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Nozick's Proviso: Misunderstood and Misappropriated*

Abstract:

After almost forty years, Robert Nozick's seminal right-libertarian classic *Anarchy, State, and Utopia* continues to stand at the center of much of the discussion regarding property and its initial acquisition. Nozick's most important contribution to that discussion is the formulation of his entitlement theory. Although the theory has received nearly unparalleled attention, its interpreters have misunderstood and misappropriated its most essential part: Nozick's proviso. This paper presents a brief selection of the most representative interpretations of Nozick's proviso, criticizes them, offers a textually well founded alternative reading of the proviso, and discusses its implications for Nozick's entitlement theory as well as right-libertarian theories of property more generally.

Keywords: Robert Nozick, Entitlement Theory, Principle of Justice in Acquisition, Lockean Proviso, New Baseline Interpretation.

1. Introduction

After almost forty years, Robert Nozick's seminal right-libertarian classic *Anarchy, State, and Utopia* continues to stand at the center of much of the discussion regarding property and its initial acquisition (Nozick 1974). Nozick's most important contribution to that discussion is the formulation of his entitlement theory. Although the theory has received nearly unparalleled attention, its interpreters have misunderstood and misappropriated its most essential part: Nozick's proviso. This paper presents a brief selection of the most representative interpretations of Nozick's proviso, criticizes them, offers a textually well founded alternative reading of the proviso, and discusses its implications for Nozick's entitlement theory as well as right-libertarian theories of property more generally.

Nozick's entitlement theory is essentially a theory of property and consists of three principles. First, the "principle of justice in acquisition" specifies how initially unheld things can justly become held. Second, the "principle of justice

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in transfer” describes how a justly-held good can justly be transferred from one person to another. Third, the “principle of rectification” requires any violations of the first two principles to be rectified and spells out how this is to be done (Nozick 1974, 151–152).

The most basic and at the same time most important principle regulates the just acquisition of resources. While Nozick does not specify the precise details of his principle of justice in acquisition, he is certain that any suitable such principle must include a proviso akin to a weak Lockean Proviso: “A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened.” Nozick’s discussion of the proviso’s baseline—as compared to which the worsening in question is measured—leaves much to be desired, although the force of the proviso obviously hinges upon the interpretation of this very baseline.

This discussion has inspired legions of authors who have—with few exceptions—criticized Nozick for his proviso. The proviso has largely been interpreted as being altogether ineffectual at restricting the initial acquisition of natural resources because of its supposedly low baseline. This has either led to calls to abandon Nozick’s theory in its entirety—mainly because of its ostensibly harsh implications for social justice—or to introduce far more restrictive provisos. To buck this trend, *section 2* presents a brief selection of low-baseline interpretations of Nozick’s proviso that have led to this assessment and demonstrates why they are false. *Section 3* analyses and criticizes a very different proviso interpretation with a high baseline before developing a new and textually well founded reading. *Section 4* discusses the implications of this reading for Nozick’s entitlement theory, points towards potential ramifications for right-libertarian theories, and concludes.

2. Provisos and Low Baselines

In the context of arguing in favor of the doctrine of communal holdings in land, John Exdell construes Nozick’s interpretation of the Lockean Proviso as “ingeniously avoid[ing]” the otherwise possibly severe restrictions placed on appropriation by Locke (Exdell 1977, 144). Exdell argues that there are two reasons why the Nozickian Proviso offers little more than protection in case of catastrophe (such as a dramatic decline in the availability of basic commodities like water) and otherwise leaves room for unlimited profits from the exploitation of the right to private property. First, private appropriation is assessed to be just if it does not worsen the situation of others who are no longer at liberty to use the resource in question. Second, this condition is seldom violated because it is essentially guaranteed that a system of private property will leave people better off than they would be if resources were unowned.

Leslie P. Francis and John G. Francis paint a similarly bleak picture of the Nozickian Proviso’s ability to restrict appropriation. In an attempt to estab-

lish the baseline against which one is to measure the above mentioned potential worsening of others by means of property acquisition, the authors offer a more detailed view than Exdell. Specifically, they suggest that Nozick favors a baseline which is fixed in time and represents "the situation before there were any property rights at all" (Francis and Francis 1976, 640). Thus, an appropriation is only said to harm a person if her position is more deprived than the position of a similar person would have been at a time prior to the establishment of the institution of property rights.

Michael Otsuka endorses a similar interpretation but puts less emphasis on the baseline being fixed in time. Rather, he claims that independent of time Nozick's proviso justifies appropriation as long as it does not make anybody worse off than she would have been if she were living in a society of hunters and gatherers (Otsuka 1998).¹ If these standard interpretations of Nozick's libertarianism were correct, this would indeed have harsh implications for social justice because there would be little reason to suspect any redistributive consequences to follow from Nozick's entitlement theory. Rather, Nozick's proviso would allow for the almost unrestricted exploitation of natural resources for private gain.

The authors discussed above have pegged the baseline of Nozick's principle of justice in acquisition to either a point in time (pre-property), a type of society (hunters and gatherers) or have more generally claimed that, due to the significant advantages of a system of private property, people living under it will generally be better off rather than worse off.

The interpretation of the baseline being fixed in time, advanced by Francis and Francis (1976), is highly questionable not only because it implicitly and implausibly credits all elements of human progress (scientific, organizational, etc.) to the establishment of private property, but also because it is textually unfounded. In his discussion of the application of the proviso to cases of newly discovered resources, Nozick explicitly states that while the discovery may justify an original appropriation of the resource, the resulting property right may be weakened "as time passes, [because] the likelihood increases that others would have come across the substance" (Nozick 1974, 181). Thus, in order to avoid others falling below their baseline, Nozick advocates limiting the bequest of the resource. This unequivocal reference to the baseline floating with respect to time makes the hypothesis that it is fixed with respect to time objectionable.

The alternative interpretation, put forward by Otsuka (1998), according to which the baseline is fixed to a type of society or to a specific use of the appropriated resource, such as hunting and gathering, is equally dubious. It has not been demonstrated that unappropriated land cannot effectively be employed in other enterprises—which would be necessary to justify anchoring the baseline as it has been proposed. While this interpretation of the baseline is problematic, its likely origin is easily traced, for it is probably the result of a misreading of Nozick's reply to Charles Fourier (see Nozick 1974, 178–179). Fourier contends that, as civilization deprives people of the basic liberties to hunt, gather, and

¹ It is debatable whether Otsuka envisions the baseline as also allowing for agrarian or other primitive use.

herd animals, a society must compensate its members by means of a basic income. Nozick disagrees and claims that this would only be justified for those for whom the “process of civilization was a *net loss*” (Nozick 1974, 179). Thus, Nozick’s reference to primitive uses stems from a related, but clearly distinct, discussion. While for Fourier these basic uses were of central importance, there is strong evidence that Nozick’s baseline properly takes into account more advanced uses—namely any use that does not require appropriation.

Textual evidence for Nozick’s envisioned baseline taking account of society’s progress can be found in his discussion of patents. Nozick favors time limits on patents, based on his conjecture that in the absence of the invention and after some time others would probably have developed the same technology (Nozick 1974, 182). Thus, Nozick supports a baseline that adapts to progress in society and to the general betterment of its members.

As introduced above, another common but troublesome interpretation of the proviso, supported by Exdell (1977), suggests that rather than being geared towards ensuring that *individuals* are not harmed, it is formulated with respect to groups. Thus, arguments along the lines of ‘people generally being better off’ under a system of private property are meant to justify private property. To be fair, Nozick himself draws upon arguments that appear to be aimed at defending the system of private property on general grounds, such as its encouragement of experimentation and the efficient allocation of the means of production. However, Nozick is quick to assert that these claims about the general efficiency of systems of private property enter his argument in order to show that the proviso will be satisfied—because every single individual is better off due to the introduction of private property—and “*not* as a utilitarian justification of property” (Nozick 1974, 177). This is essential because a utilitarian perspective would directly conflict with the self-ownership proviso and would go against the very essentials of Nozick’s theory. Therefore, a group-based perspective on the proviso is not only a misguided interpretation but also one that fundamentally conflicts with Nozick’s general position.

3. Provisos and Elevated Baselines

Suggestions such as pegging the proviso’s baseline to a specific point in time and resource usage or tying it to the welfare level experienced by groups have one thing in common: They imply an inaccurately stringent interpretation of Nozick’s proviso as well as accordingly low baselines. The great majority of Nozick’s fiercest critics advance their arguments with the help of such low-lying baselines, so as to illustrate the despicable social consequences Nozick’s entitlement theory triggers by supposedly forbidding any and all redistribution and welfare programs. However, there is a notable exception. As one of Nozick’s most vocal

interpreters and critics, Gerald Allan Cohen (1986a, 123) puts forward an all too lenient interpretation of Nozick's proviso:²

"It requires of an appropriation of an object O, which was unowned and available to all, that its withdrawal from general use does not make anyone's prospects worse than they would have been *had O remained in general use*. If no one's position is in any way made worse than it would have been had O remained unowned, then, of course, the proviso is satisfied. But it is also satisfied when someone's position is in some relevant way worsened, as long as his position is in other ways sufficiently improved to counterbalance that worsening. Hence I appropriate something legitimately if and only if no one has any reason to prefer its remaining in general use, or whoever does have some reason to prefer that gets something in the new situation which he did not have before and which is worth at least as much to him as what I have caused him to lose."

This understanding of the proviso's baseline implies that each and every appropriation is only just if it either does not worsen anybody's position or if it 'pays its way' by generating benefits for the new owner by which those who were harmed will then be compensated.

How would this play out in practice? Let us entertain a thought-experiment: In a three-person world, both Person A and Person B had ample opportunities to further their logging business by acquiring forests without thereby worsening the position of anybody. As Person C grows tired of the high price of timber, she contemplates claiming an unowned forest or two for herself in order to enter the business. Predictably, this will lower the price of timber and the profits of A and B to an extent that cannot be compensated by C.

Is C justified in her planned acquisition? According to the above interpretation of Nozick's proviso, she is certainly not, for her actions would be to the detriment of A and B while failing to create value sufficient to offer suitable compensation.

However, this result stands in obvious contrast to Nozick's understanding of justice in acquisition, as he goes out of his way to emphasize that what is meant by "worsening the situation of others [...]" does not include how I 'worsen' a seller's position if I appropriate materials to make some of what he is selling and then enter into competition with him" (Nozick 1974, 178). Thus, according

² While Cohen's interpretation of Nozick's proviso may be too lenient and may imply a baseline that is too high, it is important to note that (a) Nozick's treatment of his principle of justice in acquisition lacks expository clarity, thereby inviting confusion, and that (b) the argument Cohen builds on his interpretation does not depend on this difference. His claims that Nozick arbitrarily excludes other suitable baselines from consideration and that any proviso-style determination—of what a legitimate acquisition is—will run into trouble remain untouched (see Cohen 1986a, 126–133.) After presenting the above discussed proviso interpretation, Cohen addresses the question of how Nozick would analyse the justice of an already existing system of private property in its entirety. Here Cohen refers to a proviso interpretation similar to the one I claim should be used to analyse the justice of any and all appropriations within a Nozickian system.

to Nozick, C would be well justified in her plans to acquire forests in order to enter the logging business.

The stark differences between Nozick's actual position on justice in acquisition and Cohen's interpretation of it are indicative of strongly diverging readings of Nozick's proviso. These differences go beyond the specific definition of and exceptions to the term 'worsening' as it is applied by Nozick. While Cohen apparently thinks that the effects of any acquisition are to be assessed by comparing the actual post-acquisition situation to the situation that would have developed in the absence of that particular acquisition, Nozick compares the actual post-acquisition situation to the counterfactual situation that would have developed had no acquisition—neither the specific one in question nor any other—ever taken place.³ Thus, Cohen's interpretation implies that any acquisition must have a neutral or positive effect on all those affected. In contrast, Nozick accepts that an individual acquisition may make a person worse off as compared to the situation that would have developed in the absence of the specific acquisition as long as that person draws a net-benefit from the system of private property as a whole or all acquisitions taken together respectively.

To illustrate this point, let us return to our three-person world where A and B dominate the logging industry while C contemplates entering the market. C goes ahead with the acquisition of two unowned forests adjacent to the plots owned by A and B. However, instead of going into business, C simply fences off her forests and builds a shack in view of her neighbors. Now A and B can no longer enjoy the pristine wilderness in their vicinity and must endure the sight of C's shack from their verandas. Given that C offers no compensation, her acquisition would be deemed unjust according to Cohen's interpretation of Nozick's proviso. However, given that A and B are still considerably better off than they would be in the absence of any acquisition (including their own), Nozick's principle of justice in acquisition pronounces C's actions to be legitimate.

This comparison raises interesting issues for any property rights theorist. Assume that C's acquisition is justified as long as A and B continue to incur a net-benefit from the institution of property rights. Then it would seem to be the case that the extent to which C's acquisition is allowed to worsen the situation of A and B (as compared to the situation immediately preceding her acquisition) is only limited by the advantages A and B draw from their own acquisitions and the system of private property at large. However, as I want to illustrate, this is an illusion: An additional limit is set by the property rights of A and B.

Consider C's alternative plans. (1) C plans to acquire the forests not in order to build a shack but to construct a mansion, thereby obstructing the views from

³ At times Cohen does not distinguish sufficiently clearly between a counterfactual analysis as proposed by Nozick (comparing an actual post-acquisition situation to a counterfactual situation) and a temporal analysis (comparing an actual post-acquisition situation to an actual pre-acquisition situation). For example, Cohen (1986a, 123) claims that an appropriation may be legitimate if a person "gets something in the new situation which he did not have before". This temporal comparison of the pre- and post-acquisition situation stands in obvious contrast to Nozick's intentions. Therefore, and because Cohen usually presumes a counterfactual analysis, I interpret his overall analysis as a counterfactual one.

the adjacent plots owned by A and B. (2) C additionally plans to enjoy her mansion by playing music very loudly—every night. A and B would have to invest in soundproofing to be able to sleep. (3) In addition, C plans to uproot all the trees in her forest to burn them in her private power plant. As a result, air pollution would skyrocket, killing many of the trees owned by A and B.

Given that A and B are still better off than they would be had nobody ever acquired anything, one may be tempted to conclude that according to Nozick's principle of justice in acquisition any of C's plans (1–3) are justified. At least C's more egregious ideas to further her own welfare are not just, simply because they violate the property rights of others. The difficulties associated with determining which ways of utilizing one's property are legitimate and which ways of utilizing it infringe upon the rights of others, is a challenging question within the context of Nozick's, or any, theory of property rights. However, these difficulties do not stem from the workings of Nozick's proviso but from the precise definition and strength of any particular property right. Thus, limits to acquisition and subsequent use are not only demarcated by Nozick's principle of justice in acquisition but also by existing rights to property.

This interdependence of the justice in acquisition of a piece of property and its subsequent use is central to the differences between Cohen's and Nozick's views on Nozick's proviso. Cohen's own example (1986a, 123–124) of an appropriate acquisition of a beach is well suited to demonstrate these differences as well as the difficulties of Cohen's account:

“I enclose the beach, which has been common land, declare it my own, and announce a price of one dollar per person per day for the use of it [...]. But I so enhance the recreational value of the beach (perhaps by dyeing the sand different attractive colours, or just by picking up the litter every night) that all would-be users of it regard a dollar [...] for a day's use of it as a dollar well spent: they prefer a day at the beach as it now is in exchange for a dollar to a free day at the beach as it was and as it would have remained had no one appropriated it. Hence my appropriation of the beach satisfies Nozick's proviso.”

Cohen is correct in his assessment that the above acquisition would satisfy Nozick's proviso. However, he is incorrect to imply that a similar acquisition of a less well-intentioned capitalist would not satisfy Nozick's proviso. Suppose the would-be owner of the beach intends to charge three dollars per day for access to the beach, which is a whopping one dollar more than the maximum two dollars the would-be users are willing to pay. Would this acquisition be justified? According to Cohen's criterion it would be unjust because all would-be users have a reason to prefer for the beach to remain in general use but no benefit—stemming from that particular acquisition—that would compensate them. However, as long as no property rights are infringed and all would-be users are still better off with the system of private property in place, Nozick would judge differently.

This difference in judgment is, as discussed earlier, a matter of relying on a different baseline when assessing whether the proviso has been violated. Cohen's example of a commercially used beach provides an excellent opportunity to argue why the proviso I attribute to Nozick—in contrast to the proviso Cohen attributes to him—captures Nozick's intentions:

One of Nozick's arguments underscoring his interpretation of the principle of justice in acquisition relates to the "familiar social considerations favoring private property" (Nozick 1974, 177). According to Nozick, his proviso would not be violated by the appropriation of private property, as people benefit from a system of private property because, for example, "[...] it increases the social product by putting means of production in the hands of those who can use them most efficiently [...]". Importantly, in Nozick's argument this claim does not serve as a utilitarian justification of private property. Nozick merely wants to make plausible that his proviso will not be violated. This non-violation of the proviso—and not the positive social implications of private property—is meant to justify acquisitions.

While the claim that all individuals benefit from a system of private property can be debated, it would be absurd to claim that all individuals benefit from—or at least are not harmed by—each and every appropriation as it would be required by Cohen's interpretation of Nozick's proviso. Thus, there are two reasons to reject Cohen's interpretation. First, Nozick believes that in practice a market economy will not violate his proviso. Taken together with Cohen's interpretation of Nozick's proviso this would imply that Nozick must have assumed that nobody is being harmed by any individual acquisition. As alluded to above, this is an exceedingly strong claim, and even though Nozick is notorious for strong claims it would be a gross violation of the principle of charity to attribute this claim to Nozick. Therefore, Cohen's interpretation stands in stark contrast to *what* Nozick argues for: the non-violation of his proviso in practice.

Second, it is illuminating to consider *how* Nozick argues for this non-violation of his proviso. Much can be said about the "familiar social considerations favoring private property", and many free market theorists would surely want to argue that in general private property causes people to be much better off (Nozick 1974, 177). Some may even want to make the case that everybody is made better off or—at the very least—not harmed by the free market and the private property upon which it builds. However, the case that nobody is harmed by any individual acquisition *because* of the "familiar social considerations favoring private property" is even more outlandish than the simple claim that "nobody is harmed by any individual acquisition" (Nozick 1974, 177).

This is so because the general social advantages of private property are well suited to support arguments based on how well off people are on average in a system that allows for the private appropriation of property. (Such an argument is based on the advantage of the average acquisition for the average person. This is the utilitarian argument.) Less convincingly, general social advantages may also be employed to support arguments based on how well off every specific person is in a system that allows for the private appropriation of property. (Such

an argument is based on the advantage of the average acquisition for every specific person. This is Nozick's argument.) However, general social advantages cannot successfully be employed to support arguments based on how well off every specific person is made by every specific acquisition in a system that allows for the private appropriation of property. (Such an argument is based on the advantage of every specific acquisition for every specific person. This is the argument Cohen implicitly but erroneously attributes to Nozick.)⁴

Why can general social advantages of private property not be used to make claims about the benefits received by specific persons from specific acquisitions? It lies in the very nature of the free market that the distribution of the social advantages emanating from private property is widely dispersed and hard to predict. Some inventions pan out, some industries flourish, and others gobble up resources only to fail in the process. To employ arguments about social advantages of private property with respect to individuals and individual acquisitions, as described above, is akin to being in total denial about the workings on the free market. Accordingly, it is reasonable to assume that Nozick has a different baseline in mind when he assesses the justification of an appropriation.

As discussed in the context of Cohen's beach example, the differences between Nozick's and Cohen's approach are significant not only on a theoretical but also on a practical level. However, they become much more pronounced when one is not merely assessing the justification of a single acquisition but that of a whole group of them or even that of a system of private property. What are the relations between a single appropriation, a group of appropriations, and a system of private property? This question is pertinent, as some authors—including Cohen (1986a, 130–134)—have put forward the idea that Nozick uses different provisos when evaluating the justice of a single acquisition and the justice of a system of private property. Also speaking of a system of private property being the sum of all acquisitions is common.

A group of appropriations is the sum of a number of individual acquisitions. A system of private property is made up of the social norms or legal rules that govern the use of property in a society which adheres to such a system. Therefore, a system of private property is not the sum of the acquisitions justified by it or made under its auspices in a particular society or region. Consider a world in which—according to the system of private property entailed in Nozick's entitlement theory—no person is justified in making an acquisition because, for

⁴ The gist of my argument is this: Cohen's position is false because it implicitly attributes to Nozick a false belief and an absurd argument. Two critiques of my argument may come to mind: (a) Given that false beliefs and absurd arguments are common, how can this be the basis of a sound line of reasoning? (b) Given that this paper builds on the belief that certain key arguments of Nozick are actually false, how can Cohen be criticized for potentially recognizing different instances of the same problem? Of course I do not intend to claim that any interpretation is false simply because it claims to recognize especially egregious mistakes in somebody else's work. However, if those supposed mistakes can easily be avoided by a more charitable—and textually better founded—interpretation, that road should be taken. Where I criticize Nozick throughout this paper, I take those critiques to be inescapable in that Nozick's work does not allow for an interpretation that would be subject to less criticism.

example, the world is simply too small. If the people living in this world accept Nozick's rules, the world features a system of private property but not a single acquisition it could be made up of.

Although a private property system is not the sum of all acquisitions made under its auspices, it remains to consider whether different provisos may suitably be used to judge on a single acquisition and a system of private property. A system of private property may exist in the absence of any acquisition. However, any single private acquisition presupposes the existence of a system of private property. Therefore, in order to justify the first acquisition it is necessary to have justified or to be simultaneously justifying the system of private property which defends the acquisition. Accordingly, an individual acquisition and a system of private property may be judged on by two different provisos, but a one-step justification of a single acquisition must always include a justification of the underlying system.

For Nozick a person living in a free-market society may be severely restricted in his choices of where to go, which resources to use, and how to earn a living. As long as the system of private property does not make him worse off on the whole, the individual acquisitions within the property system are justified. In Cohen's interpretation every individual acquisition must have—at least—a neutral effect on everybody. However, many private acquisitions do significantly more than that and offer net-advantages to others. An example is the privatized and subsequently enhanced beach in Cohen's original story.

To make these widespread advantages of the acquisitions of others plausible, it is illustrative to consider how they can be measured. Economists use the concept of 'consumer surplus' to refer to "the difference between the maximum amount a consumer is willing to pay for a good and the amount he must actually pay to purchase the good in the marketplace" (Besanko and Braeutigam 2002, 185; see also Rosen 2002, 49–50). In this context, property rights are taken as given and, therefore, potential disadvantages resulting from the acquisition that have made the production of the good in question possible are disregarded. Thus, the idea of consumer surplus can only serve as one part of a measurement of the net-advantages to others caused by any given acquisition.⁵ Specifically, these net-advantages to others amount to the consumer surplus minus any dis-

⁵ Inspired by Nozick's question of whether "the situation of persons who are unable to appropriate [...] [is] worsened by a system allowing appropriation and permanent property?" it has become common in debates on Nozick's proviso to focus on the effects acquisitions have on non-owners, in order to determine whether the proviso is violated (Nozick 1974, 177; see also Cohen 1986a, 130). If we assume that owners can never be disadvantaged by the acquisitions of others, to such an extent that they no longer receive a net-benefit from the system of private property, this focus is justified. However, important questions such as whether it is just to acquire all the drinkable water in the world illustrate that non-owners are not the only ones potentially harmed by the acquisitions of others. Nevertheless, for ease of use and in line with established practice this paper often refers to the effects an acquisition may have on non-owners, even though—in principle—any other person may be negatively affected, which in turn could trigger a violation of the proviso.

advantages caused by the appropriation.⁶ In Cohen's original beach example the net-benefit to others is equal or greater to zero because the consumer surplus of the offer to use the enhanced beach outweighs any disadvantages from appropriation to the would-be user.

This simple calculation sheds light on why Cohen's interpretation of Nozick's proviso and Nozick's actual position drift further and further apart the more appropriations are to be evaluated. Consider a world in which—as the first appropriation ever—a beach has just been acquired, enhanced, and rented out to users. In assessing whether that appropriation was justified, Cohen's and Nozick's applications of the proviso return the same result. This is so because in the absence of that very first appropriation no acquisition—neither the specific one in question nor any other—would ever have taken place. Therefore, there is no difference between Cohen's baseline of how well off people would have been in the absence of that *specific* appropriation and Nozick's baseline of how well off people would have been in the absence of *any* appropriation.

Now, consider instead a world in which the beach-enhancement acquisition described above is not the first but the last acquisition—following a long line of appropriations that have created significant amounts of consumer surplus for most people. Now Cohen's and Nozick's baselines are strikingly different. For Cohen the net-benefits that non-owners derive from the previous acquisitions of owners effectively raise the baseline against which any worsening—caused by the beach acquisition—is measured. For Nozick the baseline remains the situation that would have developed in the absence of the introduction of private property.

After the institution of private property is first developed, crowding is unheard of and unowned land is ubiquitous. Thus, negative effects of early acquisitions are unlikely. Accordingly, any appropriated land that is later used commercially creates consumer surplus without generating negative externalities which, therefore, leads to a net-benefit for others. Therefore, the application of Cohen's approach to later acquisitions assumes a significantly higher baseline than Nozick would approve of and consequently makes it more likely that the proviso is violated.

Assuming that some percentage of acquisitions create a net-benefit for others, this effect is amplified the more acquisitions are individuated. If the beach enhancer chooses to acquire the beach in many segments consecutively, rather than all at once, his acquisition of the final piece of land will be measured against a higher baseline. People can already enjoy a large section of the enhanced beach

⁶ Consumer surplus is not the only kind of benefit to bystanders that can result from an acquisition. Without entering in a commercial exchange you may simply be pleased by the beautiful home your neighbor has built or the pasture she lets you share on her newly acquired property. However, the majority of benefits we receive from the acquisitions of others in a system of private property can be classified under the heading of consumer surplus. For why should an acquirer exclude you from the benefits of her land if not to either keep them for herself or share them with you at a price? However, for a more universal approach 'general benefits' can be used in lieu of 'consumer surplus' without altering the analysis.

and may view the acquisition of the last parcel of pristine beach to be to their detriment.

The decision to acquire natural resources in aggregate rather than individually has similar effects. The would-be beach enhancer may be tempted to acquire an adjacent oil well but knows that this acquisition would fail Cohen's test by making some people worse off. However, he also knows that the same people would benefit from his beach-enhancing activities to such an extent as to outweigh any harm done by the acquisition of the oil well. The simple solution to pass Cohen's test is, of course, to acquire the entire area encompassing the beach and the oil well at one stroke.⁷ This inconsistency between the evaluations of one large or many small appropriations—that in sum encompass the same area—again shows that Cohen's lenient interpretation of Nozick's proviso is flawed. It is flawed in and of itself but, because it is unnecessarily flawed, it is also an inferior interpretation of Nozick's proviso.

4. The Baseline of Nozick's Proviso and Its Implications

As argued above, the baseline of Nozick's proviso is best understood as the hypothetical position specific individuals would have been in had no acquisitions ever taken place. As applied to a system of property rights, the central question is akin to Nozick's reply to Fourier: "For whom—if for anybody—is the system of private property a *net loss*?" (Nozick 1974, 178–179) Importantly, this individualistic baseline is neither fixed with respect to time or specific resource usage nor is it meant to assess the position of groups. Thus, in this hypothetical world individuals are free to make the best use of unowned resources and expected to profit from their scientific and organizational advances.

According to Nozick, any society that is not organized based on the entitlement theory is laden with injustices that require rectification. These injustices can occur either due to violations of the principle of justice in transfer or the principle of justice in acquisition. Violations of the principle of justice in transfer are triggered by involuntary transfers as ubiquitous as theft. While some of them raise their own intricate challenges worth pursuing, they are not the subject of this paper. Violations of the principle of justice in acquisition are measured with regard to the proviso.

Having answered the question of the correct interpretation of Nozick's proviso and its baseline, it remains to discuss under what practical circumstances that baseline may be violated: Whereas much speaks for the superiority of a system of private property in producing high average incomes, it is—given the destitution and poverty capitalism fails to avert—much less clear whether there are not a significant number of people who would have been likely to fare better if natural resources were unowned.

⁷ These considerations make obvious that the acts of acquisition, transfer, and subsequent use are hopelessly intertwined and, therefore, cannot—and should not—be evaluated independently of each other.

To whom this appears counterintuitive may want to consider the case of the unemployed non-owners in Nozick's minimal state. After any and all natural resources have been acquired, the unemployed non-owners are neither able to feed themselves—be it from activities such as hunting or gathering or any other form of value creation possible in the absence of property rights—nor are they in a position to trade their talents for any of the resources essential for survival. Given that market economies are vulnerable to structural unemployment, it is likely that many people are unemployed for long periods of time (see Abel and Bernanke 2001, 94–96). Without access to natural resources, savings, unemployment insurance, or the provisions of a welfare state those unemployed are likely to be very badly off—worse off than they would have been had private property not been created.

The comparative hardship of these people would probably create instances of the violation of the proviso and, therefore, in accordance with the principle of rectification, call for compensatory payments in the form of redistribution from owners to non-owners.

This judgment obviously depends on potentially controversial empirical assumptions regarding the connection between the introduction of property rights, human development, and individual welfare. The reliance on empirical assumptions is unavoidable because any proviso compares an actual state of affairs—with private property rights—to a specific counterfactual or historic state of affairs. As these empirical assumptions are also necessary to make the theoretical differences between the discussed provisos practically relevant, it is informative to flesh them out in some detail and to use that opportunity to differentiate between the provisos on a practical level.

Proviso interpretations that feature a reference to a specific time—such as “the situation before there were any property rights at all”—ask whether the situation of a specific person in a world with private property rights is worse than the situation of a similar person would have been *prior* to the establishment of property rights (Francis and Francis 1976, 640). Whether this proviso is ever violated, crucially depends on the assumptions made about that time *prior* to the establishment of property rights. If it is assumed that that time was sufficiently retched, then such a time dependent proviso is almost never violated. The practical difference between this proviso and the one I propose depends on the assumption that time is a positive factor in human development. History vindicates that assumption.

Proviso interpretations that fix the relevant baseline to a specific resource usage such as hunting and gathering ask whether the situation of a specific person in a world with private property rights is worse than the situation of the person living in a society of hunters and gatherers (see Otsuka, 1998). Making this proviso operational requires assumptions about the realities of life in societies that use resources in such a limited fashion. The practical difference between a proviso that pegs the baseline to a specific type of society and the proviso I propose depends on the assumption that, even in the absence of property rights, societies can evolve beyond the state of hunters and gatherers. As

claimed in section two of this paper, unappropriated land may well be used for purposes other than hunting and gathering. A simplistic strategy to refute this claim assumes that any activity other than hunting and gathering implies acquisition. A more formidable challenge questions whether, once overcrowding sets in, any more advanced ways of utilization would (continue to) be possible. However, as supporting the growth of a population up to that point itself requires more efficient ways of utilizing natural resources, the objection also runs into trouble. Nevertheless, it is up to debate what exactly these more advanced ways of utilization may be, how they affect individual wellbeing, and how they, therefore, specifically affect the practical implications of the proviso.

Provisos that are meant to assess the position of groups ask whether the situation of people in a world with private property rights is worse than the situation of people in a world without any property rights. The application of such a proviso relies on assumptions about the human development that is possible in the absence of property rights. The crucial difference between such a proviso and the proviso I propose is that the focus on groups allows to brush over individual hardship. Practically, it is much more likely that people in general are better off due to a system of private property than it is that each individual is better off due to such a system. This claim does not even depend on specific assumptions about property rights but merely on the differences among humans. There are few dramatic changes—be it in the political, economic, or societal realm—that do not create winners and losers.

The proviso of which I argue that it is the correct interpretation of the Nozickian proviso sets as its baseline the hypothetical position specific individuals would have been in had no acquisitions ever taken place. Importantly, this baseline is understood to be individualistic and neither fixed with respect to time or specific resources usage. Making this proviso operational requires the construction of the relevant counterfactual situation. One way of doing this would be to ask how a highly developed modern society were to change if one was to remove all property rights. Little imagination is required to understand that this removal of property rights would lead to chaos and consequently much reduced levels of wellbeing for—almost—everyone. As alluded to above, the main chaos inducing ingredient in this situation would be the high population density made possible by modern societies. More plausibly, what is needed is an understanding of how societies *would have developed* in the absence of property rights and how this development would in turn have affected wellbeing. Fleshing out this counterfactual situation in detail is obviously well beyond the scope of this paper and possibly even beyond the scope of philosophical analysis.

A more expansive study would also need to consider the non-identity problem (see Kavka 1982 and Parfit 1984). Central parts of Nozick's theory rely on welfare comparisons and a view of compensation that make it susceptible to the Non-Identity Problem. This problem arises whenever an allegedly harmful act directly or indirectly triggers the conception of a supposedly harmed person. According to Nozick—and the conventional understanding of harm—determining that such a person was indeed harmed requires establishing that

the person would have been better off in the absence of said act. However, as the person would not even have *existed* in the absence of that act, the necessary welfare comparison becomes unintelligible. Therefore, Nozick's dependence on such comparisons becomes a liability. Needless to say, a consideration of the non-identity problem is also well beyond the scope of this paper.

However, I argue that already the preliminary perspective on the Nozickian Proviso presented here not only yields a coherent and textually well-founded interpretation of that proviso and its baseline but also an improved understanding of what the practical implications of such a proviso are. The interpretation puts on display a right-libertarian entitlement theory with redistributive consequences. As discussed above, this redistribution becomes necessary due to the plight of the unemployed non-owners in Nozick's minimal state. The extent of that redistribution and, in particular, the potential level of welfare associated with the above baseline is best analyzed by a detailed construction of the relevant counterfactual and by means of economic theory. Even though these social policy details cannot be developed here, the new proviso interpretation casts Nozick's entitlement theory in a different light and raises the question of what this implies for right-libertarian theories of property more generally. If Nozickian right-libertarianism has redistributive consequences, being a right-libertarian should no longer be understood as claiming that redistribution is *per se* illegitimate. Most notably, political references to Nozick's right-libertarianism as a defense of a society free of taxation and redistribution would be misguided. Answers to these important theoretical as well as practical questions are well worth further research.

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