

## *The Negative Principle of Just Appropriation*

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Possession and control of an object enhance the freedom of its holder. Property protects this freedom; but it restricts the freedom of all others. Drawing the boundaries of freedom with respect to external objects is a central and difficult challenge for libertarians. What justifies my ownership of, say, the cup I am drinking from? Several possible answers come to mind: answers based on need, on welfare, on desert or on equality. None of these is endorsed by the libertarian; none of these, arguably, can justify private property in the cup. From a proprietary point of view the legitimacy of any holding derives from the moral power of its previous owner. An owner has the power of transfer, the power to make another person the owner. What justifies my ownership of the cup is the exercise of the power of the person who gave it to me; his ownership was justified by the exercise of the power of the person who sold it to him; the latter's ownership was justified by the exercise of the power of the person who bequeathed it to him; and so on and so forth. But series of transfers of this kind, long as they may be, must come to an end. There must have been a point where something not privately owned became the private property of an individual or group.

Libertarians must assert a principle of just appropriation. Such a principle specifies the ways in which a person can come to own a natural resource which was previously not (privately) owned. The general schema of a principle of just appropriation will be:

P originally appropriates X if P does  $\Omega$ .<sup>1</sup>

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1 Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press 1988), 263, and J.J. Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press

What could justify such a principle? Broadly speaking, there are two approaches one may take in an attempt for a justification. First, one may invoke some positive quality of doing  $\Omega$  which justifies P's title to X. Second, the appropriation may be regarded as the exercise of a *moral power*, permissible so long as some condition, specifying what may *not* be done, is respected. These two approaches ground what may be called, respectively, the *positive* principle of just appropriation and the *negative* principle of just appropriation.

Libertarians seeking to ground a positive principle of just appropriation have typically based their argument on the right of self-ownership. To do so they must identify an act  $\Omega$  such that when performed by P creates a property right to X which must be respected on pain of violating his self-ownership. Two strategies of argumentation have been adopted for this purpose.<sup>2</sup> The first is the argument from *incorporation* by which parts of the external world are internalized into the body. The moral status of the body before this process now encompasses the newly incorporated parts. The paradigmatic case is the picked and digested apple. The second strategy is the argument from *extension*. Here, self-owned substance is externalized so that some parts of the external world now become infused by morally relevant qualities of the body. In this way the person extends the moral title he has with respect to himself to bits of natural resources. Mixing one's labor with unowned resources is the paradigmatic example of such a case: those resources do not become oneself, but their moral status becomes identical with that of oneself.

A problem encountered at the outset by this approach is that it rests on flimsy grounds. Self ownership, although an attractive principle in many ways, is highly unintuitive in other respects and, besides, ungrounded.<sup>3</sup> Moreover, the argument from incorporation seems to rest on

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1990), 324, present formulations that have reductionist connotations whereby P doing  $\Omega$  is P's appropriation of X. That leads them to assume that  $\Omega$  must be performed *on* or *to* X. In fact  $\Omega$ , or any other physical act is *not* the appropriation;  $\Omega$  can be merely its public aspect or it can be its *justification*. The performance of  $\Omega$  need not involve X at all: it could be signing one's name in a register (publicisation) or winning a competition where X is the prize (justification). Cf. Immanuel Kant, *The Metaphysics of Morals* (1797), trans. M. Gregor (Cambridge: Cambridge University Press 1991), 80f., and G.W.F. Hegel, *Elements in the Philosophy of Right* (1821), trans. H.B. Nisbet (Cambridge: Cambridge University Press 1991), 88.

2 S.R. Munzer, *A Theory of Property*, (Cambridge: Cambridge University Press 1990), Ch. 4, makes a similar distinction.

3 For critique of the principle of self-ownership see G.A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press 1995); and Daniel Attas, 'Freedom and Self-Ownership,' *Social Theory and Practice* 26 (2000) 1-23.

a confusion: truly incorporated material such as the apple cannot be conceptually owned in the sense that we cannot exercise any of the rights associated with ownership (control, use, transfer, etc.) with respect to a digested apple. The argument from extension also has some serious shortcomings, and the labor theory of appropriation has been the target of powerful attacks not to mention ridicule.<sup>4</sup> I shall not pursue these issues here.

In this paper I shall focus on the negative principle by which P originally acquires X if doing so respects a certain condition. This condition, known as the Lockean proviso, is the core of the negative principle. The possibility of incorporating such a proviso in a libertarian argument has been challenged by some critics. I first set out to show that a proviso of this sort is not incompatible with libertarianism (Section I). I then proceed to argue that a libertarian doctrine of appropriation *must* incorporate such a proviso. There can be no unilateral powers of acquisition, that fail to consider the impact on the interests of all others. Hence a condition to that effect is necessary (Section II). Finally, I discuss the several interpretations such a proviso can take on various dimensions, suggesting that the multiplicity itself is a source of vulnerability for any negative theory of appropriation. For what appears to result is that the different interpretations will be either implausible as a way of taking into consideration the interests of others, or unable to generate the kind and extent of property rights libertarians typically endorse (Section III).

## I Why Proviso?

Locke's theory of original acquisition qualifies the exclusive right to the thing labored on by the condition that there be 'enough, and as good left in common for others.'<sup>5</sup> Such a condition on appropriation is echoed by Nozick and others, and has come to be known in the interpretative and critical literature as the Lockean Proviso.<sup>6</sup> According to Nozick: 'the

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4 See, for example, Waldron, *Private Property*, 171-91; J.P. Day, 'Locke on Property,' *Philosophical Quarterly* 16 (1966) 207-20; and Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books 1974), 174-8.

5 John Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press 1960), 288

6 Locke says, 'at least where there is enough and as good....' This has led Waldron, *Private Property*, 210-1, to interpret Locke as not intending to impose a proviso at all but merely making explicit a factual assumption about the world when no one appropriates more than he can use without spoilage. D. Schmidt, 'When is Original

crucial point is whether appropriation of an unowned object worsens the situation of others.' By prohibiting certain appropriations, 'Locke's proviso ... is meant to ensure that the situation of others is not worsened.'<sup>7</sup> It is important to stress that the kind of proviso discussed here is one that legitimizes and sets limits on *appropriation* (and accumulation by transfer). It is not designed to impose conditions on *use* of one's just holdings.<sup>8</sup>

Some libertarian writers believe the proviso is incompatible with the core of libertarianism. They hold either that the proviso is grounded on extrinsic patterned elements, or that the kind and extent of property rights it permits are much too restrictive to the libertarian spirit. This view of the proviso as alien to the crux of libertarian theory is shared by some critics of libertarianism. Waldron points out that Locke's theory of property is grounded on, and therefore also limited by, a general right to self-preservation. Nature, given by God to all humankind in common, must be appropriated for the sake of subsistence, and subsistence also limits the extent of appropriation. But present-day libertarianism does not follow from such premises. On the contrary, rights and entitlements over things are prior to any need-based rights, indeed, being incompatible with each other, the former exclude the possibility of the latter. Entitlements originally generated by a principle of appropriation make up the entire structure of rights.<sup>9</sup>

Against this background, the tacking on of a very weak Lockean proviso represents, at best, a confused eclecticism, or, at worst, the half hearted indulgence of bad conscience about the ultimate unacceptability of a principle of justice in acquisition.<sup>10</sup>

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Appropriation Required?' *The Monist* 73 (1990) 504-18; and Thomson, *Realm of Rights*, also include a proviso in their account of appropriation; Jon Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press 1988), 69-71, does not do so explicitly but defends Nozick's proviso from some critics.

7 Nozick, *Anarchy*, 175

8 So it is not the kind of proviso suggested by Eric Mack, 'The Self-Ownership Proviso: A New and Improved Lockean Proviso,' *Social Philosophy and Policy* 12 (1995) 186-218. Mack's self-ownership proviso prohibits certain uses and exercises of powers deriving from ownership. Thus Adam cannot refuse to allow shipwrecked Zelda to come ashore his legitimately appropriated island. This, according to Mack, is a noninvasive nullification of Zelda's 'world interactive powers' which are a component of a full account of her self-ownership. The possibility of self-ownership-based restrictions on property is an extremely interesting issue, but it is not one I shall pursue to examine here.

9 Nozick, *Anarchy*, 238

10 Waldron, *Private Property*, 283

The true grounds of the proviso seems to be libertarians' moral qualms about accepting the consequences of their own theory. Could this be the reason Nozick so casually assumes that 'any adequate theory of justice in acquisition will contain a [Lockean] proviso'?<sup>11</sup> Why is worsening the position of others such a crucial point for Nozick? So long as no rights are violated there seem to be no libertarian grounds for restricting appropriation.

John Christman calls attention to the incompatibility of a proviso grounded on the effect on other people with property rights that supposedly enjoy the same status as body rights. Rights to external resources are construed as an extension of, and therefore of the same status as, self-ownership. If that is so then worsening the position of others could have only as much relevance to appropriation as it has to property rights in oneself, to wit, none at all. Christman does not think this is a reason to reject the proviso. Rather it is, for him, a way of defeating the inviolable status of property rights.

If criteria could be set out that would justify a natural right to property, and this right had the status of the natural right to one's body and labor, then the former would not have to make reference to the resulting distribution, since the latter does not. But no one believes that the acquisition of property could take place *without* such reference to the present distribution; appropriation in the state of nature couldn't plausibly be *simply* a first-come first-served arrangement with no restriction. What this shows is that property rights are not natural rights in any sense analogous to the rights to one's body.<sup>12</sup>

It is, of course, false that no one believes that appropriation could take place without some such proviso. But Christman is correct to conclude that if a proviso is to be consistently incorporated into a libertarian theory, then that theory cannot employ a positive argument for a principle of appropriation. If the moral status of self-ownership is transferred into natural resources, as the positive argument assumes, either by incorporation or by extension, then any imposed restriction on the legitimacy of appropriation will be an infringement of self-ownership.

Waldron's point is that in a libertarian scheme non-appropriators have no rights that require protection, such as those based on needs. Moreover, taking account of such needs will infringe upon individual entitlements. Christman's point is that a proviso is incompatible with appropriators' natural body rights that have come to encompass the

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11 Nozick, *Anarchy*, 178

12 John Christman, *The Myth of Property* (New York: Oxford University Press 1994), 60-1

appropriated resources — so a proviso within this scheme is morally wrong. Together they cast serious doubt on any attempt to incorporate a proviso, regardless of the particular form it may take, into the libertarian theory.

But there is another way in which libertarians can (and, I think, have) tackle the problem of original acquisition. The negative principle of just appropriation is not incompatible with an other-regarding restriction on appropriation. Indeed, such a restriction is constitutive of the negative principle. The incompatibility which Waldron and Christman have pointed out arises from, respectively: (1) a need-based proviso that does not fit with the entitlement-based space of rights; and (2) a positive principle of appropriation whereby acting on the physical world has the effect of extending self-ownership to natural resources. If libertarians give up on the notion of some positive quality of the appropriative act which transfers the moral status of the person to the thing acted upon, then (2) ceases to be a source of inconsistency. And if a liberty-based proviso can be advanced and appealed to, then they need no longer be embarrassed by (1).

This other route to appropriation begins from the implicit premise that a property right in  $X$  is a necessary condition for complete liberty with respect to  $X$ . This being so, and liberty being the fundamental value, original acquisition must be permissible.<sup>13</sup> The act  $\Omega$  is now merely a matter of designating the thing, a convention for making one's intention explicit. But then, since the act of appropriation itself carries no moral weight, a complaint on the part of others may be enough to override the appropriation. At least where the complaint is reasonable from a libertarian perspective, that is to say, based neither on envy nor on need, but perhaps on lost liberty.

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.<sup>14</sup>

So a negative principle of just appropriation is not based on any positive quality of the appropriative act such as incorporation or extension, but simply on the fact that no one can reasonably object to the

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13 This is analogous to Locke's argument that since consumption is necessary for subsistence, and property is necessary for consumption, then appropriation must be permissible (*Two Treatises*, 286).

14 Nozick, *Anarchy*, 178

appropriation.<sup>15</sup> This, I have shown, is not incompatible with the libertarian argument as such. In other words, by discarding the notion of a positive principle of appropriation, a property-based libertarianism can incorporate a proviso without entangling itself in inconsistencies. It is not evident however why it *must* do so. Why, that is, there should be any proviso at all. This preliminary question must be addressed before turning to a discussion of the precise meaning of the phrase 'worsens R's position' and its role as it appears in the proviso.

## II Unilateral Powers of Acquisition

The discussion in the preceding section has uncovered a weakness of the negative principle of just appropriation that is not shared with its positive counterpart. Under the positive principle of appropriation the agent acts on the physical world and this effects a change in the moral world. Under the negative principle the appropriator acts directly on the moral world. The physical act has no positive quality which endows the appropriator with a moral claim to the external resource thus appropriated. It is merely an external manifestation of one's intention, and it derives its weight entirely from the moral power of the appropriator. What this means is that, by doing  $\Omega$ , a person can unilaterally and directly alter the moral status of all other persons. He can limit everyone's freedom with respect to some object, and create obligations which did not exist before, without the consent of the newly duty-burdened persons.

The possibility of such a unilateral power has been challenged by several writers.<sup>16</sup> Allan Gibbard, for example, suggests that a person's consent is a necessary condition for making some of his actions no longer permissible. To be sure, physically changing parts of the external world by consuming or transforming them reduces other persons' opportunities, for they could previously do with or to X what they no longer *can*, since X ceases to exist as such. But this does not impose any new moral constraints: there is nothing that they *can* but are no longer morally

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15 I am here agreeing with Cohen's exclusive focus on the proviso in his reconstruction of Nozick's doctrine of appropriation (*Self-Ownership*, 74ff.).

16 Alan Gibbard, 'Natural Property Rights,' *Noûs* 10 (1976), 78f.; L.C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge and Kegan Paul 1977), 44; Waldron, *Private Property*; as well as Kant, *Metaphysics of Morals*, 77, 81-3. See also Nozick on the principle of fairness, *Anarchy*, 90-6.

*permitted* to do. I do not need a person's consent to reduce his opportunities in this way, but

I do need his consent to bring him under new moral constraints: to make it cease to be morally permissible for him to do certain things that he can do, or to make it morally permissible to coerce him in certain ways.... It is impossible to deprive someone of a right unless he himself gives up or loses that right through a voluntary act.<sup>17</sup>

Since original appropriation involves the creation of new moral constraints — duties of non-interference — on all but the appropriator, the conclusion is that appropriation as a unilateral act which does not require the consent of all others is ungrounded. This inference has been challenged by Gerald Gaus and Loren Lomasky. They claim that for Gibbard's conclusion to follow it must be the case that all moral duties are created by consent. Furthermore, if consent is necessary for the imposition of duties, that would not be a unique problem for the justification of property rights.

All moral duties would turn out to be contingent on obtaining the ongoing consent of people. Mort's liberty to speak his mind free of Millie's censorship requires her acquiescence as fully as does his liberty to determine what will be done with an item of property in his possession.<sup>18</sup>

This misrepresents Gibbard's argument. First, he did not, and need not, claim that *all* moral duties are created by consent. The point was not the obviously false claim that only consent can justify a duty, but the more plausible assertion that consent is necessary for the imposition of a *new* duty. We can accept the idea of a background of moral duties justified by the usual kind of moral justifications, but still maintain that the exercise of powers to alter this structure is subject to the consent of those who will be burdened by the new duties it imposes.

Second, there was no suggestion that an *ongoing* consent is needed once the property right is created. In this respect, property rights and other liberal rights are no different. And third, it's not property, but appropriation — the creation of property — that needs consent. It is in this respect that property rights *are* different from other liberal rights: for the latter are not created by the exercise of a moral power possessed by the potential right holder, whereas the former, supposedly, are. Gibbard

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17 Gibbard, 'Natural Property Rights,' 78

18 G.F. Gaus, and L.E. Lomasky, 'Are Property Rights Problematic?' *The Monist* 73 (1990), 491

claims that the exercise of a power needs consent, not that the existence of a right needs ongoing consent.

Nevertheless, it has to be said that Gibbard rather dogmatically states that consent is needed for the creation of new duties and makes no attempt to substantiate that assertion. In response, one can simply refer to appropriation as a case, albeit unique, of non-consensual imposition of duties. Waldron is more careful in this respect than Gibbard: he argues that such powers to acquire rights and thus impose duties on all others are both 'unfamiliar and repugnant.'<sup>19</sup>

Powers to create rights and correlative duties are not unfamiliar. Promises, for example, create obligations, but these are brought into existence by the person who will be bound by them. The same is true of all contractual rights. Unilateral appropriation, on the other hand, imposes obligations on everyone but the person who brought them into existence. So what makes this power unfamiliar is that the person exercising it can impose duties on *other* persons, and on *all* persons at that. The unilateral power to appropriate is also repugnant because it can create obligations that are onerous. An individual may be able to appropriate some resource which is necessary for another's securing his own survival or for his ability to perform his other obligations (such as caring for his children, aid to the needy etc.). Through no fault of his own, it becomes morally impossible, or morally difficult, for him to do these things.

Gaus and Lomasky have challenged Waldron's unfamiliarity claim. They consider the obligation to render people what they deserve a counter example to the unfamiliarity claim.

If Millie is the head of the philosophy department and Mort is an exceptional member of it, his performance is apt to pile obligations on Millie. When it comes time to award merit increases, approve leave applications, etc., she will find herself obligated to give Mort what he deserves. Thus through his own actions Mort generates obligations on Millie.<sup>20</sup>

There are several disanalogies between the above example and the kind of power examined and maintained to be unfamiliar. First, Mort's case is a 'positive' creation of a right, not an exercise of a moral power. His exceptional performance is not merely an explication of his intention to impose obligations on Millie, i.e., to acquire the right, but an act the moral weight of which Millie ought to recognize. That is, he acts on the

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19 Waldron, *Private Property*, 265-71

20 Gaus and Lomasky, 'Are Property Rights Problematic?' 492

physical world and the changes he brings about have moral ramifications — he does not act *directly* so as to affect the moral status of persons and things. Second, the obligation is vague: Millie has to *recognize* Mort's merit. What rewards precisely follow depends on how other members perform, on Millie's judgment and on other circumstances. This raises the further question of whether promotion, in this case, is a morally based *reward*, rather than the expected rational response to Mort's qualifications and performance that follows from the 'logic' of the institution. This leads to, third, as John Simmons points out, desert is only familiar in institutional contexts.<sup>21</sup> It is a contractual obligation: it arises from the relationship between head of department and other members. When Millie accepts her position as head of department she implicitly takes upon herself these obligations to award merit, and is understood so to do. Mort cannot press his desert claims against Mandy — the head of organic chemistry. Which also explains that, fourth, Mort's right, if it is such, is *in personam*, it is only a right against Millie; unlike property rights which are *in rem* — claimed against everyone.

Although he rejects the Gaus-Lomasky example, Simmons believes he can come up with counter-examples of his own to Waldron's unfamiliarity claim.<sup>22</sup> Some of these — occupying a public tennis court or a softball field, organizing a nature walk for children unilaterally imposing obligations of restraint on all others — can be grouped together as exercises of liberties. As in appropriation these obligations are imposed on everyone and no consent is required. But unlike appropriation no creation of a new right is involved. The obligations of restraint can be explained either as a right against assault, or as a part of the full explication of liberty: if there is a general liberty to do A then I may do A so long as this does not *interrupt* you doing A.

Simmons advances two other examples: making a legal will and registering an invention in the patent office 'unilaterally imposing certain obligations of restraint on all others.'<sup>23</sup> These too, I think, fail as counterexamples to the unfamiliarity claim. A will doesn't create any *new* obligations, it doesn't restrict anyone's freedom in new ways. Quite the contrary. No one is free to dispose of my property when I'm alive, if I bequeath it then some individuals (the inheritors) become *more* free

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21 A.J. Simmons, 'Original Acquisition Justifications of Private Property,' in Paul, Miller, and Paul, eds. *Property Rights* (Cambridge: Cambridge University Press 1994), 82, 83n.

22 *Ibid.*, 83

23 *Ibid.*

than they were, and no one becomes any less free. Registering a patent is slightly more complicated. The justification of patent laws is a subtle issue, and one I want to avoid. However, I think the following points can be made. First, legally speaking, the power to create the right and impose obligations is vested in the patent office rather than in the individual inventor-entrepreneur. Second, morally speaking, a justified patent right does not diminish opportunities; the patented invention creates new ones. Whereas, if one's claim is based merely on getting first to the patent office, this would indeed restrict others from something which they previously had free access to (for example, patenting the wheel), but would probably be unjustifiable.<sup>24</sup> The important point here is that what might create a moral right is not the exercise of a power in registering a patent, but in the invention of something original.<sup>25</sup>

Gibbard and Waldron are basically correct. A power to create new rights must be checked by some form of consent. This is overlooked in the case of appropriation when it is wrongly assumed that ownership is a moral relation between the owner and the asset. This, as Kant remarks, has odd consequences:

By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have.... Otherwise I would have to think of a right to a thing as if the thing had an obligation to me, from which my right against every possessor of it is then derived; and this is an absurd way of representing it.<sup>26</sup>

Ownership is a moral relation among persons. What one individual does to a material object cannot possibly generate obligations in others regardless of how that affects them. A negative principle of justice in appropriation must not ignore the quandary of unilateral right-confer-

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24 Cf. Nozick, *Anarchy*, 182.

25 Ordinary Lockean examples do not undermine the unfamiliarity claim. For example, if I tended a garden, I may have acquired rights to the produce of that garden which others do not have. Cases such as these amount to what I called a positive principle of appropriation, whereby one makes a change in the physical (or otherwise empirical) world thereby bringing about a change in the moral world. There is indeed nothing strange or unfamiliar about this idea, and I have made no such claim. My argument was directed at a negative principle of appropriation whereby an agent acts directly on the moral world to unilaterally create rights. It is this idea that I (and others) find strange. What is unfamiliar is a moral power to create rights to myself against others, without the consent of those who will be burdened by duties correlative to this newly created right. And it is this kind of moral power that a negative principle of appropriation assumes.

26 Kant, *Metaphysics of Morals*, 82

ring acts. Either the consent of those whose freedom is restricted is obtained, or at least their interests are otherwise attended to. This appears to make a proviso that considers the well being of others, not only compatible with a libertarian account of appropriation, but also necessary for such an account to retain any moral plausibility. What the substance of such a proviso might be is a question to which I now turn.

### III The Multi-Dimensional Proviso

Locke's proviso holds that an appropriation of a natural resource must leave enough and as good in common for others. Nozick thinks that the crucial point of the proviso is that no one's position is worsened. If that is the case, no one can reasonably complain. But this is exceptionally vague. The phrase 'worsening someone's position' can be interpreted more or less stringently in each of, at least, five dimensions. Nozick and other libertarians take the weakest interpretation of the phrase in all five dimensions. This might be necessary if we are to permit the creation of any property rights at all. But it makes the proviso, whatever its rationale, highly unattractive. It is unlikely that a strong case could be made in favor of such a weak version.

What I propose to do in this section is to discuss the five dimensions along which the proviso can be interpreted to varying degrees of stringency. In each of these dimensions I shall offer a weak, an intermediate and a stringent interpretation. I shall not attempt a complete defense in favor of any particular interpretation. Instead, the exposition is suggestive in the sense that if stringent or intermediate interpretations are found more compelling, then the proviso must be deemed unlikely to permit any individual appropriation or, at least, not of the kind of property a libertarian theory aims to establish.

What I mean by libertarian property, rather than any other lesser conception of property, is the kind of property that is typical of a model, minimal, nightwatchman state, with a robust capitalist economy. Nozick and other libertarians make no effort to disguise this ideal, they frankly and unreservedly argue for its uprightness. To be more precise, I would say that within the context we are discussing, libertarian property is characterized by two basic features:

- (1) Virtually no limit on the accumulation of assets under one's possession, or at least no limit imposed due to distributive concerns. That is to say, considerations that are sensitive to the amount of property held by others in absolute terms or in proportion to some significant trait, act, or deficiency, have no bearing on the amount one is permitted to own. Otherwise this would

introduce an element of patterning into the theory of holdings — a thought that libertarians would cringe to, since the imposition of any pattern is likely to violate liberty.<sup>27</sup>

- (2) Virtually no restriction on the use of one's property other than those implied by the respect of other people's property. Within the libertarian scheme there are only individual rights, and these rights are all property rights. As Nozick puts it 'particular rights over things fill the space of rights.'<sup>28</sup>

Now, the proviso is a restriction on appropriation and transfer,<sup>29</sup> not on use, and the restriction follows from some idea of harm. But the upshot of the discussion of the dimensions that follows is that the recognition of the moral requirement of a restriction such as this must lead the libertarian, on pain of inconsistency, to set limits on the accumulation of property and restrict its use in opposition to the two basic features of libertarian property.

Suppose, for the sake of this exposition, that P appropriates X by doing  $\Omega$ , and that R is the person most negatively affected by this, if anyone is negatively affected. The proviso will nullify an otherwise legitimate appropriation if R's position is made worse. But then several questions corresponding to the dimensions of interpretation need to be addressed: (1) In terms of what is R made worse off? (2) What is it that makes R worse off? (3) Who might R be? (4) In comparison to what situation is R's position worsened? (5) At what point in time does R's position worsen?

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27 As Nozick famously puts it: 'Liberty upsets patterns.' See *Anarchy*, 155-64.

28 *Ibid.*, 238. See also Nozick on the right to life *ibid.*, 179n.; Narveson, *Libertarian Idea*, 185-7; M. Rothbard, *Power and Market* (Menlo Park, CA: Institute for Humane Studies 1970), 76; Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell 1994), 80-106.

29 The constraints of the libertarian proviso apply not only to appropriation but to the accumulation of assets through transfers too. First, because Nozick says so: 'A theory which includes this proviso in its principle of justice in acquisition must also contain a more complex principle of justice in transfer.... If the proviso excludes someone's appropriating all drinkable water in the world, it also excludes his purchasing it all' (*Anarchy*, 179). Second, perhaps more importantly, there can be no plausible reason to limit the source of harm to an act of appropriation even though an equivalent harm can ensue from transfer. If the harm (worsening) has to be considered initially, it must be considered subsequently. If the harm is morally relevant, what possible difference could it make if it is the outcome of original acquisition or of transfer?

The first dimension can be called *the currency of comparison*. That is the terms in which R is made worse off. Whenever P appropriates X, R as well as everyone else is no longer at liberty to use X, and *a fortiori* can no longer appropriate X. Before appropriation anyone could use X, after appropriation everyone is under a duty of restraint. This is the brute moral fact that raises the problem of the proviso in the first place. But this fact is not enough to distress the libertarian. Nozick suggests two ways in which appropriating X, although restricting the liberty to use (and appropriate) X, does not worsen anyone's situation:

If I appropriate a grain of sand from Coney Island, no one else may now do as they will with *that* grain of sand. But there are plenty of other grains of sand available for them to do the same with. Or if not grains of sand, then other things. Alternatively, the things I do with the grain of sand I appropriate might improve the position of others, counterbalancing their loss of the liberty to use that grain.<sup>30</sup>

So although R's liberty has been restricted by P's appropriation of X, his overall position has not been worsened if there is a resource comparable to X which he can still use (or appropriate), or if P's appropriation of X sufficiently improved other aspects of R's well-being (such as his welfare or the *value* of his liberty). If neither of the two hold — if there is no comparable resource for R to use (or appropriate), or if other aspects of his well-being have not been improved to the required level — then R's position has been worsened and P's appropriation of X is nullified.<sup>31</sup>

The three interpretations (stringent, intermediate and weak) of the first dimension of the proviso are that R's position is made worse in terms of:

**S(1):** no longer having the liberty to use (or opportunity to appropriate) X.

**I(1):** S(1) and no longer having the liberty to use (or opportunity to appropriate) an object comparable to X.

**W(1):** I(1) and no counterbalancing improvement to his well-being.

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30 Nozick, *Anarchy*, 175

31 Notice that Nozick is very careful not to call the improvement in other aspects of well-being *compensation* but always refers to it as *counterbalancing* benefit. Compensation is due only in cases of rights violations and is typically paid by the violator: neither of which is the case in the libertarian scheme of appropriation.

I have grouped together the lost liberty to use and the lost opportunity to appropriate. This ignores Nozick's thought that there is a difference in stringency between a proviso that restricts appropriation when there is not enough left for others to *appropriate* and use (stringent proviso), and one that does so only when there is not enough left for others to *use* (weaker proviso). The 'zipping-back argument' is supposed to show that the stringent appropriation proviso can never hold, and Nozick claims the weaker use proviso is immune from such criticism. The argument proceeds as follows. If Z is left after Y's appropriation without 'enough and as good' to appropriate himself then Y's appropriation would not be allowed under the stringent proviso. In that case, X's appropriation left Y without the opportunity to appropriate, so X's appropriation must also be disallowed by the proviso; and so on back to the first person A to appropriate. But, 'with the weaker requirement, we cannot zip back so quickly from Z to A, as in the above argument; for though person Z can no longer *appropriate*, there may remain some for him to *use* as before.'<sup>32</sup>

Nozick is wrong on both counts. First, the zipping-back argument does not prohibit appropriation all the way down. If no one in a society of  $n$  persons appropriates more than a qualitatively weighted  $1/n$  of the total of resources, then there is always a comparable amount left for others to appropriate.<sup>33</sup> The prohibition only zips as far back as the person who appropriated more than an equal share of the world's resources.<sup>34</sup> Second, the argument holds for the weaker as well as the more stringent proviso. If Z was not left 'enough and as good' to *use*, then the nullification of appropriations zips back as before. Anything less than  $1/n$  of all resources to use will worsen Z's position; and anything less than  $2/n$  of resources to use will worsen Y and Z's position, and so on. What enables Nozick to overcome the zipping-back argument is not the move from an appropriation-based proviso to a use-based one, but the possibility of counterbalancing benefits accruing to the non-appropriator.<sup>35</sup>

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32 Nozick, *Anarchy*, 176

33 Of course account must be taken for complications due to population growth — an issue I shall be dealing with explicitly in the discussion of dimension 3 below.

34 This might imply, albeit on different grounds, a position similar to Hillel Steiner's that all persons have an original right to an equal share of the world's natural resources (Steiner, *Essay on Rights*, 235f.).

35 See Cohen, *Self-Ownership*, 91; Jonathan Wolff, *Robert Nozick: Property, Justice and the Minimal State* (Cambridge: Polity Press 1991), 108f.

The effect of S(1) is to prohibit all and any appropriations. Once X is appropriated everyone but the appropriator loses his liberty to use X and, of course, the opportunity to appropriate it. Because of the zipping-back argument I(1), in effect, prohibits any appropriation of more than  $1/n$  of resources. Such a limit on the amount that can be appropriated, though an appealing idea, cannot be an ideal to which a libertarian can subscribe (certainly not a right-libertarian). First, it amounts to a patterned principle, or at least introduces a patterned element into the distribution of resources. Second, bringing in future people (as I do below in the discussion of dimension 3) could make the share  $1/n$  too small to meet the concerns of libertarians to justify something like the distribution of a modern market economy.

W(1) is the only interpretation that makes a virtually unlimited appropriation possible, although it seems to prohibit the appropriation of resources left unimproved and neglected. (Otherwise where would the counterbalancing benefit derive from?) This amounts to a duty to improve owned resources beyond their natural state. Such severe constraints are incompatible with the kind of property rights libertarians want to justify. It is in the interpretation to the second dimension that they attempt to bypass this problem.

The second dimension is *the worsening cause*. That is the event or circumstance that made R worse off. The three interpretations of the second dimension are that R's position is made worse off by:

**S(2):** P owning X.

**I(2):** S(2) and P doing  $\Omega$ .

**W(2):** the rule enabling P to appropriate X by doing  $\Omega$ .

The most natural interpretation, but also the most stringent, is S(2) that P's ownership of X should not make R's situation worse. It is the most stringent because ownership does restrict everyone's liberty and, by itself, does not create any counterbalancing benefits. It is sometimes thought that ownership of an asset is a psychologically necessary condition, as an incentive, for the improvement of the asset and consequently for the gains that flow from the improvement. This may be so, but it is certainly not the case that ownership is a *sufficient* condition for improvement and general gains. I could harm, destroy or simply consume an item in my possession, none of which need result in gains for anyone. Ownership *per se* has no relevant redeeming features.

S(2) makes all and any appropriation impermissible. If the owner works to improve his property, then it is the work not the ownership that may counterbalance the loss of liberty. Perhaps it is not the ownership

that ought not make others worse off (because it certainly does) but what's done with one's assets in the act of appropriation. This leads to I(2). If  $\Omega$  makes X more valuable then this might result in benefits for all. So only when  $\Omega$  makes X more valuable to the degree that would counterbalance the loss of liberty will the appropriation of X be justified. Now this sets severe limits on what can be appropriated and how. Mere designating cannot count as appropriation; instead there must be a value-adding trait to the act. The amount appropriated is also limited by the requirement of counterbalancing gains. There is probably a threshold beyond which the loss of liberty outweighs any gains in welfare. In any minimally realistic story, no amount of added welfare can make up for the fact that I have lost all liberty because the entire world's resources are owned by other people. Moreover even if the act of appropriation improves one's property, the asset or parts of it must be made available for others to use, at a price they would be willing to pay, so that they too may gain from the enhancement of value. I doubt that such a requirement is consistent with full ownership of a resource.<sup>36</sup>

I(2) is too heavy a burden for a historical theory of justice to carry. A just holding must originate in an original acquisition that benefited everyone. An even weaker interpretation is needed. Notice how Nozick diverts the issue to get round this problem. 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?<sup>37</sup>

He then goes on to suggest that a capitalist system of private property is favored by its superior efficiency which raises everyone's standard of living. This is interpretation W(2): the whole system of property is now to be considered the counterbalancing factor in cases of original acquisition. This seems to me to be completely off the point. The proviso is a requirement of *particular* appropriations. Particular appropriations have to involve counterbalancing gains in order to be justified. Since clearly not all appropriations have this effect, Nozick's trick is to get rid of the proviso on *particular* appropriations replacing it by a promise of increased benefits of the *general* system. Even if we accept that a system of private property is on the whole better than any other system, that cannot justify P owning X rather than X remaining unowned or anyone else owning it originally. But *that* is precisely the task of a principle of just

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36 Cf. Christman, *Myth of Property*, 85.

37 Nozick, *Anarchy*, 177 (italics mine)

appropriation.<sup>38</sup> W(2) will permit most original acquisitions only by draining the principle of just appropriation and its proviso of its original significance.<sup>39</sup>

Taking stock of the situation so far. To justify private property of the libertarian sort, both dimensions must be understood in their weakest interpretation. This combination of W(1) and W(2) however, appears to be at odds with the libertarian rationale of incorporating a proviso in the first place. The justificatory basis of libertarianism is not people's well being, but the kind of freedom involved in the exclusive control and use of resources. The proviso on interpretation W(1) considers a kind of interest of people in general (well being) different from the interest appropriation promotes for the appropriator (freedom of use and control), and we can question whether this is a morally plausible way of the taking account of interests the proviso is aimed at achieving. Moreover, even granting that W(1) has some initial plausibility, in conjunction with W(2) the proviso ceases to be a condition on particular appropriations and becomes a background justification of the system of private property as a whole. As such, it fails to serve its original purpose of sorting out the harmful from the unarmful appropriations.

The third dimension is *the identity of the subject of comparison*. That is, the individuals whose position should not be made worse off. The three interpretations are that the position of the following individuals is worsened:

**W(3):** all present at time of appropriation.

**I(3):** W(3) and all definite future persons.

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38 And that is the explicit object of the proviso: 'A process normally giving rise to a permanent bequeathable property right will not do so if the position of others ... is *thereby* worsened' (Nozick, *Anarchy*, 178 italics added).

39 The success of Nozick's diversion trick can be seen in the critical literature on this subject. Some writers have accepted a version of W(2). (See Thomson, *Realm of Rights*, 330ff.; Narveson, *Libertarian Idea*, 87-93.) Others have criticized Nozick for not considering the gains involved in alternative systems of property (communal ownership, redistributive systems etc.). (See J. Arthur, 'Resource Acquisition and Harm,' *Canadian Journal of Philosophy* 17 (1987) 337-48; Christman, *Myth*, 62.) But there is no call for such comparison. The point of the proviso is to guarantee counterbalancing gains to the loss of liberty, not to advance a consequentialist defense of private property. Nozick's scheme is to find benefiting effects in the system as a whole rather than in particular appropriations. The correct critical approach is to force him back to consider particular appropriations. Comparing alternative systems of property is to concede too much in advance.

**S(3):** I(3) and all indefinite future persons.

Thus I(3) refers to all actual future persons whose identity is definite, S(3) refers also to all actual future persons of indefinite identity. While W(3) is a proviso that concentrates on the present and ignores the interests of future persons, I(3) is an identity-sensitive proviso with respect to future persons, and S(3) is an identity-insensitive proviso with respect to future persons. I shall clarify this shortly.

The libertarian wishing to remove as many obstacles as possible to the process of appropriation will be eager to adopt W(3). Together with the weaker interpretations of the proviso in the first two dimensions, this enables appropriation to proceed without too much hindrance. I(3) makes appropriation more difficult because it requires considering the counterbalancing effect on more people. Improvement of one's assets, required by W(1), must result in greater gains for all persons — present and future — whose liberty will be restricted by one's ownership. In conjunction with I(1) this means that  $n$  is greater, and therefore  $1/n$  smaller. No one can appropriate more than an equal share of resources considering the maximal number of his contemporaries at any future time.<sup>40</sup>

It may be suggested that 'the paradox of future individuals' resolves the issue by making the notion of worsening the position of future persons incoherent.<sup>41</sup> The paradox of future individuals stems from the fact that the identity of future persons depends in part on what will be done today. Appropriation of a natural resource will have a cumulative effect so that, at a sufficiently distant future, the identity of all existing individuals would be different from that of those who would have existed if the resource were not appropriated. Since their existence itself is due to the appropriation, the individuals that will exist can have no

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40 C. Wolf, 'Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations,' *Ethics* 105 (1995) 791-818, suggests that the rationale of the proviso requires restricting use, consumption and damage of one's property to take account of the needs of future generations. Legitimate appropriation thus results in what he calls usufructuary rights. Whether or not such a claim can be sustained, this is not a condition on *appropriation*, but on *use*. Unless usufruct is considered non-ownership and then the interests of future generations prohibit any appropriation at all. Cf. J.T. Sanders, 'Justice and the Initial Acquisition of Property,' *Harvard Journal of Law and Public Policy* 10 (1987), 377-8.

41 On 'The Non-Identity Problem' see Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press 1984), 351-80. L.E. Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press 1987), 145f., suggests that the paradox makes it unnecessary to rectify any but the very proximate past injustices.

complaint against the appropriation even if their situation is worse than the situation of the individuals that would have otherwise existed. This is a sound argument, but one should not exaggerate its force. Taking one appropriation at a time, it would be necessary to go into the very distant future to arrive at a point where there is no overlap between existing individuals and those that would have existed on the counterfactual supposition of non-appropriation. Up to that point there would be at least *some* individuals who would exist under both scenarios and for whom it would make sense to compare their levels of well-being under different scenarios.

If future persons matter then, surely, I(3) is a more adequate interpretation than W(3). Say that after an appropriation of X four 'generations' of individuals will come into existence, represented by  $R_1$  to  $R_4$ . And that if X is not appropriated, the individuals that would exist are represented by  $R'_1$  to  $R'_4$ . Assume  $R_1=R'_1$ ,  $R_2=R'_2$ , and  $R_3=R'_3$ , so that under both scenarios  $R_{1-3}$  will exist and their identities unchanged. But for the fourth 'generation' there is some uncertainty: a person represented by the index number 4 will actually exist, but her identity, represented by tags may depend on the appropriation.

Now, if  $R_4 \neq R'_4$  then in no way can we say that the appropriation would worsen  $R_4$ 's position. Call  $R_i$  a definite future person with respect to an appropriation if and only if  $R_i=R'_i$ , where  $R_i$  is the person that would exist if X is appropriated and  $R'_i$  is the person that would exist if X is not appropriated. I(3) asks us to consider the harms only to definite future persons.<sup>42</sup> Those that would definitely exist whether or not a certain resource is appropriated. Since  $R_4$  will not exist under the non-appropriation scenario there is no call to consider his position, in comparison to that of  $R'_4$  — since they are two different persons in terms of identity. The problem is epistemic: how do we know that  $R_4 \neq R'_4$ ? Or more generally: how can we tell at the time of appropriation who and when will ever exist in both factual and counterfactual scenarios? To remedy this problem S(3) asks us to consider the harms of indefinite future persons — those that would exist under a non-appropriation scenario even if their identity is unclear. That is to say, consider the harms also of  $R_4$  in comparison to  $R'_4$  even if  $R_4 \neq R'_4$ .<sup>43</sup>

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42 This is analogous to Parfit's Narrow Person-Affecting Principle. See *Reasons and Persons*, 39ff.

43 Analogous to Parfit's Wide Person-Affecting Principle (*ibid.*, 396ff.) that is motivated by the wish to avoid the repugnant conclusion (381-90).

Such an interpretation is itself not free of problems and its adoption makes it less probable that any appropriation will be allowed.<sup>44</sup> If this means that any solution on this dimension will create a bias either in favor of the appropriator (when the *situation* of future persons is ignored), or in favor of all the other persons (when the *identity* of future persons is ignored) then, it seems to me, better the latter than the former.

W(3) is morally implausible because it arbitrarily restricts the class of people whose interests are taken into account. I(3) has the effect of further restricting the amount of resources a person can appropriate (with I(1)) or of demanding a greater counterbalancing improvement to the resource (with W(1)). Both these limitations are incompatible with the kind of property libertarians want to justify. The intermediate interpretation of this dimension is one they cannot accept because it generates an impoverished sort of property — one that is subject to the non-worsening of the position of too many people. But a faithful application of I(3) may lead, due to the epistemic problem I alluded to, to prefer S(3) as the better interpretation of this dimension. And S(3) is even less likely to permit most appropriations.

The fourth dimension is *the baseline of comparison*. That is to say, the situation with which R's position when X is appropriated is to be compared. The three interpretations are that R's position is made worse off in comparison to:

**W(4):** X remaining unowned.

**I(4):** W(4) or a counterfactual distribution of holdings.

**S(4):** I(4) or a hypothetical distribution of holdings.

The weakest interpretation is the one that is probably adopted by Nozick. At least, his discussion is most naturally understood that way.<sup>45</sup> If ownership is a necessary condition for the improvement of a natural resource, then X remaining unowned will deprive everyone of the value

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44 Of the similar problem of including all possible persons in the original position Rawls says that it is 'to stretch fantasy too far' (John Rawls, *A Theory of Justice* (Oxford: Oxford University Press 1972), 139).

45 Nozick, *Anarchy*, 181. See G.A. Cohen, 'Self-Ownership, World-Ownership, and Equality,' in Frank S. Lucash, ed. *Justice and Equality Here and Now* (Ithaca: Cornell University Press 1986), 123-5; cf. Cohen, *Self-Ownership*, 76-8, for such an interpretation and a criticism of the position and Narveson, *Libertarian Idea*, 69-71, for an attempted defense.

which could be added to it. Such a proviso will permit most appropriations and will probably exclude only those where the owner harms his assets or merely neglects them.

But some of the things Nozick says about discoveries and inventions suggests that I(4) may be a more relevant interpretation. Accordingly, we should compare R's position to the counterfactual situation, that is to say, to what *would probably* have happened if P had not appropriated X. He argues that a discovery does not worsen anyone's situation, for if it were not discovered by that particular person no one would have had it. Nevertheless, 'as time passes, the likelihood increases that others would have come across the substance; upon this fact might be based a limit to his property right in the substance....'<sup>46</sup> And similarly with respect to inventions, 'we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery.'<sup>47</sup> Now Nozick doesn't apply this line of reasoning to appropriation in general, but one may wonder why it shouldn't be so applied. Why can't we assume that in the absence of the original appropriation, sometime later someone else would have arrived and appropriated it himself? And if that latecomer is more industrious, more inventive, and so forth, wouldn't the original appropriation worsen R's position in the relevant sense?<sup>48</sup>

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46 Nozick, *Anarchy*, 181

47 *Ibid.*, 182

48 It might be argued that the purported harms that W(4) fails to take into account are irrelevant from a libertarian perspective. If P's appropriation makes R better off than non-appropriation then the only 'harm' is that R's situation could have improved even more had Q appropriated X instead. But since a libertarian morality recognizes only *negative* duties of non-harm and, in particular, within such a scheme P has no obligation to benefit R, it may be quite proper to ignore such 'harms.' I think this reasoning is wrong. First, there is no claim that by not appropriating (an act of omission) P might benefit R and therefore he should not appropriate. Rather it is that by appropriating (an act of commission) P blocks a possible benefit to R. It is P's action that harms R, not his inaction that benefits him. So the distinction between harms in comparison to non-appropriation and harms in comparison to counterfactual appropriations cannot be made in terms of a negative duty not to harm and a positive duty to benefit. Second, to make sense of the omission-commission distinction we might imagine what would happen if P didn't exist — would R's position be better or worse? The idea is that if R's position would be no better had P not existed then R's lower welfare cannot be attributed to P's actions, only to his inaction. Now, if on the assumption of P's non-existence, Q would have come along and benefited R more than under present conditions, then P's non-existence would

If what matters is R's welfare as a result of the appropriation, and if without P's appropriation Q would most likely appropriate X, there is no reason to regard the comparison to that situation as irrelevant to the question of whether P should be allowed to appropriate X at all. W(4) is morally implausible because it defines a harm in relation to one morally arbitrary situation — that of non appropriation — thus groundlessly (from R's point of view, which is the proviso's point of view) privileging the first appropriator.

Comparison to hypothetical situations S(4), to what *could possibly* have happened, had P not appropriated X, would probably make appropriations impossible. Or at least it would be unlikely that the best hypothetical situation from R's perspective, would be duplicated by the random pattern of appropriations (and transfers). But such a comparison may seem, at first glance, irrelevant.<sup>49</sup> The proviso is a condition imposed on *appropriations*, not an end-state principle of distribution. There is no reason, consistent with libertarian theory, to opt for the distribution which is better for everyone. At a closer look, however, it is apparent that I(4) tends to resemble, if not collapses into, S(4). And that for two reasons. First, the epistemic problem of discovering which situations are counterfactual, albeit of a very low probability, and which merely hypothetical. Second, a multiple iteration of the counterfactual proviso will lead to an indefinite range of counterfactual situations which will bring the set of relevant counterfactualities extremely close to the set of hypothetical situations. For example, suppose that if P would not have appropriated X then P1 would have done so. Now if P1's appropriation is better for R than P's appropriation then, according to I(4), P's appropriation is nullified. But if P1's appropriation would have been worse for R that wouldn't be the end of that. For if a second-order counterfactual possibility, in which P2 appropriates X if P1 doesn't, is better for R, then the relevant comparison for P's appropriation would be R's situation in case P2 appropriated X and P's appropriation would be illegitimate. Similar reasoning with respect to P2 would push the comparison back to P3 and so on until Pn. If there is any n<sup>th</sup>-order counterfactuality which would be better for R than P's appropriation then, although all counterfactual

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be better for R. The conclusion is that a restriction on P's appropriation because Q's appropriation would be better for R does not amount to a positive duty to benefit R, but a negative duty not to harm him.

49 Cf. Cohen, 'Self-Ownership,' 126ff., Richard Arneson's criticism, 'Lockean Self-Ownership: Towards a Demolition,' *Political Studies* 39 (1991), 44ff., and Cohen's reply, *Self-Ownership*, 83n.

appropriations P1 to P<sub>n-1</sub> would be worse for R, P's appropriation would be null and void. So in practical terms I(4) and S(4) are very similar.

I(4) and S(4) raise a complication. It seems that these interpretations block appropriations even if those represent a Pareto improvement, and it might be thought that the moral to be drawn is that W(4) is a better interpretation of the fourth dimension of the proviso than either the stringent or the intermediate interpretations I have proposed. Consider the following example: everyone is better off if either P or Q appropriate a resource X but P would be better off if she appropriates, whereas and Q would be better off if he does.<sup>50</sup>

	P	Q
No appropriation	0	0
P appropriates	7	5
Q appropriates	5	7

Both possible appropriations represent strong Pareto improvements on the non-appropriation option since everyone's position is made better. Because Q's (the one most negatively affected by P's appropriation) position would be better if he appropriates but P's position would be worse — and vice versa — both options block each other.

One way to avoid this conclusion is to ignore identities. When comparing counterfactual situations it would make sense to compare the well being not of individuals but of placeholders. R is 'the person most negatively affected by the appropriation.' Compare the situation of the person most negatively affected under each scenario. In the above example it is equal, so either appropriation is permitted. But, in the following example, the counterfactual where Q appropriates blocks P's appropriation, but not vice versa:

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<sup>50</sup> This example was suggested to me by an anonymous referee for *CJP*.

	P	Q
No appropriation	0	0
P appropriates	10	5
Q appropriates	6	9

Now, one may wonder whether the position of a placeholder, rather than a concrete person with a constant identity is relevant as a condition constraining appropriations. Why should P compare his own situation under one scenario to that of Q under a different one and accept that his position is not worsened in a relevant sense that constrains an appropriation? I have no answer to that question but for the fact that it rebuts the Pareto objection.

Anyway, even if this modification is not accepted, the moral is not that W(4) — compare only to non-appropriation — is the better interpretation. Instead, we can add a further requirement on I(4) and S(4), that counterfactuals and hypotheticals constitute a Pareto improvement on the examined appropriation.

	P	Q
No appropriation	0	0
P appropriates	6	4
Q appropriates	6	10

Why, in the above example, accept P's appropriation, and ignore a Pareto improvement represented by Q's appropriation? The champion of W(4) cannot claim that possible Pareto improvements are irrelevant, because he made an appeal to such improvements in his rejection of the stronger versions of S(4) and I(4), the versions that ignored possible Pareto improvements. So either possible Pareto improvements are irrelevant and the simple versions of S(4) and I(4) stand, or Pareto improvements are pertinent and the modified version holds. Either way, there is no reason to accept W(4) as the more plausible interpretation.

W(4) is morally implausible because it arbitrarily restricts the source of harm to other people that is taken into account. I(4) has the effect of severely narrowing the range of possible appropriations — only the most value-improving are permitted. Such a limitation falls short of the kind of property libertarians want to justify. But I(4) is practically similar to S(4), and S(4) is unlikely to permit any appropriation at all.

The fifth and last dimension is *the time of comparison*. That is the time at which R is made worse off. The three interpretations are that R's position is made worse off at:

**W(5):** the time of appropriation.

**I(5):** W(5) or in the future due to developments beyond R's control.

**S(5):** I(5) or in the future due to developments within R's control.

A person can appropriate a water hole if there are comparable water holes left for others to appropriate or use, or if the advantages of ownership trickle down to counterbalance the loss of liberty of all others. But a monopoly on the total supply of a life necessity enables the owner to exploit his customers, i.e., to extract payment way beyond any counterbalancing value he may add: not only is their liberty to use restricted but they are also overcharged. The monopolist's appropriation is illegitimate. This much is covered by W(5), an interpretation that concentrates on harms at the time of the appropriation and ignores possible future developments.

But a negative outcome of an appropriation can take effect at a later point in time and it seems arbitrary to ignore such a possibility. Things that occur after a seemingly legitimate appropriation may put an individual's possession in a similarly monopolistic position. There are at least four possible sources of future harm: first, the occurrence of natural events (drying up of water holes, floods, earthquakes and so on); second, technological progress can change the significance of certain natural resources (the significance of oil as a source of energy, the sea or space as a medium of transportation, and so on); third, personal development can lead to a change of tastes, and needs (maturity, family, incapacity due to old age or illness); fourth, other acquisitions and transfers (one's own or others').<sup>51</sup> All these possibilities are attended to by interpretation I(5).

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<sup>51</sup> See Munzer, *Theory of Property*, 274ff.

If an individual possesses a water hole and 'it happens that all the water holes in the desert dry up, except for his [then] this unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights.'<sup>52</sup> Does this mean that he no longer owns the water hole? Or does it mean that he is limited with what he may do with it, charge for its use, and so on? Nozick is ambiguous on this point:

Once it is known that someone's ownership runs afoul of the Lockean proviso, there are stringent limits on what he may do with (what is difficult any longer unservedly to call) "his property."<sup>53</sup>

His possessions are no longer his property if it is not exclusively up to him how they are to be disposed of. I(5) nullifies, in the future, appropriations made in the past. It limits the formal feature of continuity of ownership<sup>54</sup> and as such makes it questionable whether such 'appropriations' really give rise to property rights at all. In this sense, his possessions *never were his property* since his rights to them were conditional upon certain circumstances prevailing, specifically that no one will ever be made worse off by his exclusive possession and control. Nevertheless, the requirement of I(5) is that once someone's position is worsened the property right is extinguished, not that the appropriation is made illegitimate in retrospect. The complication here is that it is not clear who should be the one to pay the price of the proviso violation: the original appropriator or the present owner? Say I appropriated one of many water holes in a desert, and immediately sell it to you. Soon after our transaction all the other water holes in the desert dry up. Now that the proviso has been violated the question is: should your water hole be confiscated while I be allowed to keep the money, am I supposed to repay you, or are we to share the burden of this illegitimatised property? In reality, the situation is messier since the originally appropriated resource has probably gone through a long chain of transfers, in the process of which it was divided, merged with other resources, and transformed in various other ways. Is each one of all who have ever owned a part of that resource expected to bear the cost of the proviso violation?

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52 Nozick, *Anarchy*, 180

53 *Ibid.*

54 The incident of absence of term — an indefinite duration of the title to the thing. There is no fixed point in time in which ownership ceases. A.M. Honoré, 'Ownership' in *Making Law Bind* (Oxford: Clarendon Press 1987), 168

Changes that occur over time make it the case that it would have been better for the person most negatively affected if someone else had appropriated the resource (in conjunction with I(4) or S(4)) or if it would have remained unowned (with W(4)). Arguably, these are all changes for which the subject is not responsible and it is not clear why she must suffer the consequences of such developments. There are many ways by which developments can negatively affect R in the future. I(5), therefore, severely restricts the amount of appropriations that can be validated by the proviso, by allowing for conditional rights to certain assets rather than full ownership rights of the sort libertarians typically espouse.

The interpretation of this dimension can be made more stringent by taking into account not only the harms due to events beyond R's control, but also those for which he may be held responsible. That is to say, even if the event that changes the significance of ownership of a particular resource is made by R's conscious choice, it may count as a harm that nullifies an appropriation. Say P appropriates a piece of land which happens to be the only source of a particular kind of rock. At the time of the appropriation this has no significance for anyone, and in particular none for R. Several years later, however, R begins consciously and deliberately to cultivate a particular taste for sculptures made of the rock available only on P's property. R's position is thereby made worse to the extent that it would have been better for R had the land remained unowned. Seeing as R's position has been made worse due to developments of his own choice, should such a harm be considered a violation of the proviso? The proposed account of S(5) would claim that it is. I can think of two reasons to count harms for which one might be thought responsible as invalidating an appropriation. First, it is plausible to assume that responsibility for past action and choices diminishes with time. In a sense I am not the same person I was 10, 20, or 30 years ago. I am more experienced, my judgment has changed, even my values have evolved. I may find it very difficult to embrace my past choices and unequivocally accept them as my own. A rigid unity of the self over time that doesn't recognize this, is arguably an unrealistic and too strict a notion. Second, even if such a demanding conception of responsibility is adhered to, the *cost* of one's past choices in this case is not something one is responsible for. Nor is it something that one has agreed to in advance, or something that is a given of nature, beyond human power. For what imposes the cost of a cultivation of a new taste, what makes the taste 'expensive,' so to speak, is the distribution itself. If the rock in this example was not P's property, there would be nothing particularly expensive for R in his newly acquired taste for sculptures made of this rock. If the harm that now ensues from R's new taste is not taken account of, this in effect restricts R's freedom and welfare at the time of appro-

priation for it does not allow R to change his preferences, with impunity, in the future.

W(5) is morally implausible because it arbitrarily restricts the time of harm to other people that is taken into account. I(5) invalidates further appropriations that would have been allowed had the proviso concentrated only on harms at the time of the appropriation. Such a limitation has the effect of allowing conditional rights to resources and cannot be made to conform with the kind of property libertarians want to justify. S(5) restricts the appropriation of assets even further by protecting others not only from developments beyond their control but also from those to which they can be held, at least partly, responsible. Possessions acquired subject to I(5) or S(5) are never property rights. This makes the rights to obtained objects contractual: they are grounded on and sustained by a relationship between all individuals which impose certain constraints on use and possession. If the future worsening of R's position can nullify P's appropriation in the present then no *property* rights can be originally acquired.

A negative argument cannot serve to legitimize private appropriations of the type libertarians are eager to justify. The notion of a person possessing the *power* to confer rights on himself, and *unilaterally* impose duties on others, is unfamiliar, repugnant and on the verge of absurdity. Therefore any such power must, to the very least, be restricted in such a way as to consider the interests of others. A detailed analysis of the proviso has shown that a condition of non-harm on appropriations, non-trivially interpreted, imposes severe constraints that make any appropriation highly unlikely. To generate the kind of property that will be compatible with libertarianism the five dimensions of the proviso must be given a morally implausible interpretation. The weak interpretation of the first two dimensions is inconsistent with what libertarians take to be individuals' most important interest. That is to say, the interest at the basis of ownership rights — the freedom to use and control resources — is ignored for non-appropriators. They must be content with the protection of their non-freedom based aspects of their well-being. Moreover, even that, on its own, cannot justify original appropriation, for what is supposed to compensate, albeit in terms of welfare, is not any feature of the particular appropriation, but incongruently the efficiency of the system as a whole.

Furthermore, to generate property rights of the libertarian type, the last three dimensions must also be taken on their weakest interpretation. But this too is implausible in its requirement of the morally arbitrary differentiation of harm according to the identity of the harmed individuals, the source of the harm, or the time at which it ensues.

Perhaps, examining the proviso from several dimensions, all that can be acquired are contractual rights to control objects which may not be

used or neglected in a way which may worsen the position of any living or possible future persons S(3), at the time of acquisition or at any future time S(5), in comparison to any alternative distribution of such contractual rights S(4).<sup>55</sup>

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