

## NOZICK AND THE LOCKEAN PROVISIO

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Robert Nozick in his book, *Anarchy, State, and Utopia*, is concerned with the justification for the state as well as with the idea of distributive justice. This paper will only be concerned with the latter aspect of his book. For Nozick, if a thing was originally acquired justly, and if all transfers of that thing between persons were just, then that thing is justly held.

It now becomes necessary to consider what the principle of justice in acquisition is according to Nozick. Admittedly, Nozick does not state the exact formula for justice in acquisition, although he does give us one very important aspect of his theory: it must contain the Lockean proviso.<sup>1</sup> Locke's proviso originally said man has the right to acquire any property through his labor "at least where there is enough, and as good, left in common for others."<sup>2</sup> Nozick explicitly rejects Locke's theory of acquisition of property through mixing one's labor with an object, although he accepts the proviso.

What exactly does Nozick believe the Lockean proviso to mean? What place does it have in Nozick's theory? And most importantly, does Nozick's interpretation solve a classic objection raised against Locke's proviso? These questions will be examined in this paper. Section one of this paper will sketch Nozick's interpretation of the proviso and his endeavors to solve a major objection to it. Sections two and three will consider these attempts in the conditions of abundance and scarcity respectively, and Section four will examine a more complicated formulation of Nozick's attempt to answer the objection to Locke's proviso.<sup>3</sup>

## I

What does Nozick consider the Lockean proviso to mean? Nozick makes his interpretation fairly clear when he writes, "The crucial point is whether appropriation of an on unowned object worsens the situation of others. Locke's proviso that there be 'enough and as good left in common for others' is meant to ensure that the situation of others is not worsened."<sup>4</sup> Nozick elaborates

when he writes, "The difficulty in working such an argument to show that the proviso is satisfied is in fixing the appropriate base line for comparison. Lockean appropriation makes people no worse off than they would be *how*? The question of fixing the baseline needs more detailed investigation than we are able to give it here."<sup>5</sup> Although Nozick skirts the issue, he later seems to be considering the baseline to be the economic conditions in a state of nature before appropriation. If this is the definition of baseline, it seems illogical because the same appropriation which would violate the proviso in the state of nature, might still cause the same amount of harm years later in an affluent society, but not make the conditions worse than the baseline position.<sup>6</sup> Thus, this interpretation appears to be a time-slice principle in that it only considers the conditions at the time of acquisition, not how the situation came to be like that. Alternatively, Nozick could mean the baseline to be a rather unspecified economic condition prior to the present level of economic achievement (e.g., the standard of living before the industrial revolution). Aside from doubts as to the feasibility of attempting to establish the "baseline" under this interpretation, it would seem that the property in that era could not be rationally considered justly acquired without evidence to that effect. As such, the acquisition of that property must also be scrutinized with regard to the Lockean proviso. Thus, the only logical interpretation of "baseline" must be the condition immediately prior to a *particular* acquisition, it is only natural to look at the consequences of that appropriation from a state of being unowned to determine if anyone is made "worse off." It is illogical to examine groups of acquisitions (how would one define "group" anyway?) or all acquisitions in a given era ("era" also being impossible to precisely define).

In order to comprehend the major objection to the Lockean proviso, assume that the baseline is the economic conditions prior to the acquisition of a particular set of items (the set may include all items if necessary). Nozick's principle of justice in acquisition would seem to counterintuitively state that if the Lockean proviso was *ever* violated, then it was never obeyed by anyone who had previously appropriated a fraction of the items in the set. As Nozick explains:

If the proviso no longer holds, then it cannot ever have held so as to yield permanent and inheritable property rights. Consider the first person Z for whom there is not enough and as good left to appropriate. The last person Y to appropriate left Z without his previous liberty to act on an object, and so worsened Z's situation. So Y's appropriation is not allowed under Locke's

proviso. Therefore the next to last person X to appropriate left Y in a worse position, for X's act ended permissible appropriation. Therefore X's appropriation wasn't permissible. But then the appropriator two from last, W, ended permissible appropriation and so, since it worsened X's position, W's appropriation wasn't permissible. And so on back to the first person A to appropriate a permanent property right.<sup>7</sup>

However, Nozick believes he has a response to this objection. It is important to remember that Nozick thinks the proviso means that no one can be made worse off by the acquisition. He then continues by saying that "Someone may be made worse off by another's appropriation in two ways: first, by losing the opportunity to improve his situation by a particular appropriation or any one; and second, by no longer being able to use freely (without appropriation) what he previously could."<sup>8</sup> He further elucidates by explaining that "A *stringent* requirement that another not be made worse off by an appropriation would exclude the first way if nothing else counterbalances the diminution in opportunity, as well as the second. A *weaker* requirement would exclude the second way, though not the first."<sup>9</sup> In other words, a stringent interpretation of the proviso would disallow an appropriation if someone else could not make a similar appropriation. For example, I can appropriate a tract of land if and only if everyone else can appropriate a land of similar worth. A weaker interpretation of the proviso would disallow an appropriation if someone else could no longer freely use what he could before. Taking the above example, I can appropriate a tract of land if everyone else at least has access to usable land. It should be noted that any appropriation which violates the weaker interpretation of the proviso will also violate the more stringent interpretation of it.

Nozick accepts the weaker interpretation and claims that this weaker interpretation will defeat the criticism which he outlined above. He claims that "With the weaker requirement, we cannot zip back so quickly from Z to A, . . . , for though person Z can no longer *appropriate*, there may remain some for him to *use* as before. In this case Y's appropriation would not violate the weaker Lockean condition."<sup>10</sup> Immediately after this, Nozick clarifies by noting that "With less remaining that people are at liberty to use, users might face more inconvenience, crowding, and so on; in that way the situation of others might be worsened, unless appropriation stopped far short of such a point."<sup>11</sup> That is Nozick's answer to the problem with the Lockean proviso.

## II

Of course, there are objections. To begin with, it should be noted that goods, as far as supply is concerned, are either scarce or abundant. If good G is such that everyone can obtain as much of G as they desire without harming others in any way, then good G is defined as "in abundance." If this is not the case, good G is scarce. It almost goes without saying that the Lockean proviso cannot be violated if the good is in a state of abundance. Take for example grains of sand on Coney Island, as Nozick does when he writes, "If I appropriate a grain of sand from Coney Island, no one else may now do as they will with *that* grain of sand. But there are plenty of other grains of sand left for them to do the same with. Or if not grains of sand, then other things."<sup>12</sup> Nozick clearly intends that situation to be a situation of abundance, and it is a good illustration of the point, if one ignores the fact that there are those who wish to appropriate all of the grains of sand to establish beach resorts, etc. In the pre-industrial world, substances such as water, air, and possibly land (with the discovery of the "New World") would have been listed as substances of such abundance that they could be appropriated by anyone without violating the proviso. However, with the advent of industrialization and its water and air pollution, as well as the population of most areas of the world, these substances must be removed from that list. In addition, there are clear time and place considerations on things to be appropriated. Using Nozick's example, a man cannot appropriate the only water hole in the Sahara desert and claim that the appropriation is legitimate by saying that the other people can appropriate water too, it is just that their water is miles away in the Pacific Ocean. If good G is such that it is very plentiful, but not readily accessible, it is also in a state of scarcity. Scarcity/abundance is a function of total supply and availability.

Hence, the only item which can really be considered in abundance is sunshine. As long as a person does not block sunshine to anyone else, that person can soak up as much sun as he/she wishes. There are clear benefits of being exposed to sunshine, such as avoiding a vitamin D deficiency that can cause rickets and getting a great tan. By blocking sunshine to anyone else, I refer not to sunbathing or other sun-absorption activities but to other activities, such as constructing large buildings (e.g., New York City) that effectively block the sun for everyone. The only other substances which are in abundance are waste materials and, by definition, they are not usable or economically profitable to use.

However, this entire discussion is rather pointless. It would seem logical to maintain that no one will ever appropriate a substance which is in abundance. Referring to the example above, no one tries to appropriate a certain mass of sunshine to sell to

others. Besides the technical problems, why would anyone buy, or wish to inherit, such a property? After all, there is lots of sunshine all over that is just "there for the taking." It must be remembered that there is a difference between using and appropriating. On the other hand, if sunshine suddenly became a scarce resource (e.g., someone "bottled" a limited quantity just before a "Nuclear winter"), then it becomes a situation of scarcity, which will be dealt with below. Thus, there is a reason for appropriating items in abundance to guard against future (unforeseen) shortages. When a resource believed to be abundant is discovered to be doomed to shortage in the future, that resource instantly becomes scarce. It appears that scarcity/abundance is in reality a function of total supply and availability, both on a long-term, and short-term basis. It is possible for someone to wish to appropriate an item to insure convenient usage of that item, or to insure privacy with respect to use of that item. However, if an item was truly abundant (readily available), convenience would not seem to be a problem and it is not clear why it would be necessary to appropriate for private use, instead of just use when the occasion arises. There remains the possibility of "finicky consumers" who will not accept the abundant substances, except under certain conditions. For example, Ku Klux Klan members refusing to sunbathe in any sun rays that a black person has ever laid eyes upon. As such, the substance is in a condition of scarcity for that person and that person would have a reason to appropriate. Therefore, there does not appear to be a great deal of rationality in appropriating abundant substances, except as noted above. The bottom line in the discussion is that although Nozick's simplistic interpretation of the Lockean proviso will work in situations of abundance, so will the so-called "strict" requirement and as such Nozick has proven the truism that if there is enough for everyone to have as much as they want of a substance, then anyone can have as much as they want.

### III

Thus, the real test of Nozick's interpretation of the proviso comes in situations of scarcity. Take any item that is even somewhat scarce, for example, parking places in the inner-city, river-front property, or diamonds. In each instance, the appropriation of any part of the sum total of these substances would leave less for others and surely create inconveniences, such as having to park elsewhere, or sit on some other bank to fish, or having less diamonds available for everyone else. In fact, I do not think it possible to name one item in a state of scarcity which can be appropriated by even one person that does not violate the proviso (i.e. make someone worse off in some way), even in its weakened

interpretation. In other words, if one can still use a particular class of items as freely and conveniently after as before someone appropriated part of that class, it must not be a scarce item. If the items are not in a condition of scarcity there is no desire to acquire them, except out of desires of stockpiling against unforeseen emergencies. Even if a person or persons does not know of the existence of an item, the acquisition of that item by another person still deprives the first person(s) of the ability to appropriate that item in the future. Christopher Columbus' claim of the "New World" for Spain made it impossible for England to appropriate any land without being in opposition to Spain's claim, even if the English knew nothing of the discovery for years. Thus, Nozick's simplistic distinction between the stringent and weaker interpretations of the Lockean proviso will not by itself solve the problem he presents in his book.

As an aside, it can be maintained with some force that, although there might not be enough of a *particular* set of items for everyone to appropriate one, that those who do not get one of the items in a particular set will be allowed to appropriate an item out of another set. However, this position is easily circumscribed by grouping all scarce items as a "set" and showing that there simply are not enough of these items for everyone to have all they desire and the Lockean proviso is still violated.

### IV

Although Nozick's simplified theory is shown to be flawed, he does provide a more complicated twist to his theory when he writes,

It is arguable that no one legitimately can complain if the weaker provision is satisfied. However, since this is less clear than in the case of the more stringent proviso, Locke may have intended this stringent proviso by "enough and as good" remaining, and perhaps he meant the nonwaste condition to delay the end point which the argument zips back.<sup>13</sup>

Nozick seems to be arguing one of two points here. The first possibility is that he is saying that everyone should only take as much as can be used without going to waste so as to enable as many people as possible to acquire property before there is a violation of the proviso. I'm not sure what the advantage of appropriations in this sort of a situation would be. I will assume that appropriations of unowned property that is in scarcity would be something like the Oklahoma land rush. In that instance, history

clearly shows how scarce substances are very quickly appropriated. There would hardly be any time to be gained by delaying the appropriations with the nonwaste provision. In addition, it should be remembered that the property rights in question deal with permanent and inheritable, not temporary, property. The second, and more likely, way this argument by Nozick could be interpreted is that with the nonwaste condition there would be more economic prosperity which would in turn compensate, maybe even completely, the other members of society for the appropriation. If this is the meaning, it is saying no more than, if the appropriation turns out to be a net benefit for everyone, the appropriation does not violate the proviso. This is true if one accepts Nozick's interpretation of the proviso as not making others worse off and if one also accepts Nozick's idea of compensation<sup>14</sup> for appropriations by others. Nozick makes this point much clearer when he writes, "Someone whose appropriations would violate the proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened."<sup>15</sup> Returning to the main point, these two interpretations of the proviso are not mutually exclusive and Nozick may have had them both in mind when he wrote his book. At any rate, it should be noted that neither of them deal with the fact that unless compensated, no one can appropriate in situations of scarcity.

### CONCLUSIONS

First of all, as Nozick states, "A theory which included this proviso in its principle of justice in acquisition must also contain a more complex principle of justice in transfer."<sup>16</sup> The complexities are spelled out by Nozick himself when he states,

Each owner's title to his holding includes the historical shadow of the Lockean proviso on appropriation. This excludes his transferring it into an agglomeration that does violate the Lockean proviso and excludes his using it in a way, in coordination with others or independently of them, so as to violate the proviso by making the situation worse than their baseline situation.<sup>17</sup>

There is no apparent reason why the stringent version of the proviso applies any less to the principle of justice in transfer than does the weaker version of the proviso. Hence, it would seem that, any transfer of items that are in a state of scarcity, and for which compensation has not been made, is prohibited by the Lockean proviso.

Secondly, there is a need to determine how and when the

proviso is violated and how violations are to be rectified. This is what Nozick would refer to as the principle of justice in rectification. Nozick shows his faith in the free market in avoiding these problems when he states: "I believe that the free operation of a market system will not actually run afoul of the Lockean proviso."<sup>18</sup> That may or may not be true, depending on economic considerations which are beyond the scope of this paper. However, this paper places in a much clearer light the need for a thorough examination of those economic considerations. In addition, with the analysis of the Lockean proviso provided within this paper, it may be necessary to reevaluate whether the free market violates what actually turns out to be the Lockean proviso.

Finally, it would seem that the Lockean proviso would prohibit the acquisition of property without compensation in virtually all cases. The great Lockean proviso, which is the only real hint which Nozick gives for the principle of justice in acquisition, has become nothing more than a demand for compensation of others for appropriations. The only exceptions are the cases of common property that is in abundance which is appropriated and stockpiled against unforeseen future disasters and cases of appropriation of waste material. In essence, Nozick has vacated the field and not attempted to defend Locke in the context in which Locke makes his arguments. The permitting of appropriations so long as "enough, and as good, [is] left in common for others" mandates that safeguards and precautions be made before the appropriation is actualized. Nozick on the other hand seems to be interpreting the proviso not only as a moral check to be made before acquisition, but a debt to be paid after the fact. Although the analogy is imperfect, Locke seems to advocate stopping and carefully looking both ways at a corner before proceeding whereas Nozick advocates running straight on through, and, if there is an accident, paying the damages. Those are two clearly distinct mind frames, and Nozick cannot logically claim that he is merely reinterpreting Locke. In order to defend the Lockean proviso against the objection stated earlier in the paper, it is irrational to completely change the meaning of the proviso and then attempt to defend the new interpretation. By defending the Lockean proviso in that manner, Nozick has implicitly granted that the objections are true. What reason other than complete lack of a defensible position for the proviso is there for such a move? The dangers of Nozick's position is clearly seen in the possibility of massive rights violations which must then be compensated. The present status of the American court system back-log is empirical proof of the inefficiency of that policy. It is possible Nozick merely wanted to reinterpret Locke in order to have Locke as some sort of talisman to lend support for Nozick's theory on compensation. In either case, close examination of what Nozick

has done is detrimental to his cause. As such, the Lockean proviso is still in need of a champion that can defend it and until such a time as a champion appears, there is serious question as to its validity.

## Notes

<sup>1</sup> Gregory S. Kavka, "An Internal Critique of Nozick's Entitlement Theory," *Pacific Philosophical Quarterly* 63 (1982) both argue that Nozick has essentially abandoned the Lockean line of thought and Kavka goes so far as to call it "Nozick's Proviso" [p. 372]. Although this paper is in substantial agreement with both of their positions, it will continue to refer to it as the "Lockean Proviso" for the sake of clarity.

<sup>2</sup> John Locke, *Second Treatise of Government* (Indianapolis: Hackett) 19.

<sup>3</sup> Although Husain Sarkar, "The Lockean Proviso," *Canadian Journal of Philosophy*, 12 (March 1982) and Kavka both mention the proviso, and Ellen Frankel Paul, "The Just Taking Issue," *Environmental Ethics*, 3 (1981) goes so far as to mention the objection to the proviso, none of them or any other articles in the literature deal specifically with Nozick's attempted solution of the objection.

<sup>4</sup> Robert Nozick, *Anarchy, State, and Utopia*, (New York: Basic Books, Harper Torchbooks, 1974) 174.

<sup>5</sup> Nozick, *Anarchy* 177.

<sup>6</sup> Assume the supply is exactly the same in the two time periods.

<sup>7</sup> Nozick, *Anarchy* 176.

<sup>8</sup> Nozick, *Anarchy* 176.

<sup>9</sup> Nozick, *Anarchy* 176.

<sup>10</sup> Nozick, *Anarchy* 176.

<sup>11</sup> Nozick, *Anarchy* 176.

<sup>12</sup> Nozick, *Anarchy* 175.

<sup>13</sup> Nozick, *Anarchy* 176. The "Nonwaste" condition is specified by Locke when he writes, "As much as any one can make use of to any advantage of life before it spoils, so much may . . . [he] fix a property in: Whatever is beyond this, is more than his share, and belongs to others." Locke, p. 21.

<sup>14</sup> See Kavka's article for a criticism of the various types of compensation ("full compensation vs. "market compensation) and the possible internal contradiction between this section of Nozick's work which apparently demands "full compensation" and other sections which demand "market compensation."

<sup>15</sup> Nozick, *Anarchy* 178. Nozick then proceeds to state the standard arguments as to how private property operates to improve the conditions of everyone and hence compensate for what would

otherwise be a violation of the proviso. His problem is that because he operates with a historical principle, he needs to know what the economic condition would have been in the original position. He leaves posterity to work out this baseline condition. I maintain it will be impossible to distinguish between the economic prosperity caused by private property and the prosperity caused by social cooperation.

<sup>16</sup> Nozick, *Anarchy* 179.

<sup>17</sup> Nozick, *Anarchy* 180.

<sup>18</sup> Nozick, *Anarchy* 182.