

## Hierarchy and the Hunt for Prey: Early Human Ownership

In the “modern West,” observe Georgy Kantor, Tom Lambert, and Hannah Skoda, “we tend to assume that land is the archetypal form of property.”<sup>1</sup> So we do; it is easy to multiply examples, not only from the literature of the law, but also from philosophy, economics, and *belles lettres*. The most florid statement of this commonplace modern Western belief came from Carl Schmitt, the matchlessly clever legal philosopher who put his pen in the service of Hitler in the 1930s. Myth, Schmitt declared in his 1950 *Nomos of the Earth*, revealed the primordial centrality of land:

In mythical language, the earth became known as the mother of law. This signifies a threefold root of law and justice. First, the fertile earth contains within herself, within the womb of her fecundity, an inner measure, because human toil and trouble, human planting and cultivation of the fruitful earth is rewarded justly by her with growth and harvest . . . Second, soil that is cleared and worked by human hands manifests firm lines, whereby definite divisions become apparent . . . Third and last, the solid ground of the earth is delineated by fences, enclosures, boundaries, walls, houses, and other constructs. Then, the orders and orientations of human social life become apparent . . . Law is bound to the earth and related to the earth. This is what the poet means when he speaks of the infinitely just earth: *justissima tellus*.<sup>2</sup>

<sup>1</sup> Georgy Kantor, Tom Lambert, and Hannah Skoda, “Introduction,” in Kantor, Lambert, and Skoda, eds., *Legalism: Property and Ownership* (Oxford, 2017), 10 [1–27].

<sup>2</sup> Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (Candor, N.Y., 2003), 42.

“[T]he great primeval acts of the law,” Schmitt continued, staked out claims on the earth, “appropriating land, founding cities, and establishing colonies.”<sup>3</sup> The very Greek word for law, *nomos*, was proof of the foundational importance of these “primeval acts.” For *nomos*, Schmitt asserted, a word derived from the Greek root *nem-*, “to distribute,” originally meant nothing other than “the distribution of land.”<sup>4</sup> The division of the earth by *nomos* thus gave birth to law itself. It established the basis for the international order as well. Without the division of the globe into territories, there could be no states; and without states there could be no international law. The whole planet, like the private holdings on it, must of necessity be divided by “enclosures, boundaries [and] walls,” delineating the independent zones of territorial domination of its sovereign entities.

Schmitt’s account of the *nomos* of the Earth, the original act of carving the surface of the planet up into the holdings of private owners and eventually territorial states, marked the mystic climax of a Western legal tradition that had been gathering strength since the early sixteenth century. Over the course of the early modern period, it gradually became a European commonplace that the planet should be mapped and divided. “The whole world,” it was widely believed by the late eighteenth century, “is best managed when divided among private owners.”<sup>5</sup> During the same centuries, it became something of a commonplace that the “primeval acts of the law” involved staking out claims on land; Locke and Rousseau are only the most familiar examples. It also became conventional to think of states as resembling private landowners: By the end of the eighteenth century, the integrity of European states was coming to depend on their capacity to erect well-demarcated and well-policed borders around contiguous territories.<sup>6</sup> It further became conventional to think of law as intimately bound up with the state’s monopoly of violence within those borders: European law came to be territorial law, law that applied to all persons once they crossed a fixed boundary and set foot

<sup>3</sup> *Ibid.*, 44.    <sup>4</sup> *Ibid.*, 67–69.

<sup>5</sup> Carol Rose, “The Comedy of the Commons: Custom, Commerce, and Inherently Public Property,” *University of Chicago Law Review* 53 (1986): 712 [711–781].

<sup>6</sup> Charles Maier, *Once Within Borders: Territories of Power, Wealth and Belonging since 1500* (Cambridge, MA, 2016).

in the domain of a sovereign.<sup>7</sup> Europeans had been exporting these ideas of the territorial division of the planet to the rest of the humanity during more than four centuries of “appropriating land [and] establishing colonies,” in a process that culminated in the scramble for Africa in the final decades of the nineteenth century, which largely completed the division of the earth among sovereigns with a territorial base.<sup>8</sup> Two generations later, the same ideas drove the *Blut und Boden* ideology of the Nazi movement in which Schmitt participated.

But over recent decades, social scientists and historians have systematically punctured Schmitt’s myth. It is not the case that the division of “the solid earth” by “fences, enclosures [and] boundaries” can be traced back to the “primeval legal acts” of human history. The early human relationship to land almost certainly looked quite different. Rights in many or most societies of the past have been primarily rights in the *resources* on the land, not in the land as such; and those rights have been governed by the hierarchical structure of the community, taking the form of “use rights” granted out by chiefs or other social superiors. As for Schmitt’s account of the history of *nomos*: It is dubious at best. Scholars now believe that the original usage of *nomos* involved the distribution, not of land, but of meat and drink, and that its earliest history should be traced back to hunter-gatherer rituals for sharing out meat after the kill. (We shall see more about such meat and drink sharing practices as this chapter goes along.) The application of the term to the distribution of land was a very late development.<sup>9</sup>

Nor is it the case that states have always and everywhere been defined by their capacity to erect and police well-defined borders around contiguous territories. Most states in most past times and

<sup>7</sup> Maier, *Once Within Borders*; and e.g., Dieter Grimm, *Types of Constitutions*, text at n. 27, available at [www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199578610.001.0001/oxfordhb-9780199578610-e-6](http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199578610.001.0001/oxfordhb-9780199578610-e-6).

<sup>8</sup> Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge, 2010). Schmitt’s own view was different. Schmitt, *Nomos of the Earth*, 217–223.

<sup>9</sup> See now the discussion of a philosopher, Thanos Zartaloudis, *The Birth of Nomos* (Edinburgh, 2019), 22–30. For a forceful earlier focus on the distribution of meat, with the distribution of land appearing only late, see Gerhard J. Baudy, “Hierarchie, oder: die Verteilung des Fleisches,” in Burkhard Gladigow and Hans J. Kippenberg, eds., *Neue Ansätze in der Religionswissenschaft* (Munich, 1983), 164 [131–174]. See further Richard Seaford, *Money and the Early Greek Mind* (Cambridge, 2004), 39–47. Further discussion below, this chapter.

places had, not fixed delineated boundaries, but fluid frontier zones; and in past centuries, rulership was conceived primarily as rulership over a people, not rulership over a territory. It is not even the case that law has always been bound up with the territorial monopoly of violence. The law of Antiquity and the Middle Ages was largely personal, not territorial: Individuals were often thought of as subject to the law of the community to which they belonged, not the law of the place in which they happened to find themselves.<sup>10</sup>

If we are to make sense of the long history of Western property law, we cannot begin with Schmitt's supposed "primeval acts" of the division of the earth. Instead, we must understand how and why the modern Western way of thinking arose, and what alternatives it displaced.

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If the "infinitely just earth" was not primevally divided up into private plots of land, with "fences, enclosures [and] boundaries," as Schmitt insisted, what *did* early human property look like? Schmitt's fable has been discarded today, but social scientists have not given up on the effort to reconstruct the primeval forms of human ownership. Quite the contrary: The problem of early human forms of property is the subject of a vibrant literature, especially among anthropologists. That literature wanders down some strange pathways, for example comparing humans to birds and spiders. Nevertheless, it makes for essential background reading to the history of Western property law that begins in ancient Rome.

Current research suggests several conclusions about the very early history of human property. Humans, like other animals, have probably always made some sort of territorial claims. Those claims, however, have by no means always taken the form of landownership familiar in the modern Western world.<sup>11</sup> To be the modern Western "owner" of land is, at its notional core, to be something like its territorial ruler, with the power, in principle, to bar entry by others and enjoy sole access to its fruits. Such exclusive ownership probably did exist early

<sup>10</sup> With many complications to be discussed in Chapter 5.

<sup>11</sup> E.g., James M. Acheson and Roy J. Gardner, "Strategies, Conflict, and the Emergence of Territoriality: The Case of the Maine Lobster Industry," *American Anthropologist* 106 (2004): 297 [296–307].

on in human societies to a limited extent, in the form of control over circumscribed areas such as garden plots.

But with regard to the larger territorial ranges of communities, rights in land looked different, typically taking the form of what anthropologists call “use rights.” A system of use rights does not accord exclusive quasi-sovereign rights in particular tracts. Instead, as the phrase suggests, it allots rights to the use of resources on the tract. Those rights to resources are generally granted out by chiefs or other figures in authority, in line with the social hierarchical order of the community. “Land tenure systems,” as one anthropologist describes this widespread pattern, “are characterized by a coexistence of multiple rights that are often held by different persons as a function of their status or position in society.”<sup>12</sup> The distinction between such a “status or position”-oriented system and the modern practice of landownership must be stated carefully. The distinction is *not* that there are no rights in land in the former. It is that rights in land, in societies more oriented toward use rights, must always be viewed against the background of the hierarchical structure of society: Rights in land exist; but they can only be understood in light of the rights-holder’s place in the communal rank order. But land, importantly, is not the only object of rights that is of interest for the study of early human property. Anthropological studies focus on something else as well: the ownership, or quasi-ownership, of animal prey.

Most of the work of anthropologists has developed in response to an age-old question, first posed in Antiquity: whether there was ever “primitive communism,” a primordial phase in the history of human societies when there was no ownership at all, and in particular no ownership of land – an age, in the words of Jean-Jacques Rousseau, when “the earth belonged to no one.”<sup>13</sup> Belief that in the beginning “the earth belonged to no one” was widespread among the ancients. Virgil, for example, sang of a happy era at the dawn of history when

<sup>12</sup> Christian Lund, *Local Politics and the Dynamics of Property in Africa* (Cambridge, 2008), 16. Cf. Maurice Godelier, “Territory and Property in Primitive Society,” in M. von Cranach, K. Foppa, W. Lepenies, and D. Ploog, eds., *Human Ethology: Claims and Limits of a New Discipline* (Cambridge, 1979), 141 [133–155].

<sup>13</sup> Jean-Jacques Rousseau, *Discourse of the Origin of Inequality*, trans. Donald Cress (Indianapolis, 1992), 44.

“no tillers subjugated the land: even to mark possession of the plain or apportion it by boundaries was sacrilege ...”<sup>14</sup> A particularly influential statement came from Cicero, who declared that land was “by nature common property,” and only artificially appropriated and distributed. Like David Hume, centuries later, Cicero was at pains to deny that ownership was a “natural” institution:

There is ... no such thing as private ownership established by nature; instead property becomes private either through appropriation by those who found it lying empty sometime in the past, or through conquest in war, or by decree of law, or by private bargain, or contractual stipulation, or distribution by lot ...<sup>15</sup>

The same view established itself in the Latin Christian tradition, whose leading figures regularly denounced private property as a product of the sin of avarice, which had simply not existed before the Fall.<sup>16</sup> The Christian tradition made its way into the writings of St. Thomas More, from More to other utopian authors such as Tommaso Campanella, and finally into Rousseau’s great lament in the *Discourse of the Origin of Inequality*:

The first person who, having enclosed a plot of land, took it into his head to say this is mine and found people simple enough to believe him was the true founder of civil society. What crimes, wars, murders, what miseries and horrors would the human race have been spared, had someone pulled up the stakes or filled in the ditch and cried out to his fellow men: “Do not listen to this impostor. You are lost if you forget that the fruits of the earth belong to all and the earth to no one!”<sup>17</sup>

<sup>14</sup> Verg. G. 1.121–129, in H. Rushton Fairclough, trans., *Virgil: Eclogues; Georgics; Aeneid: Books 1–6*, rev. by G. P. Goold, Loeb Classical Library 63 (Cambridge, MA, 1916), 106–107; cf. Sen. Oct. 398–406, in John G. Fitch, ed. and trans., *Seneca: Tragedies, Vol. II: Oedipus; Agamemnon; Thyestes; Hercules on Oeta; Octavia*, Loeb Classical Library 78 (Cambridge, MA, 2004), 548–551; Tib. 1.3.43–44, in F. W. Cornish, J. P. Postgate, J. W. Mackail, trans., *Catullus; Tibullus; Pervigilium Veneris*, rev. G. P. Goold, Loeb Classical Library 6 (Cambridge, MA, 1913), 206–207. For a deathless general survey of ancient authors, see John Selden, *Mare Clausum, seu de Dominio Maris* (Leiden, 1636), 9–12 (Lib. 1, ch. 4).

<sup>15</sup> Cic. Off. 1.21, in Walter Miller, trans., *Cicero: On Duties*, Loeb Classical Library 30 (Cambridge, MA, 1913), 22–23.

<sup>16</sup> Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge, 2007), 59–83; Arthur Lovejoy, “The Communism of St. Ambrose,” *Journal of the History of Ideas* 3 (1942): 458–468.

<sup>17</sup> Rousseau, *Discourse of the Origin of Inequality*, trans. Cress, 44.

This venerable belief, that in the infancy of humanity the earth was “the common possession of all men,” was very slow to die. Nineteenth-century historians, anthropologists, and early sociologists uniformly predicated a primitive human stage of communal ownership. As Henry Maine asserted in his 1861 *Ancient Law*, “joint-ownership, and not separate ownership, is the really archaic institution.” Lewis Henry Morgan produced a particularly important account in his 1877 *Ancient Society, or Researches in the Lines of Human Progress from Savagery, through Barbarism to Civilization*, drawn from his long experience living among the Iroquois:

[T]he property of savages was inconsiderable . . . Rude weapons, fabrics, utensils, apparel, implements of flint, stone and bone, and personal ornaments represent the chief items of property in savage life . . . Lands, as yet hardly a subject of property, were owned by the tribes in common, while tenement houses were owned jointly by their occupants . . .<sup>18</sup>

Morgan’s description of “the property of savages” shaped much of late nineteenth-century thought, notably that of Karl Marx and Friedrich Engels;<sup>19</sup> and primitive communism remained a basic tenet of the Marxist tradition deep into the twentieth century. No less an authority than Stalin laid down the Marxist line in 1938: Human history, Stalin decreed from Moscow, began in primitive communism. Only later in the course of social evolution was it succeeded by the stages of slavery, feudalism, and capitalism.<sup>20</sup>

But like most ideas promoted by Stalin, this one is in bad odor today. Anthropologists and historians alike reject the hypothesis of primitive communism, on the basis of a wide range of evidence, from archeology to animal ethology to the ethnography of hunter-gatherers. Thus ancient economic historians now confidently conclude that “private property existed before states or formal legal

<sup>18</sup> Morgan, *Ancient Society, or Researches in the Lines of Human Progress from Savagery, through Barbarism to Civilization* (New York, 1877), 527–528.

<sup>19</sup> Marx, *The Ethnological Notebooks of Karl Marx (Studies of Morgan, Phear, Maine, Lubbock)*, transcribed and ed. with an introduction by Lawrence Krader (Assen, 1974); Engels, *Der Ursprung der Familie, des Privateigentums, und des Staats, im Anschluß an Lewis H. Morgans Forschungen* (Hottingen-Zürich, 1884).

<sup>20</sup> Joseph Stalin, “The Five Main Types of Relations of Production,” in *History of the Communist Party of the Soviet Union (Bolsheviks)*, now in David Brandenberger and Mikhail Zelenov, eds., *Stalin’s Master Narrative* (New Haven, 2019), 266–267.

institutions.”<sup>21</sup> And indeed, the archeological and literary evidence for some form of early property in land is bountiful. Some of the most striking evidence takes the form of boundary stones, often elaborately carved, which survive from all over the ancient world. “You must not move your neighbor’s boundary marker,” admonishes Deuteronomy in a typical statement.<sup>22</sup> We find law of boundary stones far and wide, for example in the ancient Near East,<sup>23</sup> among the Aztecs,<sup>24</sup> or in ancient Arabia.<sup>25</sup> The Romans even worshiped their boundary stones and brought them offerings.<sup>26</sup> We shall see much more about boundary-stone cults in the chapters that follow.

To be sure, archeology and written evidence can only take us just so far back in human history. But anthropologists believe that they can push back much further, through studies of animal ethology, human ethnography, and the reconstruction of the early evolution of the genus *Homo*. Some of the most stimulating work is drawn from ethological studies of nonhuman animals. Patterns of behavior that ethologists call “territorial” are found throughout the animal world. Ethologists do not entirely agree on how to define territoriality, and as recent work emphasizes, it is far from clear that animal behavior should be interpreted in terms drawn from human experience.<sup>27</sup> Nevertheless, it has often been said that the near ubiquity of animal territoriality

<sup>21</sup> Joseph Manning, “Property,” forthcoming in *Cambridge Comparative History of Ancient Law*.

<sup>22</sup> Deut. 19:14, NRSV. For a treatment discussing this admonition alongside the Roman *terminus* and other aspects of Roman and other ancient traditions, see Karl-Heinz Ziegler, “Grenze,” in *Reallexikon für Antike und Christentum* (Stuttgart, 1950–2022), 12: cols. 1095–1107. The meaning of the Hebrew term is not entirely clear. The term is גְּבוּל (*gebul*), usually translated as “boundary” or “territory.” The term here is interpreted as boundary marker in almost all standard translations. For a valuable general survey of ancient boundary stones on the basis of the scholarship available at the time, including the Hebrew tradition, see Giulia Piccaluga, *Terminus: i segni di confine nella religione romana* (Rome, 1974), 27–93.

<sup>23</sup> Ursula Seidl, *Die babylonischen Kudurru-Reliefs: Symbole mesopotamischer Gottheiten* (Göttingen, 1989).

<sup>24</sup> Frances Berdan, *The Aztecs of Central Mexico: An Imperial Society* (New York, 1982), 98.

<sup>25</sup> D. 47.11.9. Ulpianus 9 *de off. procons.*, discussed in Ari Bryen, *Law as Books*, forthcoming.

<sup>26</sup> Below, Chapter 2.

<sup>27</sup> Ambika Kamath and Ashton Wesner, “Animal Territoriality, Property and Access: A Collaborative Exchange between Animal Behaviour and the Social Sciences,” *Animal Behaviour* 164 (2020): 233–239. For problems in definition, also Wayne



proves that human animals too must always have claimed some sort of rights in land. The economist Herbert Gintis has made a particularly energetic effort to exploit this research, arguing that studies of animal territoriality decisively disprove the classic claims of Rousseau and other believers in primitive communism. An immense variety of nonhuman creatures, writes Gintis in an article on “the evolution of property,” “own” territory. That fact suffices to prove that the idea of primitive communism is nonsense:

The dominant view in Western thought, from Hobbes, Locke, Rousseau, and Marx to the present, is that private property is a human social construction that emerged with the rise of modern civilization . . . However, evidence from studies of animal behavior, gathered mostly in the past quarter century, has shown this view to be incorrect. Various territorial claims are recognized in non-human species, including butterflies . . . spiders . . . wild horses . . . finches . . . wasps . . . non-human primates . . . lizards . . . and many others . . . In non-human species, that an animal owns a territory is generally established by the fact that the animal has occupied and altered the territory (e.g., by constructing a nest, burrow, hive, dam, or web, or by marking its limits with urine or feces). In humans there are other criteria of ownership, but physical possession and first to occupy remain of great importance.<sup>28</sup>

Human ownership, on this account, is in essence no different from the territorial claims of, for example, house cats, whose behavior has been studied by animal ethologists such as Paul Leyhausen.<sup>29</sup>

But how exactly does human territoriality function? Precisely what sorts of claims on land can we guess our early ancestors would have made? Just how much are we like our pet cats? Attempts to answer these questions have been guided by ethological studies of one kind of animal in particular: Early human behavior is thought to have resembled the behavior of birds. Here, the leading theory was proposed by the evolutionary biologist Jerram Brown, who argued in

L. Linklater, “Territorial Tuatara? – A Hypothesis Still to Be Tested,” *New Zealand Journal of Ecology*, 35 (2011): 308–311.

<sup>28</sup> Gintis, “The Evolution of Private Property,” *Journal of Economic Behavior and Organization* 64 (2006): 1–16.

<sup>29</sup> See Leyhausen, “Dominance and Territoriality as Complemented in Mammalian Social Structure,” in A. H. Esser, ed., *Behavior and Environment: The Use of Space by Animals and Men* (New York, 1971), 22–33, for an extremely stimulating discussion on the relationship between rank and space.

1964 that bird territoriality is driven by a kind of cost/benefit analysis. The key factor for birds is the “defendability” of resources:

[W]hen a food supply cannot be feasibly defended, because of its mobility or transient nature, generally no territorial system is evolved to defend it; and the territory, if present, may be restricted only to the nest and the area reachable by the parents on the nest.<sup>30</sup>

Brown offers the illustration of “a simple form of territoriality” in the Brandt’s cormorant (*Phalacrocorax penicillatus*), a handsome seabird found on the Pacific coast of North America. The territorial claims of the Brandt’s cormorant are circumscribed to an area in which it can fight off competitors:

The territory consists of the nest and a barren area extending a few feet or more around it. It is used in the attraction of a mate, for copulation, and defense of the family. All food is obtained from the sea under conditions which make the defense of a feeding area completely impractical if not impossible. Consequently, no matter how intense competition for food might be, the evolution of a territory used for feeding would be blocked through lack of defendability. On the other hand, the small area used for mating and family defense is feasibly defendable, and competition for the often limited optimal nesting space probably intensifies the necessity of defense of the nesting territory in this species.<sup>31</sup>

The bird’s “ownership,” to the extent that it is appropriate to use such a human term, is limited to its nesting area.

Taking their cue from the work of Brown and other evolutionary biologists, economic anthropologists argue that human animals are like the Brandt’s cormorant:<sup>32</sup> From the earliest history of the species, they have probably claimed relatively exclusive control over some, but only some, territories – namely those that are worth the cost of defending against competition from other humans. Rada Dyson-Hudson and Eric Alden Smith, the authors of the leading statement,

<sup>30</sup> Jerram Brown, “The Evolution of Diversity in Avian Territorial Systems,” *Wilson Bulletin* 76, no. 2 (1964): 160 [160–169].

<sup>31</sup> *Ibid.*, 162–163.

<sup>32</sup> One of the most influential economic anthropologists, James Acheson, goes so far as to argue that the defendability hypothesis explains the full spectrum of human property claims on the planet even in complex human societies down to the present. Acheson, “Private Land and Common Oceans: Analysis of the Development of Property Regimes,” *Current Anthropology* 56 (2015): 28 [28–55].

formulate the general principle: “territoriality is expected to occur when critical resources are sufficiently abundant and predictable in space and time, so that costs of exclusive use and defense of an area are outweighed by the benefits gained from resource control.”<sup>33</sup> Alden Smith and Benjamin Chabot-Hanowell identify garden plots and, curiously, livestock as leading examples of such “defensible” objects of property:

[I]f resource X is dense and predictable enough to be economically defensible, but resource Y is not, the simplest expectation is territorial defense of X but not Y. An example is the pattern of land use and property rights found among many East African cattle herders, where garden plots and livestock are claimed as property by individuals or households, but grazing land is communally owned by the “tribe” (ethnic group).<sup>34</sup>

There is obviously something odd in speaking of livestock as a kind of “territory”; I will return to the question of the ownership of beasts (and the related ownership of slaves) later. For the moment, let me just note, lest all this ethological argument seem too wildly remote from the subject of this book, that garden plots and livestock also seem to have been privileged objects of ownership in early Roman law.<sup>35</sup> Let me further note, on the topic of “defendability,” that the Roman literature derived the very word “territory” from the verb *terreo*, “to scare off.”<sup>36</sup>

These ethological analyses of human territoriality certainly do not leave much room for the hypothesis of primitive communism; Gintis is surely right about that. At the same time, it is essential to emphasize what this anthropological work does not purport to show: Contrary to what Gintis argues, it does not purport to explain the ownership of land

<sup>33</sup> Dyson-Hudson and Alden Smith, “Human Territoriality: An Ecological Reassessment,” *American Anthropologist* 80 (1978): 21 [21–41]. For a useful summary of the literature, with roots in the work on birds by Brown, see Benjamin Chabot-Hanowell and Eric Alden Smith, “Territorial and Non-territorial Routes to Power: Reconciling Evolutionary Ecological, Social Agency, and Historicist Approaches,” in James Osborne and N. Parker Van Valkenburgh, eds., *Territoriality in Archaeology* (Washington, D.C., 2015): 75 [72–86].

<sup>34</sup> Chabot-Hanowell and Smith, “Territorial and Non-territorial Routes to Power,” 77.

<sup>35</sup> Below, Chapter 2.

<sup>36</sup> Julius Frontinus, *De controversiis* 1.1.8, in Carolus Thulin, ed., *Corpus agrimensorum Romanorum*, Teubner (Leipzig, 1913): *territorium est quidquid hostis terrendi causa constitutum est*. This etymology took on quite a life in medieval law. See Dante Fedele, *The Medieval Foundations of International Law: Baldus de Ubaldis (1327–1400)* (Leiden, 2021), 204–205.

as we know it today. Modern Western landownership has two critical features: It is individual; and it is exclusionary: The law ordinarily presupposes a sole “owner,” and further generally guarantees that owner the right against “physical invasion” by others.<sup>37</sup> This is the “sole and despotic dominion . . . in total exclusion of the right any other individual in the universe” of Blackstone, and it is commonly called “Blackstonian” ownership.

Anthropologists are careful to emphasize that the human territoriality they describe does not involve ownership in the full Blackstonian sense. This is partly because claims to territory are not necessarily wholly exclusionary.<sup>38</sup> Territoriality, as anthropologist Elizabeth Cashdan carefully defines it, consists in “the maintenance of an area ‘within which the resident controls or restricts use of one or more environmental resources.’”<sup>39</sup> This “control or restriction of one or more resources” does not necessarily rule out entry into the territory by others – the claim is a claim on the resources, not on the land as such – and ethnographic studies suggest that the boundaries of such territories are often more porous than is the case in modern Western landownership. The “territories” in question are something like the “territories” of street-level drug dealers or traveling sales representatives: They are territorial rights of exploitation; and as such they do not require the prevention of entry by outsiders who do not challenge those rights. In this respect, as anthropologist Tim Ingold observes, human territoriality resembles the territoriality of other animals such as lions.<sup>40</sup> We shall see that the same is true of the territoriality of most premodern states. The modern conception of territory that must be fenced off, and of rights that are necessarily disturbed by the presence of an intruder, is quite distinctive, and it constitutes a comparatively recent development in the history of human societies, in many respects dating only to the latter part of the eighteenth century, as we shall see in Chapter 9.

<sup>37</sup> E.g., Henry Smith, “Exclusion and Property Rules in the Law of Nuisance,” *Virginia Law Review* 90 (2004): 965–1049.

<sup>38</sup> E.g., Elizabeth Cashdan, “Territoriality,” in David Levinson and Melvin Ember, eds., *Encyclopedia of Cultural Anthropology* (1996) 4:1301–1305.

<sup>39</sup> Cashdan, “Territoriality among Human Foragers: Ecological Models and an Application to Four Bushman Groups,” *Current Anthropology* 24 (1983): 47 [47–66].

<sup>40</sup> Ingold, *The Appropriation of Nature: Essays on Human Ecology and Social Relations* (Iowa City, 1987), 133–134.

Moreover, the territoriality that economic anthropologists study is by no means typically individual. “[T]raditional systems of land tenure among nonindustrial peoples,” Cashdan explains,

exist everywhere, even though they do not fit easily into Western ideas of land ownership. Rights to land are typically obtained through kinship, either from one’s parents (as among the !Kung Bushmen) or from one’s lineage (as among most pastoralists and subsistence horticulturalists). Land rights can be manipulated to the extent that kinship and fictive kinship ties can be manipulated, but access is not usually such without such ties. Because land cannot be sold in [traditional] systems, nor can individual users dispose of land as they wish Western concepts of land ownership can be misleading . . .<sup>41</sup>

“Traditional systems of land tenure” are a function of real and fictive kin relations; they involve not the ownership of land, but what is better called the allotment of the use of land in line with the interpersonal organization of the society in question. Contrary to the thesis of Gintis, the economic anthropology of territoriality thus gets us, at best, only part of the way to settling the question of how Blackstonian exclusive landownership emerged.

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The study of territoriality does not exhaust the literature of anthropology on early human ownership, however. Anthropologists also think that they can identify another important form of ownership, or quasi-ownership, that does not involve land. This has to do with the claims that attach to the capture of animal prey among hunter-gatherers.

The study of hunter-gatherers has long been regarded as particularly valuable for understanding human evolution. As Richard B. Lee and Irven DeVore write in a seminal 1968 study, “[c]ultural man has been on earth for some 2,000,000 years; for over 99 percent of this time he has lived as a hunter-gatherer.”<sup>42</sup> That fact that the human species formed almost entirely in hunter-gatherer conditions suggests that

<sup>41</sup> Cashdan, “Territoriality” (1996), 1302–1303.

<sup>42</sup> Lee and DeVore, “Problems in the Study of Hunters and Gatherers,” in Lee and DeVore, eds., *Man the Hunter* (Chicago, 1968), 3 [3–12]. Current literature emphasizes that hunter-gatherers have also frequently engaged in agriculture. See for the earliest history, e.g., Ian Hodder, “The Lady and the Seed,” in Mehmet Özdoğan, Harald Hauptmann, and Nezhir Başgelen, eds., *From Village to Cities* (Istanbul, 2003), 132 [129–137].

even modern behavioral patterns, the products of 2 million years of evolution, can be supposed to reflect the “lifestyle of Upper Paleolithic hunter-gatherers,” in the words of Christopher Boehm.<sup>43</sup> “Our intellect, interests, emotions and basic social life,” down into the present, according to this anthropological view, “all are evolutionary products of the hunting adaptation.”<sup>44</sup> This hunting adaptation, dating far back in hominin history, brought with it the use of lethal weapons; and as evolutionary anthropologists emphasize, those weapons could be turned on fellow humans just as they could be turned on animal prey: Humans became far more efficient killers of their conspecifics than other primates had ever been. Much follows, anthropologists believe, from this fact: the fact that early humans, armed with spears, became what the great historian of Greek religion Walter Burkert calls *Homo necans*, the spear-wielder, “man the killer.”<sup>45</sup> We shall see in the next chapter that the spear continued to feature prominently as a symbol of ownership in Roman law.

The norms of the hunt have figured in studies of early property concepts in particular, a topic on which anthropologists have produced a rich and stimulating literature. That literature turns on the problem of the individual ownership of prey. Hunters hunt in bands. If several hunters are pursuing the same animal, which one of them can be said to “own” the game when it is finally taken? Different societies give different answers, which have been much studied by ethnographers since the late nineteenth century. Some of those answers are summarized by J. H. Dowling:

There are a number of alternative ways of ascribing to a single person ownership of collaboratively acquired animals. Among the Central Eskimo the person who first sees a young seal or polar bear owns that animal regardless of who actually kills it . . . Among the Copper Eskimo it is the first person who inflicts a wound on the animal who owns it, even though the wound is a minor one and the animal would escape if another hunter did not assist in its killing . . . The Andamanese assign the ownership of the slain pig or dugong to the man who inflicts the first serious wound; minor wounds give the inflictor

<sup>43</sup> Boehm, *Hierarchy in the Forest* (Cambridge, MA, 1999), 3.

<sup>44</sup> Sherwood Washburn and Chet Lancaster, “The Evolution of Hunting,” in Lee and Devore, eds., *Man the Hunter*, 293 [293–303].

<sup>45</sup> Burkert, *Homo necans: Interpretationen altgriechischer Opferriten und Mythen*, 2nd ed. (Berlin, 1997), at e.g., 25.

no rights in the animal . . . Among the White Knife Shoshoni, the man who kills an animal owns it . . . As a final alternative, the Bushmen of the South African Kalahari desert ascribe ownership to the person who owns the arrow or spear that kills the animal, even though the missile is shot or thrown by another . . .<sup>46</sup>

In the next two chapters we shall see that the same problem also appeared in the Roman law of *occupatio*, which offered its own solution to the question of which hunter owns a given piece of prey.

When it comes to animal prey, at least, some form of individual ownership arguably existed very early on in human history. Yet here again, we must be careful not to suppose that we are in the presence of modern Western concepts. Dowling and other anthropologists are careful to note that the form of “ownership” that accrues to individual hunters under these various rules differs from “ownership” of the modern Western kind. This is because the “owner” does not enjoy exclusive rights over the meat of the killed animal. Meat is always shared among members of the community, as has probably been the case since very early on in hominin evolution.<sup>47</sup> In consequence, the “ownership” of the killed prey consists, not in Blackstonian “sole and despotic dominion,” but in the right to *distribute* meat, which carries great prestige. It is the prospect of such prestige that gives individuals the incentive to hunt, as anthropologist Nicolas Peterson explains:

Without such a mechanism for identifying the successful hunter, it would be difficult to motivate people to hunt in the presence of an ethic of sharing, since

<sup>46</sup> Dowling, “Individual Ownership and the Sharing of Game in Hunting Societies,” *American Anthropologist* 70 (1968): 504 [502–507] (citations omitted). For another example, Robert Bailey, “The Behavioral Ecology of Efe Pygmy Men in the Ituri Forest, Zaire,” *Anthropological Papers, Museum of Anthropology, University of Michigan* 86 (Minneapolis, 1991) 33. Useful analysis of literature and discussion of sharing practices in Nobuhiro Kishigami, “A New Typology of Food-Sharing Practices among Hunter-Gatherers, with a Special Focus on Inuit Examples,” *Journal of Anthropological Research* 60 (2004): 341–358.

<sup>47</sup> For a detailed examination of the evidence, see Brian M. Wood and Ian C. Gilby, “From *Pan* to Man the Hunter: Hunting and Meat Sharing by Chimpanzees, Humans, and Our Common Ancestor,” in Martin Muller, Richard Wrangham, and David Pilbeam, eds., *Chimpanzees and Human Evolution* (Cambridge, MA, 2017), 339–382; Carel P. van Shaik and Judith Burkart, “Mind the Gap: Cooperative Breeding and the Evolution of Our Unique Features,” in Peter M. Kappeler and Joan B. Silk, eds., *Mind the Gap: Tracing the Origins of Human Universals* (Berlin, 2009), 477–496.

everybody would sit around waiting for others to hunt, knowing they would automatically receive a portion. By identifying a hunter with the right to distribute, hunters are motivated to hunt because they receive substantial prestige by being so identified.<sup>48</sup>

The hunt is followed by collective feasting on the prey, over which the successful hunter presides. In this connection, it is worth repeating that the Greek term for law highlighted by Schmitt, *nomos*, is derived from the root *nem-*, “to distribute”; and that the primary early instances of the use of the verb *nemein*, attested in Homer, involve the distribution, not of land, but of meat and drink; in particular, as Sitta von Reden writes, they involve “food distribution . . . by a leading warrior.”<sup>49</sup> It is also worth emphasizing that the value in the right to distribute meat lies in the fact that it carries “substantial prestige.” What we see here is a culture of “ownership” in which what individuals set out to maximize is, not their wealth, but their status. We shall see more examples shortly of individuals who seek to maximize their status through the distribution of goods to others rather than maximizing their wealth in the familiar modern Western fashion.

It is important to stress a last point as well: Such ceremonies, which I will call “rites of distribution,” continued to feature in legal and religious history for millennia. In Chapter 3, we will see that comparable ceremonies governed the distribution of booty among victorious warriors from Antiquity down into the nineteenth century. Just as the hunt for animal prey ended with the festive sharing of meat, the hunt for booty in war ended as the chief distributed shares of the take. Another such rite of distribution will feature especially prominently in the chapters that follow: As Burkert and many other students of ancient religion emphasize, the killing of animals and the

<sup>48</sup> Peterson, “Demand Sharing: Reciprocity and the Pressure for Generosity among Foragers,” *American Anthropologist* 95 (1993): 866 [860–874]. For more discussion, see Morton Fried, *Evolution of Political Society: An Essay in Political Anthropology* (New York, 1967), 34, 65–67; Ingold, *Appropriation of Nature*, 223–229; Alain Testart, “Game Sharing Systems and Kinship Systems among Hunter-Gatherers,” *Man* (N.S.) 22 (1987): 287–304.

<sup>49</sup> Von Reden, *Money in Classical Antiquity* (Cambridge, 2010), 158, contrasting “food distribution among a group of equals (*daiesthai*) [with] the sharing out of pieces by a leading warrior (*nemein*)”; and the discussion of Seaford, *Money and the Early Greek Mind*, 49.



distribution of their meat, this hominin practice with an immensely deep evolutionary history, is also found in the animal sacrifices of classical Greco-Roman Antiquity, in which the killing of the victim was followed by a communal feast.

This close association between hunting practices, feasting, and animal sacrifice is frequently noted by anthropologists. “[T]he principles of sacrifice,” writes Ingold, “are prefigured in the hunt.”<sup>50</sup> It is precisely this resemblance between early human hunting and classical sacrificial ritual that led Burkert to analyze classical religion as religion of *Homo necans*, “man the killer,” displaying “tracks of biology” that reach back into the earliest phases of the evolution of human societies<sup>51</sup>; and that led Mircea Eliade to analyze classical religion as the religion of “warriors, conquerors, and military aristocracies [who] carr[ied] on the symbolism and ideology of the paradigmatic hunter.”<sup>52</sup> As I will argue in the next three chapters, the same “symbolism and ideology” can be detected in ancient Roman property law.

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The work of economic anthropologists thus suggests that human animals have always made some strong territorial claims, though probably only to limited “defensible” zones such as garden plots, comparable to the nesting areas of birds. It also suggests that there are intimations of a kind of “ownership” of prey among hunter-gatherers, conferring the right to distribute meat, and ownership of livestock as well. Studies further indicate that hunter-gatherer societies, in their more complex variants, have incorporated slavery within their systems of social stratification.<sup>53</sup> But there is nothing in

<sup>50</sup> Ingold, “From the Master’s Point of View: Hunting Is Sacrifice,” *Journal of the Royal Anthropological Institute* 21 (2015): 24–27. See further Jonathan Z. Smith, “The Bare Facts of Ritual,” *History of Religions* 20 (1980): 112–127; Ingold, “Hunting, Sacrifice and the Domestication of Animals,” in *The Appropriation of Nature*, 243–276; Valerio Valeri, “Wild Victims: Hunting as Sacrifice and Sacrifice as Hunting in Huauilo,” *History of Religions* 34 (1994): 101–131; classically Karl Meuli, “Griechische Opferbräuche,” in *Gesammelte Schriften*, ed. Thomas Gelzer (Basel, 1975), 2:948–1021 [907–1021].

<sup>51</sup> Burkert, *The Creation of the Sacred: Tracks of Biology in Early Religions* (Cambridge, MA, 1988).

<sup>52</sup> Eliade, *A History of Religious Ideas*, trans. Willard Trask (Chicago, 1978), 1:35.

<sup>53</sup> E.g., Jeanne E. Arnold, “The Archaeology of Complex Hunter-Gatherers,” *Journal of Archaeological Method and Theory* 3 (1996): 77–126; Alain Testart, “The Significance

this literature that points to anything quite like the modern Western Blackstonian conception of ownership. The same can be said of studies on the mechanics of “traditional systems of land tenure” in communally controlled zones, which characteristically involve what anthropologists call “use rights,” rights in resources assigned in accordance with the social hierarchical structure of the community.

In their explanations of how “traditional systems of land tenure” function, anthropologists draw on a conceptualization of property that dates back to the early twentieth-century work of Bronisław Malinowski and E. Adamson Hoebel, as well as the work of the philosophers of legal realism. Malinowski, Hoebel, and many subsequent anthropologists argue that the modern Western conception of ownership is out of place in the interpretation of property in many non-Western societies. This is because the modern Western conception imagines property as an unmediated relationship between persons and things. Modern Western ownership is an *in rem* right, a right “in a thing”: In the modern Western world, we believe that we can offer a complete account of the right of a person to “own” a thing without any consideration of that person’s relationship to other persons.

Not so in many non-Western cultures, in which it is commonly the case that property is understood, not as a direct *in rem* relationship between a person and a thing, but instead as a function of relationships within an assemblage of persons. Malinowski made the point in an influential 1926 account of rights in canoes among Trobriand islanders: Examining an intricate complex of shared canoe-rights, he concluded that “[o]wnership can be defined neither by such words as ‘communism’ nor ‘individualism.’”<sup>54</sup> Canoe-rights, rather than being the subject of either individual or joint ownership, were functions of a shifting web of “duties, privileges and mutualities,”<sup>55</sup> as different parties took control over a given canoe at different moments, on the basis of complex interpersonal relationships.

Canoe-rights, like rights to prey in hunter-gatherer societies, are thus lodged in a system of social relations; they are rights to the use

of Food Storage among Hunter-Gatherers: Residence Patterns, Population Densities, and Social Inequalities,” *Current Anthropology* 23 (1982): 528, 530 [523–537].

<sup>54</sup> Malinowski, *Crime and Custom in Savage Society* (London, 1926), 20–21.

<sup>55</sup> *Ibid.* Cf. E. Adamson Hoebel, “Fundamental Legal Concepts as Applied in the Study of Primitive Law,” *Yale Law Journal* 51 (1942): 951–966.

of the canoe, not rights of ownership; and the same is true of “use rights” in land, which, as their name suggests, are rights, not in the land as such, but in the resources of the land. Marshall Sahlins explains the workings of use rights in his classic *Stone Age Economics*, here describing what he calls the “primitive mode of production”:

The household in the tribal societies is usually *not* the exclusive owner of its resources: farmlands, pastures, hunting or fishing territories . . . Where these resources are undivided, the domestic group has unimpeded access; where the land is allotted, it has claim to an appropriate share. The family enjoys the *usufruct*, it is said, the use-right . . .<sup>56</sup>

Use rights thus involve what the property theorist Henry Smith calls a “governance strategy” rather than an “exclusion strategy”:<sup>57</sup> They confer rights to exploit the resources of land, without conferring the right to fence the land off “in total exclusion of the right of any other individual in the universe.” Such use rights, Sahlins tells us, are not “owned” but “allotted.” But how does the process of this allotment work? What sort of “governance” determines rights? The answer lies in what Sahlins calls “political control.” Even the simplest societies have a hierarchical authority structure, in the form of a chieftainship or of the internal hierarchy of the family; and it is that structure that determines who is assigned which privileged claims.

Sahlins illustrates the pattern of political control over the allotment of resources using the example of an ideal-typical tribal chieftainship, operating on principles of gift exchange. Gift-exchange principles, which have been much studied by anthropologists since the early twentieth century, are easily misunderstood. Gift exchange is not a form of selfless giving. It is best understood as a form of self-interested exchange. But it is a form of self-interested exchange that rests on principles different from those of market orders, and in which actors are engaged in a different kind of utility maximization. In the ideal-typical market order, self-interested individuals aim to maximize their wealth. In an ideal-typical gift-exchange order, by contrast, actors often aim to maximize, not their wealth, but their social status; and

<sup>56</sup> Sahlins, *Stone Age Economics*, new ed. (Abingdon and New York, 2017), 84–85, and 97 for “primitive structure of production.”

<sup>57</sup> Smith, “Exclusion versus Governance: Two Strategies for Delineating Property Rights,” *Journal of Legal Studies* 31 (2002): S453–S487.

higher-ranking individuals frequently achieve that end, not by accumulating resources in their own hands, but by distributing resources to others. The classic example of such a gift-exchange order is a “Big Man” society of the kind that Malinowski described in Melanesia. In Malinowski’s famous example, the Big Man oversees the distribution of yams to the community, without himself claiming any greater share of yams than anyone else. Indeed, as the work of anthropologists has repeatedly shown, high-status individuals in a gift-exchange order, far from acting acquisitively, may even impoverish themselves in order to magnify their social standing through largesse.<sup>58</sup> Like the “owners” of the prey killed among hunters and gathers, or the Homeric “leading warriors” who assert their primacy through the distribution of meat and drink, they aim to maximize their prestige through exercising the authority to distribute, rather than by laying claim to a larger share.

Land tenure in Sahlins’ “primitive mode of production” can helpfully be thought of as fitting within the classic gift-exchange logic:<sup>59</sup> The chief asserts and maintains his rank, not by accumulating lands in his own hands, but by distributing use rights in land to less high-ranking members of the community. “Chiefdoms,” in the definition of the anthropologist Elman Service, “are redistributive societies with a permanent central agency of coordination.”<sup>60</sup> From season to season, the chief determines which households will exercise rights in those tracts that are not held as a commons. This is the “political control” of which Sahlins speaks. It is a system of communal ownership in the bare sense that it assumes a certain territory claimed by a certain community. But it is not a system of the communism of coequal rights in land. Far from assuming equality, it assumes, and reinforces, the superior status of the chief. The group is collectively territorial, but within the group the

<sup>58</sup> For the current state of play on the most famous example, see M. E. Harkin, “Potlatch in Anthropology,” in James D. Wright, ed., *International Encyclopedia of the Social and Behavioral Sciences* (Amsterdam, 2015), available at [www.sciencedirect.com.yale.idm.oclc.org/referencework/9780080970875/international-encyclopedia-of-the-social-and-behavioral-sciences](http://www.sciencedirect.com.yale.idm.oclc.org/referencework/9780080970875/international-encyclopedia-of-the-social-and-behavioral-sciences).

<sup>59</sup> Although Sahlins himself does not make the connection.

<sup>60</sup> Service, *Primitive Social Organization: An Evolutionary Perspective*, 2nd ed. (New York, 1971), 134.

distribution of rights in land is determined by a distinctively human form of dominance ordering.

Such “political control” over the distribution of use rights in land has been identified by anthropologists and historians in societies all over the world, not only in the tribal chieftainships that Sahlins took as his ideal type, but in much more complex societies as well. Many of the most revealing cases have been studied by historians of the Western encounter with non-Western societies from the sixteenth century onward. The typical consequence of that encounter was not the displacement of some supposed primitive communism. Instead, the arrival of Western traders and conquerors commonly (though not invariably<sup>61</sup>) brought a confrontation between a Western attachment to landownership<sup>62</sup> and a widespread non-Western pattern of use rights in resources allotted, in line with the widespread human norm, through political control.

William Cronon, the historian of the clash between Western settlers and indigenous chieftainships in colonial Southern New England, gives a frequently quoted account of that encounter in his *Changes in the Land*: “What the Indians owned – or, more precisely, what their villages gave them claim to – was not the land but the things that were on the land during the various seasons of the year. It was a conception of property shared by many of the hunter-gatherer and agricultural peoples of the world, but radically different from that of the invading Europeans.”<sup>63</sup> Cronon’s much-cited description, it should be said, is a shade misleading. He speaks of “villages” giving claims, which might all too easily be taken to imply egalitarian sharing, or some version of primitive communism. That is not right, and Stuart Banner chooses more precise, and more hard-edged, language in his own account of the same encounter, *How the Indians Lost Their Land*. Banner emphasizes that it was “village *chiefs*” who accorded rights:<sup>64</sup> What the English colonists encountered were not communistic

<sup>61</sup> See, e.g., from a classic author, Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New York, 1971), 274.

<sup>62</sup> See below, Chapter 9, for a more thorough discussion.

<sup>63</sup> Cronon, *Changes in the Land: Indians, Colonists and the Ecology of New England* (New York, 1983), 60, 62, 65.

<sup>64</sup> Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA, 2009), 20, emphasis added.

villagers, but communities whose common territories were exploited and cultivated by families subject to the political control exercised by sachems. Other New World societies too, though they differed immensely, as Allan Greer shows, had real property regimes that functioned against the background of some form of hierarchical control.<sup>65</sup>

Parallel observations have been made about an immense variety of societies, from Hawaii<sup>66</sup> to New Zealand<sup>67</sup> to Africa,<sup>68</sup> to the pre-Columbian Inca,<sup>69</sup> to Ancient India,<sup>70</sup> many of them with much more highly articulated social hierarchies than the tribal bands of colonial Southern New England. Precolonial Africa has been the subject of especially probing work. Antony Hopkins, for example, in a study of the mid nineteenth-century British annexation of Lagos, has shown how Western conceptions of private landownership clashed with use rights in a highly developed agrarian order. Lagos was not a world of tribal bands, but it *was* one in which chiefs distributed land rights as a means of asserting and cementing their authority: “Allocation of use rights was important as a means of settling followers and of building up a power base of dependents, some free men but most of slave status, by attaching them to the entourage of the chief concerned.”<sup>71</sup> The intrusion of the British shattered this system of land allotment as an instrument of entourage-building, replacing it with the Western style of private landownership; what the arrival of Western power brought was, neither the destruction of primitive communism, nor the theft of land

<sup>65</sup> Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* (Cambridge, 2018), at e.g., 30–31 (reading Nahua real property against background of hierarchical social ordering), 40–41 (sachems in Atlantic coastal societies), 50 (on “power” and “control” among the Innu). Greer rightly emphasizes the variety among these societies, but I allow myself to hope that he would agree that they seem to have shared an orientation toward dominance relations of some kind in the understanding of rights in land.

<sup>66</sup> E.g., Jocelyn Linnekin, “The Hui Lands of Keanae: Hawaiian Land Tenure and the Great Mahele,” *Journal of the Polynesian Society* 92 (1983): 172 [169–188].

<sup>67</sup> Stuart Banner, “Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand,” *Law and Social Inquiry* 24 (1999): 807–852.

<sup>68</sup> Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Portsmouth, N.H., 1998), 231.

<sup>69</sup> Godelier, “Territory and Property,” 136–137.

<sup>70</sup> Romila Thapar, *From Lineage to State* (Oxford, 1984), 104.

<sup>71</sup> Hopkins, “Property Rights and Empire Building: Britain’s Annexation of Lagos, 1861,” *Journal of Economic History* 40 (1980): 784 [777–798].

previously owned in fee simple by the local population, but the erosion of the local authority structure. Martin Chanock, surveying a range of African studies, gives a similar account: In precolonial society, “people were linked to land through their membership of groups. It was their group standing which gave them access to land and consequently their concern was with maintaining their position linked to other persons rather than with rights in land.”<sup>72</sup> This is the state of affairs that Goody tries to capture through his phrase “chieftainship over people.”<sup>73</sup>

Discussion of precolonial African societies has centered on one particular aspect of this chieftainship over people: the master/slave relationship. Slavery was “an integral feature of almost every ancient society of Europe, Africa and Asia.”<sup>74</sup> There is thus nothing particularly surprising or shocking about its presence in precolonial Africa. Nevertheless, African slavery has inevitably seemed disturbing to modern Western observers, accustomed, since the late eighteenth century, to thinking of “property in man” as the foulest violation of human rights and sharply conscious of the horrific history of the Atlantic slave trade. This is, as one specialist puts it, an “explosively sensitive” topic,<sup>75</sup> and it is not easy to find comfortable ways of talking about it.

Anthropologists have proposed a variety of ways of defusing it. Goody suggests an economic approach: Precolonial Africa, he argues, was oriented toward the chieftainship over people rather than the chieftainship over land because in Africa, by contrast with Europe, people were scarce whereas land was plentiful. It is not that the Africans were somehow more vicious exploiters of their fellow human beings than the Europeans; it is rather that it is always the relatively scarce factor of production that comes to be defined as “property” in every society.<sup>76</sup> I will return to this economic argument at the end of this chapter.

<sup>72</sup> Chanock, Law, *Custom and Social Order*, 281.

<sup>73</sup> Jack Goody, *Technology, Tradition and the State in Africa* (Oxford, 1971), 30.

<sup>74</sup> Jeffrey Fynn-Paul, “Empire, Monotheism and Slavery in the Greater Mediterranean Region from Antiquity to the Early Modern Era,” *Past & Present* 205 (2009): 7 [3–40].

<sup>75</sup> Joseph C. Miller, “Breaking the Historiographical Chains: Martin Klein and Slavery,” *Canadian Journal of African Studies/Revue canadienne des études africaines* 34 (2000): 513 [512–531]; Sean Wilentz, *No Property in Man: Slavery and Anti-slavery at the Nation’s Founding* (Cambridge, MA, 2018).

<sup>76</sup> Goody, *Technology, Tradition and the State*, 25. In this, Goody was echoing but not citing the work of a year earlier (presumably unknown to him) by the economist Evsey Domar. See below.

Another influential approach to the problem was suggested by the anthropologist James L. Watson, in an essay contrasting African slavery with the more noxious form found in such settings as antebellum America. Antebellum slavery conformed to what Watson calls a “closed model”: Enslaved persons, deemed racially inferior, were permanently excluded from membership in the dominant society. African slavery, by contrast, operated on an “open model,” of a kind found in many parts of the world: Slaves were not regarded as inherently inferior, and they could eventually be freed and integrated into full membership in the dominant order. Indeed, enslavement was used as means of recruiting new members. In that sense, African slavery was categorically different from the slavery into which African captives were thrown in the New World. (Roman slave law, as we shall see, assumed an open model as well.<sup>77</sup>)

But the most widely cited effort to cope with the explosive challenge of African slavery comes from historian Suzanne Miers and anthropologist Igor Kopytoff. Miers and Kopytoff insist that we must not surrender to our instinctive shock when we hear the word “slavery,” for the word can mean quite different things in different contexts. The “slaves” of precolonial Africa were simply one group in a larger socio-economic order organized around what Miers and Kopytoff call “rights-in-persons.” Free persons were also subject to claims of right; slaves simply sat on the lowest rung of a social order in which most individuals were in some sense the property of a small stratum of masters. The domination over *all* persons was conceptualized through the language of ownership; the very fabric of society was woven out of the ownership of some humans by others. Younger members of lineages, for example, were understood to be property just as slaves were; the reality is that most persons in these societies were located on a “slavery to kinship continuum.”<sup>78</sup>

And in this orientation toward rights-in-persons, Miers and Kopytoff argue, African societies were not utterly different from

<sup>77</sup> James L. Watson, “Slavery as an Institution, Open and Closed Systems,” in Watson, ed., *Asian and African Systems of Slavery* (Berkeley, 1980), 1–15. For the application to Rome, Peter Temin, “The Labor Market of the Early Roman Empire,” *Journal of Interdisciplinary History* 34 (2004): 513–538.

<sup>78</sup> Miers and Kopytoff, *Slavery in Africa: Historical and Anthropological Perspectives* (Madison, WI, 1977), 23–24.



European ones, which after all also recognized such relations. They cite in particular a famous example from Roman law, to which we will return:

Rights-in-persons exist in almost all social relationships. Thus, children have the right to support and protection from their parents, who have the right to demand obedience from them; a husband in many Western societies could until recently expect domestic services from his wife in return for material support from him, and they had exclusive rights to each other's sexual activity, adultery on either side being grounds for divorce . . . Such rights-in-persons may cover not just a person's services but his entire person – thus, the father in ancient Rome could kill or sell his children . . . the position of the so-called “slave” can only be understood in the general cultural context of these rights.<sup>79</sup>

What differentiated Africa from Europe was not that the latter was a realm of perfect freedom, whereas the former was a realm of servitude. Both worlds were ones in which some persons dominated others; a Roman father (so Miers and Kopytoff believe<sup>80</sup>) could even “kill or sell his children.” What distinguished the two was rather that domination rested more on rights-in-things in Europe. In the European world, it was regularly the case that the rich ruled by virtue of being rich; in Africa, it was always the case that the status superiors ruled by virtue of being status superiors. These were simply two different styles of inequality. Sahlins gives a sharp formulation to the contrast: “[T]he two systems of property work differently,” he explains, “the one (chieftainship) a right to things realized through a hold on persons, the other (bourgeois) a hold on persons realized through a right to things.”<sup>81</sup> The contrast is not one between slavery and freedom, but one between exploitation by masters (ruling persons) and exploitation by lords (ruling lands).

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The various societies described by these anthropologists and historians are not all simple tribal chieftainships of the kind analyzed by Sahlins. But they *are* all societies whose social orders diverge sharply from what Schmitt imagined in *The Nomos of the Earth*. Schmitt declared that it was the division of the earth that gave rise to “the orders and

<sup>79</sup> Miers and Kopytoff, *Slavery in Africa*, 7.

<sup>80</sup> We shall see in the next chapter that it is not so simple.

<sup>81</sup> Sahlins, *Stone Age Economics*, 93.

orientations of human social life.” In these societies, the reverse holds, in one fashion or another: It is “the [political and hierarchical] orders and orientations of human social life” that govern the forms of land tenure. These are all societies in which the distribution of rights in land is obedient, in one way or another, to the dictates of human hierarchy.

The contrast can be pictured as a contrast in the way the law draws its map of the real property order. In the eyes of Schmitt and modern Westerners, the map of property in land is a plat, parceling out “the solid earth” into plots held by owners in fee simple. This plat identifies rights-holders who are relatively immune to “political control” within their own domains; and it is taken for granted that “[t]he whole world . . . [is] divided among private owners.”<sup>82</sup> In these numerous non-Western and nonmodern societies, by contrast, the working map of rights in land is not a plat, but a chart of the social hierarchy, tracing the threads of political control in the web of the “hold on persons.” The ultimate governing principle is not who owns which acreage, but who ranks where on the social scale of inferiors and superiors. To put it (cautiously) in the language of ethology, the ultimate governing principle has to do, not with individual territoriality, but with another pattern studied by ethologists: social dominance.<sup>83</sup>

The ethological concept of dominance certainly must be used cautiously. Human rank-ordering looks different from the rank-ordering found among other animals. The evolutionary anthropologist Bernard Chapais states the contrast this way: Dominance among other primates flows from physical intimidation. Among chimpanzees and others of our cousins, alpha males achieve their dominance, in the words of Richard Wrangham, through “physical and often bloody fights.”<sup>84</sup> By contrast, Chapais argues, human rank is a matter of

<sup>82</sup> Rose, “Comedy of the Commons,” 712.

<sup>83</sup> The distinction between dominance and territoriality poses some inevitable definitional challenges. For discussion, see Christine R. Maher and Dale F. Lott, “Definitions of Territoriality Used in the Study of Variation in Vertebrate Spacing Systems,” *Animal Behaviour* 6 (1995): 1581–1597; John H. Kaufmann, “On the Definitions and Functions of Dominance and Territoriality,” *Biological Review* 58 (1983): 1–20.

<sup>84</sup> Richard Wrangham, *The Goodness Paradox: The Strange Relationship between Virtue and Violence in Human Evolution* (New York, 2019), 159–160. Cf. Wrangham, “Evolution of Coalitionary Killing,” *American Journal of Physical Anthropology* 110 (1999): 1–30.

“prestige,” acquired through “competence” in activities “from hunting to shamanism.”<sup>85</sup> The “dominant” human is not necessarily the most physically powerful one, but the most skilled.

Now, the generalizability of Chapais’ analysis must not be overstated. This is partly because some ethologists deny that rank-ordering among other primates in fact involves pure physical intimidation. There are studies arguing that other dominant primates “generously” distribute food to subordinates just as human Big Men do.<sup>86</sup> But more importantly, for my purposes, it is because physical intimidation is so often clearly present in human societies. Chapais, like other evolutionary anthropologists, is concerned with the transition to hunter-gatherer societies, which are famously egalitarian.<sup>87</sup> More complex human societies look different, however, with patterns of dominance that unquestionably involve violent coercion, as the anthropologists Kent Flannery and Joyce Marcus emphasize.<sup>88</sup> The institution of slavery certainly rests on physical intimidation, and so do many other relationships in complex human societies that take of the form of what German law traditionally calls by the chilling phrase *besondere Gewaltverhältnisse*, substate “special relationships licensing violence.” Historical examples of such “special relationships licensing violence” are multitudinous. They can include, for instance, those between husbands and wives, parents and children, creditors and debtors, teachers and pupils. Indeed, the claim of ownership, as I suggested in the Introduction, frequently implies some sort of claim to the right to do violence. It is in the essential nature of ownership that it often grounds a *besonderes Gewaltverhältnis*.

Nevertheless, it is true, and important, that the rank-ordering of most of the cultures surveyed in this chapter is remote from a rank-ordering based purely on physical intimidation. Whether the issue is

<sup>85</sup> Chapais, “Competence and the Evolutionary Origins of Status and Power,” *Human Nature* 26 (2015): 162 [161–183].

<sup>86</sup> E.g., Jörg Massen, Lisette van den Berg, Berry Spruit, and Elizabeth Sterk, “Generous Leaders and Selfish Underdogs: Prosociality in Despotic Macaques,” *PLoS One* 5 (2010): e9734.

<sup>87</sup> Though even that egalitarianism, as Christopher Boehm famously argues, operates against the background of a threat of violence against upstarts. See Boehm, *Hierarchy in the Forest*.

<sup>88</sup> Flannery and Marcus, *The Creation of Inequality: How Our Prehistoric Ancestors Set the Stage for Monarchy, Slavery and Empire* (Cambridge, MA, 2012).

the distribution of meat in the hunt or the distribution of use rights in land, these are cultures of the maximization of status, and this maximization of status is indeed arguably distinct from dominance among other animals. Ethologists disagree over the proper definition of dominance, but the definitions ordinarily involve “priority of access to resources.”<sup>89</sup> The dominant individual, among other animals, is not only the most physically intimidating one, but the one that gets more. The human pattern on display in these various cultures is distinctive, if not unparalleled, for the simple reason that it is not necessarily the case that the dominant individual gets more.

Nevertheless, if human dominance hierarchy is not synonymous with dominance hierarchy in other animals, I believe it is right to insist that these nonmodern, non-Western patterns of property relations are shaped not just by territoriality, but by human forms of dominance as well. The societies described by these anthropologists and historians are not ruled by the happy egalitarian harmony of primitive communism. They are societies that revolve around “group *standing*,” in Chanock’s words, and the “concern” of individuals with “maintaining their position.” They are societies in which, in the classic language of legal realism, there is no “ownership” understood as a direct and unmediated relationship between persons and things. Instead, as anthropologists since Malinowski and Hoebel have emphasized, rights in things are a function of the relationships among persons.<sup>90</sup> But it must be underlined that there is nothing inherently egalitarian about the relationships among the persons in question. There is no justification for romanticizing some supposed non-Western pattern of communal sharing, or imagining that defining ownership as a relationship between persons is a formula for establishing unmarred human harmony. Property relations are inextricably tied up with patterns of human power. Human societies may well sometimes count as egalitarian in some ways;<sup>91</sup> but *property*

<sup>89</sup> E.g., Carlos Drews, “The Concept and Definition of Dominance in Animal Behaviour,” *Behaviour* 125 (1993): 288 [283–313].

<sup>90</sup> Arthur L. Corbin, “Legal Analysis and Terminology,” *Yale Law Journal* 29 (1919): 165 [163–173]; and the discussion in E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge, MA, 1967) (orig. 1954), 47; cf. Pospisil, *Anthropology of Law*, 296: “As has been pointed out so often in anthropological literature, the term ownership in itself is unsatisfactory and misleading.”

<sup>91</sup> For an immensely subtle and stimulating discussion, Boehm, *Hierarchy in the Forest*.

is an inherently inequalitarian institution. Conceptions of property differ, and differ starkly, as this book aims to show; but there is no conception of property that does not result in placing some humans higher on the scale of rank or wealth than others.

\* \* \*

In the remaining pages of this book, I will try to show that the work of the anthropologists and ethologists is of indispensable value for understanding the ancient Roman property law that lies at the headwaters of the Western tradition, and the later history of Western property law as well. Before passing to that larger history, though, I would like to stress one last point: The contrast between the two patterns of ownership culture that are my subject in this chapter are not well explained through conventional economic analysis.

There are two bodies of economic literature that purport to explain these divergent patterns of social organization. One line of argument sets out to explain why the law protects private property in land, and more broadly in “farmlands, pastures, hunting or fishing territories.” The second sets out to explain why the law, in some societies, protects private property in humans. Neither provides an explanation that is fully adequate.

Let me begin with the work of economists who set out to explain why the law protects private property in land and other forms of territory. On that question there is a familiar, and immense, literature, which begins with two seminal articles of the 1960s, Harold Demsetz’s “Toward a Theory of Property Rights,” and Garrett Hardin’s “Tragedy of the Commons.”<sup>92</sup>

Like many others writing in later decades of the Cold War, the makers of this “tragedy of the commons” literature were concerned with explaining the ineluctability of the failure of communism; and to that end, they focused on resource management. As a theoretical matter, Demsetz and Hardin argued, communal ownership could never result in the sustainable exploitation of territorial resources, once those resources reached a certain threshold value. This is because individual exploiters would have incentives to overexploit.

<sup>92</sup> Demsetz, “Toward a Theory of Property Rights,” *American Economic Review* 57 (1967): 347–359; Hardin, “The Tragedy of the Commons,” *Science* (N.S.) 162 (1968): 1243–1248.

Only private property holders would properly internalize the externalities of resource exploitation, and accordingly only a system founded in exclusive private property rights could succeed in sustaining a pool of valuable resources. Demsetz illustrated this theory with an example taken from the anthropologist Eleanor Leacock's study of the fur trade in early eighteenth-century Canada. As beaver pelts became more valuable with the appearance of French traders, a system emerged among the indigenous Montagnais of the Labrador Peninsula, under which families were allotted rights in particular hunting territories.<sup>93</sup> It was only the establishment of such rights, Demsetz argued, that permitted owners to manage the population of beavers, avoiding overhunting. Private property, he concluded, evolved in response to the challenges of sustainable resource management.

The subsequent theoretical literature has developed more complex accounts of the sustainable management of communal resources, but without departing from the basic premises of Demsetz. The Nobel-Prize-winning economist Elinor Ostrom blazed the trail in 1990: Through close studies of what she called "common-pool resources" in various parts of the world, Ostrom showed that while unregulated forms of collective ownership might be doomed to fail, under the right conditions certain kinds of commons could survive indefinitely. The success stories, which included mountain communities in Switzerland and Japan, displayed "the side-by-side existence of private property and communal property in settings in which the individuals involved have exercised considerable control over institutional arrangements and property rights."<sup>94</sup> Numerous studies since have followed Ostrom's lead, dissecting the rules of the internal governance that permit, or even require, some degree of the collective ownership or management of common pools.

This "tragedy of the commons" problem, which plays a starring role in contemporary scholarship on property law, is often said to demonstrate the necessity of Blackstonian private property rights: Only exclusive ownership, law students are taught, can succeed in

<sup>93</sup> Leacock, "The Montagnais 'Hunting Territory' and the Fur Trade," *American Anthropologist* 56, no. 5, pt. 2, memoir no. 78 (October 1954).

<sup>94</sup> Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, 1990), 61.

maintaining sustainable resource exploitation. Without it, society would perish.

Yet the anthropology surveyed in this chapter suggests otherwise. Private property in the Blackstonian sense is not in fact the only possible solution to the tragedy of the commons. The problem can be solved just as well by a system of use rights. Use rights are rights in resources, not rights in land as such; and as long as the social hierarchy that exercises “political control” is in good order, a system of use rights in resources fully suffices to avoid the dangers of the tragedy of the commons. The innumerable use-rights systems described by anthropologists and historians are, indeed, nothing other than well-ordered systems of rights in resources without exclusive Blackstonian ownership.

Such is the lesson, indeed, of the very study on which Demsetz built his original case for the tragedy of the commons hypothesis, Leacock’s work on Montagnais hunting rights in the early eighteenth century. Leacock’s argument had, in fact, nothing to do with Blackstonian ownership. She wrote about the “seasonal allotment” of rights in the resources of beaver furs, which gradually became “relatively stabilized.”<sup>95</sup> Indeed, she made a point of noting that “land [in the Montagnais system] has no value as ‘real estate’ apart from its products. What is involved is more properly a form of usufruct than ‘true’ ownership.”<sup>96</sup> The rights in question, she moreover emphasized, were rights only to the *furs* of beavers; the animals themselves remained available to be eaten by others in case of need. Her rights in resources were thus very limited indeed.<sup>97</sup> This bears no resemblance to a system of Blackstonian exclusive rights in an “owned” territory from which intruders are barred. What Leacock’s work suggests instead is exactly what the work of other anthropologists suggests. Nothing in the tragedy of the commons dynamic can explain why Blackstonian ownership should ever arise. If the issue is sustainable resource management, “political control” can comfortably do the job.<sup>98</sup>

Scholars who work in the tragedy of the commons vein do know about use rights. Property theory is conducted by legal and economic

<sup>95</sup> Leacock, “Montagnais ‘Hunting Territory,’” 15.

<sup>96</sup> *Ibid.*, 1–2 and generally on these opening pages. <sup>97</sup> *Ibid.*, 2, 15.

<sup>98</sup> I am grateful to Charlie Donahue for emphasizing this point to me.

scholars who are often admirably well read, and property theorists are well aware that property rights in territories, in early stages of development, commonly take that form. “[I]ndividual tenure,” as Smith, the theorist of “governance strategies,” observes, “probably started out as a system of usufruct.”<sup>99</sup> Robert Ellickson, in his influential article “Property in Land,” gives particular attention to the dynamics of a primitive order in which “pre-literate groups” manage land through the assignment of usufructs. A system of usufruct, he argues, arises naturally in the course of the evolution of cooperation:

Imagine that several dozen unallied family units live in a fertile valley . . . [T]he valley residents discern that it is mutually advantageous for all of them to honor a primary norm that entitles each family to keep the crops it has grown, and also a secondary norm that obligates all valley families to punish internal deviants and external marauders who fail to respect private property in crops. Out of this primordial soup emerges the private usufruct on intensively used land.<sup>100</sup>

But why usufruct rather than Blackstonian exclusive ownership? Ellickson invests considerable ingenuity into explaining the prevalence of usufruct in preliterate societies, despite what he presumes to be its relative inadequacy as an institution for the management of resources. His explanation puts the accent on technology. Preliterate societies, Ellickson argues, lack both the technological capacity to engage in permanent improvement of land and the technological capacity to record title. Moreover, land in places such as his “fertile valley” are likely to be so plentiful that permanent improvements are not imperative for efficient management of land resources. But those are conditions that pertain only in preliterate societies. As practices of land improvement and recording techniques develop, usufruct inevitably gives way to ownership of the familiar modern Blackstonian kind.<sup>101</sup>

Yet there is nothing in the logic of resource management that requires us to suppose that Blackstonian ownership would inevitably arise out of the “primordial soup” of social evolution. Why would property theorists think otherwise? The answer is that they have not

<sup>99</sup> Smith, “Exclusion versus Governance,” 458–459.

<sup>100</sup> Ellickson, “Property in Land,” *Yale Law Journal* 102 (1993): 1366 [1315–1400].

<sup>101</sup> *Ibid.*, 1367.



recognized the extent to which a system of use rights can be managed through norms of social hierarchy, providing the foundation for a fully functional “governance strategy.” The makers of this literature have familiarized themselves with anthropology – up to a point. But only up to a point. They find nothing to say about the operation of rank-ordering that features so prominently in the literature of so much of social science, and that has been my theme throughout this chapter.<sup>102</sup> The “political control” whose presence has been detected in so much of the human world by anthropologists and historians simply does not figure in their work. When these property theorists imagine the evolution of property rights, they speak in terms of coequal actors (or, as the case may be, coequal households) engaging in bargaining, or evolving unconscious patterns of mutual accommodation.

Yet it is the logic of social dominance that structures a system of use rights.

This lack of interest in, if not blindness to, the prevalence of hierarchical ordering in human societies follows from two methodological prejudices in the tragedy of the commons literature, both of which must be studiously laid aside if we are to understand the long-term development of the Western property tradition. The first is a prejudice in favor of methodological individualism, which can make it difficult to reckon with the operation of hierarchical authority in human societies.<sup>103</sup> The attachment to methodological individualism runs deep in the literature, which has framed its analyses for decades around the problems of “individuals [who] have a common or collective interest”<sup>104</sup> – the problems, in the words of Ostrom, of how “individuals ... have exercised ... control over institutional arrangements and property rights.”<sup>105</sup> Property theorists of course

<sup>102</sup> While Ellickson does acknowledge the contrast between “hierarchy and democracy,” *ibid.* 1348–1349, he does not explore the social scientific literature on the social foundations of hierarchy.

<sup>103</sup> Even in Ellickson’s case, methodological householdism, which, it seems fair to say, is the same thing writ slightly larger. Of course, a careful use of the methodological individualism of the kind advocated by Max Weber is fully able to account for the sort of hierarchical ordering that this chapter investigates. What I question is an approach that abstracts entirely from the social position of individuals and so carries the dangers found in this literature.

<sup>104</sup> Mancur Olson, *The Logic of Collective Action* (Cambridge, MA, 1965), 7.

<sup>105</sup> Ostrom, *Governing the Commons*, 61.

understand that their subject is ultimately the functioning of groups: Rights in a commons must be the products of a process of “group consensus,”<sup>106</sup> or decisions by the “group . . . acting as a corporate body.”<sup>107</sup> Nevertheless, their understanding of how groups operate assumes a process of coequal bargaining, or at least a process of autonomous individual responses to pressures leading to “the evolution of cooperation.”

But to suppose that the internal workings of “the group” are the product of bargaining among socially undifferentiated actors is to engage in heroic understatement of the element of human domination at work in so many of the orders that anthropologists and historians study. To say that is not to say that societies are all governed by dominance relations of the kind described by Sahlins and so many other scholars. Ostrom may well have succeeded in identifying examples of relatively egalitarian orders in regions like the Swiss Alpine highlands. But if we imagine that *all* property orders are the products of egalitarian bargaining or accommodation, we blind ourselves to vast stretches of the human experience, and to key evidence for the nature of human property psychology and ownership culture.

As for the second methodological prejudice: This is the assumption that property rights evolve purely as a response to the demands of sustainable resource management. This core methodological assumption lies at the foundation of Demsetz’s seminal article on the evolution of property rights. The subsequent literature has advanced greatly in subtlety; but Demsetz’s basic assumption has never been abandoned.

And of course it is true that rules of property must conduce to the sustainable management of resources. If they did not, human society would indeed not survive. Nevertheless, the work of anthropologists and historians suggests powerfully that there is much more to cultures of ownership than that. The human world is not composed of small, coequal groups, discovering ways to coexist without exhausting their shared resources. It is made up of human animals who are attached to the maximization of rank and power; and the dynamics of property

<sup>106</sup> Thomas Merrill, “The Property Strategy,” *University of Pennsylvania Law Review* 160 (2012): 2061 [2061–2095].

<sup>107</sup> Ellickson, “Property in Land,” 1368.

law inescapably reflect that fact. This is as true of the ideal-typical “bourgeois” order described by Sahlins as it is of his ideal-typical tribal chieftainship. Property rules do not just secure the efficient management of resources. They secure the accumulation of “wealth, power and prestige” as well; and the “tragedy of the commons” line of analysis leaves us far too few ways of talking about that.

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The Demsetz/Hardin line of literature is by far the best-known body of work on the economics of the evolution of property law. But there is another economic line of argument that deserves attention as well. This is a literature that sets out to explain why some societies display the ownership of humans.

That effort was made, in particular, by the economist Evsey Domar, who asked in 1970 why some societies depend on “the ownership of peasants and not of land.”<sup>108</sup> The answer, Domar concluded, lies in whether land or labor is the scarcer factor of production. Where land is abundant but people are few it is the ownership of humans that can “yield an income.”<sup>109</sup> The same economic analysis was proposed a year later, independently, by Goody, as we have seen: Africa differed from Europe, Goody argued, because in Africa “the population is small [but] land is plentiful.”<sup>110</sup> On this account, the explanation for the contrast between the ownership of people and the ownership of land lies in the most familiar and basic of market forces: It is always the scarcer resources that are the most highly valued, and that are therefore protected by the law as “property.” Where land is inexhaustibly abundant, it will no more be the subject of ownership than air.

There is some real power in this argument. It is true enough that if productive land were in infinite supply, and there were no transaction costs to taking possession of it, there would be no economic pressure to make it the object of property rights. But here again, economic analysis

<sup>108</sup> Domar, “The Causes of Slavery or Serfdom: A Hypothesis,” *Journal of Economic History* 30 (1970): 19 [18–32]. For a recent elaboration, see Nils-Petter Lagerlöf, “Slavery and Other Property Rights,” *Review of Economic Studies* 76 (2009): 319–342.

<sup>109</sup> Domar, “Causes of Slavery or Serfdom,” 19.

<sup>110</sup> Goody, *Technology, Tradition and the State*, 25. For a reserved but respectful treatment, see Watson, “Slavery as an Institution,” 11–13.

cannot yield a fully satisfactory answer to the question of why some cultures are oriented toward “the control over people” where others are oriented toward “the ownership of land.” This is partly because many historical cases are not well explained by the Domar/Goody hypothesis. We shall see, for instance, that the use of slave labor expanded dramatically in Republican Rome. Though Domar and Goody may have some insight to offer on the Roman case, it would be strained to argue that large-scale slavery took hold in Roman Italy because “the population [grew] small but the land [grew] plentiful.”

But the deeper reason for doubt lies elsewhere. The chieftainship over people is a principle of social organization that includes many features that have little to do with wealth maximization. As critics of Domar point out, slaves have often been kept, not because they “yield an income,” but as luxury goods that “consumed more than they produced”<sup>111</sup> – as a means of displaying rank, not a means of procuring wealth.<sup>112</sup> Slaves, as Orlando Patterson writes, are “likely to be nonproductive, and are held . . . mainly for prestige or political purposes.”<sup>113</sup> The same observation was made by the economic historian Karl Bücher, a man upon whose work I will draw quite a bit in the chapters that follow. Bücher emphasized, at the turn of the last century, how much the Romans invested, not just in return on their slave capital, but in the expensive prestige display of slaveownership:

When the master shows himself in public, a great crowd of slaves walks in front of him (*anteambulones*), another follows him (*pedisequi*); the *nomenclator* gives him the names of those he encounters who wish to be greeted; his *distributores* and *tesserarii* hand out bribes to the populace and give them his electioneering slogans.<sup>114</sup>

Max Weber, on whom the influence of Bücher ran deep, portrayed the society of Rome in much the same way: “The posh high-class houses of the Roman aristocracy [*die vornehmen Häuser des Römeradels*]

<sup>111</sup> Watson, “Slavery as an Institution,” 14.

<sup>112</sup> Cf. Keith Hopkins, *Sociological Studies in Roman History*, ed. Christopher Kelly (Cambridge, 2018), 347: “Slavery ceased to be a major method of procuring wealth, while it long survived as a method of displaying it.”

<sup>113</sup> Patterson, *Slavery and Social Death*, 24.

<sup>114</sup> Bücher, *Die Entstehung der Volkswirtschaft* (Tübingen, 1893), 27.

consumed slaves in massive quantities.”<sup>115</sup> Neville Morley, in a similar vein, writes vividly of “the ingenuity displayed by the Roman elite in the use of slaves to impress visitors and enhance their own public presence, such as Livia’s ‘pet child’ (*delicium*) and the dwarfs and other curiosities that . . . fascinated Romans in the slavemarket.”<sup>116</sup> Slaves were indeed often objects of display – of “conspicuous consumption,” in the famous phrase of Thorstein Veblen<sup>117</sup> – and nothing in the Domar/Goody hypothesis can make sense of that.<sup>118</sup>

It is critical to underline a further point as well: The ownership of humans involves more than just slavery. Many classes of persons have been deemed property in various societies. Women are frequently regarded as “owned” by their menfolk; and as Miers and Kopytoff point out, younger members of lineages in the precolonial African societies that interested Goody were understood to be “owned” just as slaves were. The same is true of the law of ancient Rome, which, like precolonial Africa, assumed a “slavery to kinship continuum.” The “ownership” of humans in such settings is not just a mode of economic exploitation. It is mode of expression in a system of social hierarchy in which the language of ownership is a language of rank.

Not least, the contrast between control over people and control over land is not restricted to the internal organization of households. It also makes itself felt in the forms of the state. The anthropologist Alain Testart makes the point that is made by many other social scientists as well: Premodern states, he observes, typically lacked a clearly defined “territorial base.” They were organized instead as rulerships over peoples; their political power was “primarily power over humans and not over things.”<sup>119</sup> Economics alone cannot explain why we see

<sup>115</sup> Weber, *Wirtschaft und Gesellschaft*, ed. Johannes Winckelmann, 5th ed. (Tübingen, 1985), 798.

<sup>116</sup> Morley, “Slavery under the Principate,” in John Bodel and Paul Cartledge, eds., *The Cambridge World History of Slavery, Vol. 1: The Ancient Mediterranean World* (Cambridge, 2011), 278 [265–286]. Joachim Marquardt huffily wrote that such displays cast “[a]n unpleasant light on the perversity of these times.” Marquardt, *Privateleben der Römer* (Leipzig, 1879), 1:149.

<sup>117</sup> Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* (New York, 1902), 68–101.

<sup>118</sup> For discussion and further literature, see also Stanley Engerman, “Some Considerations Relating to Property Rights in Man,” *Journal of Economic History* 33 (1973): 46 [43–65].

<sup>119</sup> Testart, *Éléments de Classification des Sociétés* (Paris, 2005), 82.

this structural consonance between state and society, between rulership and ownership, yin and yang. There may be some measure of truth in the Domar/Goody hypothesis; but in the end it explains much too little.

Certainly, it leaves us too few ways of understanding the ancient Roman foundations of Western property law, to which I now turn.