JUSTICE AND THE INITIAL ACQUISITION OF PROPERTY

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Any political theory, any economic theory, any ethical theory—perhaps any theory whatsoever that deals with human behavior, whether individual or social—is likely to have something to say about property. Theories may be more or less explicit on this score, and it is, of course, quite possible for theories to ignore the issue of property for certain analytic purposes. Even such theories, though, while they may successfully avoid making particular assumptions or pronouncements about property, are likely to have strong implications for our understanding of it.

The things that may be said about property fall into two broad categories, which may or may not be distinct: descriptive issues and normative issues. There are accounts of how property does, has, or could enter human affairs; and there are justificatory accounts, which tend rather to emphasize ways things should be. Distinct or not, the categories seem certainly to be at least relevant to one another, and *both* are important to a full understanding of property. This paper emphasizes justificatory issues, although descriptive matters will not be excluded altogether. The major question here will involve the justice of property claims.

Now, such matters are frequently discussed in terms of rights. People have, we are told, certain "property rights." It may be that they have them as individuals, or as members of a social group. These rights may be rich and far-reaching, or relatively spare. I do not dispute this idea; the notion of rights, in general, and of property rights in particular, is an extremely

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valuable one. This is because, at the least, the concept of "rights" provides a useful shorthand in discussing rather complex issues, a shorthand that emphasizes significant normative features of the relation between persons and their environments. Nevertheless, it is not always clear where rights theory may be applied. Furthermore, particular variations of rights theory seem to be inherently vulnerable to attack, often by way of *other* variations. The debates that ensue usually involve methodological and terminological issues about the deployment of "rights" jargon, rather than substantive ethical issues.

In any case, a discussion of property *rights* might involve numerous side issues that need not arise if one is hoping to focus on the justice of property claims. For that reason, this Article will largely avoid discussion of rights per se, and will deal instead with what appears to be the more substantive issue of justice.[1] If some readers feel that what follows has implications regarding rights, I would agree with them; nevertheless, although this Article deals with arguments about the justice of property claims that have been formulated in terms of property *rights*, it is not explicitly about such rights.[2]

There is a great deal that might be said about justice in property claims. The strategy that I shall employ focuses attention upon the initial acquisition of property—the most sensitive and most interesting area of property theory. Every theory that discusses property claims favorably assumes that there is some justification for transforming previously unowned resources into property. It is often this assumption that has seemed, to one extent or another, to be vulnerable to attack by critics of particular justifications of property. Nevertheless, this assumption is frequently left undefended by property theorists, and

1. In speaking of "justice," I do not mean to appeal to any particular theory of justice. For philosophical and stylistic reasons, I have tried to avoid the use of jargon that refers implicitly to one or another philosophical tradition, although this is rather difficult after 2500 years of western philosophy. I hope, therefore, that the reader will try to draw implications about my own philosophical commitments only from the arguments that are presented here.

2. One can avoid talking of rights for purposes like the present ones only temporarily. Reference to rights is an incredibly *convenient* mode of speech. Nevertheless, my strategy reflects not only an effort to avoid controversial jargon, but also my suspicion that rights are generally derivative from deeper considerations of justice. To make rights fundamental may be to reverse the proper justificatory order. Surely, though, we will find "rights" jargon useful when we go beyond the scope of this Article, to define precisely what one has done when one has acquired property. For now this issue is best left vague.

where it *is* defended, the defense is often remarkably weak. That some initial claim to property be defensible is required by any theory that holds that certain present distributions may be justified, that certain transfers of property are justified, or that restitution ought to be made for previous injustice in transfer or acquisition. The initial acquisition of property, and its justification, is crucial to the remainder of property theory.

Finally, another strategic note is in order. I shall begin the discussion with an examination of the property theory to be found in John Locke's *Two Treatises of Government*. In this I follow most other writers on the subject, including both those who find Locke's views appealing and those who find them appalling. Whatever else they may be worth, Locke's discussions of property provide a nice organizational base upon which to begin further work.

I. The Lockean Theory of Property

Locke's property theory rests on two rather different lines of argument, which converge in his conclusions about individual rights to acquire and keep property. The convergence, of course, is crucial. The convergence forms a complex argument that yields the conclusions in question, conclusions that neither argument alone could support. For Locke, the same complex argument that yields the rights also yields constraints upon what one may acquire and keep, and this turns out to be especially important. For purposes of exposition, however, I want to focus attention on the two component lines of argument, and I shall label them the *theological* and the *practical*.

The theological argument proceeds as follows: God created mankind. That God did this is clear evidence that it is God's will that mankind should exist. If mankind is to continue to exist, however, certain conditions must be met. In creating nature, God has created the means through which mankind can fulfill the divine will as it has been made manifest. Nature is God's gift to mankind, given as a means of preserving and furthering the well-being of humanity. God created mankind in a certain way, however, and this fact generates what I call the practical argument.

If mankind is to benefit from God's gift of nature, it can do so only if individuals can so benefit. If mankind is to prosper, the gift must be accessible to individual human use. This is

where private property comes in: It is a practical scheme, one that accords with God's will, for human utilization of nature. God did not create some people to be rulers or leaders of others, but rather, God charged each individual with the right and the responsibility to further his own well-being, thus taking charge of his share of the burden of fulfilling the divine will. That God's will involves preservation of mankind *in general* is echoed in Locke's conclusion that each person has a right and a duty to protect society against threats even when the threats are not a direct personal danger. But this takes us away from the practical argument for private property.

God has given each person his own body, and has therefore given each person a just claim to the labor of that body. In a way, this gift is best understood as a trust. God's will—the preservation of mankind—informs this gift (one's body) as well as the gift of nature. If one takes what is one's own (one's personal gift)—one's labor—and if one exercises it upon or mixes it with God's general gift to mankind—nature—one does only what God wills. One uses God's gifts in pursuit of God's end, by way of the only practical means of doing so. Mankind cannot prosper unless individuals do, and individuals can prosper only if they can have direct access to the God-given means of survival. Their labor gives them this access, and mixing labor with natural resources generates a just claim to the product. It is a *just* claim because it is in accord with God's will to preserve mankind. Here are Locke's words on the labor theory as such:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, hath by this *Labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to . . . ."[3]

The theological argument refers to God's will and intent. It

3. J. Locke, Two Treatises of Government 328-29 (P. Laslett rev. ed. 1963) (3d ed. 1698).

provides the normative character of the whole defense of private property. The practical argument calls attention to the human problem regarding how to go about fulfilling God's will. The upshot of the whole thing is that people have a right—even a duty—to preserve themselves through use of the means that God has put at their disposal. They have a right and a duty to acquire property, so long as they do it in a certain way: by mixing their labor with unowned natural resources. This way is the right way because it correctly uses God's gifts in pursuit of God's goals.

Now, Locke's property theory is not always sketched in such heavily theological terms.[4] Yet portraying the theory in this way is the neatest way of including another crucial strand of the theory. That strand is most dramatically, and most generally, captured in the following passages from the *First Treatise*:

> God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denied him, when his pressing Wants call for it. And therefore no Man could ever have a just Power over the Life of another, by Right of property in Land or Possessions; since 'twould always be a Sin in any Man of Estate, to let his Brother perish for want of affording him Relief out of his Plenty.[5]

> [A] Man can no more justly make use of another's necessity, to force him to become his Vassal, by with-holding that Relief, God requires him to afford to the wants of his Brother, than he that has more strength can seize upon a weaker, master him to his Obedience, and with a Dagger at his Throat offer him Death or Slavery.[6]

In these passages, Locke openly refers to a "Right to Surplusage." The implication is clear: The needs of others place important restrictions on the right to private property,[7] and

4. Some doubts might be raised about how serious Locke was in lacing his theory with so much theology. This question, while perhaps of considerable historical, political, or psychological interest, is not of crucial philosophical importance for present purposes. Regardless of whether Locke was serious in couching his theory in theological terms, I wish to assess his defense of private property, and this defense is clearly theological in form. I hope that readers who have no use for theology will bear with me for a page or two before deciding that this Article is insufficiently interesting. I shall try to pacify them below.

5. J. Locke, *supra* note 3, at 205-06.

6. *Id.* at 206.

7. The so-called "Lockean Proviso," to be discussed in a moment and criticized in

these restrictions are imposed by the same act of God that established that right. Indeed the "Right to Surplusage," and the right to acquire and use private property, seem to have precisely the same justification: God gave people the bounties of nature in order to promote human well-being. In order to be used, these bounties must be allotted to individuals somehow, and because God has not manifestly appointed anyone to rule, it is here that the doctrine on property acquisition comes in, labor theory and all. It is a just way of acquiring property, so long as one does not lose sight of the whole purpose of private property: human welfare. Where private property comes into conflict with human welfare, private property loses. This is the force of Locke's remarks about the "Right to Surplusage."

It is in the light of this overall theme that one can best understand the Lockean qualification on property acquisition that has recently come to be dubbed the "Lockean Proviso." The Proviso is to be found in the *Second Treatise*: "*Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, *at least where there is enough, and as good left in common for others*."[8]

This qualification, restricting just initial acquisition of property to situations in which there is "enough and as good left in common for others," will be discussed at some length in the next section. For now, it is important merely to observe that the Proviso seems to be a special application of the more gen-

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the next section, is often cited as evidence, for better or for worse, of Locke's concern that private property not be used to limit the opportunities of others. Such citation is appropriate, but over-emphasis of the Lockean Proviso in this regard has been misleading. Where the Proviso limits only initial acquisition, the passages cited here show that Locke was committed to a far more fundamental restriction on the right to private property: The need of others places limitations on the right to dispose of property *already owned*. The "Right to Surplusage" places important restrictions on the right to private property *wherever* it may be called upon to justify behavior. For one of the rare recent discussions of Locke that takes these matters sufficiently into consideration, see Sartorius, *Persons and Property*, in UTILITY AND RIGHTS 196 (R. Frey ed. 1984). Professor Sartorius undertakes to show that a full understanding of Locke reveals that welfare institutions are justifiable on Lockean grounds. Surely Professor Sartorius is right about this. The question of whether the "Right to Surplusage" really *does* emerge intact when one abandons Locke's labor theory of value (as Professor Sartorius urges), and when one looks closely at the question of justice in initial acquisition, will be discussed below. This, of course, is a matter of *evaluating* Locke's arguments, rather than merely describing or explaining them, and Professor Sartorius, like me, appears to come to the conclusion that the "Right to Surplusage," to the extent that it emerges at all, may be weaker in what it enjoins than might appear at first glance. Professor Sartorius acknowledges, for example, that the "right to charity" is one that cannot permissibly be enforced by the state. *See id.* at 209.

8. J. LOCKE, *supra* note 3, at 239 (emphasis added).

eral principle announced in the *First Treatise*. Because there is a restriction on the whole notion of private property, one that involves the need of others, this restriction must be taken into consideration in the initial acquisition of property. For Locke, once again, this is true because "unowned" resources are really the gift of God, for the benefit of *all* mankind. To take more than your share is unfair, and a frustration of God's will. If there is anyone who is substantially more impoverished than you, then there is prima facie evidence that the gift has not been divided properly. God's object was the well-being of mankind, and something has gone wrong if all of mankind is not well-off. If *part* of mankind is doing well while others suffer, then those who are doing poorly are the victims of injustice. This injustice must, according to Locke, be corrected. If injustice would be the consequence of an act of mixing labor with natural resources, it must be avoided.

This, then, is the Lockean theory of property. In what follows, I shall discuss only *some* of the substantive issues raised by the theory. As mentioned above, Locke's theory is introduced here for organizational reasons: The theory is rather simple and straight-forward, yet it organizes a variety of crucial considerations into a relatively consistent doctrine. Furthermore, it is this theory, more than any other, that has provided inspiration both to Locke's followers and to his critics in their own consideration of the substantive issues.

Nevertheless, I should like to make a few broad substantive remarks about Locke's argument before I proceed to a closer analysis. Contemporary readers may find some features of Locke's argument rather quaint, and this may lead them to think that his views are not as worthy of attention as are, perhaps, the more or less similar views of contemporary Lockeans. I do not agree with this notion. While I, too, am somewhat uncomfortable about what I take to be a dubious appeal to theology in the argument, I do not think that this appeal is so central as to undermine seriously the value of Lockean property theory. Furthermore, there are significant virtues of Locke's argument that are frequently not captured by contemporary versions.

First, it seems plain that rejection of Locke's theology does not rob his property theory of contemporary philosophical significance. The theology enters the theory in two ways: It pro-

vides the theory with normative force and it provides a metaphysical explanation of how people, and the rest of the world, came to be the way they are. But as long as human beings and the world in which they live have the characteristics that Locke thought they had, it does not much matter, for the property theory that follows from those characteristics, how they got that way. In other words, if the preservation and well-being of humanity are goals worth pursuing, and if injunctions to protect, promote, and preserve humanity do actually have normative force, it does not much matter—for purposes of property theory—how they got that force. One can deny Locke's theology, yet as long as one has no objection to the thesis that mankind ought to be preserved (whether for some deeper reason or for none), Locke's practical argument may still yield the Lockean conclusions. Similarly, one can deny the creation story implicit in Locke's theory. But if one does not object to Locke's description of what people are like, Locke's conclusions may, here too, still be acceptable. The theology is an attempt to provide normative force and metaphysical dimension to the property theory, and as valuable as such efforts are, one can very easily react skeptically to this attempt while affirming the value of the practical argument. I, at any rate, assume agnosticism on the part of the reader regarding Locke's theology, while accepting the normative force of the idea of human preservation[9] and some of what Locke says about human nature. In particular, I accept the idea that if mankind is to be preserved, it must be through the preservation of individuals. I also accept the idea that the preservation of individuals requires some use of natural resources.

Second, it is a particularly interesting feature of Locke's argument that both the claimed right to property acquisition and the announced restrictions on property rights stem from the same source. Indeed, it was partly as a way of emphasizing this fact that it seemed fruitful to go into such detail about Locke's theology. For Locke, it was God's will that mankind be preserved that motivated both features of his theory. For us, in what follows, the bare injunction that mankind ought to be pre-

9. Affirming that human preservation is *a* value is not even close, of course, to contending that it is the *only* value or the *source* of all value. Present purposes require only that human preservation be acknowledged as a good thing (albeit an uncomfortably vague good thing).

served will play that role. Although it would be ideal if I could provide some alternative justification for this injunction, once having rejected Locke's, I cannot do so here. For present purposes, I ask the reader's acceptance, for the sake of the argument, of the injunction. I have some reason to expect that most readers will accept it anyway.

Finally, there is a further possible area of discomfort that needs noting. Even if we ignore Locke's theology, isn't his theory committed to the view that resources not yet "owned" by individuals are somehow owned in common? While many authors do hold this view,[10] I do not believe Locke did. If Locke had really thought that resources were communally owned before private acquisition, then he would have been driven to the conclusion that everyone's permission must be asked before an individual's labor was mixed with such resources. Since this conclusion plays no part in his theory, he can not have thought that resources were communally owned in the first place.

This argument, however, should not lead us to reject altogether the idea of an ethical relationship between people and resources that have not yet been claimed. Although it shows that Locke can not have thought that there was a straightforward ownership relationship that existed between "mankind in general" and natural resources, one is nevertheless left with the feeling that there may be ethical claims, *short* of ownership claims, that mankind legitimately has over unowned resources.[11] Such a position is central to the issue of justice in property acquisition, and cannot fairly be ignored. Unfortunately, there is not space in this Article to treat that question as fully as it ought to be treated. What I shall do below is to try to indicate just where and how further work on that question might be fit into the discussion offered here.[12]

10. *See, e.g.*, L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 25 (1977). *See also infra* note 23 and accompanying text.

11. Locke's argument would have us believe that such claims derive a large part of their force from the fact that nature was created for humanity's use. Agnosticism about the theology would here seem to entail agnosticism about that particular relationship between people and nature. Nevertheless, we may not ignore the possibility that some ethical claims about unowned resources may be warranted.

12. A straightforward view that everything is naturally *owned* in common, however, *can* be ignored. If it is offered as part of a theory of just acquisition of property, then it is simply question-begging. In its simplest form, it amounts to the thesis that there are no unowned resources to worry about. Everything belongs to mankind or society or whomever. Apart from the remark that it is hard to see why this should be so (unless

Having made all these preliminary remarks and having set out the Lockean theory of property, qualified in such a way as to pacify contemporary theological skeptics, we may now proceed to particular substantive issues involved with the just initial acquisition of property. The "Lockean Proviso" will be our point of entry.

II. THE LOCKEAN PROVISO

There are several problems involved with the "Lockean Proviso." The expression refers, as mentioned above, to the explicit qualifications that Locke announced regarding the rules for just initial acquisition of property. The Proviso says that labor-mixing (to be discussed in more detail in Section III, below) is appropriate only where there is "enough and as good left for others."[13]

I shall focus attention on what I take to be the two major difficulties with the Proviso. First, I shall argue that there are substantial conceptual problems involved in deciding what one is supposed to do in the contexts covered by the Proviso. The discussion here will look more like a catalogue than an argument, but this serves my wish to be brief regarding this point—it is neither as interesting nor as important as the second point. Second, I contend that the Lockean Proviso, applied as a restriction upon initial acquisition, is, in an important sense, self-defeating. I shall make use of some of the remarks and conclusions from Section I in defending this second point.

A. *The Conceptual Problems*

Imagine that you are a citizen of a Lockean world. There is still unowned land in this world, and you set out to acquire some. You know that this may justly be done if you mix your

God gave mankind title to everything, as in a modified Lockean theology), I have nothing to say, for the moment, in response to such a view. It does, however, render meaningless the question of how people might justly acquire unowned resources. I shall return to this issue below. The common law rule concerning resources not yet propertized—a rule that was well established in Locke's time—appears to have *denied* that such resources were "held in common" by mankind. First ownership, according to that common law rule, went to the first possessor. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 10 (1985).

13. Thomson, *Property Acquisition*, 73 J. OF PHIL. 664 (1976), has suggested that the Proviso might best be construed as a sufficient, rather than a necessary, condition of just initial acquisition. *Id.* at 665. Whatever virtues this suggestion may have for an adequate theory of property, I do not think it reflects the intent of either Locke or his contemporary followers.

labor with the land, perhaps by tilling the soil, provided only that you leave enough and as good in common for others. The question, though, is this: What, precisely, must you leave?

It is appropriate here to note that Locke does specify what he calls the "measure" of property, which he thinks is set by nature; each person may acquire as much as he needs for the "Conveniency of Life."[14] Locke suggests that the invention of money has complicated matters somewhat, but the basic measuring principle is sound. The Lockean Proviso, however, is not sufficiently clarified by these remarks.

It is unclear, for example, just which "others" you are to consider in your decision to appropriate land. Is it just the presently living members of your society? All presently living people? Why one choice rather than another? What about future generations? Perhaps there is no need to consider the unborn in making decisions about what to acquire, but this position requires some defense if justice demands that other people be left "enough" land after you have mixed your labor with some of it. What possible argument could at the same time require that the present generation have scruples about leaving enough for one another, while shrugging off such concern for future generations? This is not necessarily a question of "rights of the unborn." It is a question of what is just, and if it is the preservation of humanity, or of individual persons, that requires that enough be left to one's peers, then it is hard to see why that same argument would not require similar consideration concerning people who have not yet been born.

But if you consider *all* future generations, and if you must leave enough and as good for every future human being, then it is hard to imagine that the Proviso would allow you to mix your labor with much more than an infinitesimal slice of land. If not *all* future generations, then which ones? And why those in particular? How are any of these decisions to be made? Perhaps some decisions might be made on practical grounds of one sort or another, but what could make such decisions just ones?

It might be thought that the Proviso is vague in another way, as well. Perhaps its suggestion that enough and as good must be left *in common* for others would allow you to go ahead and mix your labor, provided that there was still enough and as

14. J. LOCKE, *supra* note 3, at 334.

good for at least one more person to acquire similar land in similar ways. That is an extreme, of course, but one might look for clarification in that direction. The uncertainties continue to plague us, however. Leaving enough and as good for just one more person is quite implausible as a principle of *just* initial acquisition. It is, in general, difficult to see why leaving enough and as good for any particular number of people, or group of people, is more just than any other number (short of leaving enough and as good for *every* person, present and future; that principle, as noted above, seems effectively to rule out the just initial acquisition of property altogether, and thus to defeat the point of the whole theory).

The first conceptual problem, then, involves interpreting the part of the Lockean Proviso that refers to "others." The second conceptual problem involves trying to understand what "enough" means. Locke suggests, as noted above, that the natural "measure" of property that one may acquire involves whatever one needs for the "Conveniency of Life." The conceptual problem is perhaps obvious, but a few words may still be helpful. Is there some natural measure of "conveniency," which would help us to understand what we are talking about? Or will this vary from person to person and, perhaps, from time to time and from place to place? Will the measure of conveniency vary with the contemporary material conditions of production? Assuming that I have discovered the identity of the "others" whose interests I must take into consideration, must I leave each of them at least as much as I have taken for my convenience? Precisely as much? Or must I consider each of their goals, each of their desires, and a separate measure of convenience for each? Can these questions be settled through empirical social science (economics, sociology, psychology)? Are they philosophical questions?

Finally, there is the problem of trying to understand what might be meant by the requirement that "as good" be left in common for others. This problem is related to the "enough" problem in the following way: The earlier puzzle involved the question "Enough for what?" Here we must ask "As good for what?" But the conceptual problems involved with this question may be even more serious than those involved with the other. For while in this case, like the other, we will be faced with a variety of purposes with respect to which land or re-

sources might be considered valuable (and thus be faced with the necessity of considering all of them), there arises here a *special* problem: On certain relatively rich theories of value, there is simply no such thing as resources that are precisely equivalent in value.[15] I refer, of course, to theories that make reference to the marginal value of particular units of any commodity, with definitions of a "unit" typically varying according to the purpose of the analysis. According to such theories of value, it may be literally impossible for us to leave land for others that is precisely as good as the land we have acquired for ourselves. Avoiding this problem requires specification of particular sources of value that become canonical in making acquisition decisions, and it is hard to see how this could be done in any non-arbitrary way, given the diverse sources of value and the diverse tastes that characterize human valuation.[16] Here, of course, as above, one might alternatively argue that the Lockean Proviso effectively bars all initial acquisition of property, but this argument would have as an implication that the Proviso defeats the point of the whole property theory.

Locke, of course, seems to have thought that the availability of virtually infinite land in America rendered most of these questions moot, at least in his own day.[17] Locke was wrong. They were not theoretically moot then, and they are neither theoretically nor practically moot now. Nevertheless, one might argue that in spite of superficial appearances, unclaimed resources *are* infinite in supply. One might refer to broadcast bands on the electromagnetic spectrum, the sea beds, the air itself, flight lanes for aircraft, orbital or other trajectories for spacecraft, the planets themselves, the asteroids, stars—and so on—in defense of such a position. Such an argument, however, falls prey to at least two objections. First, it fails to consider the previously mentioned generational question in at least one of its aspects. Although a doctrine of infinite unclaimed resources, if true, leaves open the possibilty of acquisition for all persons, present and future, it nevertheless fails to address the fact that

15. Although some may regard these theories as flawed by their tendency to ignore or deny the possibility of "intrinsic" good, they are certainly less controversial when applied to questions about instrumental good. The present question is of the latter kind.

16. There is some reason to think that Locke may have had *agricultural* use in mind as a "canonical" source of value, but this is not altogether obvious. If he did, then one would have to ask for a justification of this choice.

17. J. LOCKE, *supra* note 3, at 335.

earlier acquisitions are less costly to persons than later ones. It is hard to see the justice in this, if the whole theory is supposed to be justified as a way of promoting the well-being of mankind. This is as much a problem for a John Locke who points people in the direction of America as it would be for a contemporary futurist who directs people to the stars.

Second, it is not entirely congenial that a theory of just initial acquisition should rely so heavily upon the relatively dubious empirical contention that there is an infinite supply of unclaimed natural resources that is, at least in principle, available for human acquisition. Anything short of infinity may not do, as Locke's reliance on American resources should indicate.

So much for the conceptual problems involved in interpreting what the Proviso directs us to do. I find all these problems quite baffling, yet I do not wish to place too much stress on them.[18] There is a much more serious objection to the Lockean Proviso: It appears to be substantively self-defeating.

B. *The Contradictions of the Lockean Provisio*

In Section I, above, it appeared that the Proviso was best viewed as a special application of the more general principle announced in the *First Treatise*, according to which property could never justly be used to deprive others of the opportunity to use nature, God's gift for the preservation of mankind, for their personal preservation. The Lockean Proviso seems to apply this principle in the context of initial acquisition of unowned land or other resources. In paraphrase, it suggests that initial acquisition is justified only where it does not limit similar opportunities for others. I shall argue that, while Locke's general constraint on property (the principle of the *First Treatise*) is coherent, there is something peculiar about the Proviso: Its application in practice would tend to limit the opportunities in question. Stated differently: I shall argue that if the Proviso were dropped, there would effectively be more and better resources left for others. I shall first state the argument, and then mention some possible reasons for a rather remark-

18. It may be that further inquiry would yield natural solutions to most of these conceptual problems. Robert Nozick suggests an interpretation that might make use of indifference curves. If there were some reason to try to preserve the Proviso, perhaps something like this would be the most promising route to follow. *See* R. NOZICK, ANARCHY, STATE AND UTOPIA 178-82 (1974).

able short-sightedness on the part of both Locke and the greater number of subsequent property theorists.[19]

Let us first examine the part of the Proviso that requires that "enough" be left for others. It is important to remember that this Proviso is attached to the labor-mixing rule for the initial just acquisition of previously unowned resources. "Enough" is to be measured in terms of the "conveniencies of life."

Now the conceptual problems mentioned above might turn out to be so severe as to prevent initial property acquisition from ever getting off the ground, so to speak. But perhaps the problems could be solved somehow, so as to permit limited acquisition of unowned resources. If this were the case, then we should expect some initial acquisition on the part of people who were skilled at doing whatever is involved in "mixing labor" with natural resources. People whose skills inclined them toward philosophy, or taxi-driving, or mixing labor with "producers' goods" may be excluded from such initial acquisition. People who do not involve themselves early in the race for unowned resources may be excluded, too, since it is reasonable to expect one of two situations to arise: Either everything will gradually become privatized, or increasing scarcity will gradually increase the importance of the Lockean Proviso until it effectively rules out any further acquisition of unowned resources. In either case, initial acquisition is limited to persons who have the particular skills involved in mixing labor with natural resources, and who get in early. Others will be excluded.

It is interesting to note the *difference* between the two cases, as well. In the first case, the resources will all be propertized and thus available for human use. In the second case, where there is a ban on further propertization, it is not at all clear what, if any, use may legitimately be made of the resources. If people may use them at all, but do not thereby acquire rights to exclude others, they may use or consume such resources as fast as they can, without regard for conservation. There is by now a substantial literature involving so-called "tragedies of the commons," which discusses this sort of case.[20] But what is crucial

19. The most notable exception to this rule is Lysander Spooner, who managed to avoid the problems of the Proviso, and this for all the right reasons. *See* L. SPOONER, 2, *The Law of Intellectual Property*, in 3 THE COLLECTED WORKS OF LYSANDER SPOONER 2, 21-25 (1971).

20. For the origin of this expression, see Hardin, *The Tragedy of the Common*, 162 SCIENCE 1243 (1968). But the name is of course not apt for previously unowned resources

here is this: The stronger the constraints provided by the Lockean Proviso, the fewer natural resources will be available for initial acquisition, and the more such initial acquisition will be limited to the early entrants among the class of people with the relevant skills. It is hard to see the justice in this.

We have not, however, told the whole story. The rest of the story undermines the idea that the acquisition rules are unjust, and clears up a confusion that has troubled property theory for three centuries. All we have to do is to remind ourselves that we are talking here about the rules for initial acquisition of unowned resources. We are *not* talking about the rules for acquisition of property *simpliciter*.

In either of our two cases—whether all resources become privatized or whether the Lockean Proviso bans any further propertization of unowned resources—we are faced with a situation in which *the race for initial acquisition of unowned resources is over*. Those who have been excluded are now excluded from this for all time, barring some additional principles of reversion of property. But are they excluded from acquiring property? Clearly not. They may buy it. It may be given to them. Philosophers, taxi-drivers, and factory workers now have access to property, but this is true *only* of those resources that have been propertized previously. The effect of the Lockean Proviso, then, is this: The stronger it is, the more initial access is limited to a certain class of people. And the stronger it is, the less property is available to people at all. That is its entire effect. Abandoning the Lockean Proviso altogether would have the effect of making *more* resources available, as potential property, to the class of initial labor mixers. The possibility of exchange—a possibility that is opened only once resources have been first propertized—makes these resources more available to everyone else. Since the whole point of the Proviso was to promote opportunity for acquiring property, it seems to be self-defeating.

Now let us consider the part of the Proviso that requires that "as good" be left for others. While it is certainly wishful thinking to imagine that all acquisitors of previously unowned resources will improve what they acquire, one may reasonably

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unless there can be given some just principles of *communal* initial acquisition of property that do not have anything like the Lockean Proviso attached to them. I will return to this topic below.

expect the following: *Among* the holdings that have been previously acquired, *some* will have been improved in the sense that they have been made more useful to people who do not have the skills required by the "mixing labor" theory of initial acquisition. Such improvements may take a variety of forms, depending on what it is for which such people want the resources. Furthermore, some of the holdings will have been improved with respect to the goals of those who do have the skills referred to, but who failed (or simply did not participate) in the race for initial acquisition of unowned resources. To this extent, what is available now is *better* than what was available before propertization. Indeed, it is better than any resources that may have been made unavailable for privatization by a Lockean Proviso.

What is left to consider? Well, there will be some resources that will have been neither improved nor damaged, but these will now be available for a variety of purposes that do not necessarily require the particular skills involved in the rules for initial acquisition of unowned resources. Finally, it is possible that some resources will have been made worse for *everyone's* purposes. This is a logical possibilty, anyway. But how likely is it?

The full answer to this question would involve a lengthy digression into economics, which I would like to avoid. But perhaps a short version will do. Consider the case of land-use. Imagine a stage of social development in which the dominant demand for land involves its use for agricultural purposes. To the extent that big money may be made in agriculture, and to the extent that fertile land is scarce, such land will be the first to be propertized, and it will subsequently sell at a high price.

There will, of course, be incentives to the holders of fertile land either to keep it in production or to sell to someone who can. But one can easily imagine situations in which a property owner progressively destroys his land for agricultural purposes, while hanging on to the hope that he can eventually turn this trend around.[21] Imagine that he fails. The land is eventually rendered useless for agricultural purposes. If the dominant demand for land *still* involves agricultural purposes, then some-

21. It is extremely interesting that Professor Becker's discussion of property would seem to indicate that *punishment* of such failure may be appropriate. *See* L. BECKER, *supra* note 10, at 51. This seems remarkably harsh, especially as part of a philosophy that genuinely seems to *aim* at fairness and consideration of people.

thing interesting follows. It now becomes relatively less costly for other purposes, because it is no longer in demand on the more expensive market. This "waste" of the land for tilling and other agricultural uses may make it relatively more attractive, and more available, to those with other purposes in mind. Similarly for cases of other initial dominant demands and other resources. It is a logical possibility that some resources might be made worse for *everyone's* purposes (some, in fact, can be used up, in the sense that the second law of thermodynamics makes them relatively less available for anyone's use), but the likelihood of this is far smaller, especially in the case of land, than most property theorists have admitted.

In any case, in the post-propertization stage there will be resources that are available for acquisition (through purchase, for example) that are in a wide variety of states of improvement, non-improvement, and dis-improvement. Is this better or worse than the initial acquisition situation, in which all resources are unimproved? It seems clear that, unless there is some argument forthcoming that suggests that, in general, labor tends to make resources less useful, one ought to conclude that the situation is better after the race for initial acquisition is over. Even where labor ruins resources for one sort of purpose, it may have the indirect effect of improving them for other purposes. The Lockean Proviso, to the extent that it would limit the proportion of natural resources that may be propertized, tends to lower the quality of resources overall, at least with respect to human purposes. Since the intent of the Proviso is clearly to enhance human well-being, it is therefore self-defeating.

The Lockean Proviso, then, is self-defeating on two counts. Abandoning it would have the tendency to make more land, and better land, available for acquisition. This is likely to be true, to a considerable extent anyway, of natural resources in general. How could it be, though, that Locke and others have missed this point? I can think of three possible reasons.

First, and most important, there has been a general confounding of the issues of initial acquisition of unowned resources, on the one hand, and acquisition of property in general, on the other.[22] People have thought it unfair that

22. Professor Becker, for example, illustrates this tendency throughout his book. Here are some representative passages: "[O]nce all the land is owned by a proper sub-

some should be excluded from owning property (either because they are not adventurous labor-mixing entrepreneurs or because they were born too late to take part in the race for unowned land) by the rules for initial acquisition of unowned resources. Indeed, that *would* be unfair. But people are *not* excluded from acquiring property by these rules. They are, instead, excluded from being the first to own what has not been owned previously. Is *that* unfair? Do people have some sort of right to be first owners of previously unowned resources? It is hard to imagine reasons for contending that there is such a right, unless first acquisition were the only way to gain property. Since it is not, and since access to property is actually *opened* to certain people (through the new possibility of purchase, for example) when others follow the rules for first propertization, there is reason to think that the charge of injustice has been largely the result of confusion.

Second, there is a rather general conflation of two conceptually different categories of resources: "unowned resources" and "commonly owned resources."[23] To be as brief as possible, there are three general complaints that can be made about this conflation. (1) It looks like a logical error, and a severe one at that, because it asserts that some unowned things are owned. Perhaps this could be cleared up terminologically, at least, by openly contending that there is in fact nothing that is unowned. In general, this contention seems to fall somewhat short of being fully convincing, but (2) the contention that *mankind* owns everything smacks of anthropomorphic jingoism, unless it is accompanied by some argument that shows how this could have come about. Theological arguments to this effect are not likely to be wholly satisfying, and even if the contention were de-

set of the population, the landless, while they must work on the land, are denied the whole fruits of their labors by the results of the very arguments which were supposed to guarantee them." *Id.* at 36. "[T]he elimination of . . . opportunities by the acquisition of land which does not leave 'enough and as good' for others *is* a loss to those others." *Id.* at 42-43. "Even if inheritance is not permitted, the members of the first generation and those of the second who come to maturity first clearly leave the remainder, no matter how industrious, with reduced opportunities." *Id.* at 48. For a brief argument that appears to be in the same spirit as the one offered here in the text, see R. EPSTEIN, *supra* note 12, at 11.

23. Professor Becker makes *this* mistake, too. *See* BECKER, *supra* note 10, at 25, where he follows "property theorists" in saying that "things which are not owned by anyone . . . are common property, or belong to everyone in common." He qualifies this with a distinction between things held in common "positively," and "negatively," but this does not avoid the initial mistake. *See also id.* at 51 (referring to "[t]he community stock of unowned resources").

fended by means of some principles of just initial acquisition for species (or for societies), it is hardly likely that such an argument would support the conclusion that *all* unowned resources have by now been communally propertized. (3) Even if all things *were* owned, by humanity, by society, by God, or by someone like Him, it would be misleading to write property theory as if the question of first initial acquisition of previously unowned resources were being taken seriously. Such a contention begs that question.

The significance of the conflation of "unowned" with "commonly owned" would be hard to sketch in a complete way. It has made a mess of property theory, but there is at least this to say in the present context: The confusion seems to have led people to think that banning propertization of some resources, through principles like the Lockean Proviso, somehow makes the resources available to people in general. It does not. The principles of first acquisition of previously unowned resources are supposed to show us how people may justly acquire such things. If we are told that some things may not be acquired initially by an individual because they are already owned by the community, then that is fine. But we will want to know how this came about. What justifies this claim? If we are told, instead, that some things simply may not be propertized, then we will want to know why. If the answer is that the point of this is to make them available to others, then we will want to know why anyone thinks first propertization makes them unavailable, and, more importantly, we will want to know just how people are supposed to avail themselves of the reserved resources. That is, we will re-raise the question of just initial acquisition of previously unowned resources, and we will ask for alternative principles that do not beg the question.

Finally, there is a possible historical account of the confusion in property theory regarding the Lockean Proviso. Most societies have gone through "feudal" eras, in which people were virtually locked into certain relationships with land (in particular) by virtue of class and tradition (some societies, of course, are still going through such eras today). For such societies, land was not strictly a salable or exchangeable commodity, at least not in the way that other things may have been. In such situations, it may have been reasonable to expect that once land was distributed in a certain way among initial owners, all others

were barred forever from acquisition. In such a world, the story about what is fair and what is unfair would surely be different from the story sketched above, and perhaps Locke's inclusion of the Proviso is best regarded as a reaction to a tradition which he lived close to.[24]

But markets in land and other natural resources have broken that tradition, and Locke's work has played a role in the evolution. Are we forever to go on writing property theory on the basis of expectations or fears that may have been reasonable several hundred years ago, but which experience and theory teaches us are no longer reasonable? People have often observed that Locke's "State of Nature" is theoretical fiction, but few have seen the significance of this. The fact of the matter is that very few of us who own land can trace our holdings back to some ancestral act of initial acquisition. Most of us have purchased what we own, or have received it from others who purchased it. Those of us who own no land can, by and large, get some if we want it. But we will have to purchase it, and the benefit of owning land may or may not seem worth the cost of what we would have to forego. For the poorest among us, it is true that these costs may be so high as to be, practically speaking, out of reach. But the fear that some would forever be excluded *in principle* from owning land once the finite resource was all first propertized seems, given our experience, quite quaint indeed. So long as the rules for first acquisition are fortified with just rules of transfer, that fear may be laid to rest.

Whatever reasons there may be for the confusion among property theorists regarding the Lockean Proviso, the argument of this Section seems clearly to suggest that it is self-defeating. It is appropriate, then, to wonder about the justice of a modified Lockean property theory, from which the Proviso has been dropped.

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24. Given the importance in Locke's era of various restrictions—such as primogeniture and entail—on the disposition of private property, one may even wonder about just how alienable Locke thought private property was. For Locke's own discussion of limitations on the right to bequest, for example, see LOCKE, *supra* note 3, at 436-37. For contemporary proposals and discussion concerning restrictions on the alienability of property, see Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); R. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985).

III. A Modified Lockean Property Theory

We need, in particular, to examine the justice of labor-mixing as a criterion for initial acquisition of previously unowned resources. Since virtually all of the earth has by now been claimed—as has most of the solar system[25]—a bit of science-fiction is in order if we are to avoid confusing side issues.

Imagine a small planet with a few colonists on it. They have just landed. There is no native population. The colonists have agricultural and industrial equipment with them, and they envision settling in for a long time; they think of themselves as the founders of a new society, which they expect to grow over the generations.

All of the equipment is owned by individuals. The spaceship is owned by one individual, and the colonists have rented passage. Everything is privately owned *except* for the planet. The purpose of this expedition is to colonize a previously untouched planet, and none of the colonists (including the owner of the ship) has made so large a contribution to the effort of getting there that he or she has been able to negotiate title to the planet as a condition for making the contribution. The planet, everyone agrees, is unowned.[26]

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25. *See, e.g., Agreement on Activities of States on the Moon and Other Celestial Bodies*, Art. 11, G.A. Res. 34/68, 34 U.N. GAOR Supp. (No. 46) at 77, U.N. Doc. A/34/46 (1979) (contending that "[t]he moon and its natural resources are the common heritage of mankind."). Another document, the Outer Space Treaty, Jan. 27, 1967, art. 5, 18 U.S.T. 2410, 2415, 610 U.N.T.S. 205, 209, provides that *all* activities in "outer space," whether carried on by governmental agencies or by "non-governmental entities," require "authorization and continuing supervision" by national governments. For the full texts of these and other documents, and for an illuminating commentary, see J. Fawcett, Outer Space: New Challenges to Law and Policy (1984).

26. This makes the story of the settlement of this hypothetical planet fundamentally different from the story of the settlement of North America. The whole project of first colonization in America was able to get off the ground only through the commercial support of private companies like the Virginia Company, and this suport was forthcoming only when encouraged "by the granting of royal charters guaranteeing a monopoly of the benefits accruing and offering, implicitly at least, such other aids as a tariff preference in the home market over all foreign competitors." Craven, *The Early Settlements: A European Investment of Capital and Labor*, in The Growth of the American Economy 19, 22 (H. Williamson ed. 1951). This private development method functioned alongside and in conjunction with the system of exporting to America the English feudal tradition of property in land, through the granting of vast proprietorships to such gentlemen as Lord Baltimore, the Duke of York, and William Penn. Indeed there was, in spite of much rhetoric to the contrary, virtually *no* "free land" available to those settlers who made it to these shores. This system of land distribution continued through the Nineteenth Century in such practices as the vast land grants made to the railroads, and even in the Homestead Act of 1862, ch. 75, 12 Stat. 392. *See* Overmeyer, *Westward Expansion Before the Homestead Act*, in The Growth of the American Economy, *supra*, at

One more thing: Our colonists are modified Lockeans. They believe that just title to land may be earned if labor is mixed with it, and this principle is not restricted by a Lockean Proviso.

Having just landed, then, one of the colonists—a particularly ambitious member of the group—grabs his tractor, hitches a plow to the back, and proceeds to plow up the planet.[27] This takes time, of course, and it is not to be expected that he really manages to cover the entire planet. Others, seeing what he is doing, plow up as much as they can for themselves. But our protagonist has no seed to plant, and he has no plan actually to use all this land for any purpose other than as an investment. His sole purpose is to acquire the land itself. He mixes his labor with it in order to accomplish this. His idea is that, if he manages to gain a large portion of the land, he can sell or lease it to others at a substantial profit. He is merely engaged in entrepreneurial activity.

The other colonists see what this first fellow is doing, so they adjust their plans accordingly. Among the options available to them are these two: (1) They can follow a course similar to that of our entrepreneur, and start racing around the planet with their plows; or (2) they can engage instead in industrial activity, reasoning that they can acquire land later from the plowers through trade. They can, of course, mix their activities, but there might be some reason to focus on some specialization in their investment of time and labor. Indeed, some may estimate that our "entrepreneur" is likely to lose his shirt in grand style.

Eventually, though, all the land is acquired (the planet is not *that* big), and much of it is in the hands of our entrepreneur. Some other colonists own land (they reacted fairly quickly to the activity of the first fellow); some colonists have started small industries (perhaps there are lots of tractor repair shops and the like, but there will also be specialists in industries geared to more lasting needs); and some (who have not been very lucky, or very clever, or very much interested in the whole sordid affair) will not have managed to put themselves in very good positions, and they will offer their labor to others who have amassed property. There will, of course, be constraints

82; Overton, *Westward Expansion Since the Homestead Act*, in THE GROWTH OF THE AMERICAN ECONOMY, *supra*, at 342.

27. The reason for plowing, rather than any other activity, is that it seems to be the quickest and cheapest method of mixing labor with the largest amount of land. If there is a quicker and cheaper way, then substitute that for "plowing" throughout the story.

upon the plowers, including our entrepreneur. During the period in which the land is being propertized (plowed up), there will be a huge demand on those services that are required to maintain that activity. This places financial constraints on the plowers, and *some* of them (not our initial entrepreneur, though) will reason as follows: Once all the land is privatized, it will be most valuable if they are using some of it (anyway) for productive purposes. They will own lots of land, and they hope to sell it later at a good profit. But they do not wish to put all their eggs in one basket, so they will divert some of their labor to producing eggs, basket weaving, sowing seed, lumbering, and so on.

As I say, though, our entrepreneur will devote his efforts exclusively to plowing up, and thus acquiring, land. All his resources will be devoted to this activity. Others will follow suit, to one degree or another, until the entire planet is propertized. Most of the planet will then be plowed up, although not all of it will be.

Our problem, of course, is this: We now have a planet that is propertized, but mostly plowed up. The plowers are able to retire now, living on whatever income may be earned from leasing or selling the real estate they have acquired. In plowing up the planet, they will have made the land *less* valuable for undertakings like lumbering, harvesting native plants, hunting local game, and resort-construction. They will have left the land roughly the same for undertakings like factory-building, mining, and residential construction. They will have made the land *more* valuable (let us say) only for agricultural undertakings. But there is no particular need for so much agricultural land at the present time (no demand either on this planet or anywhere else), so this improvement, on balance, is not considerable. The *main* thing that the plowers have contributed to the value of the land is that they have propertized it; it is now available to others for sale. These others can now acquire land and use it for any purpose they like. This is a contribution, and that fact suggests that some principle for initial acquisition of previously unowned resources is of great value.

But why the mere mixing of labor? The story is ridiculous. Other rules for acquiring property would have accomplished the same end, and it is a relatively pleasant diversion to imagine alternatives. What about these, for example: "One justly ac-

quires title to whatever land one can cover with little chocolate Easter-bunnies;" or "One acquires title to whatever one can run around three times without stopping, so long as one is dressed in a frog costume and does not stop whistling the love-death duet from *Tristan and Isolde*" (perhaps four times would be more appropriate); or, finally, the relatively simple "One acquires title to whatever one is first to hop across blind-folded." The virtue of the labor theory was supposed to be that it has something going for it, where these other principles do not, in terms of justice.

But *what* does it have going for it?

The Lockean line, remember, goes like this: One owns one's body, and one owns therefore the labor of one's body. In our story, one also owns one's tractor. When one mixes something one owns with something unowned, one thereby produces a new thing, which becomes one's own.

But in our plowing story, this principle seems about as rational—and about as just—as Robert Nozick's tomato juice joke. Professor Nozick wonders, tongue in cheek, if dumping a glass of tomato juice into the ocean gives one just title to the ocean once the tomato juice has dispersed (if one owns the tomato juice and the ocean is unowned).[28] We *could* affirm such a principle of property acquisition, of course, and this might very well lead to eventual propertization (a definite virtue), but why this principle rather than any other? It does not seem to have anything going for it all by itself.

It is tempting to spend time discussing the Lockean contention that one owns one's body, and the labor of that body. Although there are some lines of argument that may tend to lend support to such a contention (perhaps, for example, involving a discussion of the etymology of terms like "ownership" and "property"), I do not find them particularly persuasive. My property is conceptually distinct from me. Ownership is a claimed relationship between me and something that is not me. The thesis that I own my body makes me out to be something independent of my body, and this is far too ghostly for my metaphysical tastes.[29] Nevertheless, this argument may

28. R. Nozick, *supra* note 18, at 175.

29. For special problems involved with the idea that putatively inalienable *rights* are to be conceived of as being owned by the individual, see Andrew, *Inalienable Right, Alienable Property and Freedom of Choice: Locke, Nozick and Marx on the Alienability of Labour*,

be accepted or rejected, as the reader sees fit, for I shall avoid the temptation to elaborate further on the issue. Professor Nozick's joke shows that ownership of one's body will not help in the property argument. Even if one *did* own one's body, and one's labor, so what?

The ownership part of Locke's defense of labor-mixing as a just criterion for initial acquisition of previously unowned resources seems to be a red herring. Indeed, there is something puzzling about an argument that justifies initial acquisition of unowned resources by referring to labor, and then justifies that criterion by referring to ownership. It is not inconsistent, it is not circular, but it is somewhat unsatisfying. In any case, it is not necessary.[30]

Locke's labor-mixing principle derives whatever persuasiveness it has *not* from the mere mixing of something owned with something unowned, but rather from the idea that labor is generally invested in ways that are at least intended to be productive from the point of view of the laborer. If a stronger thesis were true—if labor *in fact* tends to improve land for human purposes—then it would seem to add force to the view that people should be "allowed" to mix labor with unowned land, and it may, with other considerations added, thus provide support for the contention that people ought to be "given" property rights in what they mix their labor with.

The alert reader, however, will have noticed the scare quotes in the last sentence. Therein lies a tale, whose moral is that one should not rely upon the thesis that labor tends to improve land for human purposes—even if it is true—in a defense of a labor-mixing criterion for just acquisition of previously unowned resources. The tale goes like this: To say that labor is generally invested in ways that are at least intended to be productive from the point of view of the laborer is to imply nothing about actual productivity, and nothing about value to anyone other than the laborer. There may be a tendency for labor to be generally beneficial to society at large, but there is

18 CANADIAN J. OF POL. SCI. 529 (1985). Professor Andrew's discussion of this matter suffers, however, from an occasional confusion between the idea that the *right* to property is inalienable, on the one hand, and the claim that the property itself is, on the other. In this, Professor Andrew repeats an error committed originally (as near as I can tell) by Peter Laslett, in his introduction to J. LOCKE, *supra* note 3, at 116 n.15.

30. For an argument to a similar effect see R. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

nothing necessary about this. In fact, one can be confident that not all labor will be *successfully* invested even from the point of view of the laborer, and that not all labor that is successful from his point of view will be valuable from the point of view of society, humanity, or anyone else at all. Usually there will be at least some other people who have goals similar to those of the laborer, but this need not be the case. Sometimes it will not be. All of this, however, is beside the point when evaluating the justice of the labor-mixing criterion for acquisition of previously unowned resources.

My point here is this: To suppose that the community may justly prohibit activities that are not positive contributions to *its* well-being (or are not likely to be, or may not be) is to miss the point of considerations of justice. Such a view amounts to ethical egoism gone communal. To say that the community, or humanity, may justly refuse to allow someone to labor upon unowned resources if such labor will not make a contribution to the well-being of mankind (or whomever) is very much like saying that I may justly prohibit you from working on unowned resources if your work does not benefit me. And to suggest that the general tendency of labor to contribute to the well-being of mankind is a good reason for adopting a labor-mixing criterion for just acquisition of previously unowned resources is to set an egoistic trap. The trap is disguised by talk of *community* interests, but it is an egoistic trap nonetheless. It implies that questions about the propriety of controlling other people may be settled by reference to the self-interest of the would-be controller.[31]

31. This problem bedevils not only property theory, but political and social philosophy in general. Anarchists, for example, typically demand *justifications* for claims that community interest outweighs individual interest, while defenders of government often seem to feel that community interest is *constitutive* of justice in some way. But surely people—like Kai Nielsen—who think that the "categoricalness" of libertarian property rights reflects moral callousness ought to address the kind of argument proposed in the text. *See* K. NIELSEN, EQUALITY AND LIBERTY: A DEFENSE OF RADICAL EGALITARIANISM 67-70 (1985). It is worth noting, in this connection, that Robert Nozick's argument—in *Anarchy, State and Utopia*—in behalf of a "minimal" state frequently tries to *balance* considerations of individual and community interests (where community interests are understood as aggregations of individual interests, and *all* of this is cast in terms of rights). *See* R. NOZICK, *supra* note 18, at 89. Although many people have ignored this and complained about his individualism, they have found his argument against anarchism convincing. Lawrence Becker, for example, remarks that "Nozick's arguments against anarchism . . . seem . . . to be as conclusive as philosophical arguments can get on this issue." L. BECKER, *supra* note 10, at 126. Professor Nozick's failure, however, is in fact rather dramatic. For criticism of his argument for the "minimal state," see J. SANDERS, THE ETHICAL ARGUMENT AGAINST GOVERNMENT 213-35 (1980) (chapter X).

The trap may be avoided, of course. After all, that something is advantageous or in your self-interest is often a good reason for doing it or encouraging it. But in the present case, as in many others, considerations of self-interest are best regarded as last-ditch efforts at convincing people who are not swayed by considerations of justice, responses to someone who says, "All this business about justice is very nice, but what's in it for *me*?" But that is *all* the impact that such considerations can have. If we keep that in mind, then we may wield arguments from self-interest in an appropriate way. They should not, however, play a strong role in discussions of justice as such, at least at this level. Communal selfishness will not generate a system of justice any more than will individual selfishness.[32]

What does this have to do with whether or not property rights should be "given" to people only when they have done something to benefit mankind? I mentioned early in the Article that I wanted to avoid discussion of rights as such, but a few words are appropriate here. Ethical rights, as opposed to legal rights, are not the sorts of things that societies or cultures can give or withhold. Legal rights, most would agree, are not the last word (or even a very illuminating first word) on rights. That some legal code says that you have certain rights is not decisive in determining whether you in fact have them. Some legal codes violate people's rights (hence the distinction between legal rights and moral or ethical rights). To think, however, that this problem is avoided by refocusing attention on cultural mores, implicit ethical beliefs, or social codes is a mistake. Some ethical codes violate people's rights and, to that extent, are unjust. It is true that justice may require that certain rights be honored, certain "institutions" be established, certain legal systems be created. It may happen that considerations of communal self-interest dictate the same set of rights, institutions, codes, or whatever. That would be nice. Considerations of justice, however, and questions about rights proper, are al-

32. Something like self-interest is bound to play a role in a general ethical theory, and perhaps at a very fundamental level. A distinction, however, must be made: It is one thing to say that justice demands the consideration of other people's self-interest but quite another thing to say that self-interest generates justice. The latter claim may be true, in a sense, if relatively *concrete* conclusions about what is just may be derived from the fact that the objects of justice have certain interests. But this will be the case only if more *abstract* considerations of justice demand that personal interests be taken into consideration. Unpacking all of this will yield, I think, the true story about self-interest and justice.

ways conceptually distinct from considerations about what societies and legal codes say about them; such considerations are logically available as tools for criticizing any set of principles or institutions, legal or ethical, established by society. Society does not give or withhold rights proper; people either have or do not have them. Human convention does not create justice; it either conforms or fails to conform to it. This is strictly a logical point.[33]

So much for the tale. The moral, once again, is that one should not rely on the thesis that labor tends to improve land for human purposes in defending the justice of a labor-mixing criterion for the first acquisition of previously unowned resources. This thesis will help people (or society) to see that it is in their interest to honor such a criterion, but it will not directly show its justice.

Justice requires consideration of the needs, the plight, the requirements, the desires, the interests of all those involved or affected by human decisions. But this is no more than a way of unpacking the Lockean normative principle, accepted above, that the well-being of mankind is something that ought to be preserved or promoted. If, however, mankind's well-being can

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33. Surely it is true, as Lon Fuller repeatedly insisted, that figuring out what the law *is* requires, in part, coming to understand the purpose, point, or intent of what was legislated. But the question as to whether the law is good or bad is yet a *different* question. Another of Professor Fuller's contentions—that no sharp distinction may be drawn between law and morality—appears also to be correct when understood as Professor Fuller meant it. The criteria used in deciding *which* precedents to take seriously, the *tacit* principles or standards that underlie legitimate law-making, the arguments used in court, the considerations deemed relevant in deciding how to apply law in particular cases, all these may be fundamentally *moral* in character. Yet these, and many other similar matters, are necessary elements in determining what the law *is*. So Professor Fuller argued. Nevertheless, this still leaves scope for morality's logical autonomy vis a vis the law (whether this is "implicit law" or "made law" in Professor Fuller's sense). Indeed, even if there were an array of absolute (right) moral standards, the deployment of (prima facie right) moral standard *A* rather than (prima facie right) moral standard *B* in some particular case would itself be eminently criticizable on moral grounds. For Professor Fuller's debate with Ernest Nagel on these matters, see Fuller, *Human Purpose and Natural Law*, 53 J. OF PHIL. 697 (1956); E. Nagel, *On the Fusion of Fact and Value*, 3 NAT. L.F. 77 (1958); Fuller, *A Rejoinder to Prof. Nagel*, 3 NAT. L.F. 83 (1958); Nagel, *Fact, Value and Human Purpose*, 4 NAT. L.F. 26 (1959). For the extraordinary debate on these matters that was conducted in the 1950s and 1960s between Professor Fuller and H.L.A. Hart, see Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); HART, THE CONCEPT OF LAW (1961); FULLER, THE MORALITY OF LAW (1964); Hart, Book Review, 78 HARV. L. REV. 1281 (1965); L. FULLER, *A Reply to Critics*, in THE MORALITY OF LAW 187 (rev'd ed. 1969). *See also* R. SUMMERS, LON L. FULLER (1984); Powers, Book Review, 1985 DUKE L.J. 221. Professor Summers makes tantalizing reference to an early correspondence between Professor Fuller and W.V. Quine, R. SUMMERS, *supra*, at 9; I have not yet been able to get my hands on it.

be preserved or promoted only if the well-being of individuals is, and if the well-being of individuals requires that they have access to natural resources, and if the character of human individuals requires that this access, if it is to yield the well-being in question, involve relative security in using those resources for individual purposes, then we have clues about why the labor-mixing criterion for acquisition of previously unowned resources may seem plausible. The story might be different in the case of *communally* owned resources, but that is not *our* story.

The labor-mixing criterion derives its force from the fact that the investment of labor almost always indicates an intent to do something or produce something that is important to the laborer. In general, justice requires that we respect such projects, at least where the projects themselves do not involve injustice to others, whether intended or not. To acknowledge that a person acquires property through mixing labor with unowned resources is simply to acknowledge the injustice of interfering with projects that other people deem important, or of robbing them of the fruits of those projects.[34]

34. Charles A. Reich, in Reich, *The New Property*, 73 YALE L.J. 733 (1964), points out that "property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner." *Id.* at 771. One need not go along with Professor Reich's conclusions about the desirability of endorsing property entitlements to "government largess" to agree that he is right about the function of private property. (Indeed, he is right, too, about the remarkable problems created for individual liberty by the radical modern expansion of government largess. Those problems might be solved most wisely in other ways, however, than by encouraging a corresponding expansion in the conception of individual entitlements.) Professor Rawls appears to take a sympathetic view of the idea that we must respect the "plans of life" of other people. J. RAWLS, A THEORY OF JUSTICE 407-16 (1971). But Professor Rawls understands his all-important two principles of justice as being "equivalent . . . to an undertaking to regard the distribution of natural abilities as a collective asset so that the more fortunate are to benefit only in ways that help those who have lost out." *Id.* at 179. Thus, in the name of the difference principle especially, interference with *any* use of one's talents may be justifiable, according to Professor Rawls. For a spirited recent response to this line of thought, see R. EPSTEIN, *supra* note 12, at 338-44. Loren Lomasky, in an approach dramatically different from that of Professor Rawls, offers some extremely good reasons for using the projects of persons as the basis for individual rights. *See* Lomasky, *Personal Projects as the Foundation for Basic Rights*, in HUMAN RIGHTS 35 (E. Paul ed. 1984). Professor Lomasky's otherwise fine discussion is flawed by a bewildering rejection of the idea that the moral point of view is to be defined in terms of impartiality among persons. This leads him repeatedly to assertions like "no project pursuer can be shown to be rationally obligated to sacrifice for the sake of someone else's interests that which is essential to his own ability to construct a worthwhile life (here understood very roughly as a life in which the persistent attachment to one's projects can be expressed in fitting activity)." *Id.* at 44. One can only wonder what Professor Lomasky would say about cases where those "interests" of others are in fact fortified by *rights*. In the last analysis, it seems plain that if

That, then, is what the labor-mixing principle has going for it. It is superior, in terms of justice, to many other principles that might be equally effective in propertizing previously unowned resources. But we have yet to address the more puzzling question. The labor-mixing criterion appeared to be quite ridiculous, when applied in our story about the colonized planet. What is it that has gone wrong in that story?

What has gone wrong is that the project, in behalf of which our entrepreneur devoted so much labor, was nothing other than the mere acquisition of property. Stated a bit differently, his object was the exclusion of others from first acquisition. Since acquisition is still open to others through exchange, it is not obvious that our entrepreneur's project was unjust. Nevertheless, there seems to be something troublesome about it.

It is interesting to note that *any* criterion for initial acquisition of previously unowned resources, once established as a practical rule, is likely to allow for some abuse of the kind illustrated in our story. Name your rule. Now figure out the quickest and most efficient means of fulfilling its requirements. Now apply it to our colonists. Voila! If the labor-mixing rule were not any more deficient in this regard than any alternative rule, then perhaps it would be somewhat vindicated. It propertizes things reasonably quickly, thus making resources available through exchange. There are considerations of justice that make it superior to many other rules that would accomplish the same thing. The question is: Are there other rules with similar advantages that are less subject to abuse?

The abuse problem might be eased a bit if we were to qualify the labor-mixing criterion so as to incorporate more explicitly some of the considerations that make it a just principle. In particular, we might want to say that investment of labor may give one just title to previously unowned resources only where it reflects an intent to do something or produce something independent of mere propertization. People who simply want to own lots of land will then have to acquire it through purchase, bidding it away from other people and other projects. Whether this qualification will help much, either in principle or in prac-

rights are to be generated from consideration of personal projects, there had better be *some* perspective from which no person's projects may be preferred over those of any other. This will be the moral point of view. For another interesting approach, somewhat more akin to what I urge here in the text, see Kelley, *Life, Liberty and Property*, in HUMAN RIGHTS, *supra*, at 108.

tice, is not completely clear to me. It might, on balance, yield even more foolishness than the simple labor-mixing rule. That it is a possible solution to an uncomfortable consequence of the straight labor-mixing criterion, however, makes it a qualification worth exploring.

One might, of course, take a stronger line. One might argue that projects whose sole object is the exclusion of others from acquisition of previously unowned resources are in fundamental conflict with the considerations of justice that motivate the labor-mixing criterion in the first place. They do not take due consideration of the requirements, the desires, the interests of others. As such, it might be argued, these projects are inconsistent with the intent of the labor-mixing criterion, and are ruled out by it without the need for qualification. As I have noted, I am not fully convinced by this argument, since acquisition of property is still open to others through exchange. Nevertheless, this argument has some plausibility. Perhaps there are other assertions that justice would warrant regarding unowned resources. It is in this context that such issues become important. Unfortunately, a complete examination of them could very well require a book.

There is, though, a similarity between the present argument for a labor-mixing criterion, and Locke's argument (sketched in Section I), which is worth noting. Locke's *First Treatise* principle suggested that where private property came into conflict with human welfare, private property loses, since the argument for it was based on human welfare. The present argument may suggest something similar. The labor-mixing criterion for just acquisition of previously unowned resources is based on considerations of justice; more specifically, it is based on the idea that justice requires consideration of the needs, the requirements, the desires of others. If justice does require those things, then it will have lots to say about situations in which some people are starving and others are rich. Such matters will not be easy to analyze, however, and it may be that nothing as strong as Locke's "Right to Surplusage" will emerge. Justice may counsel or urge that surplusage be shared with the needy, but it is not likely to require it in every case, for that would ignore consideration of the justice of the particular projects that led to the surplusage in the first place.

The upshot of all this is that the labor-mixing criterion may

not be as crazy as it might first appear, and that it does, in fact, have a great deal going for it. The *right* rule for just initial acquisition of previously unowned resources is likely to have something like labor-mixing at its core.

IV. Conclusion

This is not, of course, the last word. There is some reason to hope that a fully adequate principle for just acquisition of previously unowned resources could probe more deeply than does the bare labor-mixing principle. Are there not *other* ways of using natural resources for personal projects that are just as respectable, from the point of view of justice, as is labor-mixing? Easily imaginable examples include the gathering of native plants or the hunting of native game. One mixes one's labor with the particular plants one gathers, with the particular buffalo one shoots, I suppose, but perhaps justice would warrant some property claims over the land that supports such projects, as well. If so, then one could defend on that basis the claims of some native Americans, for example, against the allegation that they never owned the land they inhabited.[35]

Such a line of argument, I think, would be correct. It would have the effect of showing that mixing labor is at best a sufficient, but not a necessary, condition of just initial acquisition of previously unowned resources. It would also show that the real basis for acknowledging the justice of initial property claims is to be found in the principle that it is unjust to interfere with projects that others deem important, or to rob them of the fruits of those projects, when the projects are undertaken without violating any previously established just claims of others. That, I think, distills what is most important from the Lockean theory with which we began.

35. Such considerations serve to remind us that questions of just acquisition are implicated in questions of just transfer, and that manifest injustice in either first acquisition or transfer may require that restitution be made in some appropriate way. The resolution of claims as old as those of native American tribes will inevitably be tricky, and delineation of just principles of restitution in such cases is not likely to come easily. The story of restitution to native Americans has so far been pretty sad. For a reasonably even presentation of that story as it relates to certain recently settled claims, see P. Brodeur, Resitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England (1985).