

# Lockean Theories of Property: Justifications for Unilateral Appropriation

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**Abstract.** Although John Locke’s theory of appropriation is undoubtedly influential, no one seems to agree about exactly what he was trying to say. It is unlikely that someone will write *the* interpretation that effectively ends the controversy. Instead of trying to find the one definitive interpretation of Locke’s property theory, this article attempts to identify the range of reasonable interpretations and extensions of Lockean property theory that exist in the contemporary literature with an emphasis on his argument for unilateral appropriation. It goes through Locke’s argument point-by-point discussing the controversy over what he said and over what he perhaps should have said to make the most valuable and coherent argument. The result is an outline of Lockean theories of property: a menu of options by which one might use appropriation to justify property rights. Supporters only need to pick the version they find most plausible, but opponents should be aware of the entire menu. Anyone claiming to refute appropriation-based property rights must address not only one but all potentially valid versions of it.

**Key words:** property, Locke, appropriation, libertarianism, Lockean proviso.

Although John Locke’s property theory (1960, especially *Second Treatise*, ch. 5) is undoubtedly influential, no one seems to agree on exactly what he was trying to say. Many have complained about his ambiguity. Those who do not see ambiguity have interpreted him in strikingly different ways.<sup>1</sup> There is unlikely to be an “a-ha” moment, when someone writes *the* interpretation, effectively ending the controversy. But the ambiguity in Locke’s property theory does not imply that it lacks important insights. The most important and influential of these insights is unilateral appropriation: the idea that there is something individuals can do on their own to establish rights over natural resources that others have a moral duty to respect.

Given the influence of and the controversy over Locke’s theory of unilateral appropriation, it is worthwhile to take stock of the range of theories that have been developed out of it. In an effort to do so, this article makes a critical point-by-point examination of Locke and his interpreters, not to identify the one correct interpretation of Locke’s theory but to identify the menu of options: the range of potentially valid ways in which unilateral appropriation might be used to justify private property rights. Supporters only need to pick the version they find most plausible, but opponents should be aware of the entire menu. Anyone claiming to refute the appropriation-based justification of property rights must address not only one but all potentially valid versions of it.

Locke, of course, is not the first writer to discuss the appropriation of property. Grotius (2005 [1625]) had a version of appropriation theory, and in the form of first possession, it has been recognized in the common law tradition stemming as far back as an-

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1] See below.

cient Rome.<sup>2</sup> But Locke employs unilateral appropriation to argue that property rights entail morally binding restrictions on others in advance of – and perhaps with greater authority than – any social agreement. His argument has had enormous influence ever since, and therefore, it has become the starting point for almost any discussion of the appropriation-based justification of property rights. The extent to which Locke actually relies on unilateral appropriation is also a matter of controversy (discussed below), but the focus of the discussion always returns to this crucial issue.

My attention in this article is not limited to sources proposed strictly as interpretations of *Locke's* theory; it includes *Lockean* extensions and modifications as well. Following Gopal Sreenivasan (1995, 106), I use the term “Locke’s theory” to refer to Locke’s own words or intentions and the term “Lockean theory” to refer to any theory somehow based on Locke. I am interested in Locke’s property theory because it bears on the on-going philosophical debate over equality, property rights, freedom, and the legitimacy of government powers of taxation, regulation, and redistribution.<sup>3</sup> The central goal of this article is to identify the range of plausible appropriation-based justifications of private property.

Issues of why Locke said what he said, what his real intentions were, or how one comes up with a particular interpretation of Locke are of only secondary importance to this effort.

Although Locke clearly wrote in Christian terms, this article searches for a secular version of Lockean theory. Discussion of the theological aspects of Locke’s theory has become popular recently,<sup>4</sup> but those aspects of his theory can be seen at least somewhat metaphorically,<sup>5</sup> and many Lockean property theorists leave them aside.<sup>6</sup> A secularized version must be found if Lockean property theory is going to be relevant to modern pluralistic societies.

This article is organized as follows. Section I discusses the controversy over Locke’s property theory, indicating that it is unlikely to be resolved. Section II begins the discussion of Lockean property theory by examining the conditions for appropriation in the state of nature. Section III discusses the controversy over whether and how many provisos apply to appropriation. It argues that although there are up to three Lockean provisos, with reasonable simplification they can be considered jointly as one proviso. Section IV discusses now the proviso can be fulfilled in a world of scarce resources. Section V examines how, whether, and what strength of property rights (appropriated in the state of nature) can be brought into civil society. Section VI concludes by putting together an out-

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2] Epstein 1995.

3] Williams 1992; Nozick 1974; Cohen 1995; Arneson 1991.

4] Dunn 1990; Dunn 1969; Harris 1994; Waldron 2002; Myers 1995.

5] Brown 1999.

6] For discussion of the religious aspects of Locke’s theory see Oakley 1997; Schochet 2000, 367-72; Terchek and Brubaker 1989; Ward 1995.

line of Lockean theories of property. It shows how various interpretations and reformulations of Lockean theory can be understood as specifications of that outline.

An attack on appropriation theory cannot be successful if it defeats only one specification of that outline. The opponent must defeat the entire outline or any reasonable specification of it. The existence of this diverse menu of options by which a supporter might use appropriation theory to justify private property rights does not make any one argument for property logically stronger, but it does make the task of the opponent of private property much more demanding.

### I. LOCKE AS RORSCHACH

Lockean appropriation theory has been applied not only to individual property rights but to intellectual property, territorial rights, international law, bioengineering, and many other areas.<sup>7</sup> Nevertheless, “How to make full sense of Locke’s theory of property remains one of the big challenges in the history of political thought.” (Nicholson 1998, 153).

Some scholars believe that Locke’s property theory is unclear or inconsistent.<sup>8</sup> Those who have tried to clarify Locke’s property theory have produced inconsistent interpretations. Richard Ashcraft (1986) sees revolutionary theory. C. B. Macpherson (1962) and others see a basis for class-based capitalism.<sup>9</sup> Barbara Arneil (1996; 1996b) sees a justification for British imperialism in America. Many right-libertarians see liberal individualism with strong natural property rights.<sup>10</sup> John Dunn (1991 [1968]; 1969) sees property rights tempered by a strong duty of charity. Several scholars see limited, regulated property rights.<sup>11</sup> Gopal Sreenivasan (1995) sees greatly limited, egalitarian property rights. Leo Strauss (1991 [1952]) sees no appeal to natural law at all. Matthew Kramer (2004) sees a thoroughgoing communitarianism. James Tully (1980, 167-70) sees contingent property rights as strong as society chooses to grant.

Given all of this disagreement, “One cannot but be wary before trespassing on the bitter and protracted debate on Locke’s theory of property.” (Clark 1998, 256). But it has something that accounts for its enduring popularity. According to Alan Simmons:

[T]hose who innocently work to discover, make, or usefully employ some unowned good ought to be allowed to keep it (if in so doing they harm no others)... It is the strength of this intuition that keeps alive the interest in Locke’s labor theory of property acquisition... However badly he defends his views, we might say, surely Locke is on to something. (1992, 223)

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7] Child 1997; Dienstag 1996; Hughes 1997; Meyer 2000; Story 1998; Nine 2008; Steiner 2008; Levin 2001; McDaniel 2001; Lindsay 2005.

8] Monson (1971).

9] Poole (1980) and Wootton (1992).

10] Nozick (1974, 167-82); Rothbard (1982, 21-24).

11] Gough (1950); Ryan (1984); Waldron (1988, 137-252); Freeman (2001).

Or is he? Before we can evaluate it, we need to determine what justifications of property rights have been developed from this basic insight.

## II. APPROPRIATION IN THE STATE OF NATURE

Locke devised a theory of unilateral appropriation in an attempt to show how individuals can come to have unequal private property even if the Earth and all its natural resources in the initial state of nature “belong to Mankind in common” (§25-§27)<sup>12</sup>. Whatever he intended by this statement, it was something less than full ownership, or unilateral appropriation would have been prohibited outright.

Locke begins in a state of nature with abundant natural resources but no government, money, or trade. The first person to mix his or her labor with land needs no one else’s consent to appropriate it (§26-31).<sup>13</sup> A farmer (who alters the land through labor) appropriates it; a hunter-gatherer (who labors on land without significantly altering it) does not.

Locke discusses labor-based appropriation at length. It is not always clear which of his statements are meant as justifications for appropriation and which are merely descriptive. But his property chapter contains at least five possible justifications for it. First, self-ownership implies a person owns his or her labor and any unowned thing s/he mixes it with (§27-28). Second, labor improves resources and accounts for most of the value of property (§28). This reason can be read as meaning that natural resources have little or no value until mixed with labor and/or consumed.<sup>14</sup> Third, Locke’s calling attention to the improvement of resource value through the pains of the laborer (§34) can be read as some kind of desert claim.<sup>15</sup> Fourth, improving resources effectively makes more resources available for others (§37).<sup>16</sup> Fifth, appropriators are entitled to something like an unconditional right to produce their own subsistence (§28-29). This reason is illustrated by what Sreenivasan calls the “paradox of plenty” (1995, 28-29). Locke argues, “If [unanimous consent] was necessary, Man had starved, notwithstanding the Plenty God had given him” (§28). This outcome is paradoxical in the sense that God gave land to mankind

12] Unless otherwise specified, section numbers (denoted §) refer to Locke 1960, *Second Treatise*.

13] Locke actually discusses only the first *man* (§26-27) and his family (§36, 48). Waldron 1988, 161-62, argues that Locke’s family-based ownership is important. However, most contemporary Lockean apply appropriation theory on an individual, non-gender-specific basis. For discussion of the family in Locke’s theory see Pfeffer 2001.

14] Arneil (1994, 602), Olivecrona (1991 [1974], 341) and Cohen (1995) read it this way. Williams (1992, 56) reads Locke not as seeing resources as small in relative value to labor but as seeing resources as opportunities for labor.

15] Becker 1977, 35-36; Buckle 1991, 149-61.

16] This argument is elaborated and more fully connected with a need for private ownership by Schmidt (1990; 1991, 17-24).

in common so that it would sustain them, but strict common ownership could preclude individuals' access to sustenance.

All of Locke's justifications for labor-based appropriation have been challenged by scholars. For example, Waldron (1988, 168-74) argues that the paradox of plenty cannot justify appropriation because a right to subsistence can be fulfilled without conferring exclusive ownership rights to appropriators. Sreenivasan (1995, 28-29) replies that the paradox is not meant as the justification of unilateral appropriation but as a demonstration of its feasibility, by reducing the need for unanimous consent to an absurdity – starvation amid plenty.

Many authors have remarked that this argument justifies ownership of only the value added by the appropriator, not the full resource value of an asset.<sup>17</sup> Locke may have believed that the tax system could not separate value added, and he seems to have believed that resource value was insignificant. If these beliefs are incorrect, the conclusion that the laborer should own the entire resource is weakened.

Not all appropriation theorists accept first labor as the method by which property claims can be established. Some replace first labor with first claim, first use, first possession, or discovery.<sup>18</sup> Some have proposed additional justifications for appropriation, including that property takes a pivotal role in a person's life,<sup>19</sup> that a stable property rights system produces efficiency gains that benefit everyone,<sup>20</sup> and that appropriation is necessary to pursue projects, with which others should not interfere.<sup>21</sup>

### III. THREE PROVISOS IN ONE

Scholars have identified as many as three limits on Lockean appropriation: (A) the no-waste proviso or spoliation limitation, (B) the charity or subsistence proviso, and (C) the enough-and-as-good proviso or the sufficiency limitation. There is little agreement about which provisos are necessary, whether they were intended, or what their implications are, but with reasonable simplification, it is possible at least to consider them jointly. The following four subsections discuss three provisos and the possibility of combining them.

#### *A. The no-waste proviso*

Locke argues with great emphasis, that an appropriator must not waste his or her property or take more than s/he can use (§31, 38, 46). In the state of nature, this proviso

17] Epstein (1995, 60).

18] Otsuka (2003, 21 n. 29); Narveson (1988, chapter 7); Epstein (1995); Kirzner (1989, 18-19, 98-100).

19] Waldron (1992).

20] Epstein (1995).

21] Sanders (1987, 392-99); Sanders (2002, 40-45); Lomasky (1987, 130-31).

ensures substantial equality by limiting the size of holdings to the amount a person can work directly.

It is hard to understand why Locke stresses this proviso so much. The most obvious motivation is that, if people waste what they take, there might not be enough to go around, but that argument would make the no-waste proviso an instrument to maintain the enough-and-as-good proviso (discussed below). Instead, Locke seems to ascribe independent value and primary importance to the no-waste proviso. One explanation for this proviso is simply that God commanded people to use the bounty of nature (§31). If so, it might not have a secular equivalent.

Rather than protection for the propertyless from a wasteful upper class, several authors read this proviso as support for the expansion of upper class property rights through the enclosure movement in Britain and colonization abroad.<sup>22</sup> Locke's apparent argument is that peasants and technologically primitive people violate the no-waste proviso by failing to use land to its fullest. Industrious British proprietors are, therefore, justified in seizing it.<sup>23</sup> If this interpretation is correct, this aspect of Locke's theory is rather unappealing.

### ***B. The charity proviso***

Locke (1960, *First Treatise* §42; 1993, 452; Dunn 1991 [1968]) believed in a strong duty of charity by which everyone is entitled to maintain subsistence, but scholars do not agree whether he includes charity as a proviso in his property theory. Most scholars have not addressed the possibility of a distinct charity proviso. John Sanders (1987, 371-73) recognizes a duty to charity in the *First Treatise*, under the name "Right to Surplusage", but argues that it manifests itself as the enough-and-as-good proviso in the *Second Treatise*. A few scholars, such as Waldron (1979, 327-28), see it as something rather different from the enough-and-as-good proviso. He claims (2002, 177-85) that the *Second Treatise* relies heavily on the charity proviso although Locke does not specifically restate it there. Other scholars do see references to this proviso in the *Second Treatise* (§25).<sup>24</sup> Robert Lamb and Benjamin Thompson (2009) argue that concept of charity was not entirely consistent and that it implies only minimally enforceable duties. Although charity might give those in need a title to the plenty of others, it appears to be a paternal responsibility for the property-owning class rather than a challenge to the concentration of ownership. It could be used to justify taxation and redistribution, but Locke may have believed, as many right-libertarians do, that such taxation is unnecessary in a healthy economy because the

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22] Arneil (1994); Arneil (1996); Glasser (1990); Olivecrona (1974, 592); Lebovics (1991 [1986]).

23] Glasser 1990.

24] Ashcraft (1994, 243).

market provides enough jobs for the able-bodied and voluntary charity provides enough support for the infirm.<sup>25</sup>

### C. *The enough-and-as-good proviso*

Locke states that appropriation is valid, “at least where there is enough, and as good left in common for others” (§27), and he elaborates this idea significantly in the following paragraphs (§27-36). Waldron (1988, 210) and Macpherson (1962, 211) call this idea the “sufficiency limitation.” Nozick calls it “*the Lockean proviso*” (1974, 178-182).

It has inspired diverse interpretation, beginning with Locke’s placement of the words “at least.” Seemingly, either the words “at least” mean nothing, or the entire proviso means nothing. Had Locke written, *appropriation is valid where there is at least enough and as good left in common for others*, he would have made it clear that he intended it was a proviso. But instead he wrote, “*at least where there is enough and as good left in common for others*” (§27, emphasis added), implying that there are other unspecified cases in which a person can appropriate without leaving enough and as good for others. Why would Locke include this phrase “at least” if it did not mean that appropriation was also valid without it? Why would Locke mention this enough-and-as-good clause at all (and mention it several times) if he did not intend it as a proviso?

Some scholars argue that this sufficiency limitation is not a proviso at all. It could be a sufficient (but not necessary) condition for appropriation or merely a description of the effect of the no-waste proviso in the state of nature.<sup>26</sup> This position has two difficulties. First, Kramer (2004, 106) demonstrates that the enough-and-as-good proviso cannot be successfully employed as a sufficient condition. Suppose I shoot a rhinoceros, and I leave enough rhinos so that everyone who wants can shoot one too. But you, like most people, don’t want to shoot a rhino; you believe they are sacred creatures that must all be left in the wild. The fact that there is enough-and-as-good left for you to appropriate, does not mean that you should feel uninjured by my appropriation or even that I should be permitted to appropriate. For the enough-and-as-good proviso to become a sufficient condition, it would have to be combined with the assumption that there is no value in leaving the entire stock of the resource in question in common. This assumption will not hold for all resources.

Second, Locke does not state the proviso merely as a matter of fact but as a justification for appropriation. He repeatedly uses words like “injury,” “complaint,” “prejudice,” and “intrench” (§27-36) seemingly to demonstrate that the enough-and-as-good proviso justifies property *because* it ensures the appropriator “does as good as take nothing at all” (§33).

25] Waldron 1988, 161; Winfrew 1991 [1981], 398.

26] Thomson (1976); Waldron (1979, 322; 1988, 210-11; 2002, 172).

Some more extreme property rights advocates argue that appropriation theory is logically stronger without any provisos. In various versions the essential argument is that people have no positive right to resources. Therefore, they are no worse off in terms of their rights, even if others appropriate everything.<sup>27</sup> Opponents of this extreme view argue that without a proviso, appropriation interferes with, and therefore harms, anyone who is capable of using unappropriated resources.<sup>28</sup> If Locke did not intend the sufficiency limitation as a proviso, perhaps he should have. Any justification of property is weak and unpersuasive without it.

Most authors agree with Sreenivasan (1995, 40) and Nozick (1974) that the enough-and-as-good proviso is the most important limitation on property rights. Even Waldron (1979; 2002) admits that there is a problem when the sufficiency limitation is not met. If the phrase “at least” is carefully placed, it means that when goods are not scarce the appropriator is required either to compensate the non-appropriators or to obtain consent.<sup>29</sup>

#### *D. Three provisos in one*

Realizing that all three provisos stem from the belief that people should be free to use resources to meet their needs, it is possible with minor simplification to combine them into one. To do so, the no-waste proviso has to be read as an instrument to help fulfill the others, even though this is a more secularized reading than Locke probably intended. The charity and sufficiency provisos protect the propertyless better when both are in effect. The charity proviso implies greater support for those unable to appropriate resources on their own. The enough-and-as-good proviso implies greater support to those who are capable of appropriating more than just enough resources to meet their basic needs. The simplifying assumption that everyone is capable of providing for themselves given enough resources (perhaps by reselling them) allows the following section to focus on fulfilling “the” proviso without too much loss of generality. This proviso is somewhat broader than Nozick’s characterization of sufficiency as “the” proviso.

### IV. FULFILLING THE LOCKEAN PROVISO

Each of the following three subsections discusses one of three questions about how the proviso should be fulfilled. (A) Must it be fulfilled in kind or is compensation acceptable? (B) Should it be fulfilled in terms of standard-of-living or independent functioning? (C) How strong should it be? Locke did not elaborate extensively on these issues. Therefore, this discussion mostly involves Lockean adaptations.

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27] Kirzner 1989, 98-100; Narveson 1988, 100-101; Rothbard 1982, 244-45.

28] Wenar (1998).

29] Sreenivasan 1995, 40; Tully 1980.



*A. Must the proviso be fulfilled in resources or is compensation acceptable?*

It is unclear whether “enough and as good” should be left in the same kind of resources taken by the appropriator or whether the appropriator can replace natural resources with something else. Depending on the strength of the proviso, in-kind fulfillment might be difficult or impossible in a world with a population in the billions, but as long as production creates value, the possibility exists to fulfill the proviso by replacement or compensation. Locke seems to have something like this in mind when he asserts that inhabitants are beholden to the farmer who increases the stock of corn (§36) and that laborers in England are better off than kings in America.<sup>30</sup> Whether or not this is his actual intent, it seems like the logical extension of the proviso, and it has been suggested by many Lockean authors.<sup>31</sup> Three candidates for replacement – market opportunities, government services, and cash – play a part in the discussion below.

*B. Should the proviso be fulfilled in terms of standard-of-living or independent functioning?*

Some authors are concerned only with a living standard conception of the proviso, and claim that it can be shown to be fulfilled by comparing the consumption levels of modern workers with those of people who lived before the establishment of agriculture.<sup>32</sup> The focus on living standards ignores the important issue that appropriation reduces the freedom from interference of the propertyless and treats forced participation in the market economy as the moral equivalent of working as one’s own boss in pre-agricultural society.<sup>33</sup>

Simmons (1992) argues that a reasonable proviso should ensure that non-appropriators are left in a condition of nondependence: the ability to make a living with direct access to resources. He considers nondependence to be a moderate level of the proviso – as opposed to the strong and weak versions discussed below, but the question of how the proviso is to be fulfilled is entirely separate from its level. His argument for nondependence is actually a call to fulfill the proviso in terms of independent functioning rather than standard of living. Workers who have high standards of living but are dependent on their employers could meet a generous interpretation of the proviso in terms of living standards without satisfying it at all in terms of independent functioning.

Tully (1980) and Sreenivasan (1995) argue that Locke saw the proviso as ensuring that the able-bodied have direct access to the means of production so that they do not become dependent proletarians. If so, market opportunities cannot fulfill the proviso. It would require cash compensation or government-provided goods and services.

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30] Snyder 1991 [1986], 374.

31] Otsuka (2003); Paine (1797); Sreenivasan (1995).

32] Mack (1995); Nozick (1974, 182).

33] Carter 1989, 46; Bogart 1985, 833-34.

Waldron (1984; 1988; 1982, 225) argues this interpretation is an implausible account of Locke's intent; it was clear and well documented that Locke took the existence and legitimacy of dependent wage-labor for granted and believed that subsistence could be fulfilled through wage labor.<sup>34</sup> One might reply that in *the First Treatise* Locke argues against one person being in a position of dependence on another for his survival, but that passage is written in the context of *one* employer not a group of competing employers (§ 41-42). Although he didn't argue it explicitly, Locke probably believed competition among employers gave workers sufficient freedom that they did not require independence from property owners as a group. Eric Mack (1995; 2002) explicitly defends that position as the most logically plausible version of the proviso.

### C. How strong should the proviso be?

The two most commonly discussed levels for the proviso are what Nozick calls the "weak" and "strong" versions (1974, 174-82). But as I will show, neither of these versions is strong enough to meet the conditions Locke established for appropriation in the state of nature.

Nozick's weak version hinges on the words "in common" in the phrase, "enough, and as good left in common for others." One can appropriate resources as long as everyone else is as well off as they would be if *no one* had appropriated any property and society remained in a state of nature (Nozick 1974, 178-79).

Waldron (1988, 214-15), Sreenivasan (1995, 40), and Tully (1980, 137-38) agree that the proviso is best interpreted as Nozick's strong version: resources can be appropriated as long as an equal share of the value of unimproved natural resources is available to everyone. This version allows for inequality only in the improvements that have been made to resources, but the value of improvements could be by far the greater portion of total property. Some authors erroneously claim that the strong version is unfulfillable. Actually, it can be fulfilled at any level of scarcity by using the policy endorsed by some left-libertarians of taxing raw resource value at the highest sustainable rate and distributing the revenue equally to everyone.<sup>35</sup>

Locke seems to imply the equal shares version at one point writing, "He that had as good left for his improvement, *as was already taken up*, needed not complain" (§34, emphasis added). But he more often implies something much stronger: "he that leaves as much as another can make use of, does as good as take nothing at all" (§33). Locke writes that after appropriation, non-appropriators, "would still have room, for as good, and as large a Possession ... as before it was appropriated (§36).

In these passages "enough and as good" clearly does not refer to the size of the *appropriator's* share but to the amount other people can use (§33). Appropriation necessarily means that fewer unclaimed goods exist, but it does not necessarily mean that there

34] Macpherson 1962, 216-17.

35] Steiner (2009, especially 5-6; 1992).

are now fewer unclaimed goods than other people can use. A proviso allowing everyone access to as much as they could use would allow appropriation only of goods that are economically abundant. Goods, such as air, dirt, and salt water are abundant in the sense that they have a market value of zero and there is more available than anyone is able to appropriate. Locke clearly had abundance in mind when he wrote, “No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst” (§33).

This abundance condition could be called the “maximum strength” version of the proviso. It is much stronger than the “strong” proviso, because under scarcity, each person can make use of more than a per capita share, and in a monetary economy there is no limit to how much a person can use (§45-50).

One might be tempted to think that there is no need for property when goods are abundant, but in Locke’s state of nature only raw resources are abundant, not finished products (§28). If so, property has value for the reasons Locke stated, and people do continue to appropriate abundant goods. A sculptor can pick up a worthless rock by the side of a road and carve it into something valuable, even though unimproved rocks remain economically valueless. It doesn’t matter whether she now possesses more rocks than other people; it matters only that there are more unaltered rocks available than anyone wants. Someone who demands that particular rock clearly desires “the benefit of another’s pains” (§34). Assuming abundant resources that have no value left unappropriated, property seems to have no other effect than protecting people from intrusive interference. The sculptor interferes with others when she claims a particular rock but not with any project they might conceivably want to do on their own; only with their ability to thwart her efforts.

Locke clearly relies on the maximum strength proviso to justify property *when resources are abundant*; only this version fully supports his claims of no injury, entrenchment, prejudice, or cause for complaint (§27-36). Even the “strong” version protects people from some forms interference by imposing other forms of interference with things people are capable of doing without aid from others.

The maximum strength proviso and the belief that people should be free from interference with their projects are sufficient to justify property. The rest of the theory is superfluous when natural resources are abundant. If I appropriate air, it does not matter whether I work with it (using it to inflate a tire), play with it (using it to inflate a balloon), or waste it (blowing it into space). “Waste” – as Locke used the term – simply means disuse (e.g. §36, 37, 38), and he knew that some abundant resources necessarily go unused (§42). The only reasonable justification for the no-waste proviso under conditions of abundance is to prevent the possibility that waste will create scarcity, again implying only instrumental value to the no-waste proviso.

Although the maximum strength proviso has plausibility, it lacks applicability, because it justifies property only in abundant resources. Most authors who reject “the

proviso” on the grounds that it is unfulfillable seem to have the maximum strength version in mind.<sup>36</sup> Although several scholars have interpreted the proviso as an abundance condition,<sup>37</sup> I know of no explicit discussion of the difference between it and the equal-shares version, and no discussion that both recognizes Locke’s reliance on it in the state of nature and explains the move to a weaker proviso under scarcity.<sup>38</sup> However, some arguments in Lockean literature might be put to this purpose. The function of the rest of the theory must be to extend property beyond abundance.

One option is to argue that the propertyless are not entitled to all they can appropriate now given current technology but only to all they would have been able to appropriate in the state of nature. Eric Mack argues, “if the whole process of privatization leaves Sally with ‘enough and as good’ to use as she would have enjoyed (at a comparable cost) had all extra-personal resources remained in common, Sally will have no complaint.” (2002, 248).<sup>39</sup> Alan Ryan writes, “since all men have profited by entering a market society, there is no cause for complaint if some men have done better than others.” (1991 [1965], 433).

This argument is coherent and it seems to be what Locke was getting at (§37-41), but it has three difficulties. First, it relies on the implausible empirical assumption that everyone is better off now than every single person was before the invention of agriculture. It might be plausible that the average person is better off, but the very idea of a proviso is that it protects everyone. Second, it seems to give current property owners credit for all that civilization has accomplished. Third, as Michael Otsuka argues (2003, 24-26), the spirit of Locke’s proviso is that one person’s appropriation must not put another person at any disadvantage. The proviso must take into account everything non-appropriators might have done with resources, including taking the advantages current property holders have taken or creating a system that shares access to advantage more equally.

There are several other possible ways to justify moving to a weaker proviso under scarcity. Right-libertarians could appeal to a finders-keepers ethic<sup>40</sup> or any of Locke’s labor-mixing arguments. Left-libertarians could argue that equal shares version best expresses the value of equal freedom from interference.<sup>41</sup> Liberal-egalitarians could argue that the proviso implies entitlement to a decent share of society’s productive capacity.<sup>42</sup> Another option is to rely on a social agreement. Locke employs this strategy when he discusses the transition to civil society.

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36] Kirzner (1989, 156); Sartorius (1984, especially 210); for a list of several others making this claim see Schmidtz 1990, 504.

37] Carter (1989, 19).

38] Waldron (2002, 172-73) comes closest but denies the function of the maximum strength proviso.

39] Sanders (1987, 385) also makes a version of this argument.

40] Kirzner (1989, 16-18); a similar argument under a different name is given by Schmidtz (1990, 511).

41] Steiner (1981b).

42] Lemos (1991 [1975]).

## V. PROPERTY IN CIVIL SOCIETY

Most of Locke's chapter on property involves appropriation in the state of nature; only the last few paragraphs (§45-51) focus on property in civil society.<sup>43</sup> The transition to civil society is the most controversial part of his theory. Scholars have given very different accounts of the property system Locke's theory implies for modern states.

For Locke, three changes mark the transition from the state of nature to civil society: resource abundance ends, a monetary economy appears, and a government is established (§45-51). Richard Ashcraft (1994) sees discrete stages in Locke's state of nature, but Locke is unclear whether these changes are supposed to be simultaneous or sequential. Archeologists and anthropologists have found evidence of these changes need not occur together or in any specific order. Strong governments have existed without monetary economies; stateless societies have existed with substantial land scarcity; and so on.<sup>44</sup> Nevertheless, as we will see, the supposed connection between these three changes is extremely important for Lockean theory.

One might expect the end of resource abundance to reduce the size of property holdings in accordance with the enough-and-as-good proviso, but Locke instead focuses on how civil society frees owners from the no-waste proviso (§46-50). According to Locke, money requires general agreement to be valuable (§46) and provides a costless way to store wealth (§47). Locke seems to connect these two reasons (§50), but whether or not money implies consent is irrelevant to whether or not it provides a waste-free store of wealth.

There can only be slight inequality in Locke's state of nature because a subsistence farmer can only take so many resources without wasting them. However, in a monetary economy a proprietor can pay servants to keep an unlimited amount of resources from being wasted. This incentive does not ensure a waste-free economy, but Locke seemed to think it would be enough. Once again, the stress Locke places on the no-waste proviso is a mystery: it is irrelevant in the age of abundance and overcome in the age of scarcity. Perhaps it is merely a justification for colonialism.

Consent would be important if inequality of ownership in civil society required a social agreement, but Locke seems to believe that ownership is not the sort of thing that requires consent.<sup>45</sup> It is difficult to make any consistent interpretation of the role of consent in Locke's property theory without amending or absurdly interpreting at least one of Locke's statements; consider these four:

"I shall endeavor to shew, how Men might come to have a property ... without any expressed Compact of all the Commoners" (§25).

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43] Olivecrona 1991 [1974].

44] Johnson and Earle 2000.

45] Rapaczynski 1981, 306.

“[W]ill any one say he had not right to those Acorns or Apples he thus appropriated, because he had not the consent of all Mankind to make them his? ... If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him” (§28).

“The Turfs my Servant has cut ... become my *Property* without the assignment or consent of any body” (§28).

“Men have agreed to disproportionate and unequal Possession ... by tacit and voluntary consent” (§50).

One might argue that Locke believed people generally consent to a system of appropriation in which individuals may appropriate any unowned property without specific consent. This interpretation is consistent with statement A, which denies only the need for *expressed* consent, and with statement D, which asserts that consent has been given. But it conflicts with statements B and C, which deny the need for *any* consent. One might argue that consent is not necessary in the state of nature but is necessary for *unequal* property ownership in a monetary economy. This interpretation runs into difficulty with statement C, which is a case of appropriation by labor in civil society without consent. Waldron observes, “Locke appears to connect the age of plenty with the lack of any need for consent to appropriate and the age of money and scarcity with a suggestion that now, after all, property is based on consent.” (1988, 210). Even that interpretation, which does not ascribe much consistency to Locke, involves amending C.

The timing of the appearance of government is also important. If an irrevocable agreement to use money and to accept inequality comes first, social agreement validates property outside of – and possibly with greater authority than – government, and therefore, property implies moral limits on government. If money arises only with government and an explicit agreement, the theory can more easily support the idea that property is whatever society chooses to grant.

Some theorists have attempted to make sense out of Locke’s consent theory. Others argue that it cannot justify property because any tacit consent does not need to be irrevocable.<sup>46</sup> Some scholars attempt to resolve Locke’s apparent contradictions by almost completely separating his property theory in the state of nature from his property theory in civil society. According to S. B. Drury (1991 [1982]), property rights in Locke’s civil society are based on utility. According to Tully (1980, 164-70), they become contingent on whatever the polity decides. Most scholars find Tully’s view to be an implausible interpretation of Locke’s intent.<sup>47</sup> This view of Locke seems difficult, because Locke was trying to establish limits on government, and because he believed the protection of property is one of the central functions of government.<sup>48</sup>

46] Weale (1978); Zvesper (1984); Brough (2003).

47] For example, Cohen (1986); den Hartogh (1990); Sreenivasan (1995); Waldron (1984); 1988.

48] Baldwin 1982; Frye 2004; Kleinerman 2007.

Tully's interpretation implies that Locke showed nearly the opposite of what he said he would "endeavor to shew" (§25). It would mean that he intended only the last few paragraphs of his chapter on property to be relevant to the society in which he lived.

Perhaps Locke believed the propertyless had to validate property rights from the state of nature in order to move into civil society. They had the choice of being propertyless *and* remaining in the state of nature or entering civil society as a propertyless citizen. If so, Locke's theory, reduces "voluntary" consent to purely formal agreement. Locke's consent theory suffers from the problem common to consent theories of government that truly voluntary consent is absent from virtually any known polity.<sup>49</sup>

Perhaps Ellen Frankel Paul (1981) is right to conclude that Locke's attempt to conflate natural rights with consent theory is self-contradictory. However, although Locke might have applied consent inconsistently,<sup>50</sup> its inclusion could make the theory more persuasive,<sup>51</sup> if it could be made plausible. Despite what Locke's other statements might imply, contingent (or partially contingent) property rights seem to be the logical implication of a property theory that relies to any extent on voluntary consent.

Whatever the role of consent and money are in civil society, the question of whether the provisos remain in effect and consequently the strength of property rights in civil society is unclear. Locke mentions the possibility that owners can avoid violation of the no-waste proviso, but he does not mention how, why, or whether consent frees owners from the other provisos. This omission gives credence both to those who believe he intended the enough-and-as-good proviso to remain in effect and to those who believe he did not intend it as a proviso at all. Nozick (1974), Tully (1980), Simmons (1992), and Sreenivasan (1995) argue that the proviso remains in effect with the propertyless agreeing to inequality but not to less than sufficiency.

This discussion implies that there are at least three different versions of what happens to property rights in Lockean civil society:

Property owners lose their natural property rights and receive whatever rights civil society agrees on.<sup>52</sup>

Money (somehow) allows unequal property rights to exist, but the propertyless maintain their rights under the proviso(s).<sup>53</sup>

The propertyless give up all or most of their rights under the proviso(s).<sup>54</sup>

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49] Simmons 1998.

50] Franklin 1996; Russell 1986.

51] Simmons 1989.

52] Tully 1980; 1982.

53] Simmons 1992, 303-4; Sreenivasan 1995, 103-4, 112-17.

54] Macpherson 1962, 211-13; Waldron 1988, ch. 6.

Another important issue for property in civil society often overlooked by Lockean theorists is whether original appropriation has any relevance in modern times. Thomas Mautner points out that the theory applies only to property that can be traced by a series of just steps to original appropriation, but “Force and fraud have reigned supreme in the history of mankind.” (1982, 267). He concludes “both sides assume, mistakenly, that the theory can be applied.” (286). Lockean theory as stated above can at best show how property *could have* arisen justly.

One possible response would be to argue that showing property could have arisen justly is all that is necessary. As long as current property holders are not criminals and any relevant provisos are fulfilled, it is up to anyone who would dispossess a current property owner not only to show that theft or fraud exist in the history of property, but also to show he or she is the heir of a victim of a specific instance of unjust transfer of property. In some versions of this argument the satisfaction of the proviso becomes central to the justification of property.<sup>55</sup> Such “statute-of-limitations arguments” have a significant weakness; they can be used to justify governments’ ownership of the powers it holds with as much or more plausibility as they can be used to defend individual ownership of property.<sup>56</sup>

Another possible response to the claim of irrelevance would be to rely on a metaphorical appropriation argument. People who find profitable market niches have in a sense appropriated their gains through labor-mixing or other criteria. Versions of this argument have been put forward by many property rights advocates<sup>57</sup>, but they beg the question of why the *system* of property rights in which these actions are taken is justified.

David Schmidt (1990) argues for the relevance of appropriation theory on the basis that private property is necessary to overcome the tragedy of the commons. Yet government management can also be used to overcome the tragedy of the commons. Other options include relying more heavily on agreement and therefore less on unilateral appropriation.

The defense of the overall theory against the charge of irrelevance is still underexplored. It seems that whatever theory one uses to justify the gap between the original appropriator and the current property holder becomes the entire theory of modern property rights.

I have argued elsewhere (2009) that by ignoring this problem, many property rights advocates have tacitly relied on special pleading. They claim that government ownership of territory is unjust because past governments established their powers without a just connection to original appropriation, but they also claim that private ownership of land is just even though past private owners established their powers without a just connection to original appropriation.

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55] Schmidt 1990, 513-14.

56] Widerquist 2009.

57] Kirzner (1989, 98-100); Lomasky (1987, 130); Nozick (1974, 158-61).



## VI. A MENU OF LOCKEAN PROPERTY THEORIES

The following outline summarizes the above discussion of the range of Lockean unilateral appropriation theories. Each point leaves the choice of interpretation open to reflect the conflicting conclusions Lockean authors have drawn from Locke's insights.

*Outline 1: A broad outline of Lockean theories of property*

- 1) In a state of nature, individuals have equal claim, or equal lack of claim, to unused natural resources (particularly land), meaning that resources are [one of the following]
  - A) unowned, or
  - B) owned in common, for the use of everyone but the property of no one, or
  - C) collectively owned as if by a corporation in which everyone owns a share.
- 2) In the state of nature, a natural resource may be unilaterally appropriated, [all three of the following]
  - A) by the first person(s) [one or more of the following]
    - i) to alter it significantly through work,
    - ii) to use, claim, possess, or discover it,
  - B) because [any combination of the following]
    - i) the first appropriator has an unconditional right to take what s/he needs or wants to pursue her projects without interference;
    - ii) the first laborer deserves the benefit of his or her efforts;
    - iii) the modified asset embodies the appropriator's labor;
    - iv) labor improves and accounts for most of a good's value;
    - v) improving land effectively makes more resources available for others;
    - vi) property can help overcome the tragedy of the commons;
    - vii) a stable property rights system creates benefits for everyone; and/or
    - viii) property takes a pivotal role in a person's life;
  - C) providing [any combination of the following]
    - i) none of the resource is wasted (*the no-waste proviso*),
    - ii) everyone has access to subsistence (*the charity proviso*), and/or
    - iii) a sufficient amount is left for others to use (*the enough-and-as-good proviso*).
- 3) The (combined) proviso(s) can be fulfilled [all of the following]
  - A) either [one of the following]
    - i) in kind: in the same resources taken by the appropriator, or
    - ii) by replacement, through
      - (a) market opportunities,
      - (b) government services, or
      - (c) cash;
  - B) in terms of [either]
    - (i) standard of living or

- (ii) independent functioning, and
- C) at the following level [one of the following]
  - (i) weak,
  - (ii) strong, or
  - (iii) maximum strength.
- 4) Civil society is established, at which time [both of the following]
  - A) property rights [one of the following]
    - i) become partially or entirely subject to (and contingent upon) social agreement, or
    - ii) are carried over into civil society, because [all of the following]
      - a) the propertyless tacitly agree to unequal property,
      - b) the protection of property is the reason civil society exists, and
      - c) a statute of limitations protects current property holders from the responsibility for past injustices;
  - B) the proviso(s) [one of the following]
    - i) are partially or entirely obviated by agreement,
    - ii) remain in effect but are fulfilled by an unregulated market, or
    - iii) remain in effect and justify government regulation of property.
- 5) In civil society, government may not arbitrarily seize property. It may tax and regulate property, [one of the following]
  - A) only with the consent of the majority of the governed [any combination of the following]
    - i) to protect self-ownership and property rights,
    - ii) to maintain necessary government expenditure (such as public roads and services), and/or
    - iii) to enforce whatever provisos remain in effect (if necessary); or
  - B) only with the individual consent of each specific owner.

Locke's own theory clearly excludes some items in this outline, such as the prohibition of taxation and regulation (point 5:B). Although Locke might have believed that taxation required a stronger notion of consent than other legislation,<sup>58</sup> he clearly believed either that consent of the majority of property owners was enough<sup>59</sup> or that inheritors consent to taxation when they claim their heritage.<sup>60</sup> I include it because some scholars argue it follows from appropriation theory (in points 1-3).<sup>61</sup> Locke asserts that it is first labor and

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58] Tassi 1972.

59] den Hartogh 1990; Stevens 1996; Gough 1950, 84.

60] Ludwig 2000.

61] Rothbard 1982, 162, 172.

not first use or anything else that confers ownership (2:A), but some Lockean argue that other justifications make a more coherent appropriation theory.<sup>62</sup>

Someone could pick and choose almost anything on this outline to create a theory with some textual claim to be Lockean. Perhaps the malleability of Lockean property theory is one reason for its enduring popularity. The question of which specification of the outline best reflects Locke's intent should be left to the reader's judgment. Locke's intended theory is not necessarily the most valuable or the logically strongest theory of appropriation that can be extracted from Lockean property theory.

A focus either on unilateral appropriation with no need for validation through agreement or on a general agreement to create property without unilateral appropriation might be stronger than Locke's hybrid. A streamlined argument for unilateral appropriation would focus on the method and justification of appropriation (point 2), and justify property in civil society with some statute of limitations (4:A:ii:c) without relying on tacit agreement. The main areas of controversy are the justifications for appropriation (2:B), the provisos (2:C and 3:C), whether the provisos require government enforcement (4:B:ii-iii), and the corresponding strength of property rights (5).

The interpretations and reformulations of Lockean theory mentioned above can be characterized largely as specifications of this outline. For example, Nozick (1974) greatly streamlines Lockean theory to justify strong property rights. His most important premises are his unspecified theory of acquisition (2) and the weak proviso (2:C:iii and 3:C:i):

*Outline 2: Nozick's property theory in terms of the Lockean outline*

- 1) In a state of nature, individuals have an equal lack of claim to unused resources. Meaning that natural resources are
  - A) unowned.
- 2) In the state of nature, some unspecified theory justifies appropriation,
  - C) providing
    - iii) a sufficient amount is left for others (*the enough-and-as-good proviso*).
- 3) This proviso can be fulfilled
  - A) in the following form:
    - ii) by replacement, through
      - (a) market opportunities
  - B) in terms of
    - (i) standard of living,
  - C) at the following level:
    - (i) weak.
- 4) Civil society is established, at which time,
  - A) property rights
    - ii) are carried over into civil society, because

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62] Otsuka (2003, 21 n., 29); Narveson (1988, ch. 7); Kirzner (1989, 18-19, 98-100).

- c) a statute of limitations (partially) protects current property holders;
- B) the proviso
  - ii) remains in effect but is fulfilled by an unregulated market.
- 5) In civil society, government may not arbitrarily seize property. It may tax and regulate property,
  - A) only with the consent of the majority of the governed
    - i) only to protect self-ownership and property rights.

There may be a tradeoff in Lockean property theory between the strength of the theory and the strength of the property rights it supports. If an appropriation supporter accepts more limits, they can make the argument for appropriation more widely acceptable, but they may make the property rights they are able to justify less valuable to holders.

Supporters of strong private property rights have two kinds of options. They can argue against the need for limits on appropriation,<sup>63</sup> or they can accept limits, and argue that strong private property rights do not violate those limits.<sup>64</sup> Supporters of weaker property rights can accept more limits on appropriation and more limited property rights.

Opponents of appropriation need to be aware of all of these strategies. Although supporters of appropriation can choose the strongest formulation of the outline, opponents need to address the entire menu of strategies available to supporters. There are at least three ways to do so. First, they could take issue with the statute of limitations (4:A:ii:c). This strategy would not refute the idea of appropriation in the abstract, but it could possibly refute its practical relevance. Second, they could argue that the provisos (3:A-C) are necessary and cannot be fulfilled within the context of conventional property rights. Third, they could argue that none of the eight reasons for appropriation (points 2:B:i-viii) justify putting non-appropriators under the duty to respect property rights.

The ambiguity that Locke allowed to creep into his property theory has developed into a diverse set of appropriation-based justifications for private property that must be fully addressed by opponents. Anything less would be incomplete.

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63] Kirzner (1989); Narveson (1988); Rothbard (1982) use this strategy.

64] Mack (1995); 2002; Nozick (1974).

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