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## 9 Historical Constructivism

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### Introduction

This chapter is primarily concerned with the second of the conceptual dichotomies identified by the editors of this volume as posing a problem for Kantian constructivism, namely, the dichotomy between reason and history. As the editors note, failure to come to grips with this problem can render a theory “incapable of explaining how historically concrete sociopolitical institutions can embody the good and how moral progress can be rendered intelligible” (4). Within this problem, I will be particularly interested in the first part of the incapacity, namely, the difficulty in showing how institutions can embody the good. In fact, in my view, the question of historical progress is largely a red herring. The real problem in understanding the connection between reason and history is the conceptual problem of understanding the connection between something relatively simple and abstract with something relatively complex and concrete. The problem is the complicated specificity of history, rather than its temporal duration or becoming. That concreteness has a temporal form – that is what makes it historical – but the temporal form is itself more complex than mere duration or change. The temporal form proper to history is the way that the present is constituted as a field of tension by expectations that pull in different and sometimes opposite directions. This is a conception of historicity worked out by the historian Reinhart Koselleck and his collaborators, and here it is married to a distinctively Hegelian conception of philosophy which involves bringing multiple perspectives to bear on the object of study (Koselleck 2003). Hegel calls this method “the idea,” but the theoretical subtleties of that notion will remain in the background of this study (for those subtleties and their connection to historicity, see Yeomans 2018). The important point to make at the beginning is just that the multiplicity of perspectives mitigates the apparent simplicity and abstractness of reason. The greater structure of reason when understood as a multiplicity of perspectives provides more attachment points, as it were, to the concrete realities of social institutions. Those attachment points allow one to describe the

perspectives at different levels of generality, so that the system of perspectives that at its most general consists of universal, particular, and individual perspectives can also be framed more concretely as consisting of economic, juridical, and political perspectives. The economic, juridical, and political perspectives each represent certain expectations that are in tension with each other and together form the historical field of tension within which the German Idealists did their work as political theorists. In my view, what makes Kant, Fichte, and Hegel philosophers rather than simply apologists for a certain class position is that all of the three historical perspectives show up in each of their work, and the differences between them are largely a matter of emphasis.

To make the issue more tractable I will focus on the historical institution of modern property relations.<sup>1</sup> This chapter undertakes a metaethical comparison of the way Kant, Fichte, and Hegel derive the institution of property from their fundamental principles. These fundamental principles are, respectively, Kant's Universal Principle of Right, Fichte's Summons (*Aufforderung*), and Hegel's Command of Right (*Rechtsgebot*). The comparison is metaethical in the sense that the guiding theme will be the different ways in which historicity is involved in the derivations, and what difference that makes with respect to the character of the arguments as constructivist.

I begin in section 1 with a brief discussion of constructivism, oriented by the work of Kenneth R. Westphal and Arto Laitinen.<sup>2</sup> Then, in section 2, I sketch the arguments for and shape of the institution of property in Kant, Fichte, and Hegel. In section 3, I say a bit about how these features of their doctrines of property relations relate to the social and political tensions surrounding property relations at the turn of the nineteenth century and thus what is historical about the constructivism employed.

### 1. Constructivism

I'll begin with Kenneth R. Westphal, who has long advocated an interpretation of both Kant and Hegel as constructivists, and specifically against the background of Onora O'Neill's contributions to the contemporary metaethical debate. More specifically, Westphal has interpreted them as *natural law* constructivists, but here I leave this aspect of his view out of consideration to focus on the nature of the constructivism itself (as I also leave aside the connection to O'Neill's work).<sup>3</sup> There are four aspects to this constructivism that I want to highlight, though I don't pretend to offer a full reconstruction of Westphal's views. These four aspects are: First, that the relevant criterion of justice is modal rather than indicative or hypothetical. Second, that the procedure for articulating duties from this basic criterion is regressive, not progressive. Third, that the relevant facts of agents' finitude on which this regressive procedure operates are

social rather than counterfactual. And fourth, that the resulting theory is objectivist rather than realist. Let me briefly explain these distinctions before putting them to work. I should say in advance that I don't take these four criteria to set out necessary and sufficient conditions for any view to count as constructivist but only to indicate a meaningful sense of constructivism that has both historical resonance with the German texts and contemporary appeal.

First, the relevant criterion of justice is modal rather than hypothetical. As Westphal puts it, "[A]greement plays no role at all in Kant's rational idea of the social contract. . . . Instead of contractarian agreement, Kant's theory of normative justification relies on *possible* consistency of human maxims or forms of outer action. Kant's basic criterion of right action, along with its various instances, is neither indicative nor hypothetical; it is modal" (Westphal 2007: 13–14). Instead of attempting to specify that to which we *did* (implicitly) agree or *would* agree under the hypothetical circumstances of, for example, the state of nature, it attempts to specify that to which we *could not* agree under any circumstances. Of course, as a result of this modal shift the rights and duties specified by a constructivist basic principle can be minimal at best. A further constructivist application of the principle in the derivation of extended rights and duties is therefore required, which leads to the second element.

That derivation is regressive rather than progressive (Westphal 2007: 31). That is, instead of attempting to further spell out what is implicit in the minimal rights justified by the modal test of possible agreement, Kant (and especially Hegel) inquire into what conditions are required in order to secure those very minimal rights. (This is the sense in which this constructivist regress has aspects of transcendental argumentation, though the constructivist justifications regress on the conditions of a different object – rights instead of experience.) In contrast to contractualist justifications of specific duties by the progressive application of bargaining scenarios, the constructivist procedure inquires into the conditions that make possible such bargaining and any resulting voluntary agreement in the first place. This then introduces two questions: What sort of conditions are sought? and What characterization is given for the agents whose (non-)agreement is subject to the modal test?

The answer to both of these questions is essentially social. The conditions sought are largely institutions, and the subjects whose agreement is to be secured (or whose necessary disagreement is to be avoided) are finite reasoners with an essential need for discourse with others of their kind. The argument reconstructs the institutions within which agents are able to first identify their own interests and pursue them in concert with others, and thus to bargain and execute contracts with others. In both cases, the social aspect of the regress leads Kant and Hegel to move from private to public law, and in such a way that the elements of public law substantially modify the elements of private law. This subsequent

modification gives their theories an aspect of progressive argumentation (since the institutional conditions of the basic rights place certain constraints on and suggest certain specific forms of those basic rights), but not in a way that reintroduces contractualist bargaining scenarios.

Finally, the resulting theory is objectivist rather than realist. Westphal means by this that the theory is orthogonal to the realism/antirealism debate, and need take no stand on the question of whether the values in question are “out there” independent of subjects or generated by subjects in some way. Metaethical questions surrounding the nature of justification and the possibility of objectivity remain in play, but the unfortunate, positivistic framing of the latter issues in terms of the location of norms (modeled after the location of spatiotemporal objects) is discarded. The point of the theory is to generate the stable norms that can justifiably command assent and thus address the possibility of social conflict. As long it can generate such norms, their location or ontological status is irrelevant. Obviously, Kantians and post-Kantians have strong epistemological and conceptual reasons to frame the issue this way, but even for contemporary metaethics there is value in backing away from the commitment to positivism implicit in the location debate.

In contrast, Laitinen explicitly characterizes (Hegelian) constructivism as an alternative to realism (Laitinen 2016: 128).<sup>4</sup> But the main force of his objection to what he takes to be antirealist forms of constructivism applies equally well to an objectivist variant, since his main objection is that constructivism makes us infallible because it makes us the ultimate sources of value:

[C]onstructivism makes the [the source of value] an infallible source of value, normativity and deontic features. For something to be mistaken, there must be some criterion according to which it can be mistaken. In the constructivist view, there isn't. (Whatever the constructivist view deems fallible is not thereby [the source of value]). The same point concerns any change in the social norms: without an independent standard, any different social norms are just different, and no transition from A to B or from B to A can count as development.

(Laitinen 2016: 128)

In response, Laitinen proposes a “mediated realism” on which the social constructions are not themselves sources of normative truth but rather “epistemic devices” for discovering that truth through the experience of success or failure of such constructions. The social institutions that structure our ethical life don't ultimately give us reasons for thinking that we ought to do or avoid certain things, but they do give us the opportunity to discover those ultimate reasons through their correspondence with those ultimate reasons (or lack thereof).

In the rest of the chapter, I will take the four features outlined earlier to characterize constructivism: the criterion is modal rather than hypothetical; the procedure is regressive, not progressive; the relevant facts are social rather than counterfactual; and the theory is (at least) objectivist (again, putting aside the ontological issue of realism – I mean only that the theory purports to construct norms with objective rather than merely subjective or idiosyncratic validity). And I will take the infallibility objection to be the chief skeptical doubt to which constructivism must respond.

## 2. Property

In this section I want to consider the arguments for property in Kant, Fichte, and Hegel as constructivist arguments. With respect to Laitinen's objection to constructivism, the concept of property makes an interesting test case because the modern institution of property is a kind of institutionalization of infallibility at the individual level. What I mean by that is that *qua my property*, I cannot misuse a thing. I can do all sorts of harm with it, or fail to use it profitably, but the modern concept of property builds an arbitrariness of purpose into my relation to a thing that makes misuse of a thing *qua property* impossible. In Proudhon's example, “The proprietor has the power to let his crops rot underfoot, sow his field with salt, milk his cows on the sand, turn his vineyard into a desert, and use his vegetable garden as a park” (cited in James 2012: 515). Peter Benson goes even further: “Even one who uses his or her property in a way that violates the rights of another . . . does not thereby and as a matter of the right of property cease to be owner of it” (Benson 2002: 769). Whatever we, the non-owners, think of the owner's use is irrelevant. Every owner is the infallible source of the norms relating to their own use of their property *qua property*.

First take Kant's doctrine of property. The basic argument for the institution of property is structured by the relationship between the general normative principle of Kant's political philosophy, the Universal Principle of Right, and the specific principle of acquired rights to property, contract, and status that Kant terms the Postulate of Practical Reason with Regard to Rights. Here they are in full:

*The Universal Principle of Rights (UPR):* Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law (6:230).<sup>5</sup>

*The Postulate of Practical Reason with Regard to Rights (PPRR):* It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would *in itself* (objectively) have to *belong to no one* (*res nullius*) is contrary to rights (6:246).

How do we get from the first to the second? Kant does not make it easy to find out. Rather than entering into a full reconstruction, I want to pull two ideas from the interpretations of Westphal and Arthur Ripstein.

First Ripstein: on his view, the relation between the UPR and the PPRR is one of extension. Whereas the UPR is sufficient to generate your innate right to control over your own body, it only generates your acquired right to property if it is extended by means of the a priori intuition of space. Both rights concern the incompatibility of control over something, but the intuition of space generates new incompatibilities outside the body itself in the control of external objects. On the one hand, this can look progressive rather than regressive, and thus perhaps more contractualist than constructivist. But it is essential to this move that no particular kind of interest is invoked nor any bargaining scenario. Instead, Kant tries to show that under the conditions of our sharing space with other human beings, the mere possibility of choice – which *cannot be given up* without giving up the kind of freedom mentioned in the UPR – requires the right of property.

On Ripstein's view, this property right is quite sweeping in its modality (i.e., in the extent of control it confers on owners) and equally sweeping in its restriction of the holder of the right to individual agents:

Kant's argument shows, first, that the only way that a person could have an entitlement to an external object of choice is if that person had the entitlement formally, because having means subject to your choice is prior to using them for any particular purpose. Second, Kant argues that the exercise of acquired rights is consistent with the freedom of others, because it never deprives another person of something that person already has. So anything less than fully private rights of property, contract and status would create a restriction on freedom that was illegitimate because based on something other than freedom.

(Ripstein 2009: 62)

There are good reasons to doubt that this argument is valid. There is just nothing in either the formal notion of choice or the formal intuition of space that will do the requisite work of justifying such full and complete control, nor the individuality of owners. And in terms of institutional features of the property right, all that Kant seems to think he can get out of the formal notion of choice extended by the formal intuition of space is the notion that land is the first and paradigmatic form of property (6:261–2).

Thus it is not surprising that, in contrast, Westphal's Kant concludes from precisely this formality to a far more restricted modality of control in Kant's right to property – in fact such a restricted modality that Westphal emphasizes that Kant justifies only *possession* (*Besitz*) and not property (*Eigentum*). In a reading much closer to the text of the PPRR,

Westphal's Kant concludes only that there cannot be an unconditional *prohibition* on use and possession (and says nothing about any of the other incidents to the right to property, such as income or transference) (Westphal 2002: 90–92). And, importantly, rules about the specific extent of use and possession, and its potential combination with other incidents of the right to property, must be justified on independent grounds and settled by positive legislation. The property right is just the collection of all of these positive laws (6:261). At this point, the constructivism of Kant's theory breaks down, just as we get to historical features of property relations (where historical is here understood in the sense of institutional specificity more than change over time).

Take Fichte next. Fichte picks up precisely that feature of choice, the formalism of which makes Kant's doctrine so problematic. It is crucial to Kant's theory that the choice in question be distinguished from mere wishing – you cannot have a property right to anything you wish to have, but only to those things that can actually serve as means for your ends. This is explicitly built into the relevant derivation of the property right for Fichte, which turns on the notion of efficacy.

The derivation of property right therefore turns on the relation between freedom and efficacy. In fact, this is built into the very first theorem of the *Foundations of Natural Right*: “A finite rational being cannot posit itself without ascribing a free efficacy to itself” (Fichte 2000: 18). As Fichte's derivation proceeds, it turns out that such efficacy requires the resistance of an external world, and in particular the resistance provided by the efficacy of other finite rational creatures (second theorem). The key form of resistance is a summons from the other for us to engage in free willing that defines our relationship by the conditions of free willing, namely right (third theorem). At least this part of Fichte's argument seems properly characterized as constructivist, specifically in the second and third meanings of that term: the procedure is regressive, not progressive; and the relevant facts are social rather than counterfactual.

How, then, do we get from this basic relation of right to the right to property? Separating my efficacy from your efficacy requires a stable distinction between the spheres in which we operate. The security and stability involved must be of a high order, since we are inquiring here into a condition of possibility of free (finite) rational beings as such: “What initially, and from a merely speculative perspective, are the conditions of personality become rights simply by thinking of other beings who – in accordance with the law of right – may not violate the conditions of personality” (Fichte 2000: 101). Specifically, the kind of security involved is the freedom from others interfering with the contexts of our action in such a way as to compromise our efficacy:

Only other free beings could have produced an unforeseeable and unpreventable change in our world, i.e. in the system of things that we have known and related to our purposes; but in that case,

our free efficacy would be disrupted. – The person has the right to demand that in the entire region of the world known to him everything should remain as he has known it, because in exercising his efficacy he orients himself in accordance with his knowledge of the world. . . . (Here is the ground of all property rights.)

(Fichte 2000: 105–106)

The key is the need for the free subject, in its appearance as a body, to have a way to recognize its own efficacy in the sensible world. This, in turn, requires absence of interference from other agents, so that any nonnatural change can be traced by the subject back to her or his own ends and thus provide evidence of her or his efficacy.

But as David James has pointed out, this role of efficacy decisively changes the nature of the property right:

Fichte treats the right to undertake a certain activity as more fundamental than the right to a thing when, in § 18 of the *Foundations of Natural Right*, he comes to determine in more detail the terms of the property contract. Fichte here states that any objects which are an individual's property are so only in virtue of the particular use that this individual makes of them, so that the most fundamental object of property rights is to be understood as a particular activity. He consequently describes the right to property as “the exclusive right to actions, and by no means to things.”

(James 2010: 206)

Thus Fichte's “sphere” of property here points less to a determinate spatiotemporal region (as it does in Kant) than to a range of activities that can be securely pursued without interference and thus which I can be assured are the effects of my own will and activity.

The nature of the property right is further changed because Fichte introduces a particular end, that of self-preservation, as required by all other ends. It is required for all other ends because it is required for the existence of the free will itself. This remedies the deficiency that we saw in the formality of Kant's view of choice (since it specifies a particular end that can be used to determine whether something in the world is truly a means and in what respect), and it specifies the most basic means–end relation as one of labor. Fichte then connects this specification of ends with the notion of a sphere of activities to argue that the basic form of efficacy is a right to a profession or occupation. Ultimately the sphere of freedom required for free efficacy is the bundle of activities that make up an occupation that allows one to make his or her living in the economic world.

In fact, the situation is more complicated, since there are two different forms of property in Fichte. The kind of property described thus far

is the basic form and the one that must be protected first and foremost. Protection of this form of property involves support of the state and therefore a compelling state interest in seeing that everyone has a profession and pursues it diligently. Whatever is left after everyone's basic property has been secured and the relevant support has been paid to the state is “absolute property,” and this form of property is thus exempt from the sort of state intervention that is intrinsic to the basic form. Absolute property, then, corresponds to the modern form of property with respect to which we are infallible. And though this form of property is therefore more closely associated with things rather than with activities, one might think that the central insight is that a kind of leisure is owed to us for the free play of our faculties (James 2012).

To come back to the metaethical question, most of this looks straightforwardly constructivist. It is regressive, social, and objectivist. Unlike Kant, however, Fichte's social contract is indicative rather than modal or even hypothetical. Not only does Fichte envision regular constitutional conventions to set things like the number and nature of occupations; even in their absence he claims that positive law is so clearly derived from the basic principles that anyone can “do the math.” The detailed agreement can therefore be considered as one to which all have actually agreed, even if only implicitly (Fichte 2000: 98–99). In this respect, the procedure is quite a departure from the Kantian constructivist model. Again, as in Kant, the constructivism breaks down at the very point where we come to historical specificity; in Fichte, where the specific bundles of activities cohere to make up an occupation. Fichte's procedure is a departure from the Kantian constructivist model despite the fact that, for Fichte, this direct application of norms to facts is precisely what secures the constructivism of the account (in the sense that it secures the status of finite rational agents as sources of all the relevant norms). It does so because the principle of direct application eliminates problems of judgment for which other norms with perhaps other sources might need to be found.

Before moving on to Hegel's conception of property, I want to connect this point to the problem of infallibility identified by Laitinen for constructivist accounts. The reason constructivism seems to break down precisely at the point of historical specificity is that this is precisely the point at which it seems absurd to think that reasonable people couldn't disagree, and thus that reason itself could settle the issue. Kant accepts this possibility of reasonable disagreement and turns primarily to public law as a way to provide institutional form to the debate and to propose some basic and largely formal guidelines. Fichte quite notoriously rejected the notion that reasonable people could disagree about even the finest details of application of moral and political judgment, but this saddles his view with absurdity at these points of historical specificity. We seem to have a kind of dilemma for constructivism: either abandon the notion that we are sources of the norms of historically

specific institutions, or abandon the notion that reasonable people can disagree about those norms. If we take the first horn of the dilemma we create a space for pure politics and the individual exercise of judgment but at the expense of normative criteria of decision. If we take the second horn we seem to owe our interlocutors a derivation which seems logically impossible or which might require the kind of closed commercial state advocated by Fichte (which seems politically and economically impossible, to say nothing of its desirability). It is against the background of this dilemma that I want to consider Hegel's derivation of the concept of property.

The initial discussion of property in Hegel's *Elements of the Philosophy of Right* is situated within a section entitled "Abstract Right." Here is where the initial theme of infallibility is introduced, through the important role it plays in Hegel's derivation of property from the *Rechtsgebot*: "be a person and respect others as persons" (PR: §36).<sup>6</sup> Infallibility is introduced by the way that personality is introduced as subjectivity aware of itself as determinate and yet *unlimited*: "Personality begins only at that point where the subject has not merely a consciousness of itself in general as concrete and in some way determined, but a consciousness of itself as a completely abstract 'I' in which all concrete limitation and validity are negated and invalidated" (PR: §35R). One is tempted, of course, to immediately add "as unlimited *normatively speaking*," but it is not clear that the addition quite captures the depth of Hegel's meaning here. As Heidegger reminds us that talk of values is poor recompense for the loss of being, Hegel here calls us back to a lived sense of independence not just from norms but from patterns of living. This independence marked the lives of the nobility (at least away from court), and one of the functions of the modern conception of property is precisely to generalize this personal independence. This is a kind of social infallibility, if you like, that is connected with experiments in living and self-authorship.

Indeed, schematically considered, one might say that Hegel's derivation of property has only one step, which is just to point out that the very absence of general conditions on the scope of legitimate property relations is precisely that feature which makes property the actualization of personality in the world. In Hegel's text, this comes out in the connection between the "infinity" of the will and its existence as reason:

The person must give himself an external *sphere of freedom* in order to have being as idea. The person is the infinite will, the will which has being in and for itself . . . (PR §41). The rational aspect of property is to be found not in the satisfaction of needs but in the superseding of mere subjectivity of personality. Not until he has property does the person exist as reason [*Erst im Eigentume ist die Person als Vernunft*]. (PR: §41Z)<sup>7</sup>

One cannot overstate the generality of this claim, nor its modernity: property just is the way the world appears to us when we approach it from the perspective of a self-conscious subjectivity that knows itself to be the source of value. Property is not this bit of the world or that bit of the world; rather, the world as such comes into view under the description of it as property once we have achieved this self-conception. It is not so much an example of constructivism but rather the world seen through a constructivist lens. This gets us quite close to Ripstein's Kant, where the very absence of restrictions on proper ends is supposed to generate the fullness of the property right. And as in Fichte, there is a grounding of property rights in the very conditions of rational self-consciousness. But instead of then turning either to a general conception of independent choice (Kant) or to a necessary end (self-preservation in Fichte) to begin to give shape to that right, Hegel turns back to reason and particularly the forms of judgment inherent in reason.

Specifically, he turns to the different kinds of judgments of quality (positive, negative, infinite) as a means to spell out what must be involved in the property right (PR: §53; cf. EL: §§172–3). The way that a piece of property is judged *positively* is by possessing it, *negatively* by using it, and *infinitely* by alienating it. That is, in possessing the thing I identify my subjectivity positively with it; in using the thing I express the superiority of my subjectivity to this mere thing; and in alienating the thing I express the lack of connection of the thing to my subjectivity. One noteworthy aspect of this argument structure in comparison with Kant and Fichte is that the means–end relationship of property only comes in through the negative judgment. The teleological character of the ownership relation is thus an implication of a more basic (or at any rate more general) feature of any rational relationship to a thing, namely the negative judging of it as determined by my subjective attitude towards it. But this also means that there are more aspects of finite rational agency that provide resources for specifying the property right than the means–end relation that distinguishes true choice from mere wish in Kant or the pick-a-necessary-end strategy of Fichte.

In fact, Hegel purports to derive more of the characteristically modern conception of property rights than Kant before any discussion of public law, and furthermore out of the Fichtean requirement that reason be actualized in the world. Out of the affirmative judgment he derives various ways of taking possession (PR: §§54–8). Out of the negative judgment he derives the co-extension of full use and ownership (and thus the right to exclusion) (PR: §§61–2), as well as ownership of value (and thus rights to compensation) (PR: §63). Out of the infinite judgment he derives rights to transfer (and exchange) (PR: §65). If one takes the rights of use, exclusion, transfer, and compensation to constitute the core sticks in the modern property rights bundle, then Hegel purports to have an argument for that bundle that hinges neither on the form of

choice nor the end of self-preservation but simply on what is required for the free will to judge that some part of the world is its own.

Let's stop and take stock according to our questions about constructivism. First, the procedure is clearly regressive rather than progressive. Though there is no space to go into detail here, Hegel in the Introduction to the *Philosophy of Right* has already set out the rudimentary structure of the will as idea, and the argument here works as a regress on the possibility of that idea (*PR*: §§25–6; Yeomans 2015: 82–95). As in so many of Hegel's arguments, the actual argumentative step is short (one step, as I have reconstructed it earlier), but then Hegel asks us to reflect on what is embedded in that step and relies on other arguments to unfold what is embedded. Here, he relies on prior arguments about the categories of reason to specify what it means that property is the world qua objectivity for the rational will.<sup>8</sup>

Second, at least as concerns the initial discussion of property in Abstract Right, the agreement is modal rather than indicative or hypothetical: "With reference to *concrete* action and to moral and ethical relations, abstract right is only a *possibility* as compared with the rest of their content, and the determination of right is therefore only a *permission* or *warrant*. For the same reason of its abstractness, the necessity of this right is limited to the negative – *not to violate* personality and what ensues from personality" (*PR*: §38, emphasis in original). There is no question yet of implicit or hypothetical agreement. Hegel's point in showing us what is embedded in our judging of the world is not to show us that we already agree to this treatment of the world but that what we call property is already a consideration of the world under this description.

Third, as to the question of whether the relevant facts are social or counterfactual, I have stopped the argument before we have reached enough of it to truly answer it. There is nothing counterfactual here, but the social aspect actually doesn't make its appearance for some time, when one comes to the discussion of Ethical Life. One does get contract, crime, and punishment further on in Abstract Right, but the problems discovered in them (particularly in punishment) actually seem to show that they are being considered intersubjectively rather than socially. That is, they are considered in terms of bargaining scenarios rather than in terms of the institutions that make such scenarios possible. There is a long argumentative road to travel between these arguments and the arguments about social institutions, but there is an important sense in which this road is traveled by means of metaethical arguments. What I mean by this is that the very limitations pointed out by Hegel in contract, punishment, and then moral reasoning all show that such noninstitutional practical contexts are inadequate as devices for generating objective practical norms concerning property rights (including rights to one's body).

Fourth, the norms of property offered here are obviously taken by Hegel to be objective, though the very insistence on those norms as specifying the way subjectivity controls or is dominant over objectivity make it hard to see as any kind of realism, at least if realism is taken as a claim that the values are "out there" somewhere.

Finally, let us come to the infallibility objection. In comparing Kant and Fichte we came to a dilemma, in which it seemed that the constructivist either had to abandon the notion that we are sources of the norms of historically specific institutions or to abandon the notion that reasonable people can disagree about those norms.<sup>9</sup> It is initially hard to know how to locate Hegel with respect to this dilemma, but here is a start: on his account, it turns out that the norms of those institutions have a more general orientation than one might have thought, and so it makes more sense than might have initially seemed plausible to think *both* that these are norms about which there is a demonstrable, objective truth *and* that we might be their source. What I mean is this: Hegel doesn't distinguish between the categories of theoretical and practical reason – this is why it is wrong to consider Hegel's *Logic* as his theoretical philosophy. The basic logical, or, if you like, metaphysical categories do more to structure the practical treatment of the world than one might have expected (cf. Nuzzo 2017). This is, of course, analogous to the Kantian strategy played up by Ripstein, in which (apparently theoretical) intuitions of space and conceptions of force and substance generate novel incompatibilities and thus real rights to specific features of the actual world such as land. But it is particularly significant that in his derivation Hegel chooses forms of judgment (i.e., necessary modes of the subjective relation to objective reality.)<sup>10</sup> I think for this reason it makes sense to think of Hegel's procedure with respect to the justification of property relations as constructivist, because the source of the norm that controls the property relation and specifies owners' rights is a necessary structure of self-consciousness.<sup>11</sup> Of course, there is much more historical specificity in Hegel's treatment of property in Ethical Life, but even in Abstract Right there are specific, and specifically modern features of property that Hegel purports to derive directly from these features of judgment.

### 3. Historical Constructivism

The differences in Kant's, Fichte's, and Hegel's constructivism are essentially *historical* differences. I mean by this not that there is a progression from one to another to another, but rather that each philosopher constructs a doctrine of property from a distinctive and identifiable social perspective that nonetheless opens out onto the perspectives represented by the others. Their difference is historical in a synchronic rather than diachronic sense, for it is precisely the tension between these different perspectives that defines the field of the present which the philosophers

sought to understand and in which to intervene. That is, historicity is paradigmatically the field of tension at any particular time rather than change over time.

Before taking up the social nature of the positions, I want to begin with their thematic differentiation. Here we can say that modern philosophers in general, and eighteenth- and nineteenth-century German political theorists in particular, approached the problem of property simultaneously from juridical, economic, and political perspectives.<sup>12</sup> From the juridical perspective the most important feature of property is the way that it helps to specify enforceable protections for personal autonomy. From the economic perspective, the most important feature of property is its flexibility (i.e., the way that different sorts of ownership relations can be developed which correspond to and enable the growth of commerce). From the political perspective, property serves as a cornerstone in the construction of a liberal state with greater political participation by equal and independent citizens. From the early modern period through the present day,<sup>13</sup> these three perspectives constitute the field of tension within which the institution of property becomes visible as an object of public debate.<sup>14</sup> They represent the fundamental interests to which that institution is responsive.

Against this background Fichte appears most clearly as proceeding from the political perspective. From the beginning, his emphasis on the way that property allows each citizen to provide for himself and his family by work is oriented by the notion that only such economic independence could provide the basis for independent citizenship. In both the *Foundations of Natural Right* and even more so the *Closed Commercial State*, Fichte is deeply attentive to the relation between economic self-sufficiency and political independence, and shows a willingness to bite quite deeply into economic structures and development in order to secure that self-sufficiency and thus that independence.<sup>15</sup> But, of course, the very emphasis on political issues brings economic issues to the fore, even if economic goals like growth and free trade are held to be subordinate to political goals. Also present, but to a lesser extent, is the juridical perspective on personal autonomy. This is paradoxical given the starting point in individual efficacy, but that efficacy is very quickly rendered in socially visible and economically intertwined ways. Thus the promise of property for radically particular personal freedom fades from view despite its initial prominence.

Hegel's doctrine of property is most clearly juridical. Private property is a radically direct extension of the self in a way rejected by both Kant and Fichte, and wrong is understood by Hegel as an injury to the will embodied in the object damaged. The emphasis on the absolute nullity of objects as such, and the corresponding importance of the right of first occupancy, express most fully that infallibility of the property owner discussed in the previous section. The political aspect of property

is also present from Hegel's viewpoint, even before the introduction of state institutions. Among other places, this can be seen in the variety of legal determinations concerning forms of wrong that Hegel attempts to validate simply on the basis of reflection on the ways that different wills can fail to be truly united in the disposition of goods. To this political question Hegel once again applies the forms of qualitative judgment: whereas contract represents a positive judgment between the parties, unintentional (civil) wrong represents a negative judgment and crime an infinite (negative) judgment (*PR*: §§85, 88, 95). Furthermore, there is (as in Kant) already a derivation of the right to punishment or coercion, but for Hegel this right is further spelled out as a right of revenge. There is, in other words, already a nascent political society within Hegel's Abstract Right which centers around the maintenance of the boundaries of spheres of rights in the face of violations. In contrast, economic considerations don't enter into Hegel's discussion of property in Abstract Right much at all. This fact is crucial to his later modifications of property doctrines in Ethical Life, since it helps to make the case that the economically significant forms of property are already modifications of the abstract right to property effected by state intervention, as opposed to the view that the economically significant forms of private property are themselves natural rights that are then injured by state intervention.<sup>16</sup>

In interpreting Kant's doctrine, Ripstein also presents Kant as a juridical thinker. But as I suggested earlier, that saddles Kant with an impossibly ambitious argument. I think it best to interpret Kant's PPRR along the lines suggested by Westphal, according to which it simply rejects any general principles which would put any type of object outside the set of legitimately possessable objects. Similarly, its formality also entails the rejection of any general principles which would put any type of end outside the set of legitimately pursuable ends with respect to which objects can be identified and used as means. This is central to the economic perspective, which for the growth of commerce requires not a particular form of the property relation – not even full and complete ownership according to the central incidents of the modern property bundle – but rather a flexible and formal conception of ownership which might be modulated in a thousand different ways as appropriate for different sorts of commercial relations. From the economic perspective, the conceptual poverty of the idea of property is its central virtue. Once the economic perspective is seen to be primary, we can see the way that the juridical approach comes in as secondary and tempts readings like Ripstein's. Precisely for this sort of multiple specification of the property right, the right of particular persons to put objects to their own ends for their own reasons is crucial. This is the engine of creative destruction, to use Schumpeter's phrase. The more formally the property right is described, the more these particular uses fade from legal and political view. As a result, the political element recedes from view and there



are great difficulties in understanding what the constraints of public law mean for the actual exercise of property rights, and Kant notoriously rejects any requirement of actual political participation in the legislation of the regulatory scheme.

Thus, each of these three German constructivists approach the topic from a predominant perspective: juridical, economic, or political. One of the remaining two perspectives is clearly present but the second of the remaining perspectives is far less clearly present or perspicuous. So much, then, for the thematic differences in the perspectives of our three philosophers. Now I want to say just a bit about the social differences so as to bring out the way in which these thematic differences are historical differences. These patterns of clarity and obscurity are not a matter of idiosyncratic taste or blindness, but are rather constitutive of the social interests that animate the perspectives on the institution of property.

This is important for constructivism because the modal question of that to which we could or could not agree is a historical question articulated by the different social personae whose agreement is in question. Hegel himself has a historical theory of the social perspectives to which the institution of property appears. In this theory the different historical perspectives which are involved in the question of that to which anyone *could not* agree are defined by the estates structure of *Sattelzeit* Germany (1770–1830).<sup>17</sup> The answers to basic questions surrounding the meaning of property relations differed substantially *and reasonably* according to the social position of persons. These social positions are neither idiosyncratic nor defined by class. There is, of course, a substantive debate about the proper taxonomy of these positions; but the estates structure proposed by Hegel would be a serious alternative in that debate at the level of reconstruction required by a historical constructivism. The three basic estates Hegel identifies are the public estate (civil service), the commercial estate (civil society), and the agricultural estate (both peasantry and nobility but quite optimistically family farmers) (*PR*: §§199–208).<sup>18</sup> Let us then take Hegel's social theory and use it to understand the debate between Fichte, Kant, and Hegel.

Here it is, I think, quite easy to see Kant's economic approach to property as proceeding primarily from the perspective of the commercial estate. The flexibility provided by a minimal notion of property is just the mixture of warrant and protection from interference that developing industries required. It is also quite easy to see Fichte's political approach as representative of the public estate. One of the great hopes of the bureaucrats was the creation of a society with as many property holders as possible, and intensive planning and coordination efforts by the state were seen as requisite to make this happen. It is perhaps a bit more difficult to see Hegel's juridical perspective as the representative of the agricultural estate. The key is to see just how personal and how particular the rural claims to property were. One can speak in generalizations, of

course, but in actual fact the different sorts of divided ownership relations that characterized rural property in the context of personal relations between villagers and manorial lords was extraordinarily varied and yet locally quite fixed. Rural property shared the *variation* typical of commercial conceptions of property but not its actual *variability*, so to speak.<sup>19</sup>

I mention these estates only to immediately move beyond them. These are clearly not the social perspectives with respect to which a contemporary constructivism should proceed. But it is crucial to Hegel's own constructivism that determinate social perspectives be brought into play. To some degree this is obscured both by my reconstruction (which stops at Abstract Right) and by the outline structure of the *Philosophy of Right*. But lecture manuscripts and remarks concerning the more specific modulations of the institution of property in Ethical Life make clear that presenting the institution of property as reasonable to these perspectives is an essential part of their justification. A Hegelian constructivism for the present day would have to do some sociological work to uncover the analogous social perspectives for contemporary society. In doing such work, a Hegelian constructivist can be guided by the final layer of this field of tension, namely the conceptual.

I mean "conceptual" in Hegel's distinctive sense of the term. In that sense, anything conceptual is constituted by the interpenetration of three different aspects: the universal, the particular, and the individual. Though terms like "interpenetration" and "aspects" have an uncomfortably metaphorical ring to them, the aspects are best understood by doubling down on the visual metaphor and interpreting the universal, the particular, and the individual as perspectives to which any actuality appears.<sup>20</sup> But the way to understand Hegel's idealism as an idealism is as the claim that it is perspectives all the way down, and the actualities which appear are the ways in which each perspective is visible to the others. Since I have articulated and defended the view elsewhere, here I will only briefly discuss how it plays itself out with respect to property rights.

Fichte's predominantly political perspective on property is, conceptually speaking, the individual perspective. He tries to understand, first and foremost, how the different spheres of freedom can fit together in the right way so as to be stable and perceptible. The society as an individual entity is in the center of focus, and the *Closed Commercial State* is like a German hometown writ large. Furthermore, the property right protects activities first and foremost, and activities are associated by Hegel with individuality. From this individual perspective Fichte can also make out the universal perspective (i.e., the economic perspective). But there is some distortion here, and the economic features of property are primarily rendered in terms of the household. This is a sort of ancient understanding of economics as the Greek etymology suggests – household management. And in the end, the juridical side cannot be clearly brought

into view. It remains a kind of caricature, and the personal freedom the juridical approach aims to protect collapses under the paternalism of the state. Conceptually speaking, this is the inability of the individual perspective to bring the particular perspective clearly into view.

Kant's predominantly economic perspective is, conceptually speaking, the universal perspective. This is exactly what makes his treatment so formal and allows for the diametrically opposed conclusions from that formality represented by Ripstein and Westphal. This corresponds to the very rudimentary and thus slippery nature of the concept of property as a social meaning in the *Sattelzeit*. From this universal perspective Kant can make out the particular, juridical perspective (this is precisely what tempts Ripstein's interpretation). The way in which external objects serve as means for a whole variety of specific ends is clearly seen, though it is rendered rather generally in terms of spatiotemporal incompatibilities. But the individual, political perspective is rendered as a caricature of politics without political participation and only tenuously connected to the private right to property.

Hegel's predominantly juridical perspective is, conceptually speaking, the particular perspective. In the center of focus is the direct connection to and even extension of self in the object. The most particular and personal of all external connections – that between the individual person and their body – is made the model for all property relations, and indeed for the basic normative approach to external objects. From this particular perspective a certain coherent system of rights – to possession, use, and alienation – can be made out, which is the way that the individual, political perspective is brought into view. But the universal perspective is more difficult to bring into view. This is what gives rise to the Lockean problem of a cycle of revenge at the end of the discussion in *Abstract Right* – there is no universal criterion or even conception of impartiality for resolving disputes. Instead of that impartiality one has crime, which is a sort of caricature of ownership.

The three preceding paragraphs simply take the talk of thematic perspectives and parse them in conceptual language. But it is valuable because it helps to see how we might reconstruct a Hegelian constructivism for our own historical moment. In my view, what makes Kant, Fichte, and Hegel philosophers rather than simply apologists for a certain class position is that all of the three historical perspectives show up in each of their work, and the differences between them are largely a matter of emphasis.<sup>21</sup> These are not insignificant differences, but the explicitness with which all three of the perspectives show up in each creates the tissue of an engaged conversation and presents a series of views onto the complete phenomenon of property relations. Because the historical perspectives are embodiments of necessary conceptual perspectives, this series of views is a process of conceptualization of the object. On the Hegelian view, the debate is a necessary part of that conceptualization.

This is the critical-theoretical aspect of Hegelian constructivism, where the debate joined is already a part of the social actuality of the object of critique. This is also what makes the constructivism historical, again in a more synchronic rather than diachronic sense of "historical." That is, historicity is paradigmatically the field of tension at any particular time rather than change over time.

The point here is that the philosophical field of tension between Kant, Fichte, and Hegel presents in conceptual form the social field of tension that constituted their historical moment. With respect to the concept of property, that field took the form of a hopeful anticipation of a future political system in which the coherence and mutual significance of personal, economic, and political freedom would be validated. We now know that this hope was in vain, but that doesn't make this hope either unreasonable at the time nor any less central to reconstructing German Idealist conceptions of property.<sup>22</sup> It does mean that in this case we are stuck with the choice between archaism and anachronism. Since the concept of property is of no use to us now in organizing the normativity of either our economic or political relations, and of questionable use in organizing that of our personal autonomy, the choice of archaism is clear. It is a misrecognition of our own historical moment to think that such hopes as were articulated in the modern philosophical debates on property reveal the outline of our own field of tension. This is true not only of the social form of those perspectives (the estates) but also perhaps of their thematic form. It is far from clear to me that the juridical, the economic, and the political identify the requisite perspectives with respect to which the successor institution to property ought to be justified.

What does this have to do with constructivism? Importantly, there is nothing in the foregoing considerations that invalidates constructivism as a metaethical view. Rather, I have read Hegel as providing a social theory that more fully articulates the terms of the ethical debate between Kant, Fichte, and Hegel, and which therefore has some of the character of a metaethical account. *The modal question of that to which we could or could not agree is, essentially, a historical question.* But a distinctively Hegelian constructivism would retain the structure of the three perspectives as constitutive of the viewpoints with respect to which the possible agreement (or necessary disagreement) on specific norms is to be investigated. Obviously, neither estates nor classes can specify the three personae whose agreement or disagreement is in question, but that doesn't mean that a new constructivism attentive to the current social perspectives on autonomy wouldn't be a valuable approach to ethical problems. Such a constructivism would back up to the conceptual level of perspective, and then do the sociological work of identifying the social perspectives that embody those conceptual perspectives in extant social institutions (Yeomans and Litaker 2017).

For example, if one backs up to the general conceptual perspectives (universality, particularity, and individuality) and then approaches

contemporary economic life, one can make out three intertwined institutions that embody those perspectives: banks, markets, and enterprises (firms). And if one pushes a little further on the subjective side of the connective tissue, one can see different forms of agency being exercised in those institutions: accounting agency, consumptive agency, and productive agency. And if one then backs up a little – not all the way to Hegel’s conceptual perspectives but to his conception of self-determination (Yeomans 2015) – one can see these forms of economic agency as forms of self-appropriation (accounting), specification of content (consumption), and effectiveness (production). And the (political) point of all of this would be to describe the immanent norms of these institutions that enable these forms of agency and therefore provide the basis for critical evaluation of the functioning of those institutions. These norms would be the objective norms justified by a *historically* constructivist argument in the sense that they would describe (as their obverse) that to which economic agents could not agree on pain of ceasing to be economic agents.

Now one might complain that such a procedure (as well as the level of analysis of the German Idealists earlier in the chapter) is not properly metaethical. My sidestepping the realism/antirealism debate may only deepen this impression. It is certainly true that if that term is taken to imply a step outside of the practice of the justification of norms to an independent standpoint from which that practice can be its object, one cannot find such a standpoint within the German Idealists. On this point, to be an idealist is hold that there is no outside of the practice of justification, and thus that there is no metaethics in that sense. That puts a lot of pressure on the inside of the practice, of course, but here the German Idealists had a lot to say. The most important thing to say is that there are multiple internal standpoints within this practice, and this is a virtue of the theories rather than a vestige of faculty psychology. Those internal standpoints provide the model not only for intersubjectivity but for real sociality (Yeomans 2019a), and this is what allows for the bridging of the gap between reason and history.

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### Notes

1. For a parallel treatment of the family in German Idealist political philosophy, see Yeomans (2018).
2. I leave out of consideration the placement of German Idealist constructivism with respect to the realism/antirealism split. I remain unpersuaded of the

value of this distinction for ethics, despite the impressive efforts of Robert Stern (2007) and Sebastian Ostritsch (2014).

3. On Westphal’s view, Kant and Hegel are natural law theorists because they share a set of common problems with the natural law tradition (“the normativity and objectivity of justice, the possibility and necessity of social cooperation [resolving fundamental social conflict] and the possibility of legitimate possession”) (Westphal 2007: 37).
4. Laitinen does not distinguish between objectivism and realism because he takes any objective reason to be a reason independent of the agent and thus a reason located in a separate domain (e.g., Laitinen 2016: 132).
5. Citations to Kant’s *Rechtslehre* are to volume and page number of Kant (1902). Translations (with some modifications) are from Kant (1999).
6. Citations to Hegel are by section number to his *Grundlinien der Philosophie des Rechts*, volume 7 of Hegel (1970). Translations (with some modifications) are from Hegel (1991).
7. Hegel’s seriousness about the extent of this infinity is further displayed by the way that he adduces our attitude towards property – in particular, our acceptance of the legitimacy of possession of any external thing – as an *argument* against transcendental idealism (*PR*: §44).
8. There are other arguments that strike me as progressive, such as the Lockean argument that takes one from Abstract Right to Morality, which hangs on the impossibility of adequate protection of rights in the absence of an impartial arbiter.
9. I leave out of consideration here the question of whether Hegel’s central claim that the will is embodied in the property object is tenable. Obviously, Kant thought it nonsense (6:260). For my own part, I find Dudley Knowles’s (1983) defense of the notion convincing.
10. There is a further question that I put aside here, which is: why these categories rather than others?
11. Cf. Thompson (2018).
12. Compare Dieter Schwab’s entry on *Eigentum* in Brunner, Conze and Koselleck (2004, vol. III: 65–115).
13. For a contemporary example of the juridical perspective, see Benson (2002). For a contemporary example of the political perspective, see Christman (1994). For a contemporary example of the economic perspective, see Posner and Weyl (2018).
14. The notion of a historical moment as a field of tension comes from Reinhart Koselleck and Werner Conze.
15. On this point see Nakhimovsky (2011).
16. In fact, Hegel introduces a completely different term for the economic resources that are the subject of ownership interests (*Vermögen*), as opposed to private (personal) property (*Eigentum*).
17. For a more detailed account of Hegel’s theory of the estates and its philosophical significance, see Yeomans (2017).
18. A detailed treatment and connection with Hegel’s philosophy of action presupposed here can be found in Yeomans (2015).
19. There is an abundance of good detail on these points in Schwab’s entry on *Eigentum*, *op. cit.*
20. For details, see Yeomans (2019b).
21. In contrast, one might take up one of the perspectives *to the exclusion* of all others: one can defend a coherent conception of property along these lines that dispenses entirely with the economic and political dimensions. In some respects Peter Benson’s defense of a juridical conception of property borders

on this exclusivity (though it does not cross that line – Benson (2002) is no mere apologist but offers a *philosophy* of property). In an account that is remarkably close to Hegel's, Benson's notion of property is entirely identified with first occupancy (for Hegel, the right of a subject over mere objectivity). Possession, use, and alienation are conceptually derived from the conditions of that first occupancy in a similar way as Hegel (though using a somewhat different vocabulary). Economic features of the common law of property are then grounded not in the idea of property at all but rather in the idea of contract. Political features are then considered to be a part of public law. Putting aside the political features, there are two main difficulties. First, the resulting conception of property is conceptually coherent but existentially uninstantiated. For example, no one has the right to alienate their property in Benson's sense of simply abandoning ownership – even trash must be contractually transferred. Second, the concept of contract is even more subject to the pressures towards disaggregation into a bundle that looks more like a heap. This, of course, is the upshot of the “death of contracts: literature. See Gilmore (1995) and Mirabito and Snyder (2014).

22. Reinhart Koselleck is quite good on why this hope was dashed: the legal reforms championed in one way or another by the German Idealists presupposed the society that only those reforms could first create. But that circle didn't close, because the rights that would have had one extension in the society to be created had another extension in the transitional society (e.g., rural property rights designed for family farms were instead primarily held by large landowners). When those rights were granted in the transitional society, they led social and economic development in a different direction and produced a society quite different than the one presupposed by the reforms. See, e.g., Koselleck (1967: 168).

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