>12</sup> See Tully 1993, 137.

<sup>13</sup> Note also that occupancy was often associated with tribal or collective ownership rather than individual ownership. I am inclined to think this doesn't make much difference, in a context where the claims of one collective stand (and have to be justified) against the claims of others. See Nozick

title was not the only arena where first occupancy and labour theories faced off, but it was a striking illustration of their opposition, and as such a helpful rebuttal of the view that Locke's theory, in its specificity, is the only bottom-up theory in town.

In 1974, Robert Nozick published *Anarchy, State and Utopia*, in which he set out and illuminated by discussion the logical frame common to theories of this sort. The logical frame includes, foundationally, a principle of unilateral acquisition—some principle of the form:

P<sub>1</sub>: *The first person, A, to do  $\phi$  to a resource R under conditions C, gets to be the owner of R*

and a principle of justice-in-transfer, along the lines of

P<sub>2</sub>: *Any person, A, being the owner of resource R, may voluntarily, if he chooses, transfer that ownership to another person B, whereupon B gets to be owner of R.*

Nozick invited us to consider the possibility that principles like P<sub>1</sub> and P<sub>2</sub> were all one needed for the doing of justice in a modern society. In particular the state did not need to cultivate or act on any sense of the best distribution or of better-or-worse distributions of property: more or less unequal, for example, or more or less corresponding to desert or need. That a given array of property rights was the upshot of repeated applications of P<sub>1</sub> and P<sub>2</sub> was all one needed to know to judge it just, whatever distributive profile it presented.<sup>14</sup>

At the time, a lot of people criticized Nozick for failing to specify a value for  $\phi$  in P<sub>1</sub>. But Nozick was interested in theories *of this shape*, rather than any particular one of them. Both Locke's labour theory and the first occupancy theory are theories that fit this shape: according to Locke,  $\phi$  = labouring upon; according to his adversaries,  $\phi$  = occupying, seizing or taking possession of a resource. Nozick didn't need to commit himself to any particular value of  $\phi$  in order to consider the challenge that any theory of this shape might pose (say) to a theory like Rawls's.

The point is that top-down theories, including the absolutist theories developed by Hobbes and Filmer in the generation before Locke wrote, and the general will theory elaborated by Rousseau 80 years later, *cannot* be adapted to the Nozickian template. It looks as though Nozick has done us the service of stating the essential *form* of a bottom-up theory, a form into which various contents—Lockean and non-Lockean—can be poured.

Before agreeing to this last proposition, however, we had better push our inquiry one step further, and ask whether bottom-up theories have to have this Nozickian shape. For it has to be admitted, even by aficionados of theories of this type, that it is a very demanding form. One has to be able to defend and justify P<sub>1</sub> and P<sub>2</sub>. P<sub>2</sub>

1974a, 179: 'We should note that it is not only persons favoring private property who need a theory of how property rights legitimately originate. Those believing in collective property, for example those believing that a group of persons living in an area jointly own the territory, or its mineral resources, also must provide a theory of how such property rights arise; they must show why the persons living there have rights to determine what is done with the land and resources there that persons living elsewhere don't have (with regard to the same land and resources).'

<sup>14</sup> Nozick 1974a, ch. 7.

may not be so difficult, for as Nozick observes it can be presented in terms of individual consent and Pareto-improvement; but  $P_1$  presents a more demanding challenge. Given the Nozickian logic, whatever one's chosen value is for  $\phi$ , one has to be able to justify putting all the weight of justice-in-distribution on this foundational variable. Who begins with what goods assigned as theirs makes an immense difference to the way subsequent actions and market transactions generate distributive outcomes. For example, Locke has to be able to show that labour, as the value of  $\phi$ , can bear this burden: why should it make so much difference, especially so much subsequent difference, to who was the first to labour on a given piece of land?

Not only that, but any Nozickian conception is tremendously demanding of information. It is, as he calls it, a *historical* conception: one justifies  $Z$ 's property in  $R$  now, not by the truth of any factual proposition dated in the present, but by a succession of factual propositions dating back into the more and more distant past, back all the way into the dawn of time when a human first confronted  $R$ , hopefully under the auspices of  $P_1$ . The morality of this is not particularly edifying: is first occupancy's petulant claim, 'I was here *first*' really a good way of rebutting present claims of need? And quite apart from the morality, establishing who was where when is awfully difficult, as the modern indigenous rights industry reveals. Who did what first, and under what conditions things were subsequently done to them—all this has to be untangled at a historical (and indeed pre-historical) level, if any theory of the Nozickian form is to be applied to legitimize indigenous holdings. This may be simple, say, for New Zealand, with only one wave of relatively recent indigenous settlement (though even there it is not at all simple as the Waitangi Tribunal has found); but try thinking about it for India. Or Kosovo.<sup>15</sup>

Does a bottom-up theory have to be this demanding, so far as empirical information and moral justification are concerned? I don't know whether you would call it a theory, exactly, but one view about the origin of property presents it as a matter largely of the successful use of force. The powerful and the cunning grab things, both from nature and from others who may already have the things in their possession, and the powerful and the cunning manage to hold on to the things they have grabbed and use their power, politically, to persuade the whole society to throw its force behind their depredations. This is a theory of occupancy, if you like, but it is not a theory of first occupancy; it is more like a theory of *last* occupancy. The group most recently in possession of land or resources at the time that a powerful state is established gets consecrated as the legal owner of that land, whether it was the first occupant or not.

Informationally, this is a much less demanding theory; no need for any inquiry going back, as Locke's and Pufendorf's accounts have to go back, to the dawn of time.

Morally, it is much less demanding also; in fact many would say it is morally bankrupt. (Indeed, it is not really a justificatory theory at all, or if it is, it rests on something as modest as a premiss of prescription: present possession, established

<sup>15</sup> See Waldron 2003.

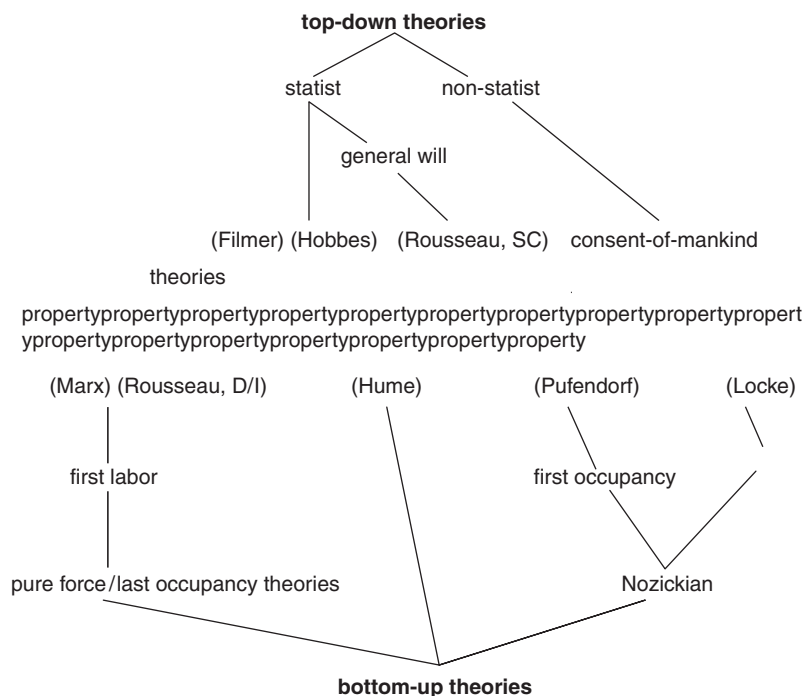


Figure 1

over a reasonable period of time, should be consecrated as legal property, presumably for reasons of stability and keeping the peace.)

Its logic is quite different from the Nozickian shape of Locke's theory. And many—quite rightly—find it plausible at least as a descriptive account of the (deplorable) way in which private property came into the world. It is roughly the theory referred to in Rousseau's *Discourse on Inequality* (as contrasted with his own more normative top-down theory in *The Social Contract*), and it is similar too to Marx's account in volume 1 of *Capital*.<sup>16</sup> This confirms the point about this really not being a justificatory theory: in the hands of its most distinguished proponents, its evaluative force is, if anything, negative.

Is there any space between these two broad types of bottom-up account? I mean between theories which have a Nozickian shape and theories of force or last occupancy?

There is, and it is occupied in my submission by the theory of David Hume, in *A Treatise on Human Nature*. (See Figure 1.) I have long had an interest in Hume's

<sup>16</sup> See the chapters on 'capitalist accumulation' in vol. 1 of *Capital* (Marx 1867). Needless to say, the reasons for sidelining Marx in a post-1989 world have nothing to do with the essential accuracy of his account of how capitalists acquired their property. That part of his theory survives, as more or less entirely convincing, even if for ideological reasons we are now happy to turn a blind eye to it.

theory and in its comparative advantages over Locke's account (or any Nozickian account).<sup>17</sup> Both are bottom-up theories. But Hume's, like the pure force/last occupancy theory, is much less morally demanding and much less demanding of historical information, than Nozickian theories are. Unlike the pure force/last occupancy theory, however, Hume's has some claim to offer a justificatory, even a moral account. It is morally less demanding than Locke's theory, but it is a moral account nonetheless. In the second part of the chapter I shall set out the main features of the Humean account.

## 2. The Humean Approach

The core of Hume's account of property is found in section 2 of Part ii of Book III of *A Treatise of Human Nature*.<sup>18</sup> That section contains two key passages on property, both justly famous.

The first establishes the human need for property. To survive and flourish people need to make use, not only of their own bodies, but of goods and resources that are external to them. But these goods are scarce, which means that—in the absence of limitless altruism—people are rivals for the use of these objects.<sup>19</sup> What's more, in contrast with the goods of body and mind, external goods are easily moveable from the possession and use of one person to the possession and use of another: depredation is a definite and profitable possibility; and anyone's possession and use of such a good is therefore vulnerable to other's depredations:

There are different species of goods, which we are possess'd of; the internal satisfaction of our minds, the external advantages of our body, and the enjoyment of such possessions as we have acquir'd by our industry and good fortune. We are perfectly secure in the enjoyment of the first. The second may be ravish'd from us, but can be of no advantage to him who deprives us of them. The last only are both expos'd to the violence of others, and may be transferr'd without suffering any loss or alteration; while at the same time, there is not a sufficient quantity of them to supply every one's desires and necessities. As the improvement, therefore, of these goods is the chief advantage of society, so the instability of their possession, along with their scarcity, is the chief impediment.

So there's a problem and clearly property rights are a solution:

the principal disturbance in society arises from those goods, which we call external, and from their looseness and easy transition from one person to another; [we] must seek for a remedy by putting these goods, as far as possible, on the same footing with the fix'd and constant advantages of the mind and body.

<sup>17</sup> See Waldron 1994.

<sup>18</sup> Almost all of the Hume quotations in this part of the chapter are from this section: *Treatise*, Bk. III, Part ii, section 2. (Hume 1739–40b).

<sup>19</sup> 'This avidity . . . of acquiring goods and possessions for ourselves and our nearest friends, is insatiable, perpetual, universal, and directly destructive of society. There scarce is any one, who is not actuated by it; and there is no one, who has not reason to fear from it, when it acts without any restraint, and gives way to its first and most natural movements.'

In this passage, what Hume is doing is sketching what H. L. A. Hart would call a general justifying aim for a property system.<sup>20</sup> But that is not the same as an account of how property might actually get under way. Particularly in the absence of a state or any other top-down decision mechanism, we need an account of how something which is a good idea in general can be parlayed into a set of rights established by individuals on a bottom-up basis.

Hume offers his solution in the second of the two famous passages I mentioned. It's a passage immediately following one about 'the instability of possession'. We need to put possession on a stable footing, he says. And he continues:

This can be done after no other manner, than by a convention enter'd into by all the members of the society to bestow stability on the possession of those external goods, and leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry. By this means, every one knows what he may safely possess; and the passions are restrain'd in their partial and contradictory motions. . . . I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. . . . After this convention, concerning abstinence from the possessions of others, is enter'd into, and every one has acquir'd a stability in his possessions, there immediately arise the ideas of justice and injustice; as also those of property, right, and obligation. The latter are altogether unintelligible without first understanding the former.

This is Hume's convention-based account of the origin of property rights. And I believe that it is a bottom-up theory and that it has a distinct non-Nozickian structure.

Before we go any further, two preliminary objections will spring to mind: (1) as set out above, the Humean account sounds much more like a top-down contractarian account; and (2) the Humean account already seems to presuppose the division of the world into individual possessions, which makes it kind of question-begging. Let's deal quickly with both of these objections.

(1) You will say: well, this account of Hume's looks like a top-down theory, with property based on social conventions, something like a social contract. It may not be a statist theory but it looks top-down nonetheless. But appearances can be misleading. And Hume is anxious to deny the apparent contractarian element in his account:

This convention is not of the nature of a promise. . . . It is only a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules. And this may properly enough be call'd a convention or agreement betwixt us, tho' without the interposition of a promise; since the actions of each of us have a reference to those of the other, and are perform'd upon the supposition, that something is to be perform'd on the other part. . . . In like manner are languages gradually establish'd by human conventions without any promise. In like manner

<sup>20</sup> Hart 1968, 4. See also the discussion of the logic of this distinction between general justifying and the allocation of particular burdens and benefits (duties and rights) in Waldron 1988, 330ff.



do gold and silver become the common measures of exchange, and are esteem'd sufficient payment for what is of a hundred times their value.

As these last examples indicate, what Hume has in mind is something like the emergent solution to a sort of coordination problem. There is a need for coordination, and it is answered by a shared sense of coordination on an option which comes to seem salient to us both. All this can happen without the interposition of any formal agreement or direction from on high.

(2) The second objection is that the theory seems to presuppose a world already divided up into individual possessions. After all, the convention is conceived as one which bestows stability *on people's individual possessions*, some of them appearing to have been consecrated already in Lockean terms—'a convention . . . to bestow stability on the possession of those external goods, and leave every one in the peaceable enjoyment of what he may acquire *by his fortune and industry*'. This has led some people to describe Hume's convention as a convention to respect the property of others<sup>21</sup>—which means it can hardly be offered as an account of the origin of property.

Well, I don't think that's the way to read it. The better reading, I think, is to construe 'possessions' in a literal *de facto* sense, as things that a person happens to have hold of, whether acquired by good fortune, honest industry, or other less estimable means. In this regard Hume's theory has something in common with the force/last occupancy account. It is uninterested in questions of who *first* had possession of a given resource; and it is certainly uninterested in the question which matters so much to Locke about *the means* by which first possession was acquired. Who has the resource *now*, when the opportunity for a convention to bestow stability on resources has arisen?—that is the crucial question from the point of view of Hume's theory.

A fuller elaboration of theories of this type is given by the modern economist James Buchanan in his book, *The Limits of Liberty*. According to Buchanan's model, we start from an assumption of conflict. Since time immemorial people have been seizing, using, and fighting over resources. Such conflict may be perpetual, leading as it does at any given time to essentially unstable outcomes, outcomes always likely to be disturbed and 'redistributed' in the next round of grabbing and fighting. But it is also possible that such volatility will die away:

as a result of the actual or potential conflict over the relative proportions of [resources] to be finally consumed, some 'natural distribution' will come to be established. . . . [T]he natural distribution may represent a conceptual equilibrium, in which each person extends his own behavior in securing (defending) shares in [resources] to the limit where marginal benefits from further effort are equal to the marginal costs that such effort requires.<sup>22</sup>

I find this a helpful account of the preconditions of the Humean approach. We begin from an assumption of conflict driven by possessive opportunism in the face

<sup>21</sup> Blackburn 2008.

<sup>22</sup> Buchanan 1975, 24.

of moderate scarcity and more or less unmitigated (perhaps intensified)<sup>23</sup> by such altruism as is natural to man. People grab things and use them; they argue and fight over them. Now things may settle down into something like a stable equilibrium, and that is what the Humean convention works on.

It is essential to recognize, according to this theory, that there is nothing moral about the possessions. Over time, the holdings determined in this way are going to be largely arbitrary. There is nothing moral or fitting or appropriate or—least of all—just about the natural distribution. It is simply an equilibrium in the arbitrary interplay of forces. We should not concern ourselves, Hume argues, with the distributive features of any possibly stable possessory regime that emerges from the era of conflict. Our aim should be to ratify any distribution that seems salient—that is, any distribution support for which promises to move us away from fighting over who should own what. The distribution might be equal or unequal, but the parties will already know that they cannot hope for a much better distribution by pitching their own strength yet again against that of others.

The idea is, in other words, that if any sort of stable pattern of *de facto* possession emerges, then something like a peace dividend may be available. It may be possible for everyone to gain by ceasing to fight any more over possessions. If each refrains from attacking the holdings of the others, then each gains (more or less automatically) an amount equal to the cost to himself of attacking others' holdings plus the cost to himself of defending against others' attacks plus the cost of the losses he would incur if his defences failed (times, of course, the probability of their failing). And each loses an amount equal to the amount by which he could augment his holding by attacking others' holdings (discounted, this time, by the probability of *their* defences failing). The Humean assumption is that the sum of these gains and losses is positive in the case of each person. I agree to respect what you have managed to hang on to, and you agree to respect what I have managed to hang on to: 'By this means, every one knows what he may safely possess.' Such an agreement, if it lasts, may amount over time to a conventional ratification of *de facto* holdings as *de jure* property.

On this account, even those who have been making a living in a Hobbesian way, preying on others, and taking and consuming things that other people have found, grown, or made, may be better off observing rules of property, along the lines indicated by the convention, than they would be in a world in which everything was up for grabs. I don't mean that such a 'natural distribution' will always emerge. Neither Hume or Buchanan is committed to the view that the conditions for a convention of this sort will always obtain, nor, when they do, that such a convention is always advantageous to everyone in a given territory. Certainly, neither of them provides grounds for supporting that view. As Jules Coleman has pointed out,

<sup>23</sup> Hume believes quite rightly that the fact that people have some altruistic feeling for their friends and family makes things worse not better so far as conflict is concerned: '[T]ho' this generosity must be acknowledg'd to the honour of human nature, we may at the same time remark, that so noble an affection, instead of fitting men for large societies, is almost as contrary to them, as the most narrow selfishness. For while each person loves himself better than any other single person, and in his love to others bears the greatest affection to his relations and acquaintance, this must necessarily produce an opposition of passions, and a consequent opposition of actions. . . .'

'cooperation that requires forgoing predation may not be a rational strategy for all agents'.<sup>24</sup> The gains that one can continue to expect from predation may, in certain circumstances, exceed the benefits one could expect from mutual restraint. If that is everyone's situation, no Humean convention is possible. If it is the situation of a few, then a Humean convention may be possible among the others, but it will also have to involve an element of self-defence against a rump of predators on whose allegiance the convention will have no claim whatsoever from either a moral or a rational choice point of view.

Notice, too, that Hume's account suggests realistically that any agreement will crystallize out, if it does, over a long period of time. It is not conceived as an instant promise, but as the gradual establishment of 'a general sense of common interest':

Nor is the rule concerning the stability of possession the less deriv'd from human conventions, that it arises gradually, and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it. On the contrary, this experience assures us still more, that the sense of interest has become common to all our fellows, and gives us a confidence of the future regularity of their conduct: And 'tis only on the expectation of this, that our moderation and abstinence are founded.

Each person may be inclined to hold out and fight for a possible outcome in which he has more of the resources he wants or needs. But this may not be the outcome in the natural equilibrium. He may hold out for it a few times before becoming convinced that, even without securing that outcome, he will be better off with an outcome that is in the natural equilibrium than with a continuation of struggle. It may take time for us to become convinced of this—that is, for us to see that

[i]nstead of departing from our own interest, or from that of our nearest friends, by abstaining from the possessions of others, we cannot better consult both those interests, than by such a convention; because it is by that means we maintain society, which is so necessary to their well-being and subsistence, as well as to our own.

So—to conclude our answer to objection (2), this is not a question-begging account of the origin of particular property rights. All it presupposes is that a pattern of distribution emerges which is steady enough—in the face of continual temptations to try and change it—to establish itself as a salient solution for the purposes of a Humean convention. 'I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behavior.'

This is a bottom-up theory, quite different in character to the Nozickian style of theory (Lockean or first occupancy) that sits to its right in Figure 1. It does not have to make any argument concerning the independent desirability of the distribution of goods that is established. Nor does it have to make any moral argument about the moral appropriateness of the means— $\phi$  on p. 5—by which holdings were

<sup>24</sup> Coleman 2002, 57.

acquired. It is indifferent to that and tolerant both of considerable inequality and a range of moral diversity so far as the means of acquisition (from industry to violence) that were involved.

On the other hand it is not entirely amoral in the sense that the force/last occupancy theory is. It resembles that theory in certain respects—in particular, in its frank recognition of the likelihood of inequality and its complete lack of interest in first occupancy or first anything. But it does present a moral profile. Everyone is better off by the convention, on the Humean account, even given the lop-sided distributions that are likely to be characteristics of any natural equilibrium. Everyone is better off—that's the justification—which is different from the powerful just using their power to entrench a given distribution that they favour. (Of course, as Rousseau observes, it may sometimes be in the cunning interest of the powerful to represent a force/last occupancy strategy in Humean terms. But that's another story.)

As bottom-up theories of property go, the Humean story has one advantage over the Lockean story: it is much more realistic. It is not in denial about the elements of conflict and depredation at the origins of property. It recognizes modern property as something that emerges out of an era of conflict rather than something that presents itself to us with an impeccable pedigree. I think it would be a good idea if this theory were as widely studied, or as widely used as a template for the study of property, as the Lockean theory presently is.

In particular it probably generates a different sense of the relation between the property rights that emerge in this way, and the activities of state and law. Hume, like Locke, believes that property can get under way without the help of law. But he is not sure that it can get very far on its own. Maybe top-down supervision is necessary in order to maintain property rights against the constant temptation that people have to forget their medium- and long-term interest.<sup>25</sup> That is roughly analogous to Locke's view that we invent the state because it turns out that not everyone is a scrupulous respecter of morally established property. But Hume also hints, in several places, that his convention account—the account we have elucidated here—cannot really explain or characterize the emergence of complex forms of property appropriate for large societies. That may require genuine top-down creativity. Hume's theory, as I have explained, perhaps generates foundations for such a theory of property. But it cannot explain everything that is built on those foundations, and it is unlikely to generate a sense of strong entitlement whereby foundational claims of property can be used as points of resistance to more creative forms of state action. This means that the political advantages of bottom-up theories—the reason they are relished by people like Nozick and Epstein—may not accrue from the Humean account in the way they accrue from the Lockean account. That's a price of the Humean account's realism. It doesn't have the same capacity to generate libertarian fantasies as the Lockean account does. But just for that reason it may be a better—more respectable—foundational account for property professors to include in their textbooks.

<sup>25</sup> See Hume 1739–40b, III.ii.7.