What counts as original appropriation?

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abstract I here defend historical entitlement theories of property rights against a popular charge. This is the objection that such theories fail because no convincing account of original appropriation exists. I argue that this argument assumes a certain reading of historical entitlement theory and I spell out an alternative reading against which it misfires. On this reading, the role of acts of original appropriation is not to justify but to individuate people's holdings. I argue that we can identify which acts count as original appropriation against the background of a general justification for a practice of property rights. On this view, what I will call 'natural' acts of original appropriation are acts by which a person begins to satisfy the general conditions for justified ownership. Finally, I offer an interpretation of John Locke's theory of appropriation along these lines and argue that it provides an attractive reading of his view.

keywords property rights, appropriation, historical entitlement, Locke

In this article, I defend historical entitlement theories of property rights against a popular charge. This is the charge that such theories fail because there cannot be acts that bring about the appropriation of unowned objects by persons. This objection seems to deliver a decisive blow to historical entitlement theories of property rights, which hold that the legitimacy of people's holdings depends on their pedigree. On a historical entitlement view, establishing that an individual has a property right over a certain thing requires showing that she obtained her possessions in a legitimate manner.[1]

Now most of the time this will happen by means of a legitimate transfer by someone else who already had a valid property right over that thing. But that can only be part of the story. For how did that previous person obtain *her* property right? In other words, we still need an answer to how such chains of (legitimate) transfers can get started at all. It is at this point, usually, that an account of origi-

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nal appropriation is invoked. An act of legitimate original appropriation is one whereby individuals can acquire property rights in previously unowned objects through unilaterally undertaking particular acts.[2]

On the standard reading of historical entitlement theories of property rights, the idea of original appropriation is said to deliver two things. First, it offers an account of why property rights (of some specific kind) are morally justified. Here the answer is that an act of original appropriation has been performed that justifies the right. Second, it offers the means of establishing the legitimacy of the given particular holdings of people at a given time. Here we must look for persons who have performed acts of original appropriation and to whom they have transferred their acquired rights. Thus the idea of original appropriation seems crucial to the viability of a historical entitlement theory of property.[3]

But many philosophers now think that the idea that there can be acts by which persons can generate property rights for themselves makes no sense. That is, most now believe that the idea that there are natural acts of original appropriation should be rejected. Moreover, this dire state of the idea of acts of original appropriation is thought to shed serious doubt on historical entitlement theories of property rights. In his famous book on the right to private property, Jeremy Waldron puts the objection forcefully:

> entitlements to keep what [original appropriators] have seized were based on the assumption that the mechanisms for a fairer distribution were not available. When that assumption failed, when those mechanisms did become available, then the entitlements founded on the assumption of their absence could not prevail. They were revealed then as *provisional* entitlements not as the enduring foundations of a system of justice that could continue to constrain us today in our thinking and action on the matter.[4]

Waldron's words reflect what is now the mainstream position. That is, most now believe that what people justly own is not determined by the way in which they came to hold their possessions, but must be determined by means of a more straightforwardly distributive theory of property rights. This is thought to be a consequence of the failure of theories of acts of original appropriation. Since there can be no such acts, the argument goes, there can be no historical entitlement theory of property rights.[5]

In this article, I will challenge this conclusion. I will begin (Section 1) by accepting the force of the standard criticisms of acts of original appropriation. However, I will argue (Section 2) that these criticisms only apply to the standard reading of historical entitlement theories I described above (in which acts of original appropriation are seen as both the justification of property rights and the means for establishing who owns what). Instead, I will argue for a different reading of such theories, a reading in which acts of original appropriation are seen as part of a wider theory of property rights. Against this view the criticisms of acts of original appropriation fail to strike and thus do not show that historical entitlement theory must be rejected. I will claim that on this reading the historical

entitlement theorist can hold on to all the elements of the theory, including the acts we usually think of as acts of original appropriation. I will argue for this in Section 3, where I set out an account of what I will label 'natural' acts of original appropriation. Thus I will not here defend the historical entitlement theory of property rights as such, but instead show that a popular reason for rejecting the theory, based on doubts about available accounts of original appropriation, is wrong. However, I will attempt in the final section to add to the plausibility of this view by showing how the arguments of the most notable original appropriation theorist, Locke, can be made to fit the approach I am putting forward.

This is clearly an important task. A main and intuitively attractive line of thinking in political philosophy is discredited by the attack on original acquisition. Indeed, the idea that there can be acts of original appropriation is caught in a remarkable limbo. Almost everyone believes that it must be possible for people to appropriate things that are unowned. In addition, it does seem very plausible to say that we have property rights over something we obtain via a legitimate transfer if the previous owner of that thing had an untainted property right over it herself.[6] Yet at the same time, consensus among philosophers now has it that there can be no such acts. But without an account of original appropriation, any theorist of property rights has a serious problem. Original appropriation is not just something from a fanciful past. Unowned things are appropriated all of the time. Moreover, there may (will) even arise entirely new questions of original appropriation, perhaps in Antarctica, on the moon, or on Mars, and perhaps in the form of new kinds of property. So we had better be prepared. As Nozick rightly pointed out: 'it is not only persons favoring *private* property who need a theory of how property rights legitimately originate'.[7]

1. The attack on original appropriation

We have seen that on the standard reading the viability of historical entitlement theories depends on the possibility of acts of original appropriation bringing about property rights. But it is not difficult to see why many think the task of showing that there can be such acts of original appropriation is a hard one. When a person establishes a property right over something that is unowned, she thereby affects the moral situation of others. By appropriating an object, a person gains some rights regarding the object and this means that all others have lost some liberty regarding the object by gaining duties towards the new owner. What is more, if original appropriation is possible, it seems that these changes can come about by someone *unilaterally* performing a certain act. When I appropriate an unowned apple, say by picking it from a tree, you lose the right to take that apple by gaining a duty to not take it away from me. And all this because of my picking it.

The major candidate in the history of philosophy for a theory of original appropriation is, of course, John Locke's idea that a person's mixing labour with an unowned object can ground her having a property right over it. Locke held that

persons own their own bodies; they are what may (anachronistically) be called 'self-owners'. But such self-owners do not only own their bodies, they stand in a similar relation to such things as the efforts and movements their bodies might generate. Thus, on one reading of this view, if a self-owner labours on an unowned object, she extends to that object something that she owns. She *mixes* something she owns with something that is unowned. This is what makes it the case that the act of labouring on an object can ground a person's property right in an object. As Locke famously put it:

> 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, at least where there is enough, and as good left for others.[8]

An action that connects something one owns to an unowned object will, on this view, give one a property right to it. Labour is a prime example of such an action. Labouring on an unowned object is to extend one's previously owned energy to that object and thus to draw it within the range of things one owns.[9]

Locke's proposal is not the only version of a theory of original appropriation. Another familiar one is the idea of first occupancy. On this view, to be the first who takes (in some relevant sense) an unowned object is, quite simply, to become its owner. We know of this kind of appropriation from daily life. If I drive up to the parking spot before you do, I get to park my car there. If you have taken the final seat on the bus, I have to stand for the journey. In both of these cases, it is possible to take possession of something merely by being the first to occupy a certain spot. Perhaps it may be said that such rights (rights of usufruct) only resemble true property rights. For when I drive away, the parking spot is no longer mine and the same goes for your seat on the bus. In any case, the parking spot and seat were presumably not unowned in the sense intended here. But it may be possible that the same idea can apply to genuinely unowned objects. Take land for example. Here is this vast, uninhabited piece of land. Perhaps I can gain possession over some piece of it by being the first who decides to live there?[10]

However, such accounts are notoriously underdetermined. On Locke's view, it is unclear for many objects how to distinguish between what one becomes entitled to through labour mixing and the rest which is to remain as it was. Consider again land. If I cultivate some strips of land, do I gain only those strips or also the land in between? What about the road I use to move from one to the other? Say I cultivate one of my strips by planting some apple trees. Presumably, I own the apple trees. Perhaps I also own the land on which they stand.[11] But if I cut them down

to use as wood for a fire, do I still own the land? Nozick has rightly argued that claiming that labour constitutes the mixing of what one owns with something one does not own can only be *part* of an argument for appropriation. What needs to be added is a reason for the conclusion that one actually gains the object, instead of losing one's labour. As Nozick illustrates, if I pour a can of tomato juice in the sea, do I gain the sea or lose my juice?[12]

Similar objections can be made against the idea that first occupancy is an appropriating act. It is not always the case that the first person who enters an unowned piece of land thereby comes to own it. And there seem to be limits to what one can appropriate by means of occupancy which cannot be explained in terms of the argument that occupancy constitutes appropriation. Surely no one believes that if I somehow succeed in putting a fence around the entire piece of uninhabited land, I thereby gain a property right over all that land.[13]

These are problems with specifying the conditions under which doing something constitutes appropriation (instead of, say, waste) and with fixing what is thereby appropriated. There are also more fundamental problems with the idea that there can be acts of original appropriation. Many have objected to the very idea of unilateral appropriation. They are suspicious of the possibility that people can be made subject to duties to others by the others' unilateral actions. This suspicion goes back at least to the time of the natural law theorists. Samuel Pufendorf, for example, objected that 'we can not apprehend how a bare corporal Act, such as seizure is, should be able to prejudice the Right and Powers of others, unless their consent be added to confirm it; that is, unless a covenant intervene'.[14] More recently, Jeremy Waldron has referred to arguments that try to establish the possibility of unilateral original appropriation as radically unfamiliar, uneasy, and seemingly repugnant.[15]

Additionally, the idea that there are such special acts of original appropriation commits us to some rather implausible conclusions. To say that there are acts of appropriation is to say that there are acts such that performing them creates a property right for the agent *ex nihilo*. Crucially, a natural act of original appropriation is said to bring this about by virtue of the act's description qua act. That is, on the standard reading of theories of original appropriation, there are said to be acts that intrinsically bring about property rights, acts that are somehow special in that they lead to the agent gaining a property right. But this idea sounds mysterious. For if there is something special about these acts that makes them natural acts of appropriation, then why can the same act, only performed later, not have the same effect? If there is something about the act qua act that makes it be an act of appropriation, then why should we not be able to appropriate (or co-appropriate) already owned things? What makes the idea of a *natural* act of appropriation mysterious is that its significance must be such that it creates a right excluding the possibility of similar later acts.[16]

This, then, is the attack on the idea of original appropriation. The idea that there are acts that simply *create* property rights, acts in whose nature it lies that

they bring about property rights, seems mysterious. For it seems doubtful that there can be acts that could carry the justificatory burden for allowing some to exclude others from using, taking, changing, and consuming previously unowned things.

2. The role of original appropriation

These are very powerful criticisms and it may thus seem that we should conclude that there can be no such thing as a unilateral act of original appropriation. But appearances deceive. For the attack on original appropriation assumes one crucial thing, namely that it is really the idea of acts of original appropriation that must fulfil the two tasks I mentioned at the beginning of this article: (1) providing an account of why property rights (of some kind) are morally justified and (2) providing the means of establishing the legitimacy of the given particular holdings of people at a given time. Let us call these (1) the element of *justification* and (2) the element of *individuation*.

It is clear that any theory of property rights should, in one way or another, deal with both of these tasks. No theory of property rights would be worthy of its name if it did not tell us that such rights are justified and no theory of property rights would be worthy of its name if it did not allow us to establish whether Jim really has a property right over his car, whether Jane really owns her house, and so forth. Only with both of these parts will a theory of property rights perform its function of enabling us to establish whether the actual holdings of actual persons are legitimate.

Now the criticisms of acts of appropriation discussed above have it that no act can achieve both of these things. But why should we expect acts of original appropriation to do this in the first place? Why should we think that there is something about acts of appropriation qua acts that *both* tells us who came to own something that was not already owned (individuation) and, at the same time, justifies the property right so established (justification)? Alternatively, we should see acts of original appropriation as part of a wider theory of property rights, and it is this wider theory that contains the justificatory element. With this in place, the role of acts of original appropriation is to supplement that general justification for property rights with the means to identify what are people's legitimate holdings.[17]

To see this more clearly, let us consider both elements in turn, starting with the element of justification. We saw that the concern about appropriation stems from the fact that appropriation allows for the freedom of individuals to be quite straightforwardly limited: acts of original appropriation bestow duties on others. The generation of such duties clearly calls for justification. How can it be that some are subject to duties due to others possessing certain objects? This is the crucial justificatory issue for a theory of property rights.

But this justificatory problem is not merely a problem about the possibility of original appropriation as such. It is a problem about the existence of the institu-

tion of property as a whole. The liberty lost as a result of an act of appropriation is a liberty one lacks with regards to *all* existing property rights, whether they are the result of original appropriation or not. If the one is worrisome, then surely the others must be worrisome too. The justificatory problem therefore is the general one of people having property rights, not just the possibility of appropriation. It is the existence of the exclusionary right that stands so blatantly in need of justification, not the mere fact that people should be able to bring them into existence. If we can offer a good justification for the former, the problem posed by the *possibility* of the latter seems decidedly smaller.[18]

What we need, then, is a justification for the rights that go with the original appropriation *and* subsequent possession of property by persons. That is, we need a justification for the presence in a society of an ongoing practice involving rights that enable people to exclude others from access to, use of, and the possibility of unilaterally appropriating their possessions. We are familiar with some good candidates for this kind of general justification. Most proposals refer in one way or another to the effects of having the institution of property present in a society. Such effects may be beneficial through ensuring that people enjoy the fruits of their labour[19] or through leading to higher social welfare by aligning individual preferences with entrepreneurial activities and productive use of resources.[20] Other proposals could work as well, of course. The correct general justification could, for example, refer to the idea that people somehow identify deeply with the objects they have in their possession.[21]

Indeed, most existing plausible proposals (that I know) about what may justify property rights in fact include some such justification of property rights *as a practice*. Even Locke and Nozick, usually portrayed as champions of the act of appropriation, offer us considerations of this kind. Locke's theory of property rights works against the background of God's command to make use of what he has given us so that mankind may 'Be Fruitful, and Multiply, and Replenish the Earth.'[22] The implication of this duty is that appropriation *must* somehow be justifiable: it is in accordance with God's will. (We will return to this in Section 4.) In addition, Nozick writes that private property

> increases the social product by putting means of production in the hands of those who can use them most efficiently (profitably); experimentation is encouraged . . . private property enables people to decide on the pattern and types of risks they wish to bear, leading to specialized types of risk bearing; private property protects future persons by leading some to hold back resources from current consumption for future markets; [and my personal favourite] it provides alternate sources of employment for unpopular persons who don't have to convince any one person or small group to hire them, and so on.[23]

So what, then, is the role of acts of original appropriation? Assume for a moment that a general justification for the existence of property rights can be had, that a practice of property rights can be justified. What kind of work do we

want our account of appropriation to do? What is appropriation *for*? First, it is clear that against the background of such a general justification of property rights it is no longer true that acts of appropriation have to do any *moral* work. For now saying that it is possible for individuals to appropriate unilaterally unowned things is *not* the same as saying that it is the performance of an act of original appropriation that justifies property rights.

Instead, acts of original appropriation are required for a particular practice of (justified) property rights to get started at a specific moment in time. The reason for this is that justifications of property at the general level can only establish a general conclusion: that there is a justification for situations in which people have property rights. They tell us that there is no moral problem when certain individuals claim certain rights against others with respect to certain objects. But this leaves out an important thing. For a general justification does not tell us whether the holdings of any given set of persons are in fact justified, nor how we could know. If we want to establish that, we need to know how a particular individual, call her P, can come to own a particular object, name it O. In particular, we want to know how P can come to possess O when it is not already in someone else's possession.

The account of original appropriation thus serves the function of individuating property rights; it allows previously unowned objects to become covered by the (justified) property rights of particular individuals. Without it, we would lack an intuitively appealing means of identifying whether a given set of holdings that arose from a situation in which there were no property rights present constitutes legitimate property. Without it, we would lack the means of establishing the legitimacy of something that was not yet owned coming into someone's possession. This is the role of original appropriation. It involves specifying certain acts that signify that a person can legitimately claim to have a property right. It involves specifying what counts as original appropriation.[24]

3. What counts as original appropriation?

We have seen that the justificatory part of a theory of property rights tells us what it is about property rights that makes a practice involving such exclusionary rights justified. We have seen also that it is against the background of such a general theory perfectly possible to say that the performance of some act under certain circumstances is a sufficient condition for a person to own a previously unowned object. In other words, it is perfectly possible for there to be unilateral acts that bring about the original appropriation of an object by a person.[25]

So what acts can count as original appropriation? In principle, the role could be fulfilled by any type of act consistent with the wider theory of property rights. Thus, if the correct theory of property rights were consistent with acts of labouring on unowned objects counting as original appropriation, then that might do the trick. Indeed, if the correct theory of property were consistent with there being

a known convention that when a person did a little dance around an object, she came to own it, that too could count as an act of original appropriation.

Does this mean that what counts as original appropriation is an entirely open question? Is it *mere* convention that determines what acts are to have such effects? Such a result would seem to rid the theory of historical entitlement of much of its traditional content, for proposals of such a view have virtually always included proposals of specific acts as acts of original appropriation. Moreover, if acts of appropriation could only be determined by convention, the historical entitlement theorist would be facing a serious problem. Conventions normally arise through the relevant acts being actually carried out. But then what about a situation in which there are no property rights yet? If there have been no acts of appropriation yet, there will probably be no convention about what counts as such either. How can there be *legitimate* original appropriation if there is no act that counts as such?[26] The historical entitlement theorist must therefore be able to say something about what counts as original appropriation independent of conventions.

Fortunately, the account of original appropriation can be filled out further in light of the general justification offered. The first thing to note is that there clearly will be better and worse candidates for such acts. For example, as it seems plausible to say that much of the value of property rights comes from the stable expectations and opportunities for mutually beneficial trade they foster, we should look for acts of original appropriation that will make others aware of the newly established right. Acts of original appropriation, that is, should clearly *communicate* to others that a certain object has come into the possession of a particular person.[27]

But there is more that can be said. Although there is no necessary limit to what acts may count as original appropriation, we can also understand what may be 'natural' acts of original appropriation. An act is a 'natural' act of original appropriation when it can be viewed as an extension of the wider theory of property rights.[28] General justifications of property rights, like the ones just discussed, spell out a *rationale* justifying the practice of property rights. By giving us the general conditions for justified ownership, the justification refers to a particular effect or activity the existence of such rights is to foster. Consider again, for example, a theory that holds that a certain property regime is justified because it leads to a society's social product multiplying. If that is what justifies property, then the rationale for justified holdings will be something like the following: according such rights to people disposes them to use resources productively. Alternatively, on another theory of property rights the rationale for justified holdings may be that property rights help people secure the possessions to which they feel connected.

We can begin by spelling out the rationale of a theory by asking what property rights are for. For example, a theory could tell us that if property rights of some kind lead to widely shared economic benefits, then such property rights are justified or that if property rights of some kind tend to offer people control over

the objects they care about the most, then such rights are justified. In this way, a theory's rationale spells out general conditions for justified ownership. And so, if property rights are justified because they lead to the social product multiplying, the general conditions of justified ownership can be stated as something like this: if it leads to objects being put to certain sorts of use, their ownership can be justified.

A 'natural' act of appropriation is an act that is an extension of the rationale of the wider theory of justified property rights. It will be the kind of act by which one begins to satisfy the general conditions for justified ownership. On the example just given of a justification referring to the beneficial consequences for the social product due to increased productivity, a 'natural' way for persons to appropriate things will be their productive use of resources. By putting things to productive use, people will be doing to objects exactly what is required for their property rights to be justified. They are acting in accordance with the theory's rationale and their behaviour satisfies the general conditions for justified ownership. Hence such acts can be said to constitute 'natural' acts of original appropriation. In the next section, I will argue that Locke's theory offers us a good example of precisely this view.

Note, however, that this is not to say, on the example we are considering, that when people do not put the things they own to productive use, they must thereby cease to have a property right over such things. Nor is it to say that anyone who would ever make productive use of something must thereby come to possess it. The general theory of property rights may specify that property rights should protect the possession of objects even when their owners do not use them in accordance with the theory's rationale, for example because, as seems plausible, rights offering that kind of protection would actually foster more productive behaviour overall. Similarly, our theory may postulate more conditions for acts to bring about a property right, such as, again, that the act was clear and overt, but also that it was carried out under certain circumstances.

By contrast, the present point is one about how a theory of property rights can offer determinate content as to what acts count as original appropriation, and this comes in the form of acts that are in accordance with the theory's rationale. Note, however, that we cannot say what kind of act in fact counts as original appropriation before we know what the correct general justification of property rights is. For the nature of acts of original appropriation depends on the general justification contained in the wider theory of property rights; it is part of the account of individuation provided by that theory.

4. A Lockean theory of property

This argument has the consequence that none of the traditional candidates for acts of original appropriation can be ruled out from the outset. In other words, despite the traditional criticisms of acts of original appropriation, it is perfectly

possible to hold a historical entitlement theory of property rights that specifies certain acts as capable of creating property rights for individuals over unowned objects under certain conditions. I will now try to illustrate this further by offering a possible interpretation of Locke's theory of property rights along these lines. This interpretation lends, I think, additional support to the argument above as it allows us to construct a picture of Locke's thought that avoids the standard criticisms noted above, lets some passages that are traditionally thought problematic fit in his overall theory more easily, and makes for, I think, a rather plausible view overall.

As pointed out above, Locke thought that the preservation of mankind is a fundamental duty of the law of nature, consistent with the will of God. In this light, he gave us a number of considerations that can be seen as forming a general justification of the practice of having property rights. These considerations stress the beneficial effects of the possibility of property rights in terms of how much there is for persons to own. Thus Locke writes that 'he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind'.[29] Locke also speculated about the (enormous) increases in resources brought about by productive labour facilitated by the existence of property rights. Throughout sections 40–3 of the Second Treatise he is at pains to make this plain by comparing various examples from his England to (some sort of) accounts of areas in the world where private property was not in place.

The implications of this for Locke's theory of appropriation will be clear by now. If such is the kind of general justification of property rights to which Locke adheres, then his account that acts of labouring on unowned objects count as original appropriation can be seen as the natural extension of the more general view. For Locke, it is *labour* which leads to the huge increases in stock in society (Locke repeatedly mentions figures ranging from 90 percent to 99 percent of its value being due to labour) and thus it is only natural to say that an act of labour can bring about a property right over an unowned object. To labour on an unowned object is to do with it what, in view of the general justification, we think is desirable (that is, employ it productively). Given that it is desirable for objects to be employed productively[30] *and* that it is precisely the point of property rights that they accord protection for such use, an act of labour on an unowned object is the 'natural' act of original appropriation.[31]

This interpretation of Locke's views allows us to see his theory as a natural whole. For example, it makes Locke's claim that there are *provisos* that specify the conditions under which acts of labouring can bring about property rights an integral part of his theory – instead of an oddity that needs to be explained. First, Locke's proviso that appropriation only goes through if one leaves 'enough, and as good' for others clearly ties in with the general justification of property. It is precisely the point of property rights that they lead to an increase in goods. But if one's appropriation were to lead to a situation wherein others were so badly off that they no longer had enough and as good as they would have in a state of

nature, the practice of property rights would defeat its essential purpose: to make people better off.[32]

We can give a similar interpretation of the so-called Spoliation Proviso, an element that is often said to sit uneasily within Locke's wider theory. For Locke, the rights created through appropriations of unowned objects in the state of nature are subject to the condition that these objects are not let go to waste:

> he that so employed his Pains about any of the spontaneous Products of Nature, as any way to alter them, from the state which Nature put them in, *by* placing any of his *Labour* on them, did thereby *acquire a Propriety in them*: But if they perished, in his Possession, without their due use; if the Fruits rotted, or the Venison putrified, before he could spend it, he offended against the common Law of Nature, and was liable to be punished; he invaded his Neighbour's share, for he had *no Right, farther than his Use* called for any of them, and they might serve to afford him Conveniencies of Life.[33]

Locke writes immediately after:

> The same *measures* governed the *Possession of Land* too: Whatsoever he tilled and reaped, laid up and made use of, before it spoiled, that was his peculiar Right; whatsoever he enclosed and could feed, and make use of, the cattle and Product was also his. But if either the Grass of his Inclosure rotted on the ground, or the Fruit of his planting perished without gathering, and laying up, this part of the Earth, notwithstanding his Inclosure, was still to be looked on as Waste, and might be the Possession of any other.[34]

Again, such remarks seem a rather natural extension of the view here attributed to Locke. To labour on an unowned object is to do with it what is desirable and what should be done to it. For the productive use of natural resources is both beneficial in general and consistent with the will of God. Productive use of an unowned object is the rationale behind the justification of property rights. But if an act of original appropriation were to lead to a situation in which property rights bring about the waste of an object, the very grounds of those rights would be perverted. Thus we are not confronted with an uneasy situation in which we need to explain how spoliation may void an otherwise fine act of appropriation. For it avoids the conclusion that, since labour mixing may of itself provide me with a title to an object, we are here facing a conflict between what is consistent with the will of God and an individual's rights. Surely, such an outcome would have been alien to Locke's mind. Therefore, on this interpretation the Spoliation Proviso is very much part of Locke's wider theory of property rights.

There is another passage that is often thought to sit oddly with Locke's views that the proposed interpretation can explain. This concerns Locke's remarks that certain acts can constitute original appropriation even though they seem to not involve any real value adding through labour at all. He writes:

> He that is nourished by the Acorns he picked up under an Oak, or the Apples he gathered from the Trees in the Wood, has certainly appropriated them to himself . . . When did they begin to be his? When he digested? Or when he eat? Or when he boiled? Or

> when he brought them home? Or when he pickt them up? And 'tis plain, if the first gathering made them not his, nothing else could.[35]

It is often argued that this passage constitutes the *reductio* of Locke's theory of labour mixing as appropriation. Surely the mere picking up of an acorn cannot be thought to constitute already such a labour mixing, or a significant enough instance of it. But again, on the present interpretation the passage makes perfect sense. Labour mixing merely functions as a means of individuating property rights (and is connected to the general spirit of property rights), thus it is perfectly possible for Locke to hold that even simply picking up an acorn may do the job. For Locke, picking up an acorn counts as original appropriation.[36]

5. Conclusion

I have said that the standard criticisms of the idea of acts of appropriation fail to establish that there can be no acts that have the moral consequence of establishing a person's having a property right over a previously unowned object. The reason is that such criticisms mistakenly expect the account of original appropriation to perform the justificatory task of a theory of property rights. Instead, this justification should take place at the level of justifying an ongoing practice of people being permitted to claim such rights against each other. Against this background we can specify which acts will count as original appropriation. Thus, our account of acts of original appropriation does not have to carry the justificatory weight of a theory of property rights. Moreover, what counts as appropriation will not just be a matter of mere convention. A 'natural' act of original appropriation, as I have called it, is an act by which a person begins to satisfy the general conditions for justified property rights. Finally, I put forward an illustration of this view by offering an interpretation of Locke's thoughts on property rights.

Conceiving of original appropriation in the manner here defended has many advantages. For example, it leaves ample room for plausible limitations to our property rights when these limitations are themselves derived from a theory's rationale. We saw the benefits of this in the possibility of interpreting Locke's provisos as integral parts of his wider theory of property rights.

Another important advantage of this view is that it allows for some necessary flexibility in our account of original appropriation. For example, it should no longer come as a surprise that acts of appropriation can *only* bring about property rights with regard to unowned objects, as this will be among the conditions set by the general theory for acts to have that significance. Moreover, it leaves room for the possibility of acts of appropriation of new forms of property, such as intellectual property, and for new forms of *appropriation*, such as 'telepossession', a term coined by a court of law when it allowed the establishment of rights in a sunken treasure through the use of remote video cameras, instead of by physical possession.[37]

With this account of original appropriation in place, it is easy to see why the popular conclusion that theories of historical entitlement are discredited does not follow from the criticisms of the idea of acts of original appropriation. For the correct general justification of property rights may well be one that tells us that our practice should be one that follows the dictates of a theory of historical entitlement. Under such a theory, the rights people have with respect to objects will depend on the past legitimate exercise of individuals' powers to transfer their property rights over objects to others. In addition, the wider theory may also specify certain 'natural' acts of original appropriation, such as the productive use of resources involved in labouring on an object. Here we have a textbook case of a theory of historical entitlement with attached to it a specific notion of what counts as original appropriation.

I have not said much in defence of such a historical entitlement theory in this article. I take it that the defender of such a view will point to the productively beneficial effects for all of decentralizing the decisions on how to allocate resources. Similarly, a defender of the historical entitlement theory will argue that the best practice of property rights is one that includes the respecting of acts of original appropriation. Here the historical entitlement theorist can take comfort in the fact that allowing individuals the possibility unilaterally to appropriate unowned things is itself, under relevant circumstances, economically efficient.[38] As such, individual unilateral original appropriative acts are a natural part of a historical entitlement theory.

One thing the critics of the idea of acts of appropriation are right about is that the fact that a person is able to appropriate things cannot itself serve as a justification for the existence of property rights. Indeed, that would be to get things the wrong way around. The right view, I have argued, is that, since persons can be justified in having property rights, they must be able to appropriate. But the fact that a theory of justified property holdings is theoretically prior to an account of justified acts of original appropriation does not warrant the conclusion that past acts of appropriation have no relevance today.

There may, of course, be good reasons for abandoning theories of historical entitlement. But such a conclusion should follow from what turns out to be the true general justification of property rights. It cannot be thought to follow from the insight that there are no intrinsic acts of appropriation. Moreover, it is perfectly possible that a historical entitlement theory of property rights has a place within a wider theory of justice. But one thing that will not do is to assert, with Waldron, that the standard critiques of acts of original appropriation show that legitimate property rights must be subject to a straightforwardly distributional theory.

notes

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1. I will speak loosely of persons owning things or objects, although this is a simplification. Rights of ownership are made up of various components and various instances of ownership may see different constellations of those components. It may even be true that there is not even an essential 'core' of components that all instances of owning an object share. See, for example, A.M. Honoré, 'Ownership', in *Oxford Essays in Jurisprudence*, edited by A.G. Guest (Oxford: Oxford University Press, 1961). Additionally, it is not at all true that every instance of a person owning something is an instance of a person owning a physical object. Merely for the sake of brevity, I will keep talking here as if each person owns, quite simply, an object. I believe this simplifying assumption has no important ramifications.
2. Of course, the most famous recent example of this kind of theory is Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), Part II. Nozick in fact identified three principles that make up a historical entitlement theory: (1) a principle of just transfer, (2) a principle of just acquisition, and (3) a principle of rectification for unjust incidents that occurred in the history of an object's history of being appropriated and transferred.
3. A. John Simmons writes that theories of original appropriation bring together the appealing intuitions 'that private property in some form under some conditions must be morally acceptable, that such ownership must have a point of origin, but that such ownership cannot arise from nothing, requiring instead a morally interesting human act (or sets of acts) as cause'. See A. John Simmons, 'Original-Acquisition Justifications of Property', *Social Philosophy and Policy* 11 (1994): 65.
4. Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), p. 280 (original emphasis).
5. In addition to Waldron, *The Right to Private Property*, see, for example, Allan Gibbard, 'Natural Property Rights', *Nous* 10 (1976): 77–86 and Leif Wenar, 'Original Acquisition of Private Property', *Mind* 107 (1998): 799–819. Wenar's own theory, set out after his critique of original appropriation, is compatible with the argument of this article, although he seems to fail to realize the ramifications.
6. Judith Jarvis Thomson believes most philosophers, including herself, accept 'The Ownership-Has-Origins Thesis: X owns a thing if and only if something happened that made X own it.' See Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), p. 323.
7. See Nozick, *Anarchy, State and Utopia*, p. 178.
8. John Locke, *Two Treatises of Government*, edited by P. Laslett (Cambridge: Cambridge University Press, 1988), Second Treatise, Section 27. Subsequent references to the *Two Treatises* will be by number of the book and paragraph. This reconstruction of Locke's idea of mixing labour is not entirely uncontroversial. The interpretation follows Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994).
9. Simmons puts it nicely: 'Locke's strategy is to show that *some* private corporal acts

(i.e., those involving purposive labor on unowned nature) are at least as morally significant as contracts between persons or civil laws backed by threat of sanction.' See Simmons, 'Original-Acquisition Justifications of Property', p. 72.

10. Cicero is said to have held something like this view, drawing on an analogy with seats in a theatre in Cicero, *On Ends*, Book III, xx, 67. Lawrence Becker discusses the idea at some length in Lawrence Becker, *Property Rights: Philosophical Foundations* (London: Routledge and Kegan Paul, 1977), Ch. 3. On the other hand, originally the Stoics used the theatre analogy to show that there can be only temporary possession of commonly owned property, not private property. I would like to thank an anonymous referee for helpful comments on this point.
11. Samuel Pufendorf would have said I own the apples; the trees remain in common. See Samuel Pufendorf, *Of the Law of Nature and Nations* (Oxford: J. Churchill et al., 1703).
12. Nozick, *Anarchy, State and Utopia*, p. 175. See also Waldron's criticisms of Locke's views in Waldron, *The Right to Private Property*, Ch. 6.
13. For additional criticisms, see Becker, *Property Rights*, Ch. 3.
14. Pufendorf, *Of the Law of Nature and Nations*, Book IV, Ch. 4, Section 5, p. 322.
15. See Waldron, *The Right to Private Property*, p. 265. It seems that the difficulty of formulating a plausible account of acts of appropriation led Robert Nozick to refrain from specifying anything like a theory of his own. (Nozick confined himself to simply noting that a theory based on historical entitlements will need some account of this.) Although for now I will proceed as if this is indeed ground for concern, it is worth noting that it is not evident that acts of original appropriation are *unique*. If I buy a chocolate bar in a shop, all others lose the liberty to do so; if I stand in the middle of the street, drivers gain a duty to stop. Additionally, Gaus and Lomasky suggest that performing deserving actions has similar effects as well. See Gerald Gaus and Loren Lomasky, 'Are Property Rights Problematic?' *The Monist* 73 (1990): 483–503.
16. Judith Jarvis Thomson offers a similar argument. See Thomson, *The Realm of Rights*, pp. 326–7. Perhaps one might think that what prevents the additional appropriating effect is precisely that the object is already owned, as Waldron, for example, argues in Waldron, *The Right to Private Property*, Ch. 6. But this will not do. The idea we are investigating is that there are *natural* acts of appropriation, acts the performance of which creates a property right. The question is, if I manage to perform such an act on an object you own, *why* should I not gain a right to it?
17. Eric Mack employs a similar idea in Eric Mack, 'The Natural Right of Property', *Social Philosophy and Policy* (forthcoming). I am grateful to an anonymous referee of this journal for directing my attention to this article and to Eric Mack for sharing it with me.
18. Say the worry is that appropriation allows one person to subject others to her will by creating duties for them. Here, too, the problem must be about the existence of a scheme of property rights in general. For it must be the *subjection* (as instantiated by all existing property rights) that is problematic, not just the *transition* from a situation of non-subjection to a situation of subjection. *If* such subjections are justifiable, then surely a particular token of such a subjection will, given the appropriate circumstances and conditions apply, be justifiable as well. I thank Thomas Christiano for pressing me on this point.
19. As John Stuart Mill writes: 'Private property, in every defence of it, is supposed to

mean the guarantee to individuals of the fruits of their own labour and abstinence.' See J.S. Mill, *Principles of Political Economy*, edited by Jonathan Riley (Oxford: Oxford University Press, 1998), Book II, Ch. 1, Section 9.

20. As David Schmidtz writes: 'in taking control of resources and thereby removing those particular resources from the stock of goods that can be acquired by original appropriation, people typically generate massive increases in the stock of goods that can be acquired by trade'. See David Schmidtz, 'The Institution of Property', *Social Philosophy and Policy* 11 (1994): 46. See also David Schmidtz, 'When is Original Appropriation Required?' *The Monist* 73 (1990): 504–18.
21. Something along these lines is endorsed by Waldron and, interestingly, John T. Sanders. See John T. Sanders, 'Projects and Property', in *Robert Nozick*, edited by David Schmidtz (New York: Cambridge University Press, 2002): 34–58.
22. See Locke, *Two Treatises of Government*, I, 33. Locke's remarks that the fundamental duty of the law of nature is the preservation of mankind can be found throughout both treatises. Mack offers an interesting argument that derives a natural right of property for individuals from this element of Locke's thought. See Mack, 'The Natural Right of Property'.
23. Nozick, *Anarchy, State and Utopia*, p. 177. Thus, in my view, Waldron misrepresents Nozick's project when he imputes to him the view that individuals' acts of appropriation are what *justify* property rights. See, for example, Waldron, *The Right to Private Property*, p. 284. I believe Nozick's discussion on pp. 179–81 of *Anarchy, State and Utopia* lends further support to my claim. Locke of course also stresses these effects of property, for example in Locke, *Two Treatises of Government*, II, 36, 37, 40–3. (See also Section 4 of this article.)
24. Individuation will, of course, require more than only an account of what counts as original appropriation. For there are more contexts in which we need to know how P can legitimately obtain O. Most will involve P coming into possession of O when it has already been in someone's possession. So our theory must also tell us something about these cases. In other words, it will very likely include a principle of the just transfer of property.
25. Of course, it still has to be shown that such unilateral acts of original appropriation are consistent, or required, by the general justification of property rights. However, my point here is about the structure of a theory of property rights, not a substantive one about what is the correct such theory. (In the Conclusion, I will offer some preliminary reflections on this matter.)
26. This problem would be a very serious one for a theory of historical entitlement, as one of the central tenets of such a theory is that the legitimacy of people's holdings can be determined entirely by tracing such holdings' pedigree, even if this means going back to the very first appropriation. That is, theories of historical entitlement need to be able to conclude that property rights may arise by a unilateral act in a situation in which such rights are not yet in place; otherwise, a justified practice of property could never get started. However, the force of the idea of 'natural' acts of original appropriation developed below does not depend on political society or an established convention being in place. Thus the historical entitlement theorist can consistently endorse the conclusion that a practice of property rights can start by a first legitimate act of original appropriation. The argument for 'natural' acts of original appropriation thus allows us to maintain both that the significance of acts of

original appropriation is theoretically derivative and that such acts make it possible for property rights to be created in a situation in which no such rights are yet in place. I would like to thank an anonymous referee for insisting that I clarify this point.

27. Carol Rose emphasizes this in her stimulating piece on adverse possession. See Carol Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, CO: Westview Press, 1994), Ch. 1.
28. I insist on putting the word *natural* in inverted commas to highlight the point that these are acts whose morally relevant effect is theoretically derivative – distinguishing a 'natural' act of original appropriation from the acts against which the critiques discussed above are directed.
29. See Locke, *Two Treatises of Government*, II, 37. See also ibid., II, 36: 'who by his Industry . . . has increased the Stock of Corn'.
30. Here again the connection with the will of God, as revealed in the fundamental law of nature, is important. Locke speaks of the times when humans first started peopling the earth: 'The Law Man was under, was rather for *appropriating*. God Commanded, and his Wants forced him to *labour* . . . And hence subduing or cultivating the Earth and having dominion, we see are joyned together. The one gave Title to the other. So that God, by commanding to subdue, gave Authority so far to *appropriate*. And the Condition of Humane Life, which requires Labour and Materials to work on, necessarily introduces *private Possessions*.' See ibid., II, 35.
31. The theoretically derivative nature of 'natural' acts of original appropriation allows for this interpretation to be consistent with the observations of Karl Olivecrona or G.A. Cohen that Locke nowhere says that it is the *value-adding* character itself of labouring on a resource that grounds a property right. See Karl Olivecrona, 'Locke's Theory of Appropriation', *Philosophical Quarterly* 24 (1974): 220–34 and G.A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995), Ch. 7.
32. Note that this also means that the 'enough, and as good' proviso may be satisfied through the spin-off effects of the possibility of appropriation. This is the interpretation favoured by Nozick and Schmidtz. See Nozick, *Anarchy, State and Utopia*, pp. 175–6; Schmidtz, 'When is Original Appropriation Required?' For a good discussion of various possible ways to interpret the proviso, see Jeremy Waldron, 'Enough and as Good Left for Others', *Philosophical Quarterly* 29 (1979): 319–28. At the same time, the present interpretation of the 'enough, and as good' proviso explains how its significance can be a lasting one, possibly affecting past appropriations at a later time. For if the circumstances that the theory specifies as generating a justification for property rights were to change in important respects, we should expect people's property rights to come into question again. This point is recognized by Nozick in his discussion of the circumstances of legitimate property rights. Nozick, too, believes that 'Each owner's title to his holding includes the historical shadow of the Lockean proviso on appropriation.' See Nozick, *Anarchy, State and Utopia*, p. 180. For an interesting application of the same idea in the other direction, see Jeremy Waldron, 'Superseding Historic Injustice', *Ethics* 103 (1992): 4–28.
33. Locke, *Two Treatises of Government*, II, 37.
34. Ibid., II, 38.
35. Ibid., II, 28.
36. Daniel Russell's argument about Locke's labour theory of value could make an

interesting counterpart to this interpretation. See Daniel Russell, 'Locke on Land and Labour', *Philosophical Studies* 117 (2004): 303–25.

37. See *Columbus-American Discovery Group Inc.* v. *Atlantic Mutual Ins. Co.*, 1992 (974, F. 2d 450-4th Cie 1992). See also Boudewijn Bouckaert, 'Original Assignment of Private Property', in *Encyclopedia of Law and Economics, Volume II: Civil Law and Economics*, edited by Boudewijn Bouckaert and Gerrit de Geest (Cheltenham: Edward Elgar, 2000), p. 12. The chapter can be downloaded at http://allserv.rug.ac.be/~gdegeest/1100book.pdf.
38. It beats, thereby, other potential mechanisms, such as an auction. See Bouckaert, 'Original Assignment of Private Property'.

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