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Makovi, Michael

Loyola University, New Orleans

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## The “Self-Defeating Morality” of the Lockean Proviso

Michael Makovi

Loyola University, New Orleans, USA.  
(eMail: mbmakovi@gmail.com)

**Abstract:** Locke's theory of appropriation includes the “Lockean Proviso,” that one may appropriate ownerless resources only if one leaves enough for others. The Proviso is normative and obviously may be rejected on normative grounds. But it is less obvious that it may have to be rejected for positive reasons. According to Hoppe, private property is a means for minimizing social conflict under conditions of scarcity. But the Lockean Proviso would actually exacerbate social conflict. According to Demsetz, property emerges precisely when scarcity arises and there is not enough left for everyone. Accordingly, the Lockean Proviso may be logically incompatible with the very purposes of the establishment of property. Or the Proviso may constitute what Derek Parfit calls “self-defeating morality.” Several adaptations of the Proviso – including Nozick's – are rejected as well, based on the impossibility of interpersonal comparisons of subjective utility and the problem of economic calculation.

**Keywords:** Locke, Nozick, appropriation, proviso, property

**JEL Codes:** A13, D23, K3

### 1. Introduction

Perhaps no theory of property has been historically more influential than John Locke's theory of original appropriation,<sup>1</sup> and it is almost impossible to exaggerate its academic importance. But to fully understand Locke's

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<sup>1</sup> Though Marx's theory is a worthy contender for this honor.

theory, it is necessary to appreciate the Lockean Proviso as well. According to Locke, a person may mix his or her labor and appropriate an unowned resource only “where there is enough, and as good, left in common for others” (Locke 1689: par. 27). Locke continues (1689: par. 33),

Nor was this *appropriation* of any parcel of *land*, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his inclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all. No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst: and the case of land and water, where there is enough of both, is perfectly the same.

According to Locke, appropriation is legitimate only when enough is left over for others.

This condition was termed by Nozick (1974: 175) the “Lockean Proviso” (Widerquist 2010: 9). This same Proviso, Widerquist refers to variously as the “enough-and-as-good” Proviso or as the “sufficiency” Proviso. Widerquist does note the possible existence of two other Lockean Provisos – the “charity” and “no-waste” provisos – but he admits (2010: 10) that “Most authors agree ... that the enough-and-as-good proviso is the most important limitation on property rights.” Furthermore, he says (*ibid.*), “If Locke did not intend the sufficiency limitation as a proviso, perhaps he should have. Any justification of property is weak and unpersuasive without it” (cf. Werner 2013: 2; Nozick 1974: 178). Therefore, even if there are other possible interpretations of the Lockean Proviso, or other provisos, the “enough-and-as-good/sufficiency” interpretation of the proviso which this essay will examine, remains the most important one. In addition, while Widerquist is correct in saying (2010: 3) that because there are multiple provisos and/or interpretations of the Proviso,

Supporters only need to pick the version they find most plausible, but opponents should be aware of the entire menu. Anyone claiming to refute appropriation-based property rights must address not only one but all potentially valid versions of it.

- nevertheless, even if this article examines only one proviso and only one interpretation thereof, the contribution is still real, because this article focuses on the most important and popular version of the proviso. If there are other versions of the Proviso left unexamined in this article, this may

leave a task for other authors. Therefore, this article will be content with criticizing the logical tenability of the “enough and as good” understanding of the Lockean Proviso. This criticism of the Lockean Proviso will be based on the crucial fact that according to positive economic science, appropriation presumes the condition of scarcity.

But actually, according to one argument, the Lockean Proviso is automatically satisfied by appropriation. Tom G. Palmer notes that Locke “adds some remarks that are, puzzlingly enough, rarely (and that is an understatement) commented upon by those who consider the issue” (Palmer 2013). Palmer quotes Locke (1689: par. 37) that, “he who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind,” and Palmer concludes (2013), “thus, it is the act of appropriation itself that satisfies the proviso that there be 'enough, and as good left in common for others.’”<sup>2</sup> Furthermore, Palmer (2013) quotes David Schmidtz (1991: 21f.) that

Leaving goods in the commons fails to satisfy the Proviso. In fact, leaving goods in the commons practically ensures their ruin. The essence of what [Garrett] Hardin calls the Tragedy of the Commons – what makes it tragic, is *precisely* that not enough and as good is left for others. As a necessary condition for satisfying the Proviso, goods must be removed from the commons. Moreover, the more severe the scarcity, the faster resources will be destroyed in the commons, and thus the more urgently the Proviso will require that resources be removed from the commons.<sup>3</sup>

If this is correct, then the act of appropriation from the commons is precisely what satisfies the Proviso, and the Lockean Proviso will always be automatically satisfied, for. If so, the Proviso is not an *extra* condition required *in addition to* the act of appropriation, and no act of appropriation will ever be invalidated by the Proviso. Similarly, after reviewing the benefits of private property, Nozick concludes (1974: 177) that “appropriation of private property satisfies the intent behind the 'enough and as good left over' proviso.”

But it should be noted that such an analysis is dynamic and assumes the passage of time. Schmidtz's statement that “the more severe the scarcity, the faster resources will be destroyed in the commons” makes sense only if time is a factor. But in the extremely short-run, the total available supply of the appropriated good is static and given. Appropriation will be zero-sum, in that whatever is appropriated by one person is no longer available to anyone

<sup>2</sup> Fitz-Claridge (2015: 62f.) does consider these passages. Cf. Widerquist (2010: 6).

<sup>3</sup> Emphasis in original.

else in the short-term. Appropriation can increase the total supply by averting the tragedy of the commons, only over the long-run with the passage of time. In the meantime, the short-run supply curve is a vertical line. So even if appropriation automatically satisfies the Lockean Proviso by increasing the available supply, this can be only the long-run where the passage of time is significant. In the extremely short-run, where supply is given, appropriation is zero-sum. This essay will examine the applicability and tenability of the Lockean Proviso under conditions of scarcity in the extremely short-run, where the Lockean Proviso raises the most difficult issues.<sup>4</sup>

Moreover, whereas Schmidtz argues that appropriation *always* satisfies the Proviso by averting the tragedy of the commons, Nozick's argument is weaker, *viz.* that a free-market economy *tends* to make everyone better off (Nozick 1974: 177, 181f.; Mack 2014 *s.v.* "4.3") – “a rising tide lifts all boats,” so to speak. The Proviso will *tend* to be automatically satisfied *most of the time*. Similarly, Nozick states (1974: 182), “I believe that the free operation of a market system will not actually run afoul of the Lockean Proviso. ... If this is correct, the proviso will not play a very important role...” This suggests his claim is something closer to an empirical tendency or generalization rather than a logical necessity. In this regard, Nozick's claim is similar to Schmidtz's but crucially weaker. Therefore, this essay will, for the sake of argument, assume that appropriation does *not* automatically satisfy the proviso.

This essay will ask the question, is the Proviso logically tenable? Is such a proviso logically consistent with the rest of Locke's theory? Can a rejection of the Lockean Proviso be based on logic or positivist (value-free) science, or instead, is any rejection of the Proviso necessarily normative or morally-based and not scientifically necessary? This essay will attempt to show that the Lockean Proviso is rendered logically difficult by the fundamental fact – according to positive economics – that appropriation presumes the condition of scarcity.

This essay will proceed as follows: section 2 explores the status of positive objections to normative theories, showing that positive science can pose a serious challenge to moral theory. Even when the positive science does not refute the moral theory, it at least reveals certain costs and difficulties which the advocates of the moral theory must admit. Section 3 is divided into four sub-sections: section 3.1 explores Harold Demsetz's

<sup>4</sup> In personal conversation, Eric Mack argued that I wrongly presume that appropriation exacerbates scarcity, whereas in actuality, he said, appropriation reduces scarcity and increases the total stock of available goods. Cf. Mack (1995: 208). It was thanks to Mack's criticism that I realized the time-element involved and the need to distinguish between appropriation as zero-sum in the short-term and positive-sum in the long-term.

argument (1967) that private property serves to internalize externalities under conditions of scarcity. With the sort of scarcity Demsetz envisions, satisfaction of the Lockean Proviso is impossible: if one appropriates scarce goods, one cannot leave enough for others, and leaving enough for others means abstaining from appropriation. 3.2 turns to the argument of Hans-Hermann Hoppe (2006 [1993], 2004) that appropriation of private property is a means of resolving social conflict under conditions of scarcity. Enforcement of the Lockean Proviso would constitute a tax which would undermine this goal. In both sections 3.1 and 3.2, we show that these same considerations undermine Preston J. Werner's (2013) use of the Nozickian historical shadow of the proviso (Nozick 1974: 180) against Schmidtz (1991). 3.3 examines the statements of those who have made similar arguments before, that scarcity precludes satisfaction of the Lockean Proviso. Not all of those who presaged our argument here, drew exactly the same conclusions.

Subsection 3.4 explores the possibility that appropriation may take place even under conditions of non-scarcity. We will find that while appropriation can sometimes occur even when there is no scarcity, nevertheless, in such cases, enforcement of the Lockean Proviso is superfluous and unnecessary. This concludes section 3, and section 4 will examine the provisos of Nozick and the left-libertarians, arguing that these adaptations of Locke are unacceptable for a completely different reason, *viz.* the problem of economic calculation under socialism and the impossibility of interpersonal comparisons of subjective utility. Section 5 concludes.

## 2. Positive versus Normative Objections to the Lockean Proviso

It is obvious that the Lockean Proviso is normative and may be rejected outright by anyone who does not share Locke's ethical views. While it is not quite true to go so far as to say that in normative matters, *de gustibus non est disputandum*, it is nevertheless the case that one is free to embrace or reject any normative position without strictly logical or compelling proof. Therefore, many libertarians are apt to reject the Lockean Proviso because it conflicts with their normative views concerning justice or robust property rights.<sup>5</sup> However, it is less obvious that in fact, the Lockean Proviso may

<sup>5</sup> Widerquist (2010: 10), Mack (1995: 189), Vallentyne (2012 s.v. “Radical right libertarianism...”), Werner (2013: 13). Cf. Stephan Kinsella's rejection of Walter Block's “Blockean Proviso.” According to Kinsella (2007), “Block imagines someone who homesteads a donut-shaped circle of land, and won't let anyone use his land to get to the unowned property in the middle of his donut.” Block attaches a condition to legitimate appropriation in such a situation, but Kinsella (2007) rejects the Blockean Proviso and refuses to sympathize with the would-be owner of the land

have to be rejected on positive, scientific grounds – “may have to be,” depending on one's basis for holding to the Lockean Proviso in the first place. In other words, even those sharing Locke's ethical viewpoint may have to reject the Lockean Proviso as impossible or untenable for non-normative reasons. As we shall show, the Lockean Proviso may have to be viewed as logically problematic or untenable as soon as it is examined in the light of a sophisticated positive (non-normative) economic theory of property rights. In particular, we will show that if the institution of property rights is understood according to either of the positive theories of private property put forth by Hans-Hermann Hoppe (2006 [1993], 2004) or of Harold Demsetz (1967), the Lockean Proviso becomes logically difficult if not impossible to hold. Anthony de Jasay (1997: 195) offers a similar refutation of Locke, but his proof is terse and requires explanation and elaboration.<sup>6</sup>

In fact the Lockean Proviso by itself in isolation may be rejected without significantly affecting the rest of Locke's theory of appropriation. The remainders of Locke's theory of appropriation – e.g. a person's moral self-ownership (Werner 2013:1-2; Mack 1990) – and thus his or her legitimate claim to what he has invested his own labor in – and the concept of the state of nature – are left essentially unaffected. When the Lockean Proviso is subtracted from the rest of Locke's theory, what remains intact of Locke's possesses approximately as much intellectual and moral justification as it ever had. In Locke's argument for self-ownership and the Lockean Proviso (1689: par. 27), the overwhelming emphasis is placed on self-ownership, and the proviso is treated almost as an afterthought:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, hath by this labour something annexed to it, that excludes the common right of other Men. For this

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in the middle, concluding, “tough luck!” Kinsella's response to the Lockean Proviso is therefore a normative, libertarian one that the owner of a donut-shaped piece of land is not morally responsible for the difficulties others face in attempting to appropriate the unowned circle in the middle. By contrast, the objection to the Lockean Proviso in this essay is not normative, but instead value-free or positive.

<sup>6</sup> This article may therefore answer the challenge laid down by Werner (2013: 13): “I leave it to the hardline libertarians to make the case against” the Lockean Proviso. Feser 2005 should be highlighted as well.

Labour being the unquestionable Property of the Labourer, no man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.

Locke has elaborated at considerable length how self-ownership implies the right of original appropriation. But it is almost as a mere afterthought – without any explanation – that he adds “at least where there is enough, and as good left in common for others.” Whereas Locke gives a lengthy explanation of why the legitimacy of appropriation logically follows from the axiom of self-ownership, there is little discursive justification for the “enough and as good” Proviso. Locke seems to have thought that the Proviso would have an immediate and self-evident appeal that required little explanation.<sup>7</sup> Therefore, it is not necessary for me to craft a whole new theory of appropriation to replace Locke's, but only to contest one single secondary element while leaving the essential core largely unaffected. Much less is it necessary for me to propose a consequentialist theory of appropriation in place of Locke's natural law theory. Consequentialist considerations will motivate a small modification to a theory that is otherwise predominately based on natural rights. As a value-free science, economics cannot by itself determine the answers to normative questions, but it can still contribute by revealing what are the costs and benefits of implementing different normative theories (DiLorenzo 1988, Pasour 1987, Ricketts 1987).

It might be argued that because Locke's theory is normative, he should not have to answer to the theories of others, whether normative and especially not positive. As long as his theory is internally consistent with itself, it has no obligation to comport with the theories of anybody else. However, this would be absolutely true only if Locke's normative theory were confronted with the normative theory of somebody else. In such a case, we could say, “*de gustibus non est disputandum*.” Two interlocutors with differing moral beliefs might just have to agree to disagree. But the case is very different when a normative theory is countered with a positive one. One is entitled to hold any moral beliefs he or she wishes provided that they do not contradict scientific fact. For example, one can claim the rich have an obligation to give half of their earnings to the poor, but it is doubtful whether one can claim the rich have an obligation to cure cancer, obviously because the rich objectively lack that ability. People may legitimately posit a moral obligation to do the objectively impossible, but they should understand the great dilemma into which they place themselves. In asserting

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<sup>7</sup> Locke (1689: par. 33) elaborates on the meaning of the “enough and as good” proviso, but still does not offer a precise logical justification for why it is necessary. Locke tells us what the proviso is but not why we need it.



that something is morally obligatory no matter how impossible or harmful the moral obligation's fulfillment would be, one suggests that “ought” does *not* imply “can” – quite a dilemma! In other words: where a normative claim conflicts with positive scientific theory, this does not necessarily invalidate the normative claim, because one may hold that the moral obligation is absolute and that one will be guilty for non-fulfillment even when the fulfillment is impossible. But anyone making such an absolutist claim should at least understand what their claim entails and own up to the enormous dilemma it creates.<sup>8</sup>

The relationship we are proposing between positive and normative theory, and the difficulty we are suggesting that positive economic theory poses to Locke's normative Proviso, is similar to Derek Parfit's notion of the “self-defeating morality.” According to Parfit (1979: 533),<sup>9</sup>

There are certain things we ought to try to achieve. Call these our moral aims. Our moral theory would be self-defeating if we believed we ought to do what will cause our moral aims to be worse achieved.

According to Parfit, a moral theory is “formally self-defeating” when one fails to perform the actions required of a moral theory that is an end unto itself – of a moral theory that is not concerned with consequences. He does not reference Kantian deontology, but that appears to be something like what he means. By contrast, when a moral theory intends certain “substantive aims” or consequences, then that moral theory is “substantively self-defeating” when the performance of the actions required by that moral theory undermine the very goals which it intended. His examples all fall into the categories of prisoner's dilemmas and public goods, where private and social costs and benefits diverge. In these cases, a moral theory which specifies one take action for one's own personal benefit (or for one's own family) will produce worse consequences not only for others but even for oneself, compared to if one had acted for others (or for others' families). In such cases, Parfit says, the self-interested moral theory is “self-defeating.”

<sup>8</sup> Similarly, Fitz-Claridge (2015: 59) has noted in a discussion of a different aspect of Locke's theory that “to hold a prescriptive theory (the moral foundation of property) whose implementation is impossible or detrimental according to a true descriptive theory (of value) is incongruous at best.”

<sup>9</sup> I thank one of the anonymous referees for highlighting my neglecting to adequately bridge the positive-normative gap in an early draft of this paper. Based on the referee's comments, Max Chiz told me I needed to “cite some ethical theorists (or meta-ethical philosophers) on the problem of normative theories that end up demanding the impossible,” and on that, Tom G. Palmer directed me to Derek Parfit.

Parfit does admit that the advocate of the self-interested moral theory can escape the dilemma. Discussing a case where two people each helped only their own children even though the children would have been better off if each person had helped the other person's children instead, Parfit says (1979: 542):

We might say: "These results are, of course, unfortunate. But how could we avoid them? Only by failing to give priority to our own children. That would be wrong. So these cases cast no doubt on our moral theory ["M"]. Even to achieve our other moral aims, we should never act wrongly." These remarks are confused. It is true that, in these cases, M is not formally self-defeating. If we obey M, we are not doing what we believe to be wrong. On the contrary, we think it wrong not to obey M. But M is substantively self-defeating.

In other words, the strict deontologist<sup>10</sup> avoids his or her theory's being substantively self-defeating by focusing only on the morality of the actions themselves and being utterly disinterested as to their consequences. Substantive self-defeat cannot arise if the moral theory has no consequentialist aims. But if a moral theory is not purely deontological – if the consequences matter *at all* – then the moral theory can be substantively self-defeating. To defend a substantively self-defeating moral theory, one must disown concern for the consequences and "[w]e must claim that it is no objection to our theory that, in such cases, it is substantively self-defeating" (Parfit 1979: 542). But Parfit criticizes this defense by asking, "Why should we try to achieve our M-given aims?" and immediately answering "Part of the reason must be that ... their achievement matters" (Parfit 1979: 542). In other words, if one's moral theory specifies the achievement of certain consequences, then it is because those consequences matter. When performing the actions required of a moral theory undermines the achievement of the consequences specified by the same theory, it is not helpful to avoid substantive self-defeat by abandoning concern for the consequences. Those consequences were specified precisely because they are somehow important.

If the establishment of private property has no aim at all, if it is to be established only for its inherent moral goodness irrespective of the consequences, then the consequences of the Lockean Proviso will not matter either, and it will be immaterial what actually happens. But if the establishment of private property is meant in some degree to accomplish some goal, then the Lockean Proviso will be "self-defeating" in Parfit's

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<sup>10</sup> My classification, not Parfit's.

sense insofar as the consequences of the enforcement of the Lockean Proviso conflict with or undermine the intended consequences of the establishment of private property.<sup>11</sup>

And even the professed deontologist should not be too quick to breathe easily yet. Insofar as consequences matter *at all* in one's moral theory, one is vulnerable to Parfit's criticism, and many professed deontologists actually concede more to consequences than they at first realize. According to Roderick T. Long (2013),

the fact that all but the hardest deontologists generally try to show that their favoured policies will in fact have good consequences, while all but the hardest consequentialists generally try to show that they're not committed to morally outrageous conclusions, suggests that most professed deontologists and consequentialists are actually, to their credit, crypto-eudaimonists.<sup>12</sup>

And insofar as one is either a consequentialist or an eudaimonist – or even a “crypto-eudaimonist” for whom consequences mean *something* – one's theory is vulnerable to Parfit's substantive self-defeat. Only the strictest, most absolute deontologist escapes this vulnerability by attributing absolutely no significance whatsoever to consequences. Insofar as the establishment of private property aims at the achievement of some given consequences, then the Lockean Proviso is self-defeating when the consequences of its enforcement conflict with or undermine the intended consequences of the establishment of property.

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<sup>11</sup> Concerning some of these bizarre consequences for the strict deontologist, it is interesting to note Tibor R. Machan's argument (2007) that many claims made against the free-market or capitalism only make sense if one relies on a Kantian deontology. According to Machan, many opponents of capitalism argue that business-activity is inherently immoral regardless of the material prosperity it indisputably creates. And so he argues that this dilemma could be avoided and the material benefits of the marketplace given their proper due, if we were to rely not on Kant but instead on an Aristotelian virtue ethics where human flourishing (eudaimonia) is defined to include – but not be limited to – material prosperity. Cf. Miller (2013), Mack (1990: 533).

<sup>12</sup> Cf. Long (2002): “Whatever they may say officially, most consequentialists would be deeply disturbed to discover that their favoured policies slighted human dignity, and most deontologists would be deeply disturbed to discover that their favoured policies had disastrous consequences.” Long adds (2012), “one of the advantages of the eudaimonistic approach, as I understand it, is that it avoids both the excessive consequence-sensitivity of utilitarianism and the excessive consequence-insensitivity of deontology.” Cf. Mack (1990: 535) that one reason some prefer rule-utilitarianism to act-utilitarianism is that it adds “a greater deontic coloration.”

The positive economic theories of Hoppe and Demsetz specify which what benefits can be feasibly achieved by the institution of private property. If the consequences of the enforcement of the Lockean Proviso undermine the beneficial consequences of the establishment of property, then this does not necessarily invalidate the Lockean Proviso. For one could consider the Proviso to be purely deontological and demand its enforcement even when doing so nullifies the benefits that would have been had by the institution of property – even if this defeats the very purpose of establishing property. In other words, one could disavow concern with the consequences and aim only for the inherent moral goodness of the act itself. Alternately, if the Lockean Proviso is self-defeating, one could therefore reject original appropriation and/or private property altogether, arguing instead for either socialism or a completely different origin for private property. In any case, it is very important to clarify whether the consequences of enforcing the normative Lockean Proviso conflict with what positive economic theory says are the benefits of the institution of private property. Unless one takes a strictly deontological stance and declares that the consequences of the establishment of private property are immaterial, then one cannot just say that Locke is entitled to his own moral opinions as long as they are internally inconsistent – that he is not obligated to answer the positive theory of somebody else.

If Hoppe and Demsetz have accurately demonstrated what private property is good for, then the Lockean Proviso should not conflict with this. If the Lockean Proviso does conflict with the positive theories of the benefits of property, then advocates of the Proviso could attempt to save the Proviso by refuting those positive theories. Or the Proviso's advocates could reject unilateral appropriation and/or private property altogether. But barring these two possibilities, then the advocates of the Proviso should frankly admit their dilemma and confess that they posit a moral obligation whose fulfillment undermines the desirable consequences which the same moral theory hoped to accomplish. It is legitimate to posit a self-defeating morality or a conflict between "ought" and "can" as long as one is open and honest about what their moral theory entails.

However, note that the conflict of Hoppe and Demsetz versus Locke will not affect Robert Nozick's own adaption of the Proviso, in which Nozick argues (1974: 174-182) that appropriation is legitimate as long as no else one who previously could have used that resource is made worse off by that act of appropriation (Vallentyne 2012 *s.v.* "Nozickean right-libertarianism"; Mack 2014 *s.v.* "4.3"; Werner 2013: 2-5; Fried 1995: 232; Fitz-Claridge 2015: 60). In Nozick's words (1974: 175; cf. 178), "The crucial point is whether appropriation of an unowned object worsens the situation of others. Locke's proviso that there be 'enough and as good left in common for others' (sect. 27) is meant to ensure that the situation of others is not worsened." In

other words, acts of appropriation must be Pareto-efficient, with the baseline being welfare in the state of nature where there has not been any appropriation yet (Mack 2014 s.v. “4.3”). But we will not be dealing with Nozick's interpretation of Locke until the conclusion of this article. Nor is this article concerned with a “standard-of-living” interpretation of the Lockean Proviso, which interprets the Proviso as somehow guaranteeing a certain standard-of-living to those who do not own property (Widerquist (2010: 11f., 14), Vallentyne (2012) s.v. “Sufficientarian (centrist) libertarianism”). Presumably, such a standard would be satisfied by some sort of social safety net or redistributionist welfare scheme, but the positive-economic objection that this would create moral hazard and perverse incentives (Tullock [1971b] 2004, 1998) is outside the scope of this article.<sup>13</sup> Similarly, normative objections – e.g., concerning the legitimacy of positive rights or taxation – are not our concern here.

Instead, we will take a simple interpretation of Locke at face-value: appropriation is legitimate if and only if enough and as good is left for others. Furthermore, our criticisms will generally apply to both “strong” and “weak” versions (Widerquist 2010: 12f.), where the baseline for comparison is either contemporary welfare at the time one appropriates today (“strong”) or welfare as it was prior to any institution of property at all (“weak”). We will show that if one follows the positive-economic theories of Hoppe or Demsetz, then Lockean Proviso – understood in the fashion we have outlined – is logically untenable – or at least, that the adherents of the Lockean Proviso necessarily place themselves in a difficult dilemma. In addition, we will show that Nozick's and two left-libertarian adaptations of the Lockean Proviso must be rejected as well because of their conflict with a separate set of positive economic theories, *viz.* the impossibility of interpersonal comparisons of utility and of economic calculation without prices.

### **3. The Economics of Private Property: Hoppe and Demsetz**

#### **3.1 Harold Demsetz: Appropriation Takes Place Only Under Scarcity**

Let us begin with Harold Demsetz's positive economic theory of property (1967). According to Demsetz, it is the simple fact of scarcity which predominately explains the emergence of property rights. By internalizing externalities, property allows a more economically efficient allocation of

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<sup>13</sup> Tullock (2003: 7) notes that although the moral hazard argument against income redistribution is only a part of the general theory of rent-seeking, those who discuss rent-seeking, he says, often do not apply the theory to government welfare. Tullock speculates an ideological, normative reason for this neglect.

scarce resource. We will show that the mere fact of scarcity itself – which necessitates property – is enough to challenge the coherence of the Lockean Proviso or at least to severely weaken it and shift the burden of proof onto its advocates. According to Demsetz (1967: 350), “property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.”

Discussing a group of hunters where the hunted animals were a common-pool resource subject to the tragedy of the commons, Demsetz says (1967: 351f.),

The externality was clearly present. Hunting could be practiced freely and was carried on without assessing its impact on other hunters. But these external effects were of such small significance that it did not pay for anyone to take them into account.

But this changed with the advent of developed trade in fur (Demsetz 1967: 352):

We may safely surmise that the advent of the fur trade had two immediate consequences. First, the value of furs to the Indians was increased considerably. Second, and as a result, the scale of hunting activity rose sharply. Both consequences must have increased considerably the importance of the externalities associated with free hunting. The property right system began to change, and it changed specifically in the direction required to take account of the economic effects made important by the fur trade.

Demsetz concludes (1967: 354), “property rights arise when it becomes economic for those affected by externalities to internalize benefits and costs.” But it is apparent that a major factor in determining when externalities exist which require internalization, is whether a resource is scarce. For example, if a common-pool resource is so abundant that it can satisfy all possible uses, then it is non-scarce and it is not subject to economics. The tragedy of the commons will not arise because there is not even an economic situation, and therefore, there will be no externality to internalize. There can be no externality precisely because there is no opportunity cost, and it is only when a resource becomes scarce that an opportunity cost arises for its use. And with the opportunity cost comes an externality affecting everyone else who would have used that resource. For property rights to emerge, the resource must become scarce – insufficient for all possible wants – so that there is a negative externality attached to its use. Furthermore, the benefit of internalization (which is equal to the cost imposed by the externality) must exceed the cost of internalization, i.e. of

establishing and maintaining property rights (Demsetz 1967). If there is an externality but the cost of internalizing it exceeds the cost imposed by the externality, then it will be uneconomical to establish and enforce property rights.

But this fact of scarcity which gives rise to the externality, itself precludes the satisfaction of the Lockean Proviso. According to Locke, the establishment of property rights is legitimate only “where there is enough, and as good, left in common for others.” But it is precisely when there is *not* enough left for others that a motivation exists to create property rights in the first place. Only where there is scarcity is there a reason for property rights to arise, but such scarcity is inconsistent with the satisfaction of the Lockean Proviso. In other words, Locke's Proviso defeats itself. Precisely the same scarcity which motivates appropriation also rules out leaving aside enough for others.

Of course, scarcity is always relative to its uses and users; as with everything else in economics, scarcity is marginal.<sup>14</sup> It might be, for example, that a householder would not mind if a guest poured himself a glass of tap-water without permission, and yet that same householder would strenuously object if the same guest were to park a water tanker outside his host's home and fill up the tanker with water from the hose. The reason is that scarcity is marginal: pouring a glass of water does not significantly affect the water bill, while filling a tanker does. So the householder would assert his or her property rights in one case but not in the other. But this does not negate the assertion that the property rights emerge due to scarcity, nor the assertion that scarcity conflicts with satisfaction of the Lockean Proviso. All it means is that a particular good may be variously scarce or non-scarce depending on who wishes to use it and for what purpose. For the purposes of filling a glass of water, water is non-scarce and effectively ownerless; legally, the householder owns the water, but he or she does not make any attempt to enforce his or her right. But it is otherwise with filling a tanker. Therefore, the marginal nature of scarcity does not conflict with the thesis of this essay. Again, as Demsetz (1967) showed, property rights will not be instituted and enforced if the costs of their establishment and enforcement exceed the benefits to be gained. So scarcity is not a sufficient condition for the establishment of property, only a necessary condition. But this does not conflict with the fundamental thesis that there is a conflict between the fact that property emerges on account of scarcity, and the requirement that original appropriation of private property must reserve a sufficient amount to be left aside for others.

The fact that appropriation takes place only under conditions of scarcity crucially weakens Preston J. Werner's argument (2013) that in several cases,

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<sup>14</sup> I thank one of the referees for forcing me to clarify this point.

the Lockean Proviso – specifically Nozick's "historical shadow" (1974: 180) – would require imposing forced labor or compulsory organ donation, violating the intent of the libertarian self-ownership thesis. Werner bases himself on Nozick's assertion (1974: 180) that if persons A and B each appropriate a well in the desert, and B's well later dries up through nobody's fault, that A is liable under the Proviso to compensate B. Werner constructs many cases which expand on Nozick's single example, involving a tsunami which unexpectedly destroys one person's resources but not the other's. He argues that the Nozickian historical shadow of the Proviso defeats the intention of advocates of self-ownership by requiring compensation for such a non-culpable violation of the historical shadow of the proviso.

Furthermore, Werner shows that in his cases, there is no tragedy of the commons – because the resources were destroyed by a tsunami, not poor stewardship – and therefore, he says, Schmidtz (1991) is incorrect that appropriation always necessarily satisfies the Proviso by averting the tragedy of the commons (Werner 2013: 7f.). But in fact, all of Werner's cases involve appropriation of a resource that "is not a scarce resource, nor would it foreseeably become one in the future" (Werner 2013: 7). Therefore, if – as we have argued – appropriation presumes scarcity, then in fact, these resources never would have been appropriated in the first place but they would have been instead left as a commons. And then the Nozickian shadow of the proviso never would have become an issue at all. If the resource was neither scarce nor would it foreseeably become scarce in the future, then nobody would have ever had any motivation to appropriate the resource in the first place, and the Proviso would simply be irrelevant. We could not have the situation of B's well drying up and A being required to compensate B (Werner (2013) following Nozick (1974: 180) if neither A nor B ever expected water to become scarce, because neither A nor B would have had any reason to assert property ownership over particular wells. If water was thought (mistakenly) to be superfluous in quantity now and forever, then both A and B would be happy to share the wells without deciding who owns which well or who gets how much water from each. Nobody has any reason to assert "this is mine" if the resource in question is superfluous in quantity. So even if one does uphold the obligatory nature of the Lockean Proviso, Werner's cases of the Nozickian historical shadow of the proviso conflicting with self-ownership would never arise because the resources would never have been appropriated in the first place.

This demonstrates how essential it is that it is scarcity which motivates appropriation in the first place. Where there is no scarcity, there will be no appropriation and therefore no issue of the Proviso. Werner argues that the Proviso could become operative even absent any possibility of the tragedy of the commons, thus refuting Schmidtz's argument that appropriation automatically satisfies the Proviso precisely by preventing the tragedy. But



this argument neglects the fact that the very same lack of scarcity which rules out the tragedy of the commons, also means there would be never be any appropriation of property in the first place. And without appropriation, the Proviso is obviously irrelevant. So Schmidtz is rehabilitated against Werner by the fact that appropriation only takes place under scarcity.

### **3.2 Hans-Hermann Hoppe: Private Property Reduces Social Conflict**

Let us now turn to examining Hoppe's positive theory of property (2006 [1993], 2004). Like Demsetz, Hoppe relies on the notion of scarcity to explain property rights. However, whereas Demsetz's analysis focuses on the bare fact of scarcity itself and how it relates to the efficient allocation of scarce resources, Hoppe instead connects scarcity with social conflict. According to Hoppe, scarcity gives rise to social conflict which is resolved through the institution of private property. The establishment of property rights is a means of avoiding and resolving social conflict, which Hoppe illustrates using the economy of Robinson Crusoe and Friday. According to Hoppe, as long as Crusoe is alone on his island, "the question concerning rules of orderly human conduct – social cooperation – simply does not arise. Naturally, this question can only arise once a second person, Friday, arrives on the island" (Hoppe 2006 [1993]: 381). But he continues, "yet even then, the question remains largely irrelevant so long as no *scarcity* exists" (Hoppe 2006 [1993]: 381).<sup>15</sup> This is because where there is no scarcity, the actions of one person never affect the welfare of the other.<sup>16</sup> Thus, there cannot be any conflict. Or as Hoppe puts it (2006 [1993]: 381),

Whatever Crusoe does with these goods, his actions have repercussions neither with respect to his own future supply of such goods, nor with regard to the present or future supply of the same goods for Friday (and vice versa). Hence, it is impossible that there could ever be a conflict between Crusoe and Friday concerning the use of such goods. A conflict becomes possible only if goods are scarce, and only then can there arise a problem of formulating rules which make orderly, conflict-free social cooperation possible.

Therefore, Hoppe concludes (2006 [1993]: 382),<sup>17</sup>

<sup>15</sup> Emphasis in original.

<sup>16</sup> But there will always be scarcity of at least one thing: one's own body and the space it occupies. Thus, even if all goods are non-scarce, conflict is still possible regarding two people's actual bodies. For example, physical violence could be understood as conflict in scarce physical occupying space. See Hoppe (2006 [1993]: 384), quoted below.

<sup>17</sup> Emphasis in original.

Outside the Garden of Eden, in the realm of scarcity, there must be rules that regulate ... *everything* scarce so that *all* possible conflicts can be ruled out. This is the problem of social order.

Hoppe rejects an initial position of communism because it would lead to social conflict, saying (2006 [1993]: 384),

Every action of a person requires the use of some scarce means (at least the person’s body and its standing room), but if all goods were co-owned by everyone, then no one, at no time and no place, would be allowed to do anything unless he had previously secured every other co-owner’s consent to do so. However, how could anyone grant such consent if he were not the exclusive owner of his own body (including his vocal cords) by means of which his consent must be expressed? Indeed, he would first need others’ consent in order to be allowed to express his own, but these others cannot give their consent without having first his, etc.

Thus, group ownership exacerbates social conflict because no one can act without the consent of others, who in turn cannot act without the consent of others, *ad infinitum*. This is a recipe for chaos, not social order, analogous to Locke’s “paradox of plenty” (Widerquist (2010: 6-7), citing Sreenivasan), wherein people would starve – says Locke – amidst the bountiful plenty of G-d’s creation if they were not entitled to unilaterally appropriate private property (Locke 1689: par. 28). On this basis, Hoppe argues for a doctrine of unilateral original appropriation by individuals in the state of nature.

However, according to Hoppe’s logic, if several independent individuals choose voluntarily to establish group ownership, then we should presume that this group ownership somehow is beneficial for all involved. After all, a business corporation is essentially a voluntary socialist collective, which all the participants feel is more beneficial than sole proprietorship (cf. Coase 1937). All mutually voluntary transactions are mutually beneficial *ex ante*, and this includes voluntary decisions to institute socialism. Similarly, Edward Feser (2005: 68) notes that rejecting the claim that the entire human species commonly owns the entire earth in favor of the doctrine of original appropriation, does not deny the possibility that many individuals will deliberately and voluntarily cooperate to establish jointly-owned private property. For example, a tribe or family might move into virgin territory and appropriate that territory as their shared property.<sup>18</sup> Therefore, ownership

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<sup>18</sup> Feser shows (2005: 67f.) that when a person appropriates a common watering hole

should be initially individualistic rather than collective, and any collectivization should proceed by voluntary contracts and consent among individuals, so as to avoid social conflict. If from that initial position of individualism, individuals proceed to voluntarily contract a collectivist outcome, then this shows that they judge themselves to be better served by collectivism than by individualism. And because the initial position was individualist, and any moves away from it required voluntary consent, the collectivization process can avoid social conflict. This conclusion appears in many ways analogous to James Buchanan's and Gordon Tullock's argument in *The Calculus of Consent* (1962) that at the "constitutional" stage of instituting a government and crafting its constitution, consent must be unanimous, and that any decision-making procedure calling for less than unanimity (e.g. majority rule) is legitimate only once it is specified in a constitution which was unanimously ratified.<sup>19</sup>

In short: according to Hoppe, the purpose of private property and original appropriation is to prevent and resolve social conflicts arising from conflicting uses of scarce resources. Where scarcity is absent, there cannot be any conflict. According to Hoppe, this precludes the need or feasibility of a proviso; in his words (Hoppe 2006 [1993]: 410):

I am criticized for misinterpreting Locke by not mentioning his famous Proviso, but I am not engaged in an interpretation of Locke. I construct a positive theory and in so doing employ Lockean ideas; and assuming my theory correct for the sake of argument, there can be no

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which had been used by others, the reason the act is unjust is not because the Lockean Proviso is violated. Instead, the act is unjust because the watering hole had already been appropriated. Usage rights are part of a bundle of property rights and constitute at least partial ownership (Feser 2005: 69) and the person who attempts to appropriate a common watering hole and deny others the right to use it, is not violating the Lockean Proviso but is instead violating others' property use rights. Similarly, Walter E. Block shows (2011) that Elinor Ostrom (1990)'s communal ownership is really just another form of private property, similar to e.g. a legal library shared jointly by several independent lawyers. Indeed, the Merriam-Webster Dictionary (2014) defines "private" as "for the use of a single person or group : belonging to one person or group : not public." Block and Ivan Jankovic (unpublished) therefore conclude that Ostrom's research is "significant and illuminating but its character was radically misunderstood by both the author and her many and diverse admirers: she did not discover any 'new' form of governance beyond private property and government control. Rather she discussed some interesting variations in contractual regulation and enforcement of the private property rights. Her enterprise properly belongs to sociology of contracts, rather than to economic theory."

<sup>19</sup> On Buchanan and Tullock (1962), cf. Butler (2012: 96f.) and Stevens (1993: 133-139).

doubt as to my verdict on the Proviso. It is false, and it is incompatible with the homesteading principle as the central pillar of Locke's theory.

So Hoppe recognizes that his theory requires a rejection of Locke's Proviso, but he did not say why this was so. Elsewhere, without mentioning the Lockean Proviso, Hoppe offers a reason why his theory might preclude any proviso: *viz.* because any Lockean Proviso is automatically satisfied as a logical necessity. In his words (Hoppe 2004: 55):

Every act of original appropriation improves the welfare of the appropriator (at least *ex ante*); otherwise, it would not be performed. At the same time, no one is made worse off by this act. Any other individual could have appropriated the same goods and territories if only he had recognized them as scarce, and hence, valuable. However, since no other individual made such an appropriation, no one else can have suffered a welfare loss on account of the original appropriation. Hence, the so-called Pareto-criterion (that it is scientifically legitimate to speak of an improvement of "social welfare" only if a particular change increases the individual welfare of at least one person and leaves no one else worse off) is fulfilled. An act of original appropriation meets this requirement. It enhances the welfare of one person, the appropriator, without diminishing anyone else's physical wealth (property). Everyone else has the same quantity of property as before and the appropriator has gained new, previously non-existent property. In so far, an act of original appropriation always increases social welfare.

Thus, every act of appropriation benefits the appropriator. And no act of appropriation will harm those who did not appropriate, for if it did, they themselves would have appropriated the resource first. When the first user of a resource appropriates it, there is no previous user who is harmed, for if there were, he or she would have appropriated it first.

But one might object that late-comers could be harmed by acts of appropriation which occur prior to their arrival. To this, Hoppe responds that conditioning appropriation on the consent or welfare of late-comers is both logically absurd and would result in perverse incentives. Essentially, he argues that conditioning appropriation on the welfare of late-comers produces the same problems as requiring unanimous consent; no one will be able to act with confidence and certainty (Hoppe 2004 *passim*). Like an initial position of communism, conditioning the legitimacy of appropriation on the welfare of late-comers would actually be likely to exacerbate social conflict. For according to Locke, every time someone appropriates

anything, he or she must leave aside enough for others. But this could easily come to mean that others will be able to constantly sue the appropriator if they believe the appropriator has not left enough behind.

Alternatively, some government regulatory agency might be required to be on the constant lookout for violations, and this government agency would initiate regulatory action against violators. Were everyone have an unconditional right to unilaterally appropriate unowned resources, then social conflict would be avoided as much as possible. But if everyone has a claim on everyone else, if parties B, C, D, and E can sue A for A's appropriating resources which A had been using, then social conflict is made worse, not better. The Lockean Proviso creates an entitlement allowing constant claims by others that an appropriator has not left suitable provision for others. Such an entitlement mentality could cause a high degree of social conflict, as people feel entitled to cast aspersions on the legitimacy of others' appropriations.

Put another way: the Lockean Proviso is a full-employment program for lawyers and an invitation for constant lawsuits. And if a government regulatory agency is resorted to, then would-be appropriators will be constantly wary of invasive government intervention. Think, for example, of the cost of filing returns with the IRS (Internal Revenue Service) of the United States, or the burden of compliance with EPA (Environmental Protection Agency) regulations which often fall just short of eminent domain takings. Either way – whether through private suit or public regulation – who will decide what “enough” is, and on what basis? “Enough” is such a vague and ambiguous standard (Werner 2013: 3) that whoever is responsible for determining its meaning – whether private individuals or regulatory bureaucrats or court justices – will have nearly unlimited discretion. It is not clear from Locke how the Lockean Proviso is to be enforced, but it would appear that by any conceivable means, it will entail an immense degree of activity and discretion on the part of somebody, potentially giving rise to greater conflict and uncertainty.

If the purpose of appropriation of private property is the minimization of social conflict, then Locke's Proviso actually undermines that purpose. As Eric Mack notes in another context (1990: 536, 542 n. 33), a legitimate rule of appropriation should sanction “identifiable and predictable entitlements”, and be “efficient” and “subject to cost-effective enforcement.” This implies that *ceteris paribus*, simpler rules are preferable, and social conflict is minimized by an unambiguous rule that everyone has a right to appropriate ownerless resources regardless of whether there will be enough left over for others. Contrariwise, any rule which establishes some sort of individual entitlement to, or group ownership of, or collective claims regarding, or government regulatory stewardship over resources, will exacerbate social conflict by introducing uncertainty and a necessity for costly negotiation

and dispute-resolution. Just as beginning with an initial position of communism is untenable because it is too costly for everyone to obtain the consent of everybody else, so too, the Lockean Proviso threatens to make appropriation too costly by creating the uncertainty of unpredictable lawsuits and claims by others. Conditioning the legitimacy of appropriation on the welfare of late-comers creates a similar invitation for costly social conflict.

Furthermore, the Lockean Proviso places such a burden of uncertainty on the would-be appropriator that some people may choose not to appropriate at all, on account of this additional cost of compliance.<sup>20</sup> In other words, the costs of complying with the Lockean Proviso constitute a tax, and some would-be appropriators will neglect to appropriate in order to avoid the tax, or they will engage less in developing and exploiting the potential of their appropriations. The marginal benefits of appropriation are reduced and the marginal costs increased, by the uncertainty engendered by the fact that at any indefinite time in the future, somebody might come along and retroactively claim that the original act of appropriation was illegitimate because the Lockean Proviso was not satisfied.<sup>21</sup> As Hoppe says (2004: 56),

Every ruling which grants non-appropriators, non-producers and non-traders control, either partial or full, over appropriated, produced or traded goods, leads necessarily to a reduction of future acts of original appropriation, production and mutually beneficial trade. ... [I]f original appropriators and producers can be found liable vis-à-vis late comers ... then the value of production will be lower than otherwise.

Similarly, enforcement of the Nozickean historical shadow of the Proviso (Werner 2013: 7 following Nozick 1974: 180) would engender a significant cost of uncertainty as well. If one person's full ownership of a given resource lasts only so long as everybody else's supply of and access to the same resource is reliable as well – if one's unimpaired sole proprietorship ceases the moment an unforeseen disaster strikes everybody else's supply of that resource – then everyone's ownership is tenuous and uncertain. Everyone will be afraid that his or her own ownership will be restricted unexpectedly without prior notice. This uncertainty would increase the cost and reduce the benefit of appropriation and improvement of resources.

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<sup>20</sup> I am indebted to my brother Matthew for making this point as well. Cf. Higgs (1997) concerning “regime uncertainty.”

<sup>21</sup> According to Nozick, violations of the Proviso do not invalidate the original appropriation but only create a claim for compensation. But the incentive created is the same: appropriators will face the uncertainty of claims for compensation which they could not have predicted ex ante.

Thus, the Lockean Proviso implies a not insignificant welfare cost which should not be disregarded by its advocates. In fact, uncertain or tenuous ownership would essentially return us to the tragedy of the commons, where everyone is locked into a prisoner's dilemma, in which everybody short-sightedly consumes the resource as quickly as they can, afraid that if they do not, somebody else will. Where property rights are uncertain – where owners are afraid that in the future, their ownership will be subjected to unanticipated limitations – owners will have a reduced incentive to act as good stewards who are concerned for the long-term. Schmidtz (1991) said that the Proviso is automatically satisfied by appropriation because appropriation averts the tragedy of the commons. But that is precisely why we should not make property less secure and appropriation more costly than it has to be. The tragedy of the commons will be averted only if we do not make property unnecessarily costly or insecure by the enforcement of extra conditions. This does not refute the Lockean Proviso nor demonstrate the impossibility of its fulfillment, but it does mean there is a great dilemma for any of its advocates, and this at least shifts the burden of proof closer towards its advocates and away from its opponents. As a value-free science, economics cannot decide normative questions, but it can at least enrich the discussion by revealing the true extent of costs and benefits. As Thomas J. DiLorenzo notes (1988: 328; cf. Ricketts 1987, Pasour 1987),

Granted, defining an “ideal” structure of rights is normative and is likely to be difficult and controversial. ... [But t]here is nothing particularly “unscientific” about investigating the economic consequences of alternative property rights structures and then, based on that research, trying to persuade others of what one believes to be a more “ideal” structure of rights. ... This approach would emphasize making greater efforts to understand the *tradeoffs* involved in political economy.

Moreover, the fact that taxation creates perverse incentives and discourages productive use of resources casts doubt on Karl Widerquist's statement (2010: 12, citing Hillel Steiner) that

Some authors erroneously claim that the strong version [of the Lockean Proviso] is unfulfillable. Actually, it can be fulfilled at any level of scarcity by using the policy endorsed by some left-libertarians of taxing raw resource value at the highest sustainable rate and distributing the revenue equally to everyone.

The perverse incentives (Fitz-Claridge 2015: 64) and moral hazard (Tullock [1971b] 2004) that would be engendered by such a policy are

potentially enormous and could possibly become self-defeating in Parfit's sense. The advocates of the Lockean Proviso are obligated to at least admit the not-insignificant costs and burdens imposed by their policies and admit that these costs and burdens run counter to the purposes of property itself.<sup>22</sup> At the very least, the burden of proof should be put on defenders of the Lockean Proviso to demonstrate how the Proviso could be enforced with minimal cost and minimal delegation of discretionary latitude, so as to maintain the power of private-property to minimize social conflict and uncertainty.<sup>23</sup>

However, one might interpret this minimization of social conflict through the institution of property rights in another manner, one which would not conflict with the Lockean Proviso.<sup>24</sup> Perhaps as a normative matter, one is entitled to appropriate as much as he can, and one has no moral obligation to leave enough and as good for others. However, such behavior – however morally legitimate – might arouse the resentment or

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<sup>22</sup> Hillel Steiner admits “As for my tax on parental germ-line genetic information, I agree with you that this poses a ‘public choice’ problem, inasmuch as it disincentivises procreation by the well-endowed and incentivises the poorly endowed.” <<http://bleedingheartlibertarians.com/2012/04/left-libertarianism-and-the-ownership-of-natural-resources/#comment-508915885>> [accessed: 25 March 2015]. Presumably taxes on any other natural resources would have the same sorts of disincentive effects.

<sup>23</sup> Jason Brennan (2015) argues that Lockean Provisos – including Nozick's – and Rawls's Difference Principle are not meant to be enforced continually for individual transactions, but instead, they are general principles which are meant to motivate the choice of a general system of rules. As Brennan notes, certain considerations may motivate the choice of a given set of rules for a sports game, but once the rules are chosen, the umpire enforces only the rules, not the principles which motivated the choice of rules. Rules are chosen which are thought to tend to promote a given outcome, but when exceptions occur and the rules fail to produce that outcome, nothing is done to correct the situation. According to Brennan, the Lockean Proviso is a principle which a good system of property rules will tend to satisfy, but when the proviso is violated, nothing specific is to be done in response. If so, then there is no uncertainty, for once the rules are chosen, there are no ad hoc deviations. Even when a given act of original appropriation fails to leave “enough, and as good” for others, the proviso is not enforced against it. It is not clear to this author whether Nozick's historical shadow of the proviso (Nozick 1974: 180, Werner 2013) can be interpreted in this fashion, but in any case, any proviso which operates on Brennan's terms will not give rise to uncertainty, because even though the proviso guides the choice of rules, once the rules are chosen, those rules are sacrosanct and never to be disrupted or violated.

<sup>24</sup> I thank my friend Arthur Sapper for the following interpretation of social conflict. And in his opinion, this is the correct interpretation of Locke's intent. Incidentally, to revert to the earlier point about the costs of regulatory compliance, Sapper provides a neglected example in Sapper and Baker (2014).



envy of others. A “finder's keeper's” ethic might be morally legitimate but nevertheless ill-advised prudentially. Therefore, one ought to leave enough and as good for others in order to maintain the peace with one's neighbors. But if this is how the Lockean Proviso is to be interpreted, then it essentially reduces to prudential advice and it would carry none of the force of a moral obligation. On the one hand, not even the strictest propertarian would be discomfited at all by the Lockean Proviso so interpreted, any more than he or she would be bothered by the advice that one should satisfy a mugger's demands. Such prudential advice to surrender one's property in self-defense does not at all conflict with an absolutist conception of property. On the other hand, advocates of the Proviso would be entirely dissatisfied with denuding the Lockean Proviso of social justice and reducing it to mere prudence.<sup>25</sup> In other words, if the Lockean Proviso is reinterpreted as mere prudence, then it would no longer conflict with the positive theory of property, but nor would it satisfy the moral concerns of the Proviso's advocates.

### **3.3 Others Who Have Lodged this Scarcity-Based Objection**

Interestingly, Anthony de Jasay already made this same argument that scarcity refutes Locke, albeit in far terser and laconic form than I have here. According to him (1997: 195),<sup>26</sup>

Only if there is literally boundless open range left for the cattle of both, will Smith and Jones have no rational reason to contest each other's attempt to “privatize” any part of it. If there is only a finite area of open range left, however vast, any diminution of it by enclosure increases the probability that some future act of additional enclosure will cause an opportunity loss (a forgone gain) to Smith, Jones, or both. This is just another way of saying that Locke's Proviso for legitimate first occupation, i.e., that “enough and as good is left to others,” is inconsistent with finite resources.

Or, as Kinsella says (1998: 91), “Jasay points out, in a world with finite resources, this [Lockean] condition would make it impossible for any unowned property to ever be used.” However, de Jasay's argument, as

<sup>25</sup> Incidentally, the social-democratic welfare state was mostly invented by Otto von Bismarck as a means of bribing the lower classes and buying their loyalty and patriotism. See, e.g., Creveld (1999: 220), Palmer (2012), Palyi (1949: 21-23), and Porter (1994: 158-160). As Bruce D. Porter notes (1994: xviii, 192f.), both liberals and conservatives should be uncomfortable with the fact that the welfare state is the product of warfare and reactionary conservatism.

<sup>26</sup> Kinsella (2009) cites Kinsella (1998: 91), which cites De Jasay (1997: 195).

stated, is not quite true. According to him, scarcity "increases the probability that some future act of additional enclosure will cause an opportunity loss." But in fact, scarcity creates an *immediate* opportunity cost. If there is only a limited supply of some resource X which both persons A and B wish to appropriate, then whatever of X which A appropriates means there is that much less of X for B to appropriate. In other words, scarcity does not create the mere *probability* of an opportunity cost; scarcity gives rise to the opportunity cost itself. If there is only a finite range for Smith's and Jones's cattle, with the total amount of available range being insufficient for all possible uses, then any appropriation of range by one necessarily means there is less for the other, and there is an *immediate* opportunity cost, not the mere *probability* of one.

Barbara Fried seems to have presaged this essay's thesis as well, but she drew very different conclusions. According to Fried (1995: 230 n. 14, cited in Fitz-Claridge 2015: 58ff),

we leave "enough, and as good" for others only when what we take is not scarce. But when it is not scarce, it has no value. So Locke's theory, with a strict proviso, amounts to saying that we can appropriate land for ourselves out of the commons only when it would be of no value to do so because there is land in super abundance whenever we want it.

Fried recognizes that appropriation is worthwhile only when the good being appropriated is scarce, and that precisely that very scarcity renders the satisfaction of the Lockean Proviso impossible. Conversely, satisfaction of the proviso is possible only when appropriation is not worthwhile, i.e. when there is super-abundance. Therefore, appropriation is legitimate only when there is no benefit, and wherever there is benefit, appropriation is illegitimate. According to Fried, one may appropriate only the good itself but not its scarcity-value; one owns only the value one's own labor or exertion marginally adds, but not the value independently imparted by scarcity (Fried 1995: 230).<sup>27</sup> Similarly, one owns the fruits of one's own exertion but not one's own inborn talents or the value added by other lucky circumstances. But as Liberty Fitz-Claridge (2015) argues – on lines very similar to this present essay – Fried's interpretation of Locke, if implemented, would have many undesirable economic consequences.<sup>28</sup>

<sup>27</sup> Cf. Widerquist (1990: 7).

<sup>28</sup> In particular: first, Fried's interpretation seems to rest on the labor theory of value, thus problematically having her normative theory rely on a false positive theory (Fitz-Claridge 2015: 59). Second, that Fried's scheme is economically unworkable

### 3.4 Appropriation of Even Non-Scarce Goods

However, there remains one last possible place of refuge for the Lockean Proviso, namely situations in which property is established in conditions of superfluity, i.e. despite a lack of any scarcity. As Widerquist notes (2010: 13), “One might be tempted to think that there is no property when goods are abundant, but in Locke's state of nature only raw resources are abundant, not finished products.” Suppose there are fifty trees in the Garden of Eden and only ten individuals, and one tree provides enough fruit for one individual to live indefinitely.<sup>29</sup> Therefore, only ten trees are necessary and the other forty trees are superfluous. Hence, there is no scarcity of trees and no one will have any reason to say, “this tree is mine.” I.e., nobody will attempt to establish property rights in trees. But let us suppose that for a tree to yield enough fruit for an individual's life, he or she must carefully and meticulously prune it. At this point, an individual will indeed have definite cause to assert property ownership over *his or her* tree in which he or she has invested costly labor. There is no scarcity of trees *per se*, but there *is* a scarcity of pruned trees, and therefore, property will arise in trees. Property will exist, not in trees in general, but in pruned trees in particular. Unless property is established in pruned trees, there will arise the tragedy of the commons: trees will be under-pruned because nobody will wish to invest his or her own labor in pruning a tree if somebody else will come along and eat the fruit.<sup>30</sup> So the point is, property rights will have arisen in trees even though trees are not scarce. Therefore, one might say, the fact of scarcity cannot be cited to negate the Lockean Proviso because there is property without scarcity. Since there can be property under conditions of non-scarcity, the Lockean Proviso still has its place even when there is no scarcity. Indeed, Widerquist argues for a form of the Lockean Proviso under such conditions, as follows (2010: 13):

A proviso allowing everyone access to as much as they could use would allow appropriation only of goods that are economically

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because it creates perverse incentives (Fitz-Claridge 2015: 64) and invites calculational chaos (Fitz-Claridge 2015: 66f.). Cf. Widerquist 1990: 7: “Locke may have believed that the tax system could not separate value added” by labor from other sources of value.

<sup>29</sup> I thank Yochanan Rivkin for forcing me to come up with the tree scenario in order to refute an objection he offered in conversation.

<sup>30</sup> Another appropriate response is communal property: the ten individuals could avert the tragedy of the commons by jointly owning ten trees together and sharing in their pruning (cf. Ostrom 1990). But as we noted earlier, jointly-owned communal property is only a special form of private property (Block 2011, Jankovic and Block unpublished, Feser 2005: 68).

abundant. ... This abundance condition could be called the “maximum strength” version of the proviso. ... Locke clearly relies on the maximum strength proviso to justify property when resources are abundant.

But in fact, this does no service to the Lockean Proviso at all, for non-scarcity renders the Lockean Proviso completely irrelevant and meaningless. For where a property right is established in a non-scarce good, there cannot be any issue of leaving enough for others. Since there is no scarcity of trees, it is impossible for anybody to fail to leave “enough and as good” for others. If there are fifty trees and only ten individuals, and every individual needs only one tree to live his or her life to the fullest, then it is pointless to assert that everyone must leave enough trees for others. Nobody has any interest in appropriating more than one tree for him- or herself, because appropriating more than one tree per person would mean investing costly labor for no benefit. Nobody needs to be commanded to leave enough for others because nobody has any reason to do otherwise. Therefore, in a situation of non-scarcity, the Lockean Proviso is not contradicted, but that is because the Proviso is not even relevant in the first place. Therefore, Widerquist concludes (2010: 13), “Although the maximum strength proviso has plausibility, it lacks applicability.”<sup>31</sup>

The situation is similar in the case of protecting resources from damage by pollution. Pollution of non-scarce resources would constitute an externality in need of internalization by the establishment of private property rights. The externality dealt with by Demsetz appears to be the tragedy of the commons, which exists only where there is scarcity. However, pollution is a different sort of externality which does not require scarcity to justify the establishment of property. Air is a prime example: the air we breathe is non-scarce, and yet it is nevertheless subject to pollution.

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<sup>31</sup> But one might argue that in these appropriated non-scarce goods, Nozick's historical shadow (1974: 180) is still applicable, as adapted by Werner (2013). Resume the case of ten individuals and fifty trees, with one tree sufficient per person as long as it is pruned. Then, a fungus or plague infests the trees, and more than forty trees are killed, leaving fewer than ten trees left for the ten individuals. One might argue that at that point, the Nozickian historical shadow applies. Those who are lucky enough that their own trees have survived, must compensate those whose trees did not, even though they did not culpably commit any trespass. However, Nozick already said (1974: 180 note), concerning the case where two people appropriate two wells and one well dries up, that “The situation would be different if his water hole didn't dry up, due to special precautions he took to prevent this.” If a plague kills all of the unowned trees and spares only some – but not all – of the appropriated trees, it is apparently because some of the owners of trees – but not all – took special precautions and protected their trees from infestation. This frees them from obligation under the Nozickian historical shadow.

To internalize this externality, we could say that first-comers have homesteaded an easement to clean air and we could proceed to assess tort damages against late-coming polluters who violate this right (Rothbard (2011a [1982]), Hoppe 2004: 54). Therefore, it would appear that non-scarce resources such as air could be subject to an externality requiring the establishment of private property. And because the resource is not scarce, one cannot lodge against the Lockean Proviso the scarcity-based objection. But once again, precisely because the resource is not scarce, it is impossible that there will fail to be “enough and as good” left for others. In conditions of non-scarcity, the Lockean Proviso is not contradicted simply because it is irrelevant and has no chance to assert itself in the first place. When we establish a property right to clean air and assess a tort against polluters, there is no danger that we will fail to leave “enough and as good” air for others.

Therefore, this essay's conclusion is upheld even in these cases: the Lockean Proviso is simply irrelevant in conditions of non-scarcity; and in conditions of scarcity, it is relevant but impossible to apply, and the attempt to uphold it will be self-contradictory and self-defeating. At the very least, adherence to the Lockean Proviso creates significant dilemmas for its advocates which they must own up to. When property rights are established because of scarcity, it is impossible to leave enough for others, and when property rights are established in non-scarce goods, it is impossible for there *not* to be enough for others. Either the Lockean Proviso is irrelevant, or else it is difficult if not impossible to enforce. In the case of air, there may be many technical difficulties with the establishment of a property right and with tort assessments against polluters – for example, the cost of enforcement may exceed the benefit – but one issue we need not worry about is whether there will be left enough air for everyone to breathe.

#### **4. Adaptations of the Lockean Proviso: Objections to Nozick and the Left-Libertarians**

With this, the simple, straightforward version of the Lockean Proviso – “enough and as good” – has been considered. That leaves Nozick's adaptation to be accounted for. As we saw, Nozick argues that an act of appropriation is legitimate as long as no one is made worse off who previously could have used to use a given resource while it was ownerless. If anyone is made worse off by an act of appropriation, then Nozick would not invalidate the acquisition but he would require compensation to be made. According to Kinsella (1998: 91), de Jasay's argument from scarcity – which we have seen brought against Locke – refutes Nozick as well, but this does not appear correct. Whereas Locke's standard of “enough and as good” requires an certain *physical* quantity to be left aside – thus directly

involving the issue of scarcity – by contrast, Nozick's standard requires assessments of economic utility, for what matters for Nozick is not whether enough in *physical quantity* has been left behind, but whether previous users of a resource have their *economic utility* diminished (Mack 2014 s.v. "4.3").

But this standard necessitates objective measurement of *subjective* utility, an act which is scientifically impossible (Rothbard 2011b [1956]). Therefore, contra Kinsella's reading of de Jasay, it is not the fact of scarcity which poses an objection against Nozick, but rather the impossibility of interpersonal comparisons of subjective utility. As Rothbard elsewhere argues (1998: 241), "Nozick's theory depends on people's utility scales being constant, measurable, and knowable to outside observers, none of which is the case. Austrian subjective value theory shows us that people's utility scales are always subject to change, and that they can neither be measured nor known to any outside observer."

One might object that in many kinds of civil proceedings and tort assessments, we often make reasonable guesses about suitable compensation even if we cannot precisely make an economic calculation about the proper level of compensation.<sup>32</sup> This is true, but it means that the more claims we entitle people to make, the more we embroil ourselves in scientific difficulties. If there is no scientific way to determine the proper compensation for damages, then this is a reason to not unnecessarily expand the list of damages which entitle one to compensation. Furthermore, the magnitude of the calculational difficulty is increased the more people are parties to the suit. If one person throws a rock through another person's window, then there is only one person's utility to be assessed. But the Nozickian Proviso requires us to assess the utilities of every other inhabitant of the locale. It is one thing to assess how a specific individual has been harmed by a specific act of trespass, but Nozick requires us to assess how a person's act of appropriation affects every inhabitant of the entire region. The magnitudes or scales of the two determinations are entirely different.<sup>33</sup>

<sup>32</sup> Eric Mack made this point to the author.

<sup>33</sup> One anonymous referee objected that, "Nozick was well aware of the 'Austrian method' (see his eponymous paper) so simply putting in Rothbard's objections is not sufficient. The problem for Nozick is rather how to move from the level of abstract theory to policy, and find an operational proxy for preferences that are genuinely subjective and unobservable." However, there does not seem to be anything in Nozick's "On Austrian Methodology" (1977) concerning Rothbard's argument about the impossibility of calculation and comparison of subjective utilities. As for the second point, about finding an "operational proxy" for subjective preferences, the same referee elaborated, saying, "In a legal setting, e.g. contract law, we always use proxies for subjective preferences. Otherwise we would not be able to have enforceable transactions. The entire practice of contract law suggests that such

Moreover, whereas an individual can be quite sure when his or her trespass on another's property will culpably cause damages, it will often be difficult for a person to know when their actions will entail liability under Nozick's standard. For example, a person can be quite sure that throwing a rock through another's window will create a liability. But a person cannot be sure that their act of appropriation does not diminish *somebody's* utility *somewhere*. This means there is a much greater degree of uncertainty. A person knows when he or she is trespassing on another's property, but a person does not always know when his or her actions affect the utility of some unknown person elsewhere. Hoppe makes a similar point in responding to the argument that a person's property rights include a right to the *value* of their possessions (2004: 54f.):

Nearly any action of an individual can alter the value (price) of someone else's property. ... The alternative view—that one could be the owner of the value or price of scarce goods—is indefensible. While a person has control over whether or not his actions will change the physical properties of another's property, he has no control over whether or not his actions affect the value (or price) of another's property. This is determined by other individuals and their evaluations. Consequently, it would be impossible to know in advance whether or not one's planned actions were legitimate. The entire population would have to be interrogated to assure that one's actions would not damage the value of someone else's property, and one could not begin to act until a universal consensus had been reached. Mankind would die out long before this assumption could ever be fulfilled.

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operationalization is possible (although details may be objectionable).” This is a remarkable observation – how are contracts able to operationalize subjective preferences into something objective? The answer is that contracts are the product of mutually-beneficial interaction and exchange, and like all such exchanges, they embody subjective preferences and are wealth-maximizing (Rothbard (2011b [1956])). Therefore, if contracts do succeed in operationalizing subjective preferences, they do so via the competitive market process. Freedom of contract is itself a discovery procedure (cf. Hayek 1968), and the terms of the contract communicate information we would not otherwise know (cf. Hayek 1945). Thus, the fact that contracts are able to operationalize subjective preferences cannot be used to justify the Nozickian Proviso against Rothbard's objection, because this relies on absolute freedom of contract, and Nozick's Proviso itself constitutes a check and limitation on those contracts. Enforcement of the Nozickian Proviso would limit and disrupt the very same voluntary contracts necessary for its enforcement.

The Nozickian Proviso would entail uncertainty, as a person can never be sure whether their act of appropriation will affect some party whose existence they are not even aware of. A person would not necessarily have to interrogate everyone before they act, but they would have to anticipate the possibility that following their act of appropriation, they will be sued in court for diminishing the utility of a non-owner whose existence they might not have even aware of. The Nozickian historical shadow would create similarly costly uncertainty, which would disincentive productive behavior.

Meanwhile, Nozick also considers the proviso and its historical shadow to outlaw natural monopoly, whether acquired by original appropriation or by transfer (1974: 179f.). One may not appropriate every well in the desert, nor may one appropriate a single well and purchase every other well from everyone else. Furthermore, if two people each own a well and an unforeseen disaster ruins or destroys one well but not the other, the one who owns the surviving well has violated the historical shadow of the proviso.<sup>34</sup> But prohibiting anyone from appropriating the single well in a desert will result in the tragedy of the commons (cf. Schmitz 1991: 21f.), which is even worse than natural monopoly. And while Nozick says (1974: 180) the monopolist may not “charge what he will,” efficient rate-regulation of a natural monopoly is not possible, because rational economic calculation is impossible without market prices and private ownership of the means of production (Cornell and Webbink 1985: *passim* esp. 44 n. 16).<sup>35</sup> Furthermore, we cannot deem natural monopoly to be economically inefficient because supply, demand, and cost curves are simply not given in the real world.

It is impossible for us to know what economic situation would prevail without a natural monopoly, and so we cannot judge the natural monopoly to be less efficient than the competitive outcome. The competitive outcome

<sup>34</sup> Feser (2005) rejects the very concept of justice in original appropriation, and therefore, he rejects the Lockean Proviso as well. To account for the Nozickian injustice of a monopoly, Feser invokes (2005: 70-76) Eric Mack (1995)'s self-ownership proviso instead.

<sup>35</sup> This challenges Nozick's claim that a dominant private security agency or network could legitimately become a monopolistic state by suitably compensating everyone affected by the abolition of its competition (Mack 2014: s.v. “3. The Minimal State versus Individualist Anarchism”). According to Nozick, if an injury is not compensable, then it does not qualify as something which is permitted as long as compensation is made (Nozick 1974: 65f.). But determining suitable compensation requires economic calculation which is impossible without market prices and private ownership of the means of production – where the means of production are the private security agencies themselves. In other words, we cannot discover what suitable compensation is for the abolition of competition in the provision of security, without seeing what actual customers are willing to voluntarily accept as suitable compensation.



is simply not known for comparison. All we can say about monopoly is that all voluntary market transactions increase wealth, and therefore, any coercive measures which prevent voluntary transactions from occurring, decrease wealth (Rothbard 2011b [1956]). Hence, state-granted monopolies are inefficient because they reduce wealth compared to the situation where voluntary transactions are allowed to occur (Leoni 2009 [1965]). But we cannot assess the efficiency or inefficiency of natural monopolies, nor can we scientifically regulate their rates. Since non-coercive monopolies – generally, those not granted by the state – cannot be economically evaluated in a scientifically precise way, it is not possible to non-arbitrarily enforce a proviso banning such monopolies.

Perhaps such a proviso could be maintained, however, as a non-enforceable moral duty. In other words, if two people each owned a well in the desert, and disaster ruined one, the owner of the surviving well ought to regard it as his moral duty to share his water with his neighbor, but his neighbor has no enforceable claim. And since the claim is non-enforceable, the one with the surviving well has some leeway in deciding what he or she thinks is a fair price for sharing his or her water.<sup>36</sup>

Similar considerations challenge two more adaptations of the Lockean Proviso as well.<sup>37</sup> According to Vallentyne (2012), “*Equal share left-libertarianism*—advocated, for example, by Henry George (1879) and Hillel Steiner (1994)—interprets the Lockean Proviso as requiring that one leave an equally valuable share of natural resources for others.” But how are we to assess what is “equally valuable”? If value is to be measured in terms of subjective utility, then everyone's valuations differ and it is impossible to compare one person's to another's. For example, the value of a herd of bison roaming free differs depending on whether one is a vegetarian or not, or even whether one prefers the flavor of poultry or red meat. And if value is to be measured by market value, we may determine what the true market value is if and only if we let the market operate.

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<sup>36</sup> This may resolve the dilemma of Werner 2013. According to Werner, the historical shadow of Nozick's proviso means that in some cases, a person will owe compensation despite their innocence of any wrongdoing. Furthermore, if no other form of compensation is available, the person may owe their own labor, defeating the purpose of self-ownership. Werner considers several possible libertarian responses (2013: 9-13), but he does not consider the possibility that the proviso is a non-enforceable moral duty. This would save self-ownership.

<sup>37</sup> Cf. Barbara Fried's normative theory (1995) that individuals deserve the fruits of their exertion but not of scarcity-rents or luck, and Fitz-Claridge's positive-economic criticism (2015: 66f.) that this would invite insoluble calculational chaos and uncertainty if implemented. It is impossible, says Fitz-Claridge, for us to accurately assess marginal contributions to value in such a way as to tax only scarcity-rents and not the value of labor itself.

However, enforcement of the left-libertarian form of the Lockean Proviso is itself a market-intervention which will alter prices. Those prices which are the consequence of intervention in the market cannot be used as measures of market-value. And the prices which result from interventions cannot be used to evaluate and judge those very same interventions.

The only means of discovering the market value of a good is to allow completely free trade in that good and observe which exchange ratios emerge from voluntary interaction amongst willing market participants. The very act of enforcing the left-libertarian Lockean Proviso alters these market exchange ratios, making it impossible to know what the market value would have been absent intervention. If so, then we cannot know what would have been of “equal value” prior to the enforcement of the left-libertarian Lockean Proviso. Prices which are themselves the consequences of intervention – i.e. enforcement of the Proviso – cannot be used to assess and evaluate that very same intervention. Similarly, Edward Feser asks (2005: 62),<sup>38</sup>

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?

Therefore, it is impossible for an appropriator to leave aside an “equal value” of the good, where value is measured in terms of market prices.<sup>39</sup>

Vallentyne (2012) continues that “equal opportunity left-libertarianism advocated, for example, by Otsuka (2003) ... interprets the Lockean Proviso as requiring that one leave enough for others to have an opportunity for well-being that is at least as good as the opportunity for well-being that one obtained in using or appropriating natural resources.” But once again, the problems of subjectivity of value and economic calculation present themselves and nullify the attempt to adapt Locke. As Tom G. Palmer (2009 [2005]: 642) notes, reviewing the same work of Otsuka cited by Vallentyne,

<sup>38</sup> Emphasis in original.

<sup>39</sup> All of this follows from the problem of economic calculation or the impossibility of economic calculation under socialism. See Hayek (1935), Hayek (1945), Brutzkus (1935), Hoff (1981 [1949]), Rothbard (1991), Steele (1992), and Leoni (2009 [1965]).

The result of Otsuka's appeal to his own intuitions is an assignment of property that would have to be changed every time its value changed (which happens constantly in a dynamic market) and every time the population of the world changed (which happens many times a minute). ... If the way we know about changes in wealth and value is through changes in prices, and prices are generated by exchange of secure property titles, then eliminating the security of property would mean there would be no way to know how wealth or value had changed. The "solution" to the problem of maintaining the kind of equality Otsuka seeks would entail eliminating the very means by which the solution could be reached. The entire enterprise is not merely impractical; it is self-defeating.

So adaptations of the Lockean Proviso by "equal share left-libertarianism" and by "equal opportunity left-libertarianism" are both *impossible* to satisfy. Value is subjective and cannot be objectively compared. The only means of comparing value is through market prices, but true prices emerge only from free markets, and enforcement of these adaptations of the Lockean Proviso would alter and falsify the very prices necessary for their evaluation.

## **5. Conclusion**

The Lockean Proviso - at least in its pure "enough, and as good" form - must therefore be rejected as logically untenable, or at least as creating a serious though not insoluble dilemma for its advocates. This is what Derek Parfit calls the "self-defeating morality," when the successful fulfillment of the actions demanded by a moral theory produces consequences which run counter to the moral theory's intentions. According to Locke, the establishment of property rights is legitimate only where enough is left over for others. But according to Demsetz and de Jasay, property rights arise precisely when there is scarcity, when there is not enough left over for others. It is therefore impossible to satisfy the Lockean Proviso. Precisely the point in time where property rights would first have reason to come into existence, is the same point where the Lockean Proviso would forbid their establishment. If one follows the Lockean Proviso, then the establishment of private-property becomes impossible. Conversely, if one does insist on establishing private-property due to scarcity, then one cannot leave enough for others, and the Lockean Proviso cannot be enforced. Whereas Werner argues there were cases where the Proviso creates obligations despite the lack of any tragedy of the commons - thus refuting Schmidt (1991) - in fact, all of Werner's cases assume appropriation of non-scarce resources,

whereas in reality, none of the actors involved would have had any reason to appropriate the resources in the first place.

And according to Hoppe, property rights serve to mitigate social conflict, but implementation of the Lockean Proviso would interfere with this goal, and also create insecurity and uncertainty for the future, making the tragedy of the commons more likely. Once again, the Lockean Proviso contradicts the purpose and intent of the establishment of property. Nozick's historical shadow (1974: 180), adapted by Preston J. Werner (2013:7) would engender precisely the insecurity and uncertainty which Hoppe says property is meant to prevent, making the tragedy of the commons more likely.

Where property rights are established in non-scarce goods, the Lockean Proviso is irrelevant, for where the good is non-scarce it is meaningless to demand that enough be left for others. Whenever there is reason to establish property in non-scarce goods, there is no danger that there will fail to be enough left for others. Therefore, the Lockean Proviso may be rejected not merely by libertarians who disagree normatively with Locke's ethical viewpoint, but in fact, it may have to be rejected by all for being logically difficult if not untenable, even for those who share Locke's moral philosophy. Those who normatively advocate the moral obligation of the Lockean Proviso may continue to do so, but they must admit the dilemma into which they fall, wherein a possible contradiction arises between "ought" and "can." This is because enforcement of the Proviso undermines the possible benefits and purposes of establishing property in the first place – thus Parfit's "self-defeating morality." One is entitled to advocate a moral theory which posits an obligation whose fulfillment undermines the achievement of other aims specified by the very same moral theory, but one must at least frankly admit the difficulty into which this places his or her theory.

In Parfit's terms, a moral theory may escape the possibility of being self-defeating only if the theory abstains from specifying any desirable consequences, being content with the inherent moral goodness of the specified actions. But it would be very strange to advocate the establishment of private property on purely deontological grounds, without any concern whatsoever for the consequences of that establishment. And even where positive economic theory cannot refute normative ethics, it can at least reveal the burdens and costs of that normative theory, and those who persist in advocating the Lockean Proviso cannot escape the costs revealed by positive theory. These costs may be deemed acceptable, but they cannot be denied. Economic theory is value-free and cannot directly decide normative questions, but it can enrich the discussion of normative issues by shedding light on the relevant tradeoffs (DiLorenzo 1988: 328).

As for Nozick's adaptation and two others – "equal opportunity" and "equal share" – their being satisfied is made difficult or impossible by the

fact that they require either the impossible quantification of subjective utilities, or else they rely on the use of objective market prices which cease to be available as soon as the Provisos are enforced.

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