On Original Appropriation

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Libertarianism holds that agents initially fully own themselves. *Lockean libertarianism* further holds that agents have the moral power to acquire private property in external things as long as a Lockean Proviso—requiring that "enough and as good" be left for others—is satisfied. *Radical right-libertarianism*, on the other hand, holds that satisfaction of a Lockean Proviso is not necessary for the appropriation of unowned things. This is sometimes defended on the ground that the initial status of external resources as unowned precludes any role for a Lockean Proviso. I shall show that this is a bad argument. Although I would argue that satisfaction of a Lockean Proviso is indeed a necessary condition for the appropriation of unowned things, I shall not attempt to establish that here. My goal here is more modest: to rebut one argument against the Lockean Proviso.

The Lockean Proviso can be interpreted in several different ways. *Nozickean right-libertarianism* interprets the proviso as requiring that no one be left worse off by the appropriation than she would be if the thing remained *in common use*.[1] *Equal share left-libertarianism*[2] interprets the Lockean Proviso as requiring that no one be worse off than she would be if no one *appropriated more than an equal share* of the competitive value (i.e., based on demand and supply) of initially unowned things. *Equal opportunity (for wellbeing) left-libertarianism*[3] interprets the Lockean Proviso as requiring (roughly) that no one be worse off than she would be if no one appropriated more than is compatible with everyone having an

equally valuable opportunity for wellbeing.[4]

I shall not here assume any particular version of the Lockean Proviso. The arguments advanced against it are typically directed at the Nozickean interpretation, but they apply equally well to the more egalitarian interpretations. For simplicity, I shall refer to "the" Lockean Proviso.

Both radical right-libertarianism and Lockean libertarianism hold that acquiring private property over a previously unowned thing requires that the agent perform some suitable action in relation to that object. The most familiar account requires that the agent mix her labor with the object (whatever exactly that means). Other accounts require that the agent discover the object, take possession or control of it, improve it, or merely stake a claim over the object. Virtually all accounts require that the agent at least stake a claim in the sense of publicly communicating that she now has private property rights over the object. In what follows, I shall leave this issue open, but for brevity shall merely write of staking a claim. Our question concerns whether staking a claim (or related activities) in an unowned object can be sufficient for acquiring private property rights over it, or whether in addition the Lockean Proviso must be satisfied.

Before proceeding, let met acknowledge that there is one important argument against the Lockean Proviso that I will not consider. Israel Kirzner argues that those who discover the existence of a resource, or discover an unknown valuable use for a known resource, are really creators of an economic resource. If one believes, as I do, that the property rights of creators over their creations are not subject to a Lockean Proviso, then Kirzner's claim, if correct, provides a strong reason for thinking that a Lockean Proviso is not needed in at least many cases of initial acquisition. I reject Kirzner's claim that discoverers are often really creators of the resources in question, but defending that rejection is more than I can do in the present paper. Hence, I set that argument aside.

There are two closely related issues that we shall be examining: (1) Can an individual acquire private property rights over a previously unowned thing even when this violates the Lockean Proviso? Throughout, I leave implicit that we are addressing cases where no one else has consented to the acquisition of such rights. The problematic case for libertarianism is appropriation without the consent of others. (2) Does someone commit an injustice if—in violation of the Lockean Proviso—she treats a previously unowned thing as if she had private property rights over it? The question here is—not whether she acquires private property rights, but rather—whether she commits an injustice by acting as if she did. Throughout justice is understood as non-violation of rights.

The idea that the initial unowned status of external things leaves no room for the Lockean Proviso to do any work is at least roughly implicit in the writing of many libertarian writers. Jan Narveson, for example, writes "[T]he world is [initially] just stuff, devoid of moral qualities and not owned by anyone. … The State of Nature is not naturally equipped with any rules whatsoever, about anything."[5] The most explicit statement is given by Edward Feser:

> Suppose an individual A seeks to acquire some previously unowned resource R. For it to be the case that A commits an injustice in acquiring R, it would also have to be the case that there is some individual B (or perhaps a group of individuals) against whom A commits the injustice. But for B to have been wronged by A's acquisition of R, B would have to have had a rightful claim over R, a right to R. By hypothesis, however, B did not have a right to R, because no one had a right to it—it was unowned, after all. So B was not wronged and could not have been.[6]

Of course, some might question the claim that there are any initially unowned things. One might claim, for example, that all external resources are initially *jointly owned* by all in the sense that no one is permitted to use such resources without collective consent of some sort (e.g., unanimity or majority). This, of course, is a crazy view and I fully agree that natural resources are initially unowned. In any case, we shall assume this for the sake of argument.

Consider now Feser's example. Let us agree that, when A uses resource R, A's use of R as such does not violate B's rights. So far, there is no injustice. No one has any *claim-rights* over the unowned thing. Everyone is initially at liberty—has a liberty-right—with respect to the use of the unowned thing.

A, however, is doing more than simply using R. She is treating R as if she privately owned it. Suppose that she uses minimal and reasonable force against B to stop him from using R—where this use of force would not violate the rights of B, were A to fully own R. (Private property, after all, includes some rights of prior restraint to stop individuals from violating one's property rights.) Does A commit an injustice? Does A, that is, violate B's rights?

Here, we must distinguish two cases. In the first, A has R in her physical possession (e.g., in her hands), and B uses force against A to obtain R. Here, B violates A's self-ownership, and A is at liberty to use reasonable force against B to stop her from violating B's self-ownership. In this case, A commits no injustice in using force to stop B from using A. This use of force, however, is justified by the fact that B is violating A's self-ownership—and is fully compatible with A having no private property rights over B.

In the second case, A *does not* have R in her physical possession. She has used R in the past (e.g., watered a tree), perhaps with a plan for future use (e.g., gathering apples), but she does not currently have the object in her physical possession. Suppose that B comes along and uses R

(e.g., gathers some apples) and that A shows up and uses force against B to stop her from using R. Does A violate B's rights? The answer is (1) that she *does not* violate B's rights, if in fact A has acquired moral private property rights over R (and she is merely enforcing her rights), and (2) that she *does* violate B's right, if R is still unowned and A is merely treating R *as if* she owned it (and B [typo correction: the published version has "A" here] is still at liberty to use R). Thus, we must turn to the first question raised above: Can A acquire private property rights over R merely by staking a claim (or other relevant actions)—even when this violates the Lockean Proviso?

The thought, I think, is that, if a thing is unowned, then there is no barrier to the first claimant acquiring private property rights over it. After all, if it is unowned, it is, it seems, not subject to any moral restrictions. This, I shall argue, is not so.

No one, we have granted, has any claim-rights concerning the use of an unowned object. There is more, however, to the moral order than *first order conditions* (e.g., claim-rights and liberty-rights). There are also *second (and higher) order conditions* on when lower order conditions *change*. Consider, for example, the *moral powers* agents have to acquire claim-rights over unowned things. The radical right-libertarian claim is that agents have a very strong moral power to acquire such claim-rights. All agents have to do is to stake a claim (or engage in related activities). This is certainly one possible second order moral view. It is, however, a moral view—a view about the conditions under which the liberty-rights and claim-rights of individuals are altered. It holds, in effect, that agents have a *very weak immunity* to losing their liberty rights to use unowned objects (since some of those liberties are lost whenever someone else stakes a claim). No matter what position one takes on how strong the powers of appropriation are, one is thereby taking a moral position on the immunity rights that agents have. There is no morally

neutral position. Moreover, each of these different second order positions is fully consistent with the first order condition of a thing being initially unowned (i.e., no one having any claim-rights over it).

In sum: The first order status of an unowned thing is clear: no one has any claim-rights concerning its use (i.e., everyone is at liberty to use it). That leaves open, however, its second order status (the conditions under which the first order status can change). One compatible position is that individuals can acquire claim-rights over first-order unowned things merely by staking a claim (or related activities). Another is that this is so only when the Lockean Proviso is satisfied. There are infinitely many other possibilities as well (e.g., whenever the king so dictates). Radical right-libertarians are thus mistaken, if they claim that their position follows from the mere fact that initially no one has any claim-rights over natural resources. First order conditions of morality are compatible with all kinds of second order conditions.

This does not, of course, establish that radical right-libertarianism is mistaken. It merely establishes that one particular argument for it is mistaken. The real work must be done by addressing the substantive moral issues of appropriation. It cannot be done simply by appealing to the fact that external things are initially unowned.[7]

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[1] See, for example, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). There are many exegetical questions about how Nozick intended his version of the Lockean Proviso to be understood, but this is one natural reading.

[2] See, for example, Hillel Steiner, *An Essay on Rights* (Cambridge, MA: Blackwell Publishing, 1994).

[3] See, for example, Michael Otsuka, *Libertarianism without Inequality* (Oxford: Clarendon

Press, 2003).

[4] For more on left-libertarianism generally, Peter Vallentyne and Hillel Steiner, eds., *The Origins of Left Libertarianism: An Anthology of Historical Writings* (New York: Palgrave Publishers Ltd., 2000) and Peter Vallentyne and Hillel Steiner, eds., *Left Libertarianism and Its Critics: The Contemporary Debate* (New York: Palgrave Publishers Ltd., 2000). For a critical assessment of left-libertarianism, see Barbara Fried, "Left-Libertarianism: A Review Essay", *Philosophy and Public Affairs* 32 (2004): 66-92; Peter Vallentyne, Hillel Steiner, and Michael Otsuka, "Why Left-Libertarianism Isn't Incoherent, Indeterminate, or Irrelevant: A Reply to Fried", *Philosophy and Public Affairs*, 33 (2005) 201-215; and Barbara Fried, "Left-Libertarianism, Once More: A Rejoinder to Vallentyne, Steiner, and Otsuka," *Philosophy and Public Affairs* 33 (2005): 216-222.

[5] Jan Narveson, "Original Appropriation and Lockean Provisos," *Public Affairs Quarterly* 13 (1999): 205-27, p. 118. [Reprinted in *Respecting Persons in Theory and Practice* (Lanham: Rowman & Littlefield Publishers, 2002), pp. 111-131]. See also, Murray Rothbard, *For a New Liberty: The Libertarian Manifesto*, revised edition (New York: Libertarian Review Foundation, 1978), pp. 31-36; Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988), ch. 7.

[6] Edward Feser, "There Is No Such Thing As An Unjust Initial Acquisition," *Social Philosophy and Policy* 22 (2005): 56-80, pp. 58-59. Feser actually makes the stronger claims that "there is no such thing as *either* a just *or* an unjust initial acquisition of resources. The concept of justice, that is to say, simply does not apply to initial acquisition. It applies only after initial acquisition has already taken place." He this stronger claim because he believes that there are no applicable

norms of justice. This, however, seems false. Individuals are posited to have the rights of self-ownership and thus there are some applicable norms of justice. Using an unowned resource in a way that violates no one's self-ownership respects those applicable norms and thus is just. In any case, I shall ignore this stronger claim and focus on the weaker claim that appropriation in violation of a Lockean Proviso is not unjust.

[7] For helpful comments, I thank Ed Feser, Jan Narveson, Mike Otsuka, Eric Roark, and Hillel Steiner.