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Property Law

Commentary and Materials



CAMBRIDGE

Justifications for property rights

3.1. Introduction: general and specific justifications

In *Property Rights: Philosophic Foundations*, Lawrence Becker draws a distinction between general justification for property rights ('why should there ever be any property rights at all?') and specific justification ('what sorts of people should own what sorts of things and under what conditions?').

In general, we consider general justification in this chapter and specific justification in Chapter 4. However, it is not possible to keep the two wholly separate. If you take an economist's view of property, the question of general justification is viewed as a question of the functions that property rights perform. This, however, quickly develops into arguments about what type of property ownership (private, communal or state ownership) best fulfils these functions. This inevitably dictates, to some extent at least, who should have what sorts of interest in what sorts of thing. We deal with both issues in section 3.2 of this chapter.

John Locke approaches the question of general justification from a different angle. In *Private Ownership*, James Grunebaum points out that property 'rights' necessarily entail exclusion, and in Chapter 2 we see that this is what marks limited access communal property and private property off from no-property and open access communal property. If no-property or open access communal property is reduced either to private ownership or to limited access communal property this necessarily results in a curtailment of everyone else's *privilege* or *liberty* to use that resource. Is it justifiable to rob one person of their *privilege* to make use of a resource in order to confer a *right* to that resource on another? This is the question that concerns Locke, and we consider his response to it in section 3.3 of this chapter.

3.2. Economic justification of property rights

3.2.1. Property and scarcity

Consider the category of resources we looked at in section 2.2.2.1 – what one might call no-property or ownerless things. In the case of such resources, *de facto* use and

enjoyment go to the first taker. This causes no problems if the supply of the resource exceeds the demand. If, however, the resource becomes scarce – demand exceeds supply – four consequences are said to follow. First, those who want to make use of the resource will struggle for control of it, leading to friction and costly and dangerous conflict. Secondly, resources that would otherwise be self-replenishing (for example, fisheries or pastureland) will be over-exploited and eventually exhausted. Thirdly, there will tend to be premature exploitation of resources that require time to fulfil their full potential (trees will be felled for timber before they reach the optimum timber-producing age). Fourthly, resources that could be made more valuable by the long-term investment of skill and labour (the prime example is land) will be under-exploited.

Economists (and others) regard the institution of property as a means of solving these problems caused by scarcity of resources. It is generally accepted that any type of property ownership will avert the first consequence. In order to prevent disputes about use, all that is needed is a system of rules allocating use and control of the resource. It makes no difference whether the rules provide for state ownership of the resource, or private ownership, or some form of communal ownership, provided the rules are sufficiently observed or enforced.

In the case of the other three consequences, however, views differ. It has been argued that they can be averted only by private ownership of the resource. The classic but now much criticised articulation of this argument is made by the American social biologist Garrett Hardin, in ‘The Tragedy of the Commons’ (Extract 3.1 below). His basic thesis is that resources that he refers to as ‘commons’ will inevitably become exhausted once scarce, and that the only way of averting this ‘tragedy’ (by which he means an inexorable process rather than a story with a sad ending) is by making the resource the subject of private ownership or state ownership. He sees these as least-worse rather than perfect solutions. In the extract we give below, he gives two examples of the ‘tragedy of the commons’. The first is a pasture open to all. He argues that each herdsman pasturing animals on the pasture has an incentive to increase the number of animals he puts on the pasture, because he will obtain 100 per cent of the benefit of each additional animal but will bear only a fraction of the cost of the negative effects of doing so (less grazing available for the other animals): these he will share with all the other herdsmen. Since this is true for all herdsmen, he argues, the pasture will inevitably be overgrazed and then exhausted. His second example is pollution, and as he points out the problem is essentially the same as the pasture problem, even though in the case of pollution the problem is putting something (the pollutant) into the commons (i.e. the atmosphere, or a water supply) rather than taking something out. Each individual with the freedom to use the commons – in this case to put, for example, chemical waste into a stream – has the incentive to do so because he will take the full benefit of the cost-saving involved in throwing the waste away rather than processing it but

bear only a fraction of the costs imposed on the community by pollution of the stream. In both examples, in other words, the problem is externalities.

Many aspects of Hardin's analysis can be criticised (see Notes and Questions 3.2 below), but for present purposes the important point is that he fails to establish why private ownership provides a better solution in the herdsman example than that which could be provided by limited access communal property. This is partly because he does not make clear the distinctions between no-property, open access communal property and limited access communal property. In Extract 3.2, Harold Demsetz looks more closely at this, both by elaborating the reasons why the individual herdsman and polluter in Hardin's examples would not curb their destructive behaviour, and by subjecting the limited access communal property solution to closer scrutiny.

Two points become clearer from this analysis. The first is that Hardin is wrong to conclude that private property is always the *only* way of averting the tragedy of the commons (if this is indeed what he is saying). It can be averted by a limited access communal property regime, but the society this produces (or, perhaps, the society that chooses this option) will be culturally very different from the one that opts for a predominantly private property holding of the same resource. If the society that adheres predominantly to a communal property regime does so voluntarily (and historically this has not always been the case) it is likely to be a small, highly cohesive and heavily regulated society, and regulation will tend to be by social convention rather than by legal sanctions (consider why). Also, the relative suitability of private property and limited access communal property will vary depending on factors such as the nature of the resource and the prevailing environmental conditions. This was demonstrated most graphically in Glenn G. Stevenson's study of Swiss alpine grazing commons, which have subsisted in some cases for a thousand years, interspersed between both private and government-controlled grazing (Stevenson, *Common Property Economics*). We look at this again in Notes and Questions 3.2 below.

The second point, as James Grunebaum explains in Extract 3.3, is that Demsetz's analysis fails to take sufficient account of state ownership, which, as Hardin himself acknowledged, might well provide solutions to scarcity problems that are both more efficient and more just than those provided by private property. Grunebaum also questions a number of the assumptions Demsetz makes in arguing for the superiority of private property.

The overall conclusion that we might draw from these extracts is that, despite disagreements as to the form property rights might take, there is general agreement on the fundamental point that scarce resources will be best utilised (whether this involves conservation or exploitation) by the imposition of a property rights regime in which rights are clearly demarcated and readily enforceable. We conclude this section with a short example provided by Yoram Barzel in *Economic Analysis of Property Rights* concerning what he describes as the conversion of the North Sea into owned property.

Extract 3.1 Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243 (reprinted with permission from (1968) 162 *Science* 1243, copyright © 1968 American Association for the Advancement of Science)

THE TRAGEDY OF FREEDOM IN A COMMONS

We may well call it ‘the tragedy of the commons’, using the word ‘tragedy’ as the philosopher Whitehead used it: ‘The essence of dramatic tragedy is not unhappiness. It resides in the solemnity of the remorseless working of things.’ . . .

The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.

As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, ‘What is the utility to *me* of adding one more animal to my herd?’ This utility has one negative and one positive component.

- 1 The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1.
- 2 The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of –1.

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination towards which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

Some would say that this is a platitude. Would that it were! In a sense, it was learned thousands of years ago, but natural selection favors the forces of psychological denial. The individual benefits as an individual from his ability to deny the truth even though society as a whole, of which he is a part, suffers. Education can counteract the natural tendency to do the wrong thing, but the inexorable succession of generations requires that the basis for this knowledge be constantly refreshed . . .

In an approximate way, the logic of the commons has been understood for a long time, perhaps since the discovery of agriculture or the invention of private property in real estate. But it is understood mostly only in special cases which are not sufficiently generalized. Even at this late date, cattlemen leasing national land on the western ranges demonstrate no more than an ambivalent understanding, in constantly

pressuring federal authorities to increase the head count to the point where overgrazing produces erosion and weed dominance. Likewise, the oceans of the world continue to suffer from the survival of the philosophy of the commons. Maritime nations still respond automatically to the shibboleth of the 'freedom of the seas'. Professing to believe in the 'inexhaustible resources of the oceans', they bring species after species of fish and whales closer to extinction.

The National Parks present another instance of the working out of the tragedy of the commons. At present, they are open to all, without limit. The parks themselves are limited in extent – there is only one Yosemite Valley – whereas population seems to grow without limit. The values that visitors seek in the parks are steadily eroded. Plainly, we must soon cease to treat the parks as commons or they will be of no value to anyone.

What shall we do? We have several options. We might sell them off as private property. We might keep them as public property, but allocate the right to enter them. The allocation might be on the basis of wealth, by the use of an auction system, It might be on the basis of merit, as defined by some agreed-upon standards. It might be by lottery. Or it might be on a first-come, first-served basis, administered to long queues. These, I think, are all the reasonable possibilities. They are all objectionable. But we must choose – or acquiesce in the destruction of the commons that we call our National Parks.

POLLUTION

In a reverse way, the tragedy of the commons reappears in problems of pollution. Here it is not a question of taking something out of the commons, but of putting something in – sewage, or chemical, radioactive, and heat wastes into water; noxious and dangerous fumes into the air; and distracting and unpleasant advertising signs into the line of sight. The calculations of utility are much the same as before. The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them. Since this is true for everyone, we are locked into a system of 'fouling our own nest', so long as we behave only as independent, rational, free-enterprisers.

The tragedy of the commons as a food basket is averted by private property, or something formally like it. But the air and waters surrounding us cannot readily be fenced, and so the tragedy of the commons as a cesspool must be prevented by different means, by coercive laws or taxing devices that make it cheaper for the polluter to treat his pollutants than to discharge them untreated. We have not progressed as far with the solution of this problem as we have with the first. Indeed, our particular concept of private property, which deters us from exhausting the positive resources of the earth, favors pollution. The owner of a factory on the bank of a stream – whose property extends to the middle of the stream – often has difficulty seeing why it is not his natural right to muddy the waters flowing past his door. The law, always behind the times, requires elaborate stitching and fitting to adapt it to this newly perceived aspect of the commons.

The pollution problem is a consequence of population. It did not much matter how a lonely American frontiersman disposed of his waste. 'Flowing water purifies itself every ten miles', my grandfather used to say, and the myth was near enough to the truth when he was a boy, for there were not too many people. But as population

became denser, the natural chemical and biological recycling processes became overloaded, calling for a redefinition of property rights . . .

An alternative to the commons need not be perfectly just to be preferable. With real estate and other material goods, the alternative we have chosen is the institution of private property coupled with legal inheritance. Is this system perfectly just? As a genetically trained biologist I deny that it is. It seems to me that, if there are to be differences in individual inheritance, legal possession should be perfectly correlated with biological inheritance – that those who are biologically more fit to be the custodians of property and power should legally inherit more. But genetic recombination continually makes a mockery of the doctrine of ‘like father, like son’ implicit in our laws of legal inheritance. An idiot can inherit millions, and a trust fund can keep his estate intact. We must admit that our legal system of private property plus inheritance is unjust – but we put up with it because we are not convinced, at the moment, that anyone has invented a better system. The alternative of the commons is too horrifying to contemplate. Injustice is preferable to total ruin.

It is one of the peculiarities of the warfare between reform and the *status quo* that it is thoughtlessly governed by a double standard. Whenever a reform measure is proposed it is often defeated when its opponents triumphantly discover a flaw in it.

RECOGNITION OF NECESSITY

Perhaps the simplest summary of this analysis of man’s population problems is this: the commons, if justifiable at all, is justifiable only under conditions of low population density. As the human population has increased, the commons has had to be abandoned in one aspect after another.

First, we abandoned the commons in food gathering, enclosing farm land and restricting pastures and hunting and fishing areas. These restrictions are still not complete throughout the world.

Somewhat later we saw that the commons as a place for waste disposal would also have to be abandoned. Restrictions on the disposal of domestic sewage are widely accepted in the Western world; we are still struggling to close the commons to pollution by automobiles, factories, insecticide sprayers, fertilizing operations, and atomic energy installations.

In a still more embryonic state is our recognition of the evils of the commons in matters of pleasure. There is almost no restriction on the propagation of sound waves in the public medium. The shopping public is assaulted with mindless music, without its consent. Our government is paying out billions of dollars to create supersonic transport which will disturb 50,000 people for every one person who is whisked from coast to coast three hours faster. Advertisers muddy the airwaves of radio and television and pollute the view of travelers. We are a long way from outlawing the commons in matters of pleasure. Is this because our Puritan inheritance makes us view pleasure as something of a sin, and pain (that is, the pollution of advertising) as the sign of virtue?

Every new enclosure of the commons involves the infringement of somebody’s personal liberty. Infringements made in the distant past are accepted because no contemporary complains of a loss. It is the newly proposed infringements that we

vigorously oppose; cries of ‘rights’ and ‘freedom’ fill the air. But what does ‘freedom’ mean? When men mutually agreed to pass laws against robbing, mankind became more free, not less so. Individuals locked into the logic of the commons are free only to bring on universal ruin; once they see the necessity of mutual coercion, they become free to pursue other goals.

Extract 3.2 Harold Demsetz, ‘Towards a Theory of Property Rights’ (1967) 57 *American Economic Review* 347 at 354–8

THE COALESCENCE AND OWNERSHIP OF PROPERTY RIGHTS

I have argued that property rights arise when it becomes economic for those affected by externalities to internalize benefits and costs. But I have not yet examined the forces which will govern the particular form of right ownership. Several idealized forms of ownership must be distinguished at the outset. These are communal ownership, private ownership, and state ownership.

By communal ownership, I shall mean a right which can be exercised by all members of the community. Frequently, the rights to till and to hunt the land have been communally owned. The right to walk a city sidewalk is communally owned. Communal ownership means that the community denies to the state or to individual citizens the right to interfere with any person’s exercise of communally owned rights. Private ownership implies that the community recognizes the right of the owner to exclude others from exercising the owner’s private rights. State ownership implies that the state may exclude anyone from the use of a right as long as the state follows accepted political procedures for determining who may not use state-owned property. I shall not examine in detail the alternative of state ownership. The object of the analysis which follows is to discern some broad principles governing the development of property rights in communities oriented to private property.

It will be best to begin by considering a particularly useful example that focuses our attention on the problem of land ownership. Suppose that land is communally owned. Every person has the right to hunt, till, or mine the land. This form of ownership fails to concentrate the cost associated with any person’s exercise of his communal right on that person. If a person seeks to maximize the value of his communal rights, he will tend to overhunt and overwork the land because some of the costs of his doing so are borne by others. The stock of game and the richness of the soil will be diminished too quickly. It is conceivable that those who own these rights, i.e. every member of the community, can agree to curtail the rate at which they work the lands if negotiating and policing costs are zero. Each can agree to abridge his rights. It is obvious that the costs of reaching such an agreement will not be zero. What is not obvious is just how large these costs may be.

Negotiating costs will be large because it is difficult for many persons to reach a mutually satisfactory agreement, especially when each holdout has the right to work the land as fast as he pleases. But, even if an agreement among all can be reached, we must yet take account of the costs of policing the agreement, and these may be large, also. After such an agreement is reached, no one will privately own the right to work

the land; all can work the land but at an agreed upon shorter workweek. Negotiating costs are increased even further because it is not possible under this system to bring the full expected benefits and expected costs of future generations to bear on current users.

If a single person owns land, he will attempt to maximize its present value by taking into account alternative future time streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately owned land rights. We all know that this means that he will attempt to take into account the supply and demand conditions that he thinks will exist after his death. It is very difficult to see how the existing communal owners can reach an agreement that takes account of these costs.

In effect, an owner of a private right to use land acts as a broker whose wealth depends on how well he takes into account the competing claims of the present and the future. But with communal rights there is no broker, and the claims of the present generation will be given an uneconomically large weight in determining the intensity with which the land is worked. Future generations might desire to pay present generations enough to change the present intensity of land usage. But they have no living agent to place their claims on the market. Under a communal property system, should a living person pay others to reduce the rate at which they work the land, he would not gain anything of value for his efforts. Communal property means that future generations must speak for themselves. No one has yet estimated the costs of carrying on such a conversation.

The land ownership example confronts us immediately with a great disadvantage of communal property. The effects of a person's activities on his neighbors and on subsequent generations will not be taken into account fully. Communal property results in great externalities. The full costs of the activities of an owner of a communal property right are not borne directly by him, nor can they be called to his attention easily by the willingness of others to pay him an appropriate sum. Communal property rules out a 'pay-to-use-the-property' system and high negotiation and policing costs make ineffective a 'pay-him-not-to-use-the-property' system.

The state, the courts, or the leaders of the community could attempt to internalize the external costs resulting from communal property by allowing private parcels owned by small groups of persons with similar interests. The logical groups in terms of similar interests, are, of course, the family and the individual. Continuing with our use of the land ownership example, let us initially distribute private titles to land randomly among existing individuals and, further, let the extent of land included in each title be randomly determined.

The resulting private ownership of land will internalize many of the external costs associated with communal ownership, for now an owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources more efficiently.

But we have yet to contend with externalities. Under the communal property system the maximization of the value of communal property rights will take place without regard to many costs, because the owner of a communal right cannot exclude others from enjoying the fruits of his efforts and because negotiation costs are too high

for all to agree jointly on optimal behavior. The development of private rights permits the owner to economize on the use of those resources from which he has the right to exclude others. Much internalization is accomplished in this way. But the owner of private rights to one parcel does not himself own the rights to the parcel of another private sector. Since he cannot exclude others from their private rights to land, he has no direct incentive (in the absence of negotiations) to economize in the use of his land in a way that takes into account the effects he produces on the land rights of others. If he constructs a dam on his land, he has no direct incentive to take into account the lower water levels produced on his neighbor's land.

This is exactly the same kind of externality that we encountered with communal property rights, but it is present to a lesser degree. Whereas no one had an incentive to store water on any land under the communal system, private owners now can take into account directly those benefits and costs to their land that accompany water storage. But the effects on the land of others will not be taken into account directly.

The partial concentration of benefits and costs that accompany private ownership is only part of the advantage this system offers. The other part, and perhaps the most important, has escaped our notice. The cost of negotiating over the remaining externalities will be reduced greatly. Communal property rights allow anyone to use the land. Under this system it becomes necessary for all to reach an agreement on land use. But the externalities that accompany private ownership of property do not affect all owners, and, generally speaking, it will be necessary for only a few to reach an agreement that takes these effects into account. The cost of negotiating an internalization of these effects is thereby reduced considerably. The point is important enough to elucidate.

Suppose an owner of a communal land right, in the process of plowing a parcel of land, observes a second communal owner constructing a dam on adjacent land. The farmer prefers to have the stream as it is, and so he asks the engineer to stop his construction. The engineer says, 'Pay me to stop'. The farmer replies, 'I will be happy to pay you, but what can you guarantee in return?' The engineer answers, 'I can guarantee you that I will not continue constructing the dam, but I cannot guarantee that another engineer will not take up the task because this is communal property; I have no right to exclude him.' What would be a simple negotiation between two persons under a private property arrangement turns out to be a rather complex negotiation between the farmer and everyone else. This is the basic explanation, I believe, for the preponderance of single rather than multiple owners of property. Indeed, an increase in the number of owners is an increase in the communality of property and leads, generally, to an increase in the cost of internalizing.

The reduction in negotiating cost that accompanies the private right to exclude others allows most externalities to be internalized at rather low cost. Those that are not are associated with activities that generate external effects impinging upon many people. The soot from smoke affects many homeowners, none of whom is willing to pay enough to the factory to get its owner to reduce smoke output. All homeowners together might be willing to pay enough, but the cost of their getting together may be enough to discourage effective market bargaining. The negotiating problem is

compounded even more if the smoke comes not from a single smoke stack but from an industrial district. In such cases, it may be too costly to internalize effects through the marketplace.

Returning to our land ownership paradigm, we recall that land was distributed in randomly sized parcels to randomly selected owners. These owners now negotiate among themselves to internalize any remaining externalities. Two market options are open to the negotiators. The first is simply to try to reach a contractual agreement among owners that directly deals with the external effects at issue. The second option is for some owners to buy out others, thus changing the parcel size owned. Which option is selected will depend on which is cheaper. We have here a standard economic problem of optimal scale. If there exist constant returns to scale in the ownership of different sized parcels, it will be largely a matter of indifference between outright purchase and contractual agreement if only a single, easy-to-police, contractual agreement will internalize the externality. But, if there are several externalities, so that several such contracts will need to be negotiated, or if the contractual agreements should be difficult to police, then outright purchase will be the preferred course of action.

The greater are diseconomies of scale to land ownership the more will contractual arrangement be used by the interacting neighbors to settle these differences. Negotiating and policing costs will be compared to costs that depend on the scale of ownership, and parcels of land will tend to be owned in sizes which minimize the sum of these costs . . .

The dual tendencies for ownership to rest with individuals and for the extent of an individual's ownership to accord with the minimization of all costs is clear in the land ownership paradigm . . . But it may not be clear yet how widely applicable this paradigm is. Consider the problems of copyright and patents. If a new idea is freely appropriable by all, if there exist communal rights to new ideas, incentives for developing such ideas will be lacking. The benefits derivable from these ideas will not be concentrated on their originators. If we extend some degree of private rights to the originators, these ideas will come forth at a more rapid pace. But the existence of the private rights does not mean that their effects on the property of others will be directly taken into account. A new idea makes an old one obsolete and another old one more valuable. These effects will not be directly taken into account, but they can be called to the attention of the originator of the new idea through market negotiations. All problems of externalities are closely analogous to those which arise in the land ownership example. The relevant variables are identical.

Extract 3.3 James O. Grunebaum, *Private Ownership* (Routledge and Kegan Paul, London and New York, 1987), pp. 158–67

D. PRIVATE OWNERSHIP AND THE ECONOMY

Forms of ownership have different effects upon society's economic organization. Economic organization should be understood as encompassing a society's productive, commercial, and financial activities, i.e. how society materially produces and sustains itself. A form of ownership determines or greatly influences how society's wealth is

produced and distributed. This is obvious once ownership is understood as a right constituted relationship between persons with respect to things, and it is the things in life which constitute wealth. Since different specific forms of ownership prescribe different sets of rights over what is owned as well as having different domains of possible ownables, there are different economic effects upon how well or efficiently what is owned can be used to produce wealth and how justly or equitably wealth is distributed. Some forms of ownership may stimulate economic growth more than others, some may have tendencies towards greater equality of wealth, some may encourage individual effort, some may foster a more rational allocation of the factors of production, and some forms may simplify or reduce the cost of economic decision-making and planning.

The purpose of this section is to examine private ownership and to dispel some of the misconceptions about private ownership's effects upon the economy . . .

The private ownership form is claimed to be economically optimific, i.e. as having the best economic consequences. Private ownership is said to give owners rights which permit the economic system to efficiently allocate factors of production including labor, to keep supply and demand near equilibrium, to create sufficient motivation for entrepreneurial activity which is needed to keep economic growth rates near an optimum level, to minimize decision-making or administrative costs, and to provide an efficient distribution of income on the basis of market valued marginal productivity. Other forms of ownership such as communal ownership are supposed to have less economically optimific effects. Inefficiencies in production, market disequilibrium, lack of incentives for growth, incomes which are divorced from marginal productivity, and high administrative decision-making costs are said to plague non-private forms of ownership. From the economic perspective, private ownership is thought to affect society in the best way possible . . .

One typical argument for the economic superiority of private ownership is made by Harold Demsetz in the *American Economic Review* [Extract 3.2 above]. He argues that private ownership of land and resources facilitates a more rational use of land and resources, specifically by preventing a too rapid depletion, and that private ownership reduces the costs of internalizing externalities. Demsetz contrasts private ownership with communal ownership. He defines communal ownership as 'a right which can be exercised by all members of the community'; walking a city sidewalk is an example, and 'private ownership implies the community recognizes the right of the owner to exclude others from exercising the owner's private rights'. Demsetz also defines state ownership which he views as implying 'that the state may exclude anyone from the use of a right as long as the state follows accepted political procedures for determining who may not use state-owned property'; but, for some unmentioned reason, state ownership does not enter into his argument. Demsetz argues that, if land and resources are communally owned, i.e. each member having the unlimited right to appropriate for himself, then resources will be depleted too quickly. Each person who tries to maximize the value of his own right will be able to pass some of the costs on to others. In this situation, the richness of the land and resources will be depleted too quickly to maximize economic return. Communal owners could undertake negotiated agreements to slow depletion, but, as Demsetz argues, the costs of negotiation will be high.

Private ownership of land can prevent too quick depletion according to Demsetz's argument:

If a single person owns land, he will attempt to maximize its present value by taking into account alternative future streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately owned land rights. We all know that this means he will take into account the supply and demand conditions that he thinks will exist after his death. It is very difficult to see how communal owners can reach an agreement that takes account of these costs.

It is not at all clear that this argument proves what it is supposed to prove. That an owner needs to consider the conditions which may occur after his death insofar as they affect the present value of this land makes sense only if the owner intends to sell his land or if he intends to bequeath a valuable piece of land to his heirs. But if the private landowner is only concerned about his own income from the land without any concern about selling it or what he may be able to bequeath, then the private owner might well exploit his land at a rate calculated to maximize his income over his life expectancy. If the owner could know with some precision the date of his death, then, given the assumed values, he rationally should adopt an income maximizing exploitation policy which would have the land depleted at, or just after, the time of his death.

Demsetz's argument is plausible only on the assumption that private owners are also motivated by a concern for the value they can bequeath to their heirs, i.e. they are not exclusively concerned with maximizing their own income from the land but they care about what value the land has for subsequent generations. It should be noted at this point that corporations of one sort or another and extended families can perform the function of considering future value and income if it is assumed that corporations or extended families continue beyond the death of any of their individual members. If members are added to the corporation to replace those who leave, then the corporate management must then consider future income. But unless some assumption is made about care for future generations, there is no superiority in land utilization of private ownership except for possible gain of land value which may last a whole generation instead of only a partial one. Further, if the assumption about motivation which is needed to make Demsetz's private ownership argument plausible is applied in the communal ownership setting, it is not at all obvious that communal owners, who care about what subsequent generations might inherit, would too quickly deplete the land and resources.

The decision-making costs involved in internalizing externalities also depend upon the motivational assumption. Demsetz argues that the decision-making costs for communal owners will be high because of the profitability for the holdout who may extract exorbitant terms. If a concern for the value left to future generations functions as a motive for the holdout also, then it is not clear how high the decision-making costs will be. At this point Demsetz's neglect of state ownership becomes relevant to the argument about decision-making costs since state ownership as an alternative to private ownership is one way of reducing the decision-making costs of communal ownership. A comparison of decision-making costs in private ownership and in state

ownership would be the more interesting comparison especially because of the similarities between state ownership and autonomous ownership [a form of ownership Grunebaum discusses in the following chapter]. Joseph Schumpeter points out, in *Capitalism, Socialism and Democracy*, that private owners may have high decision-making costs if they are ignorant of what other private owners are doing, i.e. the information cost component of decision-making costs may be higher in a private ownership competitive economy than in a state ownership economy. Lack of information may also lead to bad decisions which have costs also . . .

The second of the supposed economically optimistic consequences of private ownership is its role in an economic system which motivates individuals to engage in productive work by the lure of amassing great wealth. Private ownership of labor, land, resources, and the means of production in a free market economy enables some individuals to become wealthy by efficiently producing saleable commodities, on their own or by employing others, thereby strongly motivating individuals who desire wealth to work hard. It is assumed that only the desire for wealth is a powerful enough motive to induce sufficient numbers of individuals to work sufficiently hard so that society as a whole will prosper. It is thought that other forms of ownership in other economic systems either do not provide sufficient motivation for productive work or they must rely upon kinds of motivation which violate the moral requirements of individual autonomy and noncoercion.

The assumption that the desire for wealth is the strongest or primary motive to work has been questioned. While the assumption can be held in extreme forms which are undoubtedly false, a more moderate version of the assumption is surely reasonable, namely, that the desire to be materially well off and secure is a significant motive for engaging in productive work. Some individuals may be motivated by love or benevolence but there is no inconsistency in also believing that the desire for secure material well-being is a strong motive too.

There are forms of ownership which are incompatible with the more moderate assumption about motivation. Specific forms of ownership in which the distribution of wealth or goods is made equally or based upon some principle of need will create disincentives to hard productive work which will vary directly with the strength of the desire for wealth. Forms of communal ownership, in which not only are land and resources communally owned but in which each person's talents and abilities are likewise considered communally owned assets, also may fail to induce sufficient numbers of individuals to work sufficiently hard. If individuals must share their income with others or receive less income than they could in an uncontrolled market for labor because their talents and abilities are considered communally owned assets, then from their perspective they may have disincentives to work since they regard themselves as underpaid. The strength of the disincentive will depend upon the difference between the actual income and the perceived market value of the labor and upon how strong the desire for wealth is in the individuals, i.e. where the desire for wealth is weak the disincentive will be weak and where the desire is strong the disincentive will be strong. It might be possible to find other work incentives than the desire for wealth, well-being or security, such as honor, reputation, or the desire to

contribute to the common good. How strong these motives are is a question not yet satisfactorily answered. Other strong motives, such as the desire not to be shot, are both economically and morally undesirable.

Private ownership over the domain of land, resources, the means of production and labor may not be the only form of ownership which is compatible with the assumption about motivation. The salient feature of any economic system which is compatible with the assumption about motivation is a free labor market. In a free labor market each individual has the right to seek the kind of employment he prefers. Any individual has the right to try to become a tax attorney, for example, although market forces and professional standards may restrict the number of individuals so employed to a select few. The root concept behind a free labor market is that each individual has the right to decide how his labor is to be used and that no other members of society, either individually or collectively, may decide for him so long as what he does lies within the bounds of respect for everyone's autonomy. In order, therefore, to attract individuals to labor, jobs must be made sufficiently attractive and, if the assumption about motivation is correct, most of what makes jobs sufficiently attractive are the material rewards which are offered. Potential employers will compete for workers and the purchasers of services will compete for services by offering material incentives. The greater the demand for a kind of labor given its supply or the smaller its supply given the demand, the larger the material rewards will be which are needed to attract sufficient number of individuals to labor. The converse also is true, i.e. less demand or greater supply will lower the size of the needed incentive. Rational wealth seeking individuals will try to choose the kind of employment which maximizes the expected economic return upon their talents, skills, and training. Other non-material non-economic factors such as status or safety might also have a role in guiding choices of employment, but to the extent these factors do have a role the assumption that wealth and security is the primary motive is also weakened.

Private ownership of one's labor is an economic requirement for stimulating hard productive work and for allocating labor to market demand. Private ownership of land, resources, and the means of production is another issue entirely. There appears to be no logical reason why land, resources, and certain factors of the means of production must also be privately owned in order to provide the kinds of incentives required by the motivation assumption. What is essential is that the rewards for labor approximate market valued marginal productivity, but there is no logical impossibility of achieving this even if land, resources, and some of the means of production are not privately owned. For example, economic forces which require managers of communally or collectively owned firms to compete for labor with each other and with self-employment options for workers would create the same free labor market forces as would private owners in similar circumstances. Forms of ownership which do not permit private ownership of land, resources, and all of the means of production are not logically incompatible with the motivation assumption if something resembling private ownership of labor in a free market is part of the economic system. Autonomous ownership in which everyone may participate in decisions concerning land use therefore requires a free labor market because of the right to

direct one's own labor. The practical compatibility of a free labor market with autonomous ownership of land, resources and means of production ownership will be discussed later, but it is worth noting here that the practical question seems to center around entrepreneurship and growth rates rather than around the price or rewards for labor.

The last of the alleged economically optimistic consequences of private ownership to be discussed is its role in economic growth and technological progress. Technological progress is usually considered a concomitant of economic growth. It is frequently argued that only an economic system based upon private ownership of labor, land, resources, and the means of production will supply sufficient incentives through financial rewards for firms to expand and entrepreneurs to take risks. If neither the manager of the firm nor the entrepreneur is able to share in the profits of expansion or of new technology, then there will be insufficient incentive for adequate growth.

This argument is a corollary of the argument about hard work, centering upon one kind of hard work: that which leads to economic growth as a result of creating new products, new processes, and new services. It is further assumed that the creative initiative required for the discovery and production of new products, processes, and services is inherently individual and cannot be a consequence of bureaucratic administration or a product of special managerial organization. Therefore, specific forms of ownership other than private ownership (i.e. forms of ownership which separate the rights of management and control from the rights to income and equity or which distribute income from the firm and rights to shares in its equity throughout society) will inhibit economic and technical growth because individuals will have insufficient economic reasons for undertaking economically risky activities. Growth rates will therefore be economically inadequate.

The claim that economic and technological growth is inhibited by non-private forms of ownership is not easy to prove empirically since there are so many other variables involved, e.g. the degree of technological and economic development or the scarcity of resources and capital; the data is subject to a variety of plausible alternative interpretations. Not all actual planned or socialist economies have inadequate growth rates in all areas of the economy, nor do all private ownership capitalist economies show adequate growth in all industries and services, e.g. in the United States' steel and automobile production. Since much data is inconclusive, and if the people are motivated as assumed earlier, there appears to be no reason why a society which adopts some form of nonprivate ownership of land, resources, and some of the means of production could not have adequate economic and technological growth. Clauses could be written into managerial contracts with pay incentives to managers who create new goods and services or who expand production and, conversely, extract penalties from managers of firms that decline. Such contracts are already common in private ownership for managers of large firms owned by many shareholders. From the perspective of the manager, there would seem to be little difference whether the stockholders, who ultimately are the source of his incentive contract, are society as a whole or some large sub-set of society. The manager would have the same incentive to expand existing output if needed or to produce new goods. How large or small

the manager's incentive would need to be would have to be discovered by trial and error . . .

So far it has been tacitly assumed that economic growth is desirable and that the optimum rate of growth is easily calculated. There is, however, no general consensus about what an optimum growth rate should be. Rawls' difficulty in *A Theory of Justice*, in specifying an optimum savings rate, is merely an isomorphism of the growth rate difficulty: how much goods and services ought to be consumed or labor and capital ought to be invested in order to supply future generations with what level of goods, services, and the potential for still further growth. Present sacrifice for future growth may temporarily cause increased unemployment; in fact, Marx believed that economic expansion is profitable only on the condition that an 'army of unemployed' is maintained to keep wages low during the growth-expansion quadrant of the business cycle. How much suffering is justifiable? It is difficult to know with any precision, or with any generality, what an optimum growth rate should be.

The absence of any clear general specification of the growth rate undercuts the objection against planned economies that collective decision procedures will result in too little capital being set aside for future growth. This objection assumes that self-interested individuals will prefer their own present consumption to future consumption by others. Consequently, members of society who are given a voice through collective decision procedures will choose production levels which favor themselves at the expense of future members. Future generations would then inherit capital equipment which is too obsolete and too worn out to adequately satisfy their needs. Thus it is believed only private ownership in which investment decisions are made privately would provide sufficient safeguards for future growth. But this is again Demsetz's argument that private owners concern themselves with economic conditions which go beyond their own life span. It is of course true that some private corporations have such concerns but this may be due to the fact that private corporations are expected to survive their present members. Yet it might be asked why present members of private corporations do not prefer their own present consumption (income from the corporation) to the consumption of future stockholders. Two answers seem to make sense. First (antihypothesi), they do care about the income future stockholders will receive even if it is only their own descendants who inherit the shares of stock. Second, because generations are not discrete, either in society or in the private corporations, stockholders and younger members of society influence the older ones into taking a more long range perspective. In either case, private corporations and planned economies based upon socialist ownership could perform in similar ways.

To summarize briefly this section on the relation of the forms of ownership to economic systems, it is clear that different specific forms of ownership have different effects upon economic systems which need to be explored in any attempt at moral justification for a specific form of ownership such as autonomous ownership. Private ownership may have better economic consequences than some other forms, but private ownership is not uniquely optimistic since there are other forms of ownership with equally good economic consequences.

Extract 3.4 Yoram Barzel, *Economic Analysis of Property Rights* (2nd edn, Cambridge University Press, Cambridge, 1997), pp. 101–2

THE CONVERSION OF THE NORTH SEA INTO OWNED PROPERTY

In 1958, the Convention on the Continental Shelf was signed in Geneva ... The provisions of the convention divided among the countries bordering the North Sea some of the commonly held attributes of that sea, particularly those related to minerals. Two factors had been working to enhance the value of the North Sea in the years preceding the agreement. First, underwater drilling, which was becoming more widespread, was declining in cost; second, various signs were emerging that the region contained natural gas and crude oil reserves. The countries surrounding the North Sea could conceivably have unilaterally extended their territorial rights towards the middle of the sea. Oil companies, however, were not going to invest resources in searching for oil unless they expected their potential legal ownership and, concurrently, their economic ownership of that oil to be secure. The preceding discussion suggests that the increase in value of the oil resources of the North Sea generated forces to better delineate rights over it.

By reaching an agreement, the countries involved gained ownership of segments of the sea. They could then either exploit their sea rights directly or grant them to private parties and let those private concerns exploit them. Subsequent events proved that the formal agreement and the accurate delineation of borders was ultimately of great value. When the North Sea countries convened to establish rights over the sea, no one knew where oil would be found, so it was easy to arrive at a formula that would give each country the territory nearest to it without generating much dispute regarding the precise setting of borders. The formula actually selected was that any point on the sea (and on the sea bottom) belonged to the country to which the point was closest.

As it turned out, many of the major oil and gas discoveries lay close to the border between the Norwegian and the United Kingdom sectors. Since the border was precisely marked, ownership of these finds was not in dispute. There is little doubt that without the agreement oil companies would not have searched in that area. The value of the clear delineation is further illustrated by the following observation. There is a deep trench in the Norwegian sector of the North Sea. Laying a pipeline across the trench is prohibitively costly. Some of the Norwegian oil deposits are on the United Kingdom side of the trench, which seems to make the United Kingdom a more natural owner of that area than Norway. Consistent with the Coase theorem, however, once rights were delineated, there was little difficulty in developing the area. Indeed, some of the Norwegian oil is shipped by pipeline to the United Kingdom.

Notes and Questions 3.1

- 1 What does Hardin mean by ‘the commons’? Some of the examples he gives (e.g. fish in oceans, air and water into which pollutants are released) are what we describe here as no-property, i.e. an unowned resource which everyone has a

privilege to use but no right not to be excluded from. At least one other (National Parks) is open access communal property, i.e. a resource which everyone has a privilege to use and a right not to be excluded from, and another (grazing land leased by cattlemen on the western ranges) is limited access communal property, where each cattleman-tenant has a privilege to graze cattle, a right not to be excluded from doing so, and a right to exclude non-cattlemen-tenants. Up to a point, Hardin's failure to distinguish these different categories does not matter: his argument (that each individual has a positive and a negative incentive to over-use the resource) applies equally to all three categories.

However, the *solution* to the problem of over-use may vary from category to category. In relation to each of the examples given by Hardin, and in the light of what is said in the other materials extracted here, consider whether use regulation might best be achieved:

- (a) by making the resource subject to private ownership;
 - (b) by self-regulation by the users acting in concert;
 - (c) by state ownership; or
 - (d) by state regulation by imposition of quotas, or by taxation (most famously advocated by Pigou, *The Economics of Welfare* (consider how this would work)), or by other means.
- 2 There are many documented cases of (b) above, i.e. cases where users of scarce no-property, or of scarce limited access communal property, have avoided depletion of the resource by self-regulation of their use. See, for example, the elaborate rituals and use patterns associated with use of scarce resources in Australia by aboriginal tribes, documented in *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 and *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1 (both extracted at www.cambridge.org/propertylaw/ and discussed in Chapters 4 and 5), which have been highly successful in *conserving* resources for thousands of years (but not necessarily exploiting them to their full potential). Major studies of similarly long-standing self-regulated communal systems have been produced in response to Hardin's analysis: see, for example, Chakravaty-Kaul, *Common Lands and Customary Law*, Dahlman, *The Open Field System and Beyond* (an analysis of the open field system in medieval England specifically undertaken to demonstrate what Dahlman argued was a highly efficient system of communal land usage, whose eventual disintegration was caused not by Hardin's 'tragedy of the commons' but by other complex social and political factors) and Stevenson, *Common Property Economics* (a study of Swiss alpine grazing commons we refer to again in question 9 below). References to further examples can be found in Ellickson, 'Property in Land'; Fennell, 'Common Interest Tragedies'; and De Alessi, 'Gains from Private Property'.
- 3 Would the factors that Hardin identifies as leading inexorably to over-exploitation of the pasture be removed if the animals were also communally owned? In other words, has Hardin identified a problem arising only when there is a

mixture of private and communal ownership, which would not arise if all relevant resources were communally owned? At one level, this appears to be the case: if each animal is communally owned, each herdsman shares equally the benefits and detriments of grazing an additional animal. However, this does not alter the argument; it merely converts the problem from one of over-exploitation to one of under-exploitation. If the value of the pasture and the animals grazed there is to be maintained, never mind maximised, it will be necessary for the herdsmen to expend labour on them. But, while each herdsman bears 100 per cent of the burden of the labour he expends, he has to share the benefits accruing from his labour with all the other herdsmen: most of the benefits are external to him. Consequently, so the argument goes, he has no incentive to work harder because he has no means of ensuring that every other herdsman will do the same. In other words, in the case of any type of communal use of resources by human beings, an interface between communal ownership and private ownership is inevitable, for so long as we each own our own labour.

- 4 Does Demsetz sufficiently distinguish between limited access communal property and no-property? If not, does this affect the force of his arguments?
- 5 Demsetz assumes that those labouring for the communal good will inevitably work less hard than those labouring exclusively for their own benefit. Examine the arguments he puts forward. Do they, as Grunebaum suggests, oversimplify the issue?
- 6 Demsetz argues that the interests of future generations must be taken into account if resources are to be put to their optimal use, and that this will only occur if the resource is privately owned. To what extent does Grunebaum disagree with this? Who do you think is right?
- 7 According to Demsetz, how are externalities internalised by private property? Is he right?
- 8 Elsewhere in the article, Demsetz applies the same analysis to corporate ownership: see Chapter 8.
- 9 In his study of Swiss alpine grazing, *Common Property Economics* (referred to above), Glenn Stevenson found a wide variety of patterns of ownership of alpine grazing meadows within a relatively small area of Switzerland, and this appeared to be typical of other parts of Switzerland and also of alpine areas in other countries. Many of the meadows are communally owned (and have been for up to a thousand years); others are privately owned by individuals and either used by the owners personally or let out to other users; others are co-owned by a small number of private co-owners. Communal ownership exists in several different forms. In all cases (private and communal), use is highly regulated, sometimes by state regulation but more usually by elaborate

self-regulation, which also takes a wide variety of forms. Stevenson was unable to establish whether the communally run meadows were more or less efficient than the ones that were privately run. He *was* able to establish (by analysing milk yields) that they were less productive, but it was not possible to tell whether or not this was attributable to other differences: it could have been the case that they would have been even less productive under private ownership. In other words, a possible explanation (perhaps confirmed by the longevity of the mixed pattern of ownership) was that the pattern of ownership which had evolved for each meadow was the one to which it was most suited. As Stevenson concludes (pp. 234–5):

Whether or not an eventual net revenues analysis [i.e. looking at the productivity relative to the costs input] indicates that commons management is generally poorer than private management, common property will still have its place in specific instances. In Switzerland, natural conditions exist under which only commons will work, regardless of the general incentives inherent in commons management. Particularly the remote areas are unsuitable for private management. Because of the costs of managing the resource privately at these locations, rents under common property may well be higher. Thus, even if generally poorer performance of common property is found in a net revenues analysis, not all commons will be inferior, nor can the conclusion be reached that all commons should be converted to private property. This notion parallels the more general idea that particular resource configurations exist – from fisheries to the atmosphere – for which we are compelled to find common property rather than private property solutions.

- 10 Barzel refers to the Coase theorem, which is that, in the absence of transaction costs inhibiting the proper working of the market, the efficient allocation of resources will occur wherever the entitlement is first put. We look at this again in Chapter 6.

3.2.2. Viability of single property systems

Even if economic efficiency is the overriding criterion for measuring the success of a particular form of property ownership (and we consider below whether there are other alternative or additional criteria), and even if we are persuaded that in principle private ownership is the most efficient form of ownership, we might nevertheless want to question whether it would be economically efficient to have private ownership of all resources.

As a matter of historical record, in most societies private, communal and state ownership coexist. It is difficult to envisage a society which did not recognise some form of private ownership of some resources, however exiguous. This is probably true even of a wholly Marxist society. As Jeremy Waldron points out (Waldron, *The Right to Private Property*, pp. 425–6) it is an integral part

of Karl Marx's argument that private property should be abolished in total. He quotes Marx as responding to bourgeois critics of the socialist programme in the following terms:

You are horrified at our intending to do away with private property. But in your existing society, private property is already done away with for nine-tenths of the population; its existence for the few is solely due to its nonexistence in the hands of these nine-tenths. You reproach us, therefore, with intending to do away with a form of property the necessary condition for whose existence is the nonexistence of any property for the immense majority of society. In one word, you reproach us for intending to do away with your property. Precisely so; that is just what we intend. (Marx and Engels, *Communist Manifesto*, p. 98)

Waldron comments:

Throughout his work, Marx is adamant that the indictment against capitalism is not merely the fact that private property happens to be distributed unequally or in a way that leaves millions without any guaranteed access to the means of production; the problem is that private ownership is a form of property that has this characteristic necessarily. No matter how noble your egalitarian intentions, the existence of any distribution of private property rights in the means of production will lead quickly to their concentration in the hands of a few. Thus egalitarian intentions, so far as private property is concerned, are hopelessly utopian, for they underestimate the dynamic tendencies of the system they are interested in. 'For us the issue cannot be the alteration of private property but its annihilation.'

Nevertheless, even Marx had to have some way of recognising something akin to private property in relation to such ownables as one's labour and personal possessions. He refers to such things as 'private possessions', and although he pays little attention to precisely what rights individuals would have in such things they appear to go beyond purely possessory rights, even if not extending to full rights of alienation for reward, bequest and commercial exploitation (see further Grunebaum, *Private Ownership*, pp. 135–40, for a discussion of what these rights might be, consistently with what he terms Marx's free development principle).

At the opposite end of the scale, a society in which all resources are privately owned is probably also not feasible. This is not simply because there are some resources that any society would wish to make available for public use, such as roads and national defence systems. Resources which are to be made available for public use can still be made the subject of a modified type of private ownership which ensures public access, as we know from the privatisation of public utilities that occurred in many Western states in the late twentieth century. Nevertheless, economists recognise a category of resources, usually referred to as public goods, which many argue are most efficiently held by public ownership. As Demsetz has argued elsewhere (Demsetz, 'Ownership and the Externalities Problem', pp. 297–9), in the case of some resources such as the two examples already given,

free-rider problems would make private ownership either economically inefficient (as in the case of national defence systems) or too politically contentious to be generally adopted (in the case of privately owned roads). Essentially, the argument is that national defence systems provide benefits which cannot easily be made available only to those willing to pay for the services, and so non-payers can confidently free-ride on payers, knowing they will benefit from enemy attacks being deterred and repulsed just as much as payers will. As far as private ownership of roads is concerned, the free-rider problem is rather different. Private ownership of public roads would be feasible if road owners were entitled to charge for road use, and indeed charging for road use (whether the road is state owned or privately owned) would arguably have the advantage of reducing road use. However, in a situation in which use of roads is free, those who put a low value on their time and therefore do not much mind congestion free-ride on those who put a high value on their time and would therefore pay a toll in order to control the level of traffic (consider why). These free-riders will therefore oppose privatisation of roads, and traditionally there have been enough of them to make their opposition successful. It is worth noting in this connection that the London congestion charge (where the roads remain publicly owned but use is charged for) was made politically acceptable (to the extent it is) only as part of a scheme under which the profits from the charge (i.e. the charges collected, net of costs) are dedicated for use on paying for improvements to public transport, which can be seen as a way of making the internalisation of the externality of congestion politically acceptable.

3.2.3. Criteria for measuring the success of a particular form of ownership

Economic efficiency is not the only criterion by which we might want to measure the success or the justifiability of a particular form of ownership. Most people would want also to consider the impact that a particular form of ownership regime might have on the organisation of a society that adopted it, and to assess success and justifiability from a moral perspective as well as, or rather than, from an economic perspective. We explore this second point in the next chapter, but it is important to emphasise here that economic efficiency is not something that can be ignored in assessing the moral justifiability of a property regime. As Grunebaum points out (Grunebaum, *Private Ownership*, p. 159):

The moral perspective takes precedence [over the economic perspective]. But . . . [it] should [not] be assumed that economic criteria are wholly irrelevant to a moral justification of a specific form of ownership. Economic inefficiencies can imply a wasteful utilization of resources or labor which from a moral perspective might be unjustified because people might be forced to labor without any productive or beneficial outcome. In a similar way, high administrative costs might consume wealth which morally might be put to better use. Thus an examination of the allegedly

economic optimistic effects of private ownership is indeed relevant to the overall moral justification of autonomous ownership as an alternative form of ownership.

There is another difficulty in measuring the justifiability of any particular form of property, also identified by Grunebaum. He makes the point that, while the consequences of practicing a particular form of ownership are clearly relevant in assessing its moral justifiability, in practice it is extremely difficult to discern what those consequences are – a point that could be made with equal force in relation to the assessment of economic efficiency. As he says (Grunebaum, *Private Ownership*, p. 8):

Specific forms only have tendencies to produce certain consequences ‘all else being equal’. In actuality all else is rarely equal and consequences which are elicited in support of conclusions about the practice of a specific form of ownership may be, and sometimes are, explainable by social forces which have little relevance to the society’s specific form of ownership. For example, it is claimed that private ownership of the means of production causes increasing concentrations of wealth in the hands of a few. While this may seem plausible it is in fact difficult to prove because countervailing forces such as labor unions, progressive income tax measures, and capitalization by issuing common stock, among other forces, have exerted pressures in the opposite direction. Actual statistics about wealth distribution may by themselves be irrelevant to proving or disproving the claim. This does not mean that moral justification is impossible. What is implied is that any justification which depends upon predictions about what the consequences will be of practicing a specific form must also discuss other social forces which may affect its tendencies.

3.3. John Locke’s justification for private property

3.3.1. What Locke was attempting to establish

Jean Jacques Rousseau said in *A Discourse on the Origins of Inequality*:

The first man who, having enclosed a piece of land, thought of saying ‘This is mine’ and found people simple enough to believe him, was the true founder of civil society. How many crimes, wars, murders, how much misery and horror the human race would have been spared if someone had pulled up the stakes and filled in the ditch and cried out to his fellow men: ‘Beware of listening to this impostor. You are lost if you forget that the fruits of the earth belong to everyone and that the earth itself belongs to no one.’

John Locke’s concern is to demonstrate that this is wrong, and to establish that, given the right conditions, it is morally justifiable that those who take resources from their natural state are allowed to keep them for themselves to the exclusion of all others. He is therefore seeking to justify original acquisition of private property rights. He does not deal with transfer of property rights, nor (except incidentally)

with questions of redistribution of property rights once resources have already become subject to some form of ownership, whether private or otherwise.

3.3.2. The political context

Locke's argument about original acquisition of property rights was part of a highly charged political debate that was taking place in seventeenth-century England about the legitimacy of private rights as against an absolutist monarchy, and his antagonists in the debate had political views that were very different from those expressed by Rousseau, who was writing some fifty years after Locke's death. What Locke is saying is important to us now irrespective of its historical political context, but it makes it easier to follow what he is saying if we have some idea of the arguments he was trying to meet.

Those who supported absolutist monarchy (most notably, Sir Robert Filmer) disputed the notion, held by Locke and other natural lawyers, that private property rights and other private rights had a legitimacy which was not derived from the state. As far as natural lawyers were concerned, the world was given to people in common by God for their subsistence and preservation (or, as Locke says in paragraph 26, 'God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being.'). It is from this, they argue, that private property owners derive their rights: private ownership is acquired by individuals taking for themselves things given to 'mankind in common' by God. Consequently, natural lawyers argued (and indeed might still argue), any right that the state has to interfere with private property rights is conferred on the state by the people and can be withdrawn by the people if abused by the state. Such arguments were used to justify the Glorious Revolution in England in 1688 and in support of the French Revolution and the American War of Independence.

Filmer, in common with other supporters of absolutist monarchies and the divine right of kings, rejected this analysis. Filmer traced the derivation of property rights from God to Adam, the first man, and from him by a direct line of descent through his heirs to the monarch, regarded as Adam's only legitimate heir, the inheritor of the dominion over the world and all its resources which God gave to Adam. According to this view, such private property rights as individuals held, they held only by grace of the monarch, who could withdraw them at will. This is the argument Locke is referring to in paragraph 25 when he says that 'if it be difficult to make out "property" upon a supposition that God gave the world to Adam and his posterity in common [i.e. to all people in common], [then] it is impossible that any man but one universal monarch should have any "property" upon a supposition that God gave the world to Adam and his heirs in succession, exclusive of all the rest of his posterity'.

3.3.3. The problem of consent

Filmer argued that the natural lawyers' analysis of the derivation of property rights was fatally flawed because it failed to explain how private property owners could legitimately have acquired rights from mankind in common. If one person acquires private property rights in a thing that was formerly held by all people in common, this necessarily extinguishes the right or liberty that those people had in the thing. How can this be justified? Earlier natural lawyers, most notably Grotius and Pufendorf, had argued that it was done by the consent of the commoners. Filmer rejected this as an absurdity:

Certainly, it was a rare felicity, that all men in the world at one instant of time should agree together in one mind to change the natural community of all things into private dominion: for without such a unanimous consent it was not possible for community to be altered: for if but one man in the world had dissented, the alteration had been unjust, because that man by the law of nature had a right to the common use of all things in the world; so that, to have given a propriety of any one thing to any other, had been to have robbed him of his right to the common use of all things. (Filmer, 'Observations', in *Patriarcha*, p. 273)

In Extract 3.5 below, Locke is seeking to defend the natural law position against this attack. He does not do so by defending the consent theory (although, as others have pointed out, it is considerably more sophisticated and plausible than Filmer suggests: see, for example, Stephen Buckle's discussion of Grotius' formulation of the consent theory, and Filmer's misconception of it, in *Natural Law and the Theory of Property*, pp. 161–7). Instead, Locke argues that it is not necessary to look for consent from the commoners, because it is something else that confers legitimacy on the holding of a person who takes resources from the common. His argument is that those who take resources from the common for themselves to the exclusion of all others legitimately acquire rights over the resource if by so doing they mixed their labour with it.

3.3.4. Locke's justification for original acquisition

This argument of Locke's amounts to more than a 'first come, first served' justification. Awarding property rights to the first taker has considerable attractions, as we see in the next chapter, but this is not what Locke is advocating or defending. He argues that the first taker of a thing from the common legitimately acquires rights not *because* he was first, but *because, and if and only if*, he mixed his labour with the thing he takes. However, he argues, there are two provisos or qualifications to this general principle. The first is that no one is justified in taking more than he needs, so that the surplus spoils (sometimes referred to as 'the spoilation proviso'). The second is that such an appropriation from the commons is justifiable only when 'enough and as good [is] left in common for others' (the 'sufficiency proviso').

The precise scope and significance of these two provisos is unclear (and controversial) but before looking at them more closely we need to clarify Locke's basic premise and then outline the steps in the reasoning by which he arrives at his general principle.

3.3.5. The nature of Locke's commons

Locke talks about the world and its resources being given to mankind 'in common'. Does he mean by this that unallocated natural resources are open access communal property (i.e. resources which everyone has a Hohfeldian claim-right not to be excluded from) or that they are no-property (i.e. resources which everyone has only a Hohfeldian privilege to use, but no right not to be excluded from)? This has always been a highly controversial question, if only because of the political implications of resting Locke's theory in particular and natural law theory in general on an apparent assumption of natural communism. In fact, it is not at all clear what Locke meant: compare the different ways in which Kramer, *John Locke and the Origins of Private Property*, pp. 108–9, Waldron, *The Right to Private Property*, pp. 148–57, Tully, *A Discourse on Property*, pp. 59–64, 95–8 and 124–5, Buckle, *Natural Law and the Theory of Property*, pp. 164–5 and 183–90, Ryan, *Property and Political Theory*, pp. 29–32, and Sreenivasan, *The Limits of Lockean Rights in Property*, pp. 26–9 and 140–5, interpret what Locke actually says on this point. This is not an issue we need to explore here, because the justification problem is essentially the same whether private property robs others of a right not to be excluded from the appropriated resources or just a liberty to use it. As Waldron says, it may be that it requires stronger justification to extinguish a Hohfeldian claim-right in a thing than a Hohfeldian liberty in it, but even this is doubtful if the thing in question provided the basic means of support for the former users. So, for the purposes of the following discussion, we assume that what requires justification is an appropriation of a thing which removes everyone else's right not to be excluded from that thing or their privilege to use and enjoy it for their own self-preservation.

3.3.6. Why mixing labour with a thing should give rise to entitlement

Locke summarises his argument at paragraph 27. His starting point is that we each have 'property' in our own 'person' (the quotation marks are his), in the sense that no one but ourselves has any rights in it. In the same way, he says, the labour of our bodies and the work of our hands is also our own. When we remove something from its natural state by mixing our labour with it, we are joining something of our own to it. By doing this, we make it our own property. He goes on to elaborate the argument, and adds the two provisos (the sufficiency proviso first appearing at the end of paragraph 27 and the spoilation proviso at paragraph 31).

There are obvious problems with this reasoning. We noted in Chapter 1 that the question of whether we own our own bodies is not straightforward, so it may well

be necessary to look more closely at the first assumption in Locke's argument, that we each have property in our own bodies. But, even if we accept this first step in the argument, and also accept that our labour is our 'property' in any relevant sense (and there are difficulties with this too), why should the mixing of it with a thing make that thing our property also? Locke gives a number of reasons, which we can take as cumulative or alternative.

His first point (paragraphs 28–30) is that, if we pick an apple from an apple tree growing wild and eat it, everyone must accept that the apple becomes our exclusive property at *some* point in the process, whether when we pick it, or first bite into it, or finish digesting it. There must be some reason for this intuitive acceptance of appropriation from the common that we all have, he says. It cannot be because everyone has consented to the appropriation, because if *everyone's* consent was required to every appropriation we would all starve (this is essentially Filmer's point). However, if it isn't common consent that provides the justification, he says, it must be something else, and the only other thing it can be is the labour expended on the picking of the apple. This is the only thing that adds something to what nature has provided, the only thing that distinguishes this apple from all the other common apples.

This argument does not really take us anywhere on its own. It starts by begging the question, by assuming to be correct ('nobody can deny but' the apple becomes the property of the person who picks and eats it) the very thing that Locke is trying to prove (that unallocated resources properly become the private property of those who appropriate them). It then asserts, rather than demonstrates, that the labour involved in the picking is the only thing that *could* justify allocating the apple to the picker. He does not consider other possibilities: why not say, for example, that it is justifiable to allocate the apple to the picker because apple-picking is the first step towards apple-eating, which represents using the apple for the purpose for which Locke would say God provided it?

However, while this argument does not tell us why mixing our labour with a thing should give us property rights in it, there appears within it a reference to a more substantial argument that Locke develops later on. This is that, until we mix our labour with it, 'the common is of no use' (paragraph 28).

Locke develops this argument more fully in paragraphs 40–4. Locke's point here is that, by mixing our labour with things, we make them more valuable. Natural resources are of little use to us until we have exploited their potential by labouring on them, and if we look at the things that are valuable and useful to us we will find that 90 per cent of their value (later he increases the proportion to 99 per cent) is attributable to the labour that went into producing them. Robert Nozick points out a number of difficulties with this (see Extract 3.6 below). Apart from anything else, we do not always increase the value of things by working on them, and, even if we did, why should this give us exclusive ownership of the whole thing rather than a share in it proportionate to the increase in value? These objections can be met, to some extent at least. If we accept that the full potential

use and value of natural resources should be realised, most people would agree that this can only be achieved by individuals labouring on them. Allocating outright ownership to the labourer (regardless of the actual effect on value in each particular case) is an obviously simple and effective incentive and/or reward and/or compensation for the expenditure of the necessary labour. This can be put in religious terms, as Locke does: God provided mankind with natural resources so that people would work to improve them to produce sustenance to preserve their lives, labour being a virtue in itself, and private property being both the reward and the compensation for the expenditure of labour and the means by which God intended natural resources to be developed so that they could sustain humans. Alternatively, we can put it in economic terms: natural resources can be exploited to their fullest extent only by people working on them, and people will choose to undertake the necessary work if they are rewarded by the allocation of private property in whatever is produced by their work. If we rewarded only *successful* work and only to the extent that it was successful – i.e. labour that did in fact end up increasing the value of things, and then only up to the increase in value – we would discourage innovative work and inhibit development. No one would experiment with new ways of preserving or using timber, for example, if they knew that they would be allowed to keep the end product only if and to the extent that the experiment was successful. Also, allocating property rights in this way would require a costly bureaucracy. It would be necessary for the state, or some other official body, to judge who had ‘earned’ what property rights in what things in every case: someone would have to decide whether you increased the value of the plank by painting it pink (judged by what standard?) and if so whether to a sufficient degree to be allowed to keep it, or just to use it for a limited period of time. This would not just be costly. It would also introduce a degree of day-to-day bureaucratic intervention into the allocation of private property rights that most libertarians would find repugnant. A clear simple rule that labouring on a thing always and automatically allows you to take the thing laboured on avoids these difficulties, and arguably this outweighs the disadvantage that this will result in occasionally rewarding disimprovers.

However, this argument works least well in relation to Locke’s prime example of land. To reward labour that increases the productivity of the land (the crops, timber, minerals etc. that Locke refers to in paragraph 43) with *perpetual ownership of the land* seems disproportionate in principle. Why not just ownership of the produce, plus guaranteed use of the land for a period sufficient to enable the produce to be harvested, or alternatively for so long as the land continues to be put to productive use? This does not seem a particularly difficult rule to apply, and it would have the significant advantage of leaving future generations with the opportunity to gain land rights by original acquisition. As John Stuart Mill says (in the course of an argument that land ownership ought to continue only for so long as the owner of the land is its ‘improver’):

It is no hardship to any one, to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all. But it is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for the newcomer.

(‘Property in Land’, in Mill, *Principles of Political Economy*, Book II, Chapter 2, § 6)

It may be that Locke did not intend that the ‘property’ justifiably acquired by mixing one’s labour with a thing is always necessarily absolute perpetual ownership (although this seems unlikely given the nature of the private property rights he was seeking to defend: for the contrary view see Tully, *A Discourse on Property*). Alternatively, it can be argued (as Sreenivasan has in *The Limits of Lockean Rights in Property*, see in particular Chapter 4) that, regardless of what Locke actually meant, what his argument supports is the acquisition of only limited rights in perpetual resources such as land. Or it may simply be that Locke could face with equanimity the prospect that all land would justifiably have become taken into private ownership (or public or limited access ownership) over time, leaving nothing in the commons for general use, because non-owners would have other means of self-preservation through labour.

3.3.7. The sufficiency proviso

This brings us to the sufficiency proviso. How are we to understand the qualification that Locke introduces in paragraph 27 when he says that ownership of a natural resource not limitless in supply should go to the person who first labours on the resource ‘at least where there is enough, and as good left in common for others’?

Commentators have put forward a variety of ways of interpreting this apparent limitation. It can be read as meaning that it is justifiable to confer ownership of a thing on the person who first mixes her labour with it, but only if this leaves enough like things remaining in the common for others *to appropriate*. As Robert Nozick points out, this interpretation (what he calls the ‘stringent’ version of the proviso) if applied literally would rule out all acquisition of finite resources, however plentiful the supply (consider why), and as we see in Notes and Questions 3.2 after the extracts, there are other reasons as well for rejecting this interpretation. Arguably, the same objection applies to the second possible interpretation, which is that the appropriation by the person who mixes labour with a thing is justifiable if it leaves enough like things in the common for others to continue to make use of, i.e. if it does not worsen anyone’s *liberty to use* that kind of resource. Nevertheless, Nozick takes the view that such a version of the proviso would be contained in ‘any adequate theory of justice in acquisition’, except that an appropriation that would otherwise be illegitimate because it violated such a proviso could be legitimated by the appropriator compensating the others for their loss. This version of the proviso (Nozick’s ‘weaker’ version) comes close to

saying that appropriations are justifiable provided that they do not leave anyone worse off *in general terms*. Interpreted in such a way, there is a danger of robbing the proviso of all effect. As Kramer points out, Locke himself expressed the view that appropriation from the common not only makes society as a whole better off but also provides a positive benefit to all non-owners:

Locke, of course, not merely believed that all-encompassing swarms of acquisitions would pose no threat to anyone's basic rights; he assumed as well that the all-embracing sweep of ownership would in fact redound to the benefit of nonowners. Since the spread of human dominion over the entirety of the earth would involve the spread of a benign exploitation of the earth's riches, the outcome of that spread would enhance the fortunes of everybody. Somewhat like the Deity's filling of the earth with the glorious knowledge of Himself as envisaged by Isaiah and Habakkuk, the filling of the world with the enterprise and talents of human owners was a situation that blessed all people. Locke often made this point by contrasting the impecuniousness of the American Indians with the comforts of the highly developed land of the English. 'For I aske whether in the wild woods and uncultivated wast of America left to Nature, without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniencies of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated?' [Locke, *Two Treatises of Government* (ed. P. Laslett, 2nd edn, Cambridge: Cambridge University Press, 1967), § 37]. In a much-discussed passage, Locke asserted even more explicitly that the spread of labor and ownership throughout a country was a boon to all people, to nonowners as well as owners. Having declared firmly that 'tis *Labour* indeed that *puts the difference of value* on every thing' [Locke, *Two Treatises of Government*, edited by P. Laslett (2nd edn, Cambridge: Cambridge University Press, 1967), § 40, emphasis in original], he proceeded to the following observation:

There cannot be a clearer demonstration of any thing, than several Nations of the Americans are of this, who are rich in Land, and poor in all the Comforts of Life; whom Nature having furnished as liberally as any other people, with the materials of Plenty, i.e. a fruitful Soil, apt to produce in abundance, what might serve for food, rayment, and delight; yet, for want of improving it by labour, have not one hundredth part of the Conveniencies we enjoy: And a King of a large and fruitful Territory there feeds, lodges, and is clad worse than a day Labourer in England.

[Locke, *Two Treatises of Government*, edited by P. Laslett (2nd edn, Cambridge: Cambridge University Press, 1967), § 41]

In short, far from serving to undermine the ability of people to obtain sustenance, the extending of proprietary dominion to every usable plot of land was the surest means of strengthening that ability – for those who remained landless as well as for the landowners. Once all the earth and the earth's bounty had been appropriated and parceled out, a typical laborer might indeed have very few opportunities to become an owner of land, at least in the short term; still, he would enjoy ready access to a greater supply of comforts and conveniences than was ever within the reach of any landowner

during the presocietal stage of humankind. (Kramer, *John Locke and the Origins of Private Property*, pp. 219–20, although note that earlier, at p. 127, Kramer denies that Locke here intends to say that *all* are better off – ‘even out-and-out vagabonds’).

If this is correct, the proviso would be satisfied automatically in all cases: it could never operate to limit the justifiability of any particular original acquisition.

A more promising line of interpretation involves returning to Locke’s starting point, that natural resources were given to mankind in general for their subsistence and the preservation of their lives. If this is the case, then the proviso might be taken to mean that an appropriation of a thing by a person who mixes her labour in a thing is justifiable as long as it leaves others with sufficient opportunity to provide for their own subsistence and preservation by labour – even if this involves labouring for money to acquire property by exchange rather than labouring to appropriate property from the common. Waldron takes this further to link it with what he describes as Locke’s doctrine of charity, that property rights also must never stand in the way of human sustenance for those unable to work. This, he suggests, could lead to a proviso to the effect that ‘no appropriation is legitimate if (taking everything into account) it makes the survival of any other person less rather than more likely’. (Waldron, *The Right to Private Property*, p. 216).

These widely diverging interpretations of the proviso are attributable not so much to a lack of clarity in Locke’s wording, as to the importance of the point for any theory of allocation of property rights. While some of the interpretations are put forward as interpretations of what Locke ‘really’ meant, for most commentators the primary concern is to establish what would constitute a coherent and appropriate limitation on a labour theory of just acquisition. This involves a closer analysis of Locke’s theory than we need here, so for present purposes the important point is to note the range of possible interpretations of the proviso rather than to come to any firm conclusion as to what it ‘really’ means.

3.3.8. The spoilation proviso

The spoilation proviso as sketched out by Locke in paragraph 31 is easier, particularly if we keep in mind the general thrust of Locke’s argument. If, as Locke believed, the world and its resources are provided by God to enable people to sustain and preserve their lives, any appropriation which leads to a waste of resources is illegitimate, regardless of whether it diminishes the supply or the prospects available for others. In Locke’s view, God gave people resources to use not to waste, and so even the consent of all the commoners or limitless supply would not justify an appropriation of more than you can use for yourself or pass on to others by exchange. The argument can work just as well if God is removed from the analysis. Environmental concerns might lead us to a similar principle that exploitation of natural resources is unjustifiable if it involves taking more than can be used and wasting the surplus. The spoilation proviso is therefore not made redundant by the invention of money (taking more than you need is legitimate if you can sell the

surplus, but not if you are going to have to let it go to waste), nor is it made superfluous by the sufficiency proviso (as Nozick suggests in Extract 3.6 below).

The final points to make about Locke's labour theory of acquisition concern its present scope and relevance.

3.3.9. The theological dimension to Locke's theory

It was common ground between all sides of the debate in which Locke was engaged that God exists, and that God was the creator of the world and all its resources and the origin of legitimacy for all rights in resources. The issue that divided Locke from his opponents was whether property was then conferred by God on people in general for their common good, as Locke believed, or on the monarchy as the institution entrusted by God to rule the kingdom, as Filmer believed. The essence of the debate was therefore whether rights of the individual derive from the state or arise independently of it. This a question which is relevant beyond the specific theological context in which the debate took place. Also, as we have already noted, Locke's argument mostly works as well whether we believe that natural resources were provided by God for the benefit of humankind, or whether concern for the environment and the proper relationship between people and the world leads us to adopt a similar position on the uses to which natural resources may legitimately be put.

In other words, although Locke believed in a Christian God, his argument need not be confined to property rights arising in a Western Christian society. It is equally applicable to any society that accepts that everyone has a liberty to make use of unappropriated natural resources and an obligation not to waste them, whatever the origin of that liberty and obligation is thought to be.

3.3.10. Present relevance of Locke's theory

Locke is seeking to justify the original acquisition of private property rights in unallocated resources. Is there any scope for such a theory in modern society? Most of the examples Locke gives concern land or the natural products of land or the resources which it can be made to produce. In Locke's time, vast tracts of what appeared to be unallocated land were being opened up by colonial exploration of the Americas and other continents. There is no unallocated land in this country now, and most resources of any value are already owned by individuals, or companies, or the state, and the same is true of most developed countries. Why then do we need concern ourselves with the question of whether and how original acquisition of property rights can be justified?

This is a point that Kramer discusses at length (Kramer, *John Locke and the Origins of Private Property*, pp. 140–3 and 213–37), but for present purposes three short reasons will do. The first is that original acquisition of land in this country was no more possible in Locke's time than it is today, as he himself points out in paragraph 35. He did not see this as limiting the general application of his analysis.

The second reason why Locke's theory still matters is that original acquisition is not so very rare as to be of only marginal importance. As we noted in Chapter 2, new categories of no-property constantly emerge, and at the point when a new resource comes into being or a pre-existing no-property resource becomes scarce, it becomes necessary to consider whether and how it should be reduced to ownership. Locke's theory attempts to provide an answer to this. It explains, for example, why we might be justified in allocating ownership of a cake to the person who makes it rather than to the owner of the ingredients, and why a doctor who uses a patient's body cells in research might acquire ownership of drugs deriving from those body cells, as we saw in Chapter 1. It also forms the basis for intellectual property rights, not only in the sense that it provides a justification for giving property rights in newly created things to the creator rather than to anyone else, but also in the sense that it might provide the justification for treating the newly created thing as property at all. This point comes up again when we look at recognition of new property interests in Chapter 9.

In short, every society that recognises exclusionary property rights must have a rule allocating ownership of new things, or of previously non-allocated things that someone now wants to exclude others from. Locke tells us what he thinks that rule should be, and we need to consider whether we agree with him.

The third reason why Locke's theory still matters is because a theory of original acquisition is an integral part of any comprehensive justification of property rights. Any theory that attempts to justify, for example, why the state should confer property rights on one person rather than on another, or the confiscation or redistribution of private property by the state, or the colonial acquisition of property rights or (conversely) the survival of indigenous property rights following colonisation, or the recognition of titles derived by inheritance or gift or theft, tells us only part of the story unless it also tells us what legitimised the original property holdings in the first place, and allows us to distinguish legitimate from illegitimate holdings. This is as true now as it was when Locke was writing.

Extract 3.5 John Locke, 'On Property' in *Second Treatise of Government* (1690)

25. Whether we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as Nature affords for their subsistence, or 'revelation', which gives us an account of those grants God made of the world to Adam, and to Noah and his sons, it is very clear that God, as King David says (Psalm cxv, 16), 'has given the earth to the children of men', given it to mankind in common. But, this being supposed, it seems to some a very great difficulty how any one should ever come to have a property in anything, I will not content myself to answer, that, if it be difficult to make out 'property' upon a supposition that God gave the world to Adam and his posterity in common, it is impossible that any man but one universal monarch should have any 'property' upon a supposition that God gave the world to Adam and his heirs in succession, exclusive of

all the rest of his posterity; but I shall endeavour to show how men might come to have a property in several parts of that which God gave to mankind in common, and that, without any express compact of all the commoners.

26. God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being. And, though all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of Nature, and nobody has originally a private dominion exclusive of the rest of mankind in any of them, as they are thus in their natural state, yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial, to any particular men. The fruit or venison which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common must be his, and so his – i.e. a part of him, that another can no longer have any right to it before it can do him any good for the support of his life.

27. Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person'. This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this 'labour' being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

28. He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask, then, when did they begin to be his? when he digested? or when he ate? or when he boiled? or when he brought them home? or when he picked them up? And it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common. That added something to them more than Nature, the common mother of all, had done, and so they became his private right. And will any one say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state Nature leaves it in, which begins the property, without which the common is of no use. And the taking of this or that part does not depend on the express consent of all the commoners. Thus, the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in any place, where I have a right to them in common with others, become my property without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them.

29. By making an explicit consent of every commoner necessary to any one's appropriating to himself any part of what is given in common, children or servants could not cut the meat which their father or master had provided for them in common without assigning to every one his peculiar part. Though the water running in the fountain be everyone's, yet who can doubt but that in the pitcher is his only who drew it out? His labour hath taken it out of the hands of Nature where it was common, and belonged equally to all her children, and hath thereby appropriated into himself.

30. Thus this law of reason makes the deer that Indian's who hath killed it; it is allowed to be his goods who hath bestowed his labour upon it, though, before, it was the common right of every one. And among those who are counted the civilised part of mankind, who have made and multiplied positive laws to determine property, this original law of Nature for the beginning of property, in what was before common, still takes place, and by virtue thereof, what fish any one catches in the ocean, that great and still remaining common of mankind; or what ambergris any one takes up here is by the labour that removes it out of that common state Nature left it in, made his property who takes that pains about it. And, even among us, the hare that anyone is hunting is thought his who pursues her during the chase. For being a beast that is still looked upon as common, and no man's private possession, whoever has employed so much labour about any of that kind as to find and pursue her has thereby removed her from the state of Nature wherein she was common, and hath begun a property.

31. It will, perhaps, be objected to this, that, if gathering the acorns or other fruits of the earth, etc. makes a right to them, then any one may engross as much as he will. To which I answer, Not so. The same law of Nature that does by this means give us property, does also bound that property too. 'God has given us all things richly.' Is the voice of reason confirmed by inspiration? But how far has He given it to us – 'To enjoy'? As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy. And thus considering the plenty of natural provisions there was a long time in the world, and the few spenders, and to how small a part of that provision the industry of one man could extend itself and engross it to the prejudice of others, especially keeping within the bounds set by reason of what serve for his use, there could be then little room for quarrels or contentions about property so established.

32. But the chief matter of property being now not the fruits of the earth and the beasts that subsist on it, but the earth itself, as that which takes in and carries with it all the rest, I think it is plain that property in that too is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common. Nor will it invalidate his right to say everybody else has an equal title to it, and therefore he cannot appropriate, he cannot enclose without the consent of all his fellow-commoners all mankind. God, when He gave the world in common to all mankind, commanded man also to labour and the penury of his condition required it of him. God and his reason commanded him to subdue the earth – i.e. improve it for the benefit of life and therein

lay out something upon it that was his own, his labour. He that, in obedience to this command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.

33. Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. For he that leaves as much as another can make use of does as good as take nothing at all. Nobody 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. And the case of land and water, where there is enough of both, is perfectly the same.

34. God gave the world to men in common but since He gave it them for their benefit and the greatest conveniencies of life they were capable to draw from it, it cannot be supposed He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational (and labour was to be his title to it); not to the fancy or covetousness of the quarrelsome and contentious. He that had as good left for his improvement as was already taken up needed not complain, ought not to meddle with what was already improved by another's labour; if he did it is plain he desired the benefit of another's pains which he had no right to, and not the ground which God had given him, in common with others, to labour on, and whereof there was as good left as that already possessed, and more than he knew what to do with, or his industry could reach to.

35. It is true, in land that is common in England or any other country, where there are plenty of people under government who have money and commerce, no one can enclose or appropriate any part without the consent of all his fellow-commoners; because this is left common by compact – i.e. by the law of the land, which is not to be violated. And, though it be common in respect of some men, it is not so to all mankind, but is the joint propriety of this country, or this parish. Besides, the remainder, after such enclosure, would not be as good to the rest of the commoners as the whole was, when they could all make use of the whole; whereas in the beginning and first peopling of the great common of the world it was quite otherwise. The law man was under was rather for appropriating. God commanded, and his wants forced him to labour. That was his property, which could not be taken from him wherever he had fixed it. And hence subduing or cultivating the earth and having dominion, we see, are joined together. The one gave title to the other. So that God, by commanding to subdue, gave authority so far to appropriate. And the condition of human life, which requires labour and materials to work on, necessarily introduce private possessions.

36. The measure of property Nature well set, by the extent of men's labour and the conveniency of life. No man's labour could subdue or appropriate all, nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to entrench upon the right of another or acquire to himself a property to the prejudice of his neighbour, who would still have room for as good and as large a

possession (after the other had taken out his) as before it was appropriated. Which measure did confine every man's possession to a very moderate proportion, and such as he might appropriate to himself without injury to anybody in the first ages of the world when men were more in danger to be lost, by wandering from their company, in the then vast wilderness of the earth than to be straitened for want of room to plant in. And the same measure may be allowed still, without prejudice to anybody, full as the world seems. For, supposing a man or family, in the state they were at first, peopling of the world by the children of Adam or Noah, let him plant in some inland vacant places of America. We shall find that the possessions he could make himself, upon the measures we have given, would not be very large, nor, even to this day, prejudice the rest of mankind or give them reason to complain or think themselves injured by this man's encroachment, though the race of men have now spread themselves to all the corners of the world, and do infinitely exceed the small number was at the beginning. Nay, the extent of ground is of so little value without labour that I have heard it affirmed that, in Spain itself a man may be permitted to plough, sow, and reap, without being disturbed upon land he has no other title to, but only his making use of it. But, on the contrary, the inhabitants think themselves beholden to him who, by his industry on neglected, and consequently waste land, has increased the stock of corn, which they wanted. But be this as it will, which I lay no stress on, this I dare boldly affirm, that the same rule of propriety – namely that every man should have as much as he could make use of, would hold still in the world, without straitening anybody, since there is land enough in the world to suffice double the inhabitants, had not the invention of money, and the tacit agreement of men to put a value on it, introduced (by consent) larger possession and a right to them; which, how it has done, I shall by and by show more at large.

37. This is certain, that, in the beginning, before the desire of having more than men needed had altered the intrinsic value of things, which depends only on their usefulness to the life of man, or had agreed that a little piece of yellow metal, which would keep without wasting or decay, should be worth a great piece of flesh or a whole heap of corn, though men had a right to appropriate by their labour, each one to himself, as much of the things of Nature as he could use, yet this could not be much, nor to the prejudice of others, where the same plenty was still left, to those who would use the same industry. Before the appropriation of land, he who gathered as much of the wild fruit, killed, caught, or tamed as many of the beasts as he could – he that so employed his pains about any of the spontaneous products of Nature as any way to alter them from the state Nature put them in, by placing any of his labour on them, did thereby acquire a propriety in them; but if they perished in his possession without their due use – if the fruits rotted or the venison putrefied before he could spend it, he offended against the common law of Nature, and was liable to be punished: he invaded his neighbour's share, for he had no right farther than his use called for any of them, and they might serve to afford him conveniencies of life.

38. The same measures governed the possession of land, too. Whatsoever he tilled and reaped, laid up and made use of before it spoiled, that was his peculiar right; whatsoever he enclosed, and could feed and make use of, the cattle and product was also his. But if either the grass of his enclosure rotted on the ground, or the fruit of his

planting perished without gathering and laying up, this part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other. Thus, at the beginning, Cain might take as much ground as he could till and make it his own land, and yet leave enough to Abel's sheep to feed on: a few acres would serve for both their possessions. But as families increased and industry enlarged their stocks, their possessions enlarged with the need of them; but yet it was commonly without any fixed property in the ground they made use of till they incorporated, settled themselves together, and built cities, and then, by consent, they came in time to set out the bounds of their distinct territories and agree on limits between them and their neighbours, and by laws within themselves settled the properties of those of the same society. For we see that, in that part of the world which was first inhabited, and therefore likely to be best peopled, even as low down as Abraham's time, they wandered with their flocks and their herds, which was their substance, freely up and down – and this Abraham did in a country where he was a stranger; whence it is plain that, at least, a great part of the land lay in common, that the inhabitants valued it not, nor claimed property in any more than they made use of; but when there was not room enough in the same place for their herds to feed together, they, by consent, as Abraham and Lot did, separated and enlarged their pasture where it best liked them. And, for the same reason, Esau went from his father and his brother, and planted in Mount Seir.

39. And thus, without supposing any private dominion and property in Adam over all the world, exclusive of all other men, which can no way be proved, nor any one's property be made out from it, but supposing the world, given as it was to the children of men in common, we see how labour could make men distinct titles to several parcels of it for their private uses, wherein there could be no doubt of right, no room for quarrel.

40. Nor is it so strange as, perhaps, before consideration it may appear, that the property of labour should be able to overbalance the community of land, for it is labour indeed that puts the difference of value on everything; and let any one consider what the difference is between an acre of land planted with tobacco or sugar, sown with wheat or barley, and an acre of the same land lying in common without any husbandry upon it, and he will find that the improvement of labour makes the far greater part of the value. I think it will be but a very modest computation to say, that of the products of the earth useful to the life of man, nine tenths are the effects of labour. Nay, if we will rightly estimate things as they come to our use, and cast up the several expenses about them – what in them is purely owing to Nature and what to labour – we shall find that, in most of them ninety-nine hundredths are wholly to be put on the account of labour.

41. There cannot be a clearer demonstration of anything than several nations of the Americans are of this, who are rich in land and poor in all the comforts of life; whom Nature, having furnished as liberally as any other people with the materials of plenty – i.e. a fruitful soil, apt to produce in abundance what might serve for food, raiment, and delight; yet, for want of improving it by labour, have not one hundredth part of the conveniences we enjoy, and a king of a large and fruitful territory there feeds, lodges, and is clad worse than a day labourer in England.

42. To make this a little clearer, let us but trace some of the ordinary provisions of life, through their several progresses, before they come to our use, and see how much

they receive of their value from human industry. Bread, wine, and cloth are things of daily use and great plenty; yet, notwithstanding acorns, water, and leaves, or skins must be our bread, drink and clothing, did not labour furnish us with these more useful commodities. For whatever bread is more worth than acorns, wine than water, and cloth or silk than leaves, skins or moss, that is wholly owing to labour and industry. The one of these being the food and raiment which unassisted Nature furnishes us with; the other provisions which our industry and pains prepare for us, which how much they exceed the other in value, when any one hath computed, he will then see how much labour makes the far greatest part of the value of things we enjoy in this world; and the ground which produces the materials is scarce to be reckoned in as any, or at most, but a very small part of it; so little, that, even among us, land that is left wholly to nature, that hath no improvement of pasturage, tillage, or planting, is called, as indeed it is, waste; and we shall find the benefit of it amount to little more than nothing.

43. An acre of land that bears here twenty bushels of wheat, and another in America, which, with the same husbandry, would do the like, are, without doubt, of the same natural, intrinsic value. But yet the benefit mankind receives from one in a year is worth five pounds, and the other possibly not worth a penny; if all the profit an Indian received from it were to be valued and sold here, at least I may truly say, not one thousandth. It is labour, then, which puts the greatest part of value upon land, without which it would scarcely be worth anything; it is to that we owe the greatest part of all its useful products; for all that the straw, bran, bread of that acre of wheat is more worth than the product of an acre of as good land which lies waste is all the effect of labour. For it is not barely the ploughman's pains, the reaper's and thresher's toil, and the baker's sweat is to be counted into the bread we eat; the labour of those who broke the oxen, who digged and wrought the iron and stones, who felled and framed the timber employed about the plough, mill, oven, or any other utensils, which are a vast number, requisite to this corn, from its sowing to its being made bread, must all be charged on the account of labour, and received as an effect of that; Nature and the earth furnished only the almost worthless materials as in themselves. It would be a strange catalogue of things that industry provided and made use of about every loaf of bread before it came to our use if we could trace them; iron, wood, leather, bark, timber, stone, bricks, coals, lime, cloth, dyeing-drugs, pitch, tar, masts, ropes, and all the materials made use of in the ship that brought any of the commodities made use of by any of the workmen, to any part of the work, all which it would be almost impossible, or at least too long, to reckon up.

44. From all which it is evident that, though the things of Nature are given in common, man (by being master of himself, and proprietor of his own person, and the actions or labour of it) had still in himself the great foundation of property; and that which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniencies of life, was perfectly his own, and did not belong in common to others.

45. Thus labour, in the beginning, gave a right of property, wherever any one was pleased to employ it, upon what was common, which remained a long while, the far greater part, and is yet more than mankind makes use of. Men at first, for the most

part, contented themselves with what unassisted Nature offered to their necessities; and though afterwards, in some parts of the world, where the increase of people and stock, with the use of money, had made land scarce, and so of some value, the several communities settled the bounds of their distinct territories, and, by laws, within themselves, regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began. And the leagues that have been made between several states and kingdoms, either expressly or tacitly disowning all claim and right to the land in the other's possession, have, by common consent, given up their pretences to their natural common right, which originally they had to those countries; and so have, by positive agreement, settled a property among themselves, in distinct parts of the world; yet there are still great tracts of ground to be found, which the inhabitants thereof, not having joined with the rest of mankind in the consent of the use of their common money, lie waste, and are more than the people who dwell on it do, or can make use of, and so still lie in common; though this can scarce happen among that part of mankind that have consented to the use of money.

46. The greatest part of things really useful to the life of man, and such as the necessity of subsisting made the first commoners of the world look after – as it doth the Americans now – are generally things of short duration, such as – if they are not consumed by use – will decay and perish of themselves. Gold, silver, and diamonds are things that fancy or agreement hath put the value on, more than real use and the necessary support of life. Now of those good things which Nature hath provided in common, every one hath a right (as hath been said) to as much as he could use, and had a property in all he could effect with his labour; all that his industry could extend to, to alter from the state Nature had put it in, was his. He that gathered a hundred bushels of acorns or apples had thereby a property in them; they were his goods as soon as gathered. He was only to look that he used them before they spoiled, else he took more than his share, and robbed others. And indeed, it was a foolish thing, as well as dishonest, to hoard up more than he could make use of. If he gave away a part to anybody else, so that it perished not uselessly in his possession, these he also made use of. And, if he also bartered away plums that would have rotted in a week, for nuts that would last good for his eating a whole year, he did no injury; he wasted not the common stock; destroyed no part of the portion of goods that belonged to others, so long as nothing perished uselessly in his hands. Again, if he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life, he invaded not the right of others; he might heap up as much of these durable things as he pleased; the exceeding of the bounds of his just property not lying in the largeness of his possession, but the perishing of anything uselessly in it.

47. And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life.

48. And, as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them. For supposing an island, separate from all possible commerce with the rest

of the world, wherein there were but a hundred families, but there were sheep, horses, and cows, with other useful animals, wholesome fruits and land enough for corn for a hundred thousand times, as many, but nothing in the island, either because of its commonness or perishableness, fit to supply the place of money. What reason could any one have there to enlarge his possessions beyond the use of his family, and a plentiful supply to its consumption, either in what their own industry produced, or they could barter for like perishable, useful commodities with others? Where there is not something both lasting and scarce, and so valuable to be hoarded up, there men will not be apt to enlarge their possessions of land, were it never so rich, never so free for them to take. For I ask, what would a man value ten thousand or an hundred thousand acres of excellent land, ready cultivated and well stocked too, with cattle, in the middle of the inland parts of America, where he had no hopes of commerce with other parts of the world, to draw money to him by the sale of the product? It would not be worth the enclosing, and we should see him give up again to the wild common of Nature whatever was more than would supply the conveniencies of life, to be had there for him and his family.

49. Thus, in the beginning, all the world was America, and more so than that is now; for no such thing as money was anywhere known. Find out something that hath the use and value of money among his neighbours, you shall see the same man will begin presently to enlarge his possessions.

50. But since gold and silver, being little useful to the life of man in proportion to food, raiment, and carriage, has its value only from the consent of men – whereof labour yet makes in great part the measure – it is plain that the consent of men have agreed to a disproportionate and unequal possession of the earth – I mean out of the bounds of society and compact; for in governments the laws regulate it; they having, by consent, found out and agreed in a way how a man may, rightfully and without injury, possess more than he himself can make use of by receiving gold and silver, which may continue long in a man's possession without decaying for the overplus, and agreeing those metals should have a value.

51. And thus, I think, it is very easy to conceive, without any difficulty, how labour could at first begin a title of property in the common things of Nature, and how the spending it upon our uses bounded it; so that there could then be no reason of quarrelling about title, nor any doubt about the largeness of possession it gave. Right and conveniency went together. For as a man had a right to all he could employ his labour upon, so he had no temptation to labour for more than he could make use of. This left no room for controversy about the title, nor for encroachment on the right of others. What portion a man carved to himself was easily seen; and it was useless, as well as dishonest, to carve himself too much, or take more than he needed.

Extract 3.6 Robert Nozick, *Anarchy, State, and Utopia* (Oxford, Basil Blackwell, 1974), pp. 174–82

LOCKE'S THEORY OF ACQUISITION

... Locke views property rights in an unowned object as originating through someone's mixing his labor with it. This gives rise to many questions. What are the boundaries of what

labor is mixed with? If a private astronaut clears a place on Mars, has he mixed his labor with (so that he comes to own) the whole planet, the whole uninhabited universe, or just a particular plot? Which plot does an act bring under ownership? The minimal (possibly disconnected) area such that an act decreases entropy in that area, and not elsewhere? Can virgin land (for the purposes of ecological investigation by high-flying airplane) come under ownership by a Lockean process? Building a fence around a territory presumably would make one the owner of only the fence (and the land immediately underneath it).

Why does mixing one's labor with something make one the owner of it? Perhaps because one owns one's labor, and so one comes to own a previously unowned thing that becomes permeated with what one owns. Ownership seeps over into the rest. But why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice? Perhaps the idea, instead, is that laboring on something improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created. (Reinforcing this, perhaps, is the view that laboring is unpleasant. If some people made things effortlessly, as the cartoon characters in *The Yellow Submarine* trail flowers in their wake, would they have lesser claim to their own products whose making didn't cost them anything?) Ignore the fact that laboring on something may make it less valuable (spraying pink enamel paint on a piece of driftwood that you have found). Why should one's entitlement extend to the whole object rather than just to the added value one's labor has produced? (Such reference to value might also serve to delimit the extent of ownership; for example, substitute 'increases the value of' for 'decreases entropy in' in the above entropy criterion.) No workable or coherent value-added property scheme has yet been devised . . .

It will be implausible to view improving an object as giving full ownership to it, if the stock of unowned objects that might be improved is limited. For an object's coming under one person's ownership changes the situation of all others. Whereas previously they were at liberty (in Hohfeld's sense) to use the object, they now no longer are. This change in the situation of others (by removing their liberty to act on a previously unowned object) need not worsen their 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 left 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. The crucial point is whether appropriation of an unowned object worsens the situation of others.

Locke's proviso that there be 'enough and as good left in common for others' [paragraph 27] is meant to ensure that the situation of others is not worsened. (If this proviso is met is there any motivation for his further condition of nonwaste?) It is often said that this proviso once held but now no longer does. But there appears to be an argument for the conclusion that, if the proviso no longer holds, then it cannot ever have held so as to yield permanent and inheritable property rights. Consider the first person Z for whom there is not enough and as good left to appropriate. The last person Y to appropriate left Z without his previous liberty to act on an object, and so

worsened Z's situation. So Y's appropriation is not allowed under Locke's proviso. Therefore, the next to last person X to appropriate left Y in a worse position, for X's act ended permissible appropriation. Therefore, X's appropriation wasn't permissible. But then the appropriator two from last, W, ended permissible appropriation and so, since it worsened X's position, W's appropriation wasn't permissible. And so on back to the first person A to appropriate a permanent property right.

This argument, however, proceeds too quickly. Someone may be made worse off by another's appropriation in two ways: first, by losing the opportunity to improve his situation by a particular appropriation or any one; and second, by no longer being able to use freely (without appropriation) what he previously could. A stringent requirement that another not be made worse off by an appropriation would exclude the first way if nothing else counterbalances the diminution in opportunity, as well as the second. A weaker requirement would exclude the second way, though not the first. 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. In this case, Y's appropriation would not violate the weaker Lockean condition. (With less remaining that people are at liberty to use, users might face more inconvenience, crowding, and so on; in that way the situation of others might be worsened, unless appropriation stopped far short of such a point.) It is arguable that no one legitimately can complain if the weaker provision is satisfied. However, since this is less clear than in the case of the more stringent proviso, Locke may have intended this stringent proviso by 'enough and as good' remaining, and perhaps he meant the nonwaste condition to delay the end point from which the argument zips back.

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? Here enter the various familiar social considerations favoring private property: it increases the social product by putting means of production in the hands of those who can use them most efficiently (profitably); experimentation is encouraged, because with separate persons controlling resources, there is no one person or small group whom someone with a new idea must convince to try it out; private property enables people to decide on the pattern and types of risks they wish to bear, leading to specialized types of risk bearing; private property protects future persons by leading some to hold back resources from current consumption for future markets; it provides alternate sources of employment for unpopular persons who don't have to convince any one person or small group to hire them, and so on. These considerations enter a Lockean theory to support the claim that appropriation of private property satisfies the intent behind the 'enough and as good left over' proviso, not as a utilitarian justification of property. They enter to rebut the claim that because the proviso is violated no natural right to private property can arise by a Lockean process. The difficulty in working such an argument to show that the proviso is satisfied is in fixing the appropriate base line for comparison. Lockean appropriation makes people no worse off than they would be how? This question of fixing the baseline needs more detailed investigation than we are able to give it here. It would

be desirable to have an estimate of the general economic importance of original appropriation in order to see how much leeway there is for differing theories of appropriation and of the location of the baseline. Perhaps this importance can be measured by the percentage of all income that is based upon untransformed raw materials and given resources (rather than upon human actions), mainly rental income representing the unimproved value of land, and the price of raw material *in situ*, and by the percentage of current wealth which represents such income in the past.

We should note that it is not only persons favouring private property who need a theory of how property rights legitimately originate. Those believing in collective property, for example those believing that a group of persons living in an area jointly own the territory, or its mineral resources, also must provide a theory of how such property rights arise; they must show why the persons living there have rights to determine what is done with the land and resources there that persons living elsewhere don't have (with regard to the same land and resources).

THE PROVISIO

Whether or not Locke's particular theory of appropriation can be spelled out so as to handle various difficulties, I assume that any adequate theory of justice in acquisition will contain a proviso similar to the weaker of the ones we have attributed to Locke. 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. It is important to specify this particular mode of worsening the situation of others, for the proviso does not encompass other modes. It does not include the worsening due to more limited opportunities to appropriate (the first way above, corresponding to the more stringent condition), and it does not include how I 'worsen' a seller's position if I appropriate materials to make some of what he is selling, and then enter into competition with him. Someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened; unless he does compensate these others, his appropriation will violate the proviso of the principle of justice in acquisition and will be an illegitimate one. A theory of appropriation incorporating this Lockean proviso will handle correctly the cases (objections to the theory lacking the proviso) where someone appropriates the total supply of something necessary for life.

A theory which includes this proviso in its principle of justice in acquisition must also contain a more complex principle of justice in transfer. Some reflection of the proviso about appropriation constrains later actions. If my appropriating all of a certain substance violates the Lockean proviso, then so does my appropriating some and purchasing all the rest from others who obtained it without otherwise violating the Lockean proviso. If the proviso excludes someone's appropriating all the drinkable water in the world, it also excludes his purchasing it all. (More weakly, and messily, it may exclude his charging certain prices for some of his supply.) This proviso (almost?) never will come into effect; the more someone acquires of a scarce substance which

others want, the higher the price of the rest will go, and the more difficult it will become for him to acquire it all. But still, we can imagine, at least, that something like this occurs: someone makes simultaneous secret bids to the separate owners of a substance, each of whom sells assuming he can easily purchase more from the other owners; or some natural catastrophe destroys all the supply of something except that in one person's possession. The total supply could not be permissibly appropriated by one person at the beginning. His later acquisition of it all does not show that the original appropriation violated the proviso (even by a reverse argument similar to the one above that tried to zip back from Z to A). Rather, it is the combination of the original appropriation plus all the later transfers and actions that violates the Lockean proviso.

Each owner's title to his holding includes the historical shadow of the Lockean proviso on appropriation. This excludes his transferring it into an agglomeration that does violate the Lockean proviso and excludes his using it in a way, in co-ordination with others or independently of them, so as to violate the proviso by making the situation of others worse than their baseline situation. 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 it is difficult any longer unreservedly to call) 'his property'. Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights. Similarly, an owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser, for this would violate the Lockean proviso.

Notice that the theory does not say that owners do have these rights, but that the rights are overridden to avoid some catastrophe. (Overridden rights do not disappear; they leave a trace of a sort absent in the cases under discussion.) There is no such external (and *ad hoc*?) overriding. Considerations internal to the theory of property itself, to its theory of acquisition and appropriation provide the means for handling such cases. The results, however, may be coextensive with some condition about catastrophe, since the baseline for comparison is so low as compared to productiveness of a society with private appropriation that the question of the Lockean proviso being violated arises only in the case of catastrophe (or a desert-island situation).

The fact that someone owns the total supply of something necessary for others to stay alive does not entail that his (or anyone's) appropriation of anything left some people (immediately or later) in a situation worse than the baseline one. A medical researcher who synthesizes a new substance that effectively treats a certain disease and who refuses to sell except on his terms does not worsen the situation of others by depriving them of whatever he has appropriated. The others easily can possess the same materials he appropriated; the researcher's appropriation or purchase of chemicals didn't make those chemicals scarce in a way so as to violate the Lockean proviso. Nor would someone else's purchasing the total supply of the synthesized substance from the medical researcher. The fact that the medical researcher uses easily available chemicals to synthesize the drug no more violates the Lockean proviso

than does the fact that the only surgeon able to perform a particular operation eats easily obtainable food in order to stay alive and to have the energy to work. This shows that the Lockean proviso is not an 'end-state principle'; it focuses on a particular way that appropriative actions affect others, and not on the structure of the situation that results.

Intermediate between someone who takes all of the public supply and someone who makes the total supply out of easily obtainable substances is someone who appropriates the total supply of something, in a way that does not deprive the others of it. For example, someone finds a new substance in an out-of-the-way place. He discovers that it effectively treats a certain disease and appropriates the total supply. He does not worsen the situation of others; if he did not stumble upon the substance no one else would have, and the others would remain without it. However, 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 so that others are not below their baseline position; for example, its bequest might be limited. The theme of someone worsening another's situation by depriving him of something he otherwise would possess may also illuminate the example of patents. An inventor's patent does not deprive others of an object which would not exist if not for the inventor. Yet patents would have this effect on others who independently invent the object. Therefore, these independent inventors, upon whom the burden of proving independent discovery may rest, should not be excluded from utilizing their own invention as they wish (including selling it to others). Furthermore, a known inventor drastically lessens the chances of actual independent invention. For persons who know of an invention usually will not try to reinvent it, and the notion of independent discovery here would be murky at best. Yet 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 . . .

Notes and Questions 3.2

1 Grunebaum says of Locke:

the process of grounding ownership upon first appropriation of what is unowned by labour or some other act of appropriation is a question begging presumption in favour of private ownership.

(Grunebaum, *Private Ownership*, p. 155)

Explain what he means, and consider how far he is right.

2 Consider what Locke means when he says that we have 'property' in our own 'person'. Does he mean that we have full ownership of our bodies, or that no person other than ourselves has any rights in our person (here meaning something more than our physical bodies)? Does this affect the validity of his argument? Kramer considers this, and like objections as to whether one can say

that ‘the labour of our bodies and the work of our hands is ours’ (Kramer, *John Locke and the Origins of Private Property*, pp. 135–40).

- 3 According to Locke, children and servants do not acquire property in unallocated things by mixing their labour with them. Does he provide a satisfactory explanation for this? If not, can a satisfactory explanation be provided?
- 4 How would Locke answer Nozick’s questions about the precise boundaries of what you acquire when you mix your labour with something? Would this meet the objections implied by Nozick?
- 5 How would Locke answer Nozick’s point about the tomato juice? Would this meet Nozick’s objections?
- 6 Other commentators have objected that there are all kinds of labour that can be undertaken in relation to natural resources which may well increase their value or usefulness but could not be said to amount to ‘mixing’ or ‘annexing’ and ‘joining’ the labour to the resource. Kramer gives the following example:

Suppose that a person built his hut in proximity to a massive oak, which would furnish ample shade and which would also lend some protection from the wind and from storms. Thitherto, the oak and all the constituents of the hut had gone unpossessed by anyone. While the erection of the hut certainly would count as labor that engendered proprietary rights in the hut itself, it might well count also as an instance of labor that engendered proprietary rights in the oak. Surely, however, no one will profess that the untouched tree was mixed with the hut-builder’s labor, in any usual senses of the word ‘mixing’.

(Kramer, *John Locke and the Origins of Private Property*, p. 145)

Kramer, however, dismisses these criticisms: he says that Locke’s words should be read as ‘acceptable shorthand for the deliberate incorporation of useful items into the projects of human beings who were questing for their own survival and comfort’ (Kramer, *John Locke and the Origins of Private Property*, p. 145). Is this an acceptable interpretation of what Locke is saying?

- 7 Explain Nozick’s argument that a stringent version of the sufficiency proviso would make all appropriations illegitimate. Is he right? Would the same apply if the proviso was that, as much and as good must be left for others to *use* rather than to *appropriate*? Is this a plausible reading of the sufficiency proviso?
- 8 Waldron gives other reasons for rejecting the stringent version of the sufficiency proviso, which, as he points out, involves an acceptance of a natural right to private property:

[T]here is nothing in Locke’s argument to indicate that he thought it morally necessary for people to mix their labour with virgin resources. There is nothing remotely corresponding to Hegel’s view that a person must embody his freedom in

an external object and so become an owner in order to develop ethically as an individual. On Locke's account, some people get to mix their labour with unowned resources while others do not . . . There is nothing in Locke's discussion to indicate that he believed private appropriation satisfied any deep need in man apart from the physical needs that were satisfied by the appropriated resources. Since it is possible for those needs to be satisfied without appropriation, there is no basis for attributing to Locke the [stringent version of the sufficiency proviso] or the general right to private property that would go along with it.

(Waldron, *The Right to Private Property*, pp. 217–18)

- 9 What does Nozick mean when he says that 'Some reflection of the proviso about appropriation constrains later actions'? To what extent does he think the sufficiency proviso should influence what happens to property holdings after an original acquisition? Is this what Locke is saying?
- 10 As Nozick says, an inventor's patent does not deprive others of anything because the object invented would not have existed were it not for the inventor. Why, according to Nozick, should the period of protection given by the patent to the inventor nevertheless be limited in time?