Towards a hybrid theory of Property Entitlement, from a combination of Lockean and Humean elements.

Humphries, Simon James

Awarding institution:
King's College London

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Simon J Humphries

PhD Philosophy

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ABSTRACT

John Locke's approach to property rights is often seen as inherently unsatisfactory in today's world, because of problems in a number of areas, significant amongst which are difficulties in tracing a historical chain from just initial acquisition to current title and a certain imprecision which seems unavoidable within the theory. As a result, a more conventional approach has tended to predominate. This might be thought to be exemplified by the writings of David Hume. In this essay, I argue that liberal rights assumptions can give rise to genuine Lockean-style property claims, because these seem to do justice to a number of our ethical intuitions, and that these need to be incorporated in our ideas of how property title is justly acquired. I suggest that these intuitions relate to the genesis of property rights, whilst Humean thoughts are often more relevant when we are unable to properly trace such genesis. I also suggest that conventionalists should not dismiss Locke, nor *vice versa*. Instead we need a hybrid theory that incorporates both elements. I do not reach a final conclusion on how the two might be brought together, but suggest a way forward for this endeavour.

Locke's theory is one about how property gets going – so indeed is Hume's. But thoughts about property rights today are not so much about how they get going, but about how they are properly instantiated in today's world. These thoughts seem to demand a conventionalist approach. But no such approach can avoid thoughts about the genesis of such rights. My thesis departs from the current day emphasis, because it focuses on the genesis of property rights and suggests that considerations around such matters are not to be avoided.

I do not claim to have the final solution to this problem: my purpose is to bring this intellectual conflict to people's attention. I seek to point the way to a complex theory of property rights and give some support to it.

PhD. Thesis: Simon Humphries **(Tutor: Tom Pink)**

Title: Towards a hybrid theory of Property Entitlement, from a combination of Lockean and Humean elements.

PREFACE

John Locke's approach to property rights is often seen as inherently unsatisfactory in today's world, because of problems in a number of areas, significant amongst which are difficulties in tracing a historical chain from just initial acquisition to current title and a certain imprecision which seems unavoidable within the theory. As a result, a more conventional approach has tended to predominate. This might be thought to be exemplified by the writings of David Hume. In this essay, I argue that liberal rights assumptions can give rise to genuine Lockean-style property claims,[1] because these seem to do justice to a number of our ethical intuitions, and that these need to be incorporated in our ideas of how property title is justly acquired. I suggest that these intuitions relate to the genesis of property rights, whilst Humean thoughts are often more relevant when we are unable to properly trace such genesis. I also suggest that conventionalists should not dismiss Locke, nor *vice versa*. Instead we need a hybrid theory that incorporates both elements. I do not reach a final conclusion on how the two might be brought together, but suggest a way forward for this endeavour.

Locke's theory is one about how property gets going – so indeed is Hume's. But thoughts about property rights today are not so much about how they get going, but about how they are properly instantiated in today's world. These thoughts seem to demand a conventionalist approach. But no such approach can avoid thoughts about the genesis of such rights. My thesis departs from the current day emphasis, because it focuses on the genesis of property rights and suggests that considerations around such matters are not to be avoided. The thought is that these rights are natural and

[1] I call this approach quasi-Lockean, for reasons which will be detailed in Chapter 2.

based on the idea that labourers, using their own resources, or where no just prior ownership in the resources they use can be justified, have a right to what they invest in. This is based on the thought that, to deny them this right, would represent a theft of their labour. When I talk of 'labour-mixing' in a 'Lockean' sense, this is what I shall be referring to – not an idea that labour is literally being mixed with the physical object in question.

The thought that the two approaches might be melded is perhaps counter-intuitive since Locke starts from a position of land aplenty while Hume commences from one of scarcity. Modification to both approaches is thus required. Additionally, I suggest that, provided, we do not depend on any reference as to what God's wishes for mankind may be, the so-called 'Lockean Proviso' is not an essential part of the labour-based theory. Since my approach does not depend on the existence of God, any such omission is not pertinent to my argument. My claim is not for a natural right to property: I claim rather that property rights arise, in part, through an amalgamation of certain 'natural' rights in the person and acts with regard to the external world, together with the incorporation of certain conventional elements. Pre-supposed however, within this approach is a natural right to the practice of private property, which in turn arises from the fact that, prior to human intervention, the external world is unowned. My argument starts from a Lockean position, amends it, and then adds certain conventional elements drawn from Hume and attempts to see how the two might be joined and further attempts to identify where areas of conflict seem to arise. Because I suggest that rights in property can arise through a natural process, I am generally averse to the thought that utility can usually overrule such rights – I do suggest however, that such trumping might be appropriate in a minority of cases.

I state at the outset that my approach is an exploratory one. I do not claim to have the final solution to this problem: my purpose is to bring this intellectual conflict to people's attention. I seek to point the way to a complex theory of property rights and give some support to it. In line with Robert Nozick, I agree that "there is room for words on subjects other than last words".(*Anarchy, State and Utopia*, 1974, xii) My key point is that we need to take a Lockean-type, natural right to property, under certain conditions, into account in any theory of just property ownership.

In Chapter 1, I outline a case for a set of liberal rights in the person. I follow this in Chapter 2, by suggesting that such rights can generate rights in the external world, when persons, or groups of persons, labour on raw materials that no-one can claim any right to. I do suggest that the Lockean approach is not always precise as to the extent of such rights. In Chapter 3, I suggest that the so-called 'Lockean proviso' does not undermine previously established property claims, except in very constrained circumstances. I suggest, too, that the Lockean account relies not only on just initial acquisition, but a chain of voluntary transfers, if the initial acquirer no longer owns the rights. In Chapter 4, I investigate similarities and differences in the Humean approach, and suggest a way the two may be brought together. In particular, I suggest how the idea of prescription may be used to solve some of the issues posed by lack of clarity in the historical transfer chain.

BASIC ASSUMPTIONS

Chapter 1.

There has been no more widespread or enduring intuition about property rights than that labor in creating or improving a thing gives one special claim to it (John Simmons, 1992, 223).

Such intuitions may seem to underlie the theories of how persons come to acquire property for thinkers as diverse in their conclusions as John Locke and Karl Marx.[2] My intention in this essay is to explore this intuition, and see in what sense, if any, we may able to ground it. My approach will necessarily be quite selective. I will focus primarily on the writings of Locke, David Hume, and later writers who follow in their traditions.

Today, we tend to see property rights in a conventional light. The law of the land defines the extent of such rights, the means of just transfer, and so on. The Lockean natural rights approach suffers a number of deficiencies, the most worrying of which would seem to be that it is very difficult to establish a suitable chain of transfers from just initial acquisition to current title. In addition, it seems not to provide a definitive approach to how boundaries are set. Despite this, it is my conviction that, following from a set of initial rights in the person, we can justify the thought that unused property can be acquired in an ethical manner and that it would be wrong to take such property from the acquirer. In as far as this is the case, it seems that a purely conventional account leaves important elements out of the equation. Setting out the reasons for this, is the first basis of this essay. In addition, I suggest that, in many respects, the 'Lockean' approach is often compatible with a conventionalist one. [3] I do not suggest that I have completed such a reconciliation: in this respect my account is in need of much further work. I do try and indicate, however, some ways in which the

[2] Possibly Marx should be interpreted in terms other than those of justice.

[3] My account differs from that of Locke and, for this reason, I have described it as 'quasi-Lockean'.

two traditions might be reconciled. I do not suggest that a conventionalist approach will not end up being dominant: rather I suggest that Locke tells us something of great import, which must be included in any account of just property rights.

I commence with a justification for a quasi-Lockean approach in Chapter 2, followed by a discussion, in Chapter 3, of why the so-called Lockean proviso may have less impact on the argument than some writers in the 'left-libertarian' tradition have suggested. I discuss some elements of a Humean reconciliation in Chapter 4.

In this first chapter, however, I begin with an introduction to the debate. I will set out to do two things. I will explore some issues related to property rights and their complexity. I will suggest that, despite this complexity, we can nevertheless form an understanding of what it is to say that we have an ownership right in some aspect of the external world. I will also explore some of the foundations on which an idea of personal liberty can be based. I do not seek to ground such a view in a comprehensive way, since that would divert from the main thrust of the project: rather I give some pointers as to why a liberal standpoint may be viewed sympathetically. This is important, as the analysis that follows is based on an acceptance of the idea of personal liberty and, in particular, the thought that one should be deemed to be the owner of one's labour, in the absence of an agreement to cede it to another. In as far as this is rejected, the remainder of the essay may seem to be largely academic. This is a consequence of focusing on how property rights may flow from a starting point based on individual freedom.

Many (probably most) people intuitively think that working on some previously unworked and unowned object certainly conveys some rights – if only to that which is finally produced by using it. It would commonly be perceived as unjust, if someone, who had neither worked on an object, nor could demonstrate any good reasons for believing that he somehow 'owned' it, (as a result, say, of previous actions or agreement), were nonetheless to claim an ownership right to it, superior to that of the original developer. (We might note, in this connection, that any such claim would presumably need to be accompanied by force, in the event of the existing occupier being reluctant to cede control. Thus a right of ownership lying in the initial developer

may be seen as a means of keeping the peace.) The fact of these intuitions, of course, does not mean that we might not also have countervailing intuitions. We might, for example, acknowledge such intuitions whilst at the same time believe that, in the event of significant inequality, they should be over-ridden so that inequalities can be ameliorated. The claim is thus only a *ceteris paribus* one.

In the modern age there is little that does not come with some claim of ownership attached to it. Intuitions, under these circumstances, are generally that an object belongs to the current owner, because it has been obtained, under conditions of mutual consent, from a previous owner. But such prior ownership can only be a candidate for being just, if originally there was an initial just acquisition of the various raw materials involved in producing the object in question. Without this, the whole pack of cards on which the ownership of the object depends, begins to unravel. As David Schmidtz says rather nicely:

> The typical method of acquiring a property right involves transfer from the previous owner. But sooner or later, that chain of transfers traces back to the beginning. That is why we have a philosophical problem. How does a thing legitimately become a piece of property for the first time? (Schmidtz, 1994, 42)

There is no reason for supposing that such ownership should be by a solitary individual. We accept ownership pertains in partnerships, co-operatives and private companies. At the outset, there is no obvious reason why such joint ownership might not also apply in cases of initial acquisition. There is nothing suggested in this essay that excludes the idea of tribe or collective ownership. The point in question is whether there can be a certain exclusivity vis a vis non-owners, that can be justified from an ethical standpoint.

When I talk of property in this essay, I will not cover all aspects that could or are sometimes described as property. My discussion will focus on what might be seen as a sub-domain within a wider definition. In particular, I will discuss property as referring to ownership (or quasi-ownership) in certain tangible assets, including land and natural resources, money and cashable rights. I will not discuss property in ideas, even though these may often be called property, in part, because the arguments I shall

discuss do not obviously encompass such ideas of property. I will not consider arguments for thinking that one might have property in others, because such ideas will be inconsistent with a more general approach to individual rights. My concept will relate to person-object relationships, under which the person or persons have certain rights to control the object or where justice suggests that they should. These senses of 'property' may well be stipulative within a wider definition. I do not intend to make some point about what should or should not be called property. I merely set the bounds of this essay. It is generally in tune with a lay definition of property and does not include the thought that one might be said to have a property interest in such things as welfare entitlements. The definition I have chosen will be explored further, later in this section. When I later sometimes speak somewhat approvingly of self-ownership, or ownership of one's labour, I do not suggest that the idea of ownership is literally applicable in these cases, in the way that it might be in tangible assets – only that a relationship to oneself or to one's labour ought to be such that it is as *though* such ownership were the case, because the rights ought to be just such that they are equivalent to ownership, with the exception that ownership cannot literally apply. The main thought is that others ought to treat oneself or one's labour as though they were owned by the individual concerned. 'Self-ownership' becomes a conclusion from certain assumptions about rights, rather than a starting point for such rights.

It is also worth also noting that any idea of property rights can be addressed in either a legal or a philosophical way (there may be other approaches as well). My focus in this essay will be primarily philosophical. I shall explore, not how we come to acquire a property right in any legal sense, but rather, if and how, we can come to acquire one in an ethical sense – in a manner that could be recognized as morally just, regardless of what the law of the land may have to say. This does not mean that legal issues can always be avoided – they may indeed help us to clarify just what we mean by a property right. It should also be pointed out that, for certain philosophers, of whom Hume is one, legal rights are, in certain circumstances, constitutive of moral rights. But this does not detract from my comment in the earlier sentence, since even if the legal right is the grounding for the moral right, it is the latter that I shall be interested in.

Any theory we might develop on property rights may have a very strong influence on the rest of our political philosophy, for there is little that any human being can achieve without access to the external world. If it is believed, with John Locke, that persons can gain a right to previously unowned property as a result of certain actions, this may lead to a society bearing resemblance to Robert Nozick's brand of libertarianism, as outlined in *Anarchy, State and Utopia* (hereafter *ASU*). Conversely, proponents of a Marxist approach based on a labour theory of value might argue that all property should be invested in the state.[4] The question of just property rights may thus be seen as a key element in any political philosophy. This is particularly so, since it is clear that any set of personal rights are of little real value, unless they involve the ability to interact with the external world.

a) Some introductory thoughts on Property Rights

John Stuart Mill in *Principles of Political Economy* states that:

> The institution of property, when limited to its essential elements, consists in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or fair agreement, without force or fraud, from those who produced it (Mill, 1994, 25)

This encapsulates both the normative elements in the case I shall examine later in this essay and also the description that we typically apply to a property right. It is a right to control a particular resource. Similarly, Thomas Scanlon says that a system of property is "a set of rules defining the conditions under which a person owns an object and specifying the extent and character of the rights of owners" (Scanlon,

[4] I do not suggest this is the only interpretation. Merely that the question of how property rights might be established has profound implications.

1981, 124). JW Harris, likewise, sees the two essentials for any property regime as being trespassory rules and the ownership spectrum (Harris, 1996, 5).

We might potentially have property in many things, including weightless objects, such as information or copyrights.[5] Nonetheless, it is often thought that there is something special about land and other raw materials.[6] This, for example, was the basis of Henry George's claim that property is the only thing that governments have a right to tax. His view was that an increase in the value of raw land was unearned, and should not inhere in the owner. This is often coupled with the (rather unsophisticated) thought that raw materials are commodities that cannot be multiplied. More importantly however, land and raw materials seem to lie at the root of other property rights, in that it is difficult to generate other objects without their use. So they do seem to represent a paradigm case, and for this reason they will be the main focus of this essay, but without any suggestion that property in other material objects is excluded.

One important aspect of any theory of property rights is just what is involved in a right to ownership in something. Unsurprisingly, the subject is more complex than might initially appear. Let us suppose that I claim ownership in a particular object. This is a claim to a right in *rem* that prevails against all others. The simple thought is that only I can claim primary right to control the use of that thing, including a right as to how it may be alienated. An alternative view is that a property right is a right to benefit rather than to control. Something like a parson's freehold might be said to fit this viewpoint. The parson has the right to live there, but not the right to cede, or indeed, do much other than live there until his death. The right to benefit, in this case anyway, seems much less than the right to control. Nevertheless, the fact that it is called a freehold seems to suggest that it is seen as a property right and I do not suggest that it is not. Often, a property right will consist of a bundle of rights, sometimes held by one agent, sometimes by two or more. In fact, if control itself is seen as a benefit, then we might see a right to control as a right to benefit. In this

[5] I shall not pursue the latter in this essay.

[6] I will generally use the words land, raw materials and natural resources interchangeably in this essay, unless I specify to the contrary.

essay, when I talk about property, I shall generally talk about a right to control in the first instance and this should generally be seen as the default position, unless indicated otherwise. To motivate this, we may think that a property right does not necessarily convey any benefit, except under the interpretation mentioned above. An unprofitable farmer may be said to derive no benefit, but, if he is the owner, clearly has control rights. Furthermore, a right to benefit might be construed to suggest that a property right could be used to stop a second party on another piece of property from pursuing their own interests, insofar as these reduced the benefits – say via competition – available to the first party.[7] This would require a far stronger defence than a simple right to control and it is a defence I do not plan to mount.

Others may use the property-object, but only with the owner's permission, or after he has chosen to forgo his rights in it, except maybe in an emergency (I will discuss this point later). Thus we may see a property right in an object as involving an obligation on others *not* to do certain things with respect to that object. If the right is a legal one, then others are legally obliged not to interfere with that right, and if a philosophical one, we would want to claim that others have an *ethical* duty not to interfere.[8] In this regard a property right has been said to constitute a *special*, rather than a *general*, right because it relates to a particular object (compared with, say, the right to freedom of speech, which may be said to inhere generally in all persons). Jeremy Waldron, in *The Right to Private Property* (1988, 106) argues that these distinctions can be used to "elucidate the difference between two sorts of right-based argument for private property". A general rights approach might claim that every individual has a right to some property because his interest in having some is so important to his well-being, as to justify the imposition of duties on others. On the other hand, Locke's approach might be called a special rights approach, in that particular actions give rise to

[7] This is essentially what a patent right does.

[8] This is not to suggest that the two should be seen as totally distinct or even as opposites – it is merely to note that there may be certain distinctions between the two.

particular property rights.[9] For Waldron, the onerous nature of one person's action in relation to the duties imposed on all others, calls the very idea of such strong (or unqualified) rights into question. I shall question Waldron's position later in the essay. At this point, I stress only a need to be careful about this: the right in a particular piece of property may well be suitably classified as a 'special' right, but this does not imply that the right to property is itself special. Nor is the distinction between general and special rights necessarily particularly clear cut – it may well be that we could reformulate a particular special right in a 'general rights' manner. I suggest that property rights may, in fact, be no more special than other liberal rights – a point I return to later. I agree however that a property right, if it is anything, is a right against others,[10] in the same way as is a right to free speech – and this can be distinguished from one against a particular individual or group of individuals (such as a right to be paid for my day's labour, because you and I agreed before I started that I would be). This means, incidentally, that the right to a particular piece of property may well be both quite onerous on others – since it means that the right of all others to its use, is in some way constrained – and also, potentially, without their initial consent. I should point out that I do not mean by this that any property right is automatically absolute - it may well be qualified in a number of ways.[11] The point is that – insofar as it pertains – it does amount to an exclusion on others of at least some activities with regard to it. This suggests, in turn, that any justification for such rights will need to be robust – and the more onerous the duties on others, the more robust it will need to be.[12] Raw materials are often scarce – otherwise they would not attract a price – and this may be seen as a distinguishing feature from, say, a right to practice the religion of one's choice. The element of scarcity is an important reason for controversy over the claim that a particular object can be owned by a particular person, or group of persons.

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[9] Waldron offers the following schema for a special property right: "For all x and for all r, if x does A with respect to r, then for all other individuals y, x acquires a right that y refrain from using r."(Waldron, 1988, 265,n2)

[10] Though not necessarily *all* others.

[11] In the sense that 'full liberal ownership' (see later) might be seen to be.

[12] Actually, any justification of a right needs to be robust – though in precisely what way is endlessly controversial.

This leads to at least two thoughts that need to be addressed before we get into the questions related to justification of property rights. The first is just what constitutes a property right. The simple thought presented in the previous paragraph does not entirely connect with the complexity of the use of the term in our everyday language. Consider, for example, the case of a London domestic property. There may well be a freeholder, a head lessee, a long term leaseholder and a short term tenant, all of whom we might want to describe as having 'property rights' in the building.[13] This does not necessarily permit a tidy solution, but there are some things to be said and these help clarify some important aspects of ownership. A good starting point is A.M. Honoré's essay "Ownership".[14] Honoré considers eleven criteria for ownership. I shall do no more than draw on some interesting points here, since the essay gives a clear exposition of the subject. The most important seem to be the rights to possess, use, manage, to keep income from, to be secure in, to transmit, together with, possibly, an absence of term, all of which might be subsumed under the term 'control'. Yet, as the above example demonstrates, to possess is not necessarily the same as to own, and transmission powers may be differently manifested, even though in many cases, of course, all will coincide. Since the rights of a long term lessee[15] may not be very different from those of a full owner of a property that has covenants attached, we might be tempted to call the long term lessee the owner – and this is probably what we do in our day to day discussion on the subject. But this doesn't seem entirely right either, since the freeholder has residuary rights (another of the eleven criteria), as does the owner of a covenanted property. There seems, in fact, to be some appeal in calling the freeholder the ultimate holder of the property rights, in view of these residuary rights, with the lessees being seen as holding derivative possession rights and the freeholder in turn being seen as having subordinated certain of his ownership rights for a period of time, even if such usage is not strictly in line with the way we naturally talk. However, the thought that, because the lessees are time-limited they cannot be

[13] In the general case, the ultimate owner (freeholder) has traded certain rights in the property in exchange for something else (normally money) without the loss of ownership.

[14] Although I should acknowledge that this comes from a legal rather than moral angle.

[15] For example, a 999 year lease.

considered to be 'owners', is not simply a factor of their possession rights being time-restricted. For one might well have an easement on a piece of property in perpetuity, without being considered as a co-owner. It is as well therefore to be aware that there may be a certain vagueness in our use of the term 'ownership' and this can be thought of as suggesting that there is a 'spectrum of ownership'[16] involved in property rights and claims. This extends from full-bloodied ownership at one end to zero ownership rights at the other. In this connection, we should be aware, too, that even the freeholder often does not have full rights of disposal in the building – for instance, he might not be entitled to erect a billboard on one side of it.[17] This might be taken as an indication that he does not have complete right of use and disposal of the building and that his property right is neither absolute nor ultimate. It might also be argued that the billboard causes externalities and therefore infringes the rights of others and that ownership does not imply any right to impose such costs on others. None of this is to suggest that property rights can never be absolute:[18] only that they might not be. I shall not attempt to resolve these issues at the moment, but they will be of interest in terms of how any property rights are derived. One thing should be said however. The fragmentation of property rights in a complex society is sometimes taken to suggest that issues of property rights have somehow ceased to be of importance or that the very complexity somehow weakens the case for such rights. I accept the complexity and accept, too, that further complexity may well be on the horizon as society develops. I do not see this as a reason to reject the thought that property rights might exist or that, if they do, they do not need to be justified. And similarly, any ceding of certain incidents needs to be done in a proper manner, if basic rights are to be respected. It seems to me quite reasonable that, having granted a tenant a one year lease on a flat that I own, I should not then enter it without permission, if that is what I have agreed to do. I do not accept that I should be impeded from entering it when

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[16] A term drawn from Harris (1995)

[17] In common law systems, one generally has no right to cause a nuisance to others, by use of one's property. This should not necessarily be considered an ownership restriction, any more than the fact that I own a knife, does not entitle me to plunge it in your back (to choose an example from Nozick). The point is that human institutions are not governed by property law alone.(Harris, 33) (*Sic utere tuo ut alienum non laedas)*

[18] Even if, in the case of raw materials in the real world, they seldom are!

the lease terminates. Complexity is an issue to be managed; not one that negates the basic principle.

These thoughts prompt further questions about the extent of property rights. If I buy a perishable good and thereby establish a property right in it, then I may control its use, providing I don't infringe the rights of others by so doing. I may eat it, use it to fertilize the garden or let it rot – but I may not throw it at someone else or onto their property. But the same is not necessarily true of non-consumables that I am considered to own. It is quite possible that we might want to consider 'property rights' in a long-lasting asset as a fully repairing lease on the asset, implying that we might have to hand it back at some future date, or under certain conditions. We might even consider it to imply a fully-repairing lease in perpetuity, implying a right of continual occupation, but an obligation to maintain it in a particular condition. (This is after all, again, not much different from an object we own outright, but which has certain covenants attached to it.) Although this is more legal than philosophical, it does seem to suggest another element of vagueness in our use of the term, which needs to be kept in mind. Generally, I will refer to situations where the owner(s) has full discretion over use of the objects concerned, subject only to a respect for the rights of others, as 'full liberal ownership'[19] (a term used by Honoré)[20], and will suitably qualify this as appropriate. Full liberal ownership seems to be the default position so far as small items are concerned, though this is probably simply a matter of convenience.[21] Generally, there is no serious doubt that my shoes belong to me and me alone and I have a right to do with them as I will, provided that, in so doing, I do not infringe the rights of others – I may not throw them at another, for example. But we don't necessarily think the same about land. We may well think that I must surrender my house or farm, if a new road needs to be built. Why should this be so? It is not as though my house is being used to infringe upon the rights of others. I shall have something more to say on this subject in Section 3. I should note that the concept of the state enjoying 'eminent domain' powers seems, *prima facie*, to be inconsistent with such liberal ownership, though Honoré does not seem to think this is so. (If such

[19] Called "full-bloodied ownership" by Harris (1996). I will use both terms interchangeably.

[20] Such terminology is also employed by both Becker and Waldron.

[21] Though animals are an obvious exception and money another.

powers are clearly defined and seen as a last resort only, we may anyway classify the resulting system as being *nearly* liberal.) This needs careful watching and will be discussed later. In addition, there are other subtleties in our meanings of property rights. The thought of an *ethical* obligation of non-interference in the rights of others is in line with Locke's approach to the issue. Much recent work on the subject of rights, and their taxonomy, derives from Wesley Hohfeld - most importantly his *Fundamental Legal Conceptions* – and this can provide a useful framework for thinking about rights more generally. Again this is primarily about the legal conception of rights, but has been widely adopted by political philosophers. Hohfeld classifies rights into four main categories: a claim, a privilege (or liberty), a power or an immunity.[22] These are typically accompanied by opposite duties on others. So well has Hohfeld's taxonomy been absorbed into philosophical matters, that his classification is often accepted without question. Whilst we might accept its general direction, there is some question as to whether rights are properly subject to this kind of reduction. It may be, for example, that a full property right is *sui generis*.[23] There are also questions as to whether "rights" are really rights, if they are unaccompanied by opposing duties, as in the case of some liberty rights, for just what right (as opposed to non-normative *potential*) are they really capturing?[24]

Under the Hofeldian taxonomy a complex concept, such as a property right, will not necessarily simply map onto one of these categories. Indeed, property rights can be thought of as an amalgam of Hofeldian 'incidents': the defining core is a *claim* right against others using the property without the owner's permission, coupled with a surrounding *power* to waive, annul or transfer and an *immunity* against others altering

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[22] It has been argued, (e.g. Lomasky, 1987, 118-9), that since a property right is a bundle of rights, it somehow implies that there is a conceptual confusion between the thing and the bundle of rights. It is not obvious however how such an argument could proceed. The fact that lawyers have found it useful to analyse property rights into constituent parts cannot be taken to imply that the analysis is more than a descriptive tool, without prescriptive content. I do not intend to pursue this point further. See, for example, Friedman 57-60

[23] This might appear to be Honoré's view (134), though he also seeks a reduction into a number of 'incidents'.

[24] One possibility is that liberty rights simply mean that it is *not wrong* to undertake the action under consideration. This may appear to be a rather weak conception of 'a right'. However,

the claim.[25] I shall speak more of my approach to rights under the next section (initial assumptions). In this essay, I will on occasion discuss a Hohfelian reduction, without wishing to claim that this is the most apposite way of looking at the issue concerned.

An important question is whether we need special rights, such as property rights at all, at least in the philosophical sense (we might still retain the term in a legal sense). It seems that we might be able to describe such rights purely in terms of general rights, which might, in turn, be perceived as having certain benefits, since the plurality of classes of rights would thereby be reduced (Occam's razor). Thus if we sit down on a rock in the desert, we may perceive ourselves as having temporary possession rights but not ownership rights in the rock. (We also seem to accept a 'first come-first served' or 'finders-keepers' approach to who has the right to occupy the rock, and a similar more general approach to questions of object use will be considered later). It would seem then that, in these cases at least, no specific 'property rights' are required, and we may therefore be prompted to ask this question more generally about so-called property rights. Even in a case such as consumption of food, where it might seem that we need some sort of ownership right because the object is irretrievable after consumption, we might manage with an idea of licensing, implying that ownership itself is not strictly a precondition for just consumption. (Of course, in this case, we might question whether there was anything of significance in the difference between a licence to consume the object and an ownership right. But in the case of capital goods such as land, there clearly is the possibility of pulling the two apart.) But despite these thoughts we do generally think that ownership implies more than a bundle of other rights (Honoré, 134). It seems not just that we have some liberty and claim rights over the object, but that it is 'ours' (*meum,* and not *tuum*). It is worth noting however that the resolution of this point is not necessarily vital to the issue at hand, since it seems that a licence to use in perpetuity will often amount to an ownership right, and where it does not, it does not necessarily have any fundamental import as to whether certain rights are classified as special or general. As such I shall not pursue the matter further here. It seems that, even if we see merit in avoiding a separate class of property rights that may be considered as 'special', that the right to use and dispose

[25] And indeed there may be further incidents as well. See Wenar (2007).

of a particular object, can usefully be described as a 'property right', even though it may ultimately be derivative of more general rights.

The positions of Honoré and Hohfeld are distinct from one another, in that the first seeks to define ownership in terms of the thing *owned* (a person-object relationship), whilst Hohfeld sees it in terms of person-person relationships in respect of the object in question. In many cases, the relationship will be a person (or persons) vs. a collective (such as a nation state) or indeed the whole of humanity. This is also the approach adopted by Immanuel Kant. Does this matter? Normally, I suspect both are different ways of looking at the same issue. It is usually enough to look at trespassatory rules and an ownership spectrum. The full-blooded ownership position sees ownership as granting full control powers over the object, except insofar as the object is used to infringe basic rights in the person or the equivalent person-object ownership rights of others. A significant portion of this essay will be devoted to the question of whether such rights could be justified over an object previously unowned.

As stated earlier, in this essay, I shall restrict my discussion primarily to rights in external objects (especially raw materials), and how these may be acquired. This does not mean that one might not also justify such things as intellectual property rights, although it is worth noting one important distinction. My meaningful possession of a material object often precludes others from using it (i.e. it is rivalrous), since the particular resource in question is unique, and its use by others may prevent my use of it. And, even if there are others objects of the same kind, they may be scarce. A patent is somewhat different. It is designed to preclude others from producing the patented good, except under licence: however the production of the same good by another does not prevent or interfere with the patent-holder's production of the good in question – it only interferes with the returns available from that production.[26] This might in turn suggest that such a right is not *per se* required to protect against interference, in quite the same way.[27] It is not another's ability to use that the patent protects, but their ability to protect sunk costs or make super-normal profits –

[26] In this sense, it is more like a right to benefit.

[27] It might be argued as being required for reasons of utility, but that is a separate issue.

something that is far from protected by ownership of a piece of land. (Similarly, it may often also be appropriate to consider separating surface and sub-surface rights, since both may feasibly be enjoyed in conjunction, again without causing interference between users). The arguments made in favour of just property rights in land do not therefore automatically lead to a conclusion in favour of just intellectual property rights if the incompatibility of joint use plays a part in the argument, as is often the case for land rights (and indeed plays a part in the arguments I will consider). Equally however, if the arguments for property rights are utility-based (which is not my focus in section 2), similar justifications might be made for physical and intellectual property rights. So intellectual property rights may or may not thus require additional justification, but this is not a matter I shall pursue further here. However, the thought that, for physical property generally, costless sharing is not an option, is a key part of the argument that I shall later develop.

b) Initial Assumptions

The arguments presented in this thesis commence from the assumption of a particular position on civil liberties (I choose this categorization over 'human rights', which have assumed a rather different meaning) in general. This position is a liberal one, with an individual standpoint I call 'self-determination' or 'self-sovereignty'.[28] It suggests that persons have rights in their person, which include the protection of their person from coercion by others, except only to protect the equal rights inhering in those others.[29] Thus one may not initiate coercion against others, but one might use coercion to defend oneself against coercive action by others.[30] This liberal starting point is presented as an assumption of the thesis and will not therefore require any separate justification – the conclusions of the thesis simply depend, *inter alia*, on the acceptability of this assumption. The question is one of, *if* such individual rights are believed justified, *then* do any property rights potentially follow and, if so, under what

[28] I will use the two interchangeably.

[29] In Chapter 3 I will also seek to establish that such equal rights do have implications on the use of justly-gained property under certain, quite specific, circumstances.

[30] This, in turn, raises questions of the extent of such coercive defense. Generally, we tend to believe that it must be 'proportionate' – I shall not dwell on this point here.

circumstances. Nonetheless, the whole exercise of discussing whether property rights might arise from certain actions, given the initial assumption, might be somewhat uninteresting (except perhaps in a formal sense), were the possession of such liberal rights lacking in any merit. In addition, it is necessary to spell out in further detail exactly what this position implies, since it has taken a number of different forms. As far as the issue of an uninteresting nature is concerned, this is fortunately not the case. I shall therefore outline some reasons to believe in the desirability of such liberal, 'self-determination', rights and discuss what their content might be. I do not pretend that these arguments are comprehensive, nor that they are uncontroversial, and I shall attempt no more than a cursory refutation of the arguments that might be raised against them. I seek only to motivate the thought that this position is at least worthy of consideration, and that the drawing of inferences from this position that relate specifically to property rights, is therefore a worthwhile endeavour.

There are various components to this liberal position, but overall, it has a worthy philosophical heritage. It is apparent in Locke (of whom I shall pass over now, since I shall speak much more of his approach later), in Mill's harm principle, in Thomas Hobbes, who says in his First Law of Nature, that we are to refrain from aggressing on others, unless they aggress on us (*Leviathan*, Chap XIV) and in Kant, whose Universal Principle of Right states that:

> Every action is right which in itself, or in the maxim on which it proceeds, is such that it can coexist along with the freedom of the will of each and all in action, according to a universal law. (Kant, *Metaphysical Elements of Justice*, 1965, 35)[31]

I do not suggest that the position that I shall espouse is the same as that of these authorities – only that it seems an important element within them. Standard approaches to justification of this individual rights approach fall into one of two camps: deontological or consequentialist. Mill, for example defended the idea in consequentialist terms – presumably because the ascription of certain rights to persons

[31] Arguably, even in Marx, whose thought in his labour theory of value, that capitalists steal a part of the labourers' labour, presumably suggests that there is an act of theft, which can only be the case if the labourers own their labour, and therefore themselves, in the first case.

would promote utility – indeed his writings in *On Liberty* might be taken as suggesting that this is the supreme measure of utility. (Presumably if this is the case, it is contingently so. For this reason a deontological approach may appear more promising.)

Here is a modern deontological approach, as described by Warren Quinn:

> A person is constituted of his body and his mind. They are parts or aspects of him. For that very reason, it is fitting that he have a primary say over what may be done to them – not because such an arrangement best promotes overall human welfare, but because any arrangement that denied him that say would be a grave indignity. In giving him this authority, morality recognizes his existence as an individual with ends of his own – an independent *being*. Since that is what he is, he deserves this recognition. (1993, 170)

There are worries about this, (not least that many objects may be constituted of their parts without them thereby acquiring rights!) but the talk of dignity, may nonetheless seem to have some intuitive appeal, as do other means of grounding self-determination, such as appeals to human agency or to human nature itself.[32] (None of these appeals are uncontroversial). One method of giving rights an anchor (which appears stronger than talk of dignity) is by reference to the idea of self-ownership or self-command. It is stronger because, in the case of dignity, the rights are derivative and instrumental only. But, in the case of self-ownership, the possession of such rights is of its essence. The self-ownership concept derives from 17th century writers such as John Locke and Robert Overton and is often associated, more recently, with Robert Nozick – although he only uses the term once and then metaphorically. (This will be discussed in greater detail shortly.) Self-ownership seemingly makes the claim that it is not just dignity that is infringed when rights are not respected: it is of the nature of a coercive dispossession (a theft), since that which has been taken was not something that should have been taken without permission. It represents a gross personal interference, rather than something that should generally be respected, but

[32] "A society that does not recognize that each individual has values of his own which he is entitled to follow can have no respect for the dignity of the individual and cannot really know freedom." (F A Hayek)

which in certain circumstances might be forsaken for some 'greater' good.[33] We may also see echoes in the Kantian 'innate right to humanity'. As noted, it may also be seen as an extension of the value of human agency, or at least, in some way, related to it. Because this position depends on the nature of a person, this position can justifiably be described as one of "natural rights", although this idea has, in the past, been more associated with an approach related to God's intentions for mankind. It can also be described as 'status-based' as opposed to the consequentialist position, which is essentially instrumental. I shall return to a more detailed study of this approach shortly, but will first discuss some more general issues relating to rights.

One important question, that is often insufficiently emphasized in discussion of discussions of rights is the vexed question of metaphysical free will and to what extent, if any, humans possess it. I do not intend to go into this in this essay. I take it that, on many issues, we believe ourselves to have free will if not constrained in some way by others. We think that we can decide certain things for ourselves, even if, in a deterministic universe, we ultimately cannot. Perhaps we should call this sense of free will self-control. To avoid free will worries, when talking of deciding for oneself, I shall generally mean that the action is undertaken without coercive interference by others, rather than seeking to suggest that a pure 'libertarian' view is being taken on the free will issue.

There are a number of other taxonomical issues relating to rights. I do not intend to say much about these, except insofar as they are important to this essay. A good synopsis is given by Leif Wenar, 2005/7). One distinction, which is important to our

[33] A worry about anchoring the basic concept in dignity is that, if dignity demands something that individual freedom might be thought not to provide, then presumably dignity gains precedence, (unless, of course, they are considered to be identical). This would then suggest an assumption contrary to the assumptions of this essay. I prefer the thoughts of Chandran Kukathas: " [dignity] is not central to liberalism as it is understood here".(2003, 249) Nonetheless dignity may be considered an important component of liberty and an approach based on respect for dignity is not necessarily inconsistent with the self-sovereignty considered here.

discussion, is between liberty (negative) and welfare (positive) rights.[34] The former are essentially rights to non-interference, whereas the latter are the right to be provided with something – presumably at the 'expense' of others, at least insofar as one's own efforts fail. But we should be careful here at the outset, even if not at the conclusion. Such rights are presumably largely at the expense of others, only insofar as those others have rights to parts of the external world. Insofar as they do not, the issue becomes less controversial. It will be important to be aware of this throughout the discussion. This is not to deny that we would normally assent to thoughts such as "education can set you free". The use of the word freedom in connection with positive rights is natural. But this just illustrates the thought that there are two quite different dimensions of freedom. One is concerned with the array of choices available, whilst the other revolves around the idea of subjection to the will of another (N. Simmonds, *Law as a Moral Idea* (2007, 101)). The idea of self-determination employed here relates, in the first instance, to the second dimension. I also agree with Loren Lomasky that the arguments that are usually used to justify liberty rights, can often also be used to justify welfare rights. A thought, also from Lomasky, is that liberty rights generally allow persons to live their lives as individual 'project pursuers' and that this liberty is seen as valuable. If we are encumbered with positive obligations to others, the pursuit of our projects is hindered, even if theirs is sometimes enhanced. Furthermore, if our own project pursuit is infringed we are unlikely to be willing to protect a similar pursuit by others (Lomasky, 1987, 128). The value of enshrining this in the language of rights arises from the notion that:

> each person possesses a kind of sovereignty over his own life and that such sovereignty entails he be accorded a zone of protected activity within which he is free from encroachment by others (1987, 11)

and

> A concern with rights is a necessary cornerstone in the design of a social ethic, but it should not be confused with the completed edifice.

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[34] Perhaps these are best considered as acquired rights, since rather than protecting liberties, they make people beholden to one another via social institutions, and one person's entitlement is often another's obligation. I do not suggest that this is a universal viewpoint.

This is an inevitably brief discussion of Lomasky's viewpoint, of which he gives a fuller explication (Lomasky, (1987), 3).

A contrasting view is provided by, for example, Henry Shue (Shue, 1996). His argument is that there may be just as important a moral case for assuring nutrition (a positive right) as there is for assuring a right against assault (a negative right). The two may both be seen as indispensable for the enjoyment of all other rights by all.[35] This viewpoint has been criticized by amongst others Nickel (2008), since it is suggested that Shue's argument is only plausible based on idealizations relating to what is necessary to achieve (1) *full* enjoyment of other rights (2) *by all*. Whilst this objection may be seen as having particular relevance in terms of relationships between poor and rich countries, it does illustrate the more general point that positive rights seem to imply a diminution of negative rights, which may seem contrary to individual autonomy. I argue later that, while there may well be a moral obligation to assist the impoverished, this is not something we should generally see as something to be mandated by the state. I suggest that rights seem to get off the ground from the thought that it is reasonable for individuals to pursue their own goals and that they need protection from being trampled on by others pursuing theirs. This provides a reciprocal character to them. Hence the thought that the rights of some come about by subtracting from those of others seems inconsistent with this. I recognize that this is not a majority viewpoint.

Ultimately, if we favour non-interference rights, we may want to say that such a concern with these non-interference rights trumps welfare concerns, except perhaps, under rather specific conditions. Perhaps that one respects ones neighbour more by respecting his liberty than by being obliged to look after his welfare and *vice versa*. If persons are to be accorded dignity, we might say that this means that certain basic needs are to be catered for by others. We might also say that the dignity of all is better protected by allowing each person exclusive rights to non-interference. The two may seem mutually exclusive and this is at the crux of questions of negative vs.

[35] Wenar, 2005/2011

positive rights. I shall discuss this further below, in relation to Kant's discussion of the Categorical Imperative.

Another question relates to the degree of absoluteness of any rights. If rights are thought to clash, they presumably cannot be thought of as absolutes[36] – though one approach might be to sufficiently qualify them as to reduce or eliminate this worry. In addition, absoluteness is sometimes thought to be a concern if it means that small diminutions in rights are protected at the expense of large increases in utility. (I discuss this further under the question of eminent domain, later in the thesis). It is worth noting that, for Kant, possession of a right entails both the permissibility of a certain action and the inviolability of it, in the sense that others are under a duty not to interfere with it. Thus a right "is not merely a weighty reason for saying that the right-holder's action is permissible, but is conclusive of that permissibility" (Simmonds, 2007, 193).[37]

A somewhat different, but interesting, idea, promulgated by Ronald Dworkin (1984) is of rights as trumps. This seems to express the idea that they have special normative force, even if they are not absolute. Indeed if they did not have such force, it would be difficult to see precisely what they were really there for at all. So, we should minimally assume that, where a right is stipulated, it has some sort of precedence over other considerations, and that, where the trump does not apply, these other considerations must be deemed of particular importance.[38]

However, we need to seek greater definition than this if we are to make serious headway on the question of property rights. One worry has been properly dealt with by Nozick: the fact that a person may choose to concede some of his liberty in

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[36] Hillel Steiner covers this issue in his book *An Essay on Rights* (Blackwell, Oxford, 1994) by insisting compossibility as a criterion of rights.

[37] Hohfeld's approach somewhat complicates this approach, since it distinguishes between the different senses of the word 'right' in our natural language, but he seems to tacitly assume that the idea that we may coercively enforce them is their most vital characteristic.

[38] I am indebted to Leif Wenar (2005/7) for much of the preceding discussion on the taxonomy of rights.

exchange for welfare in no way suggests that a similar approach ought to be pursued across society as a whole – for the one represents a perfectly permissible exercise of individual sovereignty, whilst the other might be counter to it. But a typical concern is captured in the 'freezing hiker' thought experiment.[39] We are encouraged to imagine someone stranded in the snow who comes across a well-stocked cabin in the mountains, which has a notice pinned on the door saying: "Private Property – Keep Out!" Our intuitions suggest that, when high welfare considerations are at stake (perhaps he will die without access to shelter and provisions), his well-being has a higher priority than the well-justified property holdings of another.

I take a lead on this from a paper entitled "Non-absolute rights and libertarian taxation" by Eric Mack. He argues that the hiker is entitled to enter the cabin, despite the restrictive notice, when severe welfare considerations are in play. He also argues that the owner is subsequently due compensation for damage caused and provisions depleted. This seems reasonable, if we believe the cabin owner to be in possession of a just property right. He also argues that such trespass is also permissible in the event that the hiker knows that he will never be able to pay compensation, (though there is no reason to suppose that a debt is nonetheless not taken on).[40] When extended to the level of society, this suggests that property redistribution is also permissible when important threats to life and limb are at stake, even if it is unlikely that compensation will be paid.[41] Again, this approach does not suggest that the right to compensation is erased; nor that there is a general right to welfare payments, particularly when life and limb are not at threat.[42] Mack argues that the line be drawn on the principle that "the

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[39] Originally formulated by Joel Feinberg (1978).

[40] An advantage of this is that debtors could be required to accept work, which they might otherwise be unwilling to take on, in order to repay the debt.

[41] This is in line with writings in the medieval scholastic tradition, such as those by St. Thomas Aquinas. As in the Mackian position, there is no suggestion that the debt is erased.

[42] We may think that there is anyway a correlation between a situation of strong non-interference rights and the system that results from it, and the opportunities, including the opportunity to increase welfare, that arise for those able and willing to work, in that free market economies are generally correlated with economic efficiency. This is however, an empirical point and is not pursued further here.

cost of liberty is less than the price of repression".[43] The thought here is that, were it too easy to trespass on the rights of others, the reaction in terms of the generation of negative externalities or the undermining of positive externalities would outweigh the dispensation. (Further exposition is to be found in Mack's paper.) This seems like a useful approach, although it seems to me that one worry is just where the line might be drawn, since this seems to introduce a trump for utility, which should not be assumed.[44] Clearly, in part, it will rely on empirical considerations, but life, limb and health considerations would seem to be covered. I do not suggest this argument is sufficiently argued for here: more needs to be said about this and much of this can be found in Mack's paper. My point is as follows. I argue that property rights are generated under certain conditions, I accept that they may sometimes be transgressed, in the strict sense of the word, without thinking this is more than an unusual exception. I argue that, under conditions of strong need, we may 'borrow' the property of others but that 'return' must later occur.[45] Such exceptions are not a defeat of property rights but a case of where they butt up against other moral values (Friedman, 2011, 136).[46] My comments on 'positive' rights (below) should be read in this light. The property right is preserved, but the property may be borrowed in cases of significant need.

The 'self–determination' approach I shall outline, as seeming to be fruitful, is thus one of a certain personal independence[47] or personal autonomy (not restricted to the Kantian sense of the term). This allows persons to stand as individuals (or as voluntary associations comprised of groups of individuals), responsible for their own

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[43] W E B duBois in "Evolution of the Race problem" *Proceedings of the National Negro Conference* (1906, 142-158)

[44] I merely note this worry. I cannot pursue it further here.

[45] A guaranteed basic income may be one way to approach this, with those able to repay immediately incurring no debt, whilst society might expect to demand that others pursue activities that wholly or partly repay the debt (sometimes known as 'workfare').

[46] Another approach is Judith Jarvis Thomson's Infringement Theory.

[47] This will, in turn, presumably be based - at least partly - on our ability (or to avoid taking any particular stance on the free will debate) our perceived ability to make personal choices about how our lives proceed and the importance to us of being able to make such choices.

self-development and able to interact with others on a purely voluntary basis. Thus, Mill:

> Human nature is not a tree to be built after a model, and set to do exactly the work prescribed for it, but a tree that is required to grow and develop itself on all sides, according to the tendency of the inward forces that make it a living thing. (Mill, 1859, 123)

And more recently, Ben Colburn:

> What is distinctive and valuable about human life is our capacity to decide for ourselves what is valuable in life, and to shape our lives in accordance with that decision. (2010, 13)

This position may thus, *prima facie*, be seen as one of strong non-interference rights.[48] Positive rights may also apply, but there will be resultant issues when these clash with negative rights. The two are not compossible.[49] (This has been, in part, noted earlier, and I shall discuss such clashes, as appropriate, during the essay.) The important question in relation to the interplay between these types of rights is whether some individuals have the right to *demand* the positive assistance of others, rather than a mere lack of their interference, even in the absence of property transfer. This is not a question of whether we act ethically if we do grant such assistance to those of our fellows who are in need. Most of us would think that we do, particularly in cases where the need is due to factors outside of the control of the individual in question. The more salient question for this essay is whether governments, or 'society', have the right to *impose* such demands, since the concept of self-determination seems, *prima facie*, to imply that persons choose for themselves how much assistance to render to others. One aspect of the question relates to the extent of these demands: for it is unlikely that such societal imposition could be infinite, (in the way that negative ones might be), even if the need for them were to be. A second aspect is, whatever the moral salience, whether these are rights that a state should *enforce*. For to do so,

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[48] "Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone" (Feinberg, 252)

[49] Non-compossibility is a far less serious problem amongst various negative rights, particularly in a context of 'self-ownership' (Steiner, ibid)

might seem to undermine the basic liberal[50] position being used as an assumption of this essay, that individuals should not have their self-determination contravened.[51] [52] Whilst, of course, we might argue that the empowerment of the assisted individuals is increased by such assistance, or that utility is increased due to the diminishing returns of wealth, it would seem that this is only achieved at the expense of the self-sovereignty of others. And related to this is a question of the sense in which such positive rights can be said to be a demand of justice. Justice is a term with a wide scope. On one account justice might be said to be an attempt to right wrongs (which might be coupled with mechanisms to ensure that wrongs do not occur in the first place). This may be called 'individual justice'.[53] positive rights seem to step outside this traditional arena, in that it is hard to think that those called upon to assist have, in any sense, *wronged* the potential recipients, except perhaps insofar as their initial distribution was based on unjustly owned property. This highlights how crucial the justice of property distribution is to the sum of individual justice of a society. Positive rights seem more to lie within the scope of 'social justice'. A question that needs to be addressed is the extent of the scope of justice within a society – exactly what is implied when we talk, in relation to justice, of giving others 'their due'. Might it be confined to individual justice and relate to issues of bodily integrity and property or should it be extended to incorporate an idea that we have responsibilities for the welfare of others, over and above, leaving them alone?

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[50] The meaning of liberalism has changed over time and has different meanings in different places. I am using it in the classical European sense of giving a special importance to personal liberty, implying that individuals should be allowed maximum choice in their personal choices, subject only to equal rights for others. Isaiah Berlin called this 'negative freedom'.

[51] It is also worth noting that, if such duties are imposed by the state, any moral credit derived from adherence to them must be questioned, since such adherence is likely derived as much from prudence as from benevolence: only voluntary actions could be seen as purely altruistic.

[52] It would also seem that positive rights can be argued to contravene the second reading of the categorical imperative, since to demand that others contribute towards one's ends, seems to be treating them as a means and this could be seen as failing to respect them as ends in their own right. I discuss this shortly.

[53]Slote, Michael, "Justice as a Virtue", *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2014/entries/justice-virtue/>. Downloaded 02/04/2015

The (social) justice implied in the positive rights accounts is arguably based not on the thought that someone has been wronged, but that there exist certain positive duties to assist those less advantaged than oneself. The paradox behind such an account is that this type of justice, whilst it holds that persons should not be penalized in life's lottery for factors beyond their control, might only be achievable through penalization of others for things beyond *their* control.

The issue may seem to come down to whether our political obligation to others is to leave them alone, or to go further and *also (italics added)* assist them when in need. However the disjunction appears false on closer investigation. For if someone is obliged to assist, he (the assister) is not being left alone. This may incline us to think that we must choose either negative freedom or positive assistance, but that the two cannot be combined, by tagging a right to assistance on to a right to be left alone. But this conclusion would seem less compelling were the right to assistance subject to decline by the party being assisted. We would still be left with the thought that the person doing the assisting is no longer in possession of a right to be left alone.

This area is most controversial in modern political philosophy, marking a dividing line between libertarians and others. Since the starting point of this essay is based on apparently libertarian assumptions, a right to assistance will generally not be assumed. But because of the controversy, I will highlight stages in the argument where this assumption is in play, and the implication for any conclusions drawn. Perhaps the last thought on the positive/negative rights issue should be left to Nozick:

> …I distinguished the following levels or layers of ethics. The first layer is the *ethics of respect*, which corresponds to an (extended) ethics mandating cooperation to mutual benefit. Here there are rules and principles respecting another (adult) person's life and autonomy, forbidding murder and enslavement, restricting interference with a person's domain of choice, and issuing in a more general set of (what have been termed) negative rights.
>
> …The different levels of ethics have a different status. The ethics of respect, largely specified by what I have called the core principle, is the part, the one part (I think) that is (that should be) mandatory across all societies. In saying this, I am putting forward a particular normative position: that the further ethical levels are matters of personal choice or personal ideal.

… some particular societies may attempt to make one or other of these further levels mandatory *within* it, punishing those members of the society who deviate or fall short. I also believe – this is an additional component of my own position, presented in *Anarchy, State and Utopia* – that no society should take this further step. All that society should (coercively) demand is adherence to the ethics of respect. The further levels should be matters for a person's individual choice and development. (*Invariances*, 280-2)

Nozick here identifies a significant point. If a purely voluntary society is our aim, then it might seem that positive rights have no place in it and whatever the ethical merit of certain second or third layer ethical positions, these are not to be matters of societal enforcement.[54] Interestingly, we may also think that this might fall out of Rawls' appeal to an overlapping consensus in *Political Liberalism*. For we might think that this consensus should only comprise the most basic agreement among participants, and this might be said to consist of only a respect for negative rights. Of course, this is not Rawls' understanding of the consensus, and his arguments to the contrary are profound, but it would be a diversion to pursue the matter further here. Perhaps we should note that Rawls and Nozick both write from a liberal standpoint and the differences between them appear often to be exaggerated, when looked at in the round – the primary differences being the fair equality of opportunity principle and difference principle, which has important implications for their respective positions on private property.

This initial liberal position seems to be that of Locke. (Hume is more ambivalent on the subject of personal liberty.)[55] Locke, in particular, is associated with an idea of 'self-ownership', which can then extend, as the result of certain actions under certain

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[54] There are very valid reasons for believing that a purely voluntary society is but an ideal, since questions are raised as to how offenders against justice are to be dealt with. I shall not go into this here. At the very least, we presumably think that offenders must have the opportunity of a fair trial. Nozick suggests an invisible hand explanation of the state in Chapter 5 of ASU (1974, 118-9)

[55] Hume is less forthcoming on the matter, but we can ascertain his views in a number of his writings, where he stresses the importance of private liberty. In connection with property, he suggests, for instance that redistribution of property might occur, but that this would be lead to tyranny (1998, 91). The desire for liberty, for Hume, is a passion and not something that will be determined by reason. This may be seen as a reason to regard liberty as *sui generis*.

conditions, into ownership of parts of the external world.[56] The self-ownership concept seems to underpin the approach of modern-day libertarian writers of both right (e.g. Nozick) and left[57] (e.g. Michael Otsuka)[58] and something must be said about whether this position is similar or the same as the self-determination approach that I have as my key assumption. Self-ownership may be seen as a somewhat strange concept, since we normally conceive ownership as a relationship between objects – typically between persons, or groups of persons, and objects. Despite this, it has gained a certain currency following Overton,[59] and Locke, and this seems, in many ways, to encapsulate the sense of individual rights used as an assumption in this essay. It is also associated with a number of difficulties, which I shall come to shortly, and which incline me to prefer the terms 'self-determination' or 'self-sovereignty'. But self-ownership is probably more associated with the form of self-determination I favour (and arguably a sub-set of it) and it is thus important to address issues associated with it. It is also a vehicle to define my assumptions on self-determination more closely.

I am generally in sympathy by the approach expounded by Peter Vallentyne in his paper "Left- Libertarianism", sections 1-3 (2012).[60] (Vallentyne uses the term 'self-ownership' rather than my preferred term 'self-sovereignty' but there is little material difference in terms of the rights involved. Vallentyne lists full ownership as consisting of a full set of the following five ownership rights:

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[56] Though it is not obvious that a set of strong self-determination rights could not also so extend.

[57] I dislike these terms, because the idea of a left/right spectrum seems simplistic, but accept that they are in common usage.

[58] See, for example, 2003, 2 "Like all versions of Lockean-libertarianism, mine regards a right of self-ownership as fundamental…"

[59] "To every individual in nature is given an individual property by nature, not to be invaded or usurped by any: for everyone as he is himself, so he hath a self-propriety, else could he not be himself, and on this no second may presume to deprive any of, without manifest violation and affront to the very principles of nature …." Robert Overton *An arrow against all Tyrants* (1646)

[60] I also find the arguments he presents in Section 4, entitled "Rights to use and appropriate Natural Resources" of great import, since they do preserve the vital self-ownership concept, even though I am ultimately not persuaded by them. I argue against the approach in his Section 4 in my Chapters 2 & 3.

(1) *control rights* over the use of the entity (a liberty-right to use, a power to authorize use by others, and a claim-right that others not use without one's authorization),
(2) *rights to compensation* (when someone uses the entity without one's permission),
(3) *enforcement rights* (e.g., rights of prior restraint and punishment),
(4) *rights to transfer* these rights to others (by sale, rental, gift, or loan),
(5) *immunities to the non-consensual loss* of these rights.
(6) *immunities to the loss* of *other rights* merely for the possession or exercise of these rights (e.g., no rental payment or user fee is owed) (2012,5).

How might such an idea of self-ownership gain traction? We might start by dividing possible ownership of persons into three categories, which seem to exhaust all the possibilities. The first is where persons are owned, to at least some extent, by others. The second is one of self-ownership and the third one of no ownership. A stereotypical example of the first is the institution of slavery: the slave is 'owned' by his master. Clearly, if this were the only instantiation, it would be easily dismissed. But we can also consider apparently more benign examples. We might consider a situation where we all have certain elements of ownership in each other, which might be coupled with a sphere of personal autonomy.[61] We might, for instance, claim this situation occurs in a country which employs military conscription. Insofar as one is obliged to serve in the armed forces, one might be said to be 'owned' by society at large, otherwise how could society be permitted to control one's options in this manner? Nozick states of this position:

If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. The process whereby they take this decision from you makes them a *part-owner* of you (*ASU*, 1974, 172).

Cohen has criticized Nozick's position on this (1995, 230-244) on a number of counts, in relation to slavery. He contrasts the concept of slavery – essentially a coerced, lifelong contract with imprisonment, something that may be deemed similar to slavery in a number of respects. He talks of an innocent person, who is imprisoned for five minutes, say for purposes of temporary social order. He suggests that there is "a massive *normative* difference between this brief detention and life-long imprisonment". This may be true, but it doesn't seem to be so just due to its

[61] Though we well ponder a more horrific version of the thought "everyone belongs to everyone else" as described in Yevgeny Zamyatin's *We*, often deemed to have been the influence for Orwell's *1984* and Huxley's *Brave New World*.

temporary nature, since we may find a series of temporary enslavements to also be offensive and this, we may argue is just what taxation amounts to. Cohen also argues that there is a difference between having a right to one's earnings is not the same as a right to dispose of one's labour. This seems correct insofar as the state does not dictate the type of labour one undertakes. But this is not necessarily a material objection. The slave-owner forces his slave to work on a task. The state requires the taxpayer to work to support the needy, insofar as he works for wages. In that respect, it does have a resemblance to slavery – the fact that this 'slave' chooses the type of work that will be undertaken to achieve the task may reduce some of the discomfort, but it does not count as negating the concept behind it. Cohen also makes the point that Nozick himself justifies taxation to maintain the minimal state and suggests that there is not much difference between this and supporting redistributive taxation. However, Nozick suggests that the minimal state comes about via an 'invisible hand' process, which does not violate anyone's rights. So there does seem to be a difference and one which suggests a relevant difference between the two cases cited in the analogy. I draw these three objections from Tristan Rogers ("Self Ownership, World Ownership and Initial Acquisition", 2010).

Hillel Steiner in his paper "Self-Ownership and Conscription" makes a different point. He argues that there are some "servicings of others" other than via contractual consent that are consistent with self-ownership. These are of the nature that they are designed to prevent or redress the violations of rights of others. He posits a four person world in terms of a violation of rights: perpetrator, victim, conscriptor and conscript. In a densely packed argument he suggests that conscriptor may have a duty to press conscript into service to attempt to halt perpetrator violating the rights of victim. To make this go through, the rights of the different parties need to be fungible: this may seem to be allowed by Nozick's principle of rectification, presumably via means of money. The thought is that the net amount of compensation – which is finally to be paid by perpetrator is less than if conscript had not been pressed into action. A key thought is that one has the right to take action against am innocent threat – the thought being that, though the threat is innocent, the potential victim has a right of self-defence. Assuming I have understood Steiner's argument correctly, I find it unconvincing. I am not persuaded that it succeeds against Nozick's argument against

a "utilitarianism of rights" (*ASU* 30) which suffers a "side constraints objection (*ASU*, 30 et seq.). Cohen, himself is unpersuaded by arguments of this type (1995, 213-5).[62] We might also note the point that conscript is not in the same position as would be an innocent threat, suggesting a difference in the two cases. Therefore, I am unpersuaded that it is right to use other persons, other than via consent (implying a contract of some sort is in place).

If self-sovereignty is at the root of such considerations, it seems appropriate to presume that, at the outset anyway, it has equal application in all fields - those which might be characterized as economic as well as non-economic. Of course, a reason for thinking differently about economic activity might be that there is no good justification for property ownership. This is the issue this thesis attempts, in part, to address. We might also ponder the point that, if self-ownership requires justification, surely ownership of someone by another requires even more justification. These thoughts may motivate the thought that part-ownership by others is not consistent with the proper acknowledgement of personal autonomy and dignity, giving some measure of plausibility to the initial assumption. We may see self-ownership (or self-determination) as issuing intuitively from an individual's self-identification as a unique centre of consciousness, and the thought that seems to flow naturally from it, that the individual's will is to be respected with regard to decisions within that unique sphere of influence. Despite this, there is no reason to think that economic issues should not constitute part of one's conception of the good, in the same way that, say, religious ones might. There is no reason to think that an entrepreneurial project cannot hold up its head amongst other projects. In this respect, it is interesting to consider Liam Murphy and Thomas Nagel's point: "Egalitarian liberals simply see no moral similarity between the right to speak one's mind, to practice one's religion,…and the right to enter into a labor contract…unencumbered by a tax bite."(2002, 65) Murphy and Nagel's point is not as simple as this isolated quotation might seek to imply. One of the points they make is that the system of property rights only exists because of the institutions of a particular society and therefore cannot be seen as existing outside of it, in the way that other liberties might be. Thus, *inter alia*, there might be nothing wrong with saying that an entrepreneur who starts a business

[62] Though he wrote prior to Steiner.

in a particular tax regime has assented to that regime. This seems correct, *pro tanto*, and I suggest something similar in Chapter 4, under the subject of eminent domain. However, the point is only valid if the assumption about property rights is justified. I examine this issue further in Chapters 2 & 3. Some liberties are core and some, apparently, are not. Arguments of this nature do not demonstrate that the libertarian thesis is false: they presuppose that it is false. Such presupposition needs to be argued for. I take the view that any conception of the good, that does not involve the coercion of others, has a place at the table.

To continue in this vein, respect for individual rights may legitimately be seen as something that one has the right to demand of others and to fight for, or use the mechanisms of a state to defend, if not properly embodied in their actions. Conventions that arise to protect such rights may be seen as fair and unanimous from a disinterested standpoint, since such rights are both reciprocal and symmetric.[63] Similar symmetry could not so obviously be claimed for positive rights based on needs or interests,[64] since these would require that, insofar as some are net takers, others are net givers, and the same sort of unanimity could not therefore arise if what is to be taken is not freely given.[65] I suggest that this idea is captured by the thought of not using others as *mere* means, since to use them thus seems to imply that they are not happy with the arrangement and that their ends are not respected. Of course, I do not claim that such unanimity *would* arise, since this would depend on ex-ante power relationships in any given society. I claim only that it *could* arise and be stable because the rights are equal and no-one is expected to their surrender autonomy to the perceived welfare of others.[66] The result could truly be characterized as a society that is non-exploitative. Kant has also expressed this idea in his Universal Principle of Right, cited earlier. Positive rights do not seem to fit this principle, if a robust theory of property rights in the external world can be developed, since they generally involve taking the 'property' of some to provide universal rights for all (including the person

[63] I will discuss an implication for symmetry in property rights in Chapter 3.

[64] Such as might be implied in a latter-day Hobbesian-type account, as developed by such writers as David Gauthier and John Harsanyi.

[65] Though one might claim a symmetry when in particular circumstances.

[66] This point is argued for by Onora O'Neill (2000)

whose property has been confiscated). This reading is supported by the thought that, for Kant, equal freedom is not a matter of people having equal amounts of some benefit; rather it is a matter of the respective independence of persons from each other (Ripstein, 33). As Ripstein goes on to explain:

> Instead, a system of equal freedom is one in which each person is free to use his or her own powers, individually or cooperatively, to set his or her own purposes, and no one is allowed to compel others to use their powers in a way designed to advance or accommodate any other person's purposes.

When rights are seen as rights to be independent, the places where the rights of one will clash with the rights of another would seem to be relatively minimal, though I accept that this is not totally so.[67]

Under a non-interference rights, non-ideal, approach to justice (which is not Kant's approach), this idea also gains support from the thought that such rights stem from a system of norms adequate to human nature that permit harmonious and peaceful social coexistence and development, by avoiding, minimizing, or solving conflicts voluntarily, as much as is humanly possible, and by respecting the self-sovereignty of individuals. Under this concept, positive rights and duties arise from a system of contracts, entered into under the constraint of such non-interference rights and such contracts must be *freely* entered into.

Nozick clearly believes that his approach is not merely consistent with the second formulation of the categorical imperative and Kant's approach more generally– it is of its essence. But this has proved most controversial. Kant[68] explicitly denies self-ownership, believing ownership to be an attribute of objects – a class that excludes persons, but he does believe in "a right to one's own person", characterized as being innate.[69] (Kant instead bases his appeal for equal freedom on agency considerations. There is however a large degree of overlap in terms of the rights considered to be

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[67] We do not generally, for instance, accept the free speech right of one to cry “fire” in the theatre.

[68] *Lectures on Ethics*

[69] Ripstein, 35

justified between Kant and self-ownership libertarians. Most modern-day Kantians would oppose the Nozickian interpretation.) However, if we interpret ownership as a set of strong rights of control, this apparent divergence seems weaker. Many interpreters of the second formulation argue that Kant is suggesting that to treat someone as an end, we cannot merely leave them to their own devices, but must assist them in their plans. This is not the place to attempt a proper evaluation of what Kant really meant. If this is the correct interpretation and is, furthermore, enforceable, Nozick is simply wrong in suggesting that his approach is aligned with that of Kant and I shall not claim that it is. It does not however mean that there is not a perfectly respectable interpretation of the wording of the second formulation which *is* aligned with Nozick's approach and which helps illustrate it. For we can genuinely believe that treating someone as a *mere* means is the same as using them in ways other than those they would freely choose, the reality of human life on earth, rather than wistful daydreams, being taken as a given. This is a form of autonomy, which justifies considering rights as side constraints, to employ Nozick's terminology. It is an autonomy rooted in the individual, seeing the individual as the starting point for any society. It is thus not, as some have taken it, autonomy to be somehow aggregated across society and then redistributed, so as to maximize it at societal level. We might view the latter as a form of organizing society to optimise autonomy, no doubt, but it does so by demanding that some individuals sacrifice their personal autonomy in a way that cannot be justified if their fundamental autonomy is at the root of our concern. My sense of the term is not so much an end of the promotion of autonomy but a way of honouring of it. This seems to me a more than reasonable way of respecting persons as ends in their own right. It conveys the thought that an agent has "a deontic claim of discretionary moral jurisdiction over his own self and life" (Mack, 1993, 107). The agent is justified in pursuing his own ends, except insofar as he fails to respect the self-same pursuit of their own ends by others. The position is thus symmetric between persons, but there is also an asymmetry between a person's devotion to his own ends and his devotion to the ends of others. This asymmetry is grounded "in each agent's moral jurisdiction over his personal constitution as a purposive, value-seeking, being" (ibid, 106).

Nozick (1974, 171) makes the point that earlier writers, when talking of having property in themselves were drawing on the thought that the key characteristic of ownership is the right to control. Thus self-ownership amounts to little different from self-determination. On this basis we can accept that self-ownership and self-determination are similar. In fact, I generally prefer the concept of self-sovereignty and believe that the best justification for this position is Kant's second formulation of the Categorical Imperative, which provides a more convincing argument for Nozickian side constraints. The Kantian thought is that, by not coercing others, one shows an appropriate deference to their individuality and their rational agency. And this, I believe is also in tune with Nozick's approach, the views of many of his critics notwithstanding.[70] As noted earlier, Nozick mentions 'self-ownership' only once in *ASU* (1974, 172) and then not in a manner designed to drive the argument. (One might claim that it is, nonetheless, an underlying assumption of Nozick's position.) G.A. Cohen, particularly in his *Self- ownership, freedom and equality* (1995) connects Nozick extensively with the idea of self-ownership, and this no doubt reflects Cohen's genuine belief as to how Nozick's views should be characterized. One reason for this might be that Cohen is concerned that Nozick could be in danger of 'misappropriating' (in Cohen's eyes) the idea of self-ownership from a (different) Marxist conception thereof, as encapsulated in the labour theory of value. (This might be an important worry for Marxists, if less so for others.) We should therefore be careful with this interpretation. I discuss Cohen's approach further in Chapter 2, but at this point I simply note that it is possible that Cohen has done a disservice to a proper interpretation of Nozick's approach. I think that ('Nozickian') self-ownership loosely conveys a sense of the type of individual control over one's life that I believe is better conveyed by the term self-sovereignty and I am quite sympathetic to Nozick's apparent attempt to have Kantian considerations more prominently in the foreground. In particular, the Lockean thought that one's self-ownership is extended into the external world as a result of labouring on unowned resources, will not form a part of my argument.[71] I will, however, strongly refer to the thought that we are justly

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[70] For example, *Wolff, J Robert Nozick: Property, Justice and the Minimal State* (8)

[71] This then refutes the need to justify an apparent category mistake (that labour and objects are not suitable candidates for 'mixing'), though I am not so sure that this is as obvious a problem as it may at first appear. It does not, for instance, seem so much of a mistake to say that one owns one's arms, say,

considered to be the owners of our own labour. That it is up to the individual to choose whether or not to cede his labour to another and under what conditions. If one is not considered to own one's own labour, presumably one can be compelled to work against one's will, which is strongly at odds with the idea of individual liberty. The freedom to employ one's labour in a manner of one's own choosing will be a very important part of my argument in Chapter 2. I suggest that this concept is rather more intuitive than is an idea of self-ownership and is all that is required for my argument to go through.

It is worth noting that, for libertarians, an argument in favour of private property will need to be particularly strong. This is not just because the property rights argued for are particularly onerous, even though this is true. It is also because libertarians rely heavily on the thought that one should not *initiate* force against another.[72] If one says that Juanita owns her field of corn, one is not only saying that it is wrong for others to seek to take it from her by force. This thought is usually accompanied by saying that it would be permissible for her to defend it by use of force.[73] If the field is not rightly

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and thus the remainder of one's body parts. Ownership of all one's body parts is not obviously different from self-ownership, despite some genuine metaphysical concerns. If however, this point does not seem to provide a satisfactory rebuttal of the category charge, one approach would be to seek somewhat different definitions. One is via the idea of rights of non-interference with the person and the idea of self-ownership imagined as enclosed in scare quotes. This, I think, is generally preferable, since it avoids metaphysical worries, without detracting from the basic concept of self-determination. A second is to define the concept negatively, of the form that self-ownership pertains where it is not the case that others have ownership rights in any individual other than themselves. A third is to talk of a right to *exercise* self-ownership, rather than a right of self-ownership itself. Such attempts at re-definition might also be said to be incorporated within the third category mentioned earlier – that of non-ownership. (Like the idea of self-ownership, this also contains within itself a rather curious idea. For if nobody owns one, and if the idea of ownership contains within it the idea of a range of control, then it would appear that no-one has the right to the control of anyone, including themselves. Clearly however, even in a dictatorship, we do control ourselves and indeed could not survive if we did not. So this position might seem to imply that we have no right to do what we have to do. Wary of being accused of affirming the consequent, I admit that this is not an illogical position – it is just a rather strange one. Clearly, there is a great deal more that might be said on this subject, but to do so might prove diversionary as far as the basic purpose of this thesis is concerned.

[72] For example, Vallentyne, Peter and van der Vossen, Bas, "Libertarianism"

[73] I accept that the two are not *necessarily* linked.

hers, then use of such force could be deemed to be iniatory rather than defensive. Since non-libertarians are often happier with the idea of initiating the use of force, this might be less of a worry for them. Since, also, preserving the peace is a feature of non-ideal rationales for property rights, this will be further discussed in section 3 of this essay.

This concept of liberalism, *at the political level*, is that the role of the state is confined to helping prevent the coercion of one by another and promoting rectification when it nonetheless occurs. It is a position, under which any personal action is to be tolerated, except insofar as it infringes directly on a similar right of others to pursue their own concepts of the good. The state is simply an actor which must respect such rights to act of its citizens. As stated by Jan Narveson (2009, 3)

> Specifically what [the state] may *not* do, for example, is to compel this individual to give alms to the poor….or traipse off to some remote part of the world in order to save the citizens of some hapless country from the machinations of an evil dictator. All of these latter are, to be sure, fine things to do and we should encourage…people to do them…and place such individuals on a moral pedestal. That…is the moral *carrot*. The *stick* may be used only for very restricted purposes – namely [those moral requirements under the rubric of justice].

Christopher Hitchens once said that the values of socialists can only be realized in a non-socialist society: we would want to go further and say that they should only be realized in such a society – that is to say, without any compulsion on non-socialists to join in.

This thought bears similarity with John Stuart Mill's Harm principle as outlined in *On Liberty*.[74] It is also associated with Robert Nozick in *ASU*. Nozick is often accused of lacking a foundation, for example by Thomas Nagel in "Libertarianism Without Foundations" . However, Nozick clearly does provide a foundation, when he states:

[74] I should say that I find Mill's harm principle to be, at best, incomplete and having an unsatisfactory genesis in utilitarianism. I cite it because I consider that it captures some of the essence of personal independence.

the root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlines the existence of moral side constraints (*ASU*, 33)

Comparisons with HLA Hart's "right to be free" and John Rawls right to pursue our own "conception of the good" seem unavoidable, (though they do not necessarily draw the same conclusions).[75] Rawls' thought implies that what is of value to an individual is personally individuated, and this undermines "any idea of an overall social good to which people owe allegiance and in the name of which the behavior of individuals may legitimately be bent, moulded, or constrained" (Mack, 1990, 521).

This then is the liberal[76] assumption on which the arguments that follow depend. As stated earlier, I make no claim to have justified this viewpoint.[77] My aim in this subsection should be seen as establishing the point that it is sufficiently defensible to be an interesting launch point for a discussion as to whether rights to take property in the external world can be supported, and, if so, to what extent.

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[75] This is not dissimilar to Rawls' claims about the "separateness of persons" and so we might conclude that if Nozick has no foundation, neither does Rawls (Schmidtz, 2006, 205)

[76] As an aside on a terminological point, it is worth noting that, although they are classified as *liberal* egalitarians, writers such as Rawls and Dworkin do not write from within this type of liberal context and I do not wish to be seen as in some sense suggesting that they do. Dworkin specifically denies full self-ownership and Rawls certainly seems to do so in practice, since he believes that people's talents, being arbitrary, do not morally inhere in the individual possessing them and the results of their application are thus up for redistribution, (in Dworkin's case only to the extent that they do not result in a 'slavery of the talented'). G.A. Cohen has suggested that a more appropriate term for their standpoint is social democracy. Their positions imply rather a dependency by some on the efforts of others, enforced via the mechanisms of the state. I shall continue to use the term liberal to classify the self-determination standpoint, though will note that it is often nowadays referred to as 'classical liberal'. I deny that there is an injustice when happenstance leads to an arbitrary distribution of 'talents' and therefore do not believe that 'justice' requires a redistribution.

[77] Indeed, we might think it *sui generis*. But this would be worrisome, since, if this is the case, political philosophy might, at some point, become a matter of choice between equally fundamental, but rationally incomparable, values.

To finish, it is typical, in the Anglo-Saxon world, that when we think about rights, we are guided by our history. We think of the Magna Carta, when, mainly, the barons gained certain rights *vis a vis* the monarch, and of the struggles for the Bill of Rights and for parliamentary primacy in Stuart times, perhaps reaching its apogee in the US Declaration of Independence, followed in the nineteenth century by the extension of the franchise in the UK, culminating in votes for women in the twentieth century. These are largely struggles for what Samuel Johnson and James Boswell refer to as 'public liberty'. The power that was once held by the king now resides (to some extent, anyway) in the hands of the people, in that they collectively choose their government. This does not necessarily mean that 'private liberty' has been greatly extended, since (arguably) we have substituted dictatorship by the crown with dictatorship by the majority.[78] One major exception to this is the personal rights enshrined by the rebellious American colonists in their Declaration of Independence and their constitution (though it is debatable whether these have in fact guaranteed personal rights in the manner intended, leaving the United States little different in many such matters from the UK). It should be apparent from this discussion that the assumptions I have adopted relate more to 'private liberty' as discussed by Johnson, Boswell and Hume. This is generally provided for in the market place, where personal choices can be made on a day-to-day basis from a variety of offered alternatives and where contracts are enforceable in the civil courts. This clearly contrasts with the 'public' sphere where collective decisions take place every four or so years from a limited ragbag of composite programmes, and where there is anyway no guarantee provided by contract that the advertised programmes will even be delivered. It might seem strange that we so easily confused these two, quite different, spheres of liberty. Property is of great significance in this connection, since *real* private property is a genuine bulwark against the majoritarian state.

This then is a brief introduction to the idea of self-sovereignty that underlies this thesis. I do not claim to have established it – merely to have given some grounds for its plausibility. I should note that the remainder of the thesis will depend on assumptions outlined in this section. Therefore, if these assumptions are not accepted,

[78] The problems of which have been pointed out by thinkers such as Mill and Madison.

the remainder of the essay is purely conditional. In Chapter 2, which follows, I shall discuss the implications of this starting point for claims of ownership of objects in the external world. This will follow a broadly Lockean pattern. I call my approach quasi-Lockean. I suggest that we can adapt a Lockean approach that does not rely on God's wishes for the world, to conclude that certain actions give a *prima facie* right to claim ownership of previously unowned objects. I also note that there are certain issues, for example boundaries, which the quasi-Lockean approach cannot adequately handle. In Chapter 3, I go on to conclude that, except in rather narrow circumstances, such acquired rights are not compromised by the fact that the objects are in scarce supply, but that we have a problem when the historical transfer chain is cloudy. These, I see, as the two main issues with the Lockean approach. In Chapter 3, I discuss these issues that the Lockean approach does not appear to resolve, by reference to a conventional approach. The Lockean and Humean approaches are often considered to be mutually exclusive. I suggest that, in a number of instances, they can be fruitfully combined. I conclude that a Humean approach both mirrors, to some extent, and can supplement, to some extent, the quasi-Lockean approach. But, where they cannot, the ethical imperative of the 'Lockean' case must be taken into account.

I finish this section with a quote from James Buchanan:

> Man wants liberty to become the man he wants to become. He does so precisely because he does not know what man he will want to become in time…. Man does not want liberty in order to maximize his utility, or that of the society of which he is a part. He wants liberty to become the man he wants to become. ("What should economists do", 1979, 112)

NATURAL RIGHTS APPROACHES TO PROPERTY ACQUISITION

In the next two chapters, I investigate arguments for believing that we may gain a right to objects in the external world. The argument, which I call quasi-Lockean, is based on Locke's approach, but modified in light of certain problems with that approach. In Chapter 2, I conclude that, in any initial acquisition from nature, we may gain a property right only if there is no precedent justified property claim and if certain actions take place with respect to the object in question, specifically that labour is expended upon it. In particular, it will be necessary to show that, were the object to be taken by another, without the initial labourers consent, she would be deprived of her labour. A crucial thought, which I will seek to justify, is that prior to labouring, objects are literally unowned, that is to say, they cannot count as being, in some way, owned by the community or all of humankind. In this matter, I do not spend time on the subject of determinate property transfers, following initial just acquisition.[79] I assume such transfers will be justified by reference to simple rights in the person and, in particular, the thought that we should be expected to be seen as owners of our own labour. Because we have made a just initial acquisition and are justly allowed to exchange our labour, so we may exchange the product we have made our own. In Chapter 3, I conclude that, with certain, rather limited, exceptions, the fact that objects of this type are scarce, does not adversely impact the force of the arguments in Chapter 2.

Chapter 2. The Lockean Approach: The arguments for property rights in a state of nature.

The liberal ideal for political society is that the relationships between persons do not involve the initiation of force. This is also a high moral ideal. If property relationships cannot be construed in this manner they cannot count as liberal.

[79] In Chapter 4, I do address the very vexed question of indeterminate property transfers.

Property acquired through the barrel of a gun is thus not justly-owned property. When the first user appropriates property, force is not used against others in so-doing. However, when a second person makes claim to the first person's property, and the first doesn't wish to yield, clearly that is a paradigmatic use of force. It seems, then, that, if we wish to claim that private property is illiberal, we must put forward an argument that shows, *inter alia*, that first acquisition is itself, in some way, forcible.

It is worth pointing out from the start, that there is a difference between ownership rights in one's person and ownership of objects in the external world – namely that the first can be claimed to originate at birth, while for the second, they start unowned and something needs to be done to create ownership. Therefore critics are entitled to make the claim that insufficient has been done to create ownership in one case but not the other. So an acceptable argument in favour of property rights needs to be able to show that any claims to such creation are robust.

It is also worth pointing out, that no political system is entirely agnostic on the question of who owns various objects. If to own property is to control it, then an absence of some sort of control only exists when no human inhabitants are present and, were this the case, then no political system would be present either.[80] This is not to say that a political entity might not choose to designate some areas as unowned, but if persons are present it will always be the case that at least some area of the political entity will be controlled by someone. So any question on this subject that relates to those parts that are controlled must be a question of *who* owns the resource. Such parts may be privately owned, owned by the state or the community, or perhaps a mixture of these. The limits of ownership may be more or less clearly defined – but as long as it is used, it is in some way controlled and, seemingly, in some way

[80] Perhaps some notions of common property might escape this categorization. Harris (1996, Ch 2) suggests a number of imaginary societies where the concept of property is unknown. We might perhaps be inclined to counter with the thought that "a rose by any other name…" At any rate, such matters will not prove material to the questions at hand.

'owned'.[81] [82] The foremost ethical question thus, seems to be, who most justly has the right to control a particular object and to what extent does that right extend.

I shall look at this subject under the following headings (sections):

a. Locke's approach
b. The mixing of labour argument
c. A theft plus mixing approach
d. A creation based approach
e. The extent of control rights
f. Some thoughts on utility
g. Clash with other liberal rights
h. Some thoughts on deserts

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[81] I accept that the existing owner could renounce ownership, without specifically giving it away to another. But there is still a question of who has a right to control it. If the former owner forsakes all control, then the item seemingly becomes unowned, until another makes it his/hers. If the former owner continues to control, then we should question the meaning of the renouncement. There was an interesting debate on this issue in the medieval Catholic Church. A section of the Franciscans claimed to follow the twelve apostles in renouncing property. They declared that they, neither individually nor as an order, owned any property, but they continued to claim a right to control various items, including their chapter houses, *ad perpetuum*. This led to a question as to who the real owner was. Pope John 22 issued a papal bull ("*Ad Conditorem*", 1322) stating that it made no sense to demand *permanent and continued* use, but to renounce property rights. In this, he was in accord with Roman law. Pope John argued that to do as these Franciscans claimed to be doing, would simply abolish the distinction between use and property. The pope's viewpoint is in line with the argument I advance in the first paragraph. William of Occam disagreed with the pope on this matter (and was later excommunicated for his troubles), basing his argument on conditions in the so-called garden of Eden (a potential property of doubtful veracity and little concern to us here). Occam seemed to believe that ultimate property rights could lie with the papacy, (luxuriating, at the time, in its Avignon residence), whilst the order continued to have indefinite use of them, rendering the papacy's rights of mere academic interest. Pope John (rightly, in my opinion) considered this view nonsensical. (*Stanford Encyclopedia of Philosophy - William of Ockham)*

[82] Additionally, even in an extreme Marxist state, where any form of private ownership might be expressly forbidden, people would have to control the morsels of food they put into their mouths, since at that point anyway they would control them and it might therefore be said that they were privately owned.

i. The vector sum approach
j. Boundaries
k. Summing up

I shall commence by looking at John Locke's approach on this issue. His is not just one of the best known approaches: it is also one that, I shall argue, when adapted, gives rise to at least a degree of justification for property rights in raw materials. I believe it thus marks a suitable embarkation point and, if nothing else, a useful organizational basis for the discussion.[83] In chapter 4, I shall examine a Humean-style conventionalist approach to see whether this also provides a further justification or whether it provides reasons for rejecting Lockean-type conclusions.

a. Locke's approach

One reason for choosing this as a starting point is that, unlike some other accounts, Locke sees property rights as something that can be gained in a state of nature – that is to say, in the absence of government, or convention or agreement with others – via labouring on the object in question. These rights therefore precede any subsequent attempt to form a government by compact and can be brought with one into the compact (which is not to suggest that they might not subsequently be modified as part thereof). The advantage of this is that there is no dependence on any justification for government as part of the process, which may be seen as desirable if such justification itself faces difficulties.[84] It should be pointed out, too, that Hume's approach, via conventions, can also be seen as not needing to rely on government. It does however require conventional acceptance between different property claimants and might thus be seen as proto-governmental. Another advantage of commencing with a Lockean approach is that, if it is seen as plausible, then it can justly be seen as having primacy over other accounts that do not derive directly from liberal rights, since such accounts ought to take such plausibility into account, if liberal rights form part of our assumptions.

[83] See Sanders (1987, 369)

[84] See, for example, Simmons (1979)

We should not see the argument from the state of nature as indicating some actual historical process. Rather it is an abstract account of how property might be justly acquired without the existence of a commonwealth. I should point out at the outset that Locke's definition of property shifts during his discussion and variously refers to all of our rights, our rights in all external goods and our rights in the specific external good of land.(Simmons 1992, 228-9). It is however on property in all parts of the external world that I shall focus, with a particular focus on those not previously owned. Often, I will use the words 'land', 'raw materials' and 'natural resource(s)' in connection with undeveloped parts of the external world. Unless I so state to the contrary, it should be assumed that these are largely interchangeable.

It should be acknowledged that Locke's theory has been subject to a number of quite different interpretations (e.g. Tully (1980), Macpherson (1962)). It is not my intention here to conduct an exegesis of Locke's text. Rather it is to see whether there is a reasonable interpretation of a Lockean-type theory (this applies equally to other theories discussed) that can provide a plausible basis for the establishment of property rights. Locke is normally interpreted as supplying a natural rights-based account of how property rights become established. This is the line taken by Simmons in *The Lockean Theory of Rights* (which is somewhat similar to Waldron's, even if their conclusions differ) which seems to echo Locke's intentions and I shall use it as my primary reference, in this chapter. Locke has also been interpreted as providing a deserts-based account of property rights. I shall discuss the implications of this as well, later in the chapter, but generally I do not rely on an idea of deserts in furtherance of my argument, except to add some additional support. Some have suggested that the rights-based approach should encompass not merely property rights arising from respect for the particular actions of persons, which seem to result in the establishment of rights to parts of the natural world, but also those that arise because of the *needs* of persons in fulfilling their natural destiny.[85]

[85] This is reflected in the writing of Hegel. I do not discuss the matter further.

Locke can be seen as developing the work of earlier writers in the natural rights tradition, such as Grotius.[86] [87] There are three main and overt aspects to the theory. God has given the external world to mankind in common. Secondly, individual men, who have property in their own persons, may take land out of the commons, by 'mixing their labour' with it, subject, thirdly, to the provisos that 'enough and as good' be left for others and that rights cannot be claimed to allow spoilage, even if the initial property in the to-be-spoiled goods is just.(*The Second Treatise of Government* (hereafter *II*), esp. Chap V (introduced in sect. 27)) This second proviso means that the theory departs from full liberal ownership.[88] Under Hohfeld's taxonomy, the right to take property might be classified as both a 'liberty' right – we are at liberty to come to own it because there is no obligation to refrain – and a power right – we have the power to make our own, that which was previously unowned, by labouring on it. The ensuing right is then a claim right. Thus, under the Hohfeldian taxonomy, the right to property gained through labour contrasts with the Lockean rights to life and liberty, which can be seen as claim rights *simpliciter*.

At first glance, the theory may seem quite unexceptionable.[89] It would seem akin to the position of the air we breathe. There is enough for everyone and no-one objects to anyone else taking such as he 'works on' (in this case breathes in).[90] Nozick's example of taking a grain of sand from Coney Island is of a similar nature, but perhaps points to an ensuing worry – for eventually there won't be enough and as good for everyone, and this might be seen the case with land today.[91] This, as Locke correctly points out, becomes a particular problem following the invention of money, since we can acquire far more than we can work on, via the mechanism of consensual purchase and sale. In addition, the invocation of God's wishes for mankind makes

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[86] *The Rights of War and Peace* (1625). (Locke also shows some debts to Pufendorf, although the latter's theories are more conventional in character.)

[87] Hume is also sometimes seen as being (loosely) in the natural law tradition

[88] So might the first, though this is a more complex issue and depends on what Locke meant by it.

[89] Though if one had an inherent objection to the idea of private property, one presumably could take exception.

[90] We might claim perhaps that mere non-objection is insufficient to make the act moral.

[91] Though it is not obviously so and I doubt that it really should be seen in such a way, for reasons that will become apparent later.

the theory controversial, since, nowadays, we would not normally want to rely on such an assumption in our arguments. As we unpack Locke's arguments, these points may appear less worrisome than at first sight, for the reasons that ensue.

I shall follow Simmons (1992, 242 et seq.) in thinking that Locke's argument is overdetermined and can be disaggregated into two separate strands. The first proceeds from God's wishes for mankind, coupled with the means necessary to attain those wishes to a conclusion as to why private property is permissible. This argument has a teleological form. It is possible that we might reconstruct this argument without reference to God's wishes - say from certain community rights or from utility - and I shall briefly return to this point later. But first, I will discuss the second strand. In disaggregating Locke's argument in this way, it departs from its full Lockean form, and I shall henceforth classify the approach I discuss as quasi-Lockean. Locke himself appears to stress the first strand rather than the second (which emphasizes the difference from my approach) but the two seem to be conflated at times, which somewhat muddles his argument. Concentrating on only one strand thus also adds greater clarity to the discussion.

b. The 'Mixing of Labour' Argument

The second strand of the argument is non-teleological. This is both a blessing and a curse. It is a curse because an end result provides something to argue towards and that is now lacking. But it is a blessing because it does not involve controversy about God's wishes and the thought that God has provided the land to mankind in common. Secularization might suggest that we should see the wilderness as unowned (I shall develop this point further in a moment), whereas if the land had been provided to mankind in common,[92] this might point towards the thought that we need all of

[92] Locke might have meant a variety of things by the idea of land being given to mankind in common. It might imply a form of common ownership or simply that it was not owned by anyone. The thought that 'enough and as good' needed to be left when land was privatized might seem to suggest a form of common ownership. However, I shall not delve into what Locke might have meant and nothing I will say is supposed to be an analysis of Locke's true meaning. I shall however have much to say on what is the most appropriate assumption in a state of nature.

mankind's permission to privatise it. Locke has an argument from utility against this (II,V,28) with the thought that mass starvation would result, but we should presumably question whether such considerations of utility are sufficient to counteract the need for unanimity when apparently countermanding the creator's designs.

I will commence by introducing a preliminary argument as to why the 'mixing' of one's labour with unowned land might be seen as leading to ownership in it. I will follow this with some counter-arguments. As a result of the counter-arguments, I will unpack the original argument, in order to assess its plausibility, concluding that there seems to be a serious impediment to accepting that a mixing approach, on its own, can provide a plausible argument for the gaining of property rights. The gist of the 'mixing of labour' argument approach is as follows: if I take some items of property, acknowledged to be my own, and construct something from them, then the product is also mine, provided that I do not infringe the individual rights of others in the process. If I own the Lego bricks, I own the structure I create from them. This is fairly unexceptional. And if, in the process, I incorporate some unowned item into the structure, the resulting structure is also my own, because, through the mixing process, I have made it my own. This is more controversial.

I shall count as 'unowned', a raw material that no other person is currently using in any meaningful way, not something like the English commons in Locke's time, which others had been working jointly, maybe without any recognized title[93] (and which too, might profitably be privatised due to the tragedy of the commons). Locke suggests ("In the beginning all the world was America", (II,49)) that America provides an appropriate example of such land (though we might disagree to the extent that it was entirely wilderness, since some was used by the indigenous population, but presumably, at least some of it, was genuine wilderness).[94]

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[93] The latter would most likely be thought of as having already been worked by a group of persons, and thus being entitled to property rights under the thesis being examined in this essay. In simple terms, it is just a case of the law catching up with the moral case, and thus allowing the land to be used efficiently and without the problems of the commons.

[94] The word wilderness may suggest something rather bleak. This is not the intention: I simply mean that it is currently unused.

The argument is summed up by Sreenivasan (1995, 33):

> Since a ploughed field, say, cannot be taken from a man without also taking from him the labour he expended in ploughing it, the field cannot be taken from him any more than labour could be. But this is just to say that he also has property in the ploughed field.[95]

This, in bald terms, is the quasi-Lockean argument for ownership rights in previously unowned land residing in the first developer. To deny ownership rights might be seen as denying ownership in one's labour or suggesting that the 'unowned' land was, in fact, in some way owned, unless a counter-argument were to be mounted to the effect that this type of activity was simply insufficient to establish ownership, despite the intuitive success of the first argument. I shall proceed through the construction of the argument in various phases, momentarily. I should add, that this is not supposed to be a deserts-based account - it simply follows from ownership of the different elements - or lack of any ownership, in the case of unowned elements.[96] The immediate account is designed to be essentially formal.

Thus can we perceive the ghost of the argument of 'mixing' of labour to establish property ownership, for those who accept basic liberal rights in the individual. What might be said against this? There are a number of potential objections, the most important of which seem to be that labour and resource cannot be mixed, that even if they could be, such mixing is insufficient to establish ownership and that one's body too is unowned and therefore any thought of extending ownership of it into the external world is misplaced. I shall examine all these three points first and then go on to address other problems that might be raised against this approach. The second of these objections is, I believe, the most vexed one.

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[95] This is Sreenivasan's explication of the argument. I do not suggest that he reaches the same conclusions as I do.

[96] There is often a suspicion that this type of account owes something to a conception of deserts in its appeal to justice and I shall attempt to develop that further, in a subsequent section. In the meantime, my intention is to avoid any thought of deserts entering the account.)

What does it mean to talk about one's labour becoming mixed with an object? Clearly, the idea of mixing cannot be similar to that which occurs when two objects are mixed together (such as chemicals in the laboratory) and a third is formed in the process, in which case we would probably have little objection to the thought that the owner of the two objects would also become the owner of the resultant product,[97] since the thought that ownership of various objects results in ownership of anything resulting from their mixing seems quite appropriate. But labour and raw materials are objects of different kinds, which cannot, literally, be mixed. To suggest that they can has been called a category mistake. Wenar (1998, 806) states that mixing one's labour is like "mixing one's mixing", because labour is an activity, not a substance. A way to resolve this worry would be to suggest that our labour is used to develop the resource in some way - to change it - so that something different results[98] and that 'mixing' is a placeholder for a more correct gerund to describe this process. The 'mixing' is, to an extent, metaphorical. But labour has been applied to the resource and some form of alteration has taken place and, as I will discuss later, the resource may not easily be shared. So it is doubtful that these terminological worries about 'mixing' really diminish the case for saying that the resultant product should, in some way, inhere in those who own the starting materials and bring the change about. Similarly, it does not seem to matter greatly whether someone is designated as the owner of himself or whether he is to be considered as unowned but self-sovereign. Because, even if it we think it inappropriate to talk of self-ownership, it seems quite natural and appropriately in line with moral intuitions to think that, if we are self-sovereign, we should be considered to be the owners of our own labour and thus entitled to deploy it in ways of our own choosing.[99] This line of argument makes it plausible to think that

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[97] An exception might be when the reaction product seemed to have some property (such as being, or being capable of developing into, a life form that might justifiably be seen as having rights of its own) that would make it inappropriately owned by another.

[98] The difference might actually be quite small, but this does not obviously seem to detract from the basic argument

[99] It would, of course, matter if there were reasons for thinking that one person could be owned by another - or by society. If either of these situations were thought to be in play, we would seemingly have to acknowledge that the labourer could not claim ownership rights in any resulting product, certainly not full rights anyway

a free labourer who labours on his own raw materials would have the right to the resulting product.

What, then, if the raw materials utilized are previously unowned? This might seem to imply that it is open to anyone, and therefore for the first developer, to take them under his control. But it might also be taken to mean that no individual has the right to develop them in the first place or, if one does, he does not thereby become owner of the final product. To help resolve this, we need first to be clear just what is being claimed when we designate such natural resource as unowned. One thought is that the land is *really* unowned - *no-one* has any prior claim to it. If no-one has a claim, then presumably no-one can morally stop another from using it. What happens next will shortly be addressed. I will call this a 'no-ownership' situation. A seemingly different thought is that to be 'unowned' means that it is somehow the common inheritance of the group or tribe or nation state or, indeed, all of mankind, but has not yet moved into a more formal ownership status.[100] I will call this a common-ownership or 'co-ownership' position. This position might include the thought that we have certain obligations to share unowned land with others, which seems close to suggesting that they have partial ownership rights in it. This is a very different claim: for it suggests not that the land is truly 'unowned' - but that it is loosely owned in some, so far undefined, manner - and that this loose ownership means that the aforementioned group has some say in whether it continues in the 'unowned' state or may be taken out of it and into the hands of certain individuals, perhaps provided that certain conditions are fulfilled. (It could be that the only condition for this privatization is that ownership should inhere in the developer, which is the normal Lockean approach and would seemingly give similar results to the quasi-Lockean case being examined here, albeit though, by starting out from a different place.)

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[100] Proudhon's argument that "property is theft" would also seem to imply something like this: for if a theft has occurred surely some prior form of ownership must have been in place. But then, this earlier ownership was also a theft, rendering the argument incoherent, unless he means something more nuanced when he refers to 'property'. He might, for instance, be taken as referring specifically to private property.

Are there reasons for thinking that one or other of these ownerships is more plausible? One possibility is this. Ownership has to involve a natural relationship between a person and an object, or a convention that has granted it. However, in a state of nature, there is no such convention. Nor is there any natural relationship between mankind (or sub-groups thereof) and parts of the external world. Therefore the initial position is one of no-ownership. An advocate of equal voice might counter this by suggesting that the taking of an object from the wilderness harms others or interferes with them. But this is not obviously the case, unless there is a scarcity of raw materials, and even if there is perceived to be one, we can certainly mount an argument to the effect that the scarcity value will prompt efficient use. So this line also seems to have a number of worries associated with it.

Another important question concerns co-ownership position. It is a simple question of 'why?'. If it is unowned wilderness, why should anyone have some prior claim to it? Of course, if we believe, with Locke, that it was granted to mankind in common,[101] this would indeed supply a reason why, but this is a viewpoint that I have already rejected for the purposes of this initial enquiry.[102] Even without such "quaint theological premises"[103] playing a role, we might finesse the common ownership argument with the thought that there is something about our obligations to others that should prevent or moderate acts of privatisation, which imply exclusive use by one person or one group among many. Again, we need to question why this should be the case, and I imagine that the absence of reference to God's wishes will make this point more difficult to establish. It is not obviously consistent with the liberal assumption of this essay either. Nonetheless, this seems to be a major reason for those of a more communitarian viewpoint to reject full liberal ownership of property. Indeed, it appears that even Nozick has, to some extent, been seduced by this position, or so I shall later suggest. One worry is that land is scarce and one person's privatization causes a worsening for others. This is a (maybe, the) major concern and I shall devote Chapter 3 to discussing questions surrounding it. But this scarcity doesn't seem to

[101] Interestingly, though, Locke believes that land must be taken into private ownership – otherwise utility will be undermined.

[102] Nor, incidentally, do I agree with it.

[103] Wenar (1998, 804)

suggest that it should be seen as being held by the community and therefore does not seem pertinent to the question of whether there is any initial community ownership or any obligation, *per se*, to share natural resources. To suggest that it is not really unowned, seems to be a suggestion to hold a positive view on the matter, which requires reasons and, in the absence of these, genuine non-ownership seems like the proper default position. This is the line taken by Edward Feser in his paper "There's no such thing as an unjust initial acquisition", particularly in Section II ('The basic argument').

> The reason there is no such thing as an unjust initial acquisition is that there is no such thing as a just or unjust initial acquisition. The concept of justice, that is to say, simply does not apply to initial acquisition. It applies only after initial acquisition has already taken place.. In particular, it applies only to transfers of property (and derivatively, to the rectification of injustices in transfer) (2005, 58).

His argument stems from the thought that, were there an unjust initial acquisition, it would imply that the acquired object was already justly owned. He discusses the view that the resources might be commonly owned, but suggests this seems incorrect. He makes the point that this "is more in need of justification than the claim that no one initially owns anything" (2005, 60). In the paper, he gives several examples explaining why the concept of initial common ownership is 'absurd', for example:

> Consider the following: a pebble resting uneasily on the surface of the asteroid Eros as it orbits the sun, a cubic foot of molten lava churning a mile below the surface of the earth, one of the polar icecaps on Mars, an ant floating on a leaf somewhere in the mid-Pacific, or the Andromeda galaxy. It would seem odd in the extreme to claim that any particular individual owns any of these things: In what sense could Smith, for example, who like most of the rest of us has never left the surface of the earth or even sent a robotic spacecraft to Eros, be said to own the pebble resting on its surface? But is it any less odd to claim we all own the pebble or these other things? Yet the entire universe of external resources is like these things, or at least (in the case of resources that are now owned) started out like them, that is to say, as just a bunch of stuff that no human being had ever had any impact on. So what transforms it into stuff we all commonly own? Our mere existence? How so? Are we to suppose that it was all initially unowned, but only until a group of Homo Sapiens finally evolved on our planet, at which point the entire universe suddenly became our collective property? (How exactly did that process work?) Or was it just the earth that became our collective property? Why only that? Does something become collective property only when we are capable of directly affecting it? But why does everyone share in ownership in that case - why not only those specific individuals who are capable of affecting it: for example, explorers, astronauts, or entrepreneurs? It is, after all, never, literally, we collectively who discover

Antarctica, strike oil, or go to the moon, but only particular individuals, together perhaps with technical assistance and financial backing provided by other particular individuals. Smith's being the first to reach some distant island and build a hut on it at least makes it comprehensible how he might claim plausibly or implausibly to own it. This fact about Smith gives some meaning to the claim that he has come to own it. But it is not at all clear how this fact would give meaning to the claim that Jones, whom Smith has never met or even heard of, who has had no involvement in or influence on Smith's journey and homesteading, and who lives thousands of miles away (or even years in the future), has also now come to own it. Still less intelligible is the claim that Smith's act has given all of us the human race collectively, throughout all generations a claim to the island. (205, 60-1)

He concludes the section by saying:

The natural conclusion to draw from this is that the world starts off unowned, and that it is precisely and only the people who actually do something to change this fact who come to own the particular parts of the world on which they act. At the very least, *this*, I suggest, is the natural default position to take, with the common-ownership advocate being the one who needs to justify his moving off of it. But then, as I have argued, the natural default position to take on initial acquisition, is also that it is never unjust (63).

To take the matter further, by looking at it somewhat differently, I take it that any plausible rationale for common ownership would involve the thought that such ownership meets an *ethical* demand: that there is something morally wrong about interpersonal relationships, if there is no acknowledgement that collective ownership[104] of raw materials amongst persons is the proper moral relationship or more generally that some form of sharing is morally demanded. It is not clear how such a viewpoint would arise under the parameters of this account. It clearly cannot come from God, since that has been excluded as a premise of the argument. Nor does it seem likely that it would arise from any negative natural rights. Probably, the most promising viewpoint would be one where certain positive entitlements are applicable between persons in a state of nature. Such rights would have to include something like a duty to share such materials. But it is not obvious why such a duty would arise, leading back to the thought that non-ownership should be our default position unless a convincing counter-argument can be mounted. Wenar (1998, 804) makes one proposal as to why non-ownership should not be the default position. He suggests

[104] Of some form.

that the two approaches can be characterized as "equal freedom" and "equal voice". In the first case, each individual has an equal set of liberties, whilst in the second she has an equal say in collective decisions. This characterization is, no doubt, a plausible one. But it is not obvious that equal voice, in this case, amounts to more than common ownership, so the dialectic does not really seem to be advanced. I don't suggest that Wenar is unaware of this. His point, presumably, is to make this option seem more attractive, in that we might see the idea of common voice reflecting a basic human or democratic intuition. But since one of the key issues concerning democracy is whether we need a set of basic rights to preserve certain space for individual protection against majoritarian government, this simply recasts that argument, and clearly a role for individual rights is a key aspect of the assumptions behind this essay. In addition, it is not entirely appealing to think that those who have done nothing to develop a resource should nonetheless be in a position to countermand those who have.[105] Nor indeed, that equal voice should attach itself to our personal choices. Indeed, we may go further and find it worrisome, for reasons of personal liberty, that lifestyle choices be so constrained – and it is not obvious that possession of property is not an element of one's lifestyle.[106] This then seems a route that we should be wary of pursuing.

Another thought in favour of equal voice might be a claim that somehow harm would be rendered to non-owners, were "equal freedom" be allowed to pertain. This is clearly the case under particular sets of circumstances. However, it does not seem likely to be the case overall, since the benefits of property ownership are usually thought to be reinforced via the tragedy of the commons. I would suggest that, in the round, the empirical evidence seems to demonstrate the benefits of privatization.

With these thoughts in mind therefore, it does not appear unreasonable to hold that non-ownership is the more appropriate default position, since the point that it is rather

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[105] This point, I accept, incorporates an element of deserts, which I need to discuss further and will indeed do so in section (h).

[106] Especially, perhaps, if this means extension into the political arena, which seems increasingly characterized by a populism brought on by a conjunction of political and press expediency, resulting in something akin to mob rule.

strange that ownership in resources should somehow inhere in humans who happen to live nearby remains unaddressed. (I shall further discuss an argument in section (d) which suggests that different approaches may be applicable under different circumstances. Thus, if someone discovers and works a resource that others were unaware of, or disinclined to work, we may intuitively feel that equal freedom is the appropriate yardstick whereas if a group of persons are all inclined to work the same resource, equal voice may seem more justified.)

Cohen (1995) also addresses this question in *Self-Ownership, Freedom and Equality* - a work that has been highly influential.[107] In his two person world thought experiment ('Able and Infirm') Cohen starts from a position where each has a veto over the other in terms of use of the world's resources, in virtue of their joint ownership.[108] He reaches the conclusion that self-ownership is purely formal in this world. He ends by saying that:

……the particular point that talent as such yields no extra reward even under self-ownership where there is also joint ownership of external resources is, I believe generalizable.

I do not believe this is actually the case in the world that Cohen posits, since as Tom Palmer (1998, 236) argues in his paper "G A Cohen on Self-Ownership, Property and Equality" that while Infirm would not get *less* than is necessary for his sustenance, there is no reason to assume that any surplus would be shared equally. For Able has bargaining power too and could refuse to go beyond an equal sustenance point, unless permitted to keep more of the surplus.

Cohen's point, from Able and Infirm, is that, because of the problem he poses, self-ownership in a jointly owned world is merely formal since, by each exercising his veto, no one can do anything without consulting others. We may well be inclined to

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[107] See, for example, Kymlicka *Contemporary Political Philosophy* (1990, 118)"What would happen if the world was [sic] jointly owned, and hence not subject to unilateral privatization?"

[108] He is not addressing the issue directly in this piece. Rather he posits equal voice (or something close to it) and investigates the implications.

accept this, at least in part. Cohen then argues that Nozick is subject to a similar charge as a result of his zipping back argument.

His point is that this is as plausible as thinking the land is unowned, although the reason he advances for this is that it is "intuitively relevant", which might not be considered much of a justification by non-Marxists or others who do not start from a joint ownership position. I do not think it *is* as plausible, for reasons already stated. His world is a form of joint ownership. The result of his argument is that communism is compatible with – indeed the rational outcome of – self-ownership.[109] Admittedly, Cohen is arguing against Nozick's particular justification for private property, which I believe is not quite the same as the one I will argue for. In Cohen's Joint Ownership world, once the world has expanded to as little as 1000 people, either no-one would be able to appropriate anything (this is expanded further by Friedman (60-65)) or there would have to be a different form of appropriation. (This latter point has been much discussed but is not immediately relevant to the point at hand and would require a digression, so I merely note it here). However, it does not seem that the point made that Nozick suffers from the same worries, via the generalization thesis, is justified. For as Tristan Rogers argues, even if we grant Cohen his point, the opportunities open to Z are very different to those open in the Able and Infirm situation, since in the capitalist real world "every person added increases the options open to Z", whereas in the Able/Infirm world every person added reduces Able's options. (2010, 10). This latter point would certainly point to Nozick being able to demonstrate that first appropriation benefited all, in a way that Cohen's Able/Infirm Joint Ownership world would not.

In discussing this, the situation in former Palestine comes to mind and may help illuminate the issue. Here a group of persons and their ancestors had farmed the land for nearly 2000 years.[110] Settlers, who believed they had anterior claims, came to possess part of the territory. The concept of equal voice – or its democratic equivalent – led to expulsion of Palestinians from part of the territory, despite such a long period

[109] The reasoning behind this is itself suspect, even if the initial assumption is granted.

[110] I do not claim to know the reasons for the earlier expulsion of Jewish tribes, nor do I believe that claims cannot escape amelioration with the passage of time. I discuss this more in Chapter 4.

of possession and exploitation. We have sometimes been led by the settlers to believe that their superior utilization of the land somehow justified expropriation and this just seems to illustrate the wrongness of any approach based on utility as its primary motivation. The investment in the land had, to all intents and purposes, become Palestinian and to dispossess them of it and the land itself, without their consent just seems wrong. (Inevitably, in a real world situation, things are messier than the pure philosophical argument may suggest and I shall be discussing this further in Chapter 4, in connection with rather similar situations). And this is why equal liberty may be considered a more appropriate approach. It is not the business of the majority voice, once virgin land has become utilized and invested in, to remove it from the developers, say I. In saying this, I do recognize that the ancestors of the recent settlers were on the land 2000 years ago. Therefore I cannot claim that their claim is defeated by my line of argument and, indeed, I shall have to more to say on this point later. I claim only that equal voice does not seem appropriate.

John Rawls, in *A Theory of Justice* (1971) clearly has to be seen to belong to the equal voice tradition, even if this is not at first apparent. Currently-held property is available for distribution in the Original Position (as though it were manna from heaven) and this could not carry the moral weight that it does, unless the parties to the agreement are entitled to distribute shares. (Such a point is made by Lomasky, (1987) 136. I quote this just to illustrate the point. Of course, much more could be, and has been, said on existing property rights under the Original Position.) This could not be the case, were some property entitlements already in place. Therefore all property might be said to be essentially co-owned under the conditions of the OP.[111] Why does Rawls entertain this idea? An answer that he provides is that such property entitlements will have been tainted by a moral-arbitrariness that cannot be allowed to count in terms of property distribution, under justice as fairness. We are not considering all property ownership here – only previously unowned property - but if the moral arbitrariness argument works, this will impact the present argument, as well. Two points should be made here. It is not only external property that is

[111] We should note that this is a considerably more extreme position than the co-ownership position being investigated here, which applies only to unused resources – nonetheless it can serve to illuminate the issue

arbitrary. If we believe that only the non-arbitrary is not up for grabs, then we should presumably accept that, in Nozick's example of the eye lottery, one of each healthy person's eyes is potentially available for distribution to the sightless. If we do not believe this – as I presume we do not (and anyway, it would be contrary to the assumptions of this essay) - then a further relevant difference must be cited as to why moral arbitrariness provides an argument for redistribution in one case, but not in the other. One such argument would be that there is something quite different about the human body – particularly important parts thereof - when compared to parts of the external world. Intuitively, this does seem reasonable enough, though it is unlikely to counteract all property claims.

The second point to be questioned is whether the fact that some property claims are the result of moral arbitrariness could anyway provide an argument for redistributing things. Somehow an argument would need to be made that, since X is morally arbitrary, it is available for collective distribution, but not available for personal distribution. The fact that something is morally arbitrary does not seem sufficient to provide such an argument, since, of itself, it leads no more towards collective decision than personal decision. There must be a further thought that, if X is morally arbitrary, it is available for collective distribution and not personal distribution. (It should be questioned whether this is compatible with the lexical priority of the Liberty principle.) As Lomasky says (1987, 138) "Rawls has, unfortunately, undercut the supporting structures on which a viable liberalism must rest". The truth is that there is no good reason for liberals to imagine that moral arbitrariness implies social control – the reverse might seem to be the case. When individuals happen to possess properties - either internal or external - which are in some respect arbitrary, but in other ways due to their own efforts or the simple fact of their existence, the tenets of liberalism mean that those properties should inhere in the individuals concerned, to avoid their basic rights becoming trampled upon. Only if we could show that some effort or property of others had somehow provided for such arbitrary properties and such effort or property had been neither voluntarily provided, nor occurred as a result of pure happenstance, could society properly entertain a claim by such providers, that they should receive compensation in the form of redistribution. So the moral arbitrariness

claim would seem insufficient to the task of demonstrating that co-ownership of external resources is the natural starting-point.[112]

From these points, I claim that the co-ownership claim is not sustained and the argument then moves to the question of whether any individual actions, and if so which, are sufficient to justify some degree of personal ownership. Before I do that,it is perhaps worth pointing out that the no-ownership viewpoint is not without friends amongst philosophers, insofar as it may be interpreted as the thought that sharing with others may well be recommended, but is not obligatory and therefore not enforceable by the state. This approach is often associated with Hobbes and, more recently with Nozick. But it is arguably also in line with any who believe that duties of benevolence are not enforceable by the state (in contrast to duties of non-infringement). Thus Kant might arguably be included in this category, since he sees such duties as imperfect.[113] So might Hume: though, this would not apply if this results in disorder at the societal level (as does nothing being suggested in this essay).

If the land is more genuinely unowned, there seems no prior reason why someone should not be entitled to do something with it. This is just what such non-ownership amounts to: no-one has any right to stop development because there is no ownership and therefore there are no control rights in place. So there is nothing that should stop someone developing it - 'mixing labour' with it. From this, follows a question about ownership of the resulting product. If I invest my labour and my raw materials with some unowned resource, is there any reason to think I do not then own the final product? If I sow some seeds in unowned land, and tend them and it till fruition, do I not therefore have a legitimate claim to the corn that grows on that land? The corn is

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[112] Rawls' position is, in fact, I suggest, rather akin to that of the kindly shopkeeper who invites the local children into his candy store and offers to let them have the contents, on the condition that they divide them up fairly. It seems entirely proper that the distribution would be equal. But the key is that shopkeeper owns his inventory and is therefore entitled to do as he would with it. There is no reason to suppose, at the outset, that society has such ownership rights in either the developments of others or in the raw materials of the earth.

[113] More would need to be said about this. We might, for example, argue that imperfect duties become perfect in concrete situations.

the result of *my* seeds, *my* clearing of the land so that it is ready to be cultivated, and *my* tending of the crop until it is ready for consumption. It seems quite plausible to think that the corn is mine, as well. But we should acknowledge also that the land after harvesting has also been changed as a result of *my* efforts. It is no longer wilderness: it is now in a state ready for a second planting. It also therefore seems plausible that I have a prior claim to use it for a second cycle of farming. Later, I will suggest that these cases demonstrate necessary conditions for ownership: they are not sufficient however, except when removal of ownership could count as confiscation of my investment. This is in contrast with the Lockean exposition.

But there is another worry about these arguments and their potential to establish property rights. These are arguments of extent of the type offered by Nozick (*ASU*, 174-5). An astronaut claims title to the whole of Mars by planting a pole[114] on a small part on it or notoriously, a man claims the ocean by tipping his tomato juice into it. Nozick's point is that there is a difficulty in specifying the extent of any ownership rights, and *in extremis* - as in the second example - we simply waste or lose our labour. In the case of the astronaut, the question is a question of the *extent* of our property rights. This is not an unimportant question and I discuss later an approach whereby we need to establish conventions, which do not detract from the labour mixing thesis, but help clarify looseness around the edges. But as initial standpoint, it seems that my argument thus far takes us no further than thinking the astronaut owns anything more than the small piece of land on which the banner is planted. In principle, no entitlement is established to more than one has worked on, under the mixing approach.

As for the second one, we need to dissect more closely what is happening. It is not obviously the case that the man has set out with any purpose other than to discard the juice. In which case, it seems quite right to think that his labour is indeed wasted – it is perfectly feasible that one can mix vigorously, but pointlessly. But if one were to stretch the example to its limits and suggest that there had indeed been some project, perhaps to draw the fish to the surface, then perhaps he might legitimately make some

[114] I avoid suggesting that it is a flagpole, as in Nozick's example, since this would seem to imply something to do with nation states, which is a distraction at this point.

claim to the catch. (Again there might be some looseness around the edges, which needs further clarification.) The problem with the oceans in respect to property rights is their fluidity, which Nozick is presumably attempting to exploit, in order to impugn the labour-mixing argument's force. But the fluidity is a practical problem rather than a philosophical one. It is difficult to set any limits on such property, because the substrate is constantly on the move. In this, it is obviously different from land, where assignment of boundaries is far more feasible. But there is no reason why some types of boundaries cannot be established in the oceans. It is feasible, for instance, to put a cage in the mouth of a Scottish estuary, in which salmon are contained, even if the water moves through the cage walls. And, in such cases, there seems no problem in thinking that the cage and the fish growing in it, should not belong to the first user. Of course, my example of the tomato juice being used as bait is far-fetched and such a plan is therefore unlikely to succeed. If this foolhardy plan resulted in failure, the labour would again be lost: just as the labour of the farmer would be lost if *his* harvest failed. The point is not about loss or gain: it is about the constraints that might morally apply to others as a result of labour mixing. Presumably Nozick also wishes to suggest that one day the molecules of tomato juice might be dispersed – at extreme dilution – throughout the oceans and the thought that this would then confer a property right in these oceans is meant to suggest a *reductio*. But, for that argument a different counterargument would apply. For, in the case of the oceans, numerous persons have already mixed their labour in the past and they are thus not in the sort of virgin state that counts for being a candidate for first ownership.[115] We should further add the point that, a person should be seen as owning his own labour and this is why the taking of his crops is wrong. But fishing in an ocean in which tomato juice has earlier been poured by another, cannot be seen as expropriating the latter's labour, except in very restricted circumstances.

However, the example of the oceans does give rise to a more genuine worry about a pure mixing of labour approach and this relates to the question of whether minor amounts of labour mixing could plausibly give rise to a subsequent right to control.

[115] This is not to say that there might not be utility-based reasons for allowing some form of private ownership. The successful preservation of the Icelandic fisheries – compared with those in the EU – provides empirical evidence in favour.

To choose a somewhat different example (with the aim of giving rise to more clear cut analysis), I will consider the question of someone who walks across a piece of virgin land on his way to work. We might say that he has 'mixed his labour' with the land, although not in the sense I have previously defined. We could not plausibly imagine that he had thereby gained a right to control it. That he thereby had the right to exclude another who wished to do something similar from so-doing. Intuitively, it seems that the answer to this should be that he has not. But why should this be? Labour, after all, has been mixed. The mixing hypothesis might be taken to suggest that the amount of labour mixed plays no role in the garnering of a right of control, although we probably tend to think, intuitively and at first pass, that a more extensive amount of mixing creates a stronger case for control). This seems particularly to be the case for investment goods, such as land. The mixing approach may be satisfactory for immediate consumables, such as acorns and hares.[116] If we want to follow the intuition, it seems we must, in some way, amend the thesis. One way would be to amend the approach from mere mixing of labour to requiring that something rather more substantial be required, before mixing could count towards ownership. If we go down this route, we face a further worry. The amounts of mixing will presumably vary along a scale – from trivial amounts, as in this example, to more substantial amounts, when crops are grown.[117] This might then seem to represent yet another case where a convention is needed to qualify the extent and shape of the rights generated. Another approach would be to demand an additional qualification before any property right could be inferred. I investigate this under section (c) below. But the point I have argued is that mixing does not play this sort of role. Rather it reports the fact that ownership has been established.

I will leave the argument here at this point and return to it in the next section, where I will consider a more complex approach. I will also consider the implications for a resource-stretched world in Chapter 3. Firstly though, I will briefly address another criticism that might be made of the mixing approach, since, if upheld, this might also adversely impact any subsequent story.

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[116] Though the word mixing, in terms of raising an acorn to one's lips and then transferring it into one's mouth is undoubtedly strange, and not quite right, under normal parlance.

[117] The amount of mixing doesn't seem to be the point. I could mix

This has been made by Susan Moller Okin in *Justice, Gender and the Family.* If working on something could grant property rights, then the mother must be considered to have *ownership* in her children. If we reject this thought (as I agree we should) then must we reject the thought that labour might generate property rights, on pain of contradiction? Her argument is by analogy and therefore whether it works depends on whether there is a relevant difference between the two cases. Okin seems to accept that once children have grown into moral agents and become rights bearers, maternal (presumably it should really be parental?) ownership ceases, although it is not obvious why this follows. But, before that point the implications, could still be worrisome in terms of the potential for child abuse. And if we are all owned by our parents, then the self-sovereignty concept, on which the mixing of labour argument relies, might seem to fall by the wayside. In fact, Okin's argument does not echo Locke's since it is not obvious that anything previously unowned is being worked on in the case of conception and pregnancy. This takes us away from the focus of this essay and onto the justification for one of Locke's (and my) assumptions. On that score it may, however, magnify the concern rather than diminish it, since it might seem to make the parental ownership even more justified, thereby further undermining self-government rights. A proper response to Okin's objection, I think, will rest on the thought that certain types of things cannot become property via labour mixing, and these are things are those that are born to natural self-government. The fact that children up to a certain age do not yet possess moral agency may not be relevant if they are born to moral agency, in a way that other fruits of one's labour are not (Simmons 1998, 211). This will, in turn, require a potentiality argument, into which I shall not speculate further here since it is a digression from the question of working on the unowned, other than to say that there is no obvious reason why one should not be developed, even if it may not be entirely straightforward to do so. But the key objection to Okin's analogy is that the possibility of ownership arising from mixing of labour with unowned objects can only apply when an object without any potential of self-ownership is the result of the mixing. Indeed, this thought is actually supported by the key assumption of this essay - namely self-sovereignty. For it would be strange to assume that persons are self-sovereign, if this concept then undermined itself, through the actions of those persons. The thought that objects capable of self-

sovereignty cannot become owned as a result of the process involved in their generation, is thus not as *ad hoc* as it might at first appear. Instead it follows from the initial assumption and qualifies the operation of the process of property right generation in cases where that assumption would itself be undermined.

I leave this section then with the thought that the ownership of a third object resulting from the mixing of two owned objects naturally seems to inhere in their owner. There seem to be good reasons for thinking that, in its initial state, resources should be considered as unowned. But the case for thinking that mixing an owned object with an unowned one, still leaves some intuitive difficulties, if the argument is made purely in terms of 'mixing' – even if this is seen in a metaphorical way. 'Mixing', in and of itself, does not seem entirely capable of addressing why ownership should inhere in the resulting object.[118] In the next section, I suggest a more specific set of circumstances, which helps to reinforce the argument.

c. A forced-appropriation plus mixing approach

From the argument developed above, it seemed that the idea of the mixing of one's labour with an unowned resource, would be insufficient to generate future control rights. A possible way forward is to treat mixing as a necessary condition only and see whether, in conjunction with further necessary conditions, a jointly-sufficient set of conditions might be generated to give the argument a greater degree of plausibility. The possibility I shall explore in this section is one which says that, in some way, the labourer must be hindered or prevented in his use of previously-mixed resource, in the event that others were to use it, before the idea of potential ownership can gain any traction. The reason that this might gain traction is that, without a right to control, the labourer would be forcibly denied the labour, or some other input that would be deemed his own, that he had invested. The necessity of labour-theft before property title can be appropriate, gets little mention in Locke, but it may be seen as the ghost at the feast, lurking below the surface. The key point is that, if the labourer has invested

[118] In addition there may be difficulties in describing the extent of such ownership.

an input in a resource, which nobody has prior claim to, and he can only use that resource in the manner he has previously been using it, if he is undisturbed by others, then to take that resource from him would be to coercively dispossess him of that input, which is akin to theft of something that is his. The argument therefore moves from one in which the labourer might claim to have gained something from his mixing to one in which he is deprived of something when others seek to use it. And the thought that his labour is his, and therefore that it is wrong for others to dispossess him of it, arises from his basic self-sovereignty. Thus ownership of one's labour may be seen as crucial to the argument that follows. And the thought of being deprived of something created with that labour is very crucial to the neo-Lockean case I seek to develop and marks a key divergence from the more standard Lockean case.

In developing this approach, I shall argue that a property right should be seen as a right to control and not a right to profit from (a distinction that was mentioned in Chapter 1). If a right to control is removed, the labourer is denied his invested labour. So too, it might be argued, in the case of a right to profit, but there is nothing about an investment that guarantees any return, unless specified in a contract, and this will not be the case in situations of first acquisition. In particular, if a second party competes with the labourer, he may well take away the ability to profit from the labourer's investment, but he does not remove the ability to control it. This approach does not therefore preclude competition and is thus more narrowly drawn, in terms of impact, than is a right to profit from. The arguments I will advance will not be sufficiently robust to take us beyond a control right.[119]

Let me examine this in more detail. There was a worry with regard to the pure mixing argument that someone might be able to claim a resource simply by, for example, walking through the woods, and then claim a right to prevent others from using it, or to charge them for the privilege. One thought that was raised was that too little work has been done to claim a right in perpetuity. If we consider the thought of hindering the original labourer in his use however, it seem that the issue is not so much one of an amount of work that is important, but whether the original labourer is able to

[119] And this may be seen as advantageous in terms of the utility of others.

continue to use that which he has created unhindered. If he plows the field, it seems difficult to imagine that someone can come along and do something else with the land without disturbing his project – the same is more obviously the case, should he construct a factory on the land. But it is far from obvious that someone having walked through the woods could generate any claim to exclusivity, since others doing the same do not obviously hinder the first walker, should he choose to do the same the next day. Such persons would not be not depriving him of anything. And it also follows from this that harmless trespass on claimed land is permissible. The arguments presented thus far could only be used to make claims in resources insofar as to prevent hindrance to the activities of the first developer: this could not, for instance, automatically lead to *ad coelum* claims.[120] Subsurface claims are subject to similar considerations.[121] The key point is that you've mixed your labour into an unowned object if and only if it makes sense to say "take that object and you've taken my labour". There is nothing more to labour mixing than that. This gives us a *prima facie* reason for thinking that object becomes the labourer's. We may be inclined to believe this claim to be too strong at this point and think that all that should be claimed is the value added. I address this question later.

It is not that labour is literally being taken from the labourer in examples of the first kind. The labour has already been extended into the resource and cannot be taken, in the way that we might be inclined to say it had in the case of a slave. So, again, we need to see the talk of 'theft of labour' in somewhat metaphorical terms, but this seems insufficient to suggest that no form of theft has really occurred. We can rightfully say that the theft may not be of the person's labour, but it is still a theft of an object that is his, because he made it from labour that is his and materials that no-one else had any claim to. A point might be made that, since the labour itself cannot be taken (since it has now gone into the product), it would be sufficient to provide compensation of some form for the developed land removed from the labourer's ownership. Of course, this is no problem if the compensation is deemed satisfactory by the labourer, which might well be the case if all inputs and outputs are fungible, but what if it is not? It still seems wrong, (unless it can be shown that the labourer himself has acted wrongly

[120] Cuius est solum, eius est usque, ad coelom et ad inferos. (traced to William Blackstone 1766)

[121] This is interesting in terms of shale gas extraction.

in the first place) since all the inputs are recognized as his or as nobody's. Furthermore, if he were granted no rights in the developed land and the crop, something of his that he had applied to it - his labour - would have been taken from him, to the extent that its transformational activity would not inhere in its transformer.[122] This is a crucial point.

The argument from mixing went from the quite natural thought that the owner of two or more objects also became the owner of any object resulting from their mixing to the thought that he also became the owner of any resultant object, in the event that some unowned raw material was part of the mixing. But to arrive at the thought that certain acts of mixing between owned objects and parts of the unowned world do not result in ownership of the mixed object, we need to introduce the further stipulation about not counting if the mixer is not deprived of any of the benefits of his labouring. This also seems to be quite a natural thought: if others use the initially unowned resource without disturbing him in his use of it, their use represents no loss of anything initially his. We can say that he has only made his that which would deprive him of something were it to be used by others. Mixing thus becomes a necessary condition of the argument – since without it no theft of labour could occur - but there also needs to be a further condition of loss of an input belonging to a person, and the two together become jointly sufficient for a theft to occur. Such a theft is a wrong because that which would be taken would be something belonging to the labourer together with something no-one had any prior claim to and this taking is contrary to our liberal assumptions. The most likely way that an argument against this being properly called a theft might well focus on the unowned nature of the raw materials incorporated into the property of the labourer. An argument with some plausibility was constructed for this in section (b) above. However, I investigate an approach that might be said to strengthen this argument in (d) below, since this appears to be the chief objection. It is also worth noting that if one works on another's object, this is akin to an unsolicited gift. The second labourer had no right to work on it and his labour is wasted, if it was his intention to benefit from it.

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[122] This is not to say that confiscation with compensation is not better than confiscation without compensation.

An objection might be something like this: the rights we have over our bodies are to protect the serious interests we have in our bodily integrity. But these are not unqualified – we allow, for example, a right to intervene in the bodily rights of another when that other is an aggressor. So too, then, we might accept that certain rights in an object, previously unowned, have been created by use of it, but that such rights must too be heavily qualified when they threaten the interests of others.[123] But this seems defeasible. We might tell our bodily rights story in this way: but it does not seem to be the only way to do so. The interests approach is not the only approach and rights might also be characterized as being unlimited within a particular sphere rather than as more general, but qualified. Under this approach rights end where another's body begins – this is how they have a truly equal, yet reciprocal, nature. Thus when we deprive the aggressor of his rights, it is because we are aiming to hinder him in depriving us of ours – and he had no right to deprive us in this way to begin with. This does not address all the issues that might be raised in connection of property rights imposing too onerous a duty on non-owners: I shall pursue this further in Chapter 3.

There is a further implication in all this. If the first labourer's labour is no longer present, then any continued right to use will disappear, since there is nothing left to be forcibly dispossessed. At that point (although the point will be vague and will thus need to be assessed in some, so far undefined, manner) the original raw material returns to being unowned. This also seems to be an intuitively plausible result. The initial owner has walked away from his labour. But it does seem to conflict with thoughts that title, once established via the legal system, continues in perpetuity.[124] If one has no further use for a piece of land, the rational thing to do is to sell it. However, if one has some vague notion that perhaps it will be worth more in the future or that one might have some use for it in the future, it is perhaps too easy to hang on to it under normal circumstances, because title is protected by the state at no incremental cost to the landlord. If a proper price were to be paid for this service – namely one of preventing homesteaders from taking the land, such habits might be

[123] Wenar (1998, 809) makes an argument of this sort.

[124] This however may be more of a legal worry than a moral one, and thus not strictly within the confines of this essay.

rendered less worthwhile. This would then incentivize against the practice of hoarding unproductive resource.[125]

What happens however if someone builds a road, rather than just walking a path? If it's his driveway, we might be inclined to say that harmless trespass is acceptable. But it might be a private road built through a development. We presumably want to say that the builder has a right to control and, maybe, to charge for its usage. However, per the example of the path through the woods, it might be said that he loses nothing if someone walks along it. To distinguish the two cases, it would seem that something further is required. In the second case, we are talking only of a casual walk, with no particular investment intention, whilst in the first there is presumably a deliberate plan to construct something that others will subsequently pay for and, most importantly, it is not just labour that has been mixed, but other materials, which, if justly owned, again create a situation whereby, if persons were to use the road without the developer's permission, they would be using materials which they had no right to use. (If, in the first example, the person were to not just take a walk, but do so regularly and the keep the path tidy, it would come to resemble the second). It is true that the developer would not be hindered in his use by another road-user, but then it would seem that a different consideration comes into play. Now it is not only labour that has been added, but further inputs as well, which – assuming they were properly obtained – the labourer has a right to control. Now we may properly say that the user should seek the builder's permission, since any use involves use of the builder's investment.

It is worth discussing an implication of this in terms of our definition of a property right. I have adopted a default position of a property right being a right to control. This still applies in terms of the right being granted: no benefit is apparent apart from that granted by the right to control. However, benefits are clearly playing a role here, since it is the fact that benefits will be removed as the result of use by another that is

[125] we might see this as an example of how the legal system privileges existing land holdings, allowed to lie fallow, when a more productive use might be found for them. (Housing benefit is an example of apparent subsidy to the property-poor, which ends up, in part, as a subsidy to the property-rich.)

doing the work over a pure mixing theory. This is no different from the farmer who sells his products into the market. He controls the product in the first place – because he chooses whether to sell or not. But he uses that control to benefit himself. So we may see the right to control as being antecedent to any right to benefit. If I don't have title, I cannot control and thus I cannot benefit.[126] So the property right as a right to control is still to the fore and benefits may or may not result from this right. In the case of the casual path walker, a right to benefit is lost by the lack of control rights – namely a right from what benefits he might make as a result of gaining title. But his activities did not amount to sufficient to gain a right to control, because he was deprived of nothing as a result of lack of it, and he was thus also denied any right to benefit. Both results seem intuitively plausible. Control and benefits come together to give an appropriate result, whilst denying that control automatically grants benefits.

It is also worth noting Mill's comments on the subject of property rights. He makes the point that investing property rights in the first developer helps to preserve the peace. For, if the first user claims property rights, then no violence is involved. However, if second or subsequent occupiers could gain property rights, then they would presumably need to apply violence against the first occupier. Thus "the preservation of the peace" is maintained. This point will be developed further in Chapter 4, where Hume's conventional approach is discussed. Hume's motivation for saying that property rights are just is that they help to maintain a stable society – that is to say the help to avoid the Hobbesian trap, in a manner similar to the presence of the sovereign. The investiture of rights in the first developer bears similarities with the Humean thought of possession.

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[126] An exception in a negative vein may be something like the following. I am deprived of title in an immoral manner. This means I am no longer in control. However, in this case, control would not have led to any benefit. Indeed, the person who seizes control when he shouldn't, realizes only negative benefits from his act, and I, by comparison am saved such disbenefits. We may see this as being hoisted by one's own petard. It does not seem to detract from the basic approach, if the right to control is antecedent.

I have suggested here that it is not the mixing of labour *per se* that is important - it is rather the thought that something that the developer has made his is taken from him when he has developed an unowned resource in accordance with a plan and which he has no wish to yield, in the event that others seek to take it from him. The mixing of labour is not important as an explanation of why the object inheres in the developer, but because it reports the fact that one would take the labourer's labour were one to remove it from her. In that sense it is at the core of the thesis being presented here. Whether these others may seek to take it, in order to pursue their own plans or a wider vision of the good society seems beside the point. They are seeking to take something to which they have no right, because to do so would be to fail to respect the liberal rights of another and no vision or majority or any other consideration seems up to that task, if self-development rights are to be respected. One's mixing of labour morally infects the object in question, making it unethical to involuntarily remove it from the mixer. Locke's talk of labour mixing is a first stab at the task of defining justice in holdings, but it needs filling out to be persuasive. Talk of taking from others that which they are unwilling to cede helps in the task of defining the issue more closely. But mixing is still important – for it is the mixing that reports the relationship. In the next section, I will seek to expand further on this.

Perhaps the argument will be made that, if the developer knows in advance that his property rights in the resulting development will be restricted, but still goes ahead, then it is entirely appropriate that his property rights are restricted post-development. I accept with this point, *pro tanto*. It would seem, in such cases, that the developer has somehow entered into a contract by going ahead or perhaps, more likely, accepted and therefore engaged with a convention and, in so doing, has become bound by it. This is the sort of thing we do all the time without cause for complaint. But this seems to throw the question back one step – namely to questions of why the other parties had the right to impose the tax or convention on us in the first place. I sought to address these points in the first chapter. For instance, the fact that a regime is tyrannical does not mean that citizens do not go about their daily lives and this going about does not imply that they have accepted the tyranny. When the highwayman stops me on the road with a demand of "your money or your life", I accept that I have made a choice when I made the choice to hand over my money. I do not accept that he had the right

to force the choice on me and therefore I believe that the taking of my money was wrong. Of course, this is not quite the same as taxation because the possibility of robbery is substituted by the certainty of taxation. But this does not seem to be a relevant objection. The relevant question is whether taxation or robbery are right or wrong, not whether or not we know about them in advance. Then, perhaps we might go on to make an argument about democratic legitimacy. A democratically-elected government has sanctioned taxation, therefore it is justified. My point, however as stated earlier, is that majority decisions are not right merely in virtue of the fact that they gain majority endorsement. My case is that certain civil liberties should not be subject to majority decision. The question is whether justly gained property rights fit in this category and my point is that they do as a result of the arguments outlined.

Summing up this section, I do not suggest that these arguments are deductively valid - but they do seem quite plausible in the absence of further objection and seems to pass both a 'permissibility' test,[127] in that no moral obligations have been infringed, and a more stringent ownership test, since all inputs have been seen as either being owned by the developer or not owned by anyone else. So it would seem natural to think that we may mix it with what is our own and gain ownership in the resulting product. Perhaps we would not want to go so far as to say that property acquired in this way is *justly* acquired, since that would be contingent on a defined concept of justice and we know that the scope of the use of *justice* is quite wide. Instead we might want to say that the object in question is simply acquired, without infringement of the individual rights of others and that to forcibly remove it from the acquirer would infringe *his* rights. Can we further strengthen this claim?

d. A creation-based approach

Locke's labour-mixing principle derives whatever persuasiveness it has not from the *mere* mixing of something owned with something unowned, but rather from the idea that labour is generally invested in ways that are at least intended to be productive

[127] Simmons (1994, 66-9)

from the point of view of the labourer (Sanders,1987, 392). This clarifies why it has a moral force – because the investment was made with a purpose and labour was invested in it.

There are two advantages in this approach: firstly the mixing idea has been replaced by something more substantial, reducing the possibilities for intuitively-spurious mixing activities, and the need for self-ownership is no longer present. This is not intended to be a plea for property acquisition to be permitted because the end result is an increase in welfare at the societal level. Ethical rights are not to be reduced to questions of self-interest, whether at the personal or societal level. No, the point is rather that it would be an injustice to interfere with the projects that some deem important, or the fruits (or lack thereof) of such projects, when they are undertaken by the person or persons concerned and no-one else has any claim on the resources used.

Another point is this: probably any set of 'laid down' requirements for property acquisition can be 'gamed' in some manner[128] and the more we seek to qualify the rules to eliminate such gaming, the more elaborate the gaming will tend to become. Despite such worries, "the right rule for just initial acquisition of previously unowned resources is likely to have something like labor-mixing at its core" (Sanders 399).

I shall start this section considering an argument formulated by Israel Kirzner in his paper "Entrepreneurship, Entitlement and Economic Justice" (1978). This is a complex paper in which he discusses whether market transactions, which *appear* voluntary are nonetheless still just (as advocated by Nozick in his (second) principle of justice in transfer) in the event that one of the parties to the transfer did not understand the true value of the item he/she was transferring. This might typically be said to be the case when arbitrage opportunities occur. Kirzner argues that we can claim such transfers are just if we see the seizing of entrepreneurial opportunities as acts of creativity. The argument here depends on the fact that we tend to think the creator's profit is more plausibly just than that of someone who just stumbles on

[128] Consider, for example, the Oklahoma land rush, where speed was more important than prior development

something and uses it – we intuitively see value in his ingenuity and believe that it inheres in him, because it was he who created the profit opportunity.[129]

However, Kirzner argues, we can see how this can relate to mixing of labour in the case of previously unowned resources. The farmer who plows a field has also created something out of nothing, in the sense that the *plowed* field was, in a certain sense, non-existent prior to his act of plowing. Of course it was not literally non-existent in the sense that there was nothing there before.[130] It was however non-existent in the sense "relevant to the rights of access and common use". (2000, 201) The key point is that creativity is responsible for the value of the resource and the benefits accrue to the creator, in the same way that we might agree they do, when a sculpture is created. Plowing a field might not be seen as an artefact of high culture, but it is the creativity of the act of sculpting rather than its cultural value which provides the case for ownership of the resultant product. (This is, incidentally, not dissimilar to Locke's thought that 90% or even 99% of the value of the land is the result of the work done on it. "Tis Labour then, which puts the greatest part of value upon land" (20, #43), but may seem to avoid the counterargument to Locke that this is not the case when land is scarce.[131]) This point is interesting in relation to the worry described earlier that, if all that is happening is that someone's labour is being taken away, perhaps we can expropriate the land and pay compensation for the labour, since the labour, *per se*, no longer actually exists. If however the key point is that he has created something, this seems less of a satisfactory response. For the labour has now entered into the object created and become part of it and compensation for the labour alone seems insufficient for taking away the creation. The mixing of the labour and the previously unowned object has resulted in something whose value to the creator derives only from the labour. It is the result of his plans. He owned his labour and created the

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[129] Thus the price of oranges may be £1.50/kilo in the market. However the entrepreneur who invents and sells marmalade for £3/kilo and makes a profit of £0.50/kilo, because his processing and marketing costs only account for £1/kilo, can be said to make a fully justified profit because he has literally created the profit opportunity and we generally, quite plausibly, think that the benefits of creativity belong to the creator.

[130] Absent an extreme Cartesian scepticism or occasionalist view of the world.

[131] It is to be conceded that the pure Lockean argument seems incorrect when land is scarce.

object from something unused by anyone else. To take it away would be wrong because to do so would be to take the labour without permission of the labourer and the raw material was available because no-one else was using it.[132]

Now this clearly needs to be carefully unpacked. The question we need to ask is whether this metaphorical idea of non-existence prior to discovery is very meaningful in terms of it providing a more plausible reason for thinking that the discoverer gains property rights. Clearly an undeveloped object was in existence prior to the developer's arrival and it clearly has a *potential* value and there is therefore an opportunity cost prior to it being taken into private use, even if this cost is only potentially realized at a later time. However, this does not mean that we cannot gain something out of Kirzner's approach. For the thought is that an act of creation does inhere in the creator[133] and the plowed field or the built factory can be classified as acts of creation. And this fact does seem to intuitively lend plausibility to the idea of the creator gaining rights in the previously unused object, since he has created the resultant object. One possible reason is that to count as creation, we seem to need to be working towards a goal of doing something with something. If we cannot identify a goal, then it seems difficult to see how an act could count as creative – it would seem to be more a question of happenstance. The fact that the object might be used in a different way at a different time seems immaterial. The fact is that it has been used and there was nothing wrong in using it, because nobody else had a right to use it.

To return to previous examples, walking through the woods does not seem creative, and is not purposeful in terms of creating something, whereas building a road is. Planting a flagpole on Mars is creative, but only in respective of the small piece of land on which it is planted. The tomato juice pouring *simpliciter* can also count as creative *qua* act, but it does not seem as though this can realistically confer ownership

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[132] If the creation project was undertaken jointly, then, in accordance with this argument, the ownership jointly inheres in the creators. What if some of the labour was undertaken by a person or persons in return for an agreed sum and the contract indicated that there would be no ownership rights in the product? It would seem that then a different argument is in play, for such labourers have freely agreed to forego their ownership in return for an employment contract.

[133] A typical example is the picture an artist paints.

in anything other than the tomato juice itself, which the pourer might claim a right to extract, were this feasible, since the ocean itself has not been substantially changed. But pouring in the juice with the purpose of facilitating the catching of fish, like an act of arbitrage, can be seen as genuinely creative and genuinely purposeful.[134] I do not suggest at this point that either creativity or purposefulness should be seen as necessary conditions for gaining ownership: they may however incline as to see either of these as strengthening the case for ownership.

Kirzner does not suggest that his approach invalidates Nozick's. Instead, he claims it can be seen as providing an additional class of just acquisition possibilities via creation *ex nihilo* (205).[135] It also has important implications for the 'enough and as good' criterion, where we may think Nozick comes unstuck. (I shall return to this point later.) And furthermore, the justification for property rights now seems stronger than that conferred by a mixing of labour, in cases where we might see the mixing of labour as a force of creation. It is not now just that to take away the resource would be to deny the labourer his labour – it would also deny him his creation. In addition, we can see how the focus on creation and previously unknown resources might help dissolve some of the worries about land grabs, which have been levelled at the 'mixing of labour' approach. If someone plows a new field this seems to fit the description of being a genuinely creative act in the way that sculpting some clay does. But if two people both happen to know of an unowned piece of land that each wishes to develop, we might feel worried if the ownership rights just happen to inhere in the fleetest of foot. In this case, we might say that the piece of land concerned does not count as being in a sense non-existent because its location, properties and so on are known by at least two people and each has purposes in mind for it. In this case therefore, we might suggest that further qualifications might become appropriate before the land could be considered as being justly owned by one or the other party. If, for example, a group of shipwrecked mariners is heading for a deserted island that

[134] In addition, any use of the ocean that might be conferred is of such a nature that it would not preclude others from using it as well.

[135] Interestingly, this approach is consistent with the thought mentioned earlier, that we may be entitled to develop new value on someone's existing property, provided their existing use in uncompromised.

they have all observed coming over the horizon, perhaps the just division of land, in the first instance, is that each should have an equal share.[136] There is no particular reason to think that windfalls (for such indeed is the island) of this nature should be treated in the same manner as more incremental additions to developed land. To start with, for a group such as this an agreement is clearly possible and a mad scramble, akin to the Oklahoma land rush, to see which one can work the land first and lay claim to it, presumably has its drawbacks, since inappropriate factors may enter the equation.[137] And anyway, as time passes on the desert island without rescue (let us suppose), those who develop their share more effectively will end up with a greater share of the expanded resources for reasons that may seem more appealing than that they happened to get to a particular piece of land first. Thus, our intuitions of fairness may well tell us that, in this situation, the land should be divided equally immediately after landing. This will presumably also maintain the peace. But there are no good intuitions of what fairness demands after a period of development. For at that point the labour of the different workers has become bound into their development and it would be nothing less than theft to attempt to redistribute it. There is nothing obviously fair about someone owning half my labour.[138]

This may be seen as a creators-keepers approach. The creator found it: no-one else did. He created something with it in the sense that he can plausibly be said to have used it to create something he valued. And his rights are infringed if someone attempts to prevent him from the enjoyment of that which he has created. It clearly also sets limits to any proto-possessions. If acorns are gathered, then access to the acorns alone is gained. The gatherer would need to grow and nourish the trees themselves before he could claim them as well. This might perhaps be another reason, in addition to his theological concerns, why Locke seems to stress the spoilage

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[136] Or maybe, even, shares might have to pass some sort of Dworkinian envy test.

[137] This should not necessarily be seen as the case in a larger, established society, where we may see the primary internal aim of any government as defending the rights of its citizens, and where granting equal shares may be less appropriate than ensuring that each is able to properly capture what he develops.

[138] Fairness, anyway, seems to have become quite totemic in recent years, but suffers from a subjectivity of interpretation between persons, without there being any obvious resolution.

proviso over the 'enough and as good' one. For, if something is allowed to spoil, it can arguably be claimed no longer to be wanted.[139] But this returns us to the thought that the spoilage proviso seems to waste away with the advent of money.[140] For if someone creates something from Antartica, with the advent of money, he could claim to be using it, even if he does nothing with it, since he intends to sell it off at a later date. But this might result in simply hogging it without using it until eternity. But if creation is part of the picture, it seems that we might legitimately claim that the selling must take place within a 'reasonable' period of time, otherwise it appears that the creation is withering away, even if the precise point of its decease is vague.

Before moving on, I should note that the idea of creation conferring control rights is akin to Lomasky's idea, mentioned earlier, that our rights map on to the idea of persons as project pursuers. (Expounded at length in Lomasky, 1984) If acting as project pursuers, we create objects as part of that project, and such objects are created without infringing the rights of others,[141] we may see that, the expropriation of the object, should count as a denial of the pursuit of the project.

e. The extent of control rights

It was suggested in (c) that being the first labourer on a resource that was previously unowned plausibly provided a right to control the resource as long as control continued. The rationale for this was that hindering such control by another would amount to the theft of some or all of the labourer's inputs. I shall now investigate this in further detail. Two thoughts might arise in relation to this issue. One is that, although something is due to the developer, control rights in perpetuity seem too

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[139] I suppose this is not strictly true, were I to claim that I really enjoyed seeing tomatoes go rotten, but this anyway only diminishes the similarity with Locke's approach.

[140] Scanlon,(1981, 126) incidentally, claims that Locke's approach sees the advent of money as something we assent to, thereby legitimising it. If Scanlon is right in this claim, we may suspect that such legitimisation is spurious since it is not obvious how we can establish the voluntary nature of money, unless we are speaking of something like gold or silver.

[141] A thought that Lomasky does not seem to incorporate (See, also, Sanders fn 34)

much, even if there is continuous input into the resource. Perhaps some halfway house, such as control in present use or control for a period of time (such as a working leasehold) is all that is justified. A second is that, although an input has been made, this is insufficient to take the land into private ownership at all.

The first worry seems to suggest that the farmer has received too much. He is due something alright, but not as much as is implied in permanent title. I have already suggested that permanent title is only due so long as use of the resource continues, since once use ceases so too does the thought that theft of inputs would occur in the event that another seized the resource. We may think however that this concession amounts to little different from permanent title, since if the 'owner' has genuinely lost any interest in using the resource further, he will presumably dispose of it. And if he doesn't sell it, he is presumably holding it only to sell it at a higher price later[142] – in which case we may think that he *is* continuing to use it (in a speculative manner) and therefore dispossession is inappropriate. These concerns seem largely correct. However, the continued use stipulation might be appropriate under certain circumstances. We can imagine a situation in which a landowner had simply forgotten about his resource and someone else started using it, unawares that an earlier title was already attached. It would then seem appropriate that it would justly be decided that the previous title had lapsed through lack of continued use and the newer developer be considered as owner. It might also be decided that in case of continued non-use but where the title-holder was aware of his entitlement and was holding the resource on the off chance that he might sell it at an enhanced price at a later time, it would again be decided that there remained no further investment of his in the resource and he be dispossessed of it. But whilst such cases might be of some occasional interest, I agree that they do not address the major concern about use of virgin resource leading to permanent title.

The major concern – which has been raised by Waldron and others – is that permanent title is simply too great a gift[143] in comparison with, perhaps, a relatively small initial investment. Thus, for Waldron (1988, 271) the right to acquire

[142] Or something akin to this.

[143] Actually, it is not a 'gift' at all, according to this thesis.

unilaterally "cries out for justification" because it amounts to a unilateral imposition of duties on others. It would be foolish to deny that this is correct – for the developer's claim to the land implies that all others must refrain from using it (as argued here, insofar as they hinder his use) which means that others must seek his permission before they use it. This can clearly might seem like a huge burden to others. This is, of course, particularly important where scarcity prevails. It is however important to bring it into perspective.

Firstly, it is worthwhile understanding that any right has this effect. The fact of one person exercising a right to free speech imposes obligations on all others not to disrupt this exercise. The two might therefore seem entirely analogous. If I do not like the exercise of free speech by certain persons, it may be very burdensome for me to nonetheless be obliged to endure it – not in the sense that I have to listen to it – but rather in the sense that I must permit others to listen to it and thereby be influenced by it. Gaus and Lomasky (487) illustrate this by reference to blasphemy. It is not so much that I am offended by blasphemy because I am obliged to listen to it, since I may indeed be able to close my ears; it is rather the thought that such things are being said at all. But there is an important disanalogy between the speech and property cases, or so it might be said: Opportunities for free speech are, in practical terms, limitless, whilst natural resources appear not to be. This thrusts us into questions of how or why something like a Lockean proviso might apply, which I shall discuss in the next section. In the meantime, I will restrict myself to discussions of what, if any, counter-arguments might be made against the use to ownership thesis in situations of relative plenty.

Secondly, we should remember that we live every day with a system of property. When someone purchases a car for himself, he thereby excludes anyone else using it without his permission. The same applies to the purchase of a home. Even if cars are readily available, presumably houses are not, if we are concerned about raw material constraints, since the house must be built on land. Not only do we not generally find the thought of ownership of such resources particularly troubling, we are inclined (in a post-Marxist) age, to think that such forms of ownership are necessary for the efficient organization of society.

Both of these thoughts, I suggest, tend to incline most of us towards the idea that private ownership is not as worrisome as it might be made to appear and that, it is only when we come across instances of scarcity – maybe extreme scarcity – or monopolization (presumably, essentially the same thing) that such worries start becoming important.

Under the no-ownership assumption, it is the inputs of others that are taken unjustly in the event that others interfere with those inputs. This, I have said, gives the result that interference should not occur until such time as the inputs have decayed or the resource been surrendered or ceded to another via voluntary means. Let me now investigate this point in greater detail. In practice the developer will no longer be in place to have his inputs taken after three score years and ten. Does the death of the original developer indicate another potential point at which extant control rights should cease? Obviously they will cease once he is dead – this point is trivially true - but needn't detain us for long. If sufficient reason has been established to justify control rights, then presumably these will also imply that he may alienate the property through gift or sale: otherwise we could hardly say that control rights were in place at all.

The thought that control rights were justified with continued use resulted from the thought that inputs, including labour, had been invested in an unowned resource. The thought that these control rights extended beyond mere usufruct rights and persisted over time arose from the thought that some investment remained in the raw material and the only way to preserve this for the developer was to give continued control so long as the input remained. He had superior rights over newcomers because of this existing investment. I will now unpack this point further to investigate whether the input of the developer might be preserved in some other manner, short of the grant of full liberal ownership.

We might seek to address this point through something akin to a Popperian process, whereby various options were considered, short of full ownership, to see under which option the first developer would be deprived of individual rights. As already

mentioned, usufruct rights would not be sufficient to prevent such deprivation, since the first developer has added value to the original resource. This moves us to a second suggestion, namely that the first developer should gain the fruits of his investment, plus the added value of the original resource that he has invested in. This is, in fact, suggested by Nozick and then promptly dismissed on the grounds that "no coherent value-added property scheme has yet been devised" (*ASU*, 175). This does not, of itself, seem to furnish sufficient reason for rejecting the approach, since the proper response might be to work harder on devising one. It is anyway not obvious why such a system could not be approximated to, which would surely be sufficient. We do not, for instance, generally think the less of John Rawls approach because if (in the unlikely event) that there was a general wish to move towards enactment of the difference principle, we were unable to calculate exactly what level of taxation would be required to ensure that the worst off sectors of society were as well off as they could be. Presumably all that is needed to calculate the value added is to know the fruits of the labour, which will be taken anyway, plus the value of any upgrade to the resource, which can be derived from the market value less any nearby unupgraded resource. A counter-argument to the mixing + deprivation argument might therefore proceed from the thought that it would be justified to deprive the original developer of his investment, provided he was able to take the fruits of his labour plus any value added to the previously unowned resource, presumably to be provided by the new owners. We might be able to add some support to this argument with one based on utility, since presumably a second developer who is prepared to pay the value added to the first developer, can use it more efficiently or generate greater value added himself.

But there is a counter argument to this. Of course, in the free market we would normally expect investment to be directed to areas or resources where the resources can be used to generate superior returns.[144] So if an existing owner is less efficient in his use of resources than is a putative new one, he will have an incentive to sell. This is a reason why allowing an existing owner to trade his resource will normally bring utility benefits – a topic I will discuss in section (f) below. But clearly we cannot

[144] In which case it would appear that forcible dispossession is generally not required anyway and we may see advantages in this fact alone, in terms of peace preservation.

guarantee that any resource owner will always obey the laws of economic rationality. Indeed, our attachment to the idea of ownership is presumably, in part, due to the thought that obliging persons to act in a purely utility-manner is outweighed by the benefits of their being free to use their property in the manner of their own choosing. We can imagine all sorts of reasons for thinking that a strict utility-based approach should not apply. These range from a sentimental attachment to that which one owns to entrepreneurial convictions that one will be able to exploit the resource in a more effective way in the future. If we respect the owner's ownership, we must respect his desire to hold on to his property. If we believe that his project and his investment of labour and other inputs has led to him having a right to control the resource because otherwise he would be unjustly deprived of something that he has made his, then we presumably think that he is entitled to resist calls to utility and if this is the case, it would seem that we believe that the initial developer has greater rights than in the fruits and the value added. It is anyway fruitless to make appeals to public utility, if subjective values are considered to be pertinent, since measurement becomes impossible. I shall consider special case of when the state condemns property for eminent domain purposes in the next section.

This leads us to the same conclusion as Mill, with regard to the developer of raw materials:

> If he undertakes such improvements, he must have a sufficient period before him in which to profit by them: and he is in no way so sure of having a sufficient period as when his tenure is perpetual. (1994, 38)

This suggests one final case to be considered. Instead of granting that the first developer needs full liberal ownership to protect his rights, Mill's assertion may seem to point to another possible outcome, namely that what he really has a right to a is lease on the materials in perpetuity, because there seems no case for saying that payments are to be required for the granting of the lease. In fact what I have suggested falls somewhat short of this, in that it implies a lease in perpetuity or until such time as the original investment has decayed and this might suggest that a perpetual lease subject to continued use captures this idea most effectively. Since the

two ideas are little different in practise, I will assume they amount to the same thing for our purposes here.

We may be inclined to see a weakness in Mill's statement as just quoted. He says that "and he is in no way so sure of having a sufficient period as when his tenure is perpetual". This is true. But might not a sufficiently long period be equally acceptable? What about a thousand years? Or two hundred years? As far as the original developer is concerned, a long period may seem quite acceptable, and not therefore incentivize him against long term projects to any significant extent. However, the chain of inheritance or, more likely, trading of the asset will be tainted by the restriction in time. For at some point, it will play a significant role. At that time, persons will no longer be incentivized to invest. One aspect of this is a zipping back concern. As the end of the lease approaches, the object will be less and less used in an optimal way, leading to utility concerns. Since my thesis is based on a rights approach, I will simply note these, at this point, as a disadvantage that needs to be thrown into the mix. The rights approach gives us a different worry, which relates back to the no ownership/joint ownership matter discussed earlier. If others had no right in the unowned raw material at an earlier time, why would they have a right to the developed product now? After all, now it has the owner's investment mixed into it. Its value may well largely comprise value added by the current and previous owners. Therefore there seems a strong argument against anything except perpetuity. I accept, of course, that contrary arguments, such as justice as fairness or wealth inequality, hang over this whole debate. My purpose is not to enter into this debate in this essay. My purpose is to infer what follows from the initial assumptions. These, I believe, lead to the thought that the developer has gained full liberal ownership. I do, however, accept that this point is in need of further development.

f. Some thoughts on Utility

I will now make a digression into questions of utility, which may be thought to lie outside of the scope of this chapter. Mention of this was made in the previous section.

Any appeal to utility does not sit entirely comfortably with a natural rights approach adopted up to this point, but it since may be thought worrisome for the natural rights approach, I have decided to address it here.[145] Utility might be used to justify all sorts of deviations from the latter[146] – for example, a right to expropriate because one has found a more productive use for the resource in question, thereby trampling on acquired rights arguably already gained. Generally, I am agnostic on issues of utility. I quite accept that utility spurs us to do many things and this is all to the good. I also accept that issues of utility may underlie our moral intuitions. All that I question is whether utility at the group level should somehow trump questions of individual rights. Perhaps we can perceive circumstances where this may be so – I discuss one such case in Chapter 4 – I ask mainly that they should not do so before a full and proper consideration be given to the rights that might thereby be trampled. Generally, I believe that any appeal to utility must at best be supplementary and be trumped by natural rights, if the natural rights approach is to be the basis of any justification. In many cases, however, it is worth noting that utility and the natural rights approach do appear to be congruent with one another, so the utility argument, whilst supplementary, can genuinely provide additional support for property rights, in that human flourishing is also enhanced, which is perhaps the most likely reason for investments being made in the first place.[147] And, in the minority of case where the two are not congruent, preceding arguments suggest that, under liberal assumptions, rights should be ascendant, unless a very strong case can be mounted for the alternative.

It is also worth noting that utility might also supply a secular version of the first strand of Locke's argument. This strand proceeded from God's wish that mankind be preserved via the thought that the way to do this is to allow commons privatisation, to the thought that we may privatise that which we use, provided there are no prior

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[145] It does of course sit well with the Humean approach discussed in Chapter 4 and will be further discussed there.

[146] Though far from always – Rule Utility might, for example, dictate that respect for the rights of first developers maximizes overall utility.

[147] If they were not, rights holders would presumably have an incentive not to seek to enforce property rights.

claimants through use. The 'God's wishes' part might simply be substituted with human utility or with a value of human preservation.[148] The persuasive force of utility itself requires some justification, however: many of us are persuaded that such force is unlikely to amount to much in light of Rawls' refutation of this approach in *A Theory of Justice*.

This suggests that, absent a credible account of God's wishes, the first strand, justified from utility, is unconvincing, insofar as rights claims are concerned and reinforces the point that utility considerations can only be supplemental to this type of account. Utility is a wonderful thing, no doubt, and increases in it are what makes the world a more prosperous one than that that pertained in Locke's time. It may usually be relevant to property ownership in that, generally speaking, the market system encourages persons to trade their property so that the most efficient use is made of it. Generally, too, we may often adduce the benefits that arise from a system of property rights to bolster their justification. But utility should not be the starting point for property rights in situations where persons have already established a claim to particular raw materials via labouring on them or investing in them. And indeed, the problem with utility is not that it is valued by persons: the worry is rather how the utility of one is to be reconciled with the utility of another, without a baseline of individual rights. It is at the interpersonal level that utility considerations become problematic.

Whilst discussing utility, I should consider issues of eminent domain, mentioned previously. It was argued that, generally speaking, matters of utility could add support to rights-based arguments, but not countermand them. One area in which society does normally allow utility to supersede property rights is when such rights are negated because property is condemned in order to attain supposed higher utility at a societal level, by compulsory purchase. Such expropriation is generally restricted to situations where things like roads or railways are deemed necessary and respect for existing rights would result in long and winding diversions, although it has become practice in the US for it to also apply to things such as shopping malls, where

[148] We may be inclined to think, however, that general utility is unlikely to have the same persuasive force as God's wishes might, to a believer in such things.

presumably it is thought that utility considerations also apply. This, needless to say has stirred up much controversy. Perhaps these extensions may cause us to entertain 'slippery slope' worries, making us more circumspect when accepting the inevitability of such expropriations. Indeed, we should take into consideration that emotional valuations can never be properly assessed when eminent domain is applied for and apparently purely market-based valuations can be used to push through political projects favourable to particular interest groups, rather than stand on their own feet in objective terms. Anyone in doubt of this should consider the experience of those deprived of their land by order of the Tennessee Valley Authority – an organization which never managed to show any form of positive return, whilst still causing undue misery to existing landowners. I explore this area further in Chapter 4.

g. Is there a sense in which property rights clash with other liberal rights?

There is an issue, (which, incidentally, Nozick seems to be much concerned with,) as to whether property rights, once acknowledged, might seem to clash with certain rights in the person. It is not clear whether Nozick sees this as a general worry about any form of property right, or only as a worry about scarcity. Thus he says "The crucial point is whether appropriation of an unowned object worsens the situation of others" (*ASU*, 175). Since any appropriation might do this, the point needs to be addressed here. (In the sense that it only matters to the extent that there is insufficient left for others, I shall also address the point in Chapter 3. Nozick, in fact, may seem to suggest that there are two worries. The first is that there is something morally problematic about the removal of someone's Hohfeldian liberty. And the second is that external objects distinctively bear this morally problematic trait.

Neither of these seem to be correct however. Consider the following situation. A hunter is hunting on a common when a walker enters, exercising his dog. Clearly the hunter must put down his gun. But this does not suggest that the dog walker has done something wrong, and this owes to the fact that the land is not privately owned. So it does not seem as though there is necessarily anything normatively wrong with the

removal of Hohfeldian liberties or that this should be accommodated in substantive political theories.(See Mack, 1995, 205-6) I will now unpack this further.

Nozick's point is encapsulated by the following thoughts. Prior to anyone working the earth, persons had the right not only to their bodily integrity, but also to a right to roam freely across the planet, doing as they would with it along the way. However, once property rights are considered established, their rights to roam are subject to increasing restriction, since the roamer has no right to do as he wishes with what has been established as the rightful property of another. In Hohfelian terms, we might say that there is a clash between the claim right on the property and the liberty right to 'trespass' on it – to wander on it and use it at will. We must however have had this liberty right initially, otherwise we couldn't roam over it or mix our labour with it. Thus it might be claimed that one person's acquisition has limited the basic rights of others, and since such rights are side constraints, private ownership of external property is undermined. However, it is not *prima facie* obvious that a Hohfeldian liberty must automatically be protected via a claim right.[149]

I suggest this as a way forward. The right to roam is a liberty right and applies only insofar as the land is in an unowned state.[150] In this sense, it can be seen as subsidiary to the right to take rights in a piece of the external world, by a suitable method. Thus, prior to the property becoming owned, anyone had the right to roam on it, since there was no aspect of it, or of other roaming individuals, that could properly be held to restrict such roaming. Once development has taken place in a manner consistent with the developed resource becoming owned, then that property right attaches itself to the self-sovereignty rights of that person, in such a manner as to no longer be available for all and sundry to use.[151]

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[149] Otherwise, we would be right to think that, in a football game, the right to kick the ball into touch meant that others would be wrong to try and prevent such a kick. (Taken from Simmonds, 105/6)

[150] To this extent, therefore, the argument is predicated on the non-ownership approach outlined in section (b).

[151] I do not suggest by this that taking someone's property is necessarily on the same level as infringing someone's bodily integrity: this does not suggest that they are not crimes of a similar type. We do not think that cutting off someone's hair against their will is as egregious a crime as cutting off someone's hand. The latter is also, no doubt, a lot worse than taking a part of someone's physical property. There

But this still leaves an issue to be dealt with. For it would still appear that there is something unequal about the initial set of rights with respect to property. The right to take and use property seems to have managed to trump the continued roaming rights of others. It would clearly be *ad hoc* to simply stipulate that this be so: however a closer examination of what is meant by the right to roam makes a trumping of it by property rights seem less unreasonable. When we talk of a right to roam, we do not mean solely a right to roam, but leave otherwise untouched. We consider, for instance, that part of the right to roam is the right to pick a wild fruit from an unowned tree and consume it. If we don't think that this is entailed by the fact that the land is unowned, then the right to roam would become of rather limited interest. But this mere act of picking also removes an opportunity for another to do likewise and so has a degree of affiliation with privatization of land. That persons have Hohfeldian liberties, of itself, means that similar liberties in others are restricted in practical terms.[152] The two are incompossible. (In practice, we may well be inclined to think that the possibility of privatization greatly increases the ability of others to consume.) We consider that the roamer has the right to consume the wild fruit issues from the very fact that the fruit *is* unowned. We consider, I suggest, that the right to roam is a right because the land roamed over is unowned land. The right is, in fact, a right to roam over that which is unowned. This seems to synchronize well with the thought that we may not 'roam' over the body of another: that body itself, it is assumed, is self-sovereign and is thus not up for roaming over. If this is what is meant by the right to roam, it simply falls out analytically that one may not roam over that which is already owned.

Let me elaborate further on this, to help understand the assumptions that lie behind it. We have already assumed that persons should be considered as having self-

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is room for different degree of evil within one broad category. One may also cause physical pain, whilst for the other the pain is more of a psychological nature – though to cut someone from their livelihood certainly has physical ramifications.

[152] Though I do accept that if neither of us are under a duty not to pick a piece of fruit, we do both have a liberty right. The practical point is that the right is inapplicable for the second potential picker.

sovereignty rights and I shall not reopen that question. I have already argued that it is plausible to think that ownership rights are consistent with self-sovereignty and the thought that the external world is initially unowned. What then of the right to roam? Rather than seeing this as another fundamental right, it seems more appropriate to think that this also emanates from our self-sovereignty rights. We have a right to roam because no-one has the right to stop us roaming – provided that their rights are not infringed in the process. It is not a separate – and potentially conflicting – right, when contrasted with self-sovereignty right. If it emanates from the same source as do property rights, it is doubtful that a conflict would result. It is more a question of the scope of the derivative rights. The scope of derivative rights should be coherent with their source. The scope of roaming rights thus cannot be such as to conflict with other rights derived from the self-sovereignty of persons. And indeed there is no reason to think that the scope of roaming rights goes beyond those parts of the external world that do not have ownership rights attached to them. The right to roam is thus a right to roam over what is unowned.

Thus, one may legitimately gather acorns on unowned land precisely because it is unowned, but may not gather the limbs of another, who is also on that unowned land and one may also not gather the acorns that another has come to own. Of course this is a restriction on the activities of all, in a certain sense, but not in a sense which contravenes the theory of rights which forms an assumption of this essay, which includes their reciprocity. (We may also want to say that a man would be freer, insofar as he could treat others in any manner of his choosing, but only at the expense of the liberty of others, which itself forms part of our assumptions.[153]) To say that he may not trespass upon the personal rights of others, is just what it means to think that those others have personal rights. The relationship is restrictive on one and all in a reciprocal manner. The right to hold property, and thus exclude others from it, is no different from this.

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[153] It is sometimes proposed that the extent of freedom in any society is equal. Thus, in No. Korea there exists the same total freedom as in the United States – it is just that it is more unequally distributed in the first than in the second. This is just to say that individual rights are more protected in the USA, while the elite's are more extensive in the first.

A man may gather acorns from unowned land without hindrance. But unless he 'mixes' his labour with the land (e.g. by planting or tending oak trees) no ownership is thereby conferred. If someone subsequently does mix his labour, the original gatherer may indeed find that his right to roam is curtailed.[154] But this curtailment of a liberty right cannot count as a fundamental infringement of the liberal principle because the liberty right to roam is the liberty right to roam over unowned land, just as the right to live one's life freely is not total – it is the right to live one's life freely, insofar as such free living is consistent with the right of others to do likewise. If another were to attempt to stop someone roaming before establishing a property right, this would itself be morally objectionable, since no right would be infringed by his roaming. Likewise, the taking of resource into ownership does not imply that the mixer has to pay compensation to those no longer allowed to roam, since they do not have any rights in the land they previously roamed over – they had only, at that time, a right to roam over it, because it was unowned. The thought that compensation might be required seems really to be a reflection of an underlying assumption that the land was previously *owned* in common. This was indeed Locke's assumption and we can therefore understand why the issue may have been a worry for him. But it is not an assumption of the quasi-Lockean approach of this essay. Indeed, before we get too het up about this, we should remind ourselves that any right curtails the liberties of others in some way. This is indeed, its whole purpose! My right in my person means that others are not entitled to enslave me. My right to free speech means that others may not prevent me from speaking freely. So there is no particular reason to think that property rights are in conflict with individual liberty, when seen as a set up rights curtailed only by the reciprocal rights of others. Indeed, such rights are necessary to allow us to escape a Hobbesian world with its unpalatable consequences. Claim rights, unlike liberty rights, carve out a space where personal liberty is protected. When the land passes into ownership, it is indeed true that one's roaming rights are restricted. It is also true that one's roaming rights are restricted by the presence of another on the land being roamed – but this does not suggest that that other person should not be allowed to be there, nor that he should pay compensation because his presence restricts the roaming by another.

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[154] Unless his roaming does no harm to the owner's invested labour.

Schmidtz (1994, 4 fn. 4) makes a similar point. Labour mixing is a process which creates rights, "because it involves exercising a liberty in such a way that others cannot interfere with that liberty without also violating a right". When I mix labour with the land, under conditions described earlier, I create such rights. But roaming, of itself, does not create rights under the arguments thus far discussed. And roaming is a qualified right, precisely because all rights become qualified when they meet up with the rights of others.

It is also worth noting that the state of nature, which is used as a baseline, is an imaginary one, the reality of which we know little.[155] To suggest therefore that somehow persons have rights related to this baseline seems strange. Since resources can be withdrawn in the state of nature, it is not obvious why this baseline should be privileged.

However, the comparison of such property rights with, say, the right to free speech, may prompt a further objection, in that there might appear to be a relevant difference between the two cases. It is true that the exercise by someone of his free speech may be offensive to others, who would prefer that his message not be promulgated. (This is, perhaps, why the promulgation of Christianity in Iran is considered objectionable.) However, this may seem to be an inconvenience of a different kind to that of taking a property right in the external world. For it is not as though my free speech stops others from speaking freely[156] – whereas my taking of land into personal ownership might seem to restrict the opportunities of others. For speech is virtually infinitely available, whereas resources are scarce. This is not however an issue of property rights per se – it is an issue about scarcity. And such will be discussed further in Chapter 3.

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[155] Neither, for that matter, could we return to it.

[156] This might, I suppose, be said about one's right to exercise free speech via the media, in that here there is a limit to the channels available – at least in the sense of the ability to reach a mass audience. It is perhaps worth noting, however, that we would not normally say that freedom of speech does not apply because just anyone does not have a right to a slot on network television or a column in The Times, which might seem to reinforce the view expounded here.

h. Arguments from deserts

The concept of desert is much used in everyday talk and in matters relating to justice. We might say that A deserved a particular outcome as a result of an action X. She deserved/merited a high grade because she spent so much time on the project. But what if A had turned in a lousy project, despite all the effort involved? Presumably, the answer is that a high grade was not deserved. In addition, we usually think that an element of responsibility is involved. We might believe that someone deserves his wealth because he earned it. We probably don't think he deserves it because he inherited it. In that case, it would seem that other considerations would be needed to justify his wealth. (In this connection, we might see a similarity to Rawls' view that persons are not entitled to things that result from moral arbitrariness.) I make these points only to suggest that the issue of desert, as with many philosophical issues, is more complex than our day-to-day use might suggest. (For further words on this subject, see Owen McCleod (2013)) Despite this, my view in this section is based on a rather coarse-grained use of the term, as will soon become obvious. I will start with a quick definition of desert as something one is entitled to in virtue of merit nor something one is worthy of. But I acknowledge that the idea of desert is quite problematic and in need of careful treatment. The subject is in need of much further discussion and I do not rely on it here – I merely make some observations which might be seen as supportive or otherwise of earlier arguments.

There is no particular reason, *per se*, why deserts should provide an appropriate rationale for property rights, even if we might draw some comfort from the fact that they are not inversely correlated. There is no reason to imagine that property is collective and is then divvied up according to how much different people deserve it. The question of whether people deserve their property is ultimately neither here nor there: the important question is whether it is properly or improperly obtained. There is no reason to think that some external body needs to establish whether or not it is deserved before deciding whether or not it should be kept. The more appropriate question is whether some people have a good reason to take property from some

others. People are, however, wont to say such things as "It's mine because I earned it" and there might therefore be some discomfort were the two to be inversely related. Our intuitions are often that the two go hand in hand. This is the main point I will discuss in this section.

The approach described above is instead a rights-based approach to the issue of property ownership, which follows from a liberal assumption of self-sovereignty, coupled with the thought that the land is unowned prior to human development and that to take it away from the first developer would be morally wrong, because to do so would deprive him of something that is his. I believe that this can provide the main basis of support for the allocation of property rights. In this it contains elements of a Lockean approach. It has sometimes been claimed that Locke's approach is also partly based on deserts.(e.g. Ryan, (33) although Waldron (1988, 201-7) contests this). They have also been alluded to in my approach. It therefore seems appropriate to investigate whether we can further support this approach with a deserts claim. (I should say at the outset that I do not consider the deserts approach to be more than ancillary to the argument. The liberal approach is based on individual rights and peaceful relations between persons: the most important factor is that both parties should have entered into any agreement willingly. Where one person pays another to provide a service, the question of whether in some sense the payment is deserved is neither here nor there – the key point is that both have agreed to it). I acknowledge up front that we lack a robust approach to deserts as generators of rights and I shall not attempt such a justification here, since it would be well beyond the scope of this essay. I shall rather appeal to some common-sense thoughts about deserts to give some extra heft to the rights approach.

A simple naturalistic approach might generate such support. Generally, our nature is such that we think that we deserve the fruits of our labour. Lawrence Becker suggests a slight twist on this that indicates a way forward: "It is not so much that the producers *deserve* the produce of their labours. It is rather that no one else does, and it is not wrong for the laborer to have [it]".(1980, 41) Here we see an echo of the rights approach. It is the fact that others do not have a right to undeveloped land that generated the right for the developer. A parallel approach might take the fact that,

because others do not *deserve* undeveloped land, the first developer does. As Munzer argues, the attempt to intercept the fruits of the worker's labour is "at least distantly akin to extortion" (1991, 675) The fact that in both cases the reasoning is negative may lead to the intuitive feeling that the argument is weaker than it might be and that any rights generated need qualification. I shall discuss this later, but I will note at this point that we might perhaps question this intuition. It does not seem obvious, in principle, why any rights generated by the thought that others have no claim, while the labourer has some, should somehow weaken the argument. But I also accept that the argument would appear weak if faced with positive and justified deserts-based arguments. I rely on it only to provide a layer of support to earlier arguments. A key thought is that rights-based arguments would probably anyway defeat deserts-based counter-arguments.

Munzer argues that "desert, broadly understood, is a familiar and prominent feature of morality" (1991, 677). This does seem correct. In a Humean vein, we may well want to claim that since we generally sympathetically approve of desert from an impartial standpoint, it counts as a feature of justice. Waldron makes the point that this is outside the Lockean framework – which is no doubt correct, but this does not mean that it cannot be used to augment Locke's approach. Nor should we confuse the idea of desert with that of reward. Although the two are related, reward often tends to make an appeal to utility and thus assume a consequentialist cloak. But desert seems to be something quite different, and, in fact, is more closely allied to the idea of right, on which the previous argument was based. I therefore believe that our intuitions of desert can supplement the rights-based approach.

In John Stuart Mill's discussion of the merits of idealized forms of capitalism and communism he states that "private property, in every defense of it, is supposed to mean the guarantee to individuals of the fruits of their own labour and abstinence" (1994, 16). The fruits of one's labour are deserved, in this defence, because they are the result of one's labour. We can see from this statement that the traditional Lockean approach of mixing of labour and the idea of deserts are in fact very closely entwined, under this approach. This is generally in tune with the liberal position that one should not initiate force against others. (Mill later states that the decision to choose one or

the other will depend on "which of the two systems is consistent with the greatest amount of human liberty and spontaneity" (1994, 17))

This suggests that a deserts approach seems to sit well alongside a rights approach on the subject of property rights,[157] and as such can perhaps be seen as complementary to it. I have considered this, so far, to the extent that we might claim that the developer seems to deserve continued use of a resource to a greater extent than does a non-developer. This may seem however to take a rather narrow approach to the issue, since there might be other factors which also cause us to think that others are deserving of something.[158] And it is not obvious that we can map the granting of a property right exactly onto the work done by the first developer. When we think of desert we tend to think that the greater the effort, the greater the desert. However, under the thesis promoted here, the two are not necessarily synchronized. We can imagine a situation where two persons discover and exploit similar-sized seams of gold on previously unowned pieces of unconnected land. One has been patiently working away for years, whilst the second has just arrived. It would be natural to think, intuitively, at any rate, that the first one deserved his find more than the second. Yet, in either case, both would become equally wealthy. We could still say that the second one deserves it, on the grounds that he deserves it more than any other does, but it would be difficult to use desert, except perhaps in a subsidiary way, to support his property right. Desert, like fairness, seems, to an extent, to lie in the eye of the beholder. It may be that we have contradictory intuitions about desert. The theory of deserts would thus have to be developed more robustly than I have the space to do here, before it could do any major work in its own right.

This issue is particularly pertinent in terms of first appropriation. In the case of subsequent sales, we might make the case that the second owner more genuinely

[157] I do not claim they will always coincide and when they clash my approach suggests that rights should trump.

[158] Labour unions, for instance, often tend to think that they deserve something quite different from what they are able to mutually agree with their employers.

deserves the item in question, if and when a market price has been paid for it.[159] But this is not so obviously so when no exchange has taken place.

We may therefore conclude, insofar as deserts are concerned, that a deserts approach can give partial support to the entitlement approach. We should expect that, in a competitive laissez-faire approach within a minimal state, that the biggest rewards will go to those who have done the most to deserve them[160] — since rewards will go to those who best provide for their customers' needs and desires. This may be thought to be so at a coarse level anyway, even if the mapping between deserts and rights is hardly always exact.

i. The vector-sum approach

I now turn to an approach suggested by Leif Wenar (1998). Wenar is hostile to the first appropriation justification in isolation, but suggests that it may play a part in a wider theory. His main concern echoes that of Waldron – that the gaining of property rights by some results in the imposition of burdens on the remainder of humanity. I have suggested earlier that this is not strictly true, but have agreed that there might be worries once resources become scarce and have said that this matter will be addressed further in Chapter 3. What I want to address here is whether Wenar's vector-sum approach, in more general terms, has implications for the theory developed here to date.

This approach appears to be roughly as follows (1998, 1). The aggregate benefits that accrue to individuals from any particular right being in effect are compared with those that accrue from a slightly different set of rights (or no rights at all) being ascribed. These are then passed into a larger normative theory – utilitarianism, or the Rawlsian approach of ensuring that the worst off are as well off as they can be, are the two cited

[159] Though this point is hardly conclusive. For a counter to this see Cohen (2001, xxx) who points out that rates of pay in a free market economy hardly seem to conform to our assessments of desert.

[160] This is obviously not true in a 'crony capitalist' setup

examples of such larger theories. This implies that there must be some sort of *telos*, before the approach can take off. We should note also that this approach appears to be opposed to a side-constraints one: since aggregating benefits appears to lie at its core.

Firstly, I agree with Wenar that, if one is committed to one or other of such larger theories, it may very well be apposite to adopt the approach suggested. But this seems equally to mean that, if no such commitment is in place, the approach will lack a vital component.

Since I doubt that a commitment to either of the cited theories is consistent with the assumptions of this essay,[161] there would be two ways one might go with this. One would be the minimalist approach of denying any such commitment and hence calling into question whether the vector-sum approach can provide any substance in this case. The second would be to see whether there is such a commitment – albeit different from either of those suggested by Wenar – and seeing what the implications of this might be for the quasi-Lockean approach.

Under the first strand, one could cite the approach taken by Kukathas:

> The goal of public policy [in a liberal state] is not to shape the culture of the polity, or uphold the dignity of the individual, or to rescue minority groups from their marginalized status in society. The liberal state is indifferent to such matters. Its only concern is to preserve the order within which such groups and individuals exist. (2003, 250)

Under this approach, it would seem that there is no relevant *telos* with which the vector sum approach can interact. It is therefore difficult to see where we might take the vector sum approach. What we are really doing is allowing that the liberal assumptions be followed, and seeing what then arises in terms of a resultant distribution of elements of the external world. But this might seem to suggest that there is a *telos* in place; namely that of the liberal assumptions being realized.

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[161] In particular, the problems of the Rawlsian approach for truly liberal theories has been discussed above.

If we wish to adopt this idea, we might construct a *telos* something like this: to ensure that individuals are treated as self-sovereign. (At the least anyway, we cannot arrive at a destination inconsistent with this assumption.) In this case, the result is presumably something like the conclusions already suggested here, insofar as the arguments presented go through. This is because to accept a different means of distribution would result in the appropriation of labour and other inputs of some, by others, who had no right to it to start with. This has been argued to be the case, at least insofar as there are no counter-arguments resulting from resource pressure. If this is the case, we might say that granting property rights to the first developer, results in correct fulfilment of the pursued end. (The first and second strands are not supposed to be mutually exclusive, here. In fact, they largely overlap. They are more reasonably different ways of looking at the same issue. And in both cases, the results are essentially the same.)

But Wenar's approach seems to be worrisome on another level as well. If we think that the very basis of the liberal state is that individuals are at liberty to pursue their own ends, subject only to an equal liberty of all so to act, neutrality must be implied between the different ends being pursued. In which case, it seems perverse to think that there would also be neutrality between the results of such pursuits, since the starting point seems compromised if the results are to be denied. It might seem like a treasure hunt, in which whatever is found is handed back to the common pool at the end. There seems little point in participating, apart perhaps from the thrill of the chase, and of this one will surely tire when a living has to be made. But no, replies Rawls: for you will be allowed to keep a proportion of your findings – just enough, in fact, to keep you interested in continuing the pursuit. But this seems to fail to answer the point that the scheme has then become partly neutered in terms of the outcome. One is not a free individual, but a caged one – it is just that the cage is large enough to allow a finite amount of roaming. The liberal principle is seemingly not respected, since the initial liberal assumptions have become partially subverted. Rawls has a good answer to this: the pure liberal order would not be fair on those without advantages that are 'morally arbitrary'. But the worry remains that personal liberty has been subverted in the pursuit of something quite different.

If the liberal order is indifferent to the final distribution of goods and "if the domain of "justice" is coextensive with the rights that persons have, then any set of property holdings that emerge from rightful activity are, by definition, (distributively) just." (Lomasky, 1987, 125). If this is the case, it is not going to be appropriate to apply either a Rawlsian or a utilitarian test to any outcome. The two possibilities suggested seem thus to fail the liberal test, indicating that this aggregative approach contains elements inconsistent with such a test. This of course does nothing to imply that there is a satisfactory way to derive property rights in a state of nature: it means only that if there is, Wenar will not allow it to persist, since a further test against possibly illiberal theories will be allowed to determine the final outcome.

The idea of a vector analysis that is fully consistent with liberal assumptions is thus not to be dismissed: we do however have to ensure that the assumptions are preserved at the outcome.

As a final point it is worth saying something about the 'equal voice' approach that Wenar suggests. The idea of 'equal voice' is not particularly attractive intuitively – we probably wouldn't want society to have equal voice over how we think or choose to live our lives, nor about what should be done with parts of our person.[162] Such would certainly be out of tune with the liberal idea. So it is far from obvious that this approach should be rightfully applied in terms of natural resources, especially where personal labour has been expended in uplifting the value of such resources. This in no way implies that there are not situations where equal voice would not be the more appropriate method of decision making, via democratic processes; matters where public choice is necessitated and where freeloader problems can occur. National defence is an obvious example.

j. Boundaries

[162] As discussed by Nozick in the eye lottery thought experiment (*ASU*, 206)

The problem of boundaries has arisen at various points in this discussion. This is because labour mixing does not always lead to a clear delineation of the extent of someone's mixing – either in time or in space. This point was mentioned in the case of planting a pole on mars, for instance, or at exactly what point the first developer's labour has decayed. I will illustrate the problem with two examples.

It seems congruent with the preceding argument that if someone plows a field, they gain the rights to the extent of the field, since otherwise someone who sought to use it, would deprive the first developer of the results of his labour. However, what if instead he builds a house? He also wants a garden and through his work on it this also becomes part of his property. He mows the lawn and enjoys the benefits of sitting in it on a sunny afternoon; a benefit that would be diminished if all and sundry were allowed onto it. Now let's suppose that he wants the garden to remain in a wild state, because he will enjoy it more that way. Is he to be denied this altogether? That doesn't seem reasonable, since by doing some work, he could claim it. On the other hand, building a fence around it doesn't seem sufficient to establish a claim either – otherwise we return to the problem of why plowing a bit of land on Mars doesn't give rise to property in the whole planet. (Indeed, there is little reason to think that just fencing something off could really be the basis of a claim. After all, a fence around a small part of the world is the same as a fence around all of the remainder of the world – such is the nature of spheres.) This question of boundaries is often seen as a major problem for the Lockean approach, and an immediate appeal is made by defenders to the 'enough and as good proviso'. I shall consider this in the next chapter, but it should not be seen as the only way of dealing with the matter. Simmons (1992, 276) suggests that the property we gain is dependent on the purpose of our activity. This seems reasonable *pro tanto*, but might not seem to resolve the garden issue, since there is no activity in the garden and might give rise to spurious claims, were the labourer's declaration of his purposes to hold sway. The thesis suggests that just claiming a wild garden as property is insufficient to gain an ethical claim to the home and garden. My thesis up to this point is worth summarizing. There must be some work that has been done by the developer, the benefits of which would be denied him were others to use the same piece of land. If none has been done then others may wander around it in the same way as he can, and if they transform it through work,

they may make a just claim of ownership. But, it may seem that Simmons' approach has a partial answer to this objection, even if a not necessarily appealing one, so far as the putative garden-owner is concerned, since the fencing-off is itself an activity. But this doesn't resolve the inherent problem with fencing and the general thought has been denied earlier. Yet, if it has no part to play, we may be worried by the thought that another might transform the land right up to the walls of one's house. This might be seen as an infringement on the property rights he has justly acquired in the house, but not in the garden, since it will interfere with his use of it. No doubt there is more to be said here but it is indeed possible that we might not find a nice neat philosophical solution in a Lockean vein. This brings me to the second example. Someone purchases all the land around another's property, thereby encircling him. There then arises a slightly different problem, still in the same vein. It seems indisputable, on the Lockean approach, that the first developer has the right to the enclosed area, but it could also be argued that he no longer has any right to ingress or egress, thereby rendering the claim purely formal. This is perhaps a rather clichéd example, but it should be addressed. I suggest a way of handling this issue in Chapter 3, but it may also be susceptible to handling under the approach developed in 4 as well.

I do not think that either of these examples negates the approach being considered here however, since the claim on the house is still just. It is just that some of the practical issues will remain vague under the quasi-Lockean approach.[163] What is needed is not abandonment of the approach but its supplementation or modification. But while the approach is not negated, it appears somewhat lacking in terms of solving the problem of where property rights begin and end and this problem is quite widespread, particularly on a crowded planet. One approach that does seem conducive to its solution is a conventional one and I argue in Chapter 4 that this may well provide a second axis under certain situations of vagueness.

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[163] We might perhaps consider an analogy with the Gettier problem. We don't think that we don't have something relevant to say about what it is to know something, just because we haven't been able to properly tie down the rather recherché worries posed by this problem and the same might be said about precise boundaries in the question of property.

So Locke's approach appears to leave some gaps, so far as the real world is concerned. While we might at first be concerned that his approach leaves property rights indistinct, whilst rights in the person are not obviously so, we could put this down, not to a failure of rights to provide a clear solution, but to something more related to the vagaries of the labour-mixing process. This may not generally seem to create much of a problem for simple boundaries, as in the case of persons having access to the wild garden, cited above. But, it will need some further definition in practice. I will discuss this further in Chapter 4.

k. Summing up

In this Chapter, I have suggested that there is a plausible basis for believing that, given certain assumptions on self-sovereignty, a case can be made for thinking that the first developer of a natural resource can gain rights to continued control of that resource, provided that he continues to use it. A key assumption in developing this thesis is that such resources prior to development should be considered to be genuinely unowned. If we start from a position of some (perhaps vague) shared ownership or with a position in which sharing is demanded (not merely considered to be 'good'), the thesis will be undermined to the extent that it is unlikely to fully go through. I have suggested that there can be both a 'strong' and a 'weak' basis for the claims I have presented. The strong one is that, when the expropriation of the resource from the original developer, would result in the dispossession of his labour without justification, it would be ethically improper. One weaker one is that the first developer has a greater claim to the resource than does anyone else. I have also stated that allowing the first developer property rights does not disturb the peace, in the way that allowing usurpers in would do. I have also acknowledged that the quasi-Lockean approach adopted here does not necessarily result in a clear delineation of the boundaries of any property claims. It should also be acknowledged that, disregarding these points, there is still a potential, under certain circumstances, for the claims I have made to be undermined. I have not considered, so far, the implications of this approach for a world where resources might be considered significantly stretched.

Thus, it may be objected that this thesis is fine where resources are in relative abundance, since others can simply go elsewhere. But it would be too much for the claims – however justified – of the first developer to supersede the needs of the resource-poor under situations where alternative resources are not available. At the very least, this objection needs to be investigated. I shall do this in the next Chapter, via consideration of the so-called Lockean proviso and an analysis of how it should be read.

Chapter 3. The Lockean Approach: The 'enough and as good' proviso.

In the previous part of this chapter, I considered events at a micro level, when persons used raw materials and thereby claimed rights in them or the products derived from them. I argued that 'mixing of labour' – re-interpreted - does provide a justification for ownership, given certain assumptions, particularly as relating to the lack of any pre-assumed 'ownership' in 'unowned' land. I did not however address the issue of resource scarcity and it might therefore be thought that there is an unstated assumption behind this is of a reasonable abundance of unowned resource. Intuitively, it does seem as though on labouring on unowned stuff should grant us a property right, if there is plenty of similar stuff for others to work on and make their own. If someone found a particular piece of land occupied, he could find something similar elsewhere. There was thus no particular need to use the already-occupied land of another in order to pursue one's projects or just to survive.[164] We can imagine this to be quite consistent with an 'out of Africa' thesis of human evolution. As groups expanded, so they moved away from existing hunting grounds for pastures new, but further afield. Today things have moved on, the world has largely been discovered and might be considered to be resource-constrained.[165] This is confirmed by the fact that a price has to be paid for raw materials: prices are, *inter alia*, a natural response to increasing scarcity. In this Chapter, I will focus on the implications of the quasi-Lockean approach in a world of scarce resources, where the result of some persons having taken raw materials for themselves may seemingly result in scarcity for others, to see whether there are reasons for modifying the previously-formulated principle in light of this. Again, intuitively, the 'first user becomes owner' approach may seem more worrisome when others cannot gain similar resource to work on. In the discussion that follows I will work on the assumption that the general case has been made for developer-ownership of previously unowned resources, with the exception of the issue of scarcity (to be discussed in this Chapter) and the issues grouped under boundaries in the previous Chapter (which will be further discussed in Chapter 4). If it is not accepted that such a case has been made, this current Chapter must be taken as a conditional.

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[164] Though, of course, it might have been more convenient to do so than to locate something unused.

[165] There is no simple bivalence between scarcity and abundance. In practice, all situations lie on a scale between two extremes.

The argument in this Chapter will take the following form: firstly, I will look at the historical background to the 'proviso' and see briefly investigate its significance for a Lockean or quasi-Lockean approach. I will then investigate a so-called 'left-libertarian' approach, as put forward by Michael Otsuka, to the question of how we might institute a proviso, whilst maintaining an individual rights approach. I will reject this and finally, discuss an approach derived from Eric Mack, which I believe allows us to give some credence to the borrowing of property under certain circumstances. This I believe is most consistent with the individual rights approach, whilst noting certain differences between property and other rights.

(a) What to make of the proviso

Let me start by looking at Locke's approach. He introduces what Nozick has labelled the 'enough and as good' proviso. There has been much debate in the literature about what Locke meant by this. Waldron, who calls it 'the Sufficiency Limitation', gives a good synopsis of this (1988, 209-218). He argues, reasonably enough I think, that we cannot take it that Locke really meant it to have the prominence that Nozick suggests it should have. I shall not discuss this further here. Intuitively, I think, we do worry that taking land into private ownership is only acceptable insofar as enough and as good is left for others, or something akin to this. The thought of some people being left short seems to be an obvious *prima facie* concern, since it might be argued that no-one should be left in that position. But the answer might also seem to be tied in with Locke's assumption that the earth has been given to mankind in common. If it is to be privatized, we might think that some assurances need to be in place for those left standing when the music stops, since the land was also collectively theirs at the outset. Locke considers only the situation that pertains whilst the music continues to play. This suggests that his approach is incomplete – unless, presumably, he imagined that it would never stop.[166] And our concerns might be subtly different – particularly in terms of the comparison with the state of nature - if no thought of initial common ownership is in place.

[166] Which is not unreasonable, since resources are not as limited as sometimes suggested, as a result of technological improvements.

In practice, the 'enough and as good' proviso is a condition that is unlikely ever to be met, if interpreted literally. We may quibble about what it means for there to be 'enough' but the 'as good' part of the condition seems obviously problematic. Presumably farmland of similar quality, but a little bit further from the village, is unlikely to qualify as being 'as good' as that closer to it. This restrictive an interpretation does not, however, appear to be what Locke had in mind. He appears, for instance, to suggest, that an Englishman, unable to find suitable freely-available land in his homeland, might move instead to Spain or America (e.g. 2002, sect.36, 16). This seems a very broad approach to his proviso, if interpreted literally. (It might also give us a glimpse of its true intention, if not so interpreted.) To take land in America, family would have to be left, a long sea voyage undertaken and Native Americans persuaded not to interfere, or perhaps conquered.[167] We would not normally consider this to be 'as good' as finding some unoccupied land in the next county. Two things might be said about this. Firstly, if Locke's apparent (non-literal) interpretation is the appropriate one, land scarcity is only a relatively recent phenomenon, if it pertains at all. Secondly, his approach might incline us to think that Locke did not think that the proviso was invalidated by land attracting a price. After all, the price that needs to be paid for the land is a cost, as is the price of a voyage to America or Spain. Perhaps the proviso is only thought applicable under a worldwide feudal system, or somewhere like the former-USSR, where land was simply unavailable to the average citizen at any price. Under a free market system it is reasonable to assume that, provided ownership has not become highly concentrated, land will always be available provided a market price is paid.[168] Therefore we might conclude that Locke did not intend for the proviso to be interpreted in the literal manner that it often is.[169] He does, after all, say "enough and as good": this does not imply that there would be no further constraint, such as a price to be paid.[170] This is

[167] The latter itself being highly problematic, if all men possess self-determination rights.

[168] I know that people try to corner markets, but such attempts are normally unsuccessful.

[169] This is again discussed by Waldron (1988, 209-218) referencing also secondary literature from sources such as Macpherson (1962) and Tully (1980).

[170] Indeed, if the suggestion is to move to Spain or America, that does imply a cost of sorts, even if no price is to be paid for the land.

not however the only consideration. Locke also believed that at some stage a social contract would have been deemed to have come into place, via the mechanism of tacit consent and this might have included a mechanism to resolve such issues. Hume, amongst others,[171] cast doubt on the legitimacy of this approach and this doubt appears well-founded. This leaves musings on Locke's approach in limbo, (where it is perhaps best left!). We might, in fact, see Locke as providing a set of three eras.[172] In the first, land is freely available and no proviso is necessary. In the third, the social contract has come into play, as civilization, along with government, develops. It is thus only in the intermediate position – where land is perhaps scarce, but legitimate government is not in place - that the proviso might be required. But if Locke is wrong in thinking that a government properly develops via tacit consent, but right in thinking that property can be gained in a state of nature, we must investigate the proviso seriously, since we may be stranded in this intermediate state. And although we may justifiably think that land is properly privatized when resources are freely available, there is a worry posed by Nozick's zipping back argument (*ASU*, 180) that, although holdings may have been passed down legitimately between the time of abundance and the subsequent time of scarcity, this could be insufficient, of itself, to provide for their later justification, since the invalidity of later acquisitions, due to scarcity, invalidates earlier acquisitions as well, through a chain effect.

But it is as well to point out that Locke only encountered his problem because of the initial assumption that the earth had been given to mankind in common, or because of intuitively-presumed duties to support the land-ownership of the landless. In the quasi-Lockean case that I have been developing, this pre-supposition is not in place. My argument for potential property ownership has been based on the assumption that unused land is unowned. Therefore Locke's worry is not of the same concern to us as it was to Locke. It may still, of course, be of concern for other reasons, but the thought that there must be a proviso because Locke has posited one, should be resisted.

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[171] A full discussion takes place in Simmons (1979, Chapter IV)

[172] I take this approach from Geoffrey Miller (1987, 401-410).

Before moving on, I should say that, in fairness to Locke, the proviso is only supposed to apply in a pre-money world and we may think it works reasonably well there. Under such circumstances, land to cultivate was that much more important than under circumstances where money has become an exchange medium, since money facilitates diversification from initial subsistence living. So access was similarly important in a pre-money economy. Locke clearly states that, when gold and silver have become accepted, equality (presumably, roughly equated to 'enough') is no longer key (2002, V, #50). This does, however, rely on tacit consent, which is not assumed here, since he sees the emergence of money as conventional. It is not difficult, however, to imagine money arising naturally out of a primitive barter economy. People start off bartering corn for meat, but find it more conducive to rely on gold and silver as means of exchange.[173] Since there is no need for a convention, there is no need to justify one.[174] (I do not suggest that money lacks conventional elements: only that use of a reference point for money in the form of precious metals, does not require a convention in order for its inception and use.)

Before starting on further analysis, it worth pointing out too important issues. Firstly, no-one, to my knowledge, believes that an act of initial acquisition will ever satisfy the proviso, when interpreted literally, absent a complete lack of scarcity. In the absence of scarcity, I think that appropriation is justified. But clearly something has to give in the majority of circumstances. But there is another point in juxtaposition with this. Under conditions of scarcity, it would appear that the proviso must be abandoned. For if resources are left in the commons, there will not be 'enough and as good' for others.[175] This is due to the tragedy of the commons, which will be discussed shortly. In the meantime, we should acknowledge that there is a problem here.

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[173] See, for example, Rothbard *Man, Economy and State* for a story of how this develops naturally.

[174] Incidentally, this reliance on convention has some similarities with Hume's justification of property rights. This will be developed further in Chapter 4.

[175] Both of these points are spelled out in Schmidtz (1990).

To commence, what reasons might we have for thinking that there needs to be a proviso of this sort at all? I will first consider Nozick's worry. He sees the proviso as necessary for a different reason.

> 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. (*ASU*, 178)

Here the 'enough and as good' proviso has become far more stringent. No longer must resource be available to others to allow them to provide for themselves – now nobody's position may be worsened either. Nozick even claims that this is Locke's intention, as well (*ASU*, 177), although this is not obvious from reading Locke, who, as already discussed, seems to accept something far weaker. Nozick, too, later qualifies his proviso, by suggesting that such a proviso might either be stringent or weak. (*ASU*, 178) He argues that, in a weaker form, the 'zipping back' argument loses its potency, since the benefits of private ownership outweigh the worries of some persons being unable to appropriate at all. This claim would seem to be an empirical one, which may give rise to endless debate,[176] but we may find it plausible since the benefits of private property seem to outweigh other forms of organization. It should be noted that this approach is unlikely to satisfy proponents of an ideal theory of justice, since the original thought that no worsening will take place is hardly realized in individual cases. It might however be consistent with a non-ideal approach. Nozick, himself, acknowledges the difficulty of fixing an appropriate baseline.

Superficially we may think that were one person to start producing coffee on a plot adjacent to another's, property rights would not be appropriate, since the additional production would drive down prices in the coffee market and thus worsen the position of other producers. Nozick stipulates however that only cases where worsening due to an inability of others to utilize the appropriated thing can count. And the loss experienced must be a net loss – in other words, the benefits provided by civilization are weighed on the other side of the balance. Apart from other concerns about this

[176] GC Cohen (1995) is a famous riser to this challenge, as discussed elsewhere.

approach, we are left by Nozick with what Locke probably took to be a minor proviso, bearing the whole weight of the appropriation argument, since the development of a labour mixing approach has been abandoned as too difficult. This comes at a cost, since the thought that something is lost whenever developed land is forcibly appropriated is neglected as a result.

In the previous chapter, I considered the situation where someone discovers some unused resource and puts it to use. A case was made that, with continued use, a right may be thought to pertain to continue using. Does the fact that it is now difficult to discover new land and do likewise somehow call this into question, even if there is still debate about whether worsening has occurred? It is not immediately obvious why. The development of the resource makes it more valuable and means that the developer can attract a price if he chooses to sell it. This was indeed said to be part and parcel of the concept of ownership – namely that one can do what one will with it (subject to any preventative covenants). It would seem rather strange that one could purchase a developed resource for a price, but that once land itself – absent a deemed value for the value added - also attracted a price in its own right, that this would undermine the original process of ownership. To suggest, as Nozick appears to, that the whole acquisition process is undermined because land has become scarcer is not intuitively obvious. The fact that Locke wrote a proviso does not seem sufficient to remove this curiosity. To suggest that the whole appropriation process hangs on the proviso therefore seems to put the cart before the horse. Locke's worry arguably appears to be one of sufficiency, not of initial justification and I believe the arguments presented here to be consistent with this. Where Nozick does seem to have more relevance is in his talk of apparent non-sufficiency situations. I shall return to this point later.

Nozick's worry relates more to the thought that, prior to any privatization, persons were *free* to roam the earth. They could consume wild resources at will. It might look therefore as though they had a *right* to roam the earth: following repeated privatization, this right becomes ever more curtailed. Thus privatization seems to both grant a right to the privatizer and remove the rights of all others. I have argued in Chapter 2. (g) that this argument lacks bite. Any right in one person removes

liberties from others. That is the purpose of a right. My right to life means that you have no right to kill me. The 'right' to roam was only a right because the land was unowned. The proviso suggests that privatization is acceptable provided that there is enough left for others. Nozick's worry might suggest that ownership itself might be unacceptable. This is presumably why Nozick sets himself a more onerous task than Locke: to show that there is no arising disbenefit. This argument may not be up to this task anyway, since that the most that he shows, if one accepts his point about the benefits of the market system, is that there is an aggregate benefit. But Nozick has come to rely on the proviso in this way, I think, because he has given up on the 'mixing of labour' argument too early.

It is worthwhile to say a few things about price. Objects attract a price precisely because they are scarce and prices tend to rise as scarcity increases. The air that we breathe attracts no price because it is effectively limitless. No one could sell it for a price because nobody needs to pay a price to obtain it. This is not a necessary truth, but it is a contingent one. Sea water at the seaside is also effectively limitless and therefore does not attract a price either. Seawater inland is however limited and therefore would attract a price, were there any demand for it.[177] (This price difference would presumably reflect the transportation costs involved in making the product available inland.) As things become scarcer, so their price will tend to rise and vice versa. We may thus see the fact that resource scarcity means that prices become attached to objects as an entirely natural process. Not only this, it is also a highly beneficial development, even though it may not always appear so. Because prices rise, so do profits, which means that additional suppliers are attracted into the market or production is ramped up, allowing greater demand to be satisfied and allowing prices to diminish again. Furthermore, the fact that the demand of those willing to pay a higher price is the demand that is satisfied, might be held to suggest that use of the product is, *ceteris paribus*, optimized. Thus incidentally, Nozick is justified in thinking that the allowing of the operation of free markets is beneficial in the

[177] It should be noted that identical products normally command identical prices in a free market. This price discrepancy however only indicates that seawater inland and seawater at the seaside cannot be considered to be identical products.

round.[178] To think that prices would not come into play for limited resources would not only infringe property and personal rights of individuals: it would also be the prelude to economic disfunction.

There seems therefore to be nothing about the fact that objects come to attract a price, *per se*, that suggests that a proviso needs to be in place and Nozick's worries seem plausibly to be misplaced, at least in situations of mild scarcity.[179] The need for the empirical justification provided by the net benefits of a laissez-faire economic framework is not, in practice, required. It is only where scarcity impacts the ability of others to generate any sort of living for themselves that the 'enough' condition might seem to be required. I shall come back to this shortly.

(b) The 'left-libertarian' approach

To continue building the case, I will look at the work of some writers in the libertarian tradition, particularly Hillel Steiner, Peter Vallentyne and Michael Otsuka. The first of these two take the Lockean view that the starting point is that the earth is owned in common. I have already stated that this seems peculiar. To buttress this thought, consider the following example from Edward Feser (2005, 60), cited earlier. It would seem odd to imagine that a pebble sitting on the surface of the asteroid Eros, as it orbits the sun, could be said to be owned by anyone. Why would Smith, say, who has never been to the asteroid, or even sent a robotic spacecraft to it, be said to part-own it? "But is it less odd to claim that we all own the pebble…?" I do not believe that

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[178] I note, in passing, Cohen's charge (1995, 79 et seq.) that persons might choose something other than a free market system. His point is that Nozick, in constraining the case as between the state of nature and such an economy, fails to consider other alternatives. I believe the correct answer to this point is as follows: persons are of course entitled to set up Marxist communes, or any other form of arrangement of their choosing, on their land. What they are not entitled to do is co-opt others into such arrangements against their will, since to do so would contravene the self-determination principle. This includes not co-opting the justly-owned land of others, either. This is too quick, and requires further development, but is not wholly relevant at this point, since I will go on to argue that the proviso needs to be recast in an attenuated form.

[179] Howsoever defined – I will leave this vague at present.

the initial "ownership in common" has plausibility, as previously discussed.[180] I will therefore concentrate on Otsuka, who agrees that the initial position is one of non-ownership.

In *Libertarianism without Inequality*, Otsuka proposes that the proviso should be interpreted as follows:

> You may acquire previously unowned worldly resources if and only if you leave enough so that everyone else can acquire an equally advantageous share of unowned worldly resources. (2003, 24)

Before I start, I should say two things about Otsuka's approach. Firstly, the intention of the chapter concerned (Chap. 1), is to refute Cohen's claim that self-ownership and egalitarianism are incompatible. He attempts this through the medium of this interpretation of the proviso. Whether or not he is successful in this attempt is open to debate, but it is not my focus here. Rather, I shall attempt to assess whether this formulation of the proviso is compatible with the concept of self-determination. My discussion is thus somewhat orthogonal to Otsuka's. Secondly, he structures his examples in terms of persons stranded on a desert island. In fact, it is a repeat of Cohen's "Able and Infirm" argument, cited in Chapter 2 (10).[181] I have already said that conditions for gaining ownership under such circumstances may well be different from those under the more general circumstances of possession: namely, where the development of previously unowned resource is initiated by one person (or one group), prior to the arrival of others. Under these circumstances, a race to develop is not a feature of the situation. Despite these thoughts, I believe an analysis of Otsuka's approach can provide some interesting points.

Firstly, let me say that Otsuka's interpretation seems quite nice when viewed from an egalitarian perspective. Locke is not pellucid on how the proviso should be interpreted, once the initial assumption of abundance is no longer in play. We are merely left with the thought that something needs to be done to allow access to the

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[180] In addition, Vallentyne seems to misconstrue Nozick's position, by excluding part of his argument. I will not go into this further here, since Nozick's position also seems unsupportable, and the issue is therefore orthogonal, but see Friedman (2011, 71).

[181] Otsuka acknowledges his debt to Cohen.

non-possessed. Otsuka's interpretation seems to appeal to intuitions of fairness[182] and possibly to Locke's intentions as well. It seems to allow 'enough and as good' to be left for others. But we should demand to know why the initial fairness assumption should be in place. This does not really seem to be addressed. Furthermore, if the Otsuka interpretation of the proviso is announced in advance, it will preclude – in part - persons working a resource, which is then taken from them, since they will know not to begin – at least, not if they expect to continue in possession of it. This may become a drawback. It also seems quite redistributive in its intentions. I will later (p 124) discuss whether I believe it is consistent with self-sovereignty.

It should be pointed out that Otsuka's approach is not uncontroversially in tune with Locke's. Otsuka's approach is essentially egalitarian. Locke does indeed talk of "no prejudice to any others", but it is not obvious that this means some form of equality from the outset. When Locke talks of 'enough', his intentions might plausibly be read as being sufficientarian, (although the 'as good' part would seem to countermand this – I think there may be an element of imprecision here). Locke suggests that inequality of outcome will indeed be the result of his approach. It is true that Otsuka does not promote equality of outcome either, but the form of equality that he does propose – equality of opportunity for welfare – is almost certainly more egalitarian than Locke would have thought appropriate. So, we should be wary of any thoughts that Otsuka's approach amounts to a correct reading of Locke. This doesn't mean that it is not worthy of proper consideration, however.

Otsuka takes the idea of an 'equally advantageous share' from Richard Arneson's proposal in "Equality and Equality of Opportunity for Welfare",[183] under which (roughly) welfare is equalized, except insofar as choices have been made for which the choosers should be held accountable.[184] (A less radical position – not Otsuka's – would permit inequalities in opportunity for welfare and only redistribute property (or wealth), so as to equalize resources. The resulting welfare would then be unequal,

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[182] Although, again, I think we should dine with a very long spoon when 'fairness' is raised, since it has many possible interpretations, all of them highly subjective.

[183] *Philosophical Studies 56,* (1989, 79-93)

[184] Otsuka adds some tweaks to this which need not greatly concern us.

both in terms of poor choices and also in terms of different talents, or different talent exploitation. The results of such an approach however, suffer the same problems that I will identify with Otsuka's approach and I will thus not consider it further.) Otsuka states that Arneson's approach "most convincingly realizes the aforementioned value of fairness which underpins the egalitarian proviso" (25). He states that this is guided by the "more fundamental moral principle [that] one is entitled to acquire worldly resources so long as one's acquisition does not give rise to a legitimate complaint on the part of anyone else" (28). Such a complaint is said to be "one that is not overridden by countervailing considerations"(28, fn44). It is quite difficult to know exactly what to make of this. Is it not a legitimate complaint that someone has worked on a resource only to have to cede it to others? It should be noticed, too, that a 'fundamental moral principle' has now been incorporated into the approach. Thus it would seem there is a necessary condition of the Otsuka approach, which is not part of the assumptions of this essay. It seems, in fact, that it might be akin to the "equal voice" approach discussed, and rejected, earlier.

Let us leave to one side the worry that Arneson's proposal is virtually unrealizable in practice. We can imagine an attempt to approximate it. It is quite possible that, armed with this proviso, Otsuka can make the concept of 'self-ownership' compatible with egalitarianism. Cohen's point is that allowing the individual to use his talents to his own benefit will result in inequality, since talents are unequal.(1995, 162) Otsuka argues against this claim, since his take on the Proviso gives him licence to even out the resulting inequalities. In particular, he states of land reform that:

> …ownership of government land is transferred to individuals in inverse proportion to the value of land (…) they have already inherited from their ancestors so that the welfare that each can derive from the sum total of her holdings in land after this transfer is equal (31).

The reason that land falls back into government control is that the right to take land out of the commons is circumscribed by the proviso and lapses back to government control on death, under conditions where resources have become scarce.

…members of each generation ensure that, on their deaths, resources that are at least as valuable as those that they have acquired lapse back into a state of non-ownership (37).

The government then has the role of ensuring that the demands of the egalitarian proviso are met.

An important question, from my standpoint, is whether the result is such that, the idea of self-sovereignty suffers. Otsuka does not really discuss the idea that rights in land might be gained by labouring.[185] As far as I am aware there is thus no discussion of the thought that the taking of developed land involves the confiscation of embedded labour. This, I suggest, counts against the egalitarian proviso, since it takes no account of the important argument as to why something previously unowned becomes the property of someone in the first case. Again, it seems as though the proviso has become more important than the 'mixing of labour' in this adapted Lockean approach. A constraint on the ownership of land has been introduced in order to promote an egalitarian ideal. But this constraint can only have any purchase if the non-ownership of unowned resource is really a shared ownership, since otherwise the initial acquisition would make it unavailable for sharing. This is one reason why it might be rejected.

Otsuka makes the claim that, under this arrangement, the self-ownership of the individual is better protected than under Nozick's interpretation, since the untalented are not doomed to a world in which self-ownership is, in practice, meaningless since they lack any resource on which to work. In a telling comment he says that Nozick's inegalitarian proviso "provides very little protection against the forced labour of the propertyless" (2003, 35). I find this particularly unsatisfactory. The use of the term forced labour might be used in two different ways. In the first, we have something like slavery, where some are coerced, against their will, to work for others. This is rightly condemned as an infringement on their self-determination right. In the second, we simply have the fact of the conditions of life on earth. Everyone is a 'forced' labourer – unless they wish to starve to death, or rely on others – because shelter and

[185] In a footnote (22, fn 29) Otsuka explicitly dismisses the idea of mixing of labour in favour of staking a claim.

nourishment do not fall into our hands, like manna from heaven or under the initial conditions before the 'fall'. The thought that some would not be forced to labour in this sense, simply means that to survive, others must provide for them. That this is done via a proviso on the acquisition of resources hardly seems to condone it. It has the flavour of a device (or Trojan horse) to bring about egalitarian aims via simple fact of life, devoid of prescriptive content which, in the process, undermines self-determination rights.

The idea that resources potentially revert to society at the time of death has implications beyond the idea that they compromise the rights of owners to dispose of their land as they please. Persons will be faced with decisions during their lifetimes with asymmetric consequences. If they use their resources during their lifetimes, they may do so freely – only except insofar as their choice involves gifting to others, who out-survive them. When this is the case, they must accept that the gift will be reduced in the future. This is worrying in itself, since there is no good reason why some forms of control should be privileged against others. It may, in addition, seem counter to our general intuition that generosity is morally praiseworthy. And finally, it has some adverse consequences in terms of utility, since some decisions will not incorporate long term benefits.[186] For one of the reasons mentioned earlier that adds support to the principle of developer-ownership is that the tragedy of the commons is avoided. Yet this proposal gives the current owner reasons to milk assets rather than develop them. Then we may think that a slippery slope has been encountered. In order to prevent such asset drawdown, further restrictions are needed on during-lifetime spending to ensure that enough and as good is left at the time of death. This would, of course, be most intrusive and quite contrary to the idea of self-sovereignty. There is, no doubt, a natural feeling that heirs are somehow less 'deserving' of their gifts than are the original earners (possibly true, under certain assumptions about desert), but I think that the intuition that this means they should be restricted in their receipt of such gifts is ill-conceived and should be resisted. It neither respects the self-determination of individuals, nor does it necessarily promote utility.[187]

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[186] It might be dissipated with some form of a difference principle.

[187] I do not suggest that all the inheritance arguments favour utility. This needs further discussion, since some of the arguments from utility may point in a different direction. One might, for example, consider

That we have, (perhaps, via evolution,) been provided with a sense of fair play seems plausible. As Hume correctly points out, we have both self-interested and benevolent sides to our characters. We value self-determination, we value the right to follow our consciences, we value generosity and we value fairness – and when they appear to clash it is not obvious how a compromise is to be reached via intuition alone. The trouble is that, unlike self-determination, it is difficult to really know what fairness consists of. Perhaps we know it when we see it, or think that we do, but we often disagree with one another and have apparently non-congruent intuitions internally. Nor do I think that one person has any right to rope another into his interpretation, against the other's will. To do so is to compromise the liberal principle. I think, furthermore, that we can, perfectly plausibly, interpret a fair outcome as that which results from a fair process and which respects individual rights, even if this is not always intuitive. The process of fresh development of resources resulting in continued right to control is fair because it does respect an equality of such rights, as does non-coercive trade with others. I do not therefore believe that Otsuka has given us sufficient justification for a proviso that seeks to remedy a process that is not, in principle, unjust. Nor do I think that Otsuka can really achieve a synthesis between equality, of either outcome or opportunity, and liberal rights. The exercise of such rights implies differential levels of opportunity of outcome. Once we seek to rebalance the playing field, such rights become compromised. Otsuka has suggested a way of melding the two, which results in a sort of 'happy medium' between them, which in turn ends up maybe compromising both and satisfying neither. Certainly, self-determination rights would appear to be compromised. Otsuka is far from alone in this endeavour[188] and it may spring from natural human attitudes. But I think that it fails the test of properly respecting the rights to freely use one's labour and thus of being a truly self-determination based approach. And, to the point that 'unfair' outcomes are unjust, we need to add a degree of clarity about injustice. There may be a sense, in our common language usage, in which the charge is right. But the worry comes when the state or society seek to enforce outcomes which apparently remedy

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whether a time that was after death, but before infinity would defeat utility disbenefits. I have not pursued this further, because the argument is supplementary.

[188] Rawls has found a different way of attempting to achieve a similar end.

the ‘injustice’, since these may trample on self-sovereignty rights. To avoid this worry, it seems I may need to restrict the scope of justice that can be enforced, to cases where wrongs have been committed by one person to another. This cannot be said of so-called social injustice, since nobody can be perceived to have done wrong. Under this interpretation, corrections of this latter type of ‘injustice’ would not be enforceable at societal level and would instead be the target of voluntary action, though I discuss some qualifications to this shortly.

My next point relates to modern world conditions, where there are few unowned resources, and therefore takes us away from labour mixing with unowned resources. It is thus perhaps better seen as a footnote. However, I believe it is worth some cogitation. Most persons in developed countries do not own land, with the exception of their homes. (This latter form of ownership has, of course, become a very significant feature of modern life – but is not a feature of earning a living. We can easily imagine a world of happy people, whose accommodation was leased rather than being owned.[189] So it seems reasonable to take this form of ownership out of the equation.) Locke imagined that access to land was a requisite for making a living – hence the need for it to be available – but if this is not the case, then the need for the proviso is potentially also diminished.[190] [191] Thus Otsuka’s redevelopment of the proviso seems to have taken us away from the original perceived need towards something altogether different – at least so long as the monopolization worry (however defined) is not in play (which I shall come to shortly). It seems to compromise the liberal assumption and to have unfavourable consequences for economic utility. In practice, we may see creativity and entrepreneurship as more important than resources, in the modern world: the worry about lack of resources then

[189] This is in fact the case for many in a number of western societies, such as Germany and Switzerland, without any apparent worsening of human happiness as a result.

[190] I do accept that in some less developed countries this is not so true. In some Far Eastern countries, for example, people do return to the land to eke out a living, in times of recession and this provides an alternative to the welfare state.

[191] See also earlier comments in relation to Locke and the proviso applying prior to the introduction of money.

becomes less telling, under most circumstances.[192] Both entrepreneurship and creativity are potentially unlimited. And hard work for others is no less capable of providing income than hard work for oneself. In light of these thoughts, it does not seem to be the case that, where raw materials, such as land, are no longer there for the taking, the government must take some steps to make such resources available. Otsuka is not oblivious to this: his redistribution following death is carefully crafted in terms of equality of opportunity for welfare. Thus, he suggests in one example, that those incapable of using resources to generate income via some form of effort would be compensated by being allocated resources that generate income via rent alone. (Such persons are allocated land along the seafront and can support themselves with income derived from allowing others access to the beach.) But, as previously stated, this amounts to a failure to consider the implication of 'mixing of labour' in the acquisition process.[193] It is, in most respects, not an attempt to allow self-determination with respect to the outside world at all: it seems that a particular form of equality of opportunity is more to the fore, with self-sovereignty bearing the consequences.

Finally, we should note that Otsuka's point about resource availability is presumably an empirical one. He does not however adduce any empirical evidence for thinking that a failure to adopt his version of the proviso will lead to a high degree of wealth concentration. "He cannot therefore exclude the possibility that the recognition of unconditional property rights will provide greater welfare for the disadvantaged and

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[192] I have perhaps under-argued this point – Otsuka might respond that the lack of resource may influence the ability to be creative or entrepreneurial. This is not slight response, but my refutation relies on the relative importances of the two.

[193] I do not suggest that government hand-outs are never appropriate, since we can imagine situations where they seem to be. As long as government institutions run the economy at a macro level and take decisions that may result in the exclusion of certain persons from paid employment – through no wish of their own – we may think that some form of support is thereby mandated (e.g. if government specifies a target level of unemployment. It is possible that this would resolve itself naturally in the event that such direction were to be removed. If not, we might also consider basic questions of whether a community of persons where strong liberty rights are in place would be capable of being maintained in the event that certain members had no stake at all in these rights.)

disabled than the enforcement of his egalitarian proviso by a massive state bureaucracy" (Friedman, 2011, 72).

For these reasons, I do not believe that Otsuka has made the case for an interpretation of the proviso based on equality of opportunity for welfare.

(c) Other forms of proviso

The above arguments do not however mean that there is never something wrong with some persons being at a disadvantage in terms of access to resources. I have, in fact already suggested, as demonstrated by the case of the shipwrecked mariners mentioned in Chapter 2 that exceptions to the first developer principle may occur. This applies too in cases where persons arrive nearly simultaneously – such as in the Oklahoma land rush. The purpose of the project is not to protect the fleetest of foot: what is key is that the investor be protected in his investment of labour and other resources. We might thus imagine it appropriate to apply a version of the proviso in the event that there is more than one party with designs on a particular resource, but not in situations where one party has already developed something, but others later come to have designs on the same resource – even if their designs are unrelated to its developed value. This seems consistent with a reading of the Lockean proviso, without the drawback of depriving others of the resources in which they have already invested. This is a relatively simple case, since no labour was taken, since none had been applied. But there may be other sorts of cases, where labour has been applied, but where the implications for the self-determination of others are still unacceptable. An easy example to think of is the case of a knife: it can be legitimately owned, but that doesn't mean that the owner can do whatever he wants with it. He cannot, for instance, use it coercively against another. There is, in other words, a proviso, against my use of the knife, (that nobody should question I own), under certain conditions of the knife's use. In this example, the propriety of a proviso can hardly be doubted, for otherwise the universality of the self-determination principle would be compromised and, indeed, in this case seems derivative of it and thus tautological. But there may be other examples, where the use of the property is not so obviously coercive, but where

there may still be questions as to whether self-determination is being properly respected.

I have in fact, already mentioned one such proviso. Others are not to be prevented from taking land which, although a title is in place, is not actively in use, in a manner still to be defined (Chapter 2). Were this proviso not in place, others would be prevented from using land, in which the initial labour had decayed. What is less acceptable however is a proviso that effectively undermines the 'mixing of labour' argument. This is what Nozick did: the mixing of labour was considered too difficult and the whole weight was made to rest on the proviso. This is to turn what should be seen as a rider to the argument into its main component. Far from being a proviso, it became a necessary and sufficient condition for property ownership. The historical entitlement has disappeared into thin air. It is perhaps not surprising that Cohen approves of this move (1995, 122-3): it then allows him to undermine Nozick by immediately raising objections (far from ill-founded) that there are plenty of reasons for seeing the appropriation as not harmless at all. If the initial act of acquisition is justified in its own right, Cohen's criticisms have far less purchase. The fact that others may prefer that the land be used collectively is fine in itself, but this does not privilege its re-appropriation. The correct response for such socialists is to acquire the land by voluntary means and then embark on its collective development. Similarly, Otsuka does something similar, although perhaps not to the same extent: vast amounts of labour-mixing are nullified because a re-interpreted proviso demands it or else do not take place at all, to the disadvantage of all. This seems to give the proviso at least equal status with (and probably, greater than,) the labour mixing argument that it was supposed to qualify. It may not be a sufficient condition, but it is now certainly a necessary one. I shall later suggest instead that the proviso needs to have a more secondary role, in line with Locke's original ambitions.

First however, I will reconsider whether we really need a proviso at all. I will consider this for two reasons. Firstly, because I have already given reasons for thinking that we can justify initial acquisition of unowned resource in chapter 2. It would perhaps be strange to think that, if these are valid in their own right, the very

acquisition should then become subject to a proviso further down the line. I stress the acquisition here – I do not suggest that, once acquired, one should be entitled to do what one will with that acquisition. It is a premise of the whole project that one should not be entitled to use a justly-acquired gun to shoot at an innocent second party. But this does not invalidate the justice of saying that the gun has a rightful owner. Secondly, it is far from clear that the quasi-Lockean approach arrived at in 2 has the need for a proviso. Let me retrace the issue somewhat here. It is firstly apparent that Locke forms his argument in a pre-money world. The worry is that, in such a world, those who didn't acquire first would not survive at all, since persons would be at a subsistence level, and having resources to work on would be a requirement of survival. Furthermore, it is not unreasonable to think that free persons in such a world would have roughly equivalent resource requirements.[194]

Sanders proposes something similar to this (1987). Locke refers only to *initial* acquisition. He is silent on subsequent acquisitions, but it is reasonable to suppose that these proceed via free transfer under mutually agreed terms and conditions. Once a resource available for initial acquisition has been acquired,[195] subsequent acquisitions only occur via this mechanism. This is thought to be the worry we are supposed to address, but is hardly so. In practice initial acquisition will be useful to acquirers whilst the economy is operating at a very basic level, but beyond this the array of opportunities open to all is in fact increased, rather than diminished. This is because, whilst efficient farmers may prosper relative to inefficient ones in the early economy, a more developed one provides opportunities for many different talents. This, in itself can hardly be doubted. The income of a city trader with no property in land or raw materials can vastly exceed that of a Welsh hill farmer, working his own land.[196] This underscores Nozick's point, without abandoning the mechanism of first acquisition and thereby moving the proviso from the periphery to the core. It is because the land has been propertized by initial acquirers that it is available for the

[194] The spoilage proviso also seems to reflect such conditions quite naturally.

[195] Some resources may of course never be fully acquired, but this is hardly a problem.

[196] If it is disparities in income that are objected to, rather than appropriate means of acquisition, we are, of course, off on another debate entirely

exclusive use of others for a myriad of different pursuits and persons can pursue their talents in the manner most suited to them.

The result of Sanders' argument is that, if the proviso is dropped, then more and better resources are available for all. Since the intention of the proviso is that enough and as good be left for others, then if this is the case, it cannot bear on initial acquisition. If we decide that, at some point, further propertization must be stopped, then some resource must simply be left as part of the commons. (If we are convinced by Nozick's zipping back argument, we will presumably have to keep winding back propertization, until such time as a complete commons is re-established, or maybe the process can begin again at some point, with a cycle of to-ing and fro-ing between certain levels of property and commons.) In either case,

> The stronger the constraints provided by the Lockean Proviso, the fewer natural resources will be available for initial acquisition, and the more initial acquisition will be limited to the early entrants among the class of people with the relevant skills.(Sanders, 1987, 382)

This is, presumably, not the result desired by egalitarians. The purpose of saying that persons would be entitled to continue using the previously-unowned land that they had developed was that justice or non-interference demanded that they should not be dispossessed of what they had created. With the proviso in place, we move far from this, to a situation where skilled and speedy resource-developers are privileged at the expense of other members of the population and are encouraged to game the system so as to acquire resources before restrictions apply. In addition, certain resources are left in the commons and, for these, tragedies rapidly ensue. It is hard to think that this was Locke's intention, or could be the intention of anyone who espouses the thought of entitlement to that which one has created. Nor does it seem particularly worrisome that resources become removed from use by others via propertization, since resources will be removed anyway in a pre-property society, simply by consumption. I stop this land from being used by others by making it mine: I stop this orange from being used by others by eating it. For these reasons, it does not therefore appear that the proviso serves a useful purpose in terms of initial property acquisition.

(d) A scheme for a certain non-absoluteness of property rights, following just initial acquisition.

Does a proviso serve a purpose once property has been justly acquired? This is of course a separate question and one not discussed by Locke. It is also seemingly rather a troubling thought. How could something that I have properly made mine be taken away from me, when I have done nothing that justifies such confiscation? It seems that if we are to have a proviso, it should be one that does not suffer from such a defect.

I take the following idea from Eric Mack (1995). Mack sees the proviso, or his re-interpretation of it,[197] not as a restriction on initial acquisition or as a cause for dispossession. Instead it is a clarification of the right to self-determination. We have already accepted that, as a self-determiner, one cannot do just anything one wishes in one's life. In particular one cannot infringe the equal self-determination rights of others. The question raised is just what such rights should properly be considered to consist of when considering personal property.

Mack considers the case of a Crusoe,[198] who washed up, some years ago, on a desert island. The island is small and the land not particularly fertile, but, by using almost all of it, he manages to keep the wolf from the door. There is no Man Friday to spoil the bliss of solitude, but one day, over the horizon, appears a potential Man/Girl Friday. This should fill him with delight, no doubt, but it doesn't for, being a nervous sort of guy, he worries that the arrival of a second shipwreck will make his meagre life, that much harder.[199] The question is, can he, by means of some sort of barricade, prevent her from landing? To do so might not be coercive, in the same way that garden walls are not coercive: they are legitimate ways of preventing the unauthorized from trespassing on the property of another. Furthermore, this is not posed as a question of the extent of enforcement of obligations of beneficence towards others.

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[197] Called the self-ownership proviso

[198] He uses different names.

[199] For our purposes, we will assume that both could still survive, otherwise endless trolley-type debates will no doubt ensue.

There is little doubt that we would mostly think that the hand of assistance should be proffered to one in peril, even if it inconveniences oneself.[200] The question is whether the pre-established property right gives him a just reason for installing the barricade – sentencing her, perhaps, to a slow death through starvation on the outer edge of the beach. Might it be that there is something about denying the new arrival a means of survival that amounts to such an interference with her right to self-determination that he is not permitted to undertake it?

We clearly do accept that the fact that one owns a particular piece of property does not mean that one may do whatever one wants with it. This is again because of the reciprocal rights of others. The fact that I own a knife does not mean that I can stick it between your shoulders or use it to hunt game on your land. What we need to consider is whether prevention of entry to the island is akin to improper use of one's knife or simply a means of protecting one's property.[201] It certainly looks more like the latter without further unpacking of a right to self-determination.

Clearly such prevention of arrival does interfere with the possibility of her self-determination being substantive, rather than merely formal. One has to be able to interact with the external world in order to have any form of existence. I will take it that this is not a problem with property rights more generally: I have argued that, although restrictive in some manner, they do not in and of themselves, deny others the right to self-determination in the way that a restriction on Girl Friday's landing clearly would. In fact, I have argued that under normal circumstances they enhance self-determination opportunities. That was the outcome of Sanders' argument. Nor should any injustice be construed as an infringement of some positive right enjoyed by GF under circumstances of a more general nature – such as a right to fair shares. What then is the case to be made for saying that she has her self-determination undermined, in the event that Crusoe refuses to allow her to land?

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[200] "Without the right to be callous, we are deprived of the opportunity to be generous." (Friedman, 2011, 2)

[201] In the former case, the suggestion is that morality is not comprised of property rights alone that there are 'property –independent prohibitions.(Harris, 1996, 40)

In fact, the forbidding of her landing can be dealt with quite straightforwardly. I have already argued that harmless trespass should not be considered problematic, since no labour theft occurs. (Though, there is nothing wrong with putting up a fence around one's legitimate property, since this marks the property limits and informs others that it is not to be tampered with. We might also say that, conventionally, such ingress might be forbidden, but that is not so far established.) So, non-invasive prevention of trespass cannot be assumed to be rights infringing, as a matter of course.[202] But the implication of this, on its own, would be that she should simply stay, without interaction with the world that Crusoe has made his own, resulting in her starving to death.

I have argued previously that one reason we value self-determination, is because we wish to live our lives as project pursuers – we value the ability to pursue our own purposes unhindered. This is why we value the right to make certain parts of the external world our own – since without this right we would be unable to pursue our purposes. We must do this without adversely impacting the right of others to do likewise. Having our own property gives us one way to pursue our projects, if we are so inclined, and it gives others similar rights as well. We must have at least some access to the external world, if we are to survive at all. We might argue therefore, that we cannot impose ourselves on the property of others, except insofar as such imposition is the only way that we can so impose ourselves to allow survival. The thought behind this is that otherwise, under such unusual circumstances, we would have no ability to impose ourselves at all, and therefore self-determination becomes empty. We are not entitled to expect that this will come for free, only to think that, if we are not allowed to interact with the external world at all, we cannot self-determine. This gives some credence to the thought that it would be wrong for Crusoe to forbid GF from landing on the island, because it would infringe her own right of self-determination.

We must then move to the more key issue of whether GF may be denied access to some parts of the island, after she has arrived. On first thoughts, it may appear that

[202] What we may be permitted to do in the event that the prevention has been unsuccessful, is left open.

she should not automatically be allowed to access it, since it is already the legitimate property of another. But we have already accepted that there are certain things that one must not do with one's property – one must not thrust one's knife into the body of another. In that case the reason for saying this was that the act would be invasive and thus adversely impact that self-determination of another. But we can also see that denial of Girl Friday's ability to cultivate land for her basic needs would also adversely impact her self-determination – in this case specifically - since no-one can pursue their purposes, if they are unable to sustain themselves, in at least some way. Mack argues:

> Any theory of property rights which accompanies a suitably comprehensive doctrine of self-sovereignty must recognize that dispositions of property which damagingly nullify others' world-interactive capacities are not legitimate exercises of those property rights (Mack, 1995, 201)

The thought here is this: *if* the agent's status is such that it provides a rationale for claims against the invasive claims of others, because this would nullify the agent's self-determination, *then* the same rationale also prevents those others from non-invasively, but severely, nullifying her interactions with the external world, since, intuitively such nullification is akin to imprisonment. (It is specifically not, however, a claim that, ownership of some particular object X, amounts to an entitlement to access that on which the object X might be directed.) There is no suggestion that she gains rights to Crusoe's property underlying this argument. Her right to cultivate may be nothing more than a right to work in exchange for provisions. The point is that a complete denial of interaction would be wrong.

At this point, it might be objected that what has been set up is not really a right to interact, as part of an interpretation of the right to self-development, but rather a right to have basic needs satisfied. This not the way the argument proceeds however. The point is that Crusoe is using his property in a manner detrimental to the self-determination rights of Friday, if he fails to allow her access to it. It is not suggested, for example, that justice obliges him to offer her food from his table or to swim out to the reef that she might be floundering on, in order to effect a rescue. Such demands might suggest that her need is what motivates in this case. But such actions, which might well be morally recommended, are to be considered supererogatory when

examined under the lens of individual rights. (Of course, it might be suggested that her need is what *really* motivates this reading of the proviso, but that would take us away from the point about rights and into the realms of psychology.)

So, the real question comes down to a point about whether the use of a boundary fence is akin to the use of a knife to coerce someone or a wall to prevent access to one's property. We have said that uses of personal property must stop when they come up against the rights of others. We cannot say that the new arrival has a right to sustenance on the island – otherwise we would be in danger of saying she had a similar right on a barren island, which would clearly be nonsensical. But an objection to the argument thus far would be this. Use of a knife against another would amount to an initiation of force. But failure to unlock the gate around the property cannot be seen in a similar light. There is no obvious initiation of anything. We should not fall into some consequentialist trap by saying that the practical effects are the same. So the case that the knife and the gate are analogous cannot be sustained.

There are a number of ways around this. One would be to bite the bullet and say she should not be allowed through the gate. This is not an unrespectable position, from a rights standpoint, but we may intuitively feel that it is wrong, not merely from a standpoint of human compassion. A second would be to say that there is something different about property rights when compared to rights in the person. There is surely some truth it this. Property rights have been argued to gain part of their credence because labour or other rightful assets have been invested in them. I have said in Chapter 1 that these may be countermanded in certain circumstances, provided that compensation is paid. This situation clearly falls within that. She should be allowed entry, but would have to compensate by doing a share of the work, or making some other form of compensation. Additionally, we may be inclined to see another difference between rights in the person and rights in external objects. One is simply born with one's body – there is no element of choice in the matter. But there is an element of choice in acquiring external objects. One clearly has a choice as to whether one acquires them or not. One can also acquire property rights to a greater or lesser degree, as discussed briefly in the introduction. The implication of these two points is that property rights do not, *ceteris paribus*, imply an automatic right to use

the property in its intended way, despite acquisition with that intention in mind.[203] So, if we suggest that self-determination rights imply a right to use such rights only under certain conditions, this does not lead to a slippery slope under which, one is able to claim a right to use external objects which one might own, but for which a potential use is unavailable without impinging on the property of another. Thus, a right to use the rightful property of another, under prescribed conditions, can be seen as a proper form of one's self-ownership, without wider implication. Nor does this negate the thought that property has been rightfully acquired: the point is that we must more carefully define what is a rightful use of one's property.[204] It is still within the realm of the thought that its rightful use must not adversely impact the rights of others. But because the countless interactions that take place within conditions of free exchange are generally beneficial, this aspect of self-determination will seldom be invoked.

It should also be noted here that, on the island, persons are close to the state of nature that Locke envisioned. They are not in a money economy. Were we in that situation, there would be no particular reason to grant GF access to land – she would need simply to find employment in the money economy. In fact, it is probably not money that is important, but the fact that there is a relatively developed market economy in place. The lesson of this story is that the need for a proviso declines in a suitably competitive economy and probably the most likely way someone might be prevented from interaction would not be, I suggest, because of the lack of resource to interact with, but because the government imposed certain restrictions on voluntary interaction.[205] It is only when the competitive economy is itself compromised – perhaps through oligopolistic control[206] or government restriction that we might see

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[203] The acquisition of a screwdriver does not imply the right to a screw to use it on; the latter must also be acquired in a proper manner.

[204] Here I am drawing on Feser (2005, 8).

[205] Minimum wage laws or licensing restrictions are good examples. "Minimum wages reduce employment opportunities for less skilled workers and tend to reduce their earnings; they are not an effective means of reducing poverty; and they appear to have adverse long-term effects on wages and earnings, in part by reducing the acquisition of human capital…" (David Neumark, Minimum Wages, MIT Press, 2008). I do not suggest this is uncontroversial.

[206] Whether by commercial enterprises or bodies such as labour unions.

the need to invoke it – albeit in a different form, but one which preserves the basic principle - because such controls can be used to reduce competition in the economy. But generally (as argued in 2 *contra* Nozick's worries about loss of Hohfeldian liberties and opportunities), the free market vastly increases opportunities for purposive human activity. The proviso will therefore not normally be required. Nozick's worry is thus put in its proper place. Because, for Nozick, the proviso is not a proviso at all, but rather the point from which the argument seems to commence, any deviation in terms of liberties or opportunities, from the initial state of nature proves problematic. When it becomes a qualifier to the labour-mixing argument, the arguments are significantly diluted and the developed economy, rather than being something for which compensation is required, becomes the reason why the proviso loses its relevance, absent government coercion or a rather unlikely concentration of power amongst oligopolists.

Worries about monopoly still need to be addressed. These are exemplified by Nozick's water well example (*ASU*, 178-182). Perhaps there are six wells supplying a particular community and all have been acquired through sound principles and thus count as just private property. Unfortunately, five run dry, leaving the community relying on the remaining monopolist. Nozick's point is that this situation is worse than a state-of-nature baseline. This is, of course, problematic. The state of nature is an imaginary state, visible only in the eye of the philosopher and questions such as the numbers of buffalo contained within it are hard to define. Who is to say whether the monopoly price charged by the remaining water rights holder is a bargain compared to the state of nature? No doubt the fact that there were originally six water sources means that opportunities have declined, but this is not necessarily due to the fact that they were privatized. Perhaps the decline would have been faster in the absence of a regime of property rights. What we can say is that persons in the area are denied substantive world-interaction rights if they are unable to access water. What we cannot determine is what price any such rights of access should attract.

The argument being pursued here is one of analogy - the analogy between the owner's unjustified use of his knife and the potentially unjustified use of his land. The question that needs answering is whether the analogy works, or whether there is some

relevant difference between the two cases, that nullifies it. In each case there is properly established property in an object. It is the particular use of that property that causes a potential problem. It is not that the right to life of one person equates to a duty on all others to further such life – it is rather that the life must not be interfered with. In the case of the knife, a problem arises only if the knife is used in a particular way, whilst in the case of property it arises when it is used in the same way as is normally acceptable – it is the differing circumstances of use that are crucial. It seems therefore as though there might be a relevant difference between the two cases.

Further reflection however suggests that the difference is only relevant if persons are not assumed to have a right to interact with the world. In this case, use of one's property to deny such rights can be seen as an infringement of those rights, when there is no other way for them to interact. But more than this is required – otherwise Crusoe might have said that he was allowing Friday to interact simply by allowing her to swim around in the sea. It seems that the interaction must be one that permits sustainability if it is to generate a right to access another's land. We then get quite close to the Lockean thought of having 'enough' – if enough is defined in terms of sufficiency. Self-determination is defined as involving an opportunity to attempt to survive. Lacking sufficiency because one had landed on a desert island incapable of providing sustenance is just bad luck: landing on one which is capable of sustaining life would mean that property rights alone cannot be wielded so as to deny another the right to attempt to survive, because to do so would be to deny self-determination. This is an important point. It should be noted that this is not a claim that property should be redistributed to the propertyless. It is a claim that a property right should not be used to deny another sufficiency. The claim to have such self-determination rights seems plausible intuitively: a merely formal set of such rights lacks real world application.[207]

[207] We may also want to invoke the familiar observation that principles often suffer an incapacity to provide self-sufficient guides, which dispense with the need for judgement in their application. (Simmons, 146) The application of a general category requires judgement and this is "peculiar talent, which can be practised only, and cannot be taught"(Kant, *Critique of Pure Reason*, ((1781) A133, B172)

In the case of the island therefore, we may say that GF does have the right to land and attempt to make a living. It is undetermined as to whether she can use part of the island as though it were her own or whether she can work it but under conditions specified by Crusoe – such conditions being that she remains self-determining and with the possibility of sufficiency. (If the island were only half developed, she could be pointed in the direction of the other half, and told to get on with it.) In the real world it is likely that similar situations will be met only infrequently. We may think similarly that persons will normally be expected to make their own way in life, and that organizations, such as governments, should not be entitled to hinder this, by standing in their way. Except in rather unusual circumstances, property owners are not in a position to deny others the ability to sustain themselves and would therefore have no case to answer. But a restrictive monopoly might fall foul of such worries, in which case, action to dissolve such monopolies would be appropriate. It is beyond the scope of this essay to develop this further, but it is acknowledged that further development is required. Nozick himself points to one such reason reason: the prevention of a moral catastrophe (1974, 30). It seems reasonable to think that there are circumstances in which property rights can justly be infringed; (in the same way, perhaps, we might think that it is sometimes appropriate to lie, without giving up on the thought that lying is wrong, in principle).

We may say therefore, that if the right to self-determination includes a right to interact with the external world, then, under certain circumstances, this might involve a right to interact with the private property of others, albeit to an unspecified extent. In the absence of such an inclusion, no such right is established. I am inclined to think that a right to self-determination should be assumed to involve this right, since otherwise it is in danger of being purely formal, and could, in practical terms imply something akin to a right to imprison. In this connection, we may be reminded of the example discussed earlier in which a property owner found himself effectively imprisoned, because another owned the surrounding property. In that case, we may think that the person surrounded would have a right to use the property of the surroundor for the purposes of ingress and egress, under this interpretation of the right to self-development.

The implications of this interpretation of self-development rights are quite limited, since in most cases the property rights of some will not amount to a restriction on the sufficiency of others – quite the reverse, as Sanders argues. If the right were claimed too frequently the effects would be perverse – the opposite of the intention, in fact, since imprecision of property rights leads to the tragedy of the commons and a resulting erosion of sufficiency.[208] Just where the line must be drawn is thus a matter of fine decision, which may be subject to conventional approaches, as discussed in Chapter 4. Nor should this be confused with a call for an egalitarian form of distribution, since such is also the cause of similar problems, and is anyway, ruled out be the validity of property rights. It is often thought that implementation of property rights will lead to a concentration of resource ownership and the dispossession of all but an elite. There seem to be a number of reasons why this would not be the case.

Firstly, let us consider the situation in the Amazon rain forest and the plight of the indigenous populations living there, whose resources are being encroached upon by outsiders. These principles most certainly do not sanction a land grab. It seems that the indigenous Amerindian population have already done all that is necessary for them to claim proper title over, so far undefined, parts of the jungle, by hunting and living off of the resource, before the outsiders arrived. What we are seeing here is simply a failure of a statutory system of law and order to properly protect such rights. It seems to me indeed a strength of the Lockean approach that such aboriginal rights would be recognized.[209] Not only that, it is also a defense against freeloading by those who wish to participate, but without investing.

Secondly, it may be thought that such rights allow the rich world to maintain a privileged position *vis a vis* the undeveloped world. There is no good reason for this belief either, I suggest. Probably the greatest 'aid' that we could provide to the poor

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[208] See also Schmidtz (1990, 505-518, esp. 508)

[209] I do not wish to suggest that I subscribe to an over-romanticized view of such issues. The indigenous populations should be allowed to make their own choices of way of life – including the possibility of joining the 21st century. We should also note that this is a 'quasi-Lockean', rather than, 'Lockean' approach, in light of some of his suggestions that Native American groups might be dispossessed or various reasons.

would be to allow access for their products (primarily agricultural) into rich world markets without restriction. Instruments, such as the Common Agricultural Policy of the EU, are *not* the results of a Lockean approach to property and free trade. They are far more akin to their exact converse. Nor should we imagine that the lazy inheritors of their ancestors' justly owned wealth will enjoy more than a transitory advantage in a competitive economy. Wealth will generally flow to those who create value in forms others wish to consume. Thus benefits flow to both parties in the transaction – benefits which, as explained, would not be reaped in the absence of property rights. Finally mention should be made on the subject of externalities, such as pollution. Far from standing in the way of handling such matters, property rights should be seen as assisting in their solution. If I generate solid waste from my factory and dump it on your land, there is a clear solution under a regime of private property. I must either desist or negotiate terms with you. Pumping pollutants into the atmosphere is no different in principle and we may well expect property rights to be an aid in resolving such matters to the benefit of all. We should not confuse the fact that property rights are more difficult to establish in the atmosphere and in the oceans, with the thought that they are somehow part of the problem. Of course, I have done little more with these last three points than establish the way the arguments might be taken forward. A more complete analysis is not possible within the confines of this essay.

It may seem that I have spent over-much time discussing the proviso, when it does not seem an essential part of the Lockean thesis, as I have chosen to delineate it, and then only to dismiss, or heavily modify, it anyway. I have done this for two reasons. Firstly, it is usually seen nowadays as a key part of Locke's approach, and secondly it seems to have assumed prime importance in Nozick's account, due to his (overhasty, in my opinion) dismissal of the 'mixing of labour' argument. It has also provided a framework for discussion of some of the objections to the 'mixing of labour' argument. And I have established one reason why we may think a proviso, albeit of a different form, is merited under certain conditions.

To sum up this section, I would say the following. The proviso in Locke may be interpreted in a number of ways. In particular, one way may be to see it as a necessary condition for labour mixing to occur and for property rights to get started. I

do not think that Locke sees it in this way and I do not believe this to be a proper or useful interpretation. A second interpretation is as a set of conditions which might, under appropriate circumstances override certain Lockean rights. I think this is far more fruitful and this is the approach I have taken. I have suggested a set of quite narrow circumstances under which this may apply. I fully accept that this is not the only possible set of circumstances that might override Lockean rights: that is not something I claim to have established. I promote it because it seems to me to do least damage to initial acquisition rights, whilst avoiding circumstances under which the very survivability of persons might be put at risk. I accept that other interpretations may be found that better promote the aim in question though I am presently unaware of them. I do think that preserving Lockean rights to the fullest extent reasonable should be a test of such alternatives. As a final point, I should note an analogy with the approach I take to eminent domain in Chapter 4.

(e) So what?

There is a ghost that has been lurking behind this essay since the start and now needs to be addressed, since it is quite crucial to the next development in this essay. As Gaus and Lomasky state, there is something rather odd about the whole original acquisition argument (1990, 495/6). The argument relies on an original acquisition that was just, because the land was laboured on, plus a chain of legitimate transfers up to the present time. Apart from anything else, this demands a good record of all the relevant events. This may be the case in certain circumstances, but in many – almost certainly – most, it is not. In practice, particularly in Europe, but in America to some extent also, the records are lost to history. We therefore have no idea whether any particular current holding rests on a just foundation, but the likelihood is that it does not. The historical reality is that land has often been taken from rightful owners by force and the means of effecting a suitable rectification are unavailable. This must lead to an important "So what?" objection to the argument to date. The quasi-Lockean approach to initial acquisition may be satisfactory, but it tells us little about the justification for modern-day property holdings.

Nozick addresses this issue in *ASU*, but at a rather non-specific level and in a manner which seems unlikely to provide a very satisfactory conclusion. Nozick argues that as well as the three principles of legitimate acquisition, (*ASU*, 151) a principle of rectification is also required to handle situations where property title has been established through means other than conformance with the three principles. He suggests that, in principle, we need to examine the counterfactual situation that would have become instantiated were the injustice in acquisition not to have occurred. This seems reasonable in itself. Although counterfactuals are seldom likely to be definitive, perhaps the courts would make a reasonable stab at this, although anything remotely definitive will certainly be defeated by the Hayekian knowledge problem. And indeed, there is nothing untoward about the thought that past injustices be rectified. Indeed, we might justly go further and consider that wholesale land reform is indeed appropriate when we can clearly show that land has been unjustly acquired in the recent past. This might be the case, for example, where an illegitimate government has provided its cronies with land rights. When this government is subsequently overthrown a full reform of such rights seems entirely appropriate.

This solution however is of little help when the historical record is shrouded in the mists of antiquity. In such situations, Nozick seems to suggest that a more extensively redistributivist state would be required for a fixed period of time (the actual time concerned is not specified) (*ASU*, 231) – maybe even a state organized on the basis of the Rawlsian difference principle.[210] This suffers from two obvious defects. Firstly it is incomplete and tells us very little of practical consequence, since detail is lacking. And secondly, it might penalize those who, although their final chain back to legitimate property rights proved impossible to establish, had nevertheless established at least some rights via a market process of mutual exchange and personal development. They would seemingly have paid a just price and then found themselves suffering the consequences of rectification, where more than likely none for called for – at least in so far as their act of acquisition was concerned.

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[210] In his favour, he does qualify this however by saying that "to introduce socialism as punishment for our sins would be to go too far.."

Jeremy Waldron poses a number of pertinent questions in regard to the difficulties of disinterring injustices in the distant past which may impact current holdings:

> What were the conditions like when the resources were first taken into ownership? How well developed was moral consciousness? Were those to whom the principle was supposed to apply capable of implementing it properly? Could it conceivably have been a principle which they held and abided by explicitly? Or in any way? If we turn from ancient to modern capabilities, how can *we* make sense *now* of principles whose only direct application was hundreds or perhaps thousands of years ago? (1988, 259)

I propose a partial solution to some of these issues in the next chapter, under the idea of prescription. For now, I want to consider whether the idea behind a just initial acquisition, followed by a chain of just transfers is the only way of interpreting the Lockean case. This may seem a surprising change in direction, but I should make it clear that I do not wish to suggest that the historical account, sufficiently supported, is not valid. Rather I want to consider whether we might also be able to give a different account when the history is cloudy. I have suggested that liberal rights become attached to objects in the external world through a process of labour mixing or creation, at such time as the resources have no established title and gain currency because property rights ensure that such labour is not coercively confiscated by others. Property rights "(are) supposed to mean the guarantee to individuals of the fruits of their labour" (Mill, (1994), 16).

If we accept the link between individuals and the fruits of their labours, it seems that we may be able to formulate an account which is close to the historical account, but not does not rely on every link in the transfer chain having been legitimate. In practice we may also imagine, in a manner analogous to the way future revenue streams are discounted in a cash flow investment analysis decision, so events in the distant past can also be largely discounted in any chain of property title. The fact that one has paid a market price for an object and continued to use it in some way means that any element of doubt in a proper title in the past can be heavily discounted. The act of recent purchase, use or production using the assets becomes the most important element in the title claim. As claimed by Gaus and Lomasky, the historical elements may well be partially correct (and particularly recent historical events) but they can

also be seen as a thought experiment "that induce(s) us to view justificatory issues *as if* they occurred in certain idealized historical settings" (1990, 498). This may be true, but it seems to stray from the Lockean analysis: Locke's theory works (insofar as it does) because it is based on the idea of an initial appropriation followed by a historical chain of events through to the current day. An interruption in the chain might be handled, if the events leading to it are known, by some form of mutually agreed compensation, but it is not obvious that it can be moulded in this manner, if the chain interruptions are shrouded by history. It would seem that something less formal than the Lockean approach is required. This is not to suggest that the quasi-Lockean approach is incorrect: just that it cannot fill in all the details. I shall explore this further in Chapter 3.

Gaus and Lomasky also suggest that it might be argued that all indeed do accept the legitimacy of first acquisition rights. This however seems contentious. There seems little in the way of limits in terms of how some persons are inclined to blame others for failures of their own making and we can be sure that the success of developers will be seen by them as the cause of their own failure. Alternately it might be demonstrated that all gain from the institution of property rights. This seems to be more fruitful territory and has been discussed earlier. But perhaps the more pertinent question lies further back in the argument. I have made it an assumption of this essay that there are certain liberal rights that should apply to all and that property rights flow naturally from rights of life and liberty. But this does not mean that these source rights do not also need to be justified. There seems to be a feeling among certain commentators that there is something different about property rights that requires extra justification, while the basic rights of liberty are so ingrained as to appear axiomatic. But in practice justification is required for all. Such justification is not without its own problems, but these are ones that cannot be addressed within the scope of this essay, even if the some of the motivations were discussed in Chapter 1. Insofar as the real difficulty is in accepting that there is nothing particularly different about property rights, I hope to have addressed this now. But I shall investigate a Humean approach to it in Chapter 3 of the essay, to further cement these claims.

(f)Loose ends.

There are a number of loose ends which have been alluded to in this essay, but not yet resolved satisfactorily. Many of these can be grouped as vagueness issues – whether it be vagueness in boundaries or vagueness in the historical chain. Locke does not give a satisfactory justification for government, so it is not obvious how such issues might be resolved under a Lockean account. It is also doubtful that the brief earlier words on the subject of historical claims are sufficiently robust to handle this issue. It would seem therefore that, although we have some constraints that must apply when one party attempts to take the property of another, we cannot give a complete account.

I should perhaps say that I do not see that there is anything particularly wrong with the thought that certain rights have been established, but not in a sufficiently precise way to eliminate all disputes as to the extent of such rights. There does not seem to be anything in the inherent nature of rights as to suggest that this is somehow indicative of the fact that the arguments for such rights are in any way suspect. It simply shows that the rights are genuine, but that there is legitimate doubt as to exactly how they should be applied or to the precise extent of the application. In the case of property rights, it would seem that the Lockean account is incomplete. It can provide us with necessary conditions to feed into a broader account, but it cannot give a full theory of property rights itself. We must therefore seek a more comprehensive account, in which the necessary conditions that Locke identifies can be integrated. One means of clarifying the situation is by means of a conventional approach to dealing with the indistinct elements. There would seem to be two provisos that we should apply to such conventions. The first is that they should not be incompatible with the rights themselves. And the second is that they should not be obviously 'unjust'. Hume provides us with an argument about the justice of conventions. And I shall draw on this in the remainder of the essay.

CONVENTIONAL APPROACHES TO PROPERTY ACQUISITION

Chapter 4: The Humean Approach

a) Introduction

In the previous chapters, I have looked at a Lockean approach to justly gaining property. I have argued that this provides reasons for thinking that legitimate rights to continue using and to dispose, can be gained in a state of nature. We have also seen that this approach cannot answer all questions relating to the scope of such rights, in particular relating to boundaries and unclear historical claims. The theory is thus far incomplete. In many situations in modern life, it fails to provide answers as to the extent of property rights. In order to look at ways in which a theory might be completed, I investigate now an approach related to that put forward by David Hume. Because Hume's approach is conventional, we might expect that it will address the sort of boundary issues that we have seen as making Locke's approach incomplete. I suggest that in some respect Hume's approach mirrors that of Locke and in some respects is complementary to it and can help to fill the incompleteness found in Locke. In these cases, I shall suggest that we can think of issues relating to property rights along two dimensions – one based on natural rights and the other on a conventional approach, leading to a hybrid theory. I shall compare and contrast these two dimensions and will argue that a more complex theory of this nature can help resolve issues that neither, in itself, is capable of resolving. The result will point to a composite theory, involving a Lockean foundation, together with a Humean overlay, which complements the foundation while not contradicting it. A synopsis of Hume's ethical position can be found in Lara (2012).

Before proceeding, it is worth saying something about how natural (Lockean, in this case) and conventional rights may co-exist. It is sometimes said that the fact that positive law is in place means that moral rights, including property rights, cannot be natural. Hume's position is that his conventional account can override the Lockean

story. Whilst there are tensions, I do not see this as entirely correct. As explained in the previous chapters, I believe that property rights are ethical rights and exist, in their own right, with no specific reference to a system of positive law. But that does not mean that they cannot be implemented within such a system. In order to respect a neighbour's natural property rights it may well be advantageous to do this through a well-constituted legal system. This may, in part, be because the natural rights are not precise insofar as every aspect of property title is concerned. This does not, therefore, mean that we would be incapable of respecting the neighbour's rights in the absence of such a system – just that we may be able to do it better when such a system is in place.

Despite these thoughts, it is not obvious at all that Humean property rights will take the same form as Lockean ones. Hume's view is initially based on a view as to how our minds work. He seems to believe that they will always contain certain types of features as a result of our (human) nature: rights will always take a certain form because that is how our minds work. We might note, though, that if, say, in certain societies, there were different cultural norms, it is possible that there might be a variety of forms of rights, even if an underlying core is retained. Thus the foundation of Humean rights is quite different to a Lockean one which derives from self-ownership. I have to acknowledge that this may be seen as a major problem. My introduction of a Humean approach is not meant to undermine the quasi-Lockean one. It is introduced in an attempt to see whether we may be able to supplement the Lockean one, in areas where it fails to be specific. The way our minds work may help us to fill in gaps in the Lockean approach, in ways that persons can assent to. I do accept that much further work is required to reconcile two seemingly different approaches.

I should also acknowledge that Hume suggests that property, unlike appetites, is not subject to the instinctive sentiments that underlie one part of the Humean approach to morality (1998, 96). We may question this in light of the thought that persons do have sentimental attachments to objects they create. The account in chapters 2 and 3 is not supposed to be sentimentalist in foundation, but it does suggest a rationale for

ascribing property rights, based on individual rights, which Hume might seem to dismiss too easily.

Before proceeding further, I should acknowledge that, on one reading, Hume can be understood as saying that there is no point in attempting to rationally unpack basic viewpoints in political philosophy. This is because we are unable to undertake practical reasoning and thus cannot rationally argue as to what *should* be done in the political arena. Our views simply reflect our sentiments and these are not easily subject to reasoning, according to Hume.[211] However, it does seem that our views on particular issues are sometimes amenable to change when exposed to reasoning – the example of how persons in the eighteenth century came to understand that slavery was wrong seems to exemplify this. The population became convinced, contrary to earlier attitudes, that the reformers' cause was just. This is, presumably, because the anti-slavery movement was able to tap into the tug of natural human instincts, which had previously been submerged. The sentiments had not changed – rather the exposure to reason caused persons to think their existing views were opposed to the underlying sentiments. Similarly, it is apparent that attitudes towards homosexuality have altered in the last fifty years. I don't suppose that this is because the majority of people have changed their views about being personally involved in such matters (though this may be the case for some) – it is rather that a greater tolerance has been learned, after due reflection on the rights of others and after acquaintance with others. Turning to self-sovereignty, as assumed here, nobody could claim that the idea of rights as side constraints is accepted as part of current mainstream politico-philosophical debate. Progress in this field has however been made in recent history and there is no reason to think that such an approach might not become more generally accepted in the future. I do therefore believe that there is room for a sentimentalist approach to influence the arguments in political philosophy. What we may interpret Hume as saying is that the very basic foundations of our beliefs are ultimately sentimental. It is partly for this reason that I suggested in the Introduction that our beliefs in individual liberty might ultimately be *sui generis*.

[211] See, e.g. Lara (2012)

b) Hume's account of morality.

I will start with a brief overview of Hume's account of morality. As stated, this is sentimental in origin, although we may think that it could also be underpinned by an anthropological account, which attempts to show the origin of such sentiments. His approach to philosophy in general, and to social development in particular, is a scientific, rather than an *a priori* one. A particular influence on him is Hobbes, via Pufendorf. Pufendorf sees the Hobbesian project as both compelling and worrisome – the latter for moral reasons. Can we really rescue ourselves from the raw self-interest only through the mechanism of the sovereign?

Hume sees our human nature as having both self-interested and benevolent components – although he suggests that the latter is often weak. Our morals derive ultimately from our human sentiments, not from reason (*contra* Kant). He characterizes moral virtues as those things that we can approve of from an impartial standpoint and sees human utility as the usual basis for such approval. The virtues are, in turn, sub-divided into natural and artificial. Natural virtues are just that – they flow naturally from our nature as human beings. A parent's sacrifice for his child can be seen in this category. The artificial ones are more complex. In the case of justice, which, interestingly, Hume writes about primarily in the context of property, Hume sees two forces at work. Our natural benevolence may well be opposed to the idea of justice – for example, if the demands of justice are opposed to the interests of a family member, and so, indeed, might be our immediate self-interest. But our wider self-interest is such that we recognize the benefits of a system of justice, because, in the main, we see that this brings us utility and this, in turn, overcomes any immediate opposition.[212] Others reach similar conclusions and we thus reach a *modus vivendi*, where the individual benefits that accrue depend on the balance of power amongst the respective participants. Conventions that reflect this *modus vivendi* then become established. Hume cites the example of two men rowing a boat (2000 3.2.2.10). There is no formal agreement between them to continue rowing, but each recognizes that, if one stops rowing and rests on his laurels, the other will too. There is thus an

[212] In this we can see obvious connections with the Hobbesian approach.

incentive, based on self-interest, to maintain the convention. We recognize that our lives go best when we all (or nearly all) respect this *modus vivendi* and these conventions.[213] If there is a "rough equality" amongst the participants, an impartial justice may arise, and our natural sympathy tends to reinforce this, providing further support to the conventions. It is key to Hume's theory that justice arises from self-interest, rather than from benevolence – but it is a long term or perhaps 'enlightened', rather than a short term, narrow, self-interest that is the important factor. We tend to feel far more worried when our behaviour is contrary to justice, than when it is contrary to benevolence, because we have more to fear in terms of the consequences, if the conventions break down. It is however important to note in this connection that, although it is self-interest that underlies our attachment to justice, it is sympathy for others that mediates it:

> Nay when the injustice is so distant from us, as no way to affect our interest, it still displeases us; because we consider it prejudicial to human society, and pernicious to every one that approaches the person guilty of it. We partake of their uneasiness by *sympathy*… Thus self-interest is the original motive to the *establishment* of justice: But a *sympathy* with public interest is the source of the *moral* approbation, which attends that virtue. This latter principle of sympathy is too weak to control our passions; but has sufficient force to influence our taste, and give us the sentiments of approbation or blame.(2000, 3.2.2.24)

So self-interest provides the motivation to pursue justice and sympathy provides the moral flavour.[214] [215]

It is worth pointing out that, in this part of his discussion, Hume also says that he is not suggesting that it is alright to violate the property of others in a state of nature, merely that, in such a state "there was no such thing as property; and consequently cou'd be no such thing as justice or injustice" (2000, 3.2.3.28). Hume is not here

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[213] I am indebted to Rescorla (2015) for some of this synopsis, both here and throughout.

[214] We may however be inclined to think that the sympathy springs more from natural inclinations than a sympathy with the public interest. Hume's approach seems somewhat strained on this point.

[215] It has also been suggested (Barry, 167) that it is a desire to behave in such a manner as can be justified in impersonal terms that is at the root of our motivation, rather than sympathy itself. This sounds as though it is the sort of motivation that Kant, for example, could have approved of.

distinguishing between a moral sense of justice and the system of law: for him, the two are synonymous, when it comes down to property rights. We need the conventions in order to get the idea of property off of the ground. Of course, if we were suddenly to find ourselves in a state of nature, this does not mean that previously assumed conventions would not cast a shadow over issues of property. We would not need to recommence the process from scratch. But we should note that the thought that there is no such thing as property in the state of nature is quite contrary to the Lockean position.

We do not need to be too concerned about the precise source or chronology of this or whether the split between natural and artificial virtues in necessarily all that clear cut. (It may be that the interaction between our self-interested and benevolent sides is richer than as described by Hume in the *Treatise*).[216] Hume, indeed, in a letter to Hutcheson (*Letters* 1.33) says that he never suggested that the virtue of justice is unnatural – just that it is artificial.[217] The important distinction between the 'natural' and 'artificial' virtues would seem to be that, in respect to the latter, we need to arrive at a common understanding with others of the need to respect the demands of the such virtues. In this regard, we see Hume as suggesting that justice, in the sense of a set of conventions, is something that we need to create,[218] rather than something quite abstract, against which things must be judged, whilst the latter better reflects Locke's position.[219] And, furthermore, in contrast to the Lockean social contract, the Humean convention is not something we tacitly or formally assent to: rather it is something that we accept as a way of protecting our interests and aligning our common inclinations, provided that it provides utility over a Hobbesian state of nature. (This

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[216] Hume does not mention the split in his later second *Enquiry*.

[217] Though we may perhaps think that our confusion on this point owes partly to his use of these two words to distinguish them. However, he does distinguish between three different senses in which we use the word 'nature' so perhaps the confusion can be avoided by careful reading of the text.

[218] The same can be said of Rawls' system of justice, although, of course, rawls accepts practical reasoning while Hume does not.

[219] Indeed, although also in the social contract tradition, both Hobbes and Rousseau may be seen as closer to Hume than to Locke in this regard. Locke's background morality is a Christian one: we may be less able to assume an abstract morality in a situation where Christian (or indeed, religious) morality does not form a part of our assumptions.

should be seen as an advantage in Hume's approach since it seems difficult to see how such 'tacit' consent could ever be seen as a genuine one. Nor do arguments about how governments are formed 'democratically' seem particularly fruitful either.) One is obliged to obey the state, provided it meets certain tests of legitimacy. The underlying idea is that you should obey because everyone gains (i.e. utility). It need not perfectly reflect the will of the people – it is enough that there is a utility increase compared with lack of government. This applies particularly to certain functions that the state supplies – e.g. law and order. It does not necessarily imply that such a legitimate state could supersede, or choose to disregard, certain basic rights. Such rights might be argued to apply anyway, regardless of the state. We can agree with St. Augustine of Hippo that "*lex iniusta non est lex*" without forgoing the Humean conventional account. In fact, Hume is influenced by the natural law tradition[220] and appears to accept basic human liberties as somewhat foundational, perhaps because it is in our nature to desire them.[221] In this we may see a distinction from Hobbes. But he also believes, and this applies particularly to property, that we need conventions to flesh them out.

When we come to property, a key point for Hume, and this contrasts with the Lockean account, is rather that rights in property, regardless of any rights in the person, are *purely* conventional and are not derived from more fundamental rights. I have already argued that persons are entitled to be assumed to have certain basic rights, and have argued, in a Lockean fashion, that under certain conditions, these can extend into the external world. I also agree with Hume that a conventional account is sometimes required – particularly where there is imprecision on the extent of these rights, but do not accept it as the *only* way for property rights to be properly established. I also believe that justice is not solely created by conventions: they may also be said conform to natural justice or not.[222] This does not mean that they cannot supplement it.

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[220] I do not suggest that this is not necessarily accepted by all commentators.

[221] Though he is not entirely pellucid on this point and, indeed, it may be that he could also construct an artificial story here too.

[222] Sanders, 395

It is worthwhile to my approach to say something more about the distinction between a set of laws and natural justice. When Hume talks of 'justice' he appears to be talking of the former. Thus we read (2000, 3.2.2.1):

> We now proceed to examine two questions, viz. *concerning the manner, in which the rules of justice are establish'd by the artifice of men*; and *concerning the reasons, which determine us to attribute to the observance or neglect of these rules a moral beauty or deformity*.

Hume clearly does believe that certain conventions – or systems of justice – preserve the peace and this fact provides reason, in itself, to observe them. Herein lies an appeal to an imperfect form of justice. But this does not mean that there is no aspect of justice outside of established conventions. Indeed, an interesting aspect of Hume's account of justice is that it applies primarily to property and, to a lesser extent, to contract or promising. It seems wrong to conclude from this however, that Hume would see nothing wrong with, say, taking the life of another, without suitable cause. More likely, he sees rights in the person, such as a right not to have others take one's life, as subject to a realm of justice, which is based on factors other than convention.[223] Such rights seem more fundamental. The thought would seem to be that we are not going to be able to treat property in such a manner because such basic fundamentals of justice do not apply in the sphere of property. But we also perceive a hint as to how this might be undermined in the second half of the quote included above. This is when he suggests that we perceive a moral beauty or deformity in the observing or otherwise of the rules of conventional justice. Might it be that the observance of such beauty or deformity lies in the identification of an underlying, more fundamental, justice, even though it derives from the sentiments? If so, there is the possibility that such a reality applies to the rules of property acquisition as well. I shall discuss this further when we come to discuss the four aspects of property that Hume identifies as appearing natural to us. In the meantime, it seems that we may have some reason for thinking that a conventional account could live side by side and in harmony with, and possibly supplement, a natural account of justice – not the sense

[223] For example, he suggests that equalizing property will not be acceptable because it will infringe too much on individual liberty (1998, 91).

of natural that is opposed to an artificial account, but rather an account that appeals to our nature as human beings.

A worry about the Humean account relates to the necessity for a "rough equality" to pertain before the justice system can be seen as impartial. What does this imply? How rough does rough have to be? Were there to be a race of relevant weaklings living amongst us humans, it would be inappropriate to imagine that we would "lie under any restraint of justice with regard to them", says Hume. The best that they could hope for is that "we would give gentle usage to these creatures" (1998, 3.18). His reason for this is that the stronger species has no need for a *modus vivendi* with these weaklings. They would be unable to participate in the conventions of justice, including (presumably) those relating to property rights. When applied to different species presently on earth, we may generally be inclined to agree with this.[224] But the reality is that there is certainly not any equality among persons – not because of discriminatory human action, but simply because of such things as natural talent or family background. Can we therefore say that impartial justice will ever be established by convention?

We might envisage a number of solutions to this problem. Perhaps we could imagine that an egalitarian or socialist state would seek to bring equality about. This is not Hume's solution, since he believes that the impact of constant corrective action would be inimical to private liberty, which we perceive of as valuable (1998, 91). Such a system would anyway not be the result of persons participating from a position of rough equality, since it is the conclusion (or at least a step along the way) rather than the starting point. Empirical evidence from recent experiments with Marxism also suggests that it would probably not be an advance in terms of utility over the state of nature, given that persons would probably set up protective associations in such a state (*ASU*, Chap 5), which might result in rather more utility than socialism. This is an empirical claim and therefore requires evidence for its justification. This is a matter for economic analysis, best left outside a philosophical discussion. Another alternative

[224] Animal rights advocates would presumably disagree. And we, ourselves, might be inclined to strongly disagree, were a more advanced species to descend on us from outer space. Certainly this may appear as a weak point in the Humean account.

would be to claim that the differences between persons are not so great as to mean that "rough equality" does not apply. We are of course then into a further debate into just what constitutes such equality. I cannot pursue this here, but will just state my opinion that a claim of this nature seems unlikely to succeed. Anyway, for Hume, this is presumably an empirical matter. We are then left with the thought that the story is incomplete and that self-interest will not, of itself, lead to the establishment of an impartial justice. However, this was only one part of the Humean story. Sympathy also led to its reinforcement. We might imagine therefore that self-interest establishes the *modus vivendi* and sympathy goes on to establish impartiality. It does not however seem that this is what Hume had in mind however, otherwise why would the inferior beings demand gentle usage and be unsuitable to become property owners, since he acknowledges that we often display sympathy towards them? I should conclude by saying that Hume's suggestion that these inferior beings can only expect to be treated 'gently' seems something of an embarrassment for his theory, since it seems contrary to our natural sentiments. It is perhaps the greatest weakness of the Humean approach.

Of course, it is quite reasonable to believe that many societies have come close to establishing an impartial justice system. The worry is that convention alone is not up to the task and that other factors have come into play. It seems quite possible, for example, that a convention might exist for a longish period of time to respect the institution of slavery. The slave-owners accept it because it seems to provide them with utility. Perhaps the slaves accept it for this reason too: maybe they know that if they revolted they would be shipped back to Africa to enjoy even less favourable conditions – or maybe they are in the position of the relative weaklings mentioned above. Or perhaps they think that slavery is better than some other form of punishment that would ensue following revolt. A grudging acceptance thus leads to a *modus vivendi*. And sympathy with the slaves' plight is simply insufficient to change this. I do not suggest that this argument applies to Hume insofar as slavery is concerned, since his view on private liberty is no doubt opposed to it, (although his limited writings on the subject seem rather mealy-mouthed to modern ears).[225] I use it

[225] See , for example, his "The Populousness of Ancient Nations".

rather to demonstrate that conventions, in and of themselves, may not be up to satisfying all our beliefs about the justice of certain types of arrangements.

This is not simply an entertaining piece of subjunctive thought. It pinpoints a worry with the whole conventional approach. It seems possible that it may simply never result in what we believe to be an impartial justice. But Hume does have a response to this impartiality objection. He does not believe that any old convention is just – rather he believes that conventions can only be just if they arise from our natural inclinations. In the case of property, I discuss the five such inclinations below. This is an important rejoinder for a naturalist about ethics. But it seems that it will not necessarily provide us with a solution that we can believe is truly moral, if we believe that morality arises from more than our natural inclinations. Or indeed, if we believe that, in the particular case of property, we can argue that our natural rights in the person can reasonably be said to extend, at least to some extent, into the external world (as I have argued in Chapter 2). This is why I think that a rights-based approach, as outlined in the Chapter 1, has advantages over a solely conventional approach. Otherwise, we might conclude that *inter alia*, in the case of the Amerindians mentioned in Chapter 2, they are the type of inferior creatures that cannot expect to participate in the conventions of property ownership. Thus when Red Cloud, a Sioux chief, stated "All I want is right and just",[226] Hume would presumably need to claim that he was incorrect in such a claim, because he was, at that point, too impotent ("gentle"[227]) a player as to be able to claim justice in support of his cause. We might, perhaps, think so much the worse for Hume and be inclined to see this as indicating that the conventional approach is inferior to that provided by the Lockean one. Conventions can certainly get a system of justice off the ground and can fill out the rights-based approach, where there is uncertainty as to exactly how the rights should apply, but it seems less likely that they can provide us with something we can believe to be a full account of what we mean by justice. As I have argued earlier, property rights extend from rights in the person, and are, in many respects, not fundamentally different from them, but this approach can leave some indeterminacy.

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[226] Quoted by Barry, 162

[227] No doubt he was far from gentle in the current sense, but we must take Hume to be expressing doubts as to the ability of such persons to bring about that which they willed.

I, therefore, look to see if a conventional approach, exemplified by the Humean one, can resolve such indeterminacy, without fatally undermining its own foundation[228]. It is worth reminding ourselves at this point that Hume can be interpreted in a number of ways.[229] One is to see him as suggesting the benefits of property conventions compared to a pre-conventional baseline. This is the line taken, for example, by David Gautier in *Morals by Agreement* (1986). Another is to see him as a proto-utilitarian, the forefather of Bentham and Mill. A third is to start from the premises on which Hume based his theory, rather than the substantive content. The latter is the approach taken by Brian Barry (1989). Since I believe that the basis of property acquisition has been established in a quasi-Lockean manner, only the first approach is applicable in the attempt to see how Humean principles may allow us to instantiate rules that the Lockean theory fails to address.

c) How we might construct a hybrid approach to property rights, based on Lockean and Humean approaches to justice.

As indicated, I do not suggest that a Humean approach can just be tagged on to a Lockean one, in order to solve a number of issues that are problematic for the former. We need something richer than that. It should go beyond just buttressing it, but that does not suggest that the two can always, or even, often, be integrated. I shall argue for a dual dimension in property rights. One is a dimension of natural right – the thought that something belongs to someone as a result of something – which we may flesh out in a Lockean way. The other is one of utility – that the institution of property brings utility and this inclines us to the see the benefit of it, in a manner similar to that described by Hume, not least because it assists in resolving disputes and thus maintains the peace, whilst increasing prosperity. Even though the thoughts,

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[228] We should note that Hume suggests that the general principles on which "all our notions of morals are founded"(2000, 3.1.2.6) is "the good of mankind"(2000, 3.3.1.9) – that is to say, utility.[228] We see certain things as moral because they bring utility and, in the case of the artificial virtues, the motivation to pursue them is provided by sympathy.

[229] See Barry (1989) 173-8

including the moral thoughts, behind each dimension are quite different, they do involve the same institution. And both might turn out to be right about different aspects of the institution. Furthermore, sometimes the two dimensions will parallel one another. This suggests that the two will more or less happily co-exist when this occurs. In a second set of circumstances, they will be orthogonal to one another, or one or the other will simply have nothing to say about the matter. In this case they may complement each other or only one will be of relevance. And in a third set, the two will appear opposed. When this occurs, we will need to say more – simply, which will take precedence and why. For if we fail to resolve the issues that arise in that set, the approach will be rendered incoherent or, at least, incomplete.

Hume could have mentioned an association between the labourer and his labour – but, in fact, he does not. He does however suggest that *occupation* (or first possession) of an object is something our minds annex to the idea of having property in it. This may be seen as not entirely dissimilar to the Lockean thought that labouring on an unowned object gives a right to continued use, particularly as developed in Chapter 2 and suggests, in this case, that any opposition might be resolved. Hume's point seems descriptive, while Locke's is prescriptive, but that does not mean there is no element of alignment. I shall return to this shortly.

Despite Hume's account being purely conventional, there is no reason why natural sentiments might not also play a part in our beliefs about justice in property. Indeed, I believe that they should. To start exploring this point further, I will now discuss a recent paper by Thomas Pink (2011) on "Promising and Obligation". Pink argues in favour of a similar double dimension in promising and I shall argue that we can, under some circumstances, make use of a similar duality in the case of property rights.

Pink investigates, *inter alia*, the differences between Locke's natural theory of promising and Hume's conventional one. Pink develops a theory of promising that is based, partly, on natural morality – that is to say, one based on human morality. Subsequently, particularly for legal promises, – contracts – the system of law makes promises concrete – and these then take on a life of their own, which is conventional in nature. Thus, we see simple promises between acquaintances as being quite

natural, as did John Locke. Locke sees the right to make promises as deriving from a basic natural liberty, of the type I have assumed in this essay. There seems to be a natural progression from saying "I will" to "Trust me, I will" to "I promise I will". Hume, however, has a problem with this. To start with, the story of natural liberty is, at best, opaque in Hume.[230] And secondly, there has to be a promising convention in place for the idea to take off. Hume's worry is particularly related to promises where the promise and its fulfilment are time-displaced. Although, for Hume, we have both self-interested and benevolent sides to our nature, the self-interested one most often wins. Without a promising convention in place, our self-interest, on any individual occasion, tends to win out and the promise may not be fulfilled.[231] But the trouble with this soon becomes apparent, since it is to the general benefit if promising is part of our daily lives, in that it permits, *inter alia*, the division of labour and thus economic prosperity. Although Hume's theory of morality is based on sentiment, this could not explain why we have an obligation, since an obligation has to arise from an act of the will and to change our sentiments is not easily in our gift.[232] This is all resolved by the promising convention. If someone reneges on a promise, the convention comes into play and the reneger is ostracized. Thus persons find it in their self-interest to maintain the convention and all is well. The convention thus takes on a life of its own. Now, it seems perfectly correct to think that the convention can indeed reinforce the act of promising, but too pessimistic to think that it cannot succeed without it. But what is very probably true is that, as promises become less between trusted friends and more between parties who may not know each other, so the need for the convention increases. Thus commercial promises – which we call contracts – generally depend on the conventions enshrined in law, whilst personal ones depend on human trust and natural morality. We may think that the more Lockean thought that, amongst friends and acquaintances, there is a natural progression seems more intuitive than the Humean thought that when one affirms "I promise" one has somehow moved into an entirely different ball game, because we do seem to have just moved further along a spectrum. Pink (2009) describes the

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[230] He does talk favourably about private liberty in some writings, but this seems to be mainly because he believes it to be natural for us to value this.

[231] This, no doubt, owes its influence to Hobbes.

[232] Though, as discussed earlier, this is not to say they will never change.

differences in the different aspects of promising as lying on a spectrum between two bases of promissory obligation - an invitation to trust and a more formal commitment to deliver, resulting from a right to commit oneself to undertake a particular act.

And so we may be inclined to tell a similar story about property. The natural part is encapsulated in the quasi-Lockean approach described in Chapter 2. We naturally agree the first developer should have, as his property, that which he develops and maintains. But, as society grows and becomes more complex, so we need to add conventional elements to it. Of course, it is most plausible to think that property will have rather more of the conventional about it, since unlike promising, it is not generally manufactured liberally out of thin air.[233] The same property we use today was often in place millennia ago – this is particularly true of land. And the natural chain from original developer is often not discoverable. This is truer of the old world than it is of the new. I shall investigate these particular problems later.

But what might legitimately be demanded of the conventions? It would seem that they should not contradict the natural morality that precedes them. But it seems legitimate to imagine that they might supplement it, under certain qualifications. There seem to be good ways in which such supplementation may occur. If conventions are generally accepted as a way of making the natural precedents both concrete and useful, then it seems we may see them as just additions. A typical example of this is boundary disputes of the type briefly explored in Chapter 2. I mentioned the person who wished to maintain a wild garden around his house. He hasn't developed it, so the natural morality that says that it should be his does not here provide a solution. But a society may well assent to the thought that his practice can be acceptable. Perhaps we generally assent to the thought that a house is entitled to a certain area around it and a convention develops to that effect. Perhaps we agree that surrounding areas might differ with respect to population density. There is much more that needs to be said about this, but the general principle seems reasonably clear. A conventional account that does not contradict the natural one will not fall foul of it.

[233] Perhaps intellectual property is more of this type.

In saying this, I do not mean to suggest that accounts of compensatory justice are of necessity conventional.

Another such example is this. One worry about the rights approach in general (mentioned earlier, in the Introduction), which also applies to property rights, is that rights seem unable to distinguish between normatively significant and normatively insignificant impingements. So the fact that someone is tortured means that his rights have not been respected. The fact that someone deliberately steps on your foot also means that your rights have not been respected. The fact that rights have been infringed in both cases should not be in dispute (unless rights are not given any credence at all). The problem seems to be rather that, following acknowledgement of a rights infringement, rights theory may not have anything further to say on the subject. Clearly this is another case where a conventional story might supplement the rights one. We rely on conventions to tell us how much compensation might be required in the one case or the other.

This seems to have interesting application in issues of pollution. If I own property adjacent to a factory and the latter is in the habit of dumping its solid waste on my property, there seems little doubt that my rights have been infringed. I can claim compensation and I can also demand that the law enforcement agencies request that the factory cease and desist. I can also negotiate an agreement whereby the practice is permitted under certain conditions. It would appear that similar principles should apply if gaseous pollution occurs. However enforcement now becomes a lot more problematic. Consider the case of carbon dioxide. This is vital for life on earth because it is a basic raw material for plant life. It also stops the earth's temperature from diving to levels such that life would become unsustainable. However, we are now coming to recognize that too much of it might be the cause of a reverse problem. It is not obvious that a property rights approach could handle this problem in isolation - even though, in many respects, it is conducive to a solution. Strictly applied, property rights would 'over-solve' the problem, since they might forbid even trivial trespasses on the property of others, bringing economic progress to a halt. A conventional approach might be used to help resolve this process. It could be used to control carbon dioxide emissions by permitting minor releases while forbidding

amounts above a certain level, by use of emissions trading schemes. Needless to say, international progress on this issue suggests that many obstacles to a proper solution still remain, possibly because the problem is not being handled in an effective manner.

Similarly English common law practices might be said to pass the test of establishing conventions. Common law is generally derived from a set of principles which allow persons to live together in peace. It is often grounded in natural liberty rights. Take, as an example, the law disallowing violence against the person. Clearly this is seems to reflect a fundamental right to life and liberty. But suppose the courts are presented with difficult cases. Is someone guilty of murder because he defends himself against an assailant and the assailant subsequently dies? The case comes before the courts and the magistrate decides that, if legitimate defensive force is used, the death does not count as murder. Thus a set of case law builds up, which clarifies the initial stark prohibition against killing another.

Consider this from Harris:

> Social conventions in general, and juristic doctrine in particular, may serve to concretize the implications of the background right, in respect to issues which would otherwise be indeterminate or controversial (1996, 331).

This thought is very appropriate to the question of boundary issues.

The growth of common law is evolutionary and in tune with custom. We may thus suppose that it enjoys general (if not completely universal) appeal. We may see the process not so much as creating law, but uncovering it. Hayek maintained that such law was identical to the fundamental canons of justice upon which free societies rest. Its purpose was to preserve and enlarge freedom and was, argued Hayek, a reason for the extent of liberty in England, when compared to other European countries. This is consistent with the leitmotif running through Hayek of how the spontaneous order that arises through decentralized, free, individual action is superior to the statist "error of constructivism". The process can be seen as natural justice taking a concrete form.

Hayek believed that the rule of law was more important than democracy and this seems right to me. The rule of law only really exists in those societies where there is a political consensus that ensures the law functions as a neutral mechanism,[234] allowing citizens to conduct and plan their affairs without force or fraud from others, but otherwise leaves them alone. Private property is a lynchpin of this system. When the power of the state expands, so that we become increasingly dependent on it, respect for private property, free markets and personal responsibility is correspondingly diminished and the citizenry ever more infantilized, such that we blame everything on others and nothing on ourselves. And the more infantile we perceive our neighbours to be, the less likely it is that we will respect them as persons, meaning that proper interpersonal relationships no longer obtain. We are then well on the way to the "Road to Serfdom".[235]

The rule of law incorporated within common law might well also be contrasted with modern statute law. Here the process seems quite different. Elections take place every four or five years. A quite limited number of parties offer a package deal of proposed legislation. The electorate cannot pick or choose from items within these packages. It might be said that no real contract with the people: manifesto promises are frequently abandoned when one party is elected to power. Nor is there anything like a general assent to many of the laws enacted. It is, in fact, unusual for the party in power to have gained assent from even a majority of the electorate. Not, we may be inclined to think, that majorities could provide legitimacy anyway, if basic rights of liberty are to be undermined by the legislation. This process, therefore, seems unlikely to be a good way of establishing conventions that could be said to be generally consented to or to be natural morality taking a concrete form.[236] It may be objected that what I have said here is a caricature of the democratic process and

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[234] This includes the thought that it is not overridden by personal or group interests, is altered according to set out procedures, and that individuals are equal before it.

[235] I am indebted to Mark Friedman for much of the thought in this paragraph.

[236] I do not suggest from this contrast that the common law approach will always provide 'good' answers to the difficulties of living together in peace or that statute law never will. Only that one process is more likely to provide such answers than the other.

indeed it is to an extent. Political parties are very keen to keep a majority on their side and this process does not only take place at elections. But the process might be said to have become quite trivialized and it may appear sometimes that the needs of a vocal minority are often stressed more than those of a silent majority. I think the partial caricature thus helps to illustrate a very real problem.

It is perhaps worth digressing at this point on a general issue of the perceived contrast between individual rights and utility. The type of economy consistent with individual rights, including property rights, is the free market economy. There is a worry that this type of economic framework will not always be consistent with maximizing utility. If this is the case, we may be left with the thought that an economy based on strong property rights will be sub-optimal in terms of utility. This will then prompt the thought that strong property rights push up against utility, meaning that one or the other needs to be sacrificed. The typical reason for this concern is the phenomenon of so-called market failure and, in particular, imperfect competition. It is argued that, in a world marked by full information equilibrium and perfect competition, utility and strong property rights would align. But, because perfect competition does not usually reign, the free market economy ends up being suboptimal. This is probably correct and it is usually suggested that government intervention - in turn implying a weakening of property rights - will produce greater utility. Recent work by Nobel laureate Joseph Stiglitz (e.g. 1994) is often cited in support of this viewpoint.

There are however two elements of human behavior which might be seen to countermand this argument. These are limited human rationality and limited altruism. Persons make decisions in an environment of limited knowledge and do not always take them in pursuit of the overall good. Human institutions need to robustly channel these two imperfections to optimize utility, if utility is to be optimized. A situation of dispersed property ownership and competitive behavior minimizes these adverse effects because it allows a system of trial and error to promote the best interests of individuals overall. The analysis of writers such as Stiglitz stops at the point of identifying the sub-optimality resulting from imperfect competition. A *deus ex machina* is then conjured up to resolve the issue. This takes the form of government intervention to bring about the results that would have occurred, had perfect

competition been in place. The weakness of the argument thus becomes apparent. For, there is no reason to imagine that the government is able to escape these imperfections. Not only that, but the intervention subverts the very process of trial and error that the marketplace uses to trend towards optimality. The adverse consequences of poor centralized decision making are much worse than if the decision making is more dispersed. Furthermore the classical liberal framework allows exit from a predatory situation, whilst government monopoly allows such exit only after a considerable pressure has built up in the system, such that a change in government policy will take place. Since democratic governments are generally unwilling to admit mistakes, this usually takes a considerable period of time, if it happens at all. The case for markets is not that they are perfect: it is that they are best placed to cope with imperfect information and limited benevolence. It is not that there are no such things as principal/agent problems in the market economy: it is that they are magnified many fold in the government regulation economy. The market economy may not maximize utility, but it leads to greater utility than does government regulation. I take this argument from Mark Pennington's *Robust Political Economy* (2011). Thus according to Pennington:

> The case for the market economy is based on the notion that entrepreneurs do not have perfect information and that divergent interpretations of the economic environment need to be tested for learning to occur. There are no guarantees that this process will produce most 'efficient' results, but market failure theorists who advocate state intervention to counteract 'lock-ins' do not provide any reasons to suppose that interventions, which are themselves monopolistic, will 'correct' the mistakes concerned.(33)

and

> The robust political economy case for classical liberalism contends that people are not fully rational but that market processes facilitate learning and a higher level of rationality than a regime of political controls. Whether evolutionary forces tend towards more efficient outcomes depends on the institutional context in which they operate. The first and most crucial point to note that distinguishes 'democratic markets' from 'classical liberal markets' is that the former involve higher levels of coercion. When individual voters cannot, save for leaving the country, 'exit' from principal-agent relationships with politicians they are effectively forced into a series of collective action problems and they may become trapped in inefficient structures.(45)

This debate is far from resolved, but it would not be appropriate to pursue it further here.

When we come to the question of property, a key difference between Locke and Hume is that the first derives his theory on the hypothesis of plenty, whilst the second does so on the fact of scarcity. Of course, Locke does not suggest that finished products were plentiful in the beginning. It is the raw materials that were. It is not obvious that Hume would dissent from this thought. Locke's approach is bound to be historical in nature – a point correctly identified by Nozick - and this points to worries that will be discussed shortly. But Hume's might enter at a number of points along the scarcity scale – in fact, he suggests that it applies in all except conditions of absolute plenty and near-total or total shortage. But I have suggested, in Chapter 3, that a quasi-Lockean approach can escape the apparent constraint of the most literal reading of the 'enough and as good' proviso, except in rather unlikely circumstances, thereby making it seemingly more appropriate to conditions of scarcity than is often imagined. So these differences are not obviously contradictory.

For Hume, the key to the convention of property is to provide utility. It is not so important that it can be seen as just from the standpoint of a neutral or unbiased observer. Property rights provide utility – since without them instability occurs and goods are not produced. Property rights thus help preserve the peace – and, for Hume, that is a key element in their justification. In contrast to Locke, the theory is thus non-ideal. It is not derived from first principles – it is a set of conventions that allow us to live in peace with one another. (The fact that dispossessed minorities might not find the property regime desirable is not, in itself, a cause for objection. However, the fact that they might cause instability, if such desires are strong enough, might be. Locke seems to pay little attention to such matters – for him the thought that possession follows from the demands of justice and from development of unowned land is the key thought.)

We may, at first glance, see Hume's approach as perhaps better suited to a settled system where people have property and the issue is to regulate it, whilst Locke's is more suited to a frontier society, where people are establishing property and a

principle is needed to say whether acquisitions should be accepted as just. This point is at the heart of my argument. Also, where the location of a piece of property is known, but is so far undeveloped, it would appear that a convention might also be apposite, in addition to a 'labour mixing' approach. This brings to mind the example in Chapter 2 of the shipwrecked mariners heading for an island, where an initial convention would set the ground rules and future prosperity would then depend on effort and ingenuity, or perhaps just good fortune.[237] As stated previously, there is no need for a modern day version of the Oklahoma land rush, to establish initial property holdings. So, to some extent, the two approaches seem apposite for different kinds of situations and this is why a complex model involving the two may be appropriate.[238]

We might also note this thought from Lomasky (1987, 123): "Basic rights take concrete form as they are instantiated in moral and legal rights. The basic liberty right to acquire and use property is made concrete through the social recognition of conventions that define which actions constitute appropriation and transfer of property". This seems to suggest that conventions will be necessary to flesh out a moral theory, from someone approaching the project from a starting point that is favourable towards Locke.

These remarks should not be taken however to suggest that Locke's approach – and indeed the assumptions of this essay – are somehow contrary to the 'keeping the peace' project. The reverse is indeed true: the thought that one should not employ compulsion against others is at the heart of the Lockean liberal approach.[239] If 'non-coercion' is generally accepted, the peace will be maintained. It is not, however, difficult to imagine situations in which Lockean justice requires a certain pattern of property rights, but a significant section of the populace believes this pattern to be unjust. A number of reasons might explain this, including a failure to understand the moral rights of first developers and their subsequent rights to transfer. There may

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[237] Or indeed, whatever parameters they agreed upon.

[238] I have assumed that there are no native inhabitants in these examples. If there are, the situation will be quite different, since there may already be established property rights in place.

[239] Although we may well be concerned with the individual right to punish in Locke. Further discussion of this is beyond the scope of this essay.

also be more general worries that Lockean principles have not been followed when arriving at current property distributions. In addition, we often tend to be victims of normalcy bias, whereby the present is seen as the norm, rather than questioning whether the present arrangements follow from a just historical chain. This suggests that proper enforcement of such rights may well need to be evolutionary rather than revolutionary and will require the general assent of the populace. But such thoughts are of a pragmatic nature: they do not undermine the theory.

As mentioned previously, the Humean account of property is not burdened with worries about there being enough (or 'as good') being left for others. Indeed, it is precisely because of scarcity that the institution of property is appropriate.[240] This must surely be seen as an advantage. We can understand how the institution of property fits with the idea of an underlying utility by reference to the tragedy of the commons, as previously discussed, and this gives us an additional reason for approving of it. In fact, Harold Demetz (1967) gives an interesting account of how the idea of property rights develop as scarcity develops. This account is anthropological, and so is not strictly in tune with Hume's approach, which derives from self-interest and sentiment, but, as stated earlier, the two are far from incompatible. Demetz describes how a system of property rights developed among tribe members in the North of the United States and Canada – principally the Iroquois and Algonquins – whilst no such system was developed by South Western tribes such as the Navajo and Hopi. Initially, we can imagine that both tribal groups were in a situation of relative plenty, where land rights were not necessary in essentially hunter-gatherer communities, even though their climatic conditions and hence, living conditions, would have been quite different. Then along came the white colonists. The Northern tribes now found that they were in possession of a tradable resource, namely animal skins. This meant the land assumed a scarcity value. Since each hectare would only be capable of supporting a certain number of beaver if left undeveloped in the commons and in a steady state, the increased demand led to a depletion of resources. As a result, the land was sub-divided into private plots among

[240] This is also, of course, why objects command a price.

families or groups of families, who could then manage it in a sustainable way, and indeed had an incentive to do just that.

This story might be read as undermining the theory advanced in the first part of this essay, by suggesting that utility is the key to property rights, but I do not believe that to be the case. The fact that persons seek to establish property rights when such rights become useful does not undermine the thought that one gains a moral right to an unused resource by utilizing it. Just that we do not start to become protective of what we have morally gained until some degree of scarcity enters the picture. One can imagine that property rights justly invest in the tribe where land has been used communally or in the person where it has been developed individually – and which applies needs to be determined empirically. (The determination does not require that the tribesmen initially have any conception of the idea of ownership – though clearly it will need explanation if it is to be adopted as an institution.[241])What is seemingly undermined is the Lockean thesis of rights only applying when there is 'enough and as good' for others, rather than the modified Lockean thesis presented here.

Hume suggests that the main reason for establishing rules of property is to maintain the peace (2000, 3.2.3.2). The rules must be stable – otherwise the peace would not be maintained. He imagines a starting point in 'savage society'. Persons would "seek each other's company, and make an offer of mutual protection and assistance" (2000, 3.2.3.3). We should note here the similarity to Nozick's account[242] of how persons set up protective associations, which subsequently develop into governmental monopolies in particular geographic areas. Hume's account might also be taken to be akin to Nozick's in this respect and such associations be seen as proto-governmental – and established via convention rather than via contract. We should also note that, superficially at any rate, the reason Hume gives for needing a system of property rights – namely, keeping the peace – is very different from Locke's, where the key thought is that one invests one labour in unowned property, thus making it one's own.

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[241] Harris (Chap. 2) describes various imaginary societies that function without any concept of property. This is quite conceivable, but does not suggest that something akin to ownership is not thereby implied in such arrangements.

[242] *ASU*, Chapter 4

However, this does not suggest that the two are incompatible – in fact, I suggest they are, at least in some respects, closely related. It is quite reasonable to suppose that one might reach an understanding with others to keep the peace, while still believing that one's investment had made the land one's own in the first place. In the case of the Native American Indians mentioned earlier, I suggested that rights do not need to be recognized or enforced to make them valid. Similarly, a farmer might allow ramblers on his land – providing they did no harm – without it being the case that this somehow showed that he had no rights in the land. Indeed, it may very well be that, at least under some circumstances, people are automatically able to access the land of others, if they do no harm, because the quasi-Lockean case suggests that it is the theft of something that the property right condemns.

Hume suggests that the most natural way of assigning property rights is to assign them to those currently utilizing the property in question – "each to enjoy what he is at present master of…" (2000, 3.2.3.4). We are inclined to this solution because of custom and habit – we develop affection for that with which we are associated. Because all are similarly inclined, this provides the basis for an uncontentious convention and thus preserves the peace. We will need to investigate further the position of the dispossessed in this scheme of things, since this seems not to be considered by Hume.

But first, let me look more closely at what Hume has to say on this method of assigning property rights in the (later) Second Enquiry:

> Where a man bestows labour and industry upon any object, which before belonged to no body; as in cutting down and shaping a tree, in cultivating a field, &c, the alterations, which he produces, causes a relation between him and the object, and naturally engages us to annex it to him by the new relation of property. This cause here concurs with public utility, which consists in the encouragement given to industry and labour. (1998, App. 3, 174, fn 65)

Let us consider carefully what this may imply. We have understood that, for Hume, property rights ultimately depend on conventions. But here we learn two important things about his viewpoint. Firstly, his labour on an unowned object establishes a relationship between the labourer and the object. This may seem to be trivially true,

since clearly some sort of relationship has been established ('the man who first worked on this object'). But our sentiments then naturally cause us to consider it as establishing a property right in it ("annex it to him"). Since, for Hume, the sentiments are the origin of our moral values, this seems to suggest that we see the first developer as morally the owner of the object worked upon. Quite possibly, our raw sentiments are enhanced because we, in terms similar to that developed in Chapter 2, see that it belonged to nobody to begin with and because to deprive him of the object would be to deprive him of the labour that went into it. So, thus far, Locke and Hume seem congruent in terms of outcomes. We can note that Hume has nothing equivalent to Locke's 'enough and as good' proviso. We have, however, already seen in Chapter 3 that this proviso seems only to be applicable in rather recherché circumstances under a quasi-Lockean approach, and Hume's treatment is such that he doesn't dwell on such matters. There seems only a final piece of the story in terms of how, for Hume, conventions then arise that embed the moral practice. Locke does not discuss this aspect; but it is far from obvious that such conventions would be in any way problematic for the Lockean. Locke gives us the ethical story: he does not go on to discuss their means of adoption. So it does not seem that any worries necessarily develop, as to whether the two approaches might live together. Hume says that the sense that when he speaks of conventions, his meaning is not of promises, which would lead to circularity. Instead, each of us realizes that we share the same interests (2000 3.2.2.10). This is the sense of mutual advantage that leads us to abide by conventions that support such advantage. Moral sentiments arise from sympathy and our sense of benevolence for others. This is not the source of morals for Locke, but this does not to matter much for our purposes here, because both their paths seem to lead in a similar direction, insofar as property rights are concerned. In Chapter 1, I suggested that a number of approaches were consistent with self-sovereignty. In saying this, I do not suggest that their approaches necessarily converge – in a number of areas they may conflict, and this needs to borne in mind at all times. I also note, again, that Hume is not necessarily to be interpreted in utilitarian terms – it is not to be assumed that his approach takes us beyond mutual advantage, so there is no necessary conflict between overall utility and individual property rights.

Hume suggests that the ultimate cause of our approbation is public utility. This is, of course, the basis of Hume's view as to why we approve of things in general. Here, we may imagine, lies more of a difficulty. It is not as though the Lockean story is incompatible with utility. Indeed in Chapter 2 (f), I have argued that utility and a Lockean-based theory are usually compatible. Clearly, we can see some situations when they are not. But this is not a line pursued by Hume, who states clearly:

> All the laws of nature, which regulate property, as well as all civil laws, are general, and regard alone some essential circumstances of the case, without taking into consideration the characters, situations and connexions of the person concerned, or any particular consequences which may result from the determination of these laws in any particular case which offers (1998, Appx 3, 171).

He goes on to illustrate this with the thought that the laws might, quite justifiably deprive a beneficent man of all his possessions, if these are acquired by mistake and return them to the selfish miser, who, nonetheless is in possession of the proper title. For "public utility requires that property should be regulated by general inflexible rules" (1998, 171). In other words, true utility requires a sort of 'rule' utility, rather than an 'act' utility.[243] Thus, we have reason to think that Locke's and Hume's approaches are again reconcilable when it comes to property, since, although the origins are different, they end in the same place. It is true that the Humean approach does not necessarily result in the same strength of property rights as would seem to result from the Lockean approach, since it does not follow a historical chain – however, we might claim that, given the way human nature operates, there will be conflicts and failures to have concern for others, unless fairly strong property rights are in place. That, at any rate, is the Humean case employed here.

From these thoughts, we may then think the following. Hume's approach is that morals themselves arise from our sentimental attachments, including a sentimental attachment to utility. But a set of very general rules must apply if utility is ultimately to be realized. He also acknowledges the importance we accord to life and liberty. This seems also to be based on utility considerations. In either event, we may see that

[243] I do not suggest that Hume was a Benthamite utilitarian: he was not. His approach is more akin to that of Pareto optimization.

the sentiment of a natural right to life and liberty may also give rise to a natural right that property rights be invested in the first developer. Although Hume does not acknowledge this, it may nonetheless seem to follow. But if all rights flow from an approbation of utility, there is no particular reason to think that strong property rights would also not similarly flow. Thus, even though their basic groundings may be different, a similar story on property rights might be seen to flow from both authors, with some just modifications of each. I shall now discuss how further arguments made by Hume, may help solve some of the worries uncovered in the Lockean approach.

Having established how the idea of justice in property might have arisen, Hume then gives us a set of rules as to how we tend to assign particular pieces of property to particular persons or groups of persons. Hume is quite clear that the basis of assignation is not to be act utility pure and simple; for such would lead to endless dispute (2000, 3.2.3.2). He suggests four natural rules and one artificial one. The four natural rules are possession, prescription, accession and succession and the artificial one is consent.[244] I will comment on each. First however, it is worth noting that, in the Appendix on Justice in his second Enquiry, Hume does not stress these four tests, and, with hindsight, we may find these rather jejune. Instead he indicates that property regimes are similar throughout the world and argues that this is an indication of similar attitudes, due to a common human nature. Despite this, I consider one of the tests to be important in terms of considerations of justice in property in many modern day societies.

It is worth noting that it indeed obvious that the approaches of Locke and Hume to property are quite different. As discussed in Chapters 2 and 3, I have defended a Lockean (or quasi-Lockean approach). I do not suggest that a Humean approach supersedes a Lockean one: only that it may provide a solution to areas where the Lockean approach is silent or where its implications cannot be determined. My stated case is that the intuitive moral force of the quasi-Lockean argument based on self-determination is greater than the force of the Humean case for property rights.

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[244] In fact, there is a fifth, not mentioned explicitly as a test by Hume, but mentioned as a natural tendency, nonetheless. This is the affinity between the labourer and his labour, mentioned above.

I will discuss the tests briefly and go on to develop that of prescription in greater depth.

Possession means, *inter alia*, that property title naturally inheres in the first owner. We may see here a similarity with the idea of just ownership residing in being the first person to mix one's labour with unowned resource. The derivation is however quite different. For Locke, the ownership was natural, arising from a right in our own person. We have a moral right to the object of which we are the first developers. For Hume, since justice is artificial and property based on justice, it is a human contrivance. In the first instance, possession is *de facto*. But persons then realize that the best way of securing property is to form a rule that persons be confirmed in their existing possession. We may think, in Humean terms, that a habit of the mind is formed that sees first users as having rights of possession. It does seem to be much of a stretch to think that such habits owe, at least in part, to a sentiment that might be characterized as moral. We should note an important similarity with Nozick's approach here. As I said earlier, Nozick is usually said to base his arguments on self-ownership, in a way similar to Locke. However, the use of the term is essentially absent in *ASU*. In fact, Nozick might be seen as arguing that government arises from occupiers seeking to maintain their occupation. They do this, in the first instance, by forming protection associations. He then argues – I am not suggesting he is correct in this – that such associations morph into the minimal state. His argument may then seem to rest on a similar foundation to that of Hume. We naturally accept that occupiers have a right to occupy, absent conflicting earlier claims. Such arguments thus take us to a state that protects property rights, but does not go beyond that.

Hume recognizes that the extent of first ownership may be vague. Thus on arriving on a small uninhabited island, one may become possessor of all of it, but with an island the size of Britain, only that part which one "immediately" possesses (2000, 3.2.3.8). I shall return to both of these points in due course.

I shall not comment much on accession. This simply encompasses the suggestion that, if the garden is ours and the seeds were justly acquired, then the fruits are ours as

well. This seems entirely consistent with the thoughts developed earlier relating to what it is to have a property right in something.

Succession and consent can usefully be grouped together, even if one is considered natural and the other artificial.[245] In either case, we should see either as being in tune with the thought that the property owner has liberty to use his property as he sees fit. This can also be seen as echoing Nozick's second rule of justice in holdings.(ASU, 151) Succession may be by implied consent of the earlier owner or, where this is for some reason obscure (such as the lack of a testament) the natural expectation of all parties. (On this latter point, it is worth noting that when someone dies intestate, we may only *presume* that he would have favoured transmission of his property to his immediate successors. There is nothing in the institution of private property per se, that suggests that this presumption must hold or that other means of title transfer are not consistent with the liberal rights approach.)

Prescription (or usucaption) is necessary, argues Hume (2000, 3.2.3.9), because details of first ownership may become lost over a period of time. When this occurs, Hume suggests that ownership naturally inheres in the *current* possessor, in the case of "long possession". This is not to suggest that current possession automatically guarantees just possession. Where the land can be shown to have been taken from an earlier owner by force, then justice may well require restitution. Prescription is perhaps appropriate when things have become cloudy. This may naturally occur with the passage of time, even if we acknowledge that an unjust disposition has earlier taken place, because the rightful successors may no longer be apparent. As an example, we may think it unjust that the Israelites were driven from their ancestral homes early in the first millennium, without thinking it appropriate for their modern successors to return to claim title two thousand years later, thereby dispossessing people who had been peaceably utilizing it in the meantime.[246] The natural idea of

[245] It is not obvious that there is such a distinction or that, if there is, it is of any particular importance in this case.

[246] We might also think that, fifty years further on, the intermediate titles had also become obscure - interestingly, Hume mentions a period of fifty years in the *Treatise*. I shall not seek to resolve this thorny issue here.

prescription may also seem to be supported by the thought that land that had once been in someone's possession, but since become unused, might also become the rightful property of a new user. This is because after a period of non-use one's natural right in the land no longer applies, since any previous 'mixing' of labour has decayed away, as suggested in Chapter 2. This may seem akin to the use of discounted cash flow in capital analysis. In such analyses, estimated earnings from future years are discounted back to the present at a risk-adjusted interest rate, meaning that far out earnings contribute less and less to the present value. In this case, the situation is reversed, so that past events contribute less and less to present value, the further in the past they are and eventually become insignificant. Thus we might imagine a situation of this nature. A man buys a piece of land in 1813. We can trace a set of unforced title transfers between then and today. The trail goes cold before that time. Almost certainly, at some point, forced title transfers took place. Perhaps these were at the time of the Norman Conquest or the dissolution of the monasteries. It matters not. The point is that, between 1813 and 2013, the value of the land comprises, almost entirely, its development and value enhancement over that period. Nor is there anyone, with an emotional attachment, in a position to make a claim. Thus, although there is no historical chain to the first developer, the chain that is known comprises nearly all of the value. We are therefore justified in the approximation that something that very nearly amounts to such a chain is in place. This is the justification for using prescription as a proxy for such a chain. Inevitably, a degree of arbitrariness enters the justification at this point. Space does not permit me to enter further into a discussion of how such arbitrary reference points might be set, but this does not detract from the basic principle. Suffice it so say, we will need to rely on conventions to take the matter forward.

It may be objected, at this point, that little of the Lockean idea of labour mixing has been preserved. Let me say a bit more about this. There were two important thoughts in the quasi-Lockean approach. One was that the resource worked on was either unowned or had been transferred voluntarily, or via voluntary exchange, between past and present owners. The other was that the labourer owned his labour. In this prescription-based approach, the transfers were voluntary in the past, insofar as the past is determinate and the labour of the current owner and those in the determinate

past, who transferred in an appropriate way, are preserved for the current owner. Therefore, it may be argued, the Lockean concept is preserved in a realistic way, without the becoming sabotaged by events of which we know little or nothing and which make little or no contribution to current investment and value. Where we know much or something, the something allows the existing ownership to be questioned via the legal process, in a manner deemed reasonable under the normal legal conventions of a society based on liberal values.

Mill stresses the importance of prescription in any account of property rights when he states:

> …it is necessary to the security of rightful possessors, that they should not be molested by charges of wrongful acquisition, when by the lapse of time witnesses must have perished or been lost sight of, and the real character of the transactions cannot be cleared up. Possession which has not been legally questioned within a moderate number of years, ought to be, as by the laws of all nations it is, a complete title (1994, 27)

Here we are confronted by the thought that utility considerations play a part if the natural rights story is unclear and confirm the Humean thought that conventions arise when something is in the general interest. This addresses what is probably the thorniest issue for the Lockean account, since in most cases we will be unable to establish a chain of voluntary title transfers from the first user.

Prescription was the basis of Roman law on property title and the distinction between *res mancipi* and *res nec mancipi*. Under the latter, title could be established via unchallenged occupation over a number of years. This idea can be used to resolve other aspects of the Lockean account which contain elements of vagueness. Thus I argued that a man's liberal rights become extended over previously-unowned property that he labours on, because to allow otherwise would be to forcibly remove his labour from him. But I also suggested Chapter 2 that a failure to continue working on the same piece of property could lead to the property right decaying, because, after a while, no further elements of his labour will remain and it effectively becomes unowned again. But the precise time at which ownership ceases cannot be determined

by the application of such principles. Instead we need to consider that a conventional approach will be required.

The importance of prescription becomes apparent when we consider that nearly all property holdings in mature societies, such as European ones, descend from a historical chain has involved usurpation at least once, and likely, many times (Lomasky, 1987, 145). This may be less true in more recent frontier societies, but even there, it is likely that current titles often cannot be defended on the basis of the application of strict Lockean-type principles to earlier acquisition, coupled with a series of purely voluntary transfers. This may be most regrettable, but such is the nature of the world we are obliged to inhabit! Some, including Nozick, have taken this to mean that perhaps some sort of Rawlsian-type redistribution in favour of the least well off is justified, though he dismisses this as "implausible" (1974, 231). As Lomasky says, this is based on a mistaken premise, namely:

> …..that concern for rights is made manifest through the obliteration of all fruits of rights violations…… No radical upheaval in existing property rights now can make up for rights violations that occurred centuries ago. Just the opposite is the case: a confiscation of property preparatory to bringing about the Brave New World would sin against the rights of contemporary individuals to be secure in the possession of the property they are actually using in the ongoing pursuit of their projects….. If all the consequences of rights violations are to be obliterated, then we must volunteer for annihilation! (1987, 145-6)

Quite why a broad-brush approach such as taxation or land distribution, in which the innocent are compelled to contribute to rectification as well as the guilty could count as justice, is unclear. It is likely suggested by those who have quite other aims in mind. But this does not mean that rectification is not, in principle, a legitimate consideration. It more plausibly means that justice requires that only the perpetrators of any coercion be held responsible for making appropriate amends. To suggest otherwise seems to suggest that justice is a positive, rather than a negative, right. This is a complex issue, requiring further argument: simply, however, there doesn't seem any very good reason for supposing this to be so and the onus should be on the proposer of a positive right to argue otherwise.[247] The persons who have most

[247] A suggestion I take from Narveson (2009, 14)

responsibility for rectifying past sins are the transgressors themselves, and those who have directly and knowingly benefited from their transgressions. The further we go back in time, the less likely it will be that such persons could be identified. Otherwise, we need to ensure that the rights established by existing owners are properly respected. Prescription seems to be the proper basis for so-doing. The further back the alleged rights violation took place, the more the current occupier (and earlier occupiers who did transfer title legitimately) has invested in the object and thus the more he is to be considered the rightful owner. This acts in a right-preserving manner. Prescription allows a historical account to justly hold water. There does not appear to be anything in such approach which could not sit satisfactorily with the Lockean approach, since the latter lacks the proper tools to handle such issues. In cases where the Lockean approach *can* handle the issues, it seems it should have *prima facie* precedence.

One reason for this confusion over redistribution can be laid at the door of Nozick himself, who frequently refers to property as 'holdings', as though it somehow represents something fixed and immutable, and thus easily transferred as was. This is surely not the case. Let us suppose that some property was illegitimately transferred to an innocent third party several hundred years ago. In the meantime, this same third party and his legitimate (through gift or sale) successors have, let us suppose, transformed the property in question and significantly enhanced its value. To require its surrender would represent an injustice to the current owner. In many cases, the historical record will be obscure, in which case no legitimate prior ownership is relevant. In some cases, perhaps a proper ownership could be identified some time in the past. No doubt the sale of the island of Manhattan for sixty guilders had some elements of fraud or coercion about it, but to suggest that ownership of a piece of land now worth many billions of dollars is still rightfully inheres in the Lenape Indians, as is, is surely absurd. For to do so would be to disinherit many innocent persons of their hard work and creativity. The return of the land in its status *ante* is neither possible, nor it would it necessarily even be desired by the descendants of the original inhabitants and it is not obvious where any baseline should be drawn.[248] Nor, by its

[248] The return in its current state would no doubt however, be considered eminently desirable.

very nature, would it be totally possible to know the counterfactual status of the land at present, had the fraud/coercion not taken place, making discussions about appropriate baselines likely to be highly complex. Individuals may have been wronged and in most situations, only the wrong-doers are the ones who should most obviously be called to rectify. As Nozick suggests "These issues are very complex and best left to a full treatment of the principle of rectification" (1974, 231). But we must beware of the shadow of litigation leading to disbenefits, if the claims are not recent and the compensation not likely to be significant.

But we need to develop these thoughts a bit further, for it seems we may, in reality face three types of situations. Transgressions in just title transfer took place in the past, but the nature of these transgressions and the proper heirs of the true owners are lost to history. Meanwhile, a number of legitimate transfers have taken place more recently. These will constitute the vast majority of cases. In such situations, it seems appropriate that the current owners are considered to have proper title, without qualification. A second situation occurs where the just owner and the perpetrator of the usurped title are both alive. In this situation, the most obvious response is that the title must be returned to the earlier owner, with the 'current' owner forfeiting the title, due to malfeasance. The third set is murkier. In these cases, we can see how the improper usurpation took place, but the original owner is no longer alive. Subjective attachments to the object are thus no longer much in play, except perhaps at some remove. However, it might seem that some form of compensation is, in principle, payable. But there are a number of problems. One is that it is often difficult to say where the baseline should be drawn. If it is the island of Manhattan as it was then, the compensation might be *de minimis*. If it is what the island of Manhattan might have become, it is potentially large, but also largely unknowable.[249] Furthermore, there have been a number of entirely innocent occupiers in the meantime, who we might think should not be subject to compensatory payments and whose current investment needs respecting. The further back the trail goes, it might seem the smaller should be the compensation.

[249] However, we may also note, as seems appropriate, that the descendants of previous Jewish owners of artwork confiscated by the Nazis, do generally gain its return. This seems appropriate, since there is little question of improvements having been made to a piece of art.

This may well, however, be thought to be too quick. It seems to conform to the Humean idea of what persons occupying land would agree to their mutual advantage. But the Humean approach is being used in this essay to supplement the Lockean approach. Would Locke be this blasé about the rights of earlier inhabitants? The case of Manhattan will serve as an example. I have stated that the original inhabitants – let us assume here that the sale was not purely voluntary – are no longer alive and it is difficult to establish in terms of individuals, who the successors to those disinherited hundreds of years ago, really are. It is also difficult to establish the counterfactual situation had they not been deprived and, indeed, whether the counterfactual situation where past interactions were purely voluntary, is better or worse on a particular metric versus the present situation. So the Humean solution seems like an easy one. But we should not dismiss the possibility of the suitability of a form of compensation if the successors can be identified as a group.

Daniel Butt (2007) has looked at this issue in terms of European colonialism. He states:

> The idea of compensation is at the heart of many contemporary reparation claims. Suppose we believe that some communities have benefitted, and others have suffered, as a result of historic wrongdoing: does it not follow that those who have been unjustly enriched at the expense of others should pay compensation to the victims? This approach is, on the face of it,well equipped to deal with the complexities of the past, since it need not maintain that anyone presently alive was responsible. The point is simply that those who have benefited through, for example, being born into a wealthy country should be prepared to consider the price that was paid by others for their present day advantage, and be willing to give up at least some of this advantage if others are still suffering as a result.

This is a solution that seems to focus on reparation for past harm and is therefore to be taken into account before a default to a Humean *status quo* situation is accepted. One possibility might be to allow existing occupiers to retain added value, while compensating earlier occupiers for assessed original value, though the issue is bound to be fraught with difficulty. It is obviously beyond the scope of this essay to take this matter much further. The thought that compensation might be due is certainly, in principle, within the theme of what was said earlier about compensation.

This is therefore an open issue in many respects requiring further development. What is almost certain, however, is that there will be no cause to drive the wedge in further with grand designs with some entirely different end in mind. Faced with the general problem, it seems entirely reasonable to think that conventions will develop to dispel the uncertainty, since such uncertainly is not in the general interest and that the justice of compensation will be accepted when the case for it is established. This may well take the form, *inter alia*, of a statute of limitations. As an aside, it should be noted that this is also part of Kant's approach (Ripstein, 2009, 332). The fact that a defined scheme of prescription grants security and thus benefits utility counts in its favour: just as does the thought that it approximates to a Lockean approach when the transfer chain is cloudy and the cloud is significantly time-displaced from the present.

Generally, we must assume that a property regime, of some form,[250] needs to be in place for a modern society to operate. Persons would be unable to make forward plans or live their lives to the full, investments wouldn't take place and people would not be incentivized to work. Although the chain back to first investment may be cloudy, we can see that a reliance on prescription is justified within the terms of the 'first labour to ownership' model, since, as we move back further into history, any earlier unjust transfers steadily lose their purchase on current property claims, because the values foregone are small in terms of current valuations. The result preserves the rights of first users and subsequent investors, without harming those of non-investors, and seems appropriate excepting those cases where a suitable claim for unjust divestment can be established. It seems therefore that a conventional form of prescription can largely go hand in hand with a Lockean approach to first acquisition. This is the key thought of this chapter, for it means that, in modern societies, we are not obliged to abandon the natural ethics behind the Lockean approach. We can accept that a neo-Lockean approach still has purchase on questions of property in objects of the external world.

[250] There may be more than one suitable form.

It may be said that, in melding the prescription idea with the Lockean initial acquisition plus a historical chain, the initial acquisition event no longer plays a part (which is true) and so the whole Lockean story is compromised. But, if we can show that the historical chain is in tune with proper acquisition and sale and purchase insofar as the recent past is concerned and that earlier events count for little in terms of current values, and anyway involve unknowables, then my contention is that the basic Lockean idea is preserved and that the prescription approach is essentially justified. The argument from discounting the far past in terms present value helps to demonstrate why this should be the case.

In this section, I have argued two things. Firstly, the Humean and Lockean approaches are often compatible, in terms of outcomes, when applied to property rights. In addition, when they are not, they are sometimes orthogonal: this means that one can address a problem that another fails to address, without compromising the second. This allows for a richer approach and allows for a greater ability to resolve open issues. I shall now turn to issues in which the two approaches seem to provide contradictory answers.

d) Where the rights-based and conventional accounts seem to clash

To date, my thesis has been that we can use two different dimensions of property rights, one a quasi-Humean approach, the other a quasi-Lockean one. This seems beneficial when they both seem somewhat aligned or when one complements the other, without contradicting it. But what is to be done when they do seem to be at odds with one another. My first thought is that the Lockean approach must take precedence. This is because we should generally expect rights to trump utility. We do not expect that someone should forcibly be put to work, just because it results in a net utility gain. We may individually evaluate things according to a measure of utility but, as Nozick suggests, this is not something we are entitled to do across persons, since this would be a failure to properly respect persons. This thought is indeed of the essence of this essay. And since I have argued that property rights arise out of rights in the person, we should generally expect this to apply in the case of property as well. Thus the position is one of rights having lexical priority over utility. (We might even

suggest that such a position would be chosen from behind a veil of ignorance. Indeed, this would be advantageous compared with the Rawlsian Original Position, since it would allow already gained property rights to be unavailable for redistribution.)

But the rights have to be properly grounded. I have suggested that, in the case of rights in land in particular, the conventional element is very often to the fore, since the historical account is often mired in obscurity. This may allow certain situations where, particularly if land has been acquired via a conventional process, certain conventional elements may gain a purchase. This needs to be carefully unpacked. One might go a number of ways with this. One could suggest that considerations of utility (or even equality) outweigh the Lockean story. I am very wary of this because I believe rights in the person are most important. But I accept that those who disagree might take the argument in a different direction. In this section, I shall argue two things. Firstly, by reference to eminent domain, I will suggest that utility considerations are not as obviously problematic as is often thought. This prompts the thought that utility objections do not generally undermine the rights approach, in the manner that it is often suggested that they do. And secondly, I shall look at the exceptional case, where we might expect utility to nevertheless override.

Eminent domain is the right of government agencies to dispossess property owners, due to some perceived benefit at a societal level. The general thought is that the benefits to be derived by society as a result of acquiring a property can sometimes be significantly higher than those derived by the property owner, if kept in its existing use and that this is enough to suggest that property rights may be overridden. The archetypal case is something like building a road or railway: one recalcitrant landowner might (theoretically) ruin the economics of the whole project by holding out.[251] This can seem to be the case particularly since there may be rewards for being the last one to sell, because the purchaser's utility from finalizing the deal is likely to

[251] These powers have become corrupted of late, particularly in the United States. (See, for example, Kelo v. New London, Ct, 545 US 469 under which the Supreme Court (of the United States, not that of the state of Connecticut) upheld the state's use of eminent domain to condemn private homes in favour of a private development, deemed to bring greater economic benefits – a development, incidentally, that was never finally instantiated, despite the homes being condemned!

be significantly in excess of the compensation that might be demanded, despite such compensation exceeding 'market' levels. Thus we apparently have a situation where one stubborn landowner, unmoved by societal benefits, is able to 'hold the public to ransom'. Our sentiments are usually in opposition to such holding out, particularly when the hold-out manages to obtain compensation far in excess of market values.

Needless to say, matters are often not so simple. Eminent domain rules that we can approve of will generally respect the displaced landowner's property by paying compensation at market rates. For a commercial enterprise, say a factory, it is not difficult to imagine a satisfactory resolution if the state agency provides a new factory (or the funds to build one) in a similar location, plus some compensation for general disruption, plus an *ex-gratia* reward. This is because a business' primary activity is not hindered and probably somewhat enhanced if some such compensation scheme is in place.

The situation may be more complex in the case of individual property owners. Perhaps the person concerned has invested time and energy in this particular plot and has developed a sentimental attachment to it. Compensation at market rates[252] is insufficient to repay the pain of parting. Values can be apparently subjective and there is no reason to think otherwise. But determining such subjective values is enormously complex. Furthermore, for every Ella Garth, for whom our sympathies are quite properly justly invoked when she is obliged to vacate her family property for the sake of a piece of government folly,[253] overseen by a president without much regard for individual rights, there is a property speculator, who has only just

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[252] There is anyway something of a problem in assessing market rates in such situations. Generally, the market becomes blighted once the state's plans are announced. This drives prices downwards, as the prospect of the property being condemned becomes ever more apparent. To avoid this problem, some sort of artificial or shadow market price is applied. But this then becomes the subject to a drawn out debate as to whether these are a true reflection of the value of the property. Furthermore, the state naturally wishes to pay as little as possible. I shall assume for our purposes that some sort of solution is possible – maybe via over-compensation.

[253] Otherwise known as the Tennessee Valley Authority. For further explanation see: http://www.youtube.com/watch?v=4mUepS6mhL4

purchased the asset at a knock-down price, so as to make a killing on the compensation.

As a digression outside of the level of theory I am discussing here, I should say this. These are not matters which need to greatly concern us in a society where compulsory purchase has been enshrined in law for a period of time. Under such circumstances, properties will no doubt have changed hands a number of times and the purchasers will have bought on the assumption that the legislation is in place and thus their enjoyment of the property is subject to dispossession under certain circumstances. Thus they can be justifiably estopped from claiming that a compulsory purchase is contrary to their rights as landowners, (although this does not suggest that they are not owed suitable compensation).[254] Perhaps, if a road has been forecast, the purchaser has already obtained the asset for less than the market price in surrounding, but unaffected, areas.[255] The speculator problem, mentioned in the previous paragraph, can be quite justly handled. The real problem can be said to exist for those who owned to-be-condemned assets prior to the enactment of the legislation. Just as in the case of prescription, we can imagine that any such losses will fade over time and after a while become a matter of only academic interest. This is not to suggest however, that the problem is non-existent. It is real insofar as we should question whether such legislation is just, in the first instance, if it will lead to the dispossession of persons whose basic rights, as established earlier in this essay, are to be infringed. Thus the question of whether utility may sometimes supersede just property rights. It is worth noting that the issue of eminent domain is different to the other issues, such as boundary ones, which were discussed earlier. In those cases, the conventional approach merely supplemented the natural rights one, and therefore caused no problem for it. In this case however, the worry is that we may be inclined to think that it should overrule it. We thus appear to be on the horns of a dilemma. If we affirm the sovereignty of individual rights, it might appear that gross dis-utility at societal level will be the outcome. If we deny them, it seems the theory discussed in

[254] I suppose lack of the latter might also become established – but if this were the case, presumably property ownership would fail to continue, thereby denying society its benefits.

[255] Just as there is no particular reason to feel sympathy for residents around Heathrow Airport, who have purchased houses at prices that reflect the noise levels in the vicinity.

this essay will no longer apply. We might seem to skirt this problem by invocation of Nozick's "gross moral catastrophe" defence for relaxing side constraints. I shall discuss this shortly, but it would hardly seem that a road or railway is going to demonstrate such an appeal.

I suggest instead that we must usually bite the bullet in these cases. Natural rights do nearly always have supremacy over utility with regard to property ownership. I will now investigate whether the implications of this are quite as malign as we are sometimes led to believe.

Firstly, it is worth noting that eminent domain rights are quite variable over different societies. They were quite weak in the USA until more recent times. In the case of Japan they are still weak. Compulsory purchase of land was used to build Tokyo's Narita Airport, but the experience was so fraught that when a new airport was required in Osaka, it was built on reclaimed land out to sea. Property rights are very keenly felt in Japan, making expropriation extremely unpopular. New highways, for instance, have been built around the property of those who did not wish to sell. But Japan has nonetheless developed into a mature economy, with high standards of living. This may incline us to think that compulsory purchase is less important in terms of ensuring construction projects are carried out efficiently, and public utility thereby preserved, than we might be inclined to think.

When land is required for such projects, instead of simply condemning properties that stand in their way, a persuasive approach is adopted and compensation is at a level, such that owners are more willing to sell.[256] Feelings that the state is attempting to purchase at too low a price are thus not part of the picture. And it does not seem unreasonable that owners should receive a highish (if not over-high) price if that is what is needed to induce them to sell. This properly respects their agency. In addition to this, freely negotiated arrangements are more likely to be Pareto optimal than coercive ones, because persons trade objects they value less for objects they value more, and only the parties involved know their subjective values. When both

[256] As opposed to typical low-ball "sell or else" offers, prevalent in eminent domain countries.

parties are in this position, an increase in utility occurs. There is no such guarantee when coerced transactions take place. But this rule is not infallibly true. In particular, Pareto optimal transactions may not take place when transactions costs are high. If transactions costs are high for individual owners, but low for judges or planning boards, it may be that an economically more efficient solution can be arrived at by use of compulsory purchase powers. We should justly protest however that, when it comes to a person's property, we should not always be driven by issues of economic efficiency. However, holdout problems may be perceived as a particular difficulty, because they may result in high purchase prices if transactions are to be voluntary[257] and also because each owner may attempt to be the last holdout – and thereby gain the most compensation – thus causing a deal to fall through, even though it may be favoured by all the potential participants. "Land that would have been more valuable to the right-of-way company than to its present users remains(s) in its existing, less valuable, uses and this is inefficient"(Posner, 1977, 40-41).

Frequently, the holdout problem is exacerbated by the way the construction takes place. The paradigm case of building a road or railway is said to be problematic, because the company or organization starts construction before all the necessary parcels of land are secured. Clearly this represents an easy victory for speculators and holdouts, who see that the builder will have huge negative opportunity costs if a key plot cannot later be secured. But there are many alternatives to this. Constructors can purchase the entire requirement in advance. Indeed, they can and should, examine more than one route and can solicit bids on the basis that the one(s) that prove most expensive will be abandoned. This makes it far more likely that owners will put in quotes in tune with opportunity costs. Furthermore, particularly in the case of roads, landowners see benefits in having a road alongside. This incentivizes them to sell part of their property, in order to capitalize on these benefits for the non-acquired portion. Indeed, private developers often donate parts of their land to the state so that roads can be built connecting their developments to public highways (Benson, 2005, 170). In addition, the process of obtaining land via compulsory purchase is of such a nature that politicians are incentivized to low-ball the compensation offers. One or

[257] An effective monopoly is created.

two votes may be lost, but the general mass of taxpayers gain, not to mention those who use the political process to their own private ends, rather than the more ethical approach of obtaining the resources they need via voluntary means. Thus can the system properly be denoted as "dictatorship of the majority". Even if true market values were paid for condemnation, it is doubtful any account could be taken of subjective values. These issues are analysed in far greater detail in Benson's paper and I cannot go further here, for space reasons. Benson's conclusion, from a survey of the evidence, is that "because the private sector can overcome the holdout problem more effectively than the government can, private provision of roads is likely to be accomplished relatively efficiently with no eminent domain powers whatsoever".(2005, 190)

Needless to say, neither Benson nor I, could prove that the voluntary approach will *always* be superior to the compulsory one – and the compulsory one will no doubt continue to appeal to the political class and their clients, for obvious reasons. But when we couple the potential economic benefits of the voluntary route, with the fact that the latter also preserves natural rights, I believe we have good reason to suppose that confiscations are neither necessary in efficiency terms, nor can they be sanctioned in rights terms. The thesis of property rights inhering in developers, or their voluntary successors, thus escapes unscathed.

But what of more serious cases? Perhaps we imagine a situation where surrender of the property will save countless lives but the owner stands on his rights and refuses to give way in terms of control rights. This is similar to the case of the terrorist, who has planted a bomb, and will only reveal its location and thus prevent mass loss of life, if he is tortured. But respect for his rights apparently means that he must not be tortured. Presumably in this situation, we are at least tempted to consider disregarding his rights. This does not however mean that we abandon the idea of civil liberties and suggest that utility must always trump. No, we continue to think that, in cases such as this, which Nozick calls cases of gross moral catastrophe, we reluctantly abandon the civil liberties priority, so as to prevent something worse. But civil liberties remain supreme in practically all cases. I think we should see such cases of property rights in a similar light. Very rarely they will be transgressed. This is akin

to the situation of the right to transgress property rights proposed by Mack's sufficientarian approach and discussed in Chapter 1.

Furthermore, as indicated earlier, once an eminent domain convention is in operation, the problem will tend to die away. This is because subsequent purchases and sales will have taken place under the convention. The problem only pertains where value has been lost as a result of the arising of the convention. This is where issues of compensation may apply in the event of value loss.

Perhaps the outline of a formula for handling such issues might be drawn up, but I am far from certain that this could be comprehensive. Maybe the best we can hope for is a developed judicial system to consider such matters.[258] But such exceptional cases do not condemn the general rule. Otherwise, I suspect, we would be left with no general rules at all. And that would be a truly sorry state of affairs. And furthermore, it does nothing to negate Benson's point that Pareto optimality may anyway be better preserved in the absence of eminent domain powers.

e) Conclusion to this chapter.

I have claimed in this chapter that natural rights and convention can together enrich a theory of property rights and that neither is complete on its own. A natural rights approach is incomplete because it is incapable of establishing the precise bounds of property rights and because it is diminished, to an extent, when the historical record is obscure. Conventions alone are insufficient because they need to be anchored by a respect for natural rights. In this case there is an analogy with something like the right to free speech. We may accept that there will need to be conventions relating to how this can be practiced, but this does not suggest that it would be appropriate for such conventions to negate or overturn pre-existing natural rights.[259] But, via a combination, we are able to construct an approach to rights in property which seems robust in all but the most extreme cases. In the latter set, we need to judiciously

[258] One hesitates to leave such matters in the hands of politicians seeking re-election.

[259] We accept too, that freedom of speech brings utility, in terms of holding the government to account and other such things, but isn't the real point that we are entitled to speak our minds?

measure the extent that natural rights are considered to be properly grounded and the utility that may be gained by compromising them. My sense is the natural rights argument will win in many more cases than is often considered to be the case: I accept that others may take a different view on this matter.

CONCLUSION

Chapter 5.

I set out in this essay to demonstrate that, despite our approaches to property in today's world being essentially conventional, there is a strong case for saying that a quasi-Lockean argument from rights in the person to rights in objects in the external world, is a powerful one and we are not entitled to overlook its demands. My case followed from an assumption of individual rights, in particular to a right to one's own labour, to a right to annex parts of the external world, previously unowned, through labouring on them. The rationale behind the argument is that no-one has a claim to previously unworked land and that to remove a right of ownership from the 'first' labourer involuntarily, would be to steal his labour from him.

I suggested that there might be worries about this approach if land or raw materials are considered 'scarce'. This echoes Locke's point about there being 'enough and as good' left for others. I argued that generally nearly everything is scarce to an extent and this is insufficient, of itself, to negate property rights via labouring, as argued for earlier. Through the use of examples, I suggested that there may be rather rare circumstances under which we might be justified in claiming that property rights should not be enforced. These circumstances are broadly akin to Nozick's invocation of 'moral catastrophe'. I accepted that mine (and Nozick's) might be one among a number of such approaches to the scarcity issue.

I also argued that there are a number of reasons why the Lockean argument may be insufficient to establish the full or precise extent of rights in the external world. In particular, I argued that these apply to boundary issues and to circumstances where the historical chain of just initial acquisition, followed by voluntary transfers, cannot be properly established. The thought is that we may need to supplement the Lockean account with conventional elements.

I then went on to examine the Humean account of property rights. I acknowledged that this sprung from a very different place from the Lockean one – in particular, a

need to keep the peace. I argued, however, that the results were not entirely dissimilar. One reason for this is that attempts to forcibly remove property rights from the first labourer are peace-destructive and property rights preserve security, thus promoting utility. I relied, in particular, on Hume's thoughts on prescription and suggested that we could use this to, largely, – though not entirely – dismiss some of the concerns relating to full knowledge of the historical chain. My conclusion is that we might usefully knit the two approaches together to form a hybrid theory of property rights, which avoids the pitfalls of the two taken in isolation. I accept that much further work needs to be done before this could be considered complete and I certainly have not said the final word on the subject.

It may be argued that the progression of this essay has been somewhat unfair to the conventional position, in that I have started from Locke and have used a Humean conventional approach only at a secondary stage. If the progression had been the other way round, perhaps a different end point would have been reached. I acknowledge the force in this point, but do not believe the outcome would necessarily have been different. But perhaps more importantly, I believe that we should acknowledge strong individual rights and what may flow from them, for ethical reasons. And I believe that if rights in the person can, via certain actions, be extended into the external world, then any conventions that might be established independently of such rights must usually – though not necessarily always - give way to these rights insofar as they clash. If, in opposition to the claims I have supported here, such rights claims in the external world are not deemed convincing then a conventional case in support of private property would certainly be one way in which the institution might nonetheless be supported. Certainly Hume's approach is in sync with the thought that utility is gained *vis a vis* the unprivatized commons by use of the institution. But we might require a stronger basis for utility to play its part than I have discussed here and it would seem that this might involve a greater degree of empirical support than my complex theory needs to provide.

I think it is important that property rights can precede the state, can be brought into it, and that property can be gained within it, without state approval. For this allows persons to live their lives freely and without having to endlessly seek the approval of

others for how they live. We can argue for a three-pronged virtuous circle. Respect for freedom of the individual to live his own life demands the recognition of property in the external world. The existence of a regime of property rights fosters a respect for the rule of law more generally. And the rule of law, which defines the guidelines under which we may act, itself respects individual liberty, since it removes the capricious activity of others, including governments, from our lives.

I am conscious that my account may be perceived as failing to properly acknowledge the fact that many current liberal accounts of property ownership proceed from a so-called 'liberal egalitarian' standpoint. The work of John Rawls in *A Theory of Justice* may be seen as an exemplar of this approach. I have not discussed this approach directly. At this point, I will say only one thing. Rawls' approach depends upon existing property being up for redistribution under the conditions of the Original Position. Such redistribution takes place via the institutions of society thought to be justly established from this position. My one point is this: if just property rights can be established in a state of nature via the actions I have evaluated in this essay, then the thought that they are available for redistribution must be subject to question. I believe this should be taken into account when we consider the liberal egalitarian proposition. We may, of course, consider that some sort of equality of resource or outcome should play a part in any consideration of appropriate property rights – that is mainly beyond the scope of this essay. I do however seriously question the justice of any account that fails to take account of rights apparently acquired via the processes I have described here.

I commenced with an intuition from Simmons, which I believe I have grounded in personal-rights arguments. I conclude with a quote from Richard Pipes:

> The right to property in and of itself does not guarantee civil rights and liberties. But historically speaking it has been the single most effective device for ensuring both, because it creates an autonomous sphere in which, by mutual consent, neither the state nor society can encroach: by drawing a line between the public and the private, it makes the owner co-sovereign, as it were. Hence it is arguably more important than the right to vote. The weakening of property rights by such devices as wealth distribution for the purposes of social welfare and interference with contractual rights for the sake of "civil rights" undermines liberty in the most advanced democracies even as the peacetime

accumulation of wealth and the observance of democratic procedures conveys the impression that all is well.(1999, 281)

ACKNOWLEDGEMENTS

I would like to thank my two tutors, Professor Tom Pink and Dr Sarah Fine for the very valuable help they have given me in this essay.

BIBLIOGRAPHY

ARNESON, Richard "Lockean Self-Ownership: Towards a Demolition " from *Political Studies (1991) XXXIX*

BARRY, Brian *A Treatise on Social Justice, Volume 1* Harvester-Wheatsheaf, London (1989)

BECKER, L *Property Rights: philosophic foundations* Routledge, London (1980)

BENSON, Bruce L, "Holdout as a justification for Eminent Domain and Public Provision of Roads" *The Independent Review* (Fall 2005)

BRENKERT, George G. "Self-ownership, Freedom and Autonomy" *Journal of Ethics* 2: (1998)

BUCHANAN, James "Natural and Artifactual Man" *What should economists do* Liberty Fund, inc, Indianapolis (1979)

BUTT, Daniel "On benefitting from Injustice" Canadian Journal of Philosophy (2007) downloaded from http://users.ox.ac.uk/~wadh1010/ 29/05/2015

COHEN, G.A *Self-Ownership, Freedom and Equality* CUP, Cambridge (1995)

COHEN, G.A *If You're an Egalitarian, How Come You're So Rich?* Harvard University Press, Cambridge, Ma. – paperback edition (2001)

COLBURN, Ben *Autonomy and Liberalism* Routledge, Abingdon (2010)

DAY, Patrick "Self Ownership" *The Locke Newsletter* (1989)

DEMETZ, Harold "Toward a Theory of Property Rights" American Economic Review 57 #2, (1967)

DWORKIN, Ronald "Rights as Trumps" from *Theories of Rights* ed. Jeremy Waldron OUP, Oxford (1984)

FARRELLY, Colin *An Introduction to Contemporary Political Theory* Sage, London (2004)

FEINBERG, Joel "The Nature and Value of Rights" Journal of Value Inquiry 4" (1970)

FEINBERG, Joel "*Voluntary Euthanasia and the Inalienable Right to Life", Philosophy and Public Affairs 7*, (1978)

FESER, Edward "There is No Such Thing as Unjust Initial Acquisition" in Paul et al., *Natural Rights Liberalism from Locke to Nozick* CUP, Cambridge (2005)

FRANK, R.H. *Microeconomics and Behaviour* 3rd edition, McGraw-Hill, New York (1997)

FRIEDMAN, Mark D., *Nozick's Libertarian Project* Continuum, London (2011)

GAUS, Gerald F. and LOMASKY, Loren E., "Are Property Rights problematic?" *The Monist* 73 #4 (Oct 1990)

GAUTHIER, David *Morals by Agreement* OUP, Oxford (1986)

GORDON, David *Resurrecting Marx* Transaction Books, London (1990)

GROTIUS, Hugo (1625) *The Rights of War and Peace* Editors, Tuck, R and Barbeyrac, J Liberty Fund, Indianapolis, (2005)

HARRIS, JW *Property and Justice* OUP, Oxford (1996)

HAYEK, Friedrich A "Origins of the Rule of Law" downloaded from lamar.colostate.edu 1 (Oct 10, 2011)

HOHFELD, Wesley *Fundamental Legal Conceptions* Yale Univ. Press, New Haven (1964)

HONORÉ, A.M. "Ownership" in *Oxford essays in Jurisprudence* A. G. Guest (Ed.) Clarendon Press, Oxford, (1961)

HUME, David (1772) *An Enquiry concerning the Principles of Morals* (aka the "Second Enquiry") Edited and Introduced by Tom L. Beauchamp OUP, Oxford (1998)

HUME, David (1737/40) A Treatise of Human Nature Edited by David Fate Norton and Mary J. Norton OUP, Oxford (2000)

KANT, Immanuel (1797) *The Metaphysical Elements of Justice* tr. J. Ladd, Macmillan, New York (1965)

KANT, Immanuel (1797) *The Metaphysics of Morals* Edited by Mary Gregor CUP, Cambridge (1996)

KIRZNER, Israel (1978) "Entrepreneurship, Entitlement and Economic Justice" *Eastern Economic Journal* 4 (1978) reprinted in *Left Libertarianism and its Critics* Eds. Vallentyne, P and Steiner, H. Palgrave, Basingstoke (UK) (2000)

KUKATHAS, Chandran (2003) *The Liberal Archipelago* OUP, Oxford (2003)

LARA, Denis "Kant and Hume on Morality", *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2012/entries/kant-hume-morality/>. (Downloaded July 30, 2013)

LESTER, J.C. *Escape from Leviathan* MacMillan, London (2000)

LOCKE, John *The Second Treatise of Government and a Letter concerning Toleration* Dover Publications, Mineola, NY (2002)

LOMASKY, Loren "Libertarianism at Twin Harvard" *Social and Political Philosophy 2005*

LOMASKY, Loren E. *Rights, Persons and the Moral Community* OUP, New York (1987)

LOMASKY, Loren E. "Personal Projects as the Foundation for Basic Rights" Social Philosophy and Policy 1, (1984)

MACK, Eric "Self-Ownership and the Right of Property" *Monist* Vol.73 (1990)

MACK, Eric "Personal Integrity, Practical Recognition and Rights" *Monist* Vol 76 (1993)

MACK, Eric "The Self-Ownership Proviso: A New and Improved Lockean Proviso" *Social Philosophy and Policy*, *Vol 12, I* (1995)

MACK, Eric "Non-absolute Rights and Libertarian taxation" *Social Philosophy and Policy, Vol.23 II* (2006)

MACPHERSON, C.B. *The Political Theory of Possessive Individualism* OUP, Oxford (1962)

McCLEOD, Owen "Desert", *The Stanford Encyclopedia of Philosophy* (Winter 2013 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2013/entries/desert/ (Downloaded 15/04/15)

MILL, John Stuart, (1848) *Principles of Political Economy* Oxford World Classics, Oxford (1994)

MILL, John Stuart, (1859) *On Liberty*, Penguin, London (1974)

MILL, John Stuart (1863) "Utilitarianism" from *John Stuart Mill On Liberty and other essays* ed. John Gray Oxford World Classics, OUP, Oxford (1991)

MILL, John Stuart (1859) *On Liberty* Chap 3 as downloaded from http://www.utilitarianism.com/ol/three.html (18/03/2010)

MILLER, Geoffrey P. "Economic efficiency and the Lockean Proviso" *Harvard Journal of Law and Public Policy* (1987)

MUNZER, Stephen R. "The Acquisition of Property Rights" *Notre Dame Law Review* (1991)

MURPHY, Liam & NAGEL, Thomas *The Myth of Ownership* OUP, Oxford (2002)

NAGEL, Thomas "Libertarianism Without Foundations" from *Reading Nozick: Essays on Anarchy State and Utopia* Ed. Paul, Jeffrey Rowman and Littlefield Publishers, Totowa, NJ (1981)

NAGEL, Thomas "The Problem of Global Justice" from *Secular Philosophy and the Religious Temperament: Essays 2002-2008* OUP, New York (2010)

NARVESON, J. "Property Rights: Original Acquisition and Lockean Provisos" *Public Affairs Quarterly* Vol. 13 # 3 (July 1999)

NARVESON, J. "Libertarianism vs. Marxism: Reflections on G. A. Cohen's *Self-Ownership, Freedom and Equality*" *Journal of Ethics* 2: (1998)

NARVESON, J. *Respecting Persons in Theory and Practice* Rowman and Littlefield, Lanham, Md. (2002)

NARVESON, J. "Present Payments, Past Wrongs: Correcting Loose Talk about Nozick and Rectification" *Libertarian Papers* Vol. 1 (2009)

NICKELL, J. "Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights", *Human Rights Quarterly* 30: (2008)

NOZICK, Robert *Anarchy, State and Utopia* Basic Books, New York (1974)

NOZICK, Robert "On the Randian Argument" from Reading Nozick Ed. Jeffrey Paul (Blackwell, Oxford 1982)

NOZICK, Robert *Invariances* (Harvard Univ. Press, Cambridge, Ma (2001)

OKIN, Susan Moller *Justice, Gender and the Family* (Basic Books, New York, 1991)

O'NEILL, Onora "Kant and the Social Contract Tradition" in François Duchesneau, Guy Lafrance and Claude Piché, eds. *Kant Actuell: Hommage à Pierre Laberge* Ballarmin, Montréal (2000)

OTSUKA, Michael *Libertarianism without Inequality* Clarendon press, Oxford (2003)

PALMER, Tom G "G. A. Cohen on self-ownership, property, and equality" *Critical Review: A Journal of Politics and Society,* 12:3, (1998)

PENNINGTON, Mark *Robust Political Economy* Edward Elgar, Cheltenham (2011)

PINK, Thomas "Promising and Obligation" *Philosophical Perspectives* 23, (2009)

PIPES, Richard *Property and Freedom* Alfred A Knopf, New York, (1999)

POSNER, RA *Economic Analysis of Law* 2d edition Little Brown & Co, Boston, Ma (1977)

QUINN, Warren *Morality and Action* CUP, Cambridge (1993)

RAWLS, John *A Theory of Justice* OUP, Oxford (1971-Revised 1999)

RESCORLA, Michael, "Convention", *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), Edward N. Zalta (ed.), forthcoming URL = http://plato.stanford.edu/archives/sum2015/entries/convention/ (downloaded 12/06/2015)

RIPSTEIN, Arthur *Force and Freedom* Harvard Univ. Press, London (2009)

ROGERS, Tristan "Self-ownership, World-ownership and Initial Acquisition" *Libertarian Papers* Vol 2, Art # 36 (2010)

ROUSSEAU, J-J (1755) "Discourse on the Origin of Inequality" in Basic *Political Writings*, Hackett, Indianapolis, In. (1987)

RYAN, Alan *Property and Political Theory* Blackwell, Oxford (1986)

SADOWSKY, Fr. James (SJ) "Private Property and Collective Ownership" *The Libertarian Alternative* Ed. Machan, T. Nelson Hall, Chicago (1974)

SANDERS, John T. "Justice and the Initial Acquisition of Property" *Harvard Journal of Law and Public Policy* (1987)

SCANLON, Thomas "Rights, Liberty and Property" from *Reading Nozick* (Rowman and Littlefield , Totoma, NJ (1981)

SCHMIDTZ, David "The Institution of Property" from *Property Rights* Eds. Ellen Frankel Paul, Fred D. Miller, Jr. and Jeffrey Paul CUP, Cambridge (1994)

SCHMIDTZ, David "When is Original Appropriation *Required*?" *The Monist* 73 #4 (Oct 1990)

SCHMIDTZ, David *Elements of Justice* CUP, New York (2006)

SHUE, Henry *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* Princeton University Press, Princeton (1996).

SIMMONDS, Nigel *Law as a Moral Idea* OUP, Oxford (2007)

SIMMONS, A. John "Original-Acquisition Justifications of Private Property" from *Property Rights* Eds. Ellen Frankel Paul, Fred D. Miller, Jr. and Jeffrey Paul CUP, Cambridge, (1994)

SIMMONS, A. John *The Lockean Theory of Rights* Princeton University Press, Oxford (1992)

SIMMONS, A. John *Moral Principles and Political Obligations* Princeton Univ. Press, Princeton, (1979)

SIMMONS, A. John "Makers' Rights" *Journal of Ethics* 2 (1998)

SLOTE, Michael, "Justice as a Virtue", *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2014/entries/justice-virtue/>. Downloaded 02/04/2015

SREENIVASAN, Gopal *The Limits of Lockean Property Rights* OUP, Oxford (1995)

STANFORD ENCYLOPEDIA OF PHILOSOPHY (No author noted) "Medieval Philosophy" from the site: http://plato.stanford.edu/entries/ockham/#8.1 (2009) (Downloaded Dec 6, 2009)

STEINER, Hillel "Self-ownership and Conscription" from *The Egalitarian Conscience: Essays in honour of G A Cohen* ed. Christine Sypnowich OUP, Oxford (2006)

STIGLITZ, Joseph *Whither Socialism* MIT press, Cambridge, Ma (1994)

TULLY, J. *A Discourse on Property: John Locke and his adversaries* CUP, Cambridge (1980)

VALLENTYNE, Peter "Left "Left-Libertarianism" from *The Oxford Handbook to Political Philosophy* ed. David Estlund, OUP, Oxford (2012)

VALLENTYNE, Peter and VAN DER VOSSEN, Bas, "Libertarianism", *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2014/entries/libertarianism/>. (Downloaded 07 04 2015)

WALDRON, Jeremy *The Right to Private Property* Clarendon Paperbacks, Oxford. (1988)

WENAR, Leif "Rights" Stanford Encyclopedia of Philosophy (2005/amended 2011) (downloaded 01/04/2015)

WENAR, Leif "Original Acquisition of Private Property" *Mind* Vol. 107 (Oct 1998)

WENAR, Leif "The Nature of Rights" *Philosophy and Public affairs* 33 #3 (2005)