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THERE IS NO SUCH THING AS AN UNJUST INITIAL ACQUISITION*

By Edward Feser

I. Introduction

The notion that Robert Nozick's political philosophy amounts, in Thomas Nagel's words, to a "libertarianism without foundations" [1] has become something of a cliché, and like most clichés it is at best an oversimplification. Although he is not explicit about it, Nozick does seem to assume that most of the rights he ascribes to individuals follow from the thesis of self-ownership—the claim that each person has full property rights in his body and its parts, in his talents and abilities, in his labor and energies, and so forth—and this thesis surely is as plausible a moral first principle as any to which Nozick's opponents typically appeal. G. A. Cohen, who is perhaps Nozick's most perceptive interpreter and critic, not only grants that Nozick more or less *does* have an ostensible foundation for his system in the thesis of self-ownership, but even concedes that Nozick's anti-egalitarian and anti-redistributionist conclusions *really do follow* from the thesis, that the thesis is intuitively highly plausible, and that it cannot be refuted.[2] Critics of Nozick thus have no choice, in Cohen's view, but to try to find some way of avoiding commitment to this thesis. They cannot prove it false, and must rest content with trying to show that however attractive and reasonable it is, it has not been proven true. If Cohen is right, then it is hard to see how Nozick's political philosophy is in worse shape than any other. (Indeed, if Cohen is right, then it seems to be, if anything, in much *better* shape than other political philosophies.)[3]

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[1] Thomas Nagel, "Libertarianism without Foundations," in Jeffrey Paul, ed., *Reading Nozick: Essays on Anarchy, State, and Utopia* (Totowa, NJ: Rowman and Littlefield, 1981).

[2] G. A. Cohen, *Self-Ownership, Freedom, and Equality* (New York: Cambridge University Press, 1995).

[3] Given these concessions, one might say that with enemies like Cohen, Nozick doesn't need friends. That Cohen is correct in his generous interpretation of Nozick's position, but incorrect in his ultimate rejection of that position (and, in particular, in his rejection of self-ownership) is something I try to show in Edward Feser, "Taxation, Forced Labor, and Theft," *The Independent Review* 5, no. 2 (2000), and in Edward Feser, *On Nozick* (Belmont, CA: Wadsworth, 2004), chap. 3.

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Cohen's views aside, a weak link in Nozick's case might nevertheless be thought to reside in his theory of property rights—rights, that is, to resources *external* to oneself. Self-ownership may well rule out taxation of earnings from labor, as Nozick insists and as Cohen allows; it may thus doom any scheme of eliminating inequalities in wealth and income arising from prior inequalities in labor-enhancing personal endowments. Still, insofar as there are also inequalities in wealth and income that derive from inequalities in initial holdings in external resources, the egalitarian may be thought to have a toehold, for even if it is granted that you own yourself and your talents, labor, and the like, it is another question whether you own anything else. If it can be shown that you do not own, or at least do not fully own, those external resources that you have utilized in exercising your self-owned powers to acquire the wealth you possess, then the question of the redistribution of some of that wealth via taxation would appear to be reopened.

Nozick's theory of property rights has three components: the principle of justice in *acquisition*, which concerns the way in which previously unowned resources can justly come to be owned; the principle of justice in *transfer*, which concerns the way in which one might justly come to own a holding previously owned by someone else; and the principle of justice in *rectification*, which concerns the way in which past injustices in acquisition and transfer are to be corrected.[4] Famously (or notoriously), Nozick does little more than provide a sketch of these principles; and the first principle, on which the other two rest (since you cannot transfer property or return it to its rightful owner until it comes to be owned by someone or other in the first place), is usually taken to be the most problematic. If, as nearly all of Nozick's commentators, friendly and unfriendly, agree, Nozick fails to give an adequate theory of justice in acquisition, then his libertarianism appears to have at most *partial* foundations, and this may be enough to undermine it. For if, contrary to what Nozick implies, existing inequalities in holdings reflect significant injustices in the initial acquisition of resources, then redistributive taxation of a sort incompatible with Nozick's libertarianism may be justified. This, in any case, is what certain egalitarian opponents of Nozick suggest,[5] as do his so-called left-libertarian critics, who accept the thesis of self-ownership but also insist on equal ownership of external resources.[6]

[4] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 150–53. Note that "acquisition" is used here in a technical sense, not in the ordinary sense in which one might come to acquire something previously held by someone else; in Nozick's terminology, the latter case would be a case of "transfer."

[5] See, e.g., Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (New York: Oxford University Press, 1990), 117; and Jonathan Wolff, *Robert Nozick: Property, Justice, and the Minimal State* (Stanford, CA: Stanford University Press, 1991), 111.

[6] See, e.g., Peter Vallentyne and Hillel Steiner, eds., *Left-Libertarianism and Its Critics: The Contemporary Debate* (New York: Palgrave, 2000).

There is a serious difficulty with this criticism of Nozick, however. It is just this: There is *no such thing* as an unjust initial acquisition of resources; therefore, there is no case to be made for redistributive taxation on the basis of alleged injustices in initial acquisition.

This is, to be sure, a bold claim. Moreover, in making it, I contradict not only Nozick's critics, but Nozick himself, who clearly thinks it is at least possible for there to be injustices in acquisition, whether or not there have in fact been any (or, more realistically, whether or not there have been enough such injustices to justify continual redistributive taxation for the purposes of rectifying them). But here is a case where Nozick has, I think, been too generous to the other side. Rather than attempt—unsatisfactorily, in the view of his critics—to meet the challenge to show that initial acquisition has not in general been unjust, he ought instead to have insisted that there is no such challenge to be met in the first place.

Giving what I shall call "the basic argument" for this audacious claim will be the task of Section II of this essay. The argument is, I think, compelling, but by itself it leaves unexplained some widespread intuitions to the effect that certain specific instances of initial acquisition are unjust and call forth as their remedy the application of a Lockean proviso, or are otherwise problematic. (A "Lockean proviso," of course, is one that forbids initial acquisitions of resources when these acquisitions do not leave "enough and as good" in common for others.) Thus, Section III focuses on various considerations that tend to show how those intuitions are best explained in a way consistent with the argument of Section II. Section IV completes the task of accounting for the intuitions in question by considering how the thesis of self-ownership itself bears on the acquisition and use of property. Section V shows how the results of the previous sections add up to a more satisfying defense of Nozickian property rights than the one given by Nozick himself, and considers some of the implications of this revised conception of initial acquisition for our understanding of Nozick's principles of transfer and rectification.

II. The Basic Argument

The reason there is no such thing as an unjust initial acquisition of resources is that there is no such thing as *either* a just *or* an unjust initial acquisition of resources. The concept of justice, that is to say, simply does not apply to initial acquisition. It applies only after initial acquisition has already taken place. In particular, it applies only to *transfers* of property (and derivatively, to the rectification of injustices in transfer).

This, it seems to me, is a clear implication of the assumption (rightly) made by Nozick that external resources are initially unowned. Consider the following example. Suppose an individual A seeks to acquire some previously unowned resource R. For it to be the case that A commits an

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injustice in acquiring R, it would also have to be the case that there is some individual B (or perhaps a group of individuals) against whom A commits the injustice. But for B to have been wronged by A's acquisition of R, B would have to have had a rightful claim over R, a *right* to R. By hypothesis, however, B did *not* have a right to R, because *no one* had a right to it—it was unowned, after all. So B was not wronged and could not have been. In fact, the very first person who could conceivably be wronged by anyone's use of R would be, not B, but *A himself,* since A is the first one to own R. Such a wrong would in the nature of the case be an injustice in *transfer*—in unjustly taking from A what is rightfully his—not in initial acquisition. The same thing, by extension, will be true of all unowned resources: it is only *after* someone has initially acquired them that anyone could unjustly come to possess them, via unjust transfer. It is impossible, then, for there to be any injustices in initial acquisition.[7]

Now someone might object that if resources are in fact initially *commonly* owned, this argument would not work. But this objection fails for two reasons. First, the argument *would* in fact still work even if resources are initially commonly owned; second, resources are in any case *not* initially commonly owned.

The first point is actually a fairly trivial one. If resources start out *commonly* owned, then for this very reason they do not start out *un*owned, in which case there is no *initial* acquisition of *any* sort to speak of, unjust or otherwise. We all (somehow) *just own* everything. Thus, anyone who takes R without the consent of the rest of us would be committing (if he is committing an injustice at all) an injustice in transfer rather than acquisition. This is perfectly in line with my claim that injustices in holdings can take place only after someone already has ownership of resources, either through initially acquiring them from their unowned state or because the resources are "just owned" from the start; it has no tendency to show that initial acquisition itself can be just or unjust.

Of course, this raises the question of *how* exactly we come collectively to own all resources, which leads us to the second point. Those who object

[7] This argument (earlier versions of which appear in Feser, "Taxation, Forced Labor, and Theft," 231, and in chapter 5 of Feser, *On Nozick*) first occurred to me as a natural extension to the case of initial acquisition of property in the state of nature of what F. A. Hayek has argued concerning the inapplicability of the concept of justice to the results of impersonal processes like that of the market. See F. A. Hayek, *Law, Legislation, and Liberty,* vol. 2, *The Mirage of Social Justice* (Chicago, IL: University of Chicago Press, 1976); see also Edward Feser "Hayek on Social Justice: Reply to Lukes and Johnston," *Critical Review* 11, no. 4 (1997): 581–606; and Edward Feser, "Hayek, Social Justice, and the Market: Reply to Johnston," *Critical Review* 12, no. 3 (1998): 269–81. Anthony de Jasay has argued along similar lines in de Jasay, *Against Politics: On Government, Anarchy, and Order* (London: Routledge, 1997), 171–76; his argument is lucidly summarized in N. Stephan Kinsella's review of *Against Politics* in *The Quarterly Journal of Austrian Economics* 1, no. 3 (1998): 85–92. And, of course, related ideas have been expressed by Hume.

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to Nozick's assumption that resources start out unowned[8] typically rest content with noting that there are alternative possibilities, especially the possibility that resources start out commonly owned, as if the mere existence of this alternative casts doubt on Nozick's assumption—indeed, as if merely noting the possibility of common ownership were enough to establish its actuality. But why is the assumption of common ownership of resources any less in need of justification than the assumption that resources are unowned? Why should we regard the former assumption, and not the latter, as the default assumption to make?

Surely the reverse is true: the claim that we all own everything is *more* in need of justification than the claim that no one initially owns anything. Surely such a claim is not merely unjustified, but counterintuitive, even mysterious. Consider the following: a pebble resting uneasily on the surface of the asteroid Eros as it orbits the sun, a cubic foot of molten lava churning a mile below the surface of the earth, one of the polar icecaps on Mars, an ant floating on a leaf somewhere in the mid-Pacific, or the Andromeda galaxy. It would seem odd in the extreme to claim that any particular individual owns any of these things: In what sense could Smith, for example, who like most of the rest of us has never left the surface of the earth or even sent a robotic spacecraft to Eros, be said to *own* the pebble resting on its surface? But is it any less odd to claim we *all* own the pebble or these other things? Yet the entire universe of external resources is like these things, or at least (in the case of resources that are now owned) started out like them—started out, that is to say, as just a bunch of *stuff* that no human being had ever had any impact on. So what transforms it into stuff we all commonly own? Our mere *existence*? How so? Are we to suppose that it *was* all initially unowned, but only until a group of *Homo sapiens* finally evolved on our planet, at which point the entire universe suddenly became our collective property? (How exactly did *that* process work?) Or was it just the earth that became our collective property? Why only *that*? Does something become collective property only when we are capable of directly affecting it? But why does *everyone* share in ownership in that case—why not only those *specific individuals* who are capable of affecting it: for example, explorers, astronauts, or entrepreneurs? It is, after all, never literally "we" collectively who discover Antarctica, strike oil, or go to the moon, but only particular individuals, together perhaps with technical assistance and financial backing provided by other particular individuals. Smith's being the first to reach some distant island and build a hut on it at least makes it comprehensible how he might claim—plausibly or implausibly—to own it. This fact about Smith gives some *meaning* to the claim that he has come to own it. But it is not at all clear how this fact would give meaning to the claim that *Jones,*

[8] See, e.g., Cohen, *Self-Ownership, Freedom, and Equality,* chaps. 3 and 4; and Kymlicka, *Contemporary Political Philosophy,* 117–18.

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whom Smith has never met or even heard of, who has had no involvement in or influence on Smith's journey and homesteading, and who lives thousands of miles away (or even years in the future), has *also* now come to own it. Still less intelligible is the claim that Smith's act has given all of us—the human race collectively, throughout all generations—a claim to the island.

Whatever objections one might raise against Locke's "labor-mixing" theory of property,[9] it at least provides the beginnings of a story that makes it clear how anyone can come to own something. Locke's initial acquirer does, after all, *do* something to a *specific* resource, and does it *with* something he already owns (his labor), so that it is at least not *mysterious* why one might suppose he comes to own the resource, whether or not one thinks that this supposition is ultimately defensible. The common-ownership assumption, by contrast, appears to suppose that we can, all together, simply and peremptorily come to own *everything* without having to lift a finger— or worse, that we don't *come* to own it at all, but just *do* own it—the pebble on Eros, Andromeda, and all the rest. Surely it is the common-ownership advocate who has the greater burden of proof!

There is another problem with the common-ownership assumption besides its lack of support, namely, that it seems irremediably indeterminate. Indeed, at first sight it appears vacuous. If everyone has an equal right to every part of the world, how does this differ exactly from Nozick's assumption that everything is initially unowned—an assumption on which, too, everyone has an equal right to everything (since no one, at the start anyway, has *any* right to anything in particular at all)? Ownership, that is to say, seems to imply exclusion. *Your* (or even *our*) owning something implies that there are others who *do not* own it; thus, it appears that we cannot intelligibly *all* own something, much less everything. This is no doubt (part of) why Locke, though he held that God initially gave the world to mankind in common, also held that individuals can acquire portions of it for their exclusive use. Initial common "ownership" in the Lockean sense entails only that the various resources constituting the world are initially "up for grabs"; for these resources truly to become anyone's property in any meaningful sense, specific individuals actually have to go out and do something with them.

The problem, then, is that if everyone owns everything, no one owns anything. This remains true if we take not a Lockean construal of common ownership, but a construal on which one must get the permission of every other human being, as co-owners of the world, to use any part of the world—what Cohen calls the "joint ownership" interpretation of common ownership.[10] In what sense do you own something if *no one* is in

[9] John Locke, *Two Treatises of Government* (1690), ed. Peter Laslett (Cambridge: Cambridge University Press, 1967), *Second Treatise,* sec. 26.

[10] Cohen, *Self-Ownership, Freedom, and Equality,* 94.

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principle excluded from it, if *everyone* has a say over everything and anything you seek to do with it?[11] One's "ownership" becomes purely formal and practically useless. This joint-ownership construal also has the difficulty that it is incompatible with any substantial (as opposed to formal) form of *self*-ownership, since, given that I cannot so much as *move* without using parts of the external world, it entails that I cannot do anything with my self-owned powers without the permission of everyone else.[12] And it is, of course, for this reason *wildly* impractical. These considerations would seem to tell decisively against the assumption that resources are initially commonly owned (in the joint-ownership sense at least), even if there were *some* reason to believe this assumption, which (as I have suggested) there is not.

Another, and at first sight more promising, interpretation of common ownership is to suppose that we do not "collectively own everything" so much as we each own our own individual and equally divided portions of external resources, a construal Cohen calls "equal division" ownership.[13] But *which* portions exactly does each person own, and why *those*? Do we all get equal amounts of zinc and copper, for instance, or does one person get the copper, another the zinc, and so forth? And how are "resources" individuated in the first place? Is my backyard one resource or many, since it might include not only a lawn and a couple of trees, but also hidden oil and mineral deposits? For that matter, is a can of oil itself one resource or many, since I could use part of it for fuel, another part for lubrication, a third to make paint, etc.? (And why a *can* of oil, rather than a barrel or a thimbleful?) Do resources get gathered up again and redivided every time a new person is born, so as to maintain equality in distribution? Do we move people's homes periodically so that we can carve up the land again every so often to guarantee equal plots for newborns? (Why *land*, anyway? What if I want to live on a houseboat? Do we all get equal portions of the surface of the oceans, so as to leave this option open for everyone?) To avoid these problems, do we simply divvy up the "cash value" of all resources? How do we know what that value is independently of a system of market prices, which presupposes *private* ownership and the *inequalities* that go along with it? And since, given changing needs and circumstances, that value is itself perpetually changing, do we need constantly to re-collect and redistribute wealth so as to reflect the "current" economic value of resources? Yet if a demand for equal outcomes is what motivates the equal-division model in the first place, even such periodic "resetting" of the system would not be enough to satisfy such a demand; for as Cohen observes, given inequalities in

[11] This sort of problem seems endemic to egalitarianism. Rawlsians famously seek to guarantee equal self-esteem for all; yet, clearly, to quote Gilbert and Sullivan's *The Gondoliers*, "when everyone is somebody, then no one's anybody."

[12] Cohen, *Self-Ownership, Freedom, and Equality*, 98.

[13] Ibid., 103.

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persons' (self-owned) natural endowments, even an initial equal distribution of basic *resources* will still result in significant inequalities of *wealth*.[14] In this case, what is the point of insisting on initial equal-division common ownership?[15] (There seems to be little point, at any rate, if one grants the thesis of self-ownership, or at least grants that the thesis is plausible enough that the critic of Nozick is best advised to look elsewhere for a way of undermining his anti-egalitarian and anti-redistributive conclusions.)[16]

These questions seem unanswerable, perhaps even *in principle* unanswerable. But even if one insists otherwise, the issue here is not (or is not primarily) whether some scheme of common ownership can after all be made coherent and practicable. Rather, the issue is that given the difficulty of seeing how this can be done—given the *work,* intellectual and physical, required to institute a common-ownership scheme—it is counterintuitive in the extreme to suggest that the world just *starts out* commonly owned, to suggest that the assumption of common ownership is the natural default assumption to make. Nor are taking resources as initially unowned and taking them as initially commonly owned even on a par as starting points in the theory of property. Nozick's opponents accuse him of being "blithe" in his assumption that resources are initially unowned,[17] but their assumptions are, if anything, more glib. Nozick, however, has good reason for his facile assumption: We clearly need to *do* something to get ownership started, and the "we" who do it are typically *specific individuals* acting on *specific and isolated bits* of the extra-personal world. The natural conclusion to draw from this is that the world starts out unowned, and that it is precisely and only the people who actually do something to change this fact who come to own the particular parts of the world on which they act.[18] At the very least, *this,* I suggest, is the natural default position to take, with the common-ownership advocate being the one who needs to justify his moving off of it. But then, as I have argued,

[14] Ibid., 102–5.

[15] Differences in natural *needs* as well as in natural endowments also cast doubt on the point, and the justice, of insisting on an equal distribution of resources. Consider Giganto, a one-thousand-foot-tall mutant, who needs to acquire a *massive* amount of water, food, and land just in order to survive. While leaving, we can stipulate, enough for others to support themselves, he nevertheless uses *much* more of these resources than anyone else. Is this inequality *unjust*, however? Surely not. But then, how can *any* inequality, *just by virtue of being an inequality*, be unjust?

[16] By the same token, the common-ownership advocate also has to face the difficulty that "resources" by themselves are pretty useless; one has to *do* something to make them usable (digging, collecting, refining, etc.). Therefore, in forcibly redistributing those resources, one is inevitably forcibly redistributing the value produced by people's labor, thus violating self-ownership.

[17] Cohen, *Self-Ownership, Freedom, and Equality,* 94.

[18] Thus, it won't do for the egalitarian to respond that perhaps the world *starts out* unowned, but then immediately becomes commonly owned—for now the question is: *When* and *how* exactly did this happen? Obviously, the human race as a whole never collectively "mixed its labor" with all external resources, in one great act of communal initial acquisition!

the natural default position to take on initial acquisition is also that it is never unjust.[19]

III. Labor-Mixing and the Lockean Proviso

Even many of those who are inclined to grant that there is *something* to the argument of the above section might find their confidence shaken when recalling Nozick's own discussion of Locke's theory of property. Doesn't Nozick show the whole notion of labor-mixing to be dubious as a means of acquiring property? Doesn't he show that others are dealt an injustice if one acquires unowned resources in a way that violates the Lockean proviso? I answer: no, and no.

Nozick famously asks:

> Why does mixing one's labor with something make one the owner of it? . . . [W]hy 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?[20]

The answer to this question is obviously (and obviously intended to be) that the tomato juice has been dissipated foolishly. But how does this cast doubt on the idea that one can come to own something by mixing his labor with it? If the example had instead involved my dumping my tomato juice into a *puddle* of (unowned) water, the plausible conclusion to draw would be that I *have* come to own that water. Of course, there are going to be cases that are intermediate between the puddle and sea examples, where we are not sure whether to say I have come to own the water or have simply lost the tomato juice within it. Nevertheless this is no special problem for the notion of acquiring property by labor-mixing. What we have here is just one more example of the sort of vagueness classically illustrated by the paradox of the heap. A million grains of sand

[19] We also should keep in mind that one of the benefits of the market—which purportedly comes into existence only *after* property titles have already been established—is that it best allows individuals to make use of localized knowledge of needs, circumstances, and the like. (See F. A. Hayek, *Individualism and Economic Order* [Chicago, IL: University of Chicago Press, 1948].) Surely, then, one of the benefits of allowing people individually initially to acquire resources and thus establish the property titles the market depends on—as opposed to having a central authority divide the titles up equally—is that it would allow these initial acquirers to make use of analogously localized knowledge: for example, knowledge of what unowned resources are *worth the bother* of acquiring in the first place (given local needs and circumstances). The suggestion, in short, is that the market principle applies just as much in *initially acquiring* property as it does (less controversially) in transferring it.

[20] Nozick, *Anarchy, State, and Utopia*, 174–75.

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constitute a heap of sand, and ten grains do not, but at what precise point in removing grains from a heap are we no longer left with a heap? There is no principled way to answer this question, but that fact casts no doubt on the existence of heaps of sand. We can make do with paradigm cases of heaps. Similarly with labor-mixing: there are paradigm cases where mixing one's labor (or tomato juice, or whatever) plausibly results in ownership, and there are paradigm cases where one has merely frittered away one's labor (or juice) to no effect. Whittling a piece of driftwood that has washed up on the beach seems a good example of the former; gently blowing in the direction of the driftwood as it floats by fifty yards off shore seems a good example of the latter. That there are intermediate cases where it is unclear how to apply the labor-mixing principle does not cast doubt on the principle itself.

Furthermore, if I had dumped in the sea, not an ordinary can of tomato juice, but a *lake*-sized can of it, or a lake-sized can of soda pop, or nuclear waste that makes the sea glow green, it seems it would *not* be implausible in such cases to say that I have come to acquire the sea. This suggests that the key idea behind the labor-mixing principle is that of *significantly altering* a resource, at least by coming to *control* that resource, hence the intuition that by building a house on a plot of land, I have plausibly come to own that plot, but not the valley, mountain range, or continent in which the plot is situated. To acquire *those* (unowned) things, I would have to do something dramatically to affect them, too, or to bring them under my control—for example, by sending out herds of my cattle to graze on an expanse of unowned land, or by building a fence around it, or by sending an army out to secure the borders of the territory I want to claim. To take a real-world example, it would not be *absurd* for the United States government (whether or not one would *approve* of this) to claim ownership of the area of the moon's surface on which Apollo 11 landed, where part of the spacecraft remains to this day and is accessible to astronauts who could be sent there again with relative ease. It would, however, be dubious for the government to claim ownership of the entire moon, and absurd for it to claim ownership of the surface of Pluto, to which the government has never sent a spacecraft. Less easy to settle is the question of whether the government could claim ownership of a distant asteroid on which it lands a probe, but which is traveling in such an orbit that it could not within the next few hundred years be reached again by a spacecraft. The difference in the intuitive plausibility of claims to ownership in these cases clearly reflects a difference in how much *effect* or *control* we have had or could have on these various extraterrestrial regions. Thus, Locke's labor-mixing criterion seems to capture a deep and widespread intuition about how ownership comes to be established, embodied in a set of paradigm cases that form the conceptual starting point for thinking about less clear cases (such as the ownership of patents). The basic idea is that the first person to come across a previously unowned

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item and *do something significant with it* has a rightful claim over it. And not only does this *in fact* serve as our working model of property acquisition (Locke hardly took his labor-mixing principle from thin air), it is hard to imagine what an alternative model would even look like.

It must be remembered that the claim is *not* that one's having a significant effect on or exerting control over a resource makes one's initial acquisition of it *just,* for I claim that initial acquisitions are neither just nor unjust; the claim is, rather, that such effort or control makes it an *acquisition,* period. Still, one might wonder how such effect or control can give rise to a claim of *justice* against others who might seek unjustly to transfer the resource once initial acquisition has occurred. "You just happen to have been the one who got there first. Why should you have a right to it?" But this ought not to be mysterious to anyone who accepts the thesis of self-ownership or at least takes this thesis to be coherent (as even Cohen, who rejects it, does). For in owning my body parts, I also "just happen" to be the one to own them. I just "got there first," as it were—I did not *do* anything particularly *special* to get the body parts—yet I still clearly *own* them (perhaps, to appeal again to the notion of having a significant effect or degree of control, because I have as much control over and effect on them as one could possibly have). I certainly have, at the very least, *more* of a claim to them than anyone else does, as even someone who rejects the thesis of self-ownership would presumably acknowledge. But why can't the same be said for the initial acquirer of an external resource? "Why *shouldn't* I have the right to it?" he can plausibly retort. "After all, who *else* has a better claim to it? *I'm* the first to do anything with it!" Why is the burden of proof on the initial acquirer of an external resource to justify his claim, any more than it is on the initial "acquirer" of your arm (i.e., *you*) to justify the claim to the arm? Why isn't the burden instead on the person who wants to deny such a claim—a person who himself didn't do *anything at all* to acquire the resource, not even show up first?[21]

These considerations suggest that the notion of rights to external resources may be a conceptual extension of (and parasitic upon) the idea that one has a right to one's body parts, talents, abilities, labor, and the like. In both cases, one *establishes* such rights by just "showing up" and being the first to "take possession"—in the latter case by simply being born with certain things, and in the former case by incorporating into what is unowned part of what one is born with. One transfers one's sense of what is "mine" from one's body to the things one's body significantly

[21] That we do in fact, in everyday life, put the burden of proof on the denier of claims to property is evidenced by the *presumption* that exists in law that the possessor of a holding is the rightful owner of it. This reflects our intuitive sense of justice in holdings. It is only (egalitarian) philosophers who—bizarrely—put the burden on the *possessor* to prove that we shouldn't expropriate his holdings. Such philosophers are reminiscent of the epistemological skeptic who challenges you to *prove* you're not dreaming, or are not a brain in a vat, or whatever—as if it were such strange logical possibilities, rather than the commonsense belief in the external world, that had the presumption in *their* favor!

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interacts with. This would certainly account for the intuitive sense of the justice of the "finders keepers" principle even among children, and also for the sense of personal violation one feels when his property is taken from him without his consent. It accounts as well for why egalitarians such as John Rawls and Ronald Dworkin, seeing, as Cohen notes,[22] that personal endowments are just as "arbitrary" as the initial distribution of external resources, conclude that (the fruits of) these personal endowments are as ripe for redistribution as (they claim) the external resources are. The fact that who initially gets to acquire which external resources depends largely on chance is, in the final analysis, no more noteworthy than the fact that who gets born with which personal endowments is also a matter of chance. Thus, self-ownership and (some form of) Nozickian property ownership appear ultimately to stand or fall together. The "arbitrariness" of the former is really no different in principle from the arbitrariness of the latter, so that if one wants to eliminate the "arbitrariness" in the one case, he ought to have no scruples about doing so in the other as well. Rawls and Dworkin thus opt to do away with self-ownership, and do so rather casually; Cohen (to his credit) does so only with reluctance. To understand his reluctance, however, is to understand why Nozick takes the violation of property rights to be of a piece with the violation of rights to one's own person.[23]

I will return to these themes (in Sections IV and V). Before doing so, however, I need to consider the claim that violations of the Lockean proviso constitute clear examples of injustices in initial acquisition. This is, I suggest, only half right. Such violations do (very often, at least) embody injustices; they are not, however, injustices in initial acquisition.

Locke's proviso on the initial acquisition of resources was that the acquirer had to leave "enough and as good . . . in common for others" to acquire,[24] and Nozick's gloss on this proviso is that it "is meant to ensure that the situation of others is not worsened."[25] The standard example of a purported violation of the proviso involves someone appropriating for himself a resource that others had previously held in common—a water

[22] Cohen, *Self-Ownership, Freedom, and Equality,* 93.

[23] Left-libertarians are egalitarians who try to combine a commitment to self-ownership with an egalitarian distribution of external resources (e.g., Vallentyne and Steiner, *Left-Libertarianism and Its Critics,* cited in note 6). This is a position that, if I am right, is inherently unstable. For although self-ownership and equal resource ownership are *in principle* compatible, the considerations that lead egalitarians of any sort to advocate the latter would also justify rejecting the former. Some left-libertarians are keen, for example, on redistributing *inherited* wealth, which the inheritor did nothing to earn or acquire; but none of us did anything to earn or acquire our natural talents and abilities either, or even our body parts—we just "inherit" them from our parents. Therefore, if the former can be redistributed, why not the latter? If it is objected that redistribution of the latter would involve too serious an interference with people's lives, then (as with Cohen, who rejects self-ownership) it would seem that it is a moral principle of noninterference of some sort that is really what the left-libertarian is committed to, and not self-ownership per se.

[24] Locke, *Second Treatise,* sec. 27.

[25] Nozick, *Anarchy, State, and Utopia,* 175.

hole in the midst of a desert, say, which is the only source of water for those living in the surrounding area. Doesn't the person who appropriates this water hole commit a clear injustice against those who had been using it (since he now, say, charges them for water that they previously took for free, or even forbids them to use the water, in either case clearly leaving them worse off)? Doesn't such an example serve as a counterexample to the claim that there are no unjust initial acquisitions? Yes and no: yes, this person's behavior is an injustice; no, it is not a counterexample, because the person who takes possession of the water hole is *not* an initial acquirer, but a *thief*.

The correct interpretation of this sort of case is, I suggest, as follows: The water hole is not unowned in the first place when the person in question tries to acquire it. After all, other people had been using it, and their use (especially since it is presumably regular, continuous use) *itself* amounted to initial acquisition of the water hole. Their use counts as a kind of labor-mixing, a bringing of the resource under their control. Thus, they have every right to object to what the would-be acquirer tries to do, precisely because *they* have already acquired it. His act amounts to what Nozick would call an "unjust transfer" of the resource, an attempt to take it from its rightful owners without their consent.[26]

One might object that in this case we are dealing with a *community* of users of the water hole, not a single individual who came across an unowned resource; doesn't this conflict with what I said earlier about individuals, rather than "all of us collectively," being the ones who come to own resources? It does not, because nothing in what I said above rules out cases where a number of people together initially acquire a resource. Indeed, historically, this probably has happened quite often, as families and tribes moved into virgin territory. What I denied above was that "all of us collectively," that is, the human race *as a whole,* ever appropriated all unowned resources *as a whole* in a way that gave rise to common ownership of them. It is quite easy to see how a (relatively) small group of individuals might together acquire, say, a discrete tract of land, so that they all come to have common ownership of it, perhaps because they all know one another and are consciously devoted to a common purpose, and because their efforts are intertwined in such a way that it is hard to sort out exactly who has done what. This is very different from claiming that some much larger group (of perhaps thousands or hundreds of thousands of people or more) has "collectively" initially acquired a continent, where the "group" is *not* consciously working together as a whole, where its members largely do not know each other and are separated by geographical and communal boundaries, and where it is easy to demarcate

[26] Accordingly, Kymlicka's description of this sort of case as an "initial acquisition" involving "the use of force" (*Contemporary Political Philosophy,* 108) is incoherent, for if *force* is used it can't be an *initial* acquisition at all; it must be an (unjust) *transfer.*

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which bits of territory have been worked by which individuals and/or subgroups. It is not plausible to say in this sort of case, much less in the case of the human race as a whole, that "all of us collectively" have acquired resources. Rather, it is a matter of many discrete individuals and groups engaging in many discrete acts of initial acquisition.

Another objection to my interpretation of the water-hole case would be that those who were previously using the water hole might not *claim* it as their property; they might claim only the right to use it for certain purposes. As many property theorists have pointed out, however, any "property right" to something is really a bundle of rights: the right to use something (perhaps in certain ways but not others, perhaps for a certain period of time), the right to sell it or lease it, the right to exclude others from it, the right to destroy it, and so forth. *Full* ownership of something entails having all of these rights to it; having only some of these rights entails having (one of a number of degrees of) *partial* ownership. Since the right to use the water hole just is one among the bundle of rights constituting ownership of it, anyone who claims the right to use thereby claims partial ownership. The correct thing to say about the water-hole example, then, is that the users are not claiming *full* ownership of it, but they are, whether they realize it or not, claiming *partial* ownership (even, at least, temporary ownership) of it. The violation of their property rights by the newcomer thus consists in his taking over the water hole in such a way that they are no longer able to use it as they once did. If he treated it in some other way, however—acquiring *other* rights over it that the previous users neither claimed nor wanted to claim, in a way that would allow them to continue using it as they always had—then he could presumably become a partial owner of the hole as well, "initially acquiring" those aspects of it that no one had yet claimed.

This raises the question of whether our paradigmatic individual initial acquirer of an unowned resource *fully* owns what he has acquired. The right answer seems to be that he does if (unlike the water-hole users) he claims he does after mixing his labor with it in such a way that he has had a significant effect on or taken control of it in all the ways relevant to all the various rights one could claim over it. If he comes across a water hole that *no one* has ever used, and if he only bathes in it from time to time, perhaps he has only acquired in effect the right to use it; if instead he builds a fence around it, posts guard dogs, and so forth, he has acquired full ownership. The situation is really, in essence, no different from what it was when we were considering initial acquisition as acquisition of a single amorphous "property right." Whether it is one right or a bundle of them, if an individual mixes his labor with a resource in such a way that he takes control of or significantly affects a resource in ways covered by all the relevant rights in question, then he has acquired that resource. His acquisition is neither just nor unjust; it is those who would seek without his consent to deprive him of the rights he has so acquired who are the

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first who could be said to act unjustly. And if he has (by having a *very* significant effect on the resource) indeed so acquired *all* the rights that one could acquire to the resource, then his ownership of it is full ownership.

IV. Self-Ownership and the Self-Ownership Proviso

Even one who grants that what has been said so far explains away *some* of the intuition that initial acquisitions can be unjust might suspect that the last example above raises a more formidable problem for my thesis. I have said that if someone comes across and mixes his labor with a water hole that *no one* has ever used—so that there is no question of any *previous* users being made worse off (by having their partial property rights violated)—then he comes *fully* to own it. But where does this leave *future* potential users of the water hole? What if some lost and thirsty traveler stumbles across the desert and comes across the water hole, and it is the *only* water hole within hundreds of miles? What if all other sources of water on earth dry up, leaving the owner of the water hole with a monopoly on water? Wouldn't my thesis imply that he has the right to charge whatever he wants for the water, or even to exclude anyone else, however close to death's door that person might be as a result of thirst? And wouldn't this be a case of leaving others worse off by his initial acquisition, even if these others had no previous claim to the hole?

There are two possible responses that an advocate of my position could take, one a hard-line approach and the other a soft-line approach. The first involves holding that this is the place where the advocate must simply bite the bullet and argue that however selfish, cruel, or wicked the initial acquirer would be to exploit his water hole for personal gain, or even to refuse (from sheer misanthropy) to let anyone drink from it, he still commits no *injustice* in doing so, much less in initially acquiring the resource.[27] He has a *right* to act that way, even if there are other moral considerations that ought to move him not to use his right in that way. The hard-liner could then insist that moral pressure (rather than government expropriation) will usually be enough to get monopolists in this sort of situation to do the right thing, and that such situations are so rare, in any case, that the worry is a merely academic one, unlikely to crop up in

[27] Eric Mack, "The Self-Ownership Proviso: A New and Improved Lockean Proviso," *Social Philosophy and Policy* 12, no. 1 (1995): 189, draws a related distinction between hard-line Lockean-Nozickian property theorists and their softer compatriots. His distinction is between theorists who accept the need for a Lockean proviso and those (the hard-liners) who do not. Mine is between those (the hard-liners) who reject a Lockean proviso, full stop, because initial acquisition is neither just nor unjust, and those who also reject it, and for the same reason, but would nevertheless go on to endorse some other principle that, while not pertaining to initial acquisition, still does something similar to the job the Lockean proviso was intended to do. As we will see below in the text, Mack's own view lends itself to this last, softer interpretation (which I will endorse), but unlike me, Mack does not seem to reject the notion that initial acquisitions can, as such, meaningfully be said to be just or unjust.

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the real world. *Any* philosophically coherent moral view, precisely because it makes consistent and systematic intuitions that are usually ill defined and haphazardly applied in everyday life, is likely to have *some* odd consequences under certain rare circumstances. But as long as these circumstances are primarily hypothetical, and are likely to remain so, the odd consequences by themselves are not enough to justify rejecting the theory. This sort of problem is not a *special* problem for the view under discussion.

There is, I think, much merit in this hard-line reply. In any case, egalitarians, some of whose favored theories *in practice* have led to mass poverty and even mass murder (witness the Communist regimes of the twentieth century), ought to think twice about chiding their opponents for leaving the door open to unsavory consequences that are, and promise to continue to be, highly speculative. (A monopoly on water is surely a *much* less likely prospect than an egalitarian regime's tending toward totalitarianism and economic incompetence.) Still, it is always preferable to avoid having to bite bullets, if one can manage it. Is there a way to do so in this case?

There is. An alternative, soft-line approach could acknowledge that the initial acquirer who abuses a monopoly over a water hole (or any similar crucial resource) does commit an injustice against those who are disadvantaged, but such an approach could still hold that the acquirer nevertheless has not committed an injustice in acquisition—his acquisition was, as I have said, neither just nor unjust. Nor does he fail to own what he has acquired; he still cannot be said to have *stolen* the water from anyone. Rather, his injustice is an unjust *use* of what he owns, on a par with the unjust use I make of my self-owned fist when I wield it, unprovoked, to bop you on your self-owned nose. In what sense does the water-hole owner use his water unjustly, though? He doesn't try to *drown* anyone in it, after all—indeed, the whole problem is that he won't let anybody near it!

Eric Mack gives us the answer we need in what he has put forward as the "self-ownership proviso" (SOP).[28] This is a proviso not (as the Lockean proviso is) on the *initial acquisition* of property, but rather on how one can *use* his property in a way that respects others' self-ownership rights. It is motivated by consideration of the fact that the talents, abilities, capacities, energies, etc., that a person rightfully possesses as a self-owner are inherently "world-interactive"; that is, it is of their very *essence* that they are directed toward the extra-personal environment.[29] Your capacity to use your hand, for instance, is just a capacity to grasp and manipulate external objects; thus, what you own in owning your hand is something essentially grasping and manipulating.[30] Now if someone were to cut off

[28] Ibid., passim.

[29] Ibid., 186.

[30] In case there are implications of this example that Mack would not want to commit himself to, I should note that the example is mine, not his. In particular, the example might

your hand or invasively keep you from using it (by tying your arm against your body or holding it behind your back), he would obviously be violating your self-ownership rights. But there are, Mack suggests, other, noninvasive ways in which those rights might be violated. If, to use an example of Mack's, I effectively nullify your ability to use your hand by creating a device that causes anything you reach for to be propelled beyond your grasp, making it impossible for you ever to grasp or manipulate anything, I have violated your right to your hand as much as if I had cut it off or tied it down. I have, in any case, prevented your right to your hand from being anything more than a *formal* right, one that is practically useless. In the interests of guaranteeing respect for *substantive, robust* rights of self-ownership, then, "[t]he SOP requires that persons not deploy their legitimate holdings, i.e., their extra-personal property, in ways that severely, albeit noninvasively, disable any person's world-interactive powers."[31]

The SOP follows, in Mack's view, from the thesis of self-ownership itself; or, at any rate, the considerations that would lead anyone to accept that thesis should also, in his view, lead one to accept the proviso.[32] A brief summary of a few of Mack's thought experiments should suffice to give a sense of why this is so.[33] In what Mack calls the *Adam's Island* example, Adam acquires a previously uninhabited island and later refuses a shipwrecked Zelda permission to come ashore, as a result of which she remains struggling at sea (and presumably drowns). In the *Paternalist Caging* example, instead of drowning, Zelda becomes caught offshore in a cage Adam has constructed for catching large sea mammals, and, rather than releasing her, Adam keeps her in the cage and feeds her regularly. In the *Knuckle-Scraper Barrier* example, Zelda falls asleep on some unowned ground, whereupon a gang of oafish louts encircles her and, using their bodies and arms as barriers, refuses to let her out of the circle (accusing her of assault if she touches them in order to climb over or break through). In the *Disabling Property Barrier* example, instead of a human barrier, Adam constructs a plastic shield over and around the unowned plot of ground upon which Zelda sleeps, accusing her of trespassing upon his property when she awakens and tries to escape by breaking through the plastic. And in the (similarly named) *Disabling Property Barriers* example,

seem to suggest an Aristotelian-Thomistic conception of natural function, and though this by no means troubles me, it might not be what Mack himself has in mind (nor, of course, is it something every philosopher is going to sympathize with). Mack's view nevertheless seems to require *something* like this conception. And something like it—enough like it to do the job Mack needs to be done, anyway—is arguably to be found in Larry Wright's well-known reconstruction, in modern Darwinian terms, of the traditional notion of natural function. See Larry Wright, "Functions," *Philosophical Review* 82, no. 2 (1973): 139–68.

[31] Mack, "The Self-Ownership Proviso," 187.

[32] See Feser, *On Nozick,* chapter 3, for an overview of the various sorts of arguments that can be and have been given in defense of the thesis of self-ownership.

[33] Mack, "The Self-Ownership Proviso," passim.

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Adam, instead of enclosing Zelda in a plastic barrier, encloses in plastic barriers *every* external object that Zelda would otherwise be able to use—thus, in effect, enclosing her in a larger, all-encompassing plastic barrier of a more eccentric shape. In all of these cases, Mack says, although Zelda's *formal* rights of self-ownership have not been violated—no one has invaded the area enclosed by the surface of her skin—her rights over her self-owned powers, and in particular her ability to exercise those powers, have nevertheless been nullified. But a plausible self-ownership-based theory surely cannot allow for this. It cannot, for instance, allow the innocent Zelda justly to be *imprisoned* in any of the ways described!

If Mack is right, then it seems we have, in the SOP, grounds for holding that a water-hole monopolist would indeed be committing an injustice against anyone he refuses water to, or to whom he charges exorbitant prices for access. The injustice would be a straightforward violation of a person's rights to self-ownership, a case of nullifying a person's self-owned powers in a way analogous to Adam's or the knuckle-scrapers' nullification of Zelda's self-owned powers. It would *not* be an injustice in initial acquisition, however. The water-hole monopolist *still* owns the water hole as much as he ever did; he just cannot use it in a way that violates other individuals' self-ownership rights (either by drowning them in it or by nullifying their self-owned powers by denying them access to it when there is *no* alternative way for them to gain access to the water necessary for the use of their self-owned powers).

Is Mack right? The hard-liner might dig in his heels and insist that none of Mack's examples amount to self-ownership-violating injustices; instead, they are merely subtle but straightforward property rights violations or cases of moral failings of various other sorts (cruelty, selfishness, etc.). The *Adam's Island* case, for starters, is roughly analogous to the example of the water-hole monopolist, so that it arguably cannot give any non-question-begging support to the SOP, if the SOP is then supposed to show that the water-hole example involves an injustice. The *Disabling Property Barriers* case might also be viewed as unable to provide any non-question-begging support, since Adam's encasing everything in plastic might plausibly be interpreted as his *acquiring* everything, in which case we are back to a water-hole-type monopoly example. The *Knuckle-Scraper Barrier* and *Disabling Property Barrier* examples might be explained by saying that in falling asleep on the unowned plot of land, Zelda in effect has come (at least temporarily) to acquire it, and (by virtue of walking) to acquire also the path she took to get to it, so that the knuckle-scrapers and Adam violate her *property* rights (not her self-ownership rights) in not allowing her to escape. The *Paternalist Caging* example can perhaps be explained by arguing that in building the cage, Adam has acquired the water route leading to it, so that in swimming this route (and thus getting caught in the cage) Zelda has violated his property rights and, therefore, can justly be caged. Accordingly, the hard-liner might insist, we can explain

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all of these examples in a hard-line way and thus avoid commitment to the SOP.

Such a hard-line response would be ingenious (well, maybe), but still, I think, ultimately doomed to failure. Can the *Paternalist Caging* example, to start with, plausibly be explained away in the manner that I have suggested? Does Adam commit *no* injustice against Zelda even if he *never* lets her out? It will not do to write this off merely as a case of excessive punishment (explaining the injustice of which would presumably not require commitment to the SOP). For suppose Adam says, after a mere five minutes of confinement, "I'm no longer punishing you; you've paid your debt and are free to go, as far as I'm concerned. But *I'm* not going to bother exerting the effort to let you out. I never *forced* you to get in the cage, after all—you did it on your own—and you have no right to the use of my self-owned cage-opening powers to fix *your* mistake! So *teleport* out, if you can. Or get someone *else*—if you can find someone—to let you out." Adam would be neither violating Zelda's rights to external property nor excessively punishing her in this case; nor would he be invasively violating her self-ownership rights. But wouldn't he still be committing an injustice, however *non*invasively? Don't we need something like the SOP to explain why this is so?

The barrier examples, for their part, do not require Zelda's walking and falling asleep on virgin territory, which thus (arguably) becomes her property. We can, to appeal to the sort of science-fiction scenario beloved of philosophers, imagine instead a bizarre chance disruption of the structure of space-time that teleports Zelda into Adam's plastic shell or into the midst of the knuckle-scrapers. There is no question now of their violating her property rights; yet don't they still commit an injustice by nullifying her self-owned powers in refusing to allow her to exit? Consider a parallel example concerning property ownership itself. If your prized $50,000 copy of *Captain America Comics* number 1, due to another rupture in space-time or just to a particularly strong wind that blows it out of your hands and through my window, suddenly appears on the floor of my living room, do I have the right to refuse to bring it back out to you or to allow you to come in and get it? Suppose I attempt to justify my refusal by saying, "I won't touch it, and you're free to have it back if you can arrange another space-time rupture or gust of wind. But I refuse to exert my self-owned powers to bring it out to you, or to allow you on my property to get it. *I* never *asked* for it to appear in my living room, after all!" Would anyone accept this justification? Doesn't your property right in the comic book *require* me to give it back to you?

The hard-liner might suggest that this example transports the SOP advocate out of the frying pan and into the fire. For if the SOP is true, wouldn't we also have to commit ourselves to a "property-ownership proviso" (POP) that requires us not to nullify anyone's ability to use his *external* private property in a way consistent with *its* "world-interactive

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powers"? If I build a miniature submarine in my garage, and you have the only swimming pool within one thousand miles, must you allow me the use of your pool lest you nullify my ability to use the sub? If (to take an example of Cohen's cited by Mack) I own a corkscrew, must I be provided with wine bottles to open lest the corkscrew sadly fail to fulfill its full potential?[34]

Mack's response to this line of thought seems basically to amount to a bit of backpedaling on the claim that his proviso really follows from the notion of self-*ownership* per se—so as to avoid the conclusion that a (rather unlibertarian and presumably redistributionist) POP would also, in parallel fashion, follow from the concept of *property* ownership. His response seems, instead, to emphasize the idea that the considerations favoring self-ownership also favor, via an *independent* line of reasoning, the SOP.[35] In my view, however, a better response would be one that took note of some relevant disanalogies between property in oneself and property in external things.

Note first that the self-owned world-interactive powers, the possible use of which the SOP is intended to guarantee, are possessed by a *living* being who is undergoing development, which involves passing through various stages; therefore, these powers are ones that *flourish* with use and *atrophy* or even *disappear* with disuse.[36] To nullify these powers even for a limited time, then, is (very often at least) not merely temporarily to inconvenience their owner, but, rather, to bring about a permanent reduction or even disablement of these powers. By contrast, a submarine (or a corkscrew) retains its powers even when left indefinitely in a garage (or a drawer). This difference in the effect that nullification has on self-owned powers versus extra-personal property plausibly justifies a difference in our judgments concerning the acceptability, from the point of view of justice, of such nullification in the two cases; that is, it justifies adoption of the SOP but not of the POP.[37]

Second, there is an element of *choice* (and in particular, of *voluntary acquisition*) where extra-personal property is concerned that is morally

[34] Ibid., 201.

[35] Ibid., 202.

[36] Here, again, we see the possible relevance to the SOP of an Aristotelian-Thomistic understanding of human nature.

[37] Would this justify adoption of a POP when the property in question is an *animal*, which also is a living being having powers subject to atrophy, etc.? I think not, for an animal is analogous to a corkscrew or submarine at least in the sense that if left alone—if *left in the wild*, that is—*it too* doesn't lose its natural powers. Indeed, it is taking an animal *out* of the wild that is likely to cause those powers to atrophy. It is the *owner* of the animal who takes the creature from the wild and then finds he lacks the wherewithal to keep it alive and active who is responsible for its atrophying powers, *not* those who would refuse to give him food for the animal and a yard for it to run around in—just as the owner of a corkscrew who broke it while using it to hammer nails could blame no one but himself for nullifying its powers. Thus, an animal owner would not have a legitimate claim against others, based on appeal to a POP, that they should furnish him with food, etc., for the animal.

relevant here. One's self-owned powers, along with the SOP-guaranteed right to the non-nullification of those powers, are not something one chooses or acquires; one *just has* them—indeed, to a great degree one *just is* the constellation of those powers, abilities, etc.—and owns them *fully*. By contrast, extra-personal property is something one chooses to acquire or not to acquire, and as we have seen, one always acquires property rights in various *degrees*, from partial to full ownership—*and this would include the rights guaranteed by a POP*. If one *chooses* to acquire a corkscrew under conditions where wine bottles are unavailable, or are even likely at some point to become unavailable, one can hardly blame others if one finds oneself bottle-less. To fail to acquire POP-like rights regarding the corkscrew (by, say, contracting with someone else to provide one with wine bottles in perpetuity) is not the same thing as to have those rights and then have them violated. Someone who buys a corkscrew and then finds that he cannot use it is like the person who acquires only partial property rights in a water hole that others have already acquired partial use rights over. *He* cannot complain that his co-owners have violated his rights; he *never acquired* those other rights in the first place. Similarly, the corkscrew owner cannot complain that he has no bottles to open; he *never acquired* the right to those bottles, only to the corkscrew. If *full* ownership of a corkscrew requires POP-like rights over it, then all that follows is that corkscrew owners who lack bottles are not full owners of their corkscrews.

Altogether, then, the SOP seems intuitively plausible and well able to withstand even the strongest objections. It allows us to defend a very strongly libertarian (Lockean-Nozickian, anti-egalitarian, anti-redistributionist) conception of property rights, while at the same time slightly softening the hard edge that critics of libertarianism object to in this conception. In particular, the SOP allows me to defend my central thesis in this paper without having to take on board what I have called the "hard-line thesis." And it does all this without drawing us into the briar patch of the Lockean proviso, understood as a constraint on initial acquisition, with all the redistributionist hay that critics of libertarianism have tried to make of it. Thus, I am inclined to endorse the SOP, with gratitude to Mack for developing what seems to be a major contribution to the theory of self-ownership (and to libertarian theory in general).[38]

V. Some Implications

If what I have argued so far is correct, then the way is opened to the following revised case for strongly libertarian Lockean-Nozickian prop-

[38] Another benefit the SOP brings to libertarian theory is that it arguably affords a way of explaining why the mere *threat* or *risk* of harm to oneself counts as a rights violation no less than the actual infliction of the harm does. For your property rights in yourself seem *strictly* to have been violated only when you have *actually* been harmed, but if the fear imposed by a threat or risk keeps you from using your self-owned powers, then that would seem to violate the SOP, and thus itself count as an injustice.

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erty rights: We are self-owners, having full property rights to our body parts, powers, talents, energies, etc. As self-owners, we also have a right, given the SOP, not to have our self-owned powers nullified—we have the right, that is, to act within the extra-personal world and thus to acquire rights to extra-personal objects that the use of our self-owned powers requires.[39] This might involve the buying or leasing of certain rights or bundles of rights and, correspondingly, the acquiring of lesser or greater degrees of ownership of parts of the external world, but as long as one is able to exercise one's powers to *some* degree and is not rendered *incapable* of acting within that world, the SOP is satisfied. In any case, such rights can only be *traded* after they are first *established* by initial acquisition. In initially acquiring a resource, an agent does no one an injustice (it was *unowned,* after all). Furthermore, he has mixed *his* labor with the resource, significantly altering it and/or bringing it under *his* control, and is *himself* solely responsible for whatever value or utility the resource has come to have. Thus, *he* has a presumptive right to it, and, if his control and/or alteration (and thus acquisition) of it is (more or less) complete, his ownership is accordingly (more or less) full. The system of strong private property rights that follows from the acts of initial acquisition performed by countless such agents results, as a matter of empirical fact, in a market economy that inevitably and dramatically *increases* the number of resources available for use by individuals, and these benefited individuals include those who come along long after initial acquisition has taken place. (Indeed, it *especially* includes these latecomers, given that they were able to avoid the hard work of being the first to "tame the land" and draw out the value of raw materials.)[40] The SOP is thus, in fact, rarely, if ever, violated. The upshot is that a system of Lockean-Nozickian private property rights is morally justified, with a strong presumption against tampering with existing property titles in general. In any case, there is a strong presumption against any general *egalitarian* redistribution of wealth, and *no case whatsoever* to be made for such redistribution from the general theory of property just sketched, purged as it is of the Lockean proviso, with all the egalitarian mischief-making the proviso has made possible.

Even with Nozick's original Lockean proviso, however, the grounds for making such mischief were greatly exaggerated. It is true that Nozick

[39] It might be objected that at most, the SOP requires *liberties to use* extra-personal resources rather than rights over them. But when we keep in mind that property rights come in bundles of component rights, it is clear that a *liberty* to use is just a *right* to use, a right that may be only partial (i.e., a right to use only under certain conditions, at certain times, and so forth). *Full* ownership is just the possession of *all* the relevant liberties.

[40] Mack, "The Self-Ownership Proviso," 207–8, 212–16; see also David Schmidtz, "The Institution of Property," *Social Philosophy and Policy* 11, no. 2 (1994): 42–62. Incidentally, Schmidtz argues that given the benefits of initial acquisition, there are times when the Lockean proviso not only allows but *requires* such acquisition. (But requires it of *whom* exactly? That this question has no clear answer seems to me another reason for abandoning the Lockean proviso.)

spoke of a "historical shadow" cast over the principle of justice in transfer by the proviso,[41] and even contemplated the notion that a one-time redistribution of wealth along the lines of some egalitarian or other patterned principle of justice might be a way of rectifying past injustices in acquisition and transfer.[42] But this never sat well with the individualism that permeates Nozick's overall philosophy. "We as a society," as any good Nozickian knows, never commit injustices against anyone, past or present; it is only *specific individuals* and *groups* of individuals who can commit them. And this would include injustices in acquisition, if only there were any. The rectification of such injustices *could not* be achieved by taxing *everyone* in accordance with some egalitarian reading of the Lockean proviso. Indeed, this would only result in new injustices against those whose current holdings were *not* a result of past injustices in acquisition (or even against those whose holdings partly resulted from such injustices, but not to an extent that would justify the inevitably arbitrarily-set level of taxes they would be forced to pay in restitution). Such rectification could only be achieved, consistent with Nozickian principles, by dealing with *specific* claims of *specific* past injustices filed by *specific* individuals against other *specific* individuals, and treated by the state on a case-by-case basis rather than as a matter of general social policy. Fortunately, since there are no injustices in acquisition, all of this becomes moot.

What about past unjust transfers—among which we can, as we have seen, now classify at least some injustices previously thought of as injustices in acquisition? The same individualistic, case-by-case approach applies here. The case made on behalf of black Americans descended from slaves, and on behalf of American Indians, for "reparations" owed to them by the U.S. federal government is thus revealed to be simplistic at best, unfounded at worst, and in any case liable to compound past injustices by inflicting new ones on innocent (and already, from a Nozickian point of view, massively overburdened) taxpayers. This fact is obscured by the sloppy and collectivist manner in which these issues are usually discussed: as a matter of what "whites" owe to "blacks," or of what "we" (American citizens in general) owe to "the Indians."

As a matter of historical fact, of course, there was never any such thing as "the white man" doing anything to "the Indians." There were instead a multitude of different Indian individuals and groups (often in conflict with, and inflicting injustices upon, *each other,* and often in *alliance* with certain whites) who had various interactions with various groups of whites (English, Spaniards, French, etc., and various subgroups and individuals within these groups). Some of these interactions were unjust; some were dubiously moral but not strictly unjust; and some were perfectly just. Similarly, in the case of American slavery, specific individual blacks were

[41] Nozick, *Anarchy, State, and Utopia,* 180.
[42] Ibid., 231.

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dealt injustices by specific whites and groups of whites (and sometimes also by blacks who took *other* blacks as slaves or sold them into slavery, even *within* the United States). "Blacks in general" were not taken as slaves by "whites in general." Rectifying such injustices must therefore take account of all of this complexity, as well as the question of *exactly which* whites here and now owe *exactly how much* of what they have to *exactly which* past injustices committed by *exactly which* ancestors. Furthermore, it must carefully disentangle the extent to which government (and which *level* of government in which cases) was responsible for a given injustice from the extent to which certain private individuals were.[43]

Taking account of all this complexity is, I say, on a Nozickian account a necessary condition of rectifying past injustices in transfer, but merely to note this fact is to make plain that the injustices in question *cannot* for the most part be rectified, for the questions raised by these complexities are at this late date simply unanswerable.[44] (This is no doubt partly why political activists agitating on behalf of slavery reparations and similar causes simply *ignore* these complexities.) Thus, in the American context at least, past injustices in transfer have no tendency significantly to call into question existing property titles. (I make an exception to this claim in cases where injustices committed against citizens *by the government* in the wake of, say, the New Deal, are concerned, since who did what to whom is, in such cases, presumably much easier to establish. Hence, the revised Nozickian position I am advocating is, insofar as it entails a repeal of the welfarist measures of the twentieth century, not *entirely* a defense of the status quo.)

In fact, I believe that in most cases, *rectifiable* injustices in transfer are just going to be those already handled by existing legal concepts and practices (e.g., those covering criminal offenses and breach of contract) that apply to injustices that are easily identifiable because they are relatively recent; and in light of this, there seems little need for any interesting, separate "principle of justice in rectification" at all.[45] And since, as

[43] Does the role of government in slavery imply that there is, after all, a kind of collective guilt on the part of whites despite the points I've made? Not if we keep in mind that talk about "government" is shorthand for a complex of institutions, individuals, and individual actions existing over a very long period of time, and that culpability for the "actions" of "the government" as a whole (to the extent that we can cash out this figurative way of talking in literal terms) clearly does not attach equally (or, in most cases, at all) to every private citizen or official of that government who has ever lived. The problem with appeals to what "the government" has done, like the problem with appeals to what "whites" have done, is that these appeals too often ignore such complexities.

[44] For more detailed discussion of this and other difficulties with reparations schemes, see Edward Feser, "Injustice Compounded," *Liberty* 15, no. 10 (2001): 28–29 and 41.

[45] What about an extreme case, such as that of the Soviet Union, in which the officials of a government commit injustices in transfer on an enormous and systematic scale and for decades, after which the government suddenly collapses? Wouldn't those setting up a replacement government need a principle of justice in rectification? It seems to me that when the complexities involved in this sort of case are taken into account, it will look much like the American Indian and slavery cases discussed above in the text and in note 43, and

what I have argued implies, there is no need either for a "principle of justice in acquisition," Nozick's principle of justice in transfer—on which, as Jonathan Wolff has put it, "a transfer is just if and only if it is voluntary"[46]—turns out to constitute virtually the entirety of Nozick's entitlement theory of justice in holdings. Nothing more, though also nothing less, is needed. (This is not to say that there is no need for a theory of acquisition, i.e., a theory of how things come to be acquired, which I have only sketched; it is just that this will not be a theory of *justice* in acquisition.)

VI. Conclusion

This outcome has the virtue of restoring to Nozick's system the theoretical simplicity and elegance that his (rather unsystematically articulated) commitment to the Lockean proviso threatened to distort. At the same time, replacement of the Lockean proviso with the self-ownership proviso allows us to sidestep the (arguably) counterintuitive consequences of rejecting the former. Still, since there is no such thing as an unjust initial acquisition, very strong property rights to unowned external objects come to be quite easy to obtain; and they, together with the thesis of self-ownership, give us Nozick's principle of justice in transfer, with all its highly anti-egalitarian and anti-redistributionist consequences. The picture that results is very much a libertarianism *with foundations*.

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thus will reduce to a collection of individual injustices in transfer; most of these injustices will not be susceptible to rectification in practice, and those that can be rectified will need to be dealt with on a case-by-case basis. So while those setting up a replacement government would certainly need a guiding principle of *some* sort, I'm not sure that it would be a Nozickian principle of justice in *rectification* per se, or even a *fundamental* principle of justice at all (as opposed to a second-order pragmatic principle governing the application of fundamental principles—such as the principle of justice in transfer—in untidy real-world circumstances).

[46] Wolff, *Robert Nozick*, 83.

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