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PRIVATE LAND OWNERSHIP AND ITS LIMITATIONS

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People have ownership rights with respect to a wide variety of things, both tangible and intangible. Tangible property can be real or personal, the former including such things as land and houses, and the latter embracing such things as automobiles, computers, art works, furniture, jewelry, and even animals. Examples of intangible things that can be owned are bank accounts, pension funds, and corporate stock, and intellectual property such as copyrights and patents. At one time, land was the most important kind of property, but though over time, ownership of intangibles has come to play a more significant role in our society than tangibles, nevertheless most of our ideas about ownership come from the latter, and particularly from ownership of land. Land ownership was seen as involving values regarded as central in the American polity: political independence, protection of the individual from intrusion by government, and the increased productivity that comes from a private market economy.

The idea of, and the case for, private ownership of land did not become prominent until the modern era. Prior to this time, various ideas prevailed—indeed, for hundreds of years prior to the founding of the United States, numerous ideas had been put forward by those involved in the settlement of the new world regarding how land would be held, controlled, and owned. One idea was that God bestowed various parts of the earth on kings, who in turn bestowed sub-parts on individuals who thus constituted the nobility, and these in turn made grants to others who worked the land—and in sharing part of the product or providing other services, each level in the hierarchy below the king is in effect paying rent. This was one of the approaches used in the settlement of the Americas by Europeans, though there were also other ideas. Some thought that unoccupied land could be used, possessed, and improved by anyone, though this did not always go so far as to constitute private ownership, while others thought that the land *belonged* to those who worked it. Ideas about control of land were advanced by prominent figures such as John Locke and Thomas Jefferson. Locke, as Secretary of the Lords Proprietor of the colony of Carolina, was quite close to issues regarding such control.[1]

One of the most influential lines of thought that emerged from the foregoing is the rationale urged by John Locke in his *Second Treatise on Government* and advanced by many including, influentially, Robert Nozick, an approach based on self-ownership and first appropriation. The Lockean approach addresses three prominent questions: what *justifies* private ownership, *who* owns the land, and what *limitations* there are on ownership. Locke focuses on the original conversion of land from unowned (and thus available for use by everyone) to owned (and thus limited in its use to the owner or those who use it with the owner's consent). A person's mixing his labor (which he owns) with unowned land both establishes a quantity of land as privately owned and establishes who owns it. There are limits to how much land may be converted to private ownership, but when this point is reached, most land is privately owned and we know who owns each piece. Locke does not talk about future generations, but Nozick explains that after the initial acquisition phase, privately owned land is transferred in accordance with principles of justice in transfer that, over time, establish who the present legitimate owners are. Of course, history has not unfolded in exactly this way: given the realities of conquest, it is evident that not all ownership actually began in this way, nor do we have reason to believe that all injustices in transfer have been rectified.

Nevertheless, the self-ownership/first-appropriator model continues to play an important role in people's thinking about ownership of land—about the rights of owners and limitations on government. However, there are difficulties. My aim is to identify some features or limitations of the Lockean approach that have not always been noticed, and that have implications for both our understanding of, and the rationale for, land ownership. The argument of the paper is that though there are deficiencies in the Lockean approach, its central feature—acquiring land by the mixing of labor—holds up in a context in which we take account of two things: what ownership is, and what underlies the entire project of the transitioning of land from unowned to owned.

What Is Private Ownership?

The central feature of ownership has to do with control of things—who has control, what justifies someone's having it, and what forms of control are involved. Robert Nozick expresses the point this way: "The central core of the notion of a property right in X . . . is the right to determine what shall be done with X."[2] Though the idea of control might seem intuitively clear, the idea of ownership has undergone a transformation over time, from the idea of dominion to the idea of what is referred to as a "bundle of rights." The former is captured in Blackstone's characterization of ownership as "sole and despotic dominion . . . over . . . things . . . in total exclusion of any other individual in the universe."[3] But this view has given way, particularly in the law, to the idea of ownership not as a relation be-

tween a person and a thing, but as a set of relations among people with respect to various things. This is the bundle-of-rights view, with each right in the bundle (such as the right to use, the right to income, the right to sell or bequeath, the right to permit others to use, the right to exclude) being one among several ownership interests with respect to something. A significant aspect of this understanding of ownership is that not all the rights in the bundle need to belong to the same individual; ownership can be divided, as when the officers of a corporation have the right to manage the company's property whereas the shareholders have the right to the income from it. Of course, one is inclined to ask: Who, then, is the owner? Who *really* owns it? Which rights are the essential ones constituting ownership? But legally speaking, there is no answer to this question; there is no such thing as simple ownership. We might want to say that to own something, then, must be to have all of the rights in the bundle—but if it were to turn out that no one ever has all of the rights in the bundle, there would be no ownership.

Despite this, however, when we are speaking politically rather than legally, we continue to speak of ownership, of something belonging to a person or being that person's property. When it comes to most of the things we have, including homes and cars, most of the substantial rights in the ownership bundle belong to the same person, and we say that this person owns it, or that it is her or his property. This points us in the direction of the primary questions to be answered when considering the extent of and rationale for the level of control widely associated with ownership, particularly of real property: Exactly how does a person get this level of control over something? How do we justify the exclusive control by certain individuals over significant portions of the physical world? The classic argument (identified above) is John Locke's, advanced more recently in Robert Nozick's work. The idea is that originally there was no private ownership; rather, everything was available for use by everyone. But individuals are entitled to remove things from the common by "mixing their labor" with something not already owned, and by so doing, they gain private ownership. Examples of this process would include felling a tree and using the wood to fashion some sort of artifact, or, more importantly and substantially, tilling soil and then planting and harvesting crops, which is said to establish ownership not only of the crops but of the land itself. Nozick endorses such an idea of ownership, though he does not actually spell out a principle of appropriation, saying only that *if* requirements for initial acquisition, whatever they are, are properly satisfied, then private ownership of the land is established.

At this point, we have the beginnings of an answer to the question "What is ownership?"—it starts with some level of control over a portion of the physical world, which is achieved by the mixing of labor with something previously unowned. But there are further and more substantial questions to be answered about what ownership is, questions raising important issues for the first appropriator rationale for private ownership. The issue is: What does a first appropriator get

when he or she appropriates some land? What level of control does one get? What rights are included in the bundle of rights that constitutes ownership?

Though it is claimed that laboring on something unowned gives one rights of ownership, no justification is given for the particular conception of private ownership that Locke, Nozick, and others readily embrace. Many take for granted a particular conception of the property rights acquired by initial acquisition—namely the full bundle of rights mentioned earlier, including the right to income, the right to use, the right to sell or bequeath, and so on. But why, it has been asked, doesn't laboring on unowned land give rise instead to what is called "usufruct ownership," which confers all of the use-rights of private ownership but not the right to alienate by gift, bequest, or exchange? On such a conception of property rights, "[a] person who clears the land and uses it for farming, cattle raising, a home, etc., would have title to that land for as long as he continued to use it. . . . Individuals only temporarily have rights over the land and when the land is no longer used it then becomes available for others to appropriate."[4] Such a conception of private property is "consistent with the conclusion of Locke's deontological argument,"[5] which provides no explanation or argument for the inclusion of rights of alienation.[6] Further on, we will identify other questions about the nature and extent of the rights acquired by first appropriation.

The Lockean Proviso

Despite presuming that the ownership established by appropriation embraces the full bundle of rights, both Locke and Nozick insist that there are limits on the amount of land that may be appropriated, limits captured in Locke's famous proviso that a person may appropriate for private ownership only if there is "enough and as good left in common for others."

Locke says:

> 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.[7] . . . Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with . . . and thereby makes it his Property.[8] . . . *As much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*.[9] . . . Nor was this *appropriation* of any parcel of *Land* . . . any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use.[10]

Locke here maintains that appropriation is not a problem because there is land available for others to appropriate. But, of course, at least when the population rises beyond a certain point, there cannot be enough for everyone to appropriate, and so the formula that Locke intones at another place seems more appropriate—that appropriation establishes rights in the land "at least where there is

enough, and as good, left *in common* for others,"[11] which might be understood to be a reference to what is called common land—that is, land that is not privately owned and which is used in common by individuals to support themselves by, for example, raising crops, picking berries, hunting animals, or whatever. Thus, appropriation for private ownership would not be permissible beyond the point at which there is a decent amount of land remaining for common use. Indeed, a system of common land did exist in England—until overtaken by the enclosures of the sixteenth through the nineteenth centuries.

Though Locke believed that in the circumstances he described, "[n]o body could think himself injured,"[12] since everyone still has the opportunity to appropriate land for himself or at least have access to land (the common) to use for self-support, he also propounded a principle of charity, which might be construed as a backup limitation on ownership rights. He says: "As *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every Man a Title to so much of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise."[13] Locke's principle of charity, as characterized by Jeremy Waldron, "requires property-owners in every economy to cede control of some of their surplus possessions, so they can be used to satisfy the pressing needs of the very poor when the latter have no means of surviving otherwise." Waldron regards this as amounting to the recognition of welfare rights, "the elementary claims that people have in regard to the material wherewithal for basic survival, flourishing . . . and self-respect,"[14] that compete with property rights. The reason that ownership rights must give way in such cases is that "the fundamental definition of property rights is, in the last analysis, organized around the principle of satisfying need."[15] Human survival and flourishing are the basis of Locke's position; it is they that underwrite private property; but they don't go away once ownership is established; thus they also underwrite limits on the ownership rights in land. In what follows, this idea will be developed further.

Robert Nozick argues that appropriation of land for private ownership is all right so long as no one is thereby harmed, which includes the worsening of the positions of those who do not appropriate land for themselves: "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."[16] Nozick believes that non-appropriators are not harmed (i.e., that the "enough and as good" requirement is satisfied) because private ownership of land leads to increased productivity, so that there are more goods available to fulfill people's needs than without it. This assures that the position of non-owners is not worsened even though they may not have access to land either to appropriate or to use in common. As one writer puts it, "Nozick appeals to the litany of goods widely realized as a result of property rights and suggests that it

is highly unlikely there is anyone, even those with no property of their own, for whom the overall benefits generated by and through property ownership do not outweigh the harm of being unable to appropriate goods."[17] Locke himself had made a gesture in this direction when he observed that private ownership increased productivity and thus the "conveniences" available to people. Thus non-owners can acquire these goods by finding work as employees of landowners and be better off than if there were no private ownership of land at all. Importantly, in Nozick's judgment, it is not enough that the private land ownership brings about increased productivity such that there is simply a sufficient quantity of goods *available* for fulfilling people's needs (that is, such that *average* well-being increases). For Nozick, appropriating land for private ownership is justified only if no one's situation is *actually* worsened, which might require compensation:

> 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.[18]

The foregoing rationale focuses on certain expected benefits of ownership of land—the provision of regular and predictable sustenance and shelter. Indeed, in Locke's thinking about the subject, the benefits of ownership seem to be hardly more than, and certainly to be of the same order as, what non-owners would have—namely the achievement of food and shelter. There is hardly a suggestion that anyone loses anything by other people establishing private ownership of considerable portions of the land, and thus it is insisted that in the end, non-owners are not harmed by it.

How Non-Owners Lose Out

Locke and Nozick deal with "enough and as good" largely in terms of the basics of life: food and shelter. However, there are other gains experienced by owners that are not available to non-owners, and critics have held that there are impositions on, or losses experienced by, non-owners that neither Locke nor Nozick considers.

Whenever a piece of land becomes someone's private property, the situation of others is immediately worsened to some extent, for they are subject to obligations they did not have prior to the appropriation; they may no longer make use of, or even enter, the land without the owner's consent.[19]

Considerations of this sort are regarded by some as defeating the justification of private land ownership based on first appropriation. In his discussion of original appropriation, Bas van der Vossen notes that "[b]y appropriating an object, a person gains some rights regarding the object and this means that all others have lost some liberty . . . by gaining duties toward the new owner."[20] He observes

that this was a concern of natural law theorists such as Samuel Pufendorf, who objected that "we can not apprehend how a bare corporal Act, such as seizure is, should be able to prejudice the Right and Powers of others, unless their consent be added to confirm it; that is, unless a covenant intervene."[21]

Van der Vossen argues that in spite of this, appropriation does have an important role to play in our thinking about property. As he sees it, in the Lockean approach, appropriation has two distinct roles: "(1) providing an account of why property rights (of some kind) are morally justified and (2) providing the means of establishing the legitimacy of the given particular holdings of people at a given time."[22] The first of these is justification, the second individuation, and while the difficulty identified may undermine the idea that appropriation *justifies* ownership, appropriation is important in telling us *who* owns which pieces of property. Thus, the justification of ownership must come from another source: "[W]e should see acts of original appropriation as part of a wider theory of property rights, and it is this wider theory that contains the justificatory element. With this in place, the role of acts of original appropriation is to supplement that general justification for property rights with the means to identify what are people's legitimate holdings."[23]

But a somewhat different perspective on the role of appropriation in justifying ownership has been offered by Hugh Breakey, who likewise asks whether the power to appropriate ("appropriative powers") is compatible with the inevitable "imposition of new duties upon the entire world's people," such as duties not to enter or utilize the appropriated land, which are not only imposed unilaterally but for the benefit of the one imposing them. Breakey argues that duty-imposing powers should *not* be regarded as automatically undermining the justification for acquiring ownership of land by first appropriation, for the unilateral imposition of duties is not unique to the phenomenon of appropriation. He offers the following examples, among others:

- Being provided with details of a crime (past or imminent) may impress duties upon one to report information to appropriate authorities.[24]
- Being mistakenly paid (or overpaid) typically imposes a duty to return at least some of the windfall, as also may innocently coming into possession of stolen property.[25]

In these and many other cases, duties are imposed without one's consent, which is what happens when land is appropriated, reinforcing the point that the mere fact that appropriation creates duty-imposing powers is not by itself adequate to undermine the legitimacy of such appropriation. Despite this, however, Breakey notes that even though there are many kinds of rights that do impose unproblematic, nonconsensual duties on others, it does not follow that *all* rights do so, for there are cases in which the fact that exercising a power would impose unwanted duties *does* make a case against the exercise of such a power. For example, if something that I would otherwise be free to do would

have the consequence of, say, physically enclosing you in such a way that you could not move freely, then my right to do that thing is limited: "[W]e may not use our right to free bodily movement to impose duties which unduly restrict the similar movements of others."[26]

Breakey appears to be correct about this—the mere fact that the exercise of a right of appropriation imposes nonconsensual duties on others does not by itself undermine the right. On the other hand, if appropriation would have the consequence of imposing *unacceptable* burdens on others, then merely mixing one's labor would *not* be a complete justification of ownership of land; some other principle would be required to tell us under what circumstances first appropriation establishes ownership rights. In such cases, applying van der Vossen's distinction, appropriation might only tell us who owns some bit of land but would not constitute a full justification of that ownership. Some other principle would have to be appealed to in order to justify private ownership, and such a justification would very likely be in terms of the overall value of a system of private property and would enable us to determine which appropriations would advance those values and which would not.

Indeed, it would appear that in some sense, Locke is responsive to the idea that certain impositions on others brought about by the exercise of a right of appropriation could undermine an exercise of the power by leaving others without sustenance, and accordingly, he maintains that the imposition brought about by first appropriation does not have such consequences. For though others cannot then appropriate or even use *that* piece of land for their support, it does not diminish the primary right that everyone still has—the right to use or at least benefit from land for sustenance. This is so because there is plenty of other land that is as good that can be appropriated for sustenance (and if this is unavailable, there is still common land, which is just as good in achieving what ownership seeks to attain).

On its face, this is doubtful, but in any event, there are other losses experienced when some parcel of land is appropriated. In what other ways might the conditions of others be worsened by appropriation?

- They may have to go further or incur greater costs to find land to appropriate for themselves.[27]
- They may experience loss of status and influence.
- Insofar as everyone might be called upon to contribute to the protection of rights in the society, non-owners might be required to contribute to the protection of private property rights.[28]
- Owners have greater opportunity to improve their standard of living.
- Most of those who appropriate land as private property take more than they need.

The last item in this list requires explanation; it raises the question of how much land a person may appropriate. The answer may depend on what the point of appropriation is taken to be. Locke says that God "hath given the world to men in common . . . to make use of it to the best advantage of life, and convenience."[29] Further on, he says that God has given us things to "*enjoy*" and "make use of to any advantage of life."[30] These goals may suggest that robust appropriation is acceptable. But, Locke tells us, there is a limit to how much one may appropriate. With regard to the products of the earth, as distinct from the earth itself, Locke says "[a]s 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." There is, perhaps, a bit of an anomaly in this. For Locke is concerned about waste—that is, that there might not be enough for others. And yet he says "[a]s much as any one can make use of *to any advantage of life*" (emphasis added), he may take, and only "whatever is more than *this*, is more than his share, and belongs to others" (emphasis added). In other words, Locke believes it is justifiable for someone to appropriate more than he *needs*—that is, more than what is commonly thought of as basic needs, as for food and shelter. Locke seems to think that this is no problem because the fruits of the earth are so plentiful that there is enough for all to have "as much as any one can make use of to any advantage of life," though if there is this level of plenty, it is hard to see why there should be a concern about spoilage.

When it comes to appropriation of the earth itself, Locke here, too, sees limits. One can appropriate land by tilling, planting, cultivating, and improving it. How much land may be acquired by these acts? The limitation is expressed as "*[a]s much land* as a man . . . can use the product of, so much is his *property*" (emphasis in original).[31] Appropriation at this level is not "any prejudice to any other man, since there was still enough, and as good left."[32] Locke seems to have thought that there would always be adequate land remaining for anyone who desired to appropriate some for himself. But, of course, this is not the case, and Locke's limitation on appropriation is often understood to say that appropriation must cease when it reaches the point that the remaining land is needed to serve as common land. But, as above, Locke's formula for justifiable appropriation permits the taking of more than one needs, which further compromises the situations of non-appropriators. For Locke says that one may appropriate as much land as he "can use the product of,"[33] which presumably embraces not only subsistence but also "any advantage of life."[34] The consequence is that land that has been appropriated as private property provides more substantial support for the lives of its owners than common land provides for non-appropriators—and if the product of common land is regarded as adequate for the needs of those who must rely on it, then those who privately own land will typically have more land than they actually need.

Though he does not say so explicitly, Nozick, too, thinks it justifiable that appropriators take more than they need, even if it contributes to preventing others from appropriating for themselves. Recall that Nozick's primary rationale for appropriation is that the situation of those who are unable to appropriate is not worsened, largely because private property "increases the social product." However, if private property increases the social product enough to compensate non-appropriators for any worsening of their situations, then it must be the case that the owners themselves have appropriated more than they need for their own support. If the efficiencies brought about by private land ownership result in increased crop yields, such that some can be used as compensation, then as far as their own consumption is concerned, the owners could have supplied their own needs with less land than they took. This observation leads to a conundrum: If appropriators strictly limit themselves to what they themselves need for their own support, then the amount they can legitimately appropriate is limited in such a way that even though yield per acre is larger, there will not be a surplus available to provide compensation for non-appropriators; the efficiencies attributable to private ownership will only mean that production adequate for an owner's life can be achieved with less land than would have been required if land were not privately owned. On the other hand, if it is claimed to be justifiable to appropriate more than is needed for one's own support, such that there is a surplus to be used for compensation, then the rationale for private property, insofar as it rests on increasing the social product, becomes a utilitarian rationale.

Though Locke implicitly and Nozick explicitly justify people taking ownership of more land than they need, the rationale they offer seems to be at odds with their ideas about ownership rights. For, as they explain it, owners not only can, but must, use their land in ways that help fulfill the needs of, or compensate, non-appropriators. However, the usual understanding of the bundle of rights attributable to ownership includes not only the right to use land productively, but the right *not* to do so. But if part of the justification for appropriation, particularly when someone appropriates more than he himself needs, is that it enhances productivity such that non-appropriators can be compensated, then there would appear to be an obligation to continue using the appropriated land productively. Nor can an owner justify taking his land out of production by saying that there is enough being produced elsewhere to compensate non-appropriators—for then an increased obligation is being placed on other landowners, which might undercut *their* capacity to remove land from production.

Changes in Ideas of Ownership

As noted in much of this discussion, a key question is what private land ownership includes. Minimally, it involves some level of control over resources. But

there are questions about both the extent of the land that may be owned and the degree of control one acquires by appropriation. With regard to physical extent, at one time, it was held that ownership extended underneath the surface down to the "center of the earth," and above the surface "to the heavens." But why does someone whose labor on an unowned piece of land consists of growing crops by tilling several inches or feet of soil also come to own minerals well below the surface, the existence of which he most likely is unaware, and with which he has not mixed any labor? As to the idea of property rights extending to the heavens above, this has been "removed" from the conception of property rights owing to the advent of airplanes and satellites, which otherwise could be seen as trespassing. Of course, an owner does have some rights with respect to the physical space above the land, such that structures can be built, though the extent of such rights is now seen as limited. But such a removal of what had been seen as an aspect of ownership does suggest a difficulty with the Lockean conception of property—it suggests that what counts as property is a matter not of some fixed, natural conception, but, at least in part, of social needs and conventions.

In fact, there are many such "modifications" of the idea of ownership that cast doubt on the Lockean conception of what property *is*. Consider, for example, ownership rights with respect to waterways. At one time it was held, both in England and the United States, that freshwater rivers belonged to riparian owners. Nevertheless, according to a New York court in 1805, they

> may be under the servitude of the public interest, and may be of common or public use for the carriage of boats, etc., and in that sense may be regarded as common highways by water. . . . [Such navigable streams], as well in the parts where they are of private as of public property, are public rivers *juris publici*. . . . They are called public rivers, not in reference to the property of the river, but to the public use. . . . The Hudson at Stillwater is capable of being held and enjoyed as private property, but it is, notwithstanding, to be deemed a public highway for public uses.[35]

Throughout the nineteenth century, courts struggled with the issue of which rivers are entirely private property and which are burdened with rights of the public—that is, with the need to reconcile private ownership rights with public needs in response to social and economic change. In 1856, the Supreme Court of Iowa held that the Mississippi River was a public highway and therefore that private rights had to absorb public uses; the United States Supreme Court adopted the same view in 1877.

The foregoing identifies one of the ways in which land rights have come to be modified for what are taken to be good and sufficient reasons; there are several other modifications of the idea of ownership that raise questions about what is acquired through the mixing of labor. These include, among other things, zoning restrictions, limits on the extent to which an owner may tie up future ownership

of his or her land, and a variety of private and public easements that authorize entering privately owned land for public benefit—such as installing and maintaining sewers, power lines, and telephone and Internet cables.

The concern that land be used in ways that benefit society has also produced the doctrine of adverse possession. The basic idea is that squatters (typically, and historically, people living on and growing crops on the property of another) whose use of the land is adverse to the rights of the owner for a long enough period of time, can ultimately be declared the owners of the portions of the land they are using. The rationale for this common law doctrine (which is still the law in the United States) is not clear, but is sometimes said to be that it is better for land to be put to productive use rather than remain unused. Thus an owner who does not use his land productively can in fact lose it to someone who does use it productively. Interestingly, this is in opposition to one of the rights in the bundle constituting ownership (mentioned earlier)—namely that an owner is said to have the right not only to determine how to use his or her land, but also the right *not* to use it. Thus, in not using land productively, an owner is exercising one of the rights of ownership, which can in the end undermine that very ownership. Clearly such non-use was thought about to some extent, for with regard to land used by the natives in America, Locke thought that if land ceases to be used productively, it reverts to the state of nature and is available to be appropriated by someone else who does mix labor with it in a productive way.

Eminent Domain

Finally, there is eminent domain, the forced transfer of ownership of land to another. Though it can be controversial, and to some, it is contrary to the very idea of private property, eminent domain highlights an important aspect of the Lockean rationale for private property. Locke focuses on the mixing of labor as establishing ownership. But though he doesn't explicitly say so, it is not simply the mixing of labor that has this consequence, but the mixing of labor for a particular purpose: sustenance. It is unclear what Locke would have thought if someone who acquired land by tilling the soil and planting crops then mixes labor with another bit of land to construct a soccer field. On the one hand, this does fulfill the requirement of mixing labor, but it is hard to see it as being compatible with the "enough and as good" condition—because that condition, implicitly if not explicitly, has to do with the availability of land for producing food and shelter. Acquiring land for such a purpose might be unproblematic if there were clearly enough land to produce food and shelter for all, but not otherwise. Or, if at one time, there was enough and as good available, but at a later time, there is not, what is to be said of the ownership of the land supporting a soccer field?

Land ownership, then, though individual and not collective, is for a purpose—to support the lives of people, including those without land, and the main elements

of the support anticipated are food and shelter. Land ownership thus has to do with a resource that is central in supporting life, and private ownership must be oriented toward this. Though no particular owner has an obligation to see that it is achieved, the way in which we understand ownership of land and the justification of its ownership by individuals is inevitably in these terms—and if the expected aims of ownership are not achieved, modifications of the idea of ownership may be called for.

Within this framework, at least some instances of eminent domain can be seen as part of the social apparatus for achieving the underlying goals of a system of private ownership. For example, as living patterns and land use have developed over the past century or so, in order for non-landowners to support themselves, they need to get to places of employment, which requires transportation and a road system. But roads may have to pass over lands that are privately owned, so it becomes necessary to acquire land for road building—and if not voluntarily made available for sale, it must be expropriated. Thus expropriation is (or at least may be) required in order to respond to the obligation that property (collectively, not individually) has to non-property.[36]

Another important type of situation in which eminent domain is employed (not without controversy) involves the condemning of private property for economic development. In the instances of eminent domain mentioned above—taking land to build roads—a public body becomes owner of the property taken. There are, however, other sorts of cases in which eminent domain has been used. There is a long history in the United States of appropriating private property to be turned over to another *private* party who will use the land in ways that are expected to be beneficial to the community at large. Activities such as the construction of grist mills and the carrying on of mining, irrigation, lumbering, and sometimes manufacturing have been promoted by the use of eminent domain, and in such cases, the Lockean understanding of the point of, and rationale for, private ownership appears to support such transfers. Furthermore, in areas that have become blighted or economically depressed, privately owned land has been taken and transferred to another private party with the aim of redeveloping the community and raising its economic profile. While there may be difficult legal issues relating to such uses of eminent domain, in principle, it fits within the rationale for private ownership being considered here. Non-appropriators are disadvantaged; there is an obligation of property owners to use their land so as to help make up for the disadvantages; the existing owners cannot do this, so the property is transferred to owners who can contribute to redressing the disadvantages of others.

Many adherents of the Lockean approach on the acquisition, extent, and nature of private property are opposed to eminent domain and to many of the modifications of ownership rights that have been established. Of course, as noted, it is unlikely that much of the current ownership of land can actually be traced back to the sort of acquisition that is imagined. But beyond this, the

case has not been made for the extent of the ownership that is assumed to accompany original acquisition, and the modifications of ownership that have been established over time are very much in line with the point of, and limits on, acquisition that Locke regarded as central to ownership. These matters do not, though, mean that there is not an important element in Locke's approach, for it is still reasonable to maintain that the way that property is initially acquired, as characterized by Locke, remains a suitable basis for attributing at least some significant land rights, some degree of control, to first appropriators. It is a reasonable basis precisely because it provides a mechanism, by promoting increased production, for supporting an increasing population, not all of whom can be owners. And if existing ownership fails to provide the level of support needed, then modifications of the rights of property are appropriate and justifiable to the extent that they help to further this support.

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NOTES

1. See Linklater, *Owning the Earth*, chap. 5.

2. Nozick, *Anarchy, State, and Utopia*, 171.

3. Quoted in Feinman, *Law 101*, 214. Blackstone's idea of a time when people did have absolute dominion is not, however, fully accepted:

> What strikes the backward-looking observer as curious is simply this: that in the midst of such a lush flowering of absolute dominion talk in theoretical and political discourse, English legal doctrines should contain so very few plausible instances of absolute dominion rights. . . . The real building blocks of basic eighteenth-century social and economic institutions were . . . property rights fragmented and split among many holders; property rights held and managed collectively; . . . property subject to arbitrary and discretionary direction or destruction; . . . property surrounded by restriction on use and alienation; property qualified and regulated for communal or state purposes." (Gordon, "Paradoxical Property," 95, 96)

4. Grunebaum, *Private Ownership*, 58.

5. Ibid.

6. Thomas Jefferson entertained this idea, as in a proposal he put forward based on the idea "that the earth belongs in usufruct to the living"—meaning "that users of the land could naturally claim ownership of it during their lifetime, but that any further rights, such as passing it on to designated heirs, had to be created by laws 'flowing from the will of society'" (Linklater, *Owning the Earth*, 209).

7. Locke, *Two Treatises of Government*, Second Treatise, chap. 5, sec. 26.

8. Ibid., sec. 27.

9. Ibid., sec. 32.

10. Ibid., sec. 33.

11. Ibid., sec. 27; emphasis added.

12. Ibid., sec. 33.

13. Locke, *Two Treatises of Government*, First Treatise, chap. 4, sec. 42.

14. Waldron, "Nozick and Locke," 86.

15. Ibid., 89.

16. Nozick, *Anarchy, State, and Utopia*, 178.

17. Daskal, "Libertarianism Left and Right," 32.

18. Nozick, *Anarchy, State, and Utopia*, 178.

19. Kant makes the point thusly: "When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right" (Kant, *Metaphysics of Morals*, pt. 1, sec. 8, 77, quoted in Waldron, "Nozick and Locke," 100n66).

20. van der Vossen, "What Counts as Original Appropriation," 357.

21. Quoted in van der Vossen, 359.

22. van der Vossen, "What Counts as Original Appropriation," 360.

23. Ibid.

24. Breakey, "Without Consent," 622.

25. Ibid., 623.

26. Ibid., 627.

27. See Grunebaum, *Private Ownership*, 66: "Once some land becomes privately owned, others may have to travel farther and expend more effort in order to appropriate unowned land. The utility levels of the later appropriators are therefore affected because they must incur greater costs in order to appropriate."

28. This is an example of what Breakey identifies as a positive duty to benefit others. See Breakey, "Without Consent," 637, 638.

29. Locke, *Two Treatises of Government*, Second Treatise, chap. 5, sec. 26.

30. Ibid., sec. 31. The remaining quotes in this paragraph are from the same section.

31. Ibid., sec. 32.

32. Ibid., sec. 33.

33. Ibid., sec. 32

34. Ibid., sec. 31

35. Palmer v. Mulligan, 3 Cai. R. 307, 2 A.D. 270 (N.Y. 1805).

36. Indeed, in colonial times, governments sometimes appropriated property without paying compensation, on the ground that public needs demanded it. For example: "For

quite some time the less urban colonies in the South took land for highways without compensating owners. . . . South Carolina in particular continued to take land and materials for highways without compensation until well after independence—about 1836" (Meidinger, "'Public Uses' of Eminent Domain," 14).

REFERENCES

Breakey, Hugh. "Without Consent: Principles of Justified Acquisition and Duty-Imposing Powers." *Philosophical Quarterly* 59, no. 237 (2009): 618–40.

Daskal, Steve. "Libertarianism Left and Right, the Lockean Proviso, and the Reformed Welfare State." *Social Theory and Practice* 36, no. 1 (2010): 21–43.

Feinman, Jay M. *Law 101*. 4th ed. New York: Oxford University Press, 2014.

Gordon, Robert W. "Paradoxical Property." In *Early Modern Conceptions of Property*, edited by John Brewer and Susan Staves, 95–110. London: Routledge, 1996.

Grunebaum, James O. *Private Ownership*. New York: Routledge & Kegan Paul, 1987.

Kant, Immaneul. *Metaphysics of Morals*, edited and translated by Mary Gregor. Cambridge, UK: Cambridge University Press, 1991.

Linklater, Andro. *Owning the Earth: The Transforming History of Land Ownership*. New York: Bloomsbury, 2013.

Locke, John. *Two Treatises of Government*, edited by Peter Laslett. New York: Cambridge University Press, 1960.

Meidinger, Errol F. "The 'Public Uses' of Eminent Domain: History and Policy." *Environmental Law* 11, no.1 (1980): 1–66.

Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1978.

van der Vossen, Bas. "What Counts as Original Appropriation?" *Politics, Philosophy & Economics* 8, no. 4 (2009): 355–73.

Waldron, Jeremy. "Nozick and Locke: Filling the Space of Rights." *Social Philosophy and Policy* 22, no. 1 (2005): 81–110.