

Rights, Property and Politics: Hume to Hegel*

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I. Introduction: Right and Sovereignty

In a characteristically incisive essay on the languages of political thought, J. G. A. Pocock identified the dominant strain of thinking about politics in the West as “jurisprudential” in character.¹ The central terms of this “law-centered paradigm,” he thought, were *ius* and *imperium* – or right and sovereignty, as we might loosely render these expressions. Pocock did not describe in any detail the history of the tradition he was invoking, although he did indicate that its components could be variously traced to stoic philosophy, Roman law and medieval theology. He followed Richard Tuck in arguing that these strands had come together as a system of concepts under which property, right and freedom were connected to one another in a relationship of complex interdependence.²

Seventeenth-century natural law theorists, beginning with Grotius, identified “right” as a moral power (*facultas*) that entitled individuals to exercise legitimate freedoms as well as to expect just treatment in return. Justice in this broad sense was standardly differentiated into “perfect” obligations and “imperfect” virtues.³ Perfect rights, which Grotius termed “expletive,” and which Pufendorf later categorised under “commutative” justice, gave individuals command over their liberty, property and dependents.⁴ Justice so understood, as Grotius described it, concerned “that Right which a man has to his *own [sui]*.”⁵ This contrasted with what he termed “attributive” rights, which were based on the Aristotelian idea of “distributive” justice.⁶ These involved rendering to each what was due to them, not as a perfect (or “strict”) right, akin to a property right, but in accordance with their worth or merit – their

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¹ J. G. A. Pocock, “Virtues, Rights and Manners: A Model for Historians of Political Thought” in *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge, 1985).

² Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979).

³ Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis, 2005), 3 vols, I, pp. 138nff. The terminology was retained in Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (Lund, 1672), 2 vols., I, vii, 7, 118; Gershom Carmichael, *Supplements and Observations upon Samuel Pufendorf's On the Duty of Man and Citizen according to the Law of Nature* (2nd ed.1724) in *Natural Rights on the Threshold of the Scottish Enlightenment*, eds. James Moore and Michael Silverthorne (Indianapolis, 2002), p. 44; Francis Hutcheson, *An Inquiry into the Original of Our Ideas of Beauty and Virtue* (1725), ed. Wolfgang Leidhold (Indianapolis, 2004), pp. 182–3.

⁴ Samuel Pufendorf, *De Officio Hominis et Civis* (Lund, 1673), I, ii, xiv.

⁵ Grotius, *Rights of War and Peace*, I, p. 138.

⁶ *Ibid.*, p. 143.

axía or, in Latin, their *dignitas*.⁷ The distinction between these two conceptions of justice can be illustrated by the fact that, while the generous merit our gratitude and the vulnerable our mercy, everyone is owed their perfect rights regardless of their individual characteristics. Whereas the imperfect obligations of distributive justice were voluntary – liberality, for instance, could not coherently be compelled – the strict obligations of commutative justice could be imposed. It was these rights that were the central concern of what we have come to call “modern” natural law theory.⁸ A core feature of the theory was that this species of rights could be secured by sovereignty. For this reason, Pocock concluded, the juristic understanding of liberty was “negative” in character: “it distinguished between *libertas* and *imperium*, freedom and authority, individuality and sovereignty, private and public.”⁹ Its focus was on the relationship between individual rights-bearers and the state. Although that relationship was variously interpreted by Hobbes, Pufendorf and Locke, assorted historiographical traditions have nonetheless construed it as laying the foundations of what would later be termed liberalism.¹⁰

Pocock’s purpose in identifying the paradigm of liberal (or “bourgeois”) rights was to contrast it with another scheme: the republican or “civic humanist” model whose influence stretched from Aristotle to Harrington and beyond.¹¹ The emphasis here, he claimed, was less on rights than on citizenship – on participation in the management of public affairs. However, Pocock’s distinction is based on the mistaken premise that the so-called republican tradition had no need for juridical concepts like rights. However, in actual fact the very notion of having a “share” in the polity (implicit in the verb *to participate*) is itself in the end a juridical conception: according to Aristotle himself, for example, a stake in the polity should be weighted distributively.

Notwithstanding this, for Pocock, civic-minded thinkers took human nature to be invested with an inalienable political capacity, and public life should serve to realise that basic aptitude.¹² On that basis, the distinction between the republican and liberal models was so

⁷ Aristotle, *Nicomachean Ethics*, 1131a25; Cicero, *De Inventione*, II, liii. 160.

⁸ Richard Tuck, “The ‘Modern’ Theory of Natural Law” in *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (Cambridge, 1987).

⁹ Pocock, “Virtues, Rights and Manners,” p. 40.

¹⁰ Leo Strauss, *Natural Right and History* (Chicago, 1953); Sheldon Wolin, *Politics and Vision* (Boston, 1960); C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford, 1962); Michael Oakeshott, *Of Human Conduct* (Oxford, 1975).

¹¹ Pocock, “Virtues, Rights and Manners,” p. 47. For *ius* as “bourgeois right” see Karl Marx, *Critique of the Gotha Programme* (1875) in *The Marx-Engels Reader*, ed. Robert C. Tucker (New York, 1978), p. 530.

¹² J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ, 1975).

fundamental, Pocock argued, that they represented two radically “discontinuous” idioms, even though they might co-exist in a single period.¹³ A version of this argument had first been proposed by Hegel, except in his case the two paradigms were associated with successive epochs. These were, respectively, the age of ethical life in Greece and the era of universal right under the Roman Empire.¹⁴ Diverging from Hegel, part of Pocock’s purpose was to demonstrate that the civic model thrived alongside the jurisprudential one, with consequences for the modes of political argumentation in Augustan England and Revolutionary America. His other goal was to think about how the language of virtue, as classically conceived, yielded to new patterns of thought from the middle of the eighteenth century, including the Scottish emphasis on sociability and manners. Yet for all his ingenuity and purchase, there are reasons to doubt the robustness of Pocock’s division of early modern thought into mutually exclusive idioms. Aspects of his analysis were guided by normative convictions, most notably the assumption that jurisprudential conceptions had a “tendency” to compromise participation in politics.¹⁵ In this connection, he claimed that “liberty defined by law invests the citizen with rights but no part in *imperium*.”¹⁶ This conclusion, however, can surely be called into question since the amount of freedom enjoyed by citizens under sovereign authority varied among early modern natural law thinkers, some of whom awarded citizenship a share in the power of the state. This variety is equally applicable to developments from the 1750s onwards, when political, legal and social languages, instead of establishing discrete traditions, were creatively combined in assorted new ways. The concept of rights did not prescribe a specific form of state any more than the principle of virtue had determined the balance of power in republics. Relations between rights, property and politics remained controversial, and for that reason eluded schematic categorisation.

II. Hume: Justice and Property

The moral and political philosophy of David Hume offers a prime example of an attempt to rethink the relationship between rights, property and politics, not by operating within a given conceptual framework but by calling previous approaches into doubt. Central to Hume’s enterprise is his denial that virtue in general can be classed as “natural” in any of the prevailing

¹³ Pocock, “Virtues, Rights and Manners,” p. 39.

¹⁴ G. W. F. Hegel, *The Phenomenology of Spirit* (1807), trans. Terry Pinkard (Cambridge, 2018), §442. For discussion of the transition from the Greek to the Roman world in Hegel’s *Philosophy of History*, see Eric Nelson, *The Greek Tradition in Republican Thought* (Cambridge, 2004), pp. 4 ff.

¹⁵ Pocock, “Virtues, Rights and Manners,” p. 43.

¹⁶ *Ibid.*, p. 44.

theological senses. It followed from this that there were no rights derivable from nature as such. This argument formed part of Hume's sceptical rebuke to Wollaston, Clarke and Malebranche. Moral rectitude and depravity could not be intuited as elements of the rational order of nature in the form of "fitnesses" or "relations."¹⁷ Reason had no access to occult qualities of the kind and, even if it had, it could not motivate behaviour to adopt them as precepts. Nature, Hume suggested, had three principal meanings in this context: it signalled the opposite of miraculous events; it was contrasted with phenomena that were rare or unusual; or it was distinguished from norms that were deemed artificial.¹⁸ Yet none of these senses, without further clarification, elucidated the character of virtue. Effectively, Hume was directing attention away from the idea that morality was explicable in terms of "immutable measures of right and wrong" based on rational concepts.¹⁹ From his perspective, our cognitive faculties could distinguish between (say) an "apple" and a "kingdom" but could not of themselves determine which was preferable.²⁰ Based on this understanding, morality arose from impressions based on experience and not ideas of reason. Hume also denied that norms existed as mind-independent facts. Value, instead, was attributed to conduct insofar as the relevant action registered a disposition: it was neither the idea nor the fact of murder that condemned it in the minds of observers, but the reason why the behaviour was carried out.²¹ The appreciation of virtue was therefore a function of the pleasure which the intention inspiring an action provoked in an onlooker. This meant that conduct was praised or blamed on the basis of the motives that triggered it. From this conclusion, Hume came to the specific case of the "virtue of justice," by which he meant those rights that were standardly subsumed under the category of commutative justice.

For Hume the social virtues in general – like gratitude, parental affection or charity to the poor – were admired on the basis of the motives that were their cause. In other words, actions usually classed under distributive justice were appraised in terms of the attitude giving rise to the behaviour – the "passions, motives, volitions and thoughts" responsible for the conduct.²² But what could oblige an agent to observe the rules of justice in Hume's sense? That is: what could motivate a person to respect the principles of "*mine* and *thine*"?²³ Hume

¹⁷ David Hume, *A Treatise of Human Nature* (1739–40), eds. David Fate Norton and Mary J. Norton (Oxford, 2000), 3. 1. 1. 4; 3. 1. 1. 26.

¹⁸ *Ibid.*, 3, 1, 2, 8–10.

¹⁹ *Ibid.*, 3. 1. 1. 4.

²⁰ *Ibid.*, 3. 1. 1. 13.

²¹ *Ibid.*, 3. 1. 1. 26.

²² *Ibid.*

²³ *Ibid.*, 3. 2. 2. 15.

established that the social virtues are not derived from nature, but he still took them to be “natural” insofar as the human mind was constituted so as to appreciate them. “To approve of a character” – for instance, of their humanity – “is to feel an original delight upon its appearance.”²⁴ As his correspondence with Hutcheson makes clear, this natural disposition was not providentially orchestrated for Hume, but it was still a contingent fact of human nature.²⁵ Contrary to Hobbes and other exponents of “selfish” systems of morality, Hume distinguished natural virtues like the impulse to humanity from the motive of self-interest, and then interpreted benevolence as a “natural” propensity: as a fact about how individuals respond under appropriate circumstances.²⁶ Our primary constitution moved us to kindness, gratitude and generosity. Yet what were the motives for honesty, honouring promises, and justice – for respecting property, repaying debts, and impartially rendering what was due?

Hume sharpened this question by pointing to the verdicts of courts which enforce the law even where decisions violate our natural inclinations: “Judges take from a poor man to give to a rich; they bestow on the dissolute the labour of the industrious; and put into the hands of the vicious the means of harming both themselves and others.”²⁷ Each of these resolutions offends against our humanity, yet we approve the decrees as equitable nonetheless. Hume considers this capacity for judiciously awarding rights even where the ruling contradicts our natural virtues as a great civilisational achievement. Under rudimentary conditions of primitive family life, what counts is only the partiality of our affections. The object of virtue is limited to our near relations. However, over time, we learn to subordinate immediate fellow-feeling to principles encompassing society as a whole. On the basis of normative judgments of the kind, the predilection for friendship can be sacrificed to the ideal of justice, and charity suspended in the interest of property. What induces human beings to embrace a system of values that contravenes their spontaneous preferences in this way? It cannot be the simple “idea” of justice itself. There must be some motive that is able to account for the change in orientation.

Hume disregards a range of possible answers to this conundrum, dispatching claims that the origins of justice can be found in either the dictates of self-love, respect for the public interest or individual good will. The capacity for justice, Hume concluded, is not primordial but learned: it is a product of “education” – or the “culture of discipline” (*Kultur der Zucht*), in

²⁴ Ibid., 2. 1. 7. 5.

²⁵ David Hume, *The Letters of David Hume*, ed. J. Y. T. Greig (Oxford, 1932), 2 vols., I, 39–40.

²⁶ Paul Sagar, *The Opinion of Mankind: Sociability and the Theory of the State from Hobbes to Smith* (Princeton, NJ, 2018), pp. 52 ff.

²⁷ Hume, *Treatise*, 3. 3. 1. 12.

later Kantian language.²⁸ Viewing our fellows equitably, as if from behind a veil of ignorance, is an acquired rather than an original proclivity: “the sense of justice and injustice is not deriv’d from nature, but arises artificially.”²⁹ Human beings, Hume notes, possess a sexual appetite which can exercise an influence on many of their tastes. But they do not have a “universal affection” which they bear towards the species, and which can be detected alongside, or even beneath, ascertainable dispositions.³⁰ Instead, they are equipped with immediate sympathies and partialities which form the basis of an untutored moral life. A developed ethical existence involving intercourse with strangers, governed by a division and security of rights, is brought about by circumstantial experience and reflection. Rights, for this reason, are not natural but acquired.

Their acquisition is determined by the conditions of existence conjoined with our original inclinations. Hume followed Pufendorf in defining man as combining the attributes of exigency (*indigentia*) and infirmity (*imbecilitas*).³¹ Standing in need of mutual assistance to facilitate survival, the sexual instinct drives us into rudimentary cooperation leading to the institution of the family. For Kant, consensual sexual intercourse already presupposed the cultivation of the passions through rational self-restraint; but for Hume, the major transition in the refinement of sensibility is marked by the adoption of social rules to supersede the crude partiality of affections.³² Although these rules are adventitious, and therefore not strictly natural, they are discovered according to a generalisable pattern and so can properly be called the “*laws of nature*.”³³ The sphere of right pertains to the inner sanctuary of the mind, the integrity of the body and the possession of goods. Self-possession initially extends into external ownership through labour, or via the use and consumption of nature. Although self-ownership in theory is exposed to violation, Hume singled out the appropriation of external goods as posing the chief obstacle to large-scale collaboration. There is no space in this conception for a struggle-unto-death impelled by rival wills prepared to put their self-certainty on trial. While for Hegel the potential for injury in the encounter between heads-of-families asserting themselves under primitive conditions was “infinite” (*unendlich*), for Hume the threat of

²⁸ Hume, *Treatise*, 3. 2. 2. 10. Immanuel Kant, *Critique of the Power of Judgment* (1790), ed. Paul Guyer (Cambridge, 2000), 5: 431–33.

²⁹ Hume, *Treatise*, 3. 2. 1. 17.

³⁰ *Ibid.*, 3. 2. 1. 12.

³¹ Istvan Hont, “The Language of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the ‘Four-Stages Theory’” in *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (Cambridge, 1987), p. 263.

³² Immanuel Kant, “Conjectural Beginning of Human History” (1786) in *Anthropology, History and Education*, eds. Günter Zöllner and Robert B. Loudon (Cambridge, 2007), 8: 113.

³³ Hume, *Treatise*, 3. 2. 1. 19.

violence is confined to the advantages bestowed on individuals by industry and fortune.³⁴ Given that acquired possessions, being scarce, could prove contentions, justice would only be honoured by securing agreement among disputants. Such an accord is achieved by rational negotiation.

Hume distinguishes between the original acquisition of the idea of justice and its establishment as a social norm. In the former case, we discover the utility of overriding short-term interests to enjoy the long-term benefits of property. The shared judgment of advantage establishes the convention of justice on the basis of gradual trial and error: we learn by the “repeated experience of the inconveniences” involved in transgressing one another’s rights.³⁵ Trust does not give rise to cooperation; rather, a convention promoting cooperation steadily fosters trust. The process begins with the mutual recognition of present possessions. On that basis, property is stabilised by adherence to rules about which agreement is progressively attainable. Respect for the rights of occupation, accession, prescription and the transfer of goods steadily emerges, given the nature of the human mind and the conditions under which it operates. On that basis, the laws of commerce can be said to be “natural” to mankind.³⁶ They are a function of the capacity to exchange or contract. In *The Theory of Moral Sentiments*, Smith followed Hume in drawing the same conclusion: society required, not beneficence between persons, but “a mercenary exchange of good offices.” The word “mercenary” was multifaceted in its meaning. In its widest sense, the idea was not just that merchants served their interest in doing business. The point was that the institution of property itself, including contractual relations in general, was supported by an interest in society at large: “Society may subsist, though not in the most comfortable state, without beneficence; but the prevalence of injustice must utterly destroy it.”³⁷ In the surviving “Early Draft” of the *Wealth of Nations*, Smith showed how the capacity to “truck, barter and exchange” liberated society from dependence on goodwill and unleashed the productive potential of the division of labour.³⁸ By reliance on this aptitude, Hume had noted, rational calculation yielded the rudiments of a system of rights.

³⁴ G. W. F. Hegel, *Jenaer Systementwürfe I: Das System der spekulativen Philosophie* (1803–4), eds. Klaus Düsing and Heinz Kimmmerle (Hamburg, 1986), p. 217; Hume, *Treatise*, 3. 2. 2. 7

³⁵ Hume, *Treatise*, 3. 2. 2. 10.

³⁶ *Ibid.*, 3. 2. 4. 1.

³⁷ Adam Smith, *The Theory of Moral Sentiments*, eds. D. D. Raphael and A. L. Macfie (Indianapolis, 1982), p. 86.

³⁸ Adam Smith, “Early Draft of Part of *The Wealth of Nations*” in *Lectures on Jurisprudence*, eds. R. L. Meek, D. D. Raphael and P. G. Stein (Indianapolis, 1982), pp. 570–1.

III. Montesquieu, Hume and the Forms of Government

Convention alone, however, could only go so far. It could not sustain a complex society in the absence of enforcement. This consideration brought Hume to consider the status of justice as a social norm. Over time, the security of rights would need to be stabilised as the temptation and opportunity to defect from the rules of property multiplied. Justice gained support, Hume made plain, from the fact that sympathy with the public interest would lead to its approval as a moral virtue.³⁹ In addition, socialisation through the family, the desire for reputation, the artifice of politicians and the institution of government all cumulatively lent solidity to the original sense of justice.⁴⁰ Hume summarised his contribution to jurisprudence by restating the view that property began with reflection on its utility, and so could not be derived from the “relations of ideas” accessible to the intuitive intellect.⁴¹ In this he distinguished his argument from the thought of Montesquieu, specifically from Book 1 of the *Spirit of the Laws*. Whereas Montesquieu insisted that “the divinity has its laws, the material world has its laws, the intelligences superior to man have their laws, the beasts have their laws, [and] man has his laws,” Hume had abandoned the metaphysics of “necessary relations” (*rappports nécessaires*) in favour of a science grounded on empirical contingencies.⁴² In conformity with this, in the second *Enquiry*, he challenged Montesquieu’s reliance on Malebranchian moral theory, particularly his resort to “relations of fairness” (*rappports d’équité*): “This illustrious writer,” Hume complained, “... supposes all right to be founded on certain *rappports* or relations.”⁴³ For Montesquieu, it is these relations that in principle yield a “right to have rights,” to adapt to the now-infamous Arendtian phrase.⁴⁴

According to Hume, Malebranche had been the original source of the “abstract theory of morals,” later taken up by Ralph Cudworth and Samuel Clarke.⁴⁵ In the tenth Elucidation to his *Search after Truth*, Malebranche accounted for natural laws in terms of “relations of perfection” (*rappports de perfection*) antecedent to positive ordinances or human conventions.⁴⁶ In his last published work, the *Réflexions sur la prémotion physique*, he made the implications of his appeal to such relations explicit by challenging the Hobbesian idea that justice was the

³⁹ Hume, *Treatise*, 3. 2. 2. 24

⁴⁰ *Ibid.*, 3. 2. 2. 25–7.

⁴¹ *Ibid.*, 3. 2. 2. 20.

⁴² Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, eds. Anne Cohler, Bassia Miller and Harold Stone (Cambridge, 1989), p. 3.

⁴³ David Hume, *An Enquiry concerning the Principles of Morals*, ed. Tom L. Beauchamp (Oxford, 1998), p. 93n.

⁴⁴ Hannah Arendt, *The Origins of Totalitarianism* (London, 1951), p. 296.

⁴⁵ Hume, *Enquiry*, p. 93n.

⁴⁶ Nicolas Malebranche, *The Search after Truth*, eds. Thomas M. Lennon and Paul J. Olscamp (Cambridge, 1997), pp. 617–18.

command of the sovereign.⁴⁷ Malebranche's contention that justice was based on necessary and universal principles was taken up by Montesquieu in the *Persian Letters*: "justice is eternal and does not depend on human conventions," the character of Usbek declares to Rhedi at one point in the novel. Even if morality were merely an invention, Usbek went on, we should have to conceal such an abysmal truth from ourselves.⁴⁸ The argument of the *Spirit of the Laws* is more expansive. Although natural justice provides an objective standard for behaviour, the human tendency to error based on finite intelligence makes the infringement of right a permanent feature of human life. As a consequence, we need religion and philosophy to call us to our duties, and political and civil laws to secure social peace. These laws, Montesquieu thought, ought to be based on reason. However, political reason should be adapted to circumstances and cater to interests as these were variously configured. On that basis, Montesquieu wrote, "it is very unlikely that the laws of one nation can suit [*convenir*] another."⁴⁹

Despite his disregard for Montesquieu's natural law theory, Hume shared his belief that practical judgment should be guided by convenience. From this perspective, it made no sense to claim, in the words of Pocock quoted above, that "liberty defined by law invests the citizen with rights but no part in *imperium*." For both Montesquieu and Hume, legislation should confer upon the citizen whatever share in government that was compatible with the interests of society. Although justice was a natural relation in Montesquieu and an artificial virtue in Hume, civil and political laws for each were a matter of practical utility. For that reason, in the *Enquiry*, Hume deliberately echoed Montesquieu: "The laws have, or ought to have, a constant reference to the constitution of government, the manners, the climate, the religion, the commerce, the situation of each society." Analysis of the relations of reciprocal causation among these variables constituted, in Hume's estimation, a "system of political knowledge" that was as solid as it was incisive.⁵⁰ One of the most striking, and indeed provocative, arguments generated by Montesquieu's political science was that "Democracy and aristocracy are not free states by their nature."⁵¹ The comment was intended as a rebuke to the idealisation of ancient models of political liberty, and consequently a challenge to neo-republican attempts to resuscitate bygone institutions on modern terrain. The suggestion was that participation in

⁴⁷ Nicolas Malebranche, *Réflexions sur la prémotion physique* (1715) in *Œuvres complètes de Malebranche*, ed. André Robinet (Paris, 1958–1975), 20 vols., XVI, pp. 93, 98. Cf. G. W. Leibniz, "Opinion on the Principles of Pufendorf" (1706) in *The Political Writings of Leibniz*, ed. Patrick Riley (Cambridge, 1972), pp. 70–1.

⁴⁸ Charles-Louis de Secondat, Baron de Montesquieu, *Lettres Persanes* in *Œuvres complètes*, ed. Roger Caillois (Paris, 1949), 2 vols., I, p. 256.

⁴⁹ Montesquieu, *Spirit of the Laws*, p. 8.

⁵⁰ Hume, *Enquiry*, p. 93.

⁵¹ Montesquieu, *Spirit of the Laws*, p. 155.

public life as such was no guarantee of rights, and was in fact liable to undermine individual freedoms.

Rousseau echoed this specific point in his remarks on Athens included in the *Social Contract*, where the collective authority of the *dēmos* exercised through *psēphismata* is taken to have undermined the security of the individual.⁵² Establishing the “Principles of Political Right [*Droit*],” an objective highlighted by the full title of Rousseau’s work, required the appropriate distinction and combination of powers. The resulting architecture made up the substance of Rousseau’s political theory. Although Montesquieu’s preferred public norms were patently different, the basic assumption of the *Spirit of the Laws* was likewise that a system of justice depended on the opposition and orchestration of constitutional levers. This premise provided the grounds on which Montesquieu disdained attempts to find in the ancient sources exemplary instruction for modern politics: “When I turned to antiquity, I sought to capture its spirit in order not to consider as similar those cases with real differences or to overlook differences in those that appear similar.”⁵³ Ancient polities crumbled by subordinating justice to public will. In celebrating their histories, commentators tended to confuse “the power of the people” with their “liberty.”⁵⁴ Modern regimes could only succeed by securing rights through constitutional restraints under which the branches of government would “check” one another.⁵⁵ Whether this was best achieved by increasing or reducing participation was one of the critical questions of the age.

The requisite balance between securing justice and distributing power was a delicate one, as Montesquieu reflected: “in an enlightened age, one trembles even while doing the greatest goods.”⁵⁶ The only means of finding one’s bearings was by exercising judgment formed through prudential – and thus historical – reasoning. For Montesquieu, this meant curing oneself of unconscious “prejudice.”⁵⁷ For Hume, it entailed adopting the view of a philosopher above party.⁵⁸ It was a nice question whether this meant saving British liberty by curbing the power of the Commons or consolidating the French monarchy by bolstering the

⁵² Jean-Jacques Rousseau, *Social Contract, Discourse on the Virtue Most Necessary for a Hero, Political Fragments, and Geneva Manuscript*, eds. Roger D. Masters and Christopher Kelly (Hanover and London, 1994), p. 149.

⁵³ Montesquieu, *Spirit of the Laws*, p. xliii.

⁵⁴ *Ibid.*, p. 155.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, p. xliv.

⁵⁷ *Ibid.*

⁵⁸ David Hume, “That Politics May be Reduced to a Science” (1741) in *Essays Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis, 1985, rev. 1987), p. 30.

prerogatives of subordinate corporations.⁵⁹ But the issue is not well served by approaching it armed with the distinction between “negative” and “positive” freedom of the kind originally drawn by Isaiah Berlin and then used by Pocock to motivate his account of early modern thought.⁶⁰ Civil and political freedom were distinct but inseparable. The stability of rights and the balance of power reciprocally determined one another, but on terms that varied according to circumstances. There was no necessary connection between the type of government and the rights of the people.

IV. Burke, Rights and Prescription

This point was vividly made by Burke in his *Reflections on the Revolution in France*, where the purpose of government was associated with the security of justice although the form of administration under which it was guaranteed was a matter of artifice rather than nature. As Burke saw it, the Declaration of the Rights of Man and the Citizen, adopted provisionally by the National Constituent Assembly on 27 August 1789, amounted to an attack on prescriptive rights as he understood the term: that is, as a wholesale rejection of the notion that civil entitlements and political arrangements acquired authority by the passage of time. It was Burke’s commitment to prescription that later formed the main plank of Paine’s attack on the *Reflections* in his *Rights of Man* of 1791. According to Article II of the French Declaration, the goal of any legitimate civil association was to preserve the “imprescriptible rights” of human beings.⁶¹ Prescription here, in contrast to Burke’s usage, carried the Roman law meaning of “*praescriptio*”—not, in other words, its common law sense of a right conferred by continuous occupation. Under Roman law, a form of *praescriptio* emerged that referred to the extinction of entitlement by lapse of time, a conception in due course encapsulated by Kant with the German term “*Verjährung*,” indicating the superannuation of right.⁶² The point of the Declaration was to highlight enduring rights that could not be compromised through the course of ages: they could never die or be extinguished, under any conditions. In point of fact, along with Paine and the drafters of the Declaration, Burke accepted the idea of imperishable rights. It follows from this that the overlap between Burke and his opponents regarding the principles of justice are in many ways more extensive than their points of disagreement, albeit their

⁵⁹ David Hume, “Whether the British Government Inclines More to Absolute Monarchy or to a Republic” (1741) in *ibid.*, p. 52; Montesquieu, *Spirit of the Laws*, p. 116.

⁶⁰ Isaiah Berlin, “Two Concepts of Liberty” (1958) in *Four Essays on Liberty* (Oxford, 1969).

⁶¹ “Declaration of the Rights of Man and The Citizen” in Dale Van Kley ed., *The French Idea of Freedom: The Old Regime and the Declaration of Rights of 1789* (Stanford, CA, 1994), pp. 1–3.

⁶² Immanuel Kant, *The Metaphysics of Morals* (1797), ed. Lara Denis (Cambridge, 2017), 6: 292. For the same usage, cf. G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood (Cambridge, 1991), §64.

divergences were highly consequential. Unfortunately, this conformity has been systematically obscured on account of the ideological commitments that influence the interpretation of key documents of the Revolution, and indeed the period altogether. While Burke accepted that there existed “imprescriptible” rights, or rights that time could never erode, he also believed that the common law sense of prescription helped stabilize the enjoyment of those rights. Smith came to the same conclusion in his *Lectures on Jurisprudence*: prescription conferred legitimate rights based on “long possession.”⁶³

Burke’s viewpoint is made evident in a well-known passage in the *Reflections*, where he addresses what he takes to be misconceptions of human rights. When natural rights are taken to exercise an absolute authority over civil rights, prescriptive privileges lose all traction: “They have ‘the rights of men’. Against these there can be no prescription.”⁶⁴ According to the Declaration, as Burke read it, everything was a matter of original title, or primordial right, against which usages had no legitimacy, however much established practice might seem to embody leniency or fairness. In response to Revolutionary natural rights, Burke enumerated what seemed to be a series of civil rights: the right to benefit from society; the right to self-defence against tyranny; the rights of conscience, including religion; the right of offspring to parental care, and to inheritance; and, finally, the right to property in general. Many of these were entitlements enjoyed as civil benefits: “law itself is only beneficence acting by a rule.”⁶⁵ It therefore appeared as though Burke was defending civil justice against original rights.

Quite a lot in the text of the *Reflections* would seem to confirm this reading. From what we can tell of Kant’s response to Burke as registered in his essay of 1792 on “Theory and Practice,” this is how he also construed the argument of this passage: namely, as though Burke were pleading positivity against normativity. Kant insisted, opposing Burke, that the “worth of a practice” depended entirely on its conformity to “theory” – or, to a system of right independent of empirical conventions.⁶⁶ Kant was motivated to intervene in this way in part because of the manner in which Burke had disparaged metaphysical speculation, but more particularly because his former student, Friedrich Gentz, had added a long footnote in his translation of the *Reflections* reformulating and justifying Burke’s approach.⁶⁷ However, in

⁶³ Adam Smith, *Lectures on Jurisprudence*, eds. R.L. Meek, D. D. Raphael and P.G. Stein (Indianapolis, 1982), p. 32.

⁶⁴ Edmund Burke, *Reflections on the Revolution in France* (1790), ed. J. C. D. Clark (Stanford, CA, 2001), p. 217.

⁶⁵ *Ibid.*

⁶⁶ Immanuel Kant, “On the Common Saying: That May be True in Theory, but it is of No Use in Practice” (1792) in *Practical Philosophy*, ed. Mary J. Gregor (Cambridge, 1996), 8: 277.

⁶⁷ Edmund Burke, *Betrachtungen über die Französische Revolution* (1792), trans. Friedrich Gentz in *Edmund Burke/Friedrich Gentz: Über die Französische Revolution*, ed. Hermann Klenner (Berlin, 1991), pp. 138–9n.

many ways both reactions were based on misapprehensions. This applies more generally to the contemporaneous British debate. “I contend for the *rights of men*,” Wollstonecraft announced in the opening paragraph of her first *Vindication*, directed against Burke.⁶⁸ Amongst these rights she listed liberty as a “birthright” – insofar as its expression did not conflict with the freedom of others. In opposition to this warrant, she proposed, Burke acknowledged only the authority of “antiquity.”⁶⁹ Much of the *Reflections*, as Wollstonecraft noted, had indeed emphasised the legitimacy of precedent. Yet Burke also unequivocally proclaimed that “natural rights... exist,” independently of civil institutions.⁷⁰ The question for him was the relationship between these original rights and the provisions of civil jurisdiction.

Wollstonecraft’s objection became the centrepiece of Paine’s assault. For Paine, the import of Burke’s *Reflections* amounted to a justification of usurpation rooted in “*assumed*” historical entitlement, as set out in the refutation of Richard Price which takes up the first portion of Burke’s work.⁷¹ Paine alleged that the “error of those who reason by precedents drawn from antiquity, respecting the rights of man, is that they do not go far enough into antiquity.”⁷² They ought, he was asserting, go back to the beginning, to the “*creation*,” when human beings were primordially endowed with rights.⁷³ These natural rights, Paine proposed, formed the foundation of every legitimate civil right: artifice and convention – or the course of history – added nothing positive to the original investment. Paine’s menu of divine rights included the dictates of conscience, and consequently religious faith, as well as harmless freedoms that did not injure others. Importantly, Burke accepted these, not only as civil rights, but equally as natural rights.⁷⁴ For him, the rights of conscience, family relations, self-defence and property, whilst optimally secured by civil protection, had their basis in pre-civil existence. What Burke vehemently denied was that the right of self-government, the right to be “*judge*” in one’s “*own cause*,” could be enjoyed as a power under the state.⁷⁵ Although he conceded this as a right of nature, he underlined that it could not survive as a possession under established government: “as to the share of power, authority, and direction which each individual ought to have in the management of the state, that I must deny to be amongst the direct original rights

⁶⁸ Mary Wollstonecraft, *A Vindication of the Rights of Men* (1791) in *A Vindication of the Rights of Men and A Vindication of the Rights of Woman and Hints*, ed. Sylvana Tomaselli (Cambridge, 1995), p. 5.

⁶⁹ *Ibid.*, pp. 7, 8.

⁷⁰ Burke, *Reflections.*, p. 218.

⁷¹ Thomas Paine, *Rights of Man, Part I* (1791) in *Political Writings*, ed. Bruce Kuklick (Cambridge, 2000), pp. 62–7.

⁷² *Ibid.*, pp. 83–4.

⁷³ *Ibid.*, p. 85.

⁷⁴ Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Princeton, NJ, 2015), p. 574.

⁷⁵ Burke, *Reflections.*, p. 218.

of man in civil society.” The right of participation in the civil power, Burke asserted with Hume and Montesquieu, was “a thing to be settled by convention.”⁷⁶

V. Paine, Riches and Civilisation

It transpires that the rights of property, conscience and resistance were pervasively accepted among eighteenth-century thinkers, though they disputed how these entitlements were secured. For some, they were natural; for others, conventional; for still others, a complicated mixture of the two, as we have seen. However, unlike Montesquieu, Hume and Burke, Paine believed that the original right of self-government, although transmitted to representative institutions in civil society, could determine the manner of its transference. By this he meant that it could only be fairly expressed in one particular way. That is, there was – by right – only one acceptable form of government: a representative republic, designed (Paine implied) by nature. “To possess ourselves of a clear idea of what government is or ought to be,” he wrote, “we must trace it to its origin.”⁷⁷ For Montesquieu, Hume and Burke, on the other hand, there was no original model of legitimacy: the forms of government were matters for circumstantial agreement, which is why various types had emerged in different societies and periods, as illustrated extensively in the *Spirit of the Laws*. In Burke’s phrase, civil society was the “offspring” of convention. Different arrangements were the products of diverse conventions, or distinct contracts, each of which in effect determined, and thus limited and modified, “all the descriptions of constitution formed under it.”⁷⁸ For this reason Burke could assert, in a climactic section of the *Reflections*, that society was “indeed a contract.”⁷⁹ He also agreed with Paine that the contract could be undone where a state inflicted wanton suffering on its people. Unlike Paine, however, he thought that dismantling an established polity was a dreadful task, difficult to achieve without devastating cost. Like any act of war upon an existing regime, the violence of resistance had inevitable repercussions, leading ordinarily to an escalation of conflict. Paine declared explicitly that the French Revolution was a “necessity.”⁸⁰ But Burke rejected this: a reforming monarch was not easily depicted as a tyrant, as Paine conceded.⁸¹ Yet nonetheless there was for Burke an undoubted right of revolution, openly proclaimed in the text of the *Reflections*, although commentators have been distracted from his statement of principles because of the

⁷⁶ Ibid.

⁷⁷ Paine, *Rights of Man*, p. 89.

⁷⁸ Burke, *Reflections*, p. 218.

⁷⁹ Ibid., p. 260.

⁸⁰ Paine, *Rights of Man*, p. 79.

⁸¹ Ibid., p. 68: “The king was known to be the friend of the nation.”

impact of the text's reception. The "resort to anarchy," Burke recognised, was licenced by oppression. The experience of tyranny conferred an exigent right on the people, depicted as "the first and supreme necessity."⁸² Revolution was a right in the last instance, although French conditions did not count for Burke as appropriately onerous.

Together with Wollstonecraft and Paine, then, Burke accepted the existence of the rights of conscience, acquisition and resistance as fundamental, inviolable and equal entitlements held by individuals. It follows that, for each of these writers, justice was ultimately rooted in nature. Rights were grounded, as Burke put it, on "the true moral equality of mankind."⁸³ This finding is perhaps unsurprising since it stemmed from first principles for Wollstonecraft and Burke as Christians, just as it did for Paine as a Deist. However, the conditions under which Burke was prepared to apply the right of resistance differed from those of his younger contemporaries. Equally, they diverged in their application of the rights of conscience. Burke tolerated dissent, whilst supporting established religion, and so his model of religious freedom differed from Wollstonecraft and Paine. All three, again, agreed on the rights of property: Wollstonecraft, for instance, declared that "the right a man has to enjoy the acquisitions which his talents and industry have acquired" was authorised by reason and nature.⁸⁴ Yet they differed on the implications of the distribution of wealth in society. Wollstonecraft complained that only "the property of the rich" was secure in modern society, and generally inveighed against inequalities which impaired virtue.⁸⁵ However, in the *Vindication of the Rights of Men*, enlightenment, love and kindness were the principal means by which she believed disparities would be corrected.⁸⁶ Paine's justification of the rights of acquisition in his 1791 *Rights of Man* was similarly offset by a concern with the fate of the poor, though it was not really until the middle of the 1790s that he began to charge the principle of justice, as defended from Grotius to Hume, with contravening fundamental rights.

In his *Agrarian Justice* of 1797, Paine argued that a "revolution in the state of civilization is the necessary companion of revolutions in the system of government."⁸⁷ By "civilization" Paine meant the historical process leading to the creation of private property in land, and with it the class of the poor. In certain respects, this analysis was curiously close to

⁸² Burke, *Reflections*, p. 261.

⁸³ *Ibid.*, p. 205.

⁸⁴ Wollstonecraft, *Vindication*, pp. 23–4. For discussion see Sylvana Tomaselli, *Wollstonecraft: Philosophy, Passion, and Politics* (Princeton, NJ, 2021), pp. 153 ff.

⁸⁵ Wollstonecraft, *Vindication*, pp. 13, 48–9, 58–9.

⁸⁶ *Ibid.*, p. 60.

⁸⁷ Thomas Paine, *Agrarian Justice* (1797) in *Political Writings*, p. 336.

Burke's, except that Burke considered the French Revolution as exceptional in modern times insofar as it united a challenge to state authority with a dramatic alteration in social relations. The coherence of society depended on opinion, including how property was regarded. This had, Burke claimed, like so much else, been revolutionised in France, as it would be in due course across the continent of Europe – extinguishing, as it proceeded, the very “sense of justice in our minds.”⁸⁸ Attitudes to property were variously recalibrated through the nineteenth century, but more immediately debate about the credibility of the institution had been ignited by events in France. Some contributions built on earlier criticism of the disparities of commercial society, evident in the writings of Fénelon, Morelly and Mably.⁸⁹ By the middle of the 1790s, assorted schemes for price controls, fair wages, social insurance, agrarian legislation, income redistribution and common property were being publicised by supporters of the Revolution in its various incarnations.⁹⁰ Paine's argument was unusual in advocating welfare provision on the basis of original rights of possession enjoyed under conditions of primitive community in the state of nature.⁹¹ Labour created value in cultivating matter, and with it rights of ownership in the product of human effort. Inheritance was also, for Paine, a legitimate entitlement. But neither arrangement justified unfair distributions, even though they both permitted considerable inequalities. Wealth differentials posed no problem for Paine, but absolute wretchedness did: “I care not how affluent some may be, provided none be miserable in consequence of it.”⁹² The extremity of hardship rather than relative disparity was to be indemnified. Fairness, on this conception, could never yield an exact or “arithmetic” equality, although it did warrant the demand for compensation based on an acknowledgement of original rights together with an appreciation of general social utility.⁹³

As had been recognised extensively from Hume to Burke, modern commercial civilisation exhibited extremes of plenty and want. As Smith commented, the “labour and time of the poor is... sacrificed to maintaining the rich in ease and luxury.”⁹⁴ For Paine, neither agrarian laws nor charity were fit to remedy the situation.⁹⁵ Any correction would have to

⁸⁸ Edmund Burke to Captain Thomas Mercer, 26 February 1790, *Correspondence of Edmund Burke, Volume VI: July 1789–December 1791*, eds. Alfred Cobban and Robert A. Smith (Cambridge and Chicago, 1967), p. 94.

⁸⁹ Michael Sonenscher, “Property, Community, and Citizenship” in *The Cambridge History of Eighteenth-Century Political Thought*, eds. Mark Goldie and Robert Wokler (Cambridge, 2006).

⁹⁰ Gareth Stedman Jones, *An End to Poverty? A Historical Debate* (London, 2004); Samuel Fleischacker, *A Short History of Distributive Justice* (Cambridge, MA, 2004), pp. 75 ff.

⁹¹ Paine, *Agrarian Justice*, p. 325.

⁹² *Ibid.*, p. 332.

⁹³ On the contrast between geometric as opposed to arithmetic equality (meaning an equal as against a proportionate division) see Plato, *Gorgias*, 508a6.

⁹⁴ Smith, *Lectures on Jurisprudence*, p. 340.

⁹⁵ Paine, *Agrarian Justice*, pp. 326–7.

respect legitimate claims to property, but would also have to be supported by a common sense of equity. The fact was, Paine contended, the “case of property” had become “critical.”⁹⁶ This implied that reverence for the rich and powerful, anatomised decades earlier by Hume and Smith, was in the process of being progressively undermined.⁹⁷ The forms of consciousness that supported opulence were “passing in all countries.”⁹⁸ Justice, therefore, no longer meant security from injury, as it had even for Rousseau as well as Hume and Smith: “*where there is no property, there is no injury,*” Rousseau argued, consciously summarising Locke.⁹⁹ Neither Rousseau, Hume or Smith thought justice was served by dismantling the property regime. For Smith, in the *Lectures on Jurisprudence*, just entitlements prevented interlopers from seizing what was not “their own”: it protected individuals in their “perfect rights,” above all the “preservation of property.”¹⁰⁰

Paine was suggesting that the attitudes supporting this arrangement were being revamped. Hume believed that the benefits deriving from a system of individuated rights would always reassert themselves in commercial societies, even though “imprudent fanatics,” like Diggers or Anabaptists, might occasionally challenge their utility.¹⁰¹ However, Hume also saw that utility could be a matter of opinion.¹⁰² As Smith observed, theft was barely noticed among the Indian tribes of America although it was usually punished with death by the pastoralists of Asia.¹⁰³ After all, Smith’s larger thesis was that the regulation of property varied with changing social conditions. Nonetheless, for Hume, the progress of society had steadily enlarged respect for commutative justice. There was no primordial instinct that affirmed belief in the advantages of justice, yet interest in a strict system of rights ordinarily prevailed over attacks on property. This prevalence, however, could not be guaranteed since even our interests were ultimately prey to our whims: “A SYRIAN would have starved rather than taste pigeon; an EGYPTIAN would not have approached bacon,” Hume reflected.¹⁰⁴ Nonetheless, Hume also thought that reason triumphed over superstition where judgements of convenience were permitted to express

⁹⁶ *Ibid.*, p. 335.

⁹⁷ Hume, *Treatise* 2. 2. 5. 1–21; Smith, *Theory of Moral Sentiments*, pp. 50 ff.

⁹⁸ Paine, *Agrarian Justice*, p. 335.

⁹⁹ Jean-Jacques Rousseau, *Discourse on the Origins of Inequality*, eds. Roger D. Masters and Christopher Kelly (Hanover and London, 1992). p. 48.

¹⁰⁰ Smith, *Lectures on Jurisprudence*, pp. 5, 401.

¹⁰¹ Hume, *Enquiry*, p. 85. For earlier critiques of property under the influence of the idea of an *ecclesia primitiva* see Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge, 2007).

¹⁰² Hume, “Whether the British Government Inclines” in *Essays*, p. 51.

¹⁰³ Smith, *Lectures on Jurisprudence*, p. 16.

¹⁰⁴ Hume, *Enquiry*, p. 94.

themselves. Burke was insisting that the French Revolution had disturbed this calculus, while Paine concluded that its proportions could legitimately be revised.

VI. Rousseau, Kant and Hegel

Kant believed that Rousseau had transformed debate in moral and political theory by placing liberty before utility as the fundamental principle underpinning natural right. This entailed a rejection of Grotius and his successors in the post-medieval tradition of jurisprudence for whom self-preservation, rather than inalienable freedom, provided the foundation for universal norms.¹⁰⁵ In the mid-1760s, in the *Remarks* to his work on the sublime and beautiful, Kant confessed that Rousseau had taught him to honour common human dignity on terms that enabled philosophy to vindicate the rights of man.¹⁰⁶ His engagement with Rousseau was far from uncritical, but what he cherished was the identification of a principle in human nature that operated as a source of priceless value. In his *Discourse on the Origins of Inequality*, Rousseau located the font of worth in freedom. Animal existence is driven by impulse, Rousseau asserted, “whereas man contributes to his operations by being a free agent.”¹⁰⁷ In developing this aptitude for free agency, the species acquired the capacity for morality, and justified its humanity in the process. To deprive a person of their free will, Rousseau argued, involved “taking away all morality from his actions.”¹⁰⁸ The acquisition of the faculty of moral judgment substituted “justice for instinct [*l’instinct*].” It involved replacing “appetite” with “right” as the basis for normative deliberation.¹⁰⁹ This was tantamount to acting on freely chosen principles instead of merely following inclinations. Furthermore, Rousseau believed that true politics was founded on principled deliberation. Rational participation in collective decision-making was an exercise in moral autonomy. Sovereignty did not just regulate self-interest but rather offered a means of realising liberty in civil society. This realisation depended on an ability to reason for the sake of the common good. It followed that obedience to the general will involved acting in conformity with the public weal rather than on the maxims of private choice. For that reason, in subjecting themselves to legitimate political authority, each citizen divested themselves of their natural liberty whilst remaining “as free as before.”¹¹⁰

¹⁰⁵ For Rousseau’s criticism of Grotius on this score see *Social Contract*, p. 132; for Kant’s critique see “Towards Perpetual Peace: A Philosophical Project” (1795) in *Practical Philosophy*, ed. Mary J. Gregor (Cambridge, 1996), 8: 355; for Kantianism in contrast to the Grotian tradition see Tuck, “The ‘Modern’ Theory of Natural Law.”

¹⁰⁶ Immanuel Kant, *Observations on the Feeling of the Beautiful and Sublime and Other Writings*, eds. Patrick Frierson and Paul Guyer (Cambridge, 2011), 20: 44.

¹⁰⁷ Rousseau, *Discourse*, p. 25.

¹⁰⁸ Rousseau, *Social Contract*, p. 135.

¹⁰⁹ *Ibid.*, p. 141.

¹¹⁰ *Ibid.*, p. 138.

Kant followed post-Grotian moral philosophy in distinguishing right from virtue, though at the same time he developed Rousseau's insight that only the capacity for autonomy could provide human relations with properly normative content. Morality for Kant was based on respect for humanity as grounded in individual rationality – meaning each person's ability to determine their own purposes, whether instrumentally, prudentially, or normatively.¹¹¹ It was already apparent in his 1784–5 lectures on ethics, based on Alexander Baumgarten's textbooks on jurisprudence, that he thought a proper regard for humanity could be analysed into two distinct components of moral life, which he classed as “juridical” and “ethical” obligations respectively.¹¹² The distinction is implicit in the example of the prudent merchant presented in the First Section of the *Groundwork for the Metaphysics of Morals*. In treating customers honestly to protect his reputation, the merchant regards his clients' rights without any interest in their well-being.¹¹³ On the other hand, acting from duty to benefit others, as in the case of the “friend of humanity” also set out in the *Groundwork*, involves taking human beings to merit our goodwill.¹¹⁴ Ethical duty therefore enjoins: “Give to the other from what is yours.”¹¹⁵ By comparison, honesty motivated by prudent self-regard is indifferent to what consumers might morally deserve: they are objects of the merchant's justice, not his virtue. In *De Cive*, Hobbes differentiated attempts to advance one's own affairs (*rem suam*) from a deliberate design to benefit an “associate” (*socium*).¹¹⁶ Commerce was incentivised by business and not friendship. Yet even business, for Kant, despite the absence of benevolence in transactions, could be regarded as subject to “rectitude”: it could be based on a respect for right that was not reducible to expediency.¹¹⁷

This insight supplied the foundation for *The Metaphysics of Morals*. It enabled Kant to challenge the Horatian maxim, supported by thinkers from Grotius to Hume, that “utility” was the “mother of justice.”¹¹⁸ The source of justice was to be found instead in freedom according to Kant: “All rights are based on the concept of freedom, and are a result of preventing damage to freedom in accordance with law.”¹¹⁹ He explicated his view by commenting on Ulpian, as

¹¹¹ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (1785), eds. Mary Gregor and Jens Timmerman (Cambridge, 2012), 4: 415–16, where purposes are differentiated into those of “skill,” “prudence” and “morality.”

¹¹² Immanuel Kant, “Collins Lectures” (1784–5) in *Lectures on Ethics*, eds. Peter Heath and J. B. Schneewind (Cambridge, 1997), 27: 280.

¹¹³ Kant, *Groundwork*, 4: 397.

¹¹⁴ *Ibid.*, 4: 398.

¹¹⁵ Kant, “Vigilantius Lectures” (1793) in *Lectures on Ethics*, 27: 589.

¹¹⁶ Thomas Hobbes, *De Cive: The Latin Version*, ed. Howard Warrender (Oxford, 1983), p. 90.

¹¹⁷ Kant, “Collins Lectures” in *Lectures on Ethics*, 27: 413.

¹¹⁸ Horace, *Satires*, I, 3, l. 98.

¹¹⁹ Kant, “Vigilantius Lectures” (1793) in *Lectures on Ethics*, 27: 587.

relayed in the *Digest* of Justinian, in order to combine classical legal reasoning with philosophical jurisprudence.¹²⁰ This approach connected the notion of a “wrong” with an offence against free personality rather than a transgression against natural law as such: “If freedom is subject to a law of nature then it is not freedom.”¹²¹ For Rousseau, Kant and Hegel alike, slavery was the extreme case of a violation of right, depriving an individual of their fundamental liberty. In this they agreed with Montesquieu and Burke (though not with Grotius).¹²² Nonetheless, despite this apparent commonality, Kant and Hegel added conceptual depth to the meaning of servitude. In Kant’s case, subjugation involved treating a “person” as a “thing” (*Sache*) by denying their innate aptitude for independent choice.¹²³ The idea of chattel-status was again derived from Roman law – “Romans also considered slaves as things” – but the notion was enriched by an ideal conception of agency.¹²⁴ Freedom meant the intrinsic right to set purposes without infringement. From this perspective, harming one’s interests was not equivalent to contravening one’s rights.¹²⁵ As Kant understood it, an agent is not wronged when, as a matter of fact, their opportunities are narrowed through no one’s fault, or when their resources are depleted through legitimate competition. It was Fichte who first challenged this core conviction of Kantian jurisprudence, inaugurating debate about the capacity of rights to legitimise social welfare.¹²⁶

A juridical infraction, for Kant, is a denial of self-government. It involves an individual imposing their objectives on another, thereby compromising their entitlement to select their means to pursue their goals. Its significance lies less in being affected by others’ choices than in the experience of personal despotism, including where subordination is seemingly generous, as in the case of a well-treated slave. Equally, for Kant, freedom from subjection does not confer material benefits per se. We do not “deserve” to have our welfare secured any more than we have a “right” to have our wishes granted. In his characteristic phraseology, the law does

¹²⁰ See, for instance, Immanuel Kant, “Morality According to Prof. Kant: Lectures on Baumgarten’s Practical Philosophy” [C. C. Mrongovius] (1785) in *Lectures on Ethics*, 29: 631, discussing a passage from *The Digest of Justinian*, trans. Charles Henry Munro and W. W. Buckland (Cambridge, 1904–9), 2 vols., I, p. 5. Both Kant and Baumgarten are following G. W. Leibniz, *Nova methodus discendae docendaeque iurisprudentiae* (Frankfurt, 1667), §71–5.

¹²¹ Immanuel Kant, “Natural Right Course Lecture Notes by Feyerabend” in *Lectures and Drafts on Political Philosophy*, ed. Frederick Rauscher (Cambridge, 2016), 27: 1322.

¹²² On slavery in Locke, Montesquieu and Rousseau see Céline Spector, “Rights in Enlightenment Philosophy” above.

¹²³ Kant, *Metaphysics of Morals*, 6: 223.

¹²⁴ Kant, “Notes by Feyerabend” in *Lectures and Drafts*, 27: 1335.

¹²⁵ Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA, 2009), pp. 45–7.

¹²⁶ On this see Frederick Neuhaus, “Rights in the Thought of Kant, Fichte, and Hegel” below.

not protect the “*matter of choice*” so much as the formal enjoyment of the capacity to choose.¹²⁷ Along with the primordial ownership of oneself, the elements of private right – property, contract and status – serve as means to advance the claim to independent goal setting. Interfering with these instruments by encroachment or deception constitutes a violation of the person. Having established the provisional authority of private rights in the state of nature, Kant proceeded to show that their security depended on the institutions of public right. He rejected Gottfried Achenwall’s identification of a “rightful” condition with social relations as such, arguing instead that the security of justice required the establishment of a civil state, which Kant now termed the sphere of distributive justice.¹²⁸

The implications of Kant’s vision of innate and acquired rights as based on the inalienable power of freedom have played a central role in modern debates about justice, not least in the thought of Rawls, Nozick and Dworkin – although none of them, strictly speaking, stuck to the Kantian programme.¹²⁹ But already in the generation following Kant’s mature work, his arguments were subject to critical scrutiny. The most searching critique began with the early writings of Hegel, whose indictment shaped political philosophy down to the Frankfurt School and beyond. Where Kant had elucidated the idea of rights *more geometrico*, Hegel tackled the subject historico-philosophically. Kant was likewise interested in the historical progress of ideas of reason, as illustrated by his 1786 essay on the “Conjectural Beginning of Human History”, yet in the *Metaphysics of Morals* he proceeded purely analytically, seeking the origin of rights “in reason alone.”¹³⁰ Hegel’s focus instead was on the self-development of reason as manifested in the history of the species. His emphasis therefore fell on the transformation of self-consciousness through a process of reflexive criticism. As he put it in the *Phenomenology* – gnomically, but not untypically – “consciousness is the going beyond of its own self.”¹³¹ In the Introduction to his *Lectures on the Philosophy of World History*, he adapted Rousseau’s term “perfectibility” (*Perfektibilität*) to capture what he meant.¹³² His idea was that inhabiting a particular social world – or “shape of spirit” – involved

¹²⁷ Kant, *Metaphysics of Morals*, 6: 230.

¹²⁸ Ibid., 6: 306. Kant is taking issue with Gottfried Achenwall, *Ius naturae in usum auditorum, pars posterior* (Göttingen, 5th ed., 1763) on the idea of a social state (“the civil union [*unio civilis*] cannot itself be called a *society*”). He is following Hobbes in defining “distributive justice” in terms of the judicial power of the state.

¹²⁹ For the example of Rawls see Richard Bourke, “History and Normativity in Political Theory: The Case of Rawls” in *History in the Humanities and Social Sciences*, eds. Richard Bourke and Quentin Skinner (Cambridge, 2022).

¹³⁰ Kant, *Metaphysics of Morals*, 6: 230.

¹³¹ Hegel, *The Phenomenology*, §80.

¹³² G. W. F. Hegel, *Lectures on the Philosophy of World History. Introduction: Reason in History*, trans. H. B. Nisbet (Cambridge, 1975), pp. 125, 149. Cf. Hegel, *Philosophy of Right*, §343.

an apperceptive commitment to its prevailing norms, and so also to the possibility of critically assessing them.¹³³ This ultimately enabled Hegel to explain, for instance, not only why slavery was wrong (*unrecht*), but also why it had been valid (*gültig*).¹³⁴ Any proper “science of right” needed to account for both aspects of the phenomenon. Essentially, this insight flagged the end of the natural law tradition that had persisted from Grotius to Kant, with Hegel’s 1802–3 essay on *The Scientific Ways of Treating Natural Law* marking its terminus.¹³⁵

Hegel’s approach brought him into conflict with such pillars of the historical school of law as Gustav von Hugo and Carl von Savigny.¹³⁶ Against their detailed reconstructions of the development of law, Hegel believed that the legitimacy of legal practices could never be a function of the fact of their existence: “a determination of right may be shown to be entirely grounded in and consistent with the prevailing circumstances and existing legal institutions, yet it may be contrary to right and irrational in and for itself.”¹³⁷ Explanation (*Erklärung*) should not be confused with justification (*Rechtfertigung*). Hegel drew out the implications of his point by attacking Burke’s defence of the rights of monasteries in the *Reflections*, though without explicitly naming his target. The rights of monastic communities were an issue for Burke and Hegel since, in the aftermath of the French Revolution’s dissolution of religious orders, “monkish” establishments in Germany were similarly secularised during the process of mediatisation introduced by Napoleon after 1802.¹³⁸ Given that in France alone ten per cent of the landed property had belonged to the Gallican Church in 1789, the upheaval was profoundly relevant to debate about fundamental rights. It was in this context that Burke pronounced that for “the national assembly of France, possession is nothing; law and usage is nothing... [they] openly reprobate the doctrine of prescription.”¹³⁹ While critics of European monasteries had castigated their superstition as well as their lack of productivity, for Burke they ought, like any corporation, to be recipients of rudimentary justice, not least because of the incidental benefits they provided in terms of cultivation and scholarship.¹⁴⁰ However, as Hegel saw it, this was to

¹³³ Here I follow Robert Pippin, *Hegel on Self-Consciousness: Desire and Death in the Phenomenology of Spirit* (Princeton, NJ, 2011), pp. 25–6, on Hegel’s understanding of “going beyond” consciousness.

¹³⁴ Hegel, *Philosophy of Right*, §57.

¹³⁵ For the aftermath in Britain and France see Greg Conti, “On the Nadir of Natural Rights Theory in Nineteenth-Century Britain” below.

¹³⁶ G. W. F. Hegel, *Die Philosophie des Rechts: Die Mitschriften Wannemann (1917–18) und Homeyer (1818–19)*, ed. Karl-Heinz Ilting (Stuttgart, 1983), §27.

¹³⁷ Hegel, *Philosophy of Right*, §3.

¹³⁸ Derek Beales, *Prosperity and Plunder: European Catholic Monasteries in the Age of Revolution, 1650–1815* (Cambridge, 2003). For discussion of Burke’s views on the subject see Derek Beales, “Edmund Burke and the Monasteries of France,” *The Historical Journal*, 48: 2 (June 2005), pp. 415–36.

¹³⁹ Burke, *Reflections*, p. 322.

¹⁴⁰ *Ibid.*, pp. 331–3.

confuse a benign purpose with the means to that purpose. From his perspective, civil society (*bürgerliche Gesellschaft*), which secured a system of rights under neutral laws, was the instrument best fitted in the modern world to the cause of material and cultural prosperity. In that context, monasteries had become “superfluous and inappropriate.”¹⁴¹ They should succumb, in Hegel’s terse expression, to the “*absolute right*” of history.¹⁴²

In this historicist but equally philosophical spirit, Hegel’s *Philosophy of Right* explored the conditions under which the “concept of right” is actualised as an “Idea.”¹⁴³ That entailed the reconciliation of *ius* and *imperium*, with which this chapter began. Explaining how such a result could be brought about involved showing, first, how the values embodied in the thought of Rousseau and Kant had been made possible and, second, how their deficiencies could be overcome by integrating “abstract right” and “morality” with “ethical life” (*Sittlichkeit*). “The sphere of right and that of morality,” Hegel wrote, “cannot exist independently; they must have the ethical as their support and foundation.”¹⁴⁴ With this commitment, the Grotian distinction between commutative and distributive justice, of which Hegel was still acutely aware, lost its original significance.¹⁴⁵ At the same time, the Kantian opposition between duty and desire was surmounted. Equally, the Rousseauian vision of sovereignty as a union of competing wills was replaced by Hegel’s theory of the “ethical” state.¹⁴⁶ In many ways, the *Philosophy of Right* concludes an era of innovation in thinking about justice. But it stands near the beginning of the ascent of rights as an idiom that would travel the globe. That process, given its fitfulness and undeniable violence, has attracted copious adverse commentary – from Heidegger and Schmitt to Adorno and Foucault. Yet there is wisdom in avoiding the hypocrisy of denouncing what we actually cherish and enjoy. The career of rights from Hume to Hegel was not a sequence of self-serving stratagems, nor an exercise in covert exploitation. It offers instead a powerful resource for philosophical reflection on the world we have inherited.

¹⁴¹ Hegel, *Philosophy of Right*, §3. Cf. *ibid.*, §46.

¹⁴² *Ibid.*, §345. Cf. James Mackintosh, *Vindiciae Gallicae and Other Writings on the French Revolution*, ed. Donald Winch (Indianapolis, 2006), pp. 69–70: “The soul which actuated monachism has fled.”

¹⁴³ Hegel, *Philosophy of Right*, §1.

¹⁴⁴ *Ibid.*, §186.

¹⁴⁵ For this awareness see G. W. F. Hegel, “The Positivity of the Christian Religion” (1795–96) in *idem.*, *Early Theological Writings*, eds. T. M. Knox and Richard Kroner (Philadelphia, 1996), pp. 95 ff.; Hegel, *Philosophy of Right*, §112.

¹⁴⁶ *Ibid.*, §257.