

Original Acquisition of Private Property

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Suppose libertarians could prove that durable, unqualified private property rights could be created through “original acquisition” of unowned resources in a state of nature. Such a proof would cast serious doubt on the legitimacy of the modern state. It could also render the approach to property rights that I favour irrelevant. I argue here that none of the familiar Lockean-libertarian arguments for a strong natural right to acquisition succeed, and that any successful argument for grounding a right to acquire would have to use my favoured approach to property rights—the “vector-sum” approach. I conclude with some doubts about original acquisition theory and natural property rights.

1. Introduction: Rights and property rights

The vector-sum approach is a component of the full justification of a right. It recommends that we first investigate the benefits to individuals that will flow from the right’s being in effect; and that we make a similar tally of the costs to individuals’ interests from recognising the right. With this information about costs and benefits, we calculate an “array of interests” that shows how well-off each individual would be were that right ascribed. We then calculate similar arrays of interests for alternative schemes in which slightly different rights are ascribed, and in which no such right is ascribed. Having assembled these arrays of interests, the vector-sum approach can pass the arrays to a larger normative theory. This larger normative theory explains why recognising the right in question is more reasonable, given its relative benefits and costs, than recognising slightly different rights or no right at all.

Different normative theories will of course have different ways of determining which selection of rights is more “reasonable”. A theory may prefer the right which produces the array of interests where the sum of interests is greatest, or the array where the worst-off person is best off, or whatever. For our purposes here it is not important which of these larger theories is correct; all we will need is the relatively uncontroversial premise that it is more reasonable to recognise one scheme of rights than another if the one leads to greater benefits for

every person than does the other, or if the one is better for some and worse for none.¹

An example is the right that we ascribe to everyone against being touched without consent (“the right to bodily integrity”). On the one hand, this right protects several important individual interests: our interests in being free from pain and distraction, in being able to carry out complex plans of action, in being able to limit information about ourselves, and in being able to form intimate relationships. On the other hand, we pay the costs of respecting this right when another person’s body is an object of aversion or desire, or an obstacle, or a threat. Recognising a general right to bodily integrity makes everyone better off than recognising no such right at all, or than, for example, recognising a general right that would be violated whenever one person came within ten feet of another. This is the justification of the general right to bodily integrity.

Yet the general right to bodily integrity that we recognise is also qualified in many ways. It may not be a rights-violation to strike an assailant, or to jostle through a crowd to catch a thief, or to pull a comatose victim to safety. The right to bodily integrity is intricately “shaped”, and given even the sketch of rights-theory above we can see why this is so. A wide range of interests figure into the costs and benefits of recognising this right, and the relative importance of these interests will vary with circumstances. In some situations the costs of recognising the general right shoot up, while in others the benefits dwindle. The contours of a general right like the right to bodily integrity will be formed by the qualifications it admits for such situations.

Because several variable interests are relevant to most or all rights, we can expect that every right we ascribe will have some complexities to its shape. To use a metaphor from Nozick, every right will be “the (moral) vector resultant of the opposing weighty considerations, each of which must be taken into account somehow” (Nozick 1974, p. 146). One difficult task of a moral philosopher is to describe how these several interests should both ground and qualify a general right—that is, to explain exactly why a right of a certain shape is the “vector-sum” of all the interests at stake.²

Ownership is a three-place relation: some agent holds certain rights over some thing. Elsewhere (Wenar, forthcoming) I propose a conceptual analysis of ownership that focuses on the complex structure of the rights involved in this relation. Property, I claim, is any object of transferable

¹ Utilitarianism, contractualism, prioritarianism and traditional egalitarianism converge on the first part of this premise, and only egalitarianism dissents to the second part in some cases.

² A good example of an investigation of the qualifications to a general right is Sidgwick’s study of promise-keeping (1907, pp. 303–11).

rights to exclusive use. One benefit of this analysis is that it fits well into the vector-sum approach. Bringing out the complexity of the property rights structure highlights the many ways that property rights—that is, rights to transfer, to exclude, and to use—can be strengthened or weakened so as to protect and advance different kinds of interests. The vector-sum approach as applied to this analysis of property says that the best way to discover which property rules are best for us is to examine how the large number of often countervailing interests put pressure on the contours of the property rights structure at different points.

This investigation of how various interests put pressure on the contours of property rights is more complex than an investigation into the right of bodily integrity would be, because *who* should be able to hold *which rights* of *what duration* over *what sorts* of property are in general more contentious questions than analogous questions about the body. Even cataloging the “vectors” relevant to property will require a lot of space.

The current paper argues against the type of libertarian theory that would say this space is not worth taking. Suppose it could be established that individuals have a natural right to appropriate unowned resources in such a way as to generate bequeathable and relatively unqualified property rights. It would then also be possible that the weighing of current costs and benefits would have no bearing on the question of what property rights we should recognise now. For appropriation in the state of nature could then create strong property entitlements that would persist to this day. Moreover, since the rights defining these entitlements could only be “reshaped” by the individual rights-holders, any general qualifications of property rights could come about only through an unlikely universal agreement to alter the ancient entitlements. Whether these inherited rights were isomorphic to the rights currently endorsed by the vector-sum approach would be irrelevant to their justification.

This challenge comes, of course, from original acquisition theory and the libertarian successors to Locke.³ I will contend against such theorists that original acquisition theory, if it is to work at all, must use the vector-sum approach. My strategy is to corral acquisition theory toward this conclusion by closing off alternatives suggested by the Lockean tradition. Thus after an analysis and winnowing of possible pre-appropriation states of nature, I show that all arguments but one for ascribing a strong natural right of acquisition fall short. And this one remaining argument, I will claim, must fit within the vector-sum framework.

³ I say “libertarian successors to Locke” because it seems unlikely that Locke would endorse the libertarian thesis that strong property rights are acquired in the state of nature. See for example Wolff (1991, pp. 24–7).

2. *The structure of original appropriation theories*

Specific arguments for a natural right to appropriate build on the assumptions of the surrounding theory, and particularly on the assumptions about what the state of nature is like before appropriation takes place. This section lays out the structure of original appropriation theories with special attention to the pre-appropriation states of nature that such theories might deploy. I argue that only one of these pre-appropriation states could be useful to the libertarian appropriation theorist, thereby establishing the context for the natural rights arguments examined later.

Original appropriation theories can be divided into five parts:

1. The first part of an original appropriation theory describes the rights enjoyed by the inhabitants of the state of nature before appropriation begins (I assume this includes normal bodily rights in all variations). I'll discuss three types of candidates for this initial state in a moment.
2. Second comes a description of what pressures the inhabitants to begin private appropriation, such as a looming tragedy of the commons (e.g. Schmidtz 1990) or as Pufendorf put it merely "innumerable conflicts ... from rivalry of many persons over the same thing" (Buckle 1991, p. 98).
3. Third is a specification of the circumstances in which appropriation is permitted, in the general form, "If *C* obtains, then *A* can appropriate *O*". Here we might find Locke's "enough, and as good left in common for others" (Locke 1689, p. 288), or Nozick's Lockean proviso: "A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened" (Nozick 1974, p. 178). Of course, a theorist may also (as Narveson 1988, pp. 84–5) place no circumstantial restrictions whatsoever on appropriation.
4. Fourth, an original appropriation theory states which acts give rise to private property entitlements. There are several familiar alternatives here, including labour-mixing, incorporation, and first occupation.
5. Finally, a theory must indicate the shape and duration of the rights of ownership that original appropriation generates. For example, Grotius qualifies the private right to exclude from land and water with a right in non-owners to "innocent use" of fields and rivers; and both Pufendorf and Locke provide that the (blameless) needy can expropriate the rich of their surplus. As to duration, Locke's spoilation proviso provides one type of qualification: a property right endures until it becomes clear that the property is going to spoil. Nozick's "historical shadow of the Lockean proviso on appropriation" fits here too: property rights over an object last only

so long as non-owners are above some baseline situation with respect to that object (Nozick 1974, p. 180).

We are here engaged with original appropriation theories that seek to ground *strong* private property rights, which are the sorts of property rights that libertarians characteristically defend—that is, rights unqualified enough to call into question the legitimacy of the normal expropriative and regulatory powers of the modern state. These are the sorts of property rights that threaten to make the vector-sum approach to property irrelevant. It is as much the *duration* as the *shape* of these strong rights that threatens the vector-sum approach—because only durable naturally-generated rights would have implications for our current property practices. However, the duration of any individual’s control over an appropriated resource must be neither too short *nor too long* if property rights are to play their role in libertarian theory.

Clearly, strong property rights must last beyond the time that the appropriator actually uses the appropriated thing. The duration of the rights must make it possible to own what is currently unused, just as the shape of the rights must make them somewhat resistant to the desires and even the needs of non-owners. Yet an appropriator cannot gain rights to control the appropriated thing for too far into the future, unless feudalism instead of capitalism is the desired result. A moment’s reflection on the history of the entailed estate (true “absolute ownership” of real property) should convince the libertarian that the Law of Nature must include something like the Rule against Perpetuities. An appropriator may be granted strong rights to control an object during his lifetime, but he must not be allowed to determine the object’s eternal fate.

We can now explore the options for the first part of original appropriation theory: the pre-appropriation state of nature. There are two species of pre-appropriation states of nature, and then a third species made up of hybrids of the other two.

The first species comprises the “no-ownership” states of nature, and the second the “common-ownership” states. In a no-ownership state, each person may initially use any object in any way she likes, within the limits of others’s bodily rights. Each can possess, use, consume or destroy anything that she can grab or keep hold of. Moreover, anyone may unilaterally create private property rights in herself given that she is in the conditions that the theory specifies.

In a common-ownership state, on the other hand, theorising begins with everything owned by everyone. The task of the original appropriation theorist who starts from a common-ownership premise is to show how “privatization” as opposed to “acquisition” takes place.

Of course an original appropriation theorist may also choose an initial state that is a hybrid of these two basic types. Thus Rousseau famously (if not precisely) distinguishes original rights over different types of objects by declaring that “The fruits of the earth belong to all, and the earth itself to no one!” (Rousseau 1755, p. 60).

We want to discover which of these possible states of nature might be a viable starting point for the libertarian appropriation theorist. Modern theorists (e.g. Gaus and Lomasky 1990, p. 489) might think that the universal-ownership construals of the starting state cannot be motivated without an appeal to quaint theological premises. Or at the least the burden should be on the proponent of universal-ownership to say why it should be thought that everyone initially owns everything, rather than that everyone initially owns nothing.

Yet is it so obvious that this second assumption needs less justification than the first? None of the possible states of nature is, after all, a rights-vacuum. In the no-ownership scenarios each person has the natural right to create property rights in herself—is this less contentious than that each person should be vested with property rights from the start? Moreover the no-ownership variants give each inhabitant of the state of nature the right of using (even using up) what others may want or need, while the common-ownership states give each equal say in determining the disposition of the resources that all might use. When phrased in these terms—in terms of “equal freedom” versus “equal voice”—it seems less likely that no-ownership can win by default.

It is an entirely different matter, however, when we ask which of these feasible starting states might be useful to the theorist hoping to generate an extensive system of strong property rights. On this question, all other contrasts between no-ownership and common-ownership are overshadowed by one large difference. Within no-ownership states, appropriation is unilateral, while in the common-ownership states any appropriation of private property requires the consent of all non-appropriators. That is, acquisition from within no-ownership is do-it-yourself, while privatization from within common-ownership must be the result of a bargain among all parties.

There is one important advantage for the strong appropriation theorist who tries to generate private entitlements through universal consent. The rights that the strong appropriationist wants—unqualified, durable and transferable rights to exclusive use—are a simple and therefore a salient solution to the bargaining problem. A theorist attempting to use a unanimous consent justification for strong property rights would be well advised to highlight this salience by emphasising situations in which the pressures towards privatization are intense. Yet two types of asymmetries

among the bargaining parties will scuttle a derivation of strong property from universal consent in any but the most extreme circumstances.

The first type of asymmetry is among the inhabitants of the state of nature with respect to the act that is supposed to generate strong property entitlements (see Gaus and Lomasky 1990, p. 499). Whatever act is proposed (first occupation, labour-mixing, etc.) some will be better at it, or better situated or more willing to do it. Those worse at the proposed act have incentives to hold out for qualifications to the property structure, such as usufruct rights, or perpetual side-payments, or something like the right of eminent domain. In Gibbard's example, the handicapped (who are worse at, say, first occupation) might hold out for mandatory welfare subsidies from the able-bodied (Gibbard 1976, pp. 80–1). Moreover Gibbard's example underestimates the complexities that follow from this type of asymmetry. For the possibility of coalitions makes it hard to say in advance how pressures to appropriate will bear on any individual.

Perhaps this first asymmetry could be overcome by bypassing the specification of an appropriative act and allowing the bargainers to agree simultaneously on a structure of strong property rights and on a distribution of particular entitlements. Such an agreement would still be a threat to the vector-sum approach to property. Yet even this solution cannot avoid the second type of asymmetry, which is the time of entry to the agreement (see Gibbard 1976, pp. 81–2). Children are born, and in unanimous consent theory they would not be bound to recognise pre-existing entitlements unless they agreed to respect them. Yet why would these latecomers agree to respect the existing structure and distribution of property rights? Either an original agreement must allow for continuous redistribution that placates latecomers, or the agreement must be renegotiated every time a child reaches maturity. In neither of these cases is a system of relatively unqualified, durable property rights in place.

The general difficulty facing the strong appropriation theorist who starts from a state where appropriation requires universal consent is that he is trying to create property out of contracts. What he needs to show is that there is a fairly well-defined structure of rights, good equally against all, that can be held over most objects. But what he has to work with in these scenarios is a group of contractors distinguished by their abilities, situations, desires, and generations. The nature of the bargaining situation works against him, tending to yield rights-structures that vary across time, that vary in strength, and that vary even according to what persons they relate. These tendencies make any proof of strong property from universal consent seem highly unlikely, and so should make any initial state of

nature that involves common-ownership, including hybrids, unattractive to the strong appropriation theorist.⁴

3. The challenge to strong appropriation theory

I have tried to show that arguments for ascribing a right to create strong property entitlements must begin from a state of no-ownership. This conclusion should not discomfit Lockean-libertarians, since no-ownership is the context that they most often assume for their arguments. But now, when we examine a no-ownership state more closely, we will find that it contains a significant justificatory challenge for the strong appropriationist position.

In the no-ownership state before acquisition each person has broad rights to use natural resources, within the limits of the bodily rights of others. From this starting point all variants of strong appropriation theory grant to each person the right to create in herself property rights over some objects, by performing some specified action, under certain conditions, and without the consent of any other person.

It is specifically the grant of this power to create property rights that raises the justificatory challenge for original acquisition theory, because the exercise of this power causes such dramatic moral changes. Before acquisition, each inhabitant of the state of nature may use, consume, damage or destroy anything, just as she likes. After acquisition, every person but the acquirer has a duty not to disturb the acquired thing without the acquirer's permission. The acquirer in exercising her acquisitive right imposes a duty on each non-acquirer with respect to the acquired thing, and without any non-acquirer's consent. By the exercise of the acquisitive right, the acquirer unilaterally imposes duties on everyone else. Moreover, the acquirer typically imposes these duties intending only her own advantage, and since they are strong duties they may be burdensome to those who bear them.

⁴ Nor will tacit consent help where actual consent theory is troubled. Tacit consent does not speak to any of the problems above, and it adds problems of its own. For the more tacit the consent, the less likely that people have tacitly consented to strong property rights. In every new situation, some person could always claim that she had not tacitly agreed to rights that were unconditional in that way (or that could be held over those objects, or that could last so long). Neither can the strong appropriation theorist improve his position by saying (with Pufendorf 1672) that the bargains that generate property begin locally, and only become more universal as groups expand and agree to respect each other's local agreements. None of the arguments above traded on the difficulties of getting all persons together to bargain; all turn on the difficulties that ensue once a group of any size is assembled.

Because of this unilateral imposition of potentially burdensome duties, the ascription of a right to acquire “cries out for a justification” (Waldron 1988, p. 271). Indeed, Waldron argues that the peculiar properties of a natural right to original acquisition are sufficient to consign it to a philosophical bestiary. Original acquisition, were it possible, would be the only act we recognise by which one person could create potentially burdensome duties in others without the others’ consent (Waldron 1988, pp. 266–71).⁵

It is not merely the singularity of the act that is worrisome. Imagine an analogous right to impose potentially burdensome “contractual” duties on another person for one’s own advantage (say, a duty to perform at dinner-times, or to get out of Dodge). Such a right seems almost impossible to justify. How much more justificatory weight must there then be to ground a right to acquire property, by which one person can impose potentially burdensome duties on everyone else at once? This line of questions should be especially worrisome to libertarians, who generally treat involuntarily-imposed duties as anathema.

I will organise the Lockean-libertarian arguments in favour of the natural right to appropriate around this challenge of showing how potentially burdensome duties can be created in others without their consent. This organization will make the strong appropriation theorist appear to be giving what trial lawyers call a “four dog defense”.⁶ First I will consider arguments that original acquisition in fact creates no new duties in others; second, arguments that acquisition creates new duties in others but that these duties are not burdensome; third, that acquisition creates burdensome duties in others but that the acquirer deserves what he gets; and, fourth, that it creates burdensome duties in others without desert but that the burdens can be compensated for. As in a trial, the case will be won if any of these arguments succeeds. I aim to show that only the last dog will hunt, and then only if it pursues according to the vector-sum path.

4. Labour-mixing and incorporation

A strong appropriation theorist might initially try to meet the challenge of justification by adapting two arguments of Locke. The first is that a person can come to have rights (our theorist says “strong rights”) over unowned

⁵ For debate over Waldron’s thesis, see Gaus and Lomasky (1990) and Simmons (1994).

⁶ “I own no dog”; “That’s not my dog”; “My dog doesn’t bite”; “My dog didn’t bite him”.

objects by mixing her labour with the objects.⁷ The second is that a person can come to have rights over unowned objects by making the objects part of her body.⁸

These arguments are both notable for their attempt to generate property without creating any “new” rights. How this is supposed to work in labour-mixing is familiar. Labour is a substance over which the labourer has property-type rights, and this substance comes to be dispersed throughout the object laboured upon. Through mixing, rights previously confined to the labourer’s body come to reside farther afield. The incorporation argument, on the other hand, is one that Locke applies only to food; but Samuel Wheeler (1980) provides the necessary extension for other types of resources. Any object, Wheeler claims, can come to be part of one’s body when it becomes analogous to an actual or possible body part. Thus an artificial leg becomes a body part when it is used like a real leg; clothes qualify through analogy to fur, a mansion is analogous to a shell, and so on; in a very real sense “your property *is* your body” (Wheeler 1980, p. 184).⁹ Here the incorporator’s extant bodily rights are merely “stretched” to include more body, as they would stretch if he became more portly.

Both arguments have an air of sophistry to them, and it is not hard to compile a list of serious objections. To the incorporationist it may be pointed out that the rights we intuitively assign to our undetached body parts do not include rights of transfer; so even if, say, houses could be “incorporated” as suggested they would not become property strictly speaking. To the labour-mixing theorist the most obvious objection is that there is no “substance” that is both mixable with external objects and the object of personal rights (see Waldron 1988, pp. 180–3). Labour is an activity, not a substance; indeed, “mixing one’s labour” may be incoherent in logical form, as it is the same form as “mixing one’s mixing” (see Waldron 1988, pp. 184–7). And the extent of what one would acquire by labour-mixing is uncertain in any case (see Nozick 1974, p. 174).

Even if these objections could be overcome, both arguments can be shown to be poor responses to the justificatory challenge by an adaptation

⁷“Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to” (Locke 1689, p. 288).

⁸“The Fruit, or Venison, which nourishes the wild Indian, who knows no Inclosure, and is still a Tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it” (Locke 1689, p. 287).

⁹ See also T. H. Green: “These [appropriated] things, so taken and fashioned, cease to be external as they were before. They become a sort of extension of the man’s organs, the constant apparatus through which he gives reality to his ideas and wishes” (Macpherson 1978, p. 115).

of Nozick's famous "tomato juice" argument (Nozick 1974, pp. 174–5). Nozick asks why when mixing one's tomato juice in the sea one should think that one is gaining the sea instead of losing one's juice. Similarly, we can ask the strong appropriation theorist why, even if bodily rights could be dispersed or stretched, we should construe the extensions as strong rights. As we saw with the right to bodily integrity, we acknowledge bodily rights because of the way these rights protect significant interests of the person whose body it is (in being free from pain and distraction, in being able to carry out complex plans of action, etc.). Yet the bodily rights we recognise are qualified, and many of the qualifications come in circumstances where recognising an unqualified right would be too costly to others (as when the rights-holder is an aggressor). Bodily rights that were mixed into or stretched over objects that are insensate, or detached, or not under the conscious control of the acquirer would be that much less connected to the acquirer's interests. Moreover bodily rights that extended to scarce goods or spaces would be that much more costly to others. So even an acquisition that created no "new" rights could not give rise to property rights that were strong rights.

5. Value-creation and provisos

A second strategy of the strong appropriation theorist would be to admit that acquisition creates duties in others, but to deny that these duties are even potentially burdensome. Authors defending original acquisition often use this strategy, if only in giving examples that draw the reader's attention toward acquisitions of trivial importance—such as Locke's "He" who gathers acorns under an oak (Locke 1689, p. 288), or Rothbard's sculptor moulding found clay (Rothbard 1974, pp. 109–10), or Nozick's grain of sand taken from Coney Island (Nozick 1974, p. 175).

A more serious version of this strategy could be drawn from other passages in Locke: "'Tis Labour indeed that puts the difference of value on every thing", a difference in value that he successively estimates at 9/10, 99/100, and 999/1000 of the total (Locke 1689, pp. 296–8). The thought here is that the duties created by acquirers are not onerous because the things acquired are of little value. No one can be made much worse off by being excluded from some marshland and a little seed, it might be said, and it is the labourer's own efforts that turn these into smiling fields.

Adding value to nature, in itself, seems too flimsy to support strong private property rights. For the possibility is always open that an improver is merely adding value to the commons. Moreover even if property were in the offing we can ask, as Nozick does, why an improver should get an entitle-

ment over everything she works on instead of only the value she has created, and whether we can ever know what that value is (Nozick 1974, p. 175).¹⁰

Beyond these objections is the problem of keeping the value-creation argument from drawing its force from other arguments, which either admit that the imposition of property duties is onerous but say that the corresponding rights are deserved (perhaps because the labourer has created value), or admit that the duties are onerous but claim that the burdens on others will be compensated (perhaps when others gain access to the value the labourer creates).¹¹

Once these arguments are separated out the value-creation strategy is without hope. For one thing, it can be burdensome to be excluded from materials with which one could create value oneself (Wolff 1991, pp. 104–5). For another, it can be hard to be excluded from a valuable good regardless of the origin of that value. One of the most notable features of strong property rights is their duration—the fact that they persist through changes in the value of their objects. The acquisition theorist can hardly declare a strong right trivial just because its object is not valuable today.

The strong appropriation theorist might instead try to reduce the burdensome nature of his favoured rights by altering parts of his original acquisition theory. Thus he might restrict the conditions in which acquisition is possible to those in which there is enough and as good left for others, or he might reshape the rights that acquisition generates.

As for “enough and as good” provisos, they will prevent potentially onerous duties being generated only at the price of prohibiting the acquisition of any scarce good. Or, to put it differently, the more scarce the goods that can be acquired under such a proviso, the more potentially onerous will be duties that acquisition can create. The point about duration carries through here too: the rights generated by acquisition may last forever, so the proviso will only acquit acquisitions of being burdensome if there will always be enough and as good.

¹⁰ Worries such as this one lead Becker (1977) and Gaus (1989) to say that labouring cannot effect property rights over land and other natural resources, since these are not produced. For a detailed examination of Locke on value-creation and land, see Cohen (1986b).

¹¹ For example, another of Locke’s quotes about value-creation:

He who appropriates land to himself by his labour, does not lessen but increase [sic] the common stock of mankind He, that incloses Land and has a greater plenty of the conveniencys of life from ten acres, than he could have from an Hundred left to Nature, may truly be said, to give ninety acres to Mankind. (Locke 1988, p. 294)

In this argument it is not the “greater plenty of the conveniencys of life” that is doing the work, but the fact that non-enclosers are better off because the encloser no longer roams the other ninety acres. This is an implicit compensation argument, and so not the sort of argument we are looking for here. On the argument of this particular passage in Locke see also Wolff (1991, p. 104), Cohen (1986b).

The final version of this strategy would be to qualify the rights generated by original acquisition so as to limit the burdens that these rights impose on others. As noted above, the blameless needy might get a right to expropriate, or a right to harmless trespass might be granted. This tactic would reduce the pressure on strong appropriation from specific objections like those of Waldron (1988, pp. 267–8), who complains that the property duties imposed on non-acquirers can limit food supplies or make it hard to care for children.

Yet these sorts of qualifications underestimate the negative impact that strong property rights can have on what appear to be the legitimate interests of non-acquirers. Because of Locke (1988, p. 291) we tend to think of non-acquirers as lazy louts thwarted from pinching “the benefit of another’s Pains”. Yet non-acquirers faced with strong property rights would also have no recourse, for example, when land they could use went uncultivated, when sites of great natural beauty were whimsically destroyed, when huge pornographic balloons were floated nearby, or when the Old City was sold to the Other Side. The strong appropriation theorist cannot qualify acquired rights to mitigate all of the possible negative effects of strong rights, because after the qualifications no strong right would be left. Strong rights are pointless unless they thwart many seemingly unobjectionable desires of non-owners; for if other people do not care much about what you do with some thing, why shouldn’t mere possession or a weak property right be enough?

6. *Desert*

The original appropriationist might now acknowledge that acquisition creates at least potentially burdensome duties, yet stake his claim on the acquirer deserving the corresponding rights. As Gaus and Lomasky (1990, p. 498) say, “a basic appeal of state of nature/original acquisition stories [is that] they fix a spotlight on the intuition that producers deserve to own the fruits of their labors”.¹² Could desert be the basis of a natural right to strong property acquisition?

Once again we must work to get a clean intuition supporting the thesis. Certainly the mere expenditure of effort need deserve nothing (or nothing beyond bemusement or pity). To be a candidate for deserving property rights, the fruits of one’s labour must be sweet. Yet to whom do we imag-

¹²Several theorists have opted for desert-based justifications for property rights in recent years, although they have also qualified both the conditions in which appropriation is allowed and the property rights generated. See Becker (1977, pp. 48–56), Munzer (1990, pp. 254–97), Gaus (1989).

ine the laboured-upon thing becomes more valuable? If one's labours produce something that will only ever be valuable to oneself (such as pink-enameled driftwood),¹³ a reward of strong rights seems inappropriate if others will remain indifferent to it, there is no need for strong rights; and if others are averse to it, scorn seems more deserved than sanction. On the other hand, if the product is valued by others then we must again be careful to separate our intuitions about desert from the thought that non-acquirers may somehow be compensated for the duties imposed on them (for example, by gaining a chance to trade for the valuable good).

The intuition behind the desert argument seems most pure in the thought that a labourer is deserving when she expends effort to produce something that is objectively valuable, independent of the possible compensation that this value might provide for those who must render what the labourer deserves. (Perhaps Rothbard's sculptor working on found clay is an example.) There are threshold problems for making this intuition into an argument. The strong appropriation theorist wants to say that strong property rights are the appropriate reward for such effort, yet he must say why (or when) rights are deserved instead of, say, fame or gratitude. Also, he must fashion a correspondingly strong penalty for those who decrease the value of the commons (what happens if it is a very bad sculpture?) (see Becker 1977, pp. 48–56).

Yet the strong appropriation theorist's real problem is matching desert, which is a scalar magnitude, with his point-like set of favoured rights. We might wonder first whether any productive effort is so tremendous as to deserve rights to exclusive use that echo through the ages. Second, and more importantly, the desert theorist must explain why an improvement of greater value should not create a property structure that is more unqualified or that lasts longer. Even if Praxiteles could generate everlasting rights by his crafting, it is hard to see how my efforts would deserve more than a temporary reprieve from the kiln.

The strong appropriation theorist may be coming to a renewed appreciation of the states of nature that required universal consent to generate private property rights. For all of their difficulties, at least these states gave clear grounds for preferring a strong property structure (the salience of these rights as the solution to a bargaining problem). When the strength of the property structure cannot be taken for granted, it becomes harder to find arguments that point to exactly the right thing. But the strong appropriation theorist has one strategy remaining before he must take his chances with the vector-sum approach.

¹³Nozick's example of something made less valuable (Nozick 1974, p. 175).

7. Acquisition with compensation

The situation now stands as follows. The burden on the strong appropriation theorist is to justify the unilateral creation of relatively unqualified and durable private property rights. We have narrowed the possible strategies whereby this burden might be discharged to one that grants that non-acquirers must be compensated for the burdens that acquisition imposes on them. This is Nozick's (1974) strategy as indicated by the proviso on the principle of just acquisition:

A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened Someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened. (Nozick 1974, p. 178).

As explained above, each instance of strong appropriation renders someone potentially worse off in at least some respect; otherwise there would be no point to the creation of a strong right. This means that the strong appropriation theorist must potentially require compensation to non-acquirers for every act of acquisition. There are two ways that compensation could be effected, and only one is serviceable for generating the entitlements that the strong appropriation theorist desires.

The first way, suggested by Nozick's proviso and a few of his examples,¹⁴ is to require that the burdens imposed by each act of acquisition be compensated by the acquirer—either directly through side-payments to the non-acquirers or indirectly through the benefits that flow to others from the acquirer's having private property rights (such as increased opportunity for trade). This first way is blocked by two practical obstacles.

First, the level of compensation required to bring each non-acquirer back to her pre-acquisition state will vary from person to person, according to how onerous the property duties imposed on each person turn out to be. It may be a real pain for one man to observe his neighbour's newly-acquired right to exclude from a plot, yet only an occasional inconvenience to another man. In fact these complexities may be even greater, since there is no reason to expect that any indirect compensation generated by property acquisition will correlate with the onerousness of that acquisition for any particular person.

Second, compensation must be ensured for each person for the entire duration of the property right, which (given the transferability of strong

¹⁴In particular, the examples of water in the desert, the newly discovered medicine, and the inventor's patent (Nozick 1974, pp. 178–80).

property rights) is essentially forever. This means that either some estimate of future burdens must be made for each person for each acquired resource and this compensation received instantly, or that the process of compensation will be ongoing as the relative onerousness for each person becomes apparent over time. Nor can ongoing compensation be avoided in any case, for latecomers will be owed compensation for the duties that acquisition imposes on them, and latecomers cannot be compensated in advance.

The practical difficulties surrounding the first way of effecting compensation should push the strong appropriation theorist toward a second way, which is suggested by Nozick's wider references to the overall benefits of capitalism.¹⁵ By this argument, private acquisition that generates strong property entitlements is permissible because the operation of the system of property that emerges from individual acquisitions is not to the net detriment of anyone. The justificatory burden is discharged, that is, by showing that each person is on the whole no worse off in a world where strong property entitlements can be generated unilaterally. Compensation is handled not individually, but systematically.

This argument runs better where we have seen others stumble, because it includes a solid rationale for strong acquired rights. The stronger the system of rights, the fewer the qualifications and thus the fewer the rules that all must learn. And the lower a system's information costs, the more likely it is that it can provide adequate compensation.

Yet the justificatory foundation of this type of argument has not yet been located. At first, the argument seems to be grounded in some principle of natural freedom to engage in types of acts that are harmless. "One is free to pursue one's own good", such a principle might read, "so long as one's acts (perhaps when combined with similar acts of others) are not to anyone's detriment". If the system of property generated by strong appropriation does its work, then each individual acquisitive act will be part of a class of acts that together have no ill effects. It seems immaterial that it takes similar (predictable) acts of others to ensure that one's own act is permissible. My graffiti might be by itself a defacement, but if others also take up a spray can the result may be pleasing to all.

Can this principle of natural freedom anchor an adequate justification of original acquisition? The economist's familiar admonition to respect opportunity costs makes it doubtful. There can only be one property system in effect at a time. If original acquisition is generating strong private property rights, it is not generating another possible property

¹⁵ Especially the list of "the various familiar social considerations favoring private property" (Nozick 1974, p. 177), the footnote on Fourier (pp. 178–9), and the remark on about the "free operation of the market system" (p. 182). Wolff (1991, pp. 109–12) endorses reading Nozick in this second way.

system. But what if some other property system were better for everyone than a strong system? Or better for some people and not worse for others? Could it still reasonably be claimed that strong appropriation were acceptable, since a system of strong rights was adequate to compensate for its own burdens? To the contrary, isn't the relevant level of compensation for strong appropriation not the no-property state of nature baseline, but the baseline of the best property system that could be generated in the strong system's place?¹⁶

Once compensation "goes systematic" it is hard to see how this conclusion can be resisted. Consider the people living in a property system generated by original acquisition who could do better within some other system. They should be compensated, if compensation is possible, not only for the particular costs imposed by others' acquisitions, but for the opportunity costs of living in that property system instead of the system better for them. This implies that between two systems, if one is better for some and worse for none, then only that better system is acceptable.

The underlying justification for the systematic compensation argument now seems less like a principle of natural freedom, and more like the sort of benefit-cost reasoning with which this essay began. The strong appropriation theorist must prove that the system of strong property rights provides significant benefits, at a reasonable cost, and does so better than other systems that might be put into effect. He must show that a system of strong property rights is more reasonable than a weaker system of private rights, or a system of non-private rights, or a mixed system, or no property at all.

Moreover, the appropriation theorist must specify the interests against which benefits and costs are to be measured. It will not do simply to stipulate that people's interests are in the satisfaction of whatever desires they happen to have, nor to restrict the range of relevant interests artificially. The appropriation theorist must detail the interests that differently-shaped property rights protect and foster, in order to show that his favoured rights produce the array of interests that some larger normative theory would accept as most reasonable. If these rights turn out to be strong rights, so be it. Strong appropriation theory has been brought back to the vector-sum approach.

Perhaps this should not be surprising. The problem that laid the justificatory burden on the strong appropriation theorist was that property acquisition seems to be the only act by which one person can impose potentially burdensome duties on others without their consent, which duties are to the imposer's advantage. Yet property acquisition is not the

¹⁶ For worries about setting the baseline for compensation, see also Cohen (1986a), Kymlicka (1990, pp. 112–7), Wolff (1991, pp. 112–5).

only act that can generate onerous duties in others simply without their consent. Such duties are generated by every human birth. You do not consent to the relatively strong duties to respect bodily integrity that are imposed on you whenever a child is born. Nor is it plausible to deny that such duties can be onerous—as anyone stuck aboard an airplane with a newborn can attest. Yet the vector-sum approach to rights works out well for the right to bodily integrity, so it should work for property rights too.

8. *Conclusion*

The strong appropriation theorist may balk at being singled out specially to face the challenge of showing that his preferred set of rights is one that could be generated from a state of nature. As Nozick says, “it is not only persons favoring private property who need a theory of how property rights legitimately originate” (Nozick 1974, p. 178). The same point could be made for strong private property. Doesn’t everyone need to show how her favoured property system could originate, regardless of the property system she supports?

In general, I do not believe so. Were we to find the most reasonable system of property rights for us now using the vector-sum approach, the most important thing would be to move our rules of property toward that structure as smoothly as possible, relative to the various interests now at stake. It is only the strong appropriation theorist who believes that what happened in a state of nature, or what could legitimately happen there, might constrain our present choices about which property system to move toward. Other theorists (including those who merely believe that strong property rights are best for us now) do not need a theory of original appropriation, because their theories are compatible with any number of possible histories of legitimate property rules. What they need is a theory of transition.

Except, of course, that every theorist needs to say something about the original appropriation that is still possible for us (say, in Antarctica or on other planets).¹⁷ For these cases every property theory will indeed need to face the problems of selecting a justifiable appropriative mechanism. But these cases will be ones that extend, not that create, a system of property rights, and so will be at the periphery not the core of a theory of property.

Finally, all of the objections to strong appropriation theory above might make it seem as though I am claiming that there could be no private rights

¹⁷ The importance of contemporary appropriation is stressed by Schmidtz (1994) and Simmons (1994).

over resources whatsoever in a state of nature. And that claim seems counterintuitive, considering straightforward Lockean examples like the industrious farmer who has toiled to raise a crop. Wouldn't a brigand who carried this crop away violate some right in seizing "the benefit of another's Pains"?

There may well be a natural right to non-interference with resources that resembles a property right in many respects.¹⁸ When a person in a natural state is engaged in an extended activity that uses or relies on some object, and when this activity is part of a plan to secure material sustenance, then (under certain conditions) it seems plausible to say that others ought not take that object to use it for their own purposes. It seems plausible to ascribe such a right because it seems plausible that people have strong interests in being able to engage in connected sequences of actions that are intended to sustain life and that require certain objects to remain undisturbed. The intuition that there are such interests and that they should be protected is a firm one, and it draws us when we think of the "Pains" that a person might take in Locke's state of nature. Yet this natural right of non-interference falls short of being a strong property right. The intuition that supports the right responds poorly when the "acquired" resource remains unused or is wasted, when it is used to insult or offend others, when it is part of a surplus of possessions, and in situations of general need. Nor does the intuition support a strong right of transfer. The interests that people have in being able to use a resource as part of an extended plan of action are important ones. Yet these interests constitute only one set of vectors that can influence the nature of the property rights that we should recognize.¹⁹

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¹⁸This point is derived from Scanlon (1987), from which Simmons (1992, pp. 273–4) also draws.

¹⁹Many thanks to Robert Nozick, T. M. Scanlon, Steven Gross and Miranda von Dornum.

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