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Uncomfortable Bedfellows: Locke and the Libertarian Theory of Property

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UNCOMFORTABLE BEDFELLOWS: LOCKE AND THE LIBERTARIAN THEORY
OF PROPERTY

by

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Uncomfortable Bedfellows: Locke and the Libertarian Theory of Property

Abstract:

Libertarians, such as Robert Nozick, have often appealed to Locke's labor theory as the basis in which to defend full ownership rights to property. My central claim is that this is a mistake. Locke, I argue, is not a comfortable libertarian bedfellow for the following three reasons. (1) Locke's account of property neither implies rights to full ownership, nor was Locke himself committed to the view. (2) The conditions Locke's labor theory places on property rights would generate a state that more closely aligns with the welfare state than the libertarian minimal state. (3) Even when we ignore Locke's theological commitments—commitments that tend to support (1) and (2)—and operationalize his labor theory on secular grounds, full ownership rights would not follow. I conclude that if libertarians are serious about defending rights to full ownership, it's unlikely to be found in Locke.

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Introduction

John Locke is often championed as one of the first major advocates of natural-rights individualism. It's not surprising, then, to find libertarians taking their cues from Locke's *Second Treatise*. With expressions from, "no one ought to harm another in his Life, Health, Liberty, or Possessions," to "every Man has a Property in his own Person; this no Body has any Right to but himself," libertarians can find much to love in Locke.¹ But, as I will argue, once you peel back the veneer, libertarians are not going to find what they are looking for in Locke. Close examination of Locke's labor theory of property reveals that both the logic and natural law framework in which his argument operates does not easily lend itself to the full ownership rights libertarians are committed to—rights that, if enforced, would severely limit the role of the state. This is for three reasons. First, Locke's labor theory of property cannot justify natural rights to transfer or income—two rights of paramount importance to libertarian thought. Nor should Locke be read as implying as much, for aside from rights to use and possess, Locke's account of property is notably and intentionally silent on justifying any particular rights to property, let alone full ownership rights. Second, the conditions that Locke's natural law imposes on property would contravene full ownership. In fact, rather than inaugurate a libertarian minimal state, these conditions would inaugurate a state with powers comparable to the welfare state. Lastly, even when we abstract away from Locke's theological commitments and operationalize his labor theory on

¹ §6 & §27, respectively.

² Nozick is notably silent on this, but since this silence undermines much of his project, and

secular grounds, full ownership rights do not follow. Locke is not a comfortable libertarian bedfellow.

I. Nozick's Libertarian Theory of Property

If the preceding argument is to have any modicum of success it will be helpful to have an account of libertarianism against which to compare Locke's theory of property. Here I follow Robert Nozick's *locus classicus* of libertarian thought, *Anarchy, State, and Utopia* (ASU). Proceeding from Locke, Nozick asserts rights as natural. Rights are natural in the sense that they are pre-institutional; they do not depend on established social institutions or distributional considerations for their normative force, but on individuals qua individuals. Thus, the core of Nozick's libertarian project is concerned with ensuring the rights we have and the content assigned them respect the 'separateness of persons'. But what exactly does it mean to respect the 'separateness of persons'? Nozick appropriates the Kantian idea that for another to use us as a means to their end, without our consent, fails to respect us as persons; they fail to respect us as autonomous agents with "the ability to regulate and guide [our] life in accordance with some overall conception [we choose] to accept" (p. 49). Taking this separateness of persons seriously, Nozick asserts rights as side-constraints. Side-constraints ensure that no one can impose nonconsensual obligations on us, regardless of the potential benefits such obligations might bring about, without violating the moral boundaries defined by our individual rights. Thus Nozick remarks,

Your being *forced* to contribute to another's welfare [via taxation] violates your rights, whereas someone else's not providing you with the things you need greatly, including the things essential to the protection of your rights, does not *itself* violate your rights, even though it avoids making it more difficult for someone else to violate them (p. 30).

However, nothing has yet been said on just what rights we possess.² For Nozick the individual is sovereign, and individual rights are to reflect this sovereignty by enabling complete control over one's mental and physical assets and whatever results from them (p. 225). One way to describe the significance of such rights is to say X has full ownership (FO). Borrowing from A.M. Honore's (1987) analysis of ownership, I define FO as follows:

FO: X has full ownership of z (where z may equal X) if and only if (1) X has a right to use, possess, manage, destroy, transfer, and gain income from z; and (2) X possesses these rights to the greatest extent possible of unrestricted scope.³

An important corollary of this definition is that it allows us to ascribe ownership to someone even if they do not possess *full* ownership. X may own z but X does not *fully* own z; instead, X may have only partial ownership of z. For instance, Jane might own herself, but not *fully* in the sense that she has a right to commit suicide—e.g. a

² Nozick is notably silent on this, but since this silence undermines much of his project, and at the risk of imputing to him a position he does not endorse, I will attempt to fill in this gap with what, I think, is a plausible view given his commitments. More on this below.

³ Honore refers to the right to transfer as a right to capital—i.e. the *at will* power to alienate, and the liberty to consume, waste, modify, or destroy it. See p. 170.

right to destroy. It's also possible that Jane has the full complement of rights above (i.e. rights to use, possess, manage,...), but not to the greatest extent possible of unrestricted scope. For instance, Jane may have a right to income but is entitled to only a portion of the market value that she receives from a transaction, not the full market value. The remainder of that value is taxed for redistribution by the state. In this case, Jane does not possess an *unrestricted* right to income. In both examples, Jane owns herself but possesses only partial ownership.

Nozick takes issue with partial ownership. As he derisively remarks, partial ownership allows others to “decide what you are to do and what purposes your work is to serve apart from your decisions; it gives them a property right in you; [just] as having such partial control and power of decision, by right, over an animal or inanimate object would have a property right in it” (p. 172). Of course, to claim that individuals possess FO is not to claim that everything is permitted. Individuals are not permitted to use their body in a manner that might violate the FO rights of others. So in a limited sense, we do have nonconsensual obligations imposed on us, but if, according to Nozick, we are to take seriously the separateness of persons, these are the only nonconsensual obligations that can be imposed on us.⁴ FO rights plausibly ensure this.

The implications of FO are quite substantial. What I may do with my body—and the skills, talents, and labor thereof—is entirely at my discretion. I may, for instance, choose to alienate my right to a hair on my head to save 100 lives, but I am under no *enforceable* obligation to do so, nor do I ever have an enforceable

⁴ Within the scope of FO, X can have a partial property right in Y, without Y's consent, but only if Y reneges on her promise to X, or Y violates X's FO rights.

obligation to do so. We might balk at such moral austerity. Moral intuition, in such trivial cases of harm, might nudge us toward a consequentialist analysis of rights, as it's tempting to think being forced to part with a hair on our head is far outweighed by the benefit of saving 100 lives. Yet this is precisely what Nozick is rallying against. For if we considered rights in this vein, rights would no longer be treated as inviolable side constraints, but as violable according to some social rather than agent-relative dimension. A further implication of FO is that the rights we possess are negative rights. X must refrain from harming Y, but X has no enforceable obligation to *assist* Y. Positive rights exists only in so far as they are obligations incurred through voluntary contract. Any other basis for having a property right in X, such as on the basis of need, desert, or equality—reasons for potentially having positive rights—would violate X's self-ownership.⁵

So far, we have addressed the content that Nozick thought that rights have in regards to our person, but what about rights to natural resources? Nozick extends FO to natural resources but subject to the qualification that his entitlement theory is satisfied. Thus, X can fully own z if and only if the following conditions are met:

- 1.) Justice in acquisition
- 2.) Justice in transfer
- 3.) Justice in rectification

Justice in acquisition concerns how individuals acquire a title over un-owned resources (p. 150). Justice in transfer holds that a transaction is just if and only if it is voluntary (pp. 150, 160-164). Justice in rectification serves to rule out any

⁵ Nozick does allow special cases of moral catastrophe to override FO. See p. 30 fn., & p. 180.

appropriation of property that resulted from coercion or theft (p. 152). Provided all three principles are met, X fully owns z. No individual or government can ever have a partial claim to X's property.

For purposes of this paper I will ignore conditions (2) and (3), while focusing on (1). It is Nozick's justification for (1) that is deeply indebted to Locke's labor theory of property. While I will say much more on Locke's position below, it is worth just briefly noting the logic of Locke's argument and Nozick's appropriation of it. As Locke asserts, it is the fact that individuals own themselves and invest a part of themselves in an un-owned object that gives them a property right to it. Nozick follows suit, claiming that whatever flows from our natural assets we are entitled to (p. 225).⁶ But self-ownership, as Locke acknowledged, is not sufficient for ownership in natural resources. How such resources are distributed does matter. If your appropriation leaves me worse off than I was before, then your claim to property in natural resources seems hardly justified. Thus, Locke introduced his 'enough and as good' condition as a constraint on property rights. Again Nozick follows Locke here, although, as I will show, absent Locke's natural law, Nozick's appropriation of Locke's 'enough and as good' condition presents a considerable difficulty for libertarianism.

For Nozick then, rights are natural, they are inviolable, and they are negative; individuals possess FO over their persons and can extend this ownership onto un-owned goods. Given this content, it's not surprising then that Nozick conceives of his project as justifying no more than a minimal state, with powers limited to that of

⁶ See also, p. 160, 155, 172.

protecting individuals from force, theft, fraud, and the enforcement of contracts.

Taxation for purposes other than the strict enforcement of FO is equivalent to theft.

And since rights are viewed as side-constraints they are strictly negative. The state

“may not use its coercive apparatus for the purpose of getting some citizens to aid others or in order to prohibit activities to people for their *own* good or protection”

(ix). Both compulsory redistribution and paternalistic interference are ruled out as

appropriate functions of the state. As we will see, Locke’s account provides the

scaffolding for a more expansive state than the minimal state of Nozick—one with

stronger ties to the welfare state than the libertarian minimal state.

II. Locke’s Labor Theory of Property

The Problem of Consent in Original Acquisition

Locke stresses early on in the *Second Treatise of Government* the source of our natural rights, the Fundamental Law of Nature: humankind is to be preserved as much as possible. But why must humankind be preserved? It is because we are the property of God, “the Workmanship of one Omnipotent, and infinitely wise Maker ...made to last during his, [and] not one another’s Pleasure” (§6). Failing to preserve one’s self or humanity is to violate God’s property. Thus, Locke writes,

As every one as he is *bound to preserve himself*, and not to quit his Station willfully; so by the like of reason when his own Preservation comes not in competition, ought he, as much as he can, to *preserve the rest of Mankind*, and may not unless it be to do Justice to an Offender, take away, or impair the life,

or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another (§6).

Each of us, then, has a natural right to preservation and a correlate duty to refrain from interfering with the preservation of others. But if we are bound by God to preserve ourselves, then it would also seem to follow that we have a natural right to the *means* of our preservation. It would be perverse to suppose God commands us to preserve ourselves but denies us access to the fruits of the earth necessary for preservation. To this end, Locke writes, “*Reason*, which tells us, that Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence[... for] God [...] *has given the Earth to the Children of Men*, given it to Mankind in common” (§25). However, this grant of universal ownership to the commons poses a problem, for if all the earth belongs to humanity in common, then no one can have “private Dominion, exclusive of the rest of Mankind” (§26).⁷ Any appropriation of an item from the commons would violate the claim-rights of all to which the item belongs.⁸ It would require that every appropriation be subject to universal consent. As Locke recognized, this would have the absurd result that most would starve in the face of abundance, an abundance that God has provided for our preservation (§28). So it cannot be consent that fixes property in external goods. Instead, what Locke

⁷ Locke’s unwillingness to accept private dominion over universal dominion, as a legitimate form of ownership over the commons, was a result of his repudiation of Sir Robert Filmer’s view. According to Filmer, the divine right of kings passed from an original grant of “*Private Dominion*” from God to Adam claiming all the Earth belonged to Adam (I, §23). Universal dominion denies that the earth belonged solely to Adam, hence denying the link between Adam and the monarchy. I will say more on this below.

⁸ By claim-right I mean, if X has a claim-right to z, then others must refrain from using z, unless X consents to its use.

proposes as a solution to the problem of consent in original acquisition is his celebrated labor theory of property. Individuals can acquire a property right in the commons, without the consent of their fellows, provided the following four conditions are met: (1) X must invest her labor in the commons; (2) X must leave enough and as good for others; (3) X must not allow what she has appropriated to spoil; and (4) before X can have any claim to the surplus value her labor generates, X must first work to ensure the subsistence needs of the non-able-bodied are met. I will explain each in turn.

1.) The Labor Condition

In a famous passage that echoes the self-ownership thesis, Locke introduces the labor condition:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has 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" (§27).

What grounds a claim to ownership is that X has invested a part of herself in z, and since X owns herself she also owns the object. But what exactly does it mean to mix your labor with something? Does my shaking the oak tree to acquire its acorns give me property in the oak tree, or just the acorns? Nozick provides a vivid example of the oddness of the labor-mixing claim (ASU, p. 174-5). Suppose you own a can of

tomato soup, but in your zeal to open it, it spills into the ocean. Should we say that you lost your labor or that you now own the ocean? Clearly, as it stands, Locke's labor mixing strategy is insufficient to establish a title to something. But Locke is not yet out of options.

Locke is eager to show the magnitude of labor's addition to objects appropriated from nature. As he states, "what in them is purely owing to *Nature*, and what to *labour*, we shall find, that in most of them 99/100 are wholly to be put on account of *labour*" (§40). And if that were not enough, he gives us an account of labor's transformative power from raw, unimproved state, to useful end product:

For whatever *Bread* is more worth than Acorns, *Wine* than water, and *Cloth* or *Silk* than Leaves, Skins, or Moss, that is wholly *owing to labour* and industry. The one of these being Food and Rayment which unassisted Nature furnishes us with; the other provisions which our industry and pains prepare for us, which how much they exceed the other in value, when any one hath computed, he will then see, how much *labour makes the far greatest part of the value* of things, we enjoy in this World (§42).

Labor is not simply the mixing of kinetic energy with an object. Individuals come to possess a title to some un-owned object because of the value their labor adds to that object. I do not come to own the tree just because I happen to be the first to shake it. Rather, it is the care and attention I have spent in making the tree more productive than it was before that entitles me with a right to exclude others from its use. My productive use of the tree increases the common store and benefits us all by making the fruits of the earth more abundant.

There is, however, an ambiguity in Locke's "added value argument". If individuals own only the added value of their labor, it would suggest individuals do not own the land on which they labored, as the land would exist regardless of whether or not somebody labored on it. As Alan Ryan frames it, Locke's model of property is not a freehold title to a portion of the earth, but a leasehold title (1984, p. 31-32). It's not individuals who own the earth but God. We are merely stewards of God's property commanded to preserve our selves and others through its prudent use. We own the value of our labor but not the object in which our labor is invested.

2.) The 'Enough and as Good' Condition

However, if individuals only have a leasehold title to objects they add value to, does this mean others can also have a title to that object? Not if we assume, as Locke initially does, that resources are abundant:

He that had as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to, and not the Ground which God had given him in common with others to labour on, and whereof there was as good left, as that already possessed, and more than he knew what to do with, or his Industry could reach" (§34).

Notice the qualifier "as good left." Locke is clear that within conditions of abundance, the establishment of property through labor did not infringe an individual's right to the means of preservation. Provided X invested her labor in an

object and added value to it, X's appropriation from the commons could not be considered an act of robbery (§28). But if we move from a condition of abundance to scarcity⁹, then the added value of individual labor was not a sufficient condition to exclude others from an object's use. This was especially the case when doing so denied others the means to their preservation. Why, for instance, should the support and comfort of my being suffer simply because you happened to be the first to invest your labor in it? More importantly, why should anyone accept nonconsensual obligations to respect private property if doing so makes them worse off? Locke was keenly aware of the potential harm exclusive control over the commons could cause non-owners under conditions of scarcity, which led him to stress throughout *Of Property* the following condition:

X can appropriate from the commons without the consent of Y, provided X leaves enough and as good for Y.

We saw earlier what (1) Locke's labor condition entailed, but what exactly does Locke mean by (2) leave enough and as good? The following passage is illustrative:

Appropriation of any parcel of *Land*, by improving it [was not a] prejudice to any [...] Man, since there was still enough and as good left; and more than the yet unprovided could use. So that in effect, there was never the less left for others because of inclosure to himself. For he that leaves as much as another can make use of, does as good as take nothing at all. No Body could think himself injur'd by the drinking of another Man, though he took a good

⁹ The notion of scarcity that is assumed here and throughout the paper is scarcity in the relative sense, as a consequence of property rights where all un-owned goods are owned, and not in the absolute sense, as a result of natural resources being scarce within a geographic locale.

Draught, who had a whole River of the same Water left him to quench his thirst. And in the Case of Land and Water, where there is enough of both, is perfectly the same (§33).

So had Jack drank from the river, Jane would be no worse off than she was before. But had Jack appropriated the river, supposing it was the only river in their geographic locale, Jane would be worse off and likewise for all natural resources. If Jack appropriates all the fertile land near the river leaving Jane with the barren highlands, Jane is worse off than she was before. We can suppose that for the same yield, Jane must now invest four times as much labor than she would have had Jack not existed. Therefore, Jack's appropriation violates (2) the Lockean proviso. But this poses problem. As Judith Thomson (1990) remarks, if "the first labor-mixer must literally leave as much and as good for others who come along later, then no one can come to own anything, for there are only finitely many things in the world so that every taking leaves less for others" (p. 330). Does this mean Jack must relinquish his right to property? The problem here is whether we should interpret the 'enough and as good' condition in the literal or non-literal sense. The former would suggest that a sufficient stock of un-owned goods be left for others to appropriate, lest property owners violate non-owners right to the means of preservation. While the latter suggests that even if all natural resources were owned, provided non-owners are sufficiently compensated, their right to the means of preservation needn't be violated. Locke's own view is with the latter camp.

While Locke's 'enough and as good' condition functioned within a context of scarcity to guarantee each laborer a share of the commons necessary for their

preservation, this did not imply that each laborer must be guaranteed a share of un-owned goods in *kind*. Locke certainly allowed for the possibility, “where all the Land is possessed, and none lies waste” (§184).¹⁰ So we might suppose a laborer’s right to the means of preservation could just as easily be accommodated in a context of scarcity by offering the laborer a compensation package equivalent to what she was denied. We could say that while Jack’s labor transformed z (the fertile land near the river) into something that would not have existed otherwise, say $z+m$, where m is the surplus value Jack adds to z , Jack’s ownership of z prevents Jane from having access to z and thereby makes her worse off. Since Jane values Jack’s land more so than her own, Jack derives a scarcity value, n , due to his exclusive access to z . And since (2) ‘the enough and as good’ condition is violated, Jack can only claim the surplus value of his labor minus the scarcity value of his exclusive access, $(z+m)-n$, otherwise Jane is made worse off from Jack’s appropriation. What the account implies is that Jack need not relinquish his property right in z , but he does owe Jane compensation for violating her right to the means of preservation.

Two things are worth emphasizing in the above account. First, compensation is not unconditional. Jane’s right to the means of preservation is not a right to sit idle. It is not a positive right to be provided with the conveniences of life. “God, when he gave the World in common to all Mankind, commanded man also to labour” (§32). Jane must reciprocate by exercising her labor. Thus the compensation package Jack must offer can come in two forms: an offer of employment at a wage equivalent to the value of $(z+m)-n$, or an offer to annex a portion of his property

¹⁰ See also, §45.

equivalent to that value.¹¹ Second, Locke's use of the term 'preservation', in relation to the commons is quite narrow. "Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence" (§25). Everyone has a right to a basic subsistence, but this need not amount to an equal share of the earth's resources. Inequalities in resources are justified provided the subsistence needs of all are met. So in a context of scarcity, if Jack is to avoid violating the 'enough and as good' condition, and hence avoid violating Jane's right to the means of preservation, then Jack need not leave Jane an equal share. But he must leave Jane a share sufficient to meet her subsistence needs. Notice, on this account, that Jack's property right in *z* is not a permanent right. It is a right that ebbs and flows with the particulars of the population. For if we suppose that an additional laborer is introduced, say Jill, then Jill is also entitled to the same compensation package as Jane, and Jack's property right in *z* is further constrained.

3.) The Spoilage Condition

Aside from the 'enough and as good' condition, Locke also introduces the spoilage condition:

God has given us all things richly... But how far has he given it us? To enjoy. As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more

¹¹ Gopal Sreenivasan (1995) suggests this bifurcated strategy. See p. 51.

than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy (§31).

The spoilage condition is a condition on proper use. If I appropriate a dozen apples but only consume one while letting the other eleven rot, I violate the spoilage proviso. The same is true of land. If I fenced off a pasture but used only 1/3 of it, the remaining 2/3 is “to be looked on as Waste, and might be the possession of any other” (§38). Excessive appropriation beyond one’s subsistence needs suffers from two ills: it wasted effort, and it robbed others of their right to use the commons (§46). It violated God’s purpose in providing the earth for the preservation of humankind.

4) The Charity Condition

Earlier we saw that Locke’s Fundamental Law of Nature constituted the ground in which to derive the following two natural rights: a right to preservation and a right to the means of preservation. Thus far, these rights have been presumed to be strictly negative rights—rights that come attached with duties of non-interference, not duties of assistance. As a result, it’s reasonable to suppose that since labor entitles an individual to a property right in the commons, anyone who fails to exercise her labor is not entitled to the property of another. There is some truth to this claim, however, if left unqualified, anyone without the capacity to labor—e.g. the elderly, children, and the disabled—would be at a serious disadvantage within Locke’s state of nature. Consequently, in the *First Treatise* Locke points to a positive conception of rights:

As *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise; and 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 (I, §42).

Not only then do we have negative duties of non-interference, but we also have positive duties to provide assistance to others.¹² Naturally this duty to charity is not supererogatory. If I barely have enough to satisfy my hunger, it would be counter-productive to the goal of preserving humankind to suggest that my duties to others extend beyond my own subsistence, by giving what little food I have to others in a similar predicament. Nonetheless, once our subsistence needs are secured, self-interest is superseded by the interest of humanity as a whole and any individual surplus would be subject to the charity condition. Note that Locke did not think *all* were entitled to charity. “[God] gave [the world] to the use of the Industrious and Rational,” he did not give the world to the lazy and feckless (§34). Had able-bodied Jane squandered her property by imprudent conduct or simply refused to labor, Jane would not be entitled to Jack's surplus. Lockean charity clearly had limits.

¹² There are also numerous passages in the *Second Treatise* suggesting that Locke has not waived in his commitments from the *First Treatise*. See II, §5, 6, 70, 93.

III. Assessing Locke and the Libertarian

Having presented both Locke and Nozick's theory of property we are nearly in a position to draw out the uneasy relation between Locke and the libertarian. But before doing so, and if only to draw attention to their differences, the similarities between the two should not be discounted. Both start with the premise that individuals possess natural rights, and that these rights are independent of the state; any state that violates our natural rights is, ergo, illegitimate. Both hold some version of the self-ownership thesis and extend that thesis onto un-owned things; if X has property in herself and X mixes that property with something un-owned, X has property in that object.¹³ Both endorse the 'enough and as good' condition so as to obviate the need for consent in original acquisition; I'll say more on this below. Undoubtedly the two accounts share a family resemblance, a resemblance that likely led Nozick to remark, "only when some divergence between our conception and Locke's is relevant to *political* philosophy, to our argument about the state, will it be mentioned," (p. 9).

The remainder of this paper will be dedicated to the significance of this divergence. For despite their similarities, I will argue Locke's theory of property does not support the FO rights that Nozick covets for the following three reasons.

(1) Locke's theory of property neither implies full ownership, nor should it be read

¹³ Given Nozick's penetrating criticism of Locke's labor condition (ASU, p. 175) it might be doubted whether Nozick supports this Lockean inference. Yet despite his scrutiny, there are numerous passages scattered throughout ASU suggesting he remains committed to something like Locke's labor theory of property. So for purposes here, I will interpret him as doing so. See ASU, pp. 160, 155, 172, 225.

as such, for aside from rights to use and possess, Locke's account of property is notably and intentionally silent on justifying any particular rights to property, let alone FO rights. (2) The conditions that Locke draws from natural law and imposes on property do not support FO but contravene it, with serious repercussions for the emergence of the state; rather than support a minimal state, the conditions Locke imposes on property inaugurate a state with powers akin to the welfare state. (3) Even when Locke's labor theory is operationalized without recourse to natural law—often dubbed the 'Lockean' view and which Nozick's project is conceived as—it is doubtful this strategy could support FO rights.

1.) Implications and Non-Commitments

What Locke has shown so far is that if X is to have property in something: X must invest her labor in un-owned object z by adding value m to z; X must leave enough and as good for Y; X must not appropriate more than she can make use of; and X must provide a share of her surplus to the non-able bodied. However, while each condition may act as a constraint against property rights, nothing has yet been said on what *kind* of rights Locke thought us to possess. Should Locke be thought to establish full ownership rights—e.g. rights to use, possess, manage, destroy, transfer, and gain income from? I will argue that Locke leaves the question of what kind of natural rights to property we possess largely indeterminate. At most individuals have natural rights to use and possess. But the right to transfer and, hence, the right to income—two rights of paramount importance to libertarianism—are not justified by Locke's natural law. They are neither

implications of his theory nor are they rights that play any essential role within it. Instead, what Locke aimed to provide was the bare bones of property, of how property could emerge without the consent of one's fellows, and the conditions any system of property must meet so as to obviate the need for consent. As Locke himself affirms, the exact details of any property regime—what rights we possess and the scope of those rights, aside from the conditions that natural law attaches to them—were to be determined by civil society, not via natural law.

Locke was explicit in his contention that individuals could acquire property in the state of nature. Provided the conditions above were satisfied, X possessed a property right in z and thus could “exclude the common right of other Men” (§27). However, the fact that X has a property right in z does not entail that X has full ownership of z. All that is entailed by “[excluding] the common right of other Men” is a right to use and possess—i.e. the liberty to use z without the consent others, and the right to prevent others from its use, respectively. Neither, for instance, entails a right to transfer.

Now it might be supposed that such a right follows from the fact that X has invested her labor in z. Since X owns her labor X also has a right to alienate her labor. The idea might be that if X has a right to control her labor, then X should also be able to divest herself from it. And if X can divest herself from her labor, X also has the power to will her labor to another. Thus, X can be said to possess a right to transfer. For arguments sake, I will assume this to be the case. Notice that in order for X to transfer z to Y requires the following two conditions: (1) X has a right to transfer z and (2) Y has a right to acquire z. Since we are assuming X has a right to

transfer the question is whether Y has a right to acquire? As we saw within Locke's theory, what established a right to acquire is the exercise of labor and this is an obligation imposed upon us by God (§32). But this poses a problem. Consider the following two paradigm cases of transfer: gift exchange and market exchange. In the case of gift exchange, for X to transfer *z* to Y, Y must have invested her labor in *z* in order for Y to have a legitimate title to it on Lockean grounds. But if X gives *z* to Y, then presumably Y has not invested her labor in *z*. Y, therefore, acquires *z* illegitimately.¹⁴ Arguably the same is true in bilateral market exchanges where both parties have some object the other party desires. Suppose X engages in a market exchange with Y, trading *z* for *w*. X is now in possession of *w*, and Y is now in possession of *z*. However, neither X nor Y has directly invested their labor in the objects they each now possess. Thus, neither X nor Y can have a legitimate title to *w* and *z*, respectively. X may have a right to alienate her labor, but X does not have a natural right to transfer within the framework provided by Locke's natural law.¹⁵

Even if we do suppose the ownership of labor confers a right to alienate one's labor, and the problem of acquisition in transfer could be avoided, the relation

¹⁴ Jeremy Waldron (1981) makes a similar remark about inheritance: "To vest the earner's right in somebody else as a result of his death would amount to the creation of an *unearned* right of property—a right *not* arising from the investment of the labour of the person purporting to hold it. Succession, therefore, would undermine the justification of property entitlements on the basis of labour" (p. 39-40).

¹⁵ It might be replied that if we distinguish between *original acquisition*, acquiring what was un-owned, and *acquisition*, acquiring what was owned, we could circumvent the problem (Sreenivasan, 1995, p. 108). Since all transfers depend on acquisition rather than original acquisition we might suppose that so long as both parties consent to the transfer, Y can acquire *z* from X. Y need not exercise her labor in order to acquire *z* from X. Locke's own emphasis on property, as that which cannot be taken without individual consent, might be taken to imply this much (§138, 140, 193). However consent, by itself, is insufficient to establish that Y has a *natural* right to acquire *z* from X. For something to qualify as a natural right it cannot be consent alone that establishes its legitimacy, but some further special property of persons. Further argument is needed to establish this claim.

between labor and a natural right to income is tenuous at best. Consider the following example. Farmer Jane wants to sell her crop in the marketplace. Suppose the selling price of corn happens to double as a result of a recent drought. Jane, to her good fortune, happened to have a rain cloud over her farm while her competitors didn't. Since demand for corn remains high but the yield of corn is low, Jane can capitalize on her good fortune, selling her crop for double the profits. Should we say that Jane is entitled to the full value of her crop? In this case, much of the income Jane receives has little to do with her labor and everything to do with the transaction costs her competitors face (relocation costs associated with moving to less drought prone regions or finding alternative sources of water), and the preferences of those who prefer corn to any other commodity. If, as Locke says it does, the value our labor added to z entitles us to a property right in z , then any additional value—e.g. economic rents—not due to our labor, is value to which we are not entitled. What the account implies is that even if we suppose X possesses FO in her person, X does not possess FO in z . X is not entitled to the full value of z due to the fact that part of z 's value is determined independently of X 's labor contribution. X does not exercise control over this value.

This latter point is worth emphasizing for it points to a difficulty that all natural rights theories face in attempting to justify a natural right to income. Recall that a shared feature of natural rights is that they exist and are justified independently of social and distributional considerations. Jane acquires a property right in z by investing in it something she owns—i.e. her labor. Jane's natural title to un-owned z is justified not by reference to prevailing social and distributional

considerations, but by reference to particular moral properties of the individual. Thus, we get the inference from Locke's claim that everyone "has Property in his own Person" to the more robust libertarian claim that "every man has full ownership in natural resources."

Income, in contrast, is wholly dependent on existing social institutions. The value Jane receives for her labor within a marketplace can only be determined by reference to the existing distribution of goods. It is this reference to distributional considerations that casts doubt on the claim that individuals can possess a *natural* right to income in some un-owned good simply on the basis of self-ownership. Why, then, should we say that as a matter of natural right Jane has a right to income? Recall in Nozick's case, the appeal to FO was grounded in an appeal to the autonomy of persons. But how exactly does a natural right to income secure my autonomy when the income I receive is not something I exercise control over? There seems to be a relevant disconnect between the control I have over my person and the control I have over *the value of* my person. Where the former is intrinsic and self-determined, the latter is extrinsic and other-determined. Of course I might believe I have some control over the value of a good I own; I might have particular expectations attached to that value, and in the best of times my expectations might be realized or even surpassed, nonetheless I do not determine its value nor may I even identify with that value. So we might grant individuals natural rights to use and possess, as these rights are important in securing the autonomy of the person from the interference of others, but remain skeptical that a right to income can be grounded on this basis.

We might doubt the plausibility of the latter arguments on the grounds that they rely on *implications* that Locke, himself, did not affirm. In fact, Locke is suggestive at times of a more expansive set of rights, which would include rights to transfer and income. Consider the following representative sample of passages where Locke might be thought to presuppose a natural right to transfer:

- 1) And indeed it was a foolish thing, as well as dishonest, to hoard up more than he could make use of. If he gave away a part to any body else, so that it perished not uselessly in his Possession, these he also made use of. And if he also *bartered* [(emphasis mine)] away Plumbs that would have rotted in a Week, for Nuts that would last good for his eating a whole Year, he did no injury (§46).
- 2) [Money allows] a man [to] possess more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and Silver (§50).
- 3) *Paternal Jurisdiction*...is the Power Men generally have to *bestow their Estates* on those, who please them best (§72).

Given these passages, it would be fruitless to argue that Locke did not permit transfers within the state of nature, but the question I want to pursue is whether this permission follows from Locke's natural law in the sense that would qualify it as a natural right. I argue that in none of the three passages mentioned, should Locke be read as justifying a natural right to transfer in the sense presupposed by

libertarians.¹⁶ The upshot of doing so should help bolster the claim that Locke's theory of property was not intended to justify any particular system of property rights, but something much less ambitious. Locke's intent was merely to lay the groundwork for property, to show how property rights in the commons could be generated without the need for consent.

Notice that Locke's reference to bartering in (1) is a corollary of the spoilage condition mentioned earlier. The spoilage condition imposes a due-use condition on property. No one could appropriate more than they could make use of, nor would they have an incentive to do so, for any surplus an individual procured was a violation of God's property.

[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 Neighbor'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...The same measures governed the Possession of Land too (§37).

If the acquisition of surplus, beyond what was necessary to sustain one's self in the state of nature, was a violation of the Law of Nature, then any bartering that took place within Locke's context was simply a function of the spoilage condition ensuring that no one has appropriated more than they can make personal use of, and not a result of any principled reason independent of this condition. But if this is Locke's intent behind the spoilage condition, it's hard to make sense of the need for

¹⁶ I will ignore a right to income, as this right, I take it, is dependent on a right to transfer. If it can be established that individuals do not possess a rights to transfer, then they do not possess rights to income.

a natural right to transfer. I do not trade my plums for nuts because trade is essential to my preservation. No, I trade because I took more plums from the commons than I could make use of. Second, bartering, if it occurred at all in Locke's state of nature, it did so infrequently. Bartering depends upon others desiring what you have—i.e. it depends on scarcity. However, before the introduction of money, Locke's conception of the state of nature, is a state of abundance: "*God has given us all things richly*" (§31); "Men were more in danger to be lost, by wandering ...in the then vast Wilderness of the Earth, than to be straitned for want of room to plant in" (§36). Absent scarcity, then, the desire to barter would be negligible at best.

Anything an individual might possess that was desired by another was available for appropriation in the commons.¹⁷ Note, the claim being made here is *not* the denial of bartering as such within a Lockean state of nature, but rather that the conditions and constraints that Locke imagines within pre-civil society are not conducive to the market-driven desires—such as trade and acquisition—that would compel a natural right to transfer, at least in the libertarian sense. Thus, to include a natural right to transfer within Locke's natural law framework when its function is largely superfluous seems, on explanatory grounds, a good reason to eliminate it.

Just as bartering is a corollary of the spoilage condition, a similar relation holds between the spoilage condition and (3), Locke's remarks about inheritance. As Jeremy Waldron (1981) remarks, "if I find that I have enclosed more land than I can use the product of, the proper course for me is simply to take down my fences, not to purport to give away the surplus to my friends and relatives" (p. 47). Again, just

¹⁷ Everything was available, provided no one had added value to the object prior to its appropriation.

as we saw in (1), the natural law framework in which Locke operates gives us little reason to suppose rights beyond use and possession. Furthermore, and contrary to Locke's implication in (3), Locke's account of inheritance was not a license to give away one's surplus to whomever one fancied. Locke immediately follows (3) with the qualifier, "according to the Law and Custom of each Country," which suggests that the context in which (3) is offered is not one of natural law but convention (§72). Inheritance, at least as it is ordained by Locke's natural law, is limited to only those who lack the capacity for labor, in this case, children. Children, Locke claims for reasons of dependency, have a property right in their parents. "Hence it comes, that when their Parents leave the World, and so the care due to their Children ceases [...] the Provisions they have made in their Life time, are understood to be intended as nature requires they should, for their Children, whom after themselves, they are bound to provide for..." (I, §89). In contrast, then, to the implication of (3), the class of individuals who qualify for inheritance within Locke's natural law framework is quite narrow. It is only children who are entitled to a share of their parent's surplus; and it is only in virtue of their dependency that they have a positive right to assistance from their parents—a positive right to the means of preservation. Non-dependent kin would have no claim to their parent's surplus. Locke's account of inheritance, thus, does not vindicate a natural right to transfer. Parents do not possess the *at will* power to alienate their surplus. They do not get to choose who can receive a part of their surplus or how much. Rather, children as a matter of positive right have a claim to a portion of their parent's surplus necessary for their preservation, and parents have a correlate duty to provide them with it.

This still leaves us with (2) Locke's introduction of money as a potential point of entry for a natural right to transfer. Locke's introduction of money is interesting in that it marks a transition in his argument from a condition where the individual is motivated solely by the constraints set by the spoilage proviso to a condition where the spoilage proviso is circumvented. As Locke writes, "thus *came in the use of Money*, some lasting thing that Men might keep without spoiling, and that by mutual consent Men would take in exchange for the truly useful, but perishable Supports of Life" (§47). Money, Locke notes, induces us to take more than we can make use of, "[find] out something that hath the *Use and Value of Money* amongst his Neighbors, you shall see the same Man will begin presently to *enlarge his Possessions*" (§49). We might then suppose since the introduction of money renders the spoilage condition obsolete, individuals could exercise FO over their appropriated resources.

But whenever Locke speaks of money it is always with an eye to consent. "[Since] Gold and Silver, being little useful to the Life of Man in proportion to Food, Rayment, and Carriage, has its value only from the consent of Men..." (§50). Similarly, "[Men] had agreed, that a little piece of yellow Metal, which would keep without wasting or decay, should be worth a whole heap of Corn" (§37).¹⁸ Notice how radically this view departs from Locke's natural law. It is no longer God who dictates the standards in which individuals and governments are to abide by, but rather the express or tacit consent of the individual. So if we are to suppose the introduction of money suggests an implicit right to transfer, or equally, a right to

¹⁸ See also §36, 45-47.

income, these rights are not natural rights; they are not rights derived independently of social institutions but wholly dependent on them.

I have introduced some reasons to doubt the inclusion of a natural right to transfer within Locke's natural law, reasons that do not conclusively refute the inclusion of FO rights within Locke's labor theory, but do at least constitute prima facie evidence against such an inclusion. Given what has been adduced thus far, what I do think the preceding analysis highlights is an important point about Locke's overarching project in relation to property. Locke was likely little concerned with the project of justifying specific rights to property. As Alan Ryan (1984) remarks, "[once] Locke had argued to his own satisfaction that property was not held as a gift from the supposed heirs of Adam, nor with the consent of all mankind, he was unconcerned to argue for any particular sort of property rights..." (p. 45). Unpacking Ryan's claim, Locke's concern was twofold: (1) against Sir Robert Filmer, show that God did not grant Adam '*Private Dominion*' over the Earth, but "Dominion in common with the rest of Mankind" (I, §29); and (2) show that property as 'Dominion in common' did not lapse into absurdity by requiring universal consent when appropriating from the commons. In this regard Locke introduced the conditions set out above; conditions that were intended to ensure our inalienable rights to the means of preservation were respected, even when the commons was appropriated for private use. But these conditions alone do not determine the property rights we possess. Rather, as Locke conceives, it is "... the Civiliz'd part of Mankind, who have made and multiplied positive Laws [that] determine Property..."

(§30).¹⁹ It is not natural law then that determines rights to property, but civil society. What Locke provides is the bare bones of property, of how property can come about, and what conditions any system of property must satisfy so as not to violate natural law—specifically, the right to the means of preservation.²⁰ But as Locke recognized, it is far from the last word on the matter. The point is worth emphasizing, for whether the rights to property that we possess are full, in the libertarian sense, or of a more limited variety, they are not natural rights but rights established through the consensual process of civil society.²¹ Locke’s natural law neither necessitates full ownership, nor does it eliminate its possibility. However, this latter claim will be taken up in the next section and ultimately rejected. The conditions Locke places on property are not insubstantial and would grant significant powers to the state.

2.) Locke and the Welfare State

The analysis up to this point has proceeded without much comment on the conditions Locke imposes on property and their bearing on full ownership. I now want to shift focus and address this issue. Locke, as we saw, introduced four conditions on property—labor, enough and as good, spoilage, and charity—each of

¹⁹ See passages §38, 45, 123, 136, where Locke makes similar comments.

²⁰ In the closing paragraph to ch. V. Locke remarks, “And thus, I think it is very easie to conceive without any difficulty, *how Labour could at first begin a title of Property* in the common things of Nature...” (§51). Similarly, “the several *Communities* settled the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so, by *Compact* and Agreement, *settled the Property* which Labour and Industry began” (§45).

²¹ As Rawls (2007) notes, “[an] important consequence of the conventional nature of (real) property in political society is that a liberal socialist regime is not, I think, incompatible with what Locke says” (p. 150).

which issued from natural law. In this section I'll address the following two questions. Supposing we start from the assumption that the exercise of labor does vest us with FO in an object, (1) what impact does Locke's remaining three conditions have for such ownership? And (2) what are the consequences of this for the state?

In many cases Locke's natural law would directly contravene FO. Consider the fact that we are God's property. We are effectually leaseholders of our bodies with God being the lessor.²² Consequently, Locke's theology would not warrant the right to destroy our selves. We could not alienate our rights to person in favor of suicide, assisted suicide, or voluntary slavery, any of which would be an offense against God and the Fundamental Law of Nature. A similar relation holds between the world and us. The world for Locke is not initially un-owned. God is the proprietor, and as we saw with the spoilage condition there are restrictions on how God's property may be used. We do not have a right to destroy the earth's resources or hold them idle. Nor, as the charity condition mandates, can we refuse the entitled needy a share of our surplus labor, even if it means that the loss of our surplus forces us to labor on behalf of the needy instead of ourselves. Self-interest is

²² It has been suggested Locke's contention that humanity is the property of God and that each of us are self-owners, rests on a contradiction. Accordingly, it is not possible for individuals to own themselves and be the property of God. The fruits of our labor would not be our property but God's property. However, this would follow only if self-ownership entailed FSO. But one need not be committed to FSO in order to exercise self-ownership. Cases of partial ownership may suffice. Similarly, we might relativize the claim that God owns us to a metaphysical relation that holds between God and us, and the claim that we own ourselves to an interpersonal relation that holds between us and others. We could say the former always takes precedent over the latter, but it is the latter—our self-ownership—that always takes precedent in earthly affairs.

superseded by an obligation to ensure the preservation of all. Contra Nozick then, others can have a partial claim on us.

Of course, we are under no enforceable obligation to share the fruits of our labor with the able-bodied—those with the capacity to labor. But if the able-bodied through no fault of their own are unable to exercise their labor as a consequence of our over-appropriation of the commons, they may appropriate our property up to the point where any further appropriation would prevent us from satisfying our basic needs. And while the introduction of money does allow us to circumvent the spoilage condition and acquire more than we can make use of, the spoilage condition does not dissolve our obligations toward the able-bodied. Money may introduce inequality in resources and scarcity, but scarcity is constrained by the ‘enough and as good’ condition; and, as earlier noted, the ‘enough and as good’ condition guarantees that everyone has access to the means of preservation, where preservation is understood as “Meat and Drink, and such other things, as Nature affords for [...] Subsistence” (§25). So even in a world wholly owned, owners were obligated to compensate non-owners either in the form of a labor wage equivalent to their subsistence needs, or its property-in-kind equivalent. Furthermore, this entitlement would scale with the population. The more populated the commons the more landowners would be forced to relinquish their property. In contradistinction, then, to Nozick, property for Locke is not permanent property, but ebbs and flows with the needs of the collective.²³

²³ See ASU p. 178 for Nozick’s assumption that property rights are permanent.

The question still remains as to how these conditions and their implications would bear on the state. Within a Lockean state of nature the insecurities in holdings precipitated by population pressures, along with its effects on efficiency, would likely prompt the emergence of a state. As Locke remarks,

To avoid these Inconveniences which disorder Mens Properties in the state of Nature, Men unite into Societies, that they may have the united strength of the whole Society to secure and defend their Properties, and may have standing Rules to bound it, by which everyone may know what is his (§136).

Although Locke thought it was the role of civil society and the state to settle the laws and institutions that determine and govern existing natural property, the “*Rules* that they make [...] [must] be conformable to the Law of Nature, i.e. to the Will of God” (§135). And since the conditions Locke places on property are derivative of the Law of Nature, it follows that the state would be permitted to ensure that these conditions were respected. Any state, which emerged through mutual compact, would be granted powers to ensure compliance with the conditions. Thus, if the state were to be in compliance with the labor condition, then all able-bodied individuals would have enforceable obligations to labor; no one could sit idle. It might even be speculated that a leisure class would be impossible within a Lockean state, for if we define a leisure class as those able-bodied individuals who have inherited their wealth without any productive contribution (labor) on their behalf, such acts of inheritance would be impermissible. No able-bodied individual could draw from the social pot without the reciprocation of labor on their part. To do otherwise would be to benefit from another’s pains, to free ride on the advantages

created by the labor of another, and free riding at all levels would be liable to punishment from the state. Moving to the charity condition, compliance here would likely consist in all non-able-bodied individuals—the disabled, elderly, and orphaned—receiving a basic subsistence from the surplus labor of the able-bodied, presumably via taxation of the able-bodied. Lastly, in compliance with the ‘enough and as good’ condition, the state would be responsible for ensuring all able-bodied individuals were employed and guaranteed a basic subsistence. No able-bodied person could be refused the opportunity to labor for subsistence.

Granted the policies for ensuring compliance with each of these conditions will vary under differing popular governments, but notice that no property owner under any system of government could possess rights that would make it impermissible for the state to redistribute a portion of their surplus to qualifying able and non-able-bodied individuals. FO is not a relevant possibility within Locke’s natural law framework. Everyone has a right to the means of preservation—a right to a basic subsistence—and no government could refuse to honor that right. In fact, Locke’s minimal state²⁴ is commensurate with the modern welfare state, which, provided certain constraints are met (ironically in most cases a labor requirement), grants all its citizens a baseline level of goods necessary to life.

3.) Whither ‘Lockean’ Libertarianism?

Before concluding, I want to head off a possible objection to the project at large and raise a problem for Lockean libertarianism. The objection might go as

²⁴ Not to be confused with Nozick’s minimal state, by ‘minimal state’ I mean the baseline set of features that any state must satisfy so as not to violate Locke’s natural law.

follows. Certainly one can agree that sufficient attention to Locke's natural law would undermine the strongly individualistic project of libertarianism, and yet one can deny that the Lockean libertarianism of Nozick is committed to Locke's natural law. Undoubtedly this is true, and the intent has not been to suggest that Nozick is committed to Locke's natural law because he is committed to Locke's labor theory of property, but to highlight the fact that Locke does not sit easily within the libertarian paradigm. However, suppose we do eliminate the offending natural law element from Locke's labor theory of property and operationalize his theory on secular grounds, as Nozick does in fact do, would this secularization succeed in justifying rights to full ownership from Lockean premises? I think not. As earlier noted, Nozick's account depends on two significant elements of Locke's labor theory of property: the labor condition and the 'enough and as good' condition. Since we saw earlier the consequences of trying to derive full ownership rights to natural resources on behalf of self-ownership, and hence, labor, I will ignore the former and concentrate strictly on the 'enough and as good' condition.

Following Locke, Nozick adopts the 'enough and as good' condition as a means to obviate the need for consent in original acquisition. Yet where Locke treats the earth's resources as originally owned in common, Nozick regards them as un-owned, subject to an equal liberty-to-use right:

It will be implausible to view improving an object as giving full ownership to it, if the stock of unowned objects that might be improved is limited. For an object's coming under one person's ownership changes the situation of all

others. Whereas previously they were at liberty (in Hohfeld's sense) to use the object, they now no longer are (p. 175).

Similarly,

A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened (p. 178).

As Nozick recognized, even when no one had a prior claim to an object, as they did in Locke's common ownership schema, to deprive others of their original liberty to use the object was not a morally insignificant act. So while Nozick's account differs from Locke in his respective starting positions—the earth is un-owned versus owned in common—this difference is merely superficial. Just as we saw with Locke, Nozick's grant of equal liberty-to-use vests all with original and this vestment ushers in the problem of consent in original acquisition. Jack's appropriation of *z* invariably restricts the liberty of Jane, as Jane is no longer at liberty to use *z* without the express consent of Jack. Why, then, Jane may ask, is she under any nonconsensual obligation to respect Jack's property right if doing so makes her worse off than she was before his appropriation? Should we think Jack's right to property dissolves at this point? Nozick's solution here is analogous to Locke's: non-owners do not literally need to be left with 'enough and as good' to appropriate. He asks, "Is the situation of persons who are unable to appropriate (there being no more accessible and useful unowned objects) worsened by a system allowing appropriation and permanent property?" (p. 177). Should we foreclose the possibility that private property might provide non-owners with benefits that offset

the harms associated with their inability to appropriate? Nozick thinks not, noting the myriad benefits private property confers such as increased productivity, innovation, savings for future markets, etc. (p. 177). So rather than make non-owners worse off, the productive benefits generated by a system of private property, quite possibly, outweigh the costs associated with their inability to appropriate. As one commentator of Nozick remarks, “if anyone had a right to be compensated, it would be first appropriators” (Schmidtz, 2011, p. 211).

Nozick thus suggests a method for holding fast to full ownership while blunting the force of the problem of consent in original acquisition. The fact that non-owners suffer a nonconsensual loss of liberty does not necessarily mean they are entitled to compensation from owners. Non-owners are entitled to compensation only if “the process of civilization [is] a net loss” to them—i.e. only if they are worse off than they were in original acquisition (p. 179 ff.).²⁵ But, as Nozick believes, since the productive benefits generated by private property in a free market are more than sufficient to compensate non-owners for their lost opportunities, full rights to property “will not actually run afoul of the Lockean proviso” (p. 182). Consequently, non-owners have no legitimate complaint against owners in regards to their loss of liberty.

Nozick’s account turns on the question of whether, assuming all un-owned objects are owned, does a system of full ownership generate benefits for non-

²⁵ ‘Worse off’ for Nozick is understood in the economic sense. X is worse off under no-ownership, if no-ownership leaves X on a lower indifference curve than X would have been under a system of full-ownership. See ASU, pp. 57-58. Obviously, lacking access to the means of subsistence in a system of full-ownership would place one on a lower indifference curve than under no-ownership, but Nozick seems to believe this possibility is remote.

owners that outweigh those generated under original acquisition—i.e. no-ownership? If so, then the ‘enough and as good’ condition is satisfied. Nozick, I think, is right to argue that a system of full ownership is likely to have superior benefits in comparison to no-ownership, but wrong to assume that *all* will benefit under such a system, and it is the quantifier ‘all’ that is of utmost importance to his argument. For if one person is made worse off, then the property regime is invalidated.²⁶

Consider the following example.²⁷ Both Jane and Jack are in an initial condition of no-ownership. Now suppose Jack appropriates all the fertile land along the river, call it *z*. Assuming full-ownership, Jane is now worse off than she was before as Jack can exclude her from using *z*, where previously she was free to use *z*. However, Jack being the entrepreneur that he is offers Jane a compensation package equivalent to what she would have received had there been no-ownership. Jane is thus not made worse off in comparison to the baseline of no-ownership and Nozick’s version of Locke’s ‘enough and as good’ condition is satisfied. But why should we suppose Jane is better off under Jack’s appropriation? Suppose we entertain a counterfactual. Had Jane been the first to appropriate *z*, given her superior talents, the benefits that would accrue to her from her productive use of *z* might have far outweighed the compensation package Jack provides her. It’s possible, then, that Jack’s ownership of *z* does in fact make Jane worse off.²⁸ Jack cannot insist that Jane is no worse off than she was before his appropriation.

²⁶ This is because Nozick’s argument is not utilitarian but deontological. See ASU, p. 177.

²⁷ Adopted from Cohen (1995). See pp. 80-81.

²⁸ One possible way to avoid the scenario described and preserve full ownership is to say, if Jane believes the benefits that would accrue to her—as a result of her productive use of *z*—far outweigh the compensation Jack is willing to provide her, then Jack could agree to give *z*

Furthermore, even if Jane were better off under a system of full ownership, there is no reason to suppose a system of no-ownership as the only alternative in which to compare full ownership against.²⁹ Surely Jane is better off under a system of full ownership than under no ownership, but she might be worse off under full ownership than under, say, redistributive capitalism. Nozick's restriction to no-ownership as the baseline for comparison simply begs the question in favor of full ownership. The point here is not to get immersed in a defense of one property system over another but to spotlight the indeterminacy Locke's 'enough and as good' condition engenders under a Lockean conception. Any decision we make regarding a particular system of property is bound to benefit some while inadvertently imposing costs on others, and those costs may be quite substantial. In economic parlance, no system of property stands as Pareto-superior to any other; there will always be some whose indifference curve sits lower under one system than another, and since Nozick's account is deontological rather utilitarian, the simple fact that one person sits on a lower indifference curve in comparison to others is morally problematic. Nozick cannot, in such circumstances, safely assume the need for consent is obviated. To do otherwise, would be to violate the individual's original liberty-right to use the earth's natural resources. Thus, Nozick's version of Locke's 'enough and as good' condition cannot support full ownership in natural resources. We are given no reason to believe that *all* individuals actually are

to Jane in return for a *future* compensation package from Jane. This compensation package would be equivalent to the benefits Jack would have received had he not given *z* to Jane. But notice that since Jack possesses full ownership of *z*, Jack determines the selling price. There is nothing that would bar Jack from requiring compensation far above his reservation price—i.e. the lowest point he is willing to trade. In which case Jack gains at Jane's expense.

²⁹ I follow Cohen (1995) here who effectively levels this objection against Nozick. See p. 87.

better off under full ownership. As I see it, if Nozick is to preserve both his deontological credentials and full ownership, the only other option is to drop the equal liberty-to-use clause and adopt a first-occupation theory of property.³⁰ Doing so has the benefit of preserving full-ownership and avoiding the indeterminacy problem posed above, but, absent a 'enough and as good' condition, its hard to see how such a view could qualify as 'Lockean'. Regardless, Nozick's Lockean libertarianism cannot justify full ownership.

IV. Conclusion

In this paper, I have expressed a number of reasons for doubting Locke's libertarian credentials. We saw how God's mandate to preserve ourselves grants each of us a right to the means of our preservation—a claim-right in the commons. But this universal claim-right in the commons generated a problem. If all have a claim-right in the commons, then any individual appropriation of it without universal consent is equivalent to theft. How, then, is private property at all possible? We saw that Locke's unique solution to the problem was the labor theory of property. X can possess a nonconsensual property right in z if and only if: (1) X has invested her labor and added value to z; (2) X's appropriation of z left 'enough and as good' for others; (3) X's appropriation did not take more than she could make use of; and (4) any surplus X's appropriation generated was subject to redistribution to the non-able bodied prior to X's claim to it. From here, I argued

³⁰ Narveson (1988) and Rothbard (1978) adopt this latter approach.

that Locke's labor condition did not imply the sought after rights to transfer and income that libertarians champion. I raised doubts, largely on account of Locke's spoilage condition, that reading Locke as implying such rights is a mistake. And I used the exercise as a means to highlight Locke's indeterminateness in regards to what property rights we possess. As far as Locke was concerned, a complete system of property was to be determined via mutual consent in civil society, not via natural law. This indeterminateness did not rule out FO, per se, but neither did it rule out other avenues of ownership that might permit redistribution by the state. However, as I argued, the conditions Locke placed on property are indeed sufficient to rule out the provision of FO within civil society. In fact, Locke's conditions on property would mandate a welfare-like state as the baseline for the state. Lastly, I suggested even if we abstract from Locke's natural law, as Nozick's Lockean libertarianism does, such a tactic is unlikely to generate FO without losing its "Lockean" credentials. Given this scrutiny, I think it's fair to say that Locke is not a liberal in libertarian stripe. His preoccupation with securing access for all the goods necessary for subsistence lends a leftist tenor to his project—a tenor that infects even his 'Lockean' counterparts. Private property was indeed important but was always subject to modification given the needs of the collective. No one could possess natural rights to property that were not subject to distributional considerations. Hence, if libertarians are serious in justifying FO, Locke is not a comfortable bedfellow.

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