

# Savagery, Civilization, and Property: Theories of Societal Evolution and Commons Theory

David B. Schorr\*

*This article argues that modern commons theory has been substantially shaped by early modern ways of thinking about the evolution of civilizations. In particular, it has hewed closely to models that gelled in the Enlightenment-era works known as “stadial theory,” by authors such as Lord Kames and Adam Smith, and passed down to the twentieth century, to theorists including Garrett Hardin, Harold Demsetz, and Elinor Ostrom. It argues that stadial thinking reached modern commons theorists largely through the disciplines of anthropology and human ecology, paying particular attention to the debate among anthropologists over aboriginal property rights, colonial and international development discourse, and neo-Malthusian conservationism. The effects of stadial theories’ influence include a belief among many that private property represents a more advanced stage of civilization than does the commons; and among others a Romantic yearning to return to an Eden of primitive and community-based commons. Thus do deep cultural attitudes, rooted in the speculative thinking of an earlier age, color today’s theories — positive and normative — of the commons.*

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\* Senior Lecturer, Buchmann Faculty of Law, Tel Aviv University. Thanks to Sharon Kingsland, Fabien Locher, Lucy McCann, Michel Morin, Carol Rose, and Natty Wolloch for their helpful suggestions, and to Elizabeth Cox and Aviya Basha for research assistance.

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## INTRODUCTION

This article makes a simple claim: that the commons theory of the last half century, in its various forms and schools, has been substantially shaped by early modern ways of thinking about the evolution of civilizations. In particular, it has hewed closely to models that gelled in the Enlightenment-era works known as “stadial theory,” passed down to the twentieth century through the disciplines of anthropology and human ecology, and strongly entrenched in the patterns of thought of property theorists to this day.

I do not wish to argue that recent thinkers deliberately or consciously based their theories on early modern precedents, nor do I claim that their theories simply recast old theories, pouring old wine into new bottles. What I wish to argue, rather, is that modern commons theory is a series of variations on a theme, the theme being the passage of human societies from stages of “barbarism” or “savagery” to “civilization.” This way of thinking, largely elaborated in the eighteenth century, has proved to be so powerful that it continues to shape the discourse around common property and environmental commons into the twenty-first. As Nathaniel Wolloch has argued with respect to similarities between stadial theory and Norbert Elias’s civilizing-process theory, “the similarities between these two perspectives are much clearer than their differences, and point to a continuing tradition in modern historiographical interpretations of the rise of civilization.”<sup>1</sup> For Elias’s theory substitute property theory, and for historiographical interpretations of the rise of civilization substitute theoretical interpretations of the rise of private property, and you have my argument.

The significance of this claim lies not only in its implication that modern commons theory has been somewhat confined by the straits of a discourse of which it is not even always aware. It lies also in that commons theory’s portrayals of transitions between property regimes largely partake either of Enlightenment assumptions of civilizational progress or of a Romantic reaction to this attitude, with its valorization of the primitive. Thus do deep cultural attitudes, rooted in the speculative thinking of an earlier age, color today’s theories — positive and normative — of the commons.

To set the stage, consider the concrete examples or allegories used by commons theorists of the last half century, discussed in Part I. Nearly without exception, they have skipped over such familiar but prosaic commons as cooperatives, condominiums, corporations, and neighborhood associations, in favor of studies of the exotic worlds of hunters, herdsman, and smallholding

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1 Nathaniel Wolloch, *The Civilizing Process, Nature, and Stadial Theory*, 44 *EIGHTEENTH-CENTURY STUD.* 245 (2011).

farmers. The reason, I suggest, is the continuing influence of early modern theories of civilization.

After describing (in Part I) these earlier ways of thinking I will note (in Part II) the striking similarities of recent theories of the commons to the earlier models, and then (in Part III) try to trace the channels of influence. I will conclude with why I think this matters.

## I. CIVILIZATION AND ITS DISCONTENTS

The second half of the eighteenth century saw the development, primarily in Scotland (though with significant French and other precedents),<sup>2</sup> of what would come to be known as “stadial theory” or “four-stages theory.” This group of theories built on an age-old interest in the origins of society and its institutions, sharpened by contact with New World societies that reminded Europeans of societies described in classical Greco-Roman and biblical sources, and raised the issue of what separated “savage” or “barbaric” peoples from “civilized” ones. Stadial thinking offered a theory of progress:

In its most specific form, the theory was that society ‘naturally’ or ‘normally’ progressed over time through four more or less distinct and consecutive stages, each corresponding to a different mode of subsistence, these stages being defined as hunting, pasturage, agriculture, and commerce. To each of these modes of subsistence, it came to be argued, there corresponded different sets of ideas and institutions relating to law, property, and government...<sup>3</sup>

From the beginning, property law had a central place in this type of theory — it was, it seems, the motivating factor behind the theory<sup>4</sup> — and the discussion of property displayed striking similarities to aspects of modern commons theory (to be discussed in Part III below). John Dalrymple’s three-stage theory, the first published version of stadial theory (1757), connected the progress of society with increasing specification of property rights. Moreover, it

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2 See RONALD L. MEEK, *SOCIAL SCIENCE AND THE IGNOBLE SAVAGE* 5–98 (1976); PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* 1–22 (1980) [hereinafter STEIN, *LEGAL EVOLUTION*]; PETER STEIN, *The Four Stage Theory of the Development of Societies*, in *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 395 (1988) [hereinafter STEIN, *Four Stage Theory*].

3 MEEK, *supra* note 2, at 6.

4 See ANDREAS RAHMATIAN, *LORD KAMES: LEGAL AND SOCIAL THEORIST* 144 (2015); STEIN, *Four Stage Theory*, *supra* note 2, at 397, 401.

attributed the transition between stages to what we might today call increasing pressure on resources:

The first state of society is that of hunters and fishers; among such a people the idea of property will be confined to a few, and but a very few moveables; and subjects which are immoveable, will be esteemed to be common. In accounts given of many American tribes we read, that one or two of the tribe will wander five or six hundred miles from his usual place of abode, plucking the fruit, destroying the game, and catching the fish throughout the fields and rivers adjoining to all the tribes which he passes, without any idea of such a property in the members of them, as makes him guilty of infringing the rights of others.

The next state of society begins, when the inconveniencies and dangers of such a life, lead men to the discovery of pasturage. During this period, as soon as a flock have brouzed [sic] upon one spot of ground, their proprietors will remove them to another; and the place they have quitted will fall to the next who pleases to take possession of it: for this reason such shepherds will have no notion of property in immoveables, nor of right of possession longer than the act of possession lasts. The words of Abraham to Lot are: "Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then will I go to the right; or if thou depart to the right hand, then will I go to the left." And we are told that the reason of this separation, was, the quantity of flocks, and herds, and tents, which each of them had, and which the land was unable to support; and therefore lord [sic] Stairs ingeniously observes, that the parts of the earth which the patriarchs enjoyed, are termed in the scripture, no more than the *possessions*.

A third state of society is produced, when men become so numerous, that the flesh and milk of their cattle is insufficient for their subsistence, and when their more extended intercourse with each other, has made them strike out new arts of life, and particularly the art of agriculture. This art leading men to bestow thought and labour upon land, increases their connection with a single portion of it; this connection long continued, produces an affection; and this affection long continued, together with the other, produces the notion of property.<sup>5</sup>

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5 JOHN DALRYMPLE, AN ESSAY TOWARDS A GENERAL HISTORY OF PROPERTY IN GREAT BRITAIN 86–88 (London, A. Millar 1757). See discussion in STEIN, LEGAL EVOLUTION, *supra* note 2, at 23–25; MEEK, *supra* note 2, at 99–102.

The jurist Henry Home, Lord Kames, also connected the stages of society to property law in his *Historical Law Tracts*:

In the two first stages of the social life, while men were hunters or shepherds, there scarce could be any notion of land-property. Men being strangers to agriculture, and also to the art of building, if it was not of huts, which could be raised or demolished in a moment, had no fixed habitations, but wandered about in hordes or clans, in order to find pasture for their cattle. In this vagrant life men had scarce any connection with land more than with air or water. A field of grass might be considered as belonging to a horde or clan, while they were in possession; and so might the air in which they breathed, and the water of which they drunk: but the moment they removed to another quarter, there no longer subsisted any connection betwixt them and the field that was deserted. It lay open to new-comers, who had the same right as if it had not been formerly occupied. Hence I conclude, that while men led the life of shepherds, there was no relation formed betwixt them and land, in any manner so distinct as to obtain the name of Property.

Agriculture, which makes the third stage of the social life, produced the relation of land-property. A man who has bestowed labour in preparing a field for the plough, and who has improved this field by artful culture, forms in his mind a very intimate connection with it.<sup>6</sup>

Elsewhere Kames connected the advance between stages with the pressure of growing populations on resources:

Plenty of food procured by hunting and fishing, promotes population: but as consumption of food increases with population, wild animals, sorely persecuted, become not only more rare, but more shy. Men, thus pinched for food, are excited to try other means for supplying their wants. A fawn, a kid, or a lamb, taken alive and tamed for amusement, suggested probably flocks and herds, and introduced the shepherd-state. . . . The shepherd-state is friendly to population. Men by plenty of food multiply apace. . . . Necessity, the mother of invention, suggested agriculture. When corn growing spontaneously was rendered scarce by consumption, it was an obvious thought to propagate it by art. . .<sup>7</sup>

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6 HENRY HOME, LORD KAMES, *HISTORICAL LAW TRACTS* 144–46 (Edinburgh, A. Kincaid & J. Bell, 1758) (footnotes omitted and spelling modernized). See MEEK, *supra* note 2, at 102–07; STEIN, *LEGAL EVOLUTION*, *supra* note 2, at 27–28.

7 1 HENRY HOME, LORD KAMES, *SKETCHES OF THE HISTORY OF MAN* 55–56 (James A. Harris ed., Liberty Fund 2007) (1788). See also *id.* at 59; 2 *id.* at 561–62

Adam Smith's *Wealth of Nations* made frequent use of the stages of society — hunters, shepherd nations, and so forth.<sup>8</sup> But it was in his *Lectures on Jurisprudence* that his full exposition of the four-stage theory, again with increasingly developed property law as society progresses, was recorded. In his telling, increased regulation of property becomes necessary as competition over resources increases:

There are four distinct states which mankind pass thro: — 1st, the Age of Hunters; 2dly, the Age of Shepherds; 3dly, the Age of Agriculture; and 4thly, the Age of Commerce.<sup>9</sup>

It is easy to see that in these severall ages of society, the laws and regulations with regard to property must be very different . . . . [I]n North America . . . where the age of hunters subsists, . . . [f]ew laws or regulations will requisite in such an age of society, and these will not extend to any great length . . . . But when flocks and herds come to be reared property then becomes of a very considerable extent; there are many opportunities of injuring one another and such injuries are extremely pernicious to the sufferer. In this state many more laws and regulations must take place . . . . In the age of agriculture . . . there are many ways added in which property may be interrupted as the subjects of it are considerably extended. The laws therefore . . . will be of a far greater number than amongst a nation of shepherds. In the age of commerce, as the subjects of property are greatly increased the laws must be proportionally multiplied. The more improved any society is and the greater length the severall means of supporting the inhabitants are carried, the greater will be the number of their laws and regulations necessary to maintain justice, and prevent infringements of the right of property.<sup>10</sup>

Similarly, the French writer Claude Adrien Helvétius emphasized the connection between pressure on resources and increasing privatization as society evolves through the classic stages of development:

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(asserting that North American tribes remain hunters due to lack of population pressure).

- 8 See Duncan Forbes, 'Scientific' Whiggism: Adam Smith and John Millar, 7 CAMBRIDGE. J. 643, 647 (1954) cited in E. G. West, *Adam Smith's Two Views on the Division of Labour*, 31 *ECONOMICA* 23, 27 (1964).
- 9 ADAM SMITH, *LECTURES ON JURISPRUDENCE* 27 (R.L. Meek, D.D. Raphael & P.G. Stein eds., 1982) (1762–1763).
- 10 *Id.* at 32–35. See MEEK, *supra* note 2, at 116–20; STEIN, *LEGAL EVOLUTION*, *supra* note 2, at 110; STEIN, *Four Stage Theory*, *supra* note 2, at 406.

When the lakes and the forests are exhausted of fish and game, [man] must seek new means of procuring subsistence. . . .

When the inhabitants are not yet very numerous, they breed cattle, and become pastors; but when they are greatly multiplied, and are obliged to find subsistence within a small compass, they must then cultivate the land, and become agriculturalists. . . .

What follows from the necessity of cultivation?

The necessity of property.<sup>11</sup>

This survey of late-Enlightenment stadial thought would not be complete without William Blackstone, whose influence on modern property theory might be described as legendary.<sup>12</sup> Blackstone's account of the development of private property follows the stadial model developed by his contemporaries from north of the border:

[W]hile the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required. . . .

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very *substance* of the thing to be used. . . .

Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature, and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner. . . .

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants: and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing

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11 2 HELVÉTIUS, *A TREATISE ON MAN; HIS INTELLECTUAL FACULTIES AND HIS EDUCATION* 424–25 (W. Hooper trans., London, Vernor, Hood & Sharpe 1810) (1773). See also *id.* at 20, 493; MEEK, *supra* note 2, at 133–34.

12 See David B. Schorr, *How Blackstone Became a Blackstonian*, 10 *THEORETICAL INQUIRIES L.* 103 (2009).

a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been received and adopted. . . .

Necessity beget property. . .<sup>13</sup>

It bears noting that while these stadial theories were presented as positive theories of societal development, in their historical context they typically made an implicit, normative claim — that property institutions could, and should, progress to increasingly private property.<sup>14</sup>

It also bears noting that opponents of such “progress,” while opposing the normative tint of the stadial story, stayed firmly within its descriptive framework.<sup>15</sup> Writers from the Roman Lucretius to the Romantics of the nineteenth century considered humankind to have evolved through the same stages as the Scottish thinkers discussed above, but valorized early stages, with their common property arrangements, holding up the “noble savage” as an ideal.<sup>16</sup> As Smith’s contemporary, Jean-Jacques Rousseau, wrote:

So long as men remained content with their rustic huts, so long as they were satisfied with clothes made of the skins of animals and sewn together with thorns and fish-bones . . . they lived free, healthy, honest and happy lives . . . . But . . . from the moment it appeared advantageous to any one man to have enough provisions for two, equality disappeared, property was introduced, work became indispensable, and vast forests became smiling fields, which man had to water with the sweat of his brow, and where slavery and misery were soon seen to germinate and grow up with the crops.<sup>17</sup>

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13 WILLIAM BLACKSTONE, 2 COMMENTARIES \*3–\*8. See MEEK, *supra* note 2, at 177–79.

14 RAHMATIAN, *supra* note 4, at 144. See also Nathaniel Wolloch, *The Idea of Historical Progress in the Transition from Enlightenment Historiography to Classical Political Economy*, 9 ADAM SMITH REV. 75, 76 (2016).

15 See Fritz L. Kramer, *Eduard Hahn and the End of the “Three Stages of Man,”* 57 GEOGRAPHICAL REV. 73, 75 (1967).

16 JEAN-JACQUES ROUSSEAU, *Discourse: The Second Part*, in THE SOCIAL CONTRACT AND DISCOURSES 207 (G.D.H. Cole trans., 1923) (1754); George Boas, *Primitivism*, in 3 DICTIONARY OF THE HISTORY OF IDEAS 557 (Philip P. Wiener ed., 1973); THOMAS HYLLAND ERIKSEN & FINN SIVERT NIELSEN, A HISTORY OF ANTHROPOLOGY 12–14 (2d ed. 2013); Kramer, *supra* note 15, at 75, 78.

17 ROUSSEAU, *supra* note 16, at 214–15.



## II. THE COMMONS THEORISTS

Now let us examine some of the classics of modern commons theory, noting the fondness of theorists for stories reminiscent of various aspects of stadial theory. I wish to highlight here not simply that commons theorists of many stripes tend to connect pressure on resources to property regimes, as unanimity on this point could plausibly be explained by observations of a pervasive phenomenon. It is rather the connection of these two parameters — pressure and property — with the early modern idea of civilizational stages characterized by hunting, pastoralism, agriculture, and sometimes commerce, that is striking. Whether seeing these stages in terms of the march of Progress or a fall from Edenic bliss, nearly all commons theorists seem to be attracted to the basic narrative of stadial theory.

Garret Hardin's *Tragedy of the Commons* illustrated its argument against common property with a parable of a common pasture.<sup>18</sup> While neither Hardin nor William Forster Lloyd, from whom he borrowed the story, argued that society does or should progress along stages of development, their descriptions of the common pasture echoed some elements of stadial theory: shepherds have no "property" in their pastures, a characterization consistent with stadial thinking (and clearly disproved by historical work on actual common pastures).<sup>19</sup> Such pastures are subject to overgrazing, as in the story of Abraham and Lot adduced by Dalrymple.<sup>20</sup> Moreover, Hardin's article echoed stadial theory at several points, such as when he writes that "the logic of the commons has been understood for a long time, perhaps since the discovery of agriculture or the invention of private property in real estate,"<sup>21</sup> or in his argument that increasing pressure on resources drives enclosure of the commons:

Perhaps the simplest summary of this analysis of man's population problems is this: the commons, if justifiable at all, is justifiable only under conditions of low-population density. As the human population has increased, the commons has had to be abandoned in one aspect after another.

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18 Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244 (1968); W.F. LLOYD, *TWO LECTURES ON THE CHECKS TO POPULATION* 18 (Oxford, Collingwood 1833). See Stuart Banner, *The Banality of the Commons: Efficiency Arguments Against Common Ownership Before Hardin*, 19 *THEORETICAL INQUIRIES L.* 395 (2018).

19 DALRYMPLE, *supra* note 5, at 87–88; KAMES, *supra* note 6, at 144–45.

20 DALRYMPLE, *supra* note 5, at 87–88.

21 Hardin, *supra* note 18, at 1244.

First we abandoned the commons in food gathering, enclosing farm land and restricting pastures and hunting and fishing areas.<sup>22</sup>

Approximately contemporaneously with Hardin's article, Harold Demsetz published his *Toward a Theory of Property Rights*.<sup>23</sup> Here the similarities to stadial theory were yet more prominent. Demsetz, relying on the work of anthropologists who had studied native tribes of the Canadian northeast, described societies that had moved from hunting to husbandry of fur-bearing animals (husbandry being either a sort of pastoralism or agriculture). Demsetz argued that this change in subsistence methods was accompanied by a change in property arrangements — lack of private property gave way, as a response to new, commercial demands for pelts, to defined property rights in land:

We may safely surmise that the advent of the fur trade had two immediate consequences. First, the value of furs to the Indians was increased considerably. Second, and as a result, the scale of hunting activity rose sharply. Both consequences must have increased considerably the importance of the externalities associated with free hunting. The property right system began to change, and it changed specifically in the direction required to take account of the economic effects made important by the fur trade.<sup>24</sup>

While not tracking Enlightenment stadial theory precisely, Demsetz's account overlapped with it in several respects (not at all coincidentally, as we will see): echoes of the progression hunting-pastoralism-agriculture-commerce, an accompanying shift to increasingly defined property rights, and an explanatory mechanism based on increasing pressure on the resource.<sup>25</sup> Regarding this last point, Demsetz's consideration of externalities was markedly similar to Adam Smith's argument that "when flocks and herds come to be reared property then becomes of a very considerable extent; there are many opportunities of injuring one another and such injuries are extremely pernicious to the sufferer."<sup>26</sup>

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22 *Id.* at 1248.

23 Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

24 *Id.* at 352.

25 See also Armen A. Alchian & Harold Demsetz, *The Property Right Paradigm*, 33 J. ECON. HIST. 16, 19–25 (1973). For an analysis pointing out the similarities between Demsetz's account and the earlier theories of Locke and Blackstone, see Carol M. Rose, *Evolution of Property Rights*, in 2 THE NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS 93, 94 (1998).

26 SMITH, *supra* note 9, at 33–34.

Demsetz's work was extremely influential on property theorists in the legal academy, many of whom continue to make use of the stadial paradigm. James Krier, for instance, recently advanced a modified Demsetzian account of the evolution of property rights from hunter-gatherer societies with communal ownership to agricultural ones with individual ownership.<sup>27</sup> Demsetz's model also had major impacts on the economic literature on the commons,<sup>28</sup> as well as on the "common pool resources" literature associated with Elinor Ostrom.<sup>29</sup>

Perhaps less obvious, but in some respects uncannily similar to Adam Smith's theory, is Carol Rose's influential classification of management strategies for common resources.<sup>30</sup> Rose sets out four "management techniques" — or legal regimes — that can be used to keep exploitation or use at an efficient level: In "Do-Nothing" there are no legal controls on use; "Keepout" controls who is entitled to exploit the resource and who not; "Rightway" prescribes how users may use or exploit the resource; and "Property" grants individualized property rights to users. Each is progressively more sophisticated and better at preventing overuse of the resource, but also more expensive to run, and so society is best off, Rose argues, in climbing the ladder of legal regimes as resource congestion increases. Not only is Rose's model a four-stage theory; it also tracks Smith's association of increasing pressure on a resource with increasingly elaborate legal regimes culminating in private property.<sup>31</sup>

Finally, the massive literature on "common property resources" identified with Elinor Ostrom, the International Association for the Study of the Commons, and related institutions, seems to borrow from stadial theory in several respects. The empirical studies in this body of work were carried out primarily with regard to the (now) exotic worlds of hunters, shepherds, and peasant farmers about which stadial theorists wrote, not to the more familiar (to most of us) worlds of common property in urban dwellings, businesses, or cultural endeavors;<sup>32</sup> a tendency all the more striking in light of Ostrom's background

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27 James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 *CORNELL L. REV.* 139, 157–59 (2009).

28 See for example Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 *J.L. & ECON.* 163 (1975) and the literature it spawned.

29 See, e.g., Bonnie J. McCay & James M. Acheson, *Human Ecology of the Commons*, in *THE QUESTION OF THE COMMONS* 1, 17, 20–21 (Bonnie J. McCay & James M. Acheson eds., 1987) [hereinafter: *THE QUESTION OF THE COMMONS*].

30 Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 40 *DUKE L.J.* 1 (1991).

31 See SMITH, *supra* note 9.

32 Ostrom's lead article in the first issue of the *International Journal of the Commons* identified fishery, forestry, irrigation, water management, and animal husbandry

in urban studies.<sup>33</sup> They placed a heavy emphasis on the *evolution* of property institutions.<sup>34</sup> And, as Carol Rose has noted, this literature is replete with references to “pressure” on resources,<sup>35</sup> a prominent feature of classic stadia thought.

Unlike Hardin or Demsetz, the common property resources school clearly rejected that aspect of mainstream Enlightenment stadia thought that saw progression through the stages of civilization and property forms as unidirectional, indeed indications of progress.<sup>36</sup> At the same time, however, the affinity of this type of commons theorist to the Romantic, pastoral variant of stadia thought, with its valorization of pre-commercial and preindustrial societies and their common property arrangements, seems clear. In Ostrom’s seminal *Governing the Commons*, for one, generally written in the dry tone of institutional analysis (and explicit about not all traditional systems of resource management being effective), the author sometimes seemed to lose herself in some of the color of her case studies, as when describing ancient Spanish water courts:

The Tribunal de las Aguas is a water court that has for centuries met on Thursday mornings outside the Apostles’ Door of the Cathedral of Valencia. . . . Its proceedings are carried on without lawyers, but with many onlookers. A presiding officer questions those who are involved in a dispute and others who may be able to provide additional information, and the members of the court, excluding the syndic whose canal is involved, make an immediate decision regarding the facts of the case in

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as the “big five” topics in commons research; Frank van Laerhoven & Elinor Ostrom, *Traditions and Trends in the Study of the Commons*, 1 INT’L J. COMMONS 3, 8 (2007). See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 58–181 (James E. Alt & Douglas C. North eds., 1990) and the studies collated in THE QUESTION OF THE COMMONS, *supra* note 29.

33 See Fabien Locher, *Historicizing Elinor Ostrom: Urban Politics, International Development and Expertise in the U.S. Context (1970-1990)*, 19 THEORETICAL INQUIRIES L. 533 (2018).

34 See, e.g., the subtitle of OSTROM, *supra* note 32; Robert McC. Netting, *What Alpine Peasants Have in Common: Observations on Communal Tenure in a Swiss Village*, 4 HUM. ECOLOGY 135 (1976); Peter J. Richerson, Robert Boyd, & Brian Paciotti, *An Evolutionary Theory of Commons Management*, in THE DRAMA OF THE COMMONS 403 (Elinor Ostrom ed., 2002).

35 See Rose, *supra* note 30, at 13, n. 35.

36 See, e.g., McCay & Acheson, *supra* note 29, at 18–21.

light of the specific rules of the particular canal. . . . The final decisions of the court are recorded, but not the proceedings.<sup>37</sup>

More generally, hundreds of studies on common pool resources in the Ostromian vein followed, holding up indigenous commons as a model for sustainable management of resources.<sup>38</sup> As one self-critical member of the Ostrom school has written,

The idea of the “commons” harkens to a mythic time — before The Fall or before Capitalism or before The Gods Became Crazy — when people lived in harmony with each other and with nature and hence there was no need for the institutions of private property. . . . The romantic appeal of “the commons” is doubtless part of the old Western suspicion that “individualism” is flawed, and that a better way of life could be found in small rural communities where people shared in common even the very land upon which they depended. . . . [R]omanticization of prestate, preindustrial, pre-Columbian, pre-whatever human society is central to this narrative.<sup>39</sup>

### III. FROM STADIAL THEORY TO COMMONS THEORY

The modern commons theorists discussed above did not explicitly refer to the Enlightenment or Romantic thinkers whose theories may have influenced them. Yet the striking similarities between these two groups of theories, separated though they were by two centuries, seem to provide evidence of influence. It is likely that thinking in terms of civilizational stages was simply so deeply entrenched in the intellectual baggage of educated Westerners, whether through study of the classics, of Blackstone, or of Gibbon, that modern commons

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37 OSTROM, *supra* note 32, at 71-72 (notes omitted).

38 See Bonnie J. McCay, *Community and the Commons: Romantic and Other Views*, in COMMUNITIES AND THE ENVIRONMENT: ETHNICITY, GENDER, AND THE STATE IN COMMUNITY-BASED CONSERVATION 180, 181 (Arun Agrawal & Clark C. Gibson eds., 2001). Ostrom herself said late in life: “I am deeply indebted to the indigenous peoples in the U.S. who had an image of seven generations being the appropriate time to think about the future. I think we should all reinstate in our mind the seven-generation rule,” Elinor Ostrom, *Crafting Rules to Sustain Resources*, remarks delivered May 8, 2008, <http://www.aapss.org/news/crafting-rules-to-sustain-resources> (last visited Feb. 12, 2018).

39 McCay, *supra* note 38, at 180-81 (citations omitted); See also John R. Wagner, *Water and the Commons Imaginary*, 53 CURRENT ANTHROPOLOGY 617, 621 (2012).

theorists replicated its patterns as a matter of course.<sup>40</sup> Nevertheless, I suggest we can also trace more concrete lines of influence through the intertwined disciplines of anthropology and human ecology, as well as through the worlds of international development and conservationism.

### A. The Aboriginal Property Rights Debate

An important branch of the field of anthropology's research agenda was largely set in the mid-nineteenth century by stadial theory, and thereafter developed to a significant degree in dialogue with it. Anthropological works that clearly influenced modern commons thought, in particular those cited by Demsetz in his important 1967 article,<sup>41</sup> were very much part of this dialogue, thereby infusing his work and that of others writing in the economic tradition with a large dose of stadial thinking.

The Victorian-era thinkers who strongly influenced anthropology in its founding era — Henry Maine, Lewis Henry Morgan, Karl Marx, and Friedrich Engels — were themselves influenced by the stadial theories of the late eighteenth century, and saw societies as evolving through modes of subsistence or production, viewed largely through the lens of property.<sup>42</sup> But while Maine saw the transition from common to private property as a sign of civilization,<sup>43</sup> Morgan, and, following him, Marx and Engels, saw this transition as a form of injustice and source of inequality (though perhaps a necessary one).

Morgan, based on his knowledge of American Indians and reading of classical sources, argued that property was a key factor in the evolution of society as it progressed from a state of savagery (based on hunting) to barbarism (based on herding and farming) to one of civilization:

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40 See Wolloch, *supra* note 1; MEEK, *supra* note 2, at 2; STEIN, *Four Stage Theory*, *supra* note 2, at 409. For stadial theory in Gibbon (EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* (London, William Strahan & Thomas Cadell, 1776)), see MEEK, *supra* note 2, at 175; J.G.A. Pocock, *Gibbon and the Shepherds: The Stages of Society in the Decline and Fall*, 2 *HIST. EUR. IDEAS* 193 (1981).

41 Demsetz, *supra* note 23.

42 See Siomonn Pulla, *A Redirection in Neo-Evolutionism?: A Retrospective Examination of the Algonquian Family Hunting Territories Debates*, 7 *HIST. ANTHROPOLOGY ANN.* 170 (2011); Chris Hann, *Property: Anthropological Aspects*, in 19 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES* 153 (2d ed. 2015); STEIN, *LEGAL EVOLUTION*, *supra* note 2, at 107–11; GEORGE W. STOCKING, JR., *VICTORIAN ANTHROPOLOGY* 11 (1987).

43 HENRY SUMNER MAINE, *ANCIENT LAW* 237–94 (4th Am. ed., 1906) (1861). See STEIN, *LEGAL EVOLUTION*, *supra* note 2, at 107; Hann, *supra* note 42.

The idea of property was slowly formed in the human mind, remaining nascent and feeble through immense periods of time. Springing into life in savagery, it required all the experience of this period and of the subsequent period of barbarism to develop the germ, and to prepare the human brain for the acceptance of its controlling influence. Its dominance as a passion over all other passions marks the commencement of civilization. It not only led mankind to overcome the obstacles which delayed civilization, but to establish political society on the basis of territory and of property. A critical knowledge of the evolution of the idea of property would embody, in some respects, the most remarkable portion of the mental history of mankind.<sup>44</sup>

As twentieth century anthropology developed the tool of ethnographic fieldwork, the work of many anthropologists, particularly in North America, revolved around supporting or disproving Morgan's evolutionary account, with one arena of contention concerning the question of whether "primitive" hunting societies had private property or not.<sup>45</sup>

Demsetz seems to have been aware of the raging debate, and invoked the anthropological studies of Frank Speck and Eleanor Leacock for their empirical value:

The question of private ownership of land among aboriginals has held a fascination for anthropologists. It has been one of the intellectual battlegrounds in the attempt to assess the "true nature" of man unconstrained by the "artificialities" of civilization. In the process of carrying on this debate, information has been uncovered that bears directly on the thesis with which we are now concerned.<sup>46</sup>

Yet he elided (or failed to appreciate) the academic and ideological baggage Speck and Leacock were carrying and the fact that they represented two antagonistic strains of anthropology. Compounding the problem, he conflated

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44 LEWIS H. MORGAN, *ANCIENT SOCIETY* 5–6 (London, MacMillan & Co. 1877).

45 See Robert McC. Netting, *Territory, Property, and Tenure*, in 2 *BEHAVIORAL AND SOCIAL SCIENCE RESEARCH: A NATIONAL RESOURCE* 446, 449–50 (Robert McC. Adams, Neil J. Smelser, & Donald J. Treiman, eds., 1982); Adrian Tanner, *The New Hunting Territory Debate: An Introduction to Some Unresolved Issues*, 28 *ANTHROPOLOGICA* (n.s.) 19 (1986); Harvey A. Feit, *The Construction of Algonquian Hunting Territories: Private Property as Moral Lesson, Policy Advocacy, and Ethnographic Error*, in *COLONIAL SITUATIONS: ESSAYS ON THE CONTEXTUALIZATION OF ETHNOGRAPHIC KNOWLEDGE* 109 (George W. Stocking ed., 1991).

46 Demsetz, *supra* note 23, at 351.

their opposing positions, claiming that Speck's work supported his own account, while ignoring the normative subtext of Leacock's so antagonistic to his own.

Speck's research focused on showing that the native groups of the northeastern U.S. and Canada had had property from a very early stage, before contact with Europeans. His work was "whipped into a 'disproof' of Morgan, Marx, and Engels by antievolutionists."<sup>47</sup> At the opening of his major 1915 article on the subject, he explained what was at stake in terms of evolutionary theories of property and society:

The idea has always prevailed, without bringing forth much criticism, that, in harmony with other primitive phenomena, the American Indians had little or no interest in the matter of claims and boundaries to the land which they inhabited. This notion has, in fact, been generally presupposed for all native tribes who have followed a hunting life, to accord with the common impression that a hunter has to range far, and wherever he may, to find game enough to support his family.

Whether or not the hunting peoples of other continents, or even of other parts of America, have definite concepts regarding individual or group ownership of territory, I should at least like to show that the Indian tribes of eastern and northern North America did have quite definite claims to their habitat. Moreover, as we shall see, these claims existed even within the family groups composing the tribal communities . . . . It would seem, then, that such features characterize actual ownership of territory.<sup>48</sup>

In later articles, Speck and his supporters explicitly argued for the aboriginality of property in hunting territories, rejecting the thesis that these

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47 JERRY D. MOORE, VISIONS OF CULTURE: AN INTRODUCTION TO ANTHROPOLOGICAL THEORIES AND THEORISTS 219 (3d ed., 2009). See Frank G. Speck & Loren C. Eiseley, *Montagnais-Naskapi Bands and Family Hunting Districts of the Central and Southeastern Labrador Peninsula*, 85 PROC. AM. PHIL. SOC'Y 215, 238 (1942); Richard B. Lee & Richard H. Daly, *Eleanor Leacock, Labrador, and the Politics of Gatherer-Hunters*, in FROM LABRADOR TO SAMOA: THE THEORY AND PRACTICE OF ELEANOR BURKE LEACOCK 33, 34 (Constance R. Sutton ed., 1993); Christine Ward Gailey, *Eleanor Burke Leacock (1922–1987)*, in WOMEN ANTHROPOLOGISTS: SELECTED BIOGRAPHIES 215, 217 (Ute Gacs, Aisha Khan, Jerrie McIntyre & Ruth Weinberg, eds., 1989).

48 Frank G. Speck, *The Family Hunting Band as the Basis of Algonkian Social Organization*, 17 AM. ANTHROPOLOGIST (n.s.) 289 (1915); Frank G. Speck, *The Basis of American Indian Ownership of Land*, OLD PENN WEEKLY REV., Jan. 16, 1915, at 491, version cited in Demsetz, *supra* note 23, at 351.



developed only in response to the increased demand for beaver pelts spurred by European traders.<sup>49</sup>

Speck's position was thus actually diametrically opposed to that of Demsetz, who argued that the aboriginal peoples of northeast Canada developed private property in land only in response to the increasing value of hunting brought about by contact with European traders who placed high values on furs.<sup>50</sup> Whether or not Demsetz realized that Speck's position contradicted his own, it is clear that Demsetz was reading anthropological literature deeply engaged with stadial theory.

Leacock's work, on the other hand, actually did support Demsetz's position that property rights had developed among the native peoples of the Northeast as a response to increased pressure on the fur resources brought about by colonial trade. Leacock was firmly in the evolutionist camp of anthropology,<sup>51</sup> and believed that it was only colonialism that had led to private property in trapping grounds.<sup>52</sup> A Marxist feminist, her work on the natives of Labrador — work that she herself described as “polemic” — was directed against Speck's anti-Marxist theses and dedicated to showing that communism had existed in this society before it was corrupted by colonialist commerce into adopting private property.<sup>53</sup> She advanced an evolutionary, three-stage model of society *à la* Morgan and Engels, with property regimes deteriorating from primitive communism to capitalist private property.<sup>54</sup> But the work cited by Demsetz was published in the 1950s, when Leacock hid her Marxism.<sup>55</sup> We thus have the tasty irony of Demsetz, a director of the libertarian Mont Pelerin Society, basing his classic article on the work that was (probably unknown to him)

49 See, e.g., Frank G. Speck & Loren C. Eiseley, *Significance of Hunting Territory Systems of the Algonkian in Social Theory*, 41 *AM. ANTHROPOLOGIST* (n.s.) 269 (1939); John M. Cooper, *Is the Algonquian Family Hunting Ground System Pre-Columbian?*, 41 *AM. ANTHROPOLOGIST* (n.s.) 66 (1939).

50 Demsetz, *supra* note 23, at 351–53.

51 See, e.g., Eleanor Leacock, *Introduction to Social Stratification and Evolutionary Theory: A Symposium*, 5 *ETHNOHISTORY* 193 (1958).

52 Eleanor Leacock, *The Montagnais “Hunting Territory” and the Fur Trade*, 56 *AM. ANTHROPOLOGIST* (Pt. 2), *Memoir No. 78* (1950).

53 Eleanor Burke Leacock, *Introduction*, in *FREDERICK ENGELS, ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 1, 7, 19 (1972); Eleanor Burke Leacock, *Being an Anthropologist*, in *FROM LABRADOR TO SAMOA*, *supra* note 47, at 19. See Pulla, *supra* note 42, at 184–85.

54 See Eleanor B. Leacock, *Lewis Henry Morgan on Government and Property*, in *NEW DIRECTIONS IN POLITICAL ECONOMY: AN APPROACH FROM ANTHROPOLOGY* 307 (Madeline B. Léons & Frances Rothstein eds., 1979).

55 See MOORE, *supra* note 47, at 221.

that of a Marxist radical, dedicated to demonstrating the essential accuracy of Marx and Engels's evolutionary view of property.<sup>56</sup>

For the purposes of this study, what matters is not whether Demsetz understood the anthropological scholarship on which he relied, but that these sources were suffused with stadial thinking about property, given which it is not surprising that Demsetz's article also reflects a stadial view of property. Moreover, Demsetz's reading of Leacock's work stripped of its ideological color allowed his theory to be infused with his own ideological tint, with private property representing a more advanced stage of society than that represented by the commons. As noted above, Demsetz's work was extremely influential on other commons theorists from the 1970s on.<sup>57</sup>

Meanwhile the Marxist nostalgia for common property, reflected in Leacock's work, fed into the work of the Ostrom camp as well as into other strains of pro-commons and anti-"enclosure" literature in the late twentieth and early twenty-first centuries.<sup>58</sup>

## B. Colonial Development, Anthropology and Ecology

A second line of influence leads, I believe, from Enlightenment stadial theory to modern commons theory by way of the work of anthropologists and scientists associated with British colonial development efforts under the aegis of colonial administrator Malcolm Hailey. Lord Hailey, after a career in the Indian Civil Service, was tapped to run the African Survey in the 1930s and the Colonial Research Committee in the 1940s, and was an advocate of multidisciplinary social science research, particularly anthropological, in the colonies.<sup>59</sup>

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56 For Demsetz's libertarianism, see UCLA WEBPAGE FOR HAROLD DEMSETZ, <http://www.econ.ucla.edu/demsetz> (last visited Feb. 12, 2018).

57 See *supra* at notes 27–29.

58 The literature expressing nostalgia for an environmentally sustainable and just commons, usually indigenous, is extensive. Some prominent examples include the influential S. V. Ciriacy-Wantrup & Richard C. Bishop, "Common Property" as a Concept in Natural Resources Policy, 15 NATURAL RES. J. 713 (1975); Julian C. Juergensmeyer & James B. Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem*, 14 NATURAL RES. J. 361 (1974); VANDANA SHIVA ET AL., THE ENCLOSURE AND RECOVERY OF THE COMMONS (1997); DEREK WALL, THE COMMONS IN HISTORY: CULTURE, CONFLICT, AND ECOLOGY (2014).

59 See LORD HAILEY, AN AFRICAN SURVEY: A STUDY OF THE PROBLEMS ARISING IN AFRICA SOUTH OF THE SAHARA (1938); JOHN W. CELL, HAILEY: A STUDY IN BRITISH IMPERIALISM, 1872–1969 (1992); John W. Cell, *Lord Hailey and the Making of the African Survey*, 88 AFRICAN AFFAIRS 481 (1989) [hereinafter Cell, *Lord Hailey*];

The staff of Hailey's African Survey seem to have created something of a nexus for stadial thought in the context of colonial development. London School of Economics anthropologist Lucy Mair's chapter on land made heavy use of the stadial framework for considering "the evolution of the most suitable form of land tenure":<sup>60</sup>

In some areas land custom is changing rapidly under the influence of new conditions, such as the increase of the pressure of population or the spread of a market economy. These changes will eventually involve official intervention . . . ; the need must, for example, be envisaged for the definition and recording of title . . .<sup>61</sup>

There is nothing peculiar to Africa in the general direction which the evolution of land custom is taking; its adjustment in response to economic changes is a natural process which would occur independently of any action taken by the administration.<sup>62</sup>

In Mair's analysis, traditional, communal forms of African land tenure needed to progress to more private rights in order to encourage development:

All discussions on the subject agree as to the value of giving security to the occupier of land, and the further advantage of what is generally termed the individualization of tenures. It has been urged on different occasions that the extended system of rights, vested in the family or group, has proved in Africa to be an obstacle to improved agriculture.<sup>63</sup>

Strikingly, Mair also reported on Hardin's tragedy of the commons, *avant la lettre*, herdsman and all:

Those who have had to deal with East African conditions have added the . . . argument that there is little incentive to natives to reduce their live-stock in order to prevent the wastage of pasture and consequent erosion, since nothing done by the individual will avail unless his neighbours take corresponding action . . .<sup>64</sup>

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David Mills, *British Anthropology at the End of Empire: The Rise and Fall of the Colonial Social Science Research Council, 1944–1962*, 6 *REVUE D'HISTOIRE DES SCIENCES HUMAINES* 161, 163–68 (2002).

60 HAILEY, *supra* note 59, at 864. For Mair's authorship of this chapter, see Cell, *Lord Hailey*, *supra* note 59, at 498.

61 HAILEY, *supra* note 59, at 830. *See also id.* at 842.

62 *Id.* at 865.

63 *Id.* at 868–69. *See also id.* at 863–64.

64 *Id.* at 869.

Moreover, in a remarkable anticipation of later legal scholarship that highlighted potential “comedies of the commons” and “tragedies” of its disappearance,<sup>65</sup> she also warned of the advantages of common property in some situations: “The question of rights over grazing commonages presents its own difficulties; the partition of grazing grounds into small units would be a bar to the adoption of that rotational use of pasture which many hold to be the best preventive of erosion in East African conditions.”<sup>66</sup>

Anthropologist Charles Kingsley Meek’s 1946 *Land Law and Custom in the Colonies*, a study initiated by Hailey’s committee, opened with an argument that increasing population required rigid rules of land tenure.<sup>67</sup> Lord Hailey himself contributed an introduction to the volume, in which he laid out a stadial framework for understanding changes in land tenure in the context of colonial development, apparently heavily reliant on Mair’s chapter for the *African Survey*. The transition between “stages of development” — from a pastoral economy to subsistence agriculture and then to market-oriented production — is accompanied, he wrote, by “automatic” changes in the system of land tenure, with a growing conception of individual ownership.<sup>68</sup> “A further stage arrives when, with the growing density of population and increased pressure on the land, holdings acquire a transferable value, and rights in them become more completely commercialized.”<sup>69</sup>

In the normative dimension, Hailey generally approved of this evolution of property rights on efficiency grounds:

In the extensive Colonial areas in which the system of landholding is based on the conception of a collective right in the land, the most conspicuous effect of economic development will . . . appear in the progressive individualization of holdings. That process will have the economic advantage of giving to the holders a greater sense of security and a greater incentive to a more intensive type of cultivation . . .<sup>70</sup>

But, building on Mair’s insight, Hailey also warned of potentially deleterious effects of private property:

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65 See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

66 HAILEY, *supra* note 59, at 870.

67 C.K. MEEK, *LAND LAW AND CUSTOM IN THE COLONIES* vi, 1 (1946).

68 Lord Hailey, *Introduction by Lord Hailey*, in MEEK, *supra* note 67, at xii–xiii.

69 *Id.* at xii.

70 *Id.* at xix.

An undue acceleration in the form taken by the development of a system of proprietary tenures may impair the success of major schemes of irrigation, which depends largely on the holding of land in units suitable for irrigated cultivation. The establishment of exclusive rights over pastoral lands may make it difficult to adopt the regime of rotational closures necessary to prevent their deterioration. Measures necessary for soil conservation, such as contour ridging, may be rendered more difficult . . . Exceptional difficulties are also liable to occur in connection with the rights in certain forestal products, for example palm trees. As experience shows, such rights may be held in a manner which presents grave obstacles to the development of economic methods of processing or marketing.<sup>71</sup>

Another central figure in Hailey's African Survey was biologist/ecologist E.B. Worthington.<sup>72</sup> Worthington's long career in science and administration in Britain, Africa, and the Middle East was marked by repeated invocations of stadial thinking, likely introduced to him by Mair, as indicated by the similarity between the latter's reflections on the effects of population pressure on land use and tenure and his own later ones.<sup>73</sup> (He himself drew connections between evolutionary thinking in anthropology as related to its centrality in the biological sciences.<sup>74</sup>)

Worthington's earliest statement of the theory came in the opening to his report on his wartime work for the Middle East Supply Centre investigating Middle Eastern science, in a section entitled "Stages of Development": "In analyzing the problems it is useful to keep in mind the four stages of human development which are associated with an increased pressure of population on the land, namely the modes of life illustrated by hunters, shepherds, cultivators, and industrial workers."<sup>75</sup> As population in the region increased, he wrote,

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71 *Id.* at xx–xxi. See also MEEK, *supra* note 67, at 289.

72 See PEDER ANKER, *IMPERIAL ECOLOGY: ENVIRONMENTAL ORDER IN THE BRITISH EMPIRE, 1895–1945*, at 208–13 (2002).

73 Compare E. BARTON WORTHINGTON, *THE ECOLOGICAL CENTURY: A PERSONAL APPRAISAL* 36–37, 44–49 (1983), with passages from Mair and Hailey cited *supra* at notes 60–70.

74 WORTHINGTON, *supra* note 73, at 17, 27, 36, 46.

75 E.B. WORTHINGTON, *MIDDLE EAST SCIENCE: A SURVEY OF SUBJECTS OTHER THAN AGRICULTURE* 1 (1946). Peder Anker has written that Worthington took for granted "the relation between the 'primitive' and 'advanced' levels of historical development," ANKER, *supra* note 72 at 218, citing E.B. Worthington, *Primitive Craft of the Central African Lakes*, 19 *MARINER'S MIRROR* 146 (1933); the works by Worthington I cite here are more significant examples.

the outlet should be “progress towards the industrial stage,” but even then the Maltshusian specter of population increase outstripping production loomed.<sup>76</sup>

Lest one think that these four stages were simply the categories that Worthington happened upon in his study, the above sentence appeared again, nearly verbatim, in the introduction to his influential *Science in the Development of Africa*.<sup>77</sup> Though Worthington believed, like his Enlightenment predecessors, that transitions between stages were a matter of slow evolution, he thought that Africa would pass through the same stages as Europe but in a much shorter time, and drew familiar connections between population size and civilizational stages.<sup>78</sup>

Hailey’s chairmanship of the British Colonial Research Committee (created to help implement the Colonial Development and Welfare Act), Worthington’s leadership positions in a variety of development projects,<sup>79</sup> and the influence of their oft-cited works with their expositions of stadial theory ensured an audience for stadial thinking in the world of international development.<sup>80</sup> The field of development, also influenced by the evolutionist theories of anthropology surveyed above, in turn was an important influence on the commons thinking of Ostrom and her circle.<sup>81</sup>

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76 WORTHINGTON, *supra* note 75, at 2.

77 E.B. WORTHINGTON, *SCIENCE IN THE DEVELOPMENT OF AFRICA: A REVIEW OF THE CONTRIBUTION OF PHYSICAL AND BIOLOGICAL KNOWLEDGE SOUTH OF THE SAHARA* 4 (1958). *See also* E.B. Worthington, *The Use of Science in Underdeveloped Countries*, in 2 DUKE OF EDINBURGH’S STUDY CONFERENCE ON THE HUMAN PROBLEMS OF INDUSTRIAL COMMUNITIES WITHIN THE COMMONWEALTH AND EMPIRE 97 (1956) (hereinafter Worthington, *Use of Science*); WORTHINGTON, *supra* note 73, at 48.

78 Worthington, *Use of Science*, *supra* note 77, at 98–99; E. Barton Worthington, *Book Review*, 25 ENVTL. CONSERVATION 184, 185 (1998) (reviewing NILES ELDREDGE, *DOMINION* (1995)).

79 Among Worthington’s positions after his work on the Middle East survey: Scientific Secretary to the Colonial Research Council, Scientific Secretary to the East African High Commission, Secretary-General to the Scientific Council for Africa South of the Sahara, Deputy Director-General of the Nature Conservancy, Scientific Director of the International Biological Programme. *See* J.M. Cokayne, *Biographical Note*, Catalogue of the Papers of Edgar Barton Worthington, 1912–1984 (Bodleian Libraries Special Collections, Oxford 1971), <http://www.bodley.ox.ac.uk/dept/scwmss/wmss/online/blcas/worthington-eb.html> (last visited Feb. 12, 2018).

80 For Worthington in the development context, see Christophe Bonneuil, *Development as Experiment: Science and State Building in Late Colonial and Postcolonial Africa, 1930–1970*, 15 OSIRIS 258 (2000).

81 *See* Locher, *supra* note 33; Fabien Locher, *Third World Pastures. The Historical Roots of the Commons Paradigm (1965–1990)*, 1 QUADERNI STORICI 303 (2016).

### C. Neo-Malthusian Conservatism

The final line of intellectual influence of Enlightenment stadial theory on recent commons theory leads from early nineteenth century economist Thomas Malthus through his followers in the twentieth century conservation movement.<sup>82</sup>

The writings of Malthus on population, clearly a pervasive influence on later scholars dealing with issues of pressure on resources, were suffused with stadial thinking, although for Malthus, changes in methods of subsistence and increasingly defined property rights drove population growth, not the reverse.<sup>83</sup> Twentieth century eugenicist Alexander Carr-Saunders, whose work was influential on Worthington (among others), devoted considerable attention in his *Population Problem* (1922) to property institutions in societies of hunters, farmers, and so on.<sup>84</sup>

Stadial theory (it seems by way of Gibbon), neo-Malthusianism, and a somewhat Orientalist outlook came together in Fairfield Osborn's bestselling *Our Plundered Planet* (1948), a book known mostly for its warnings against the environmental consequences of overpopulation.<sup>85</sup> But Osborn had a lot to say, as well, about the property institutions associated with various ways of life. The book was hostile to pastoralists, including American cattlemen, throughout, but with a particularly condemnatory account of the destruction of commons by herders in Spain, blamed on the nomadism of its Moslem

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Though, as Locher points out, anthropologist Robert Netting, a key figure in the Ostrom group, was a critic of the idea that societies must evolve away from communal ownership, Netting nonetheless largely accepted the stadial framework, with its emphasis on the development of property regimes as a response to resource pressure, while adding (like Mair, Hailey, and others) an agnosticism as to the necessary direction of change. Locher, *id.* at 320–21; See also Netting, *supra* note 34; Netting, *supra* note 45.

82 See generally THOMAS ROBERTSON, *THE MALTHUSIAN MOMENT: GLOBAL POPULATION GROWTH AND THE BIRTH OF AMERICAN ENVIRONMENTALISM* (2012).

83 See THOMAS MALTHUS, *AN ESSAY ON THE PRINCIPLE OF POPULATION* (London, J. Johnson 1798), especially chap. 3, 4; MEEK, *supra* note 2, at 223; M. Godelier, *Malthus and Ethnography*, in *MALTHUS PAST AND PRESENT* 125 (J. Dupâquier & A. Fauve-Chamoux eds., 1983); STOCKING, *supra* note 42, at 34.

84 See A.M. CARR-SAUNDERS, *THE POPULATION PROBLEM: A STUDY IN HUMAN EVOLUTION* 197–214 (1922); E. Barton Worthington, *The Ecological Century*, 9 *ENVTL. CONSERVATION* 65, 65–66 (1982); E. Barton Worthington, *World Campaign for the Biosphere*, 9 *ENVTL. CONSERVATION* 93, 98 (1982).

85 See Pierre Desrochers & Christine Hoffbauer, *The Post War Intellectual Roots of the Population Bomb: Fairfield Osborn's 'Our Plundered Planet' and William Vogt's 'Road to Survival' in Retrospect*, 1 *ELECTRONIC J. SUSTAINABLE DEV.* 37 (2009); ROBERTSON, *supra* note 82, at 36–60.

conquerors.<sup>86</sup> Anticipating Hardin's Tragedy, Osborn wrote of herdsmen who "try to maintain the largest possible number of animals on a limited range, grazing at all times . . . and so destroy the grass and bushes to such an extent that nothing is left but nearly barren ground."<sup>87</sup> On the other hand, the private property of European agriculturalists was held up for praise:

Land in many regions of Europe . . . was divided up and held in relatively small tracts for the use and benefit of individual owners and their families. Thus it was protected and cared for.

European peoples early became intelligent tillers of the soil, and were not nomadic but lived for generations in one place. They loved their land and learned to return to it much of the substance they drew from it.<sup>88</sup>

It seems clear that Hardin, at least, was influenced by Carr-Saunders, Osborn, and their circles.<sup>89</sup>

## CONCLUSION

I have argued in this article that various strands of modern commons theory, though based, as well, on novel theoretical and empirical work, seem to lean heavily on the structures, examples, and sensibilities of stadial theories of civilization that rose to prominence in the late eighteenth century. These Enlightenment-era ways of thinking are admittedly outmoded as theories of history, but why should the historical sources of current theory matter?

Beyond the important goal of understanding the sources of our theories, foregrounding the continuing influence of stadial thinking on current theories of the commons should help us question some aspects of these theories by highlighting some of their oddities — such as the disproportionate weight of studies of hunting, herding, and the like among a far more diverse universe of commons situations that could be studied.

Possibly more important are the residues of the narrative of civilizational progress that continue to adhere to property theory. Carol Rose has noted the

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86 FAIRFIELD OSBORN, *OUR PLUNDERED PLANET* 148–51, 183–84 (1948).

87 *Id.* at 54–55.

88 *Id.* at 143.

89 See Fabien Locher, *Les pâturages de la Guerre froide: Garrett Hardin et la «Tragédie des communs»*, 60 *REVUE D'HISTOIRE MODERNE ET CONTEMPORAINE* 7 (2013) (Fr.) translated in Fabien Locher, *Cold War Pastures: Garrett Hardin and the "Tragedy of the Commons,"* *CAIRN-INT* (2013), [https://www.cairn-int.info/article-E\\_RHMC\\_601\\_0007--cold-war-pastures-garrett-hardin-and.htm](https://www.cairn-int.info/article-E_RHMC_601_0007--cold-war-pastures-garrett-hardin-and.htm).



quasi-religious belief in the advantages of private property held by some property theorists, especially those associated with the modern law and economics movement, according to which “an evolving property rights regime might lead humankind toward a new kind of earthly Paradise,” “a secular Eden of peace and plenty.”<sup>90</sup> Rose’s own work, as well as that of some of the other commons theorists surveyed above, is free of this bias, remaining pointedly agnostic as to the direction of evolution among property regimes. But others — not only law and economics types but Hardinians and others — seem to accept (though they might not put it in these terms) that private property represents a more advanced stage of civilization than does the commons. This type of thinking lies at the root of many neoliberal policy prescriptions, from the importance of secure private property regimes to developing countries to the salience of cap-and-trade as a solution for climate change and other environmental problems.

On the other hand, the Romantic and Marxist reactions to the Enlightenment stories of stadial progress continue to inform another set of prescriptions and critiques, most prominent among them the many studies of successful indigenous commons management following Ostrom’s work. Whatever the normative and ethical attractions of these positions, it seems that their appeal rests partly on a narrative of fall from grace, a sort of negative image of the economists’ story described by Rose, and a yearning to return to an Eden of primitive and community-based commons.

Finally, on a more general level, I would like to highlight the central role that historical narratives or myths continue to play in nominally theoretical and normative scholarship. Myths are important, but so is clear-headed thinking about policy. By recognizing the myths on which much commons scholarship is built, we might be able to improve it.

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90 Rose, *supra* note 25, at 93.

