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PRODUCTIVE USE IN ACQUISITION, ACCESSION, AND LABOUR THEORY

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**George Mason University Law and
Economics Research Paper Series**

13-02

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Introduction

In 'Of Property,' chapter five of his *Second Treatise of Government*, John Locke claims to supply 'the great Foundation of Property' in man's 'Proprietor[ship] of his own Person, and the Actions or *Labour* of it.'¹ Locke's account of labour seems intuitively persuasive to many readers, including many English and American judges. For example, the 1871 case *Haslem v. Lockwood* required the Connecticut supreme court to decide who had appropriated manure scattered on a public road. Haslem spotted the manure first, directed servants to gather it into piles, and left the piles overnight intending to recover them the next morning when he returned with a cart. Before Haslem returned, Lockwood found the piles and carted them away. In the court's view, 'after the plaintiff [Haslem] had changed [the manure's] original condition and greatly enhanced its value by his labor, [defendant Lockwood] seized and appropriated to his own use the fruits of the plaintiff's outlay.'² The 'fruits of one's labour' metaphor all but decided the case.

In contemporary scholarship, however, labour arguments fare much, much worse. Labour theory is often portrayed as being incoherent. Lockean labour theory seems to appeal to two different modes of normative reasoning. On one hand, Locke grounds property in external assets in what seems to be an inalienable right: the '*Property*' 'every man has ... in his own *Person*,' which 'no Body has any Right to but himself.' On that ground, Haslem's manure-gathering seems to have given him an inalienable right to keep the manure. On the other hand, Locke also argues that labour-based property

¹ Locke 1689b/1988, *Second Treatise*, s.44, p.298-99

² *Haslem v. Lockwood*, 37 Conn. 500, 507 (1871)

rights will generate value 100 times the intrinsic values of the resources covered by property.³ This argument makes what seems to be a utilitarian prediction. On this ground, Haslem seems to deserve ownership to the manure because (and only to the extent that) his gathering benefits the community, by converting what had been a public nuisance into useful fertilizer. These two foundations for labour-based rights seem inconsistent in principle. Sensing as much, scholars who are generally sympathetic to Locke's political project assume that these two argument foundations try to 'square a legal circle.' Such scholars seek other, usually utilitarian, routes for 'the reconciliation of these two divergent imperatives.'⁴

Separately, modern scholars assume that labour theory cannot supply an adequate foundation for property rights in practice. Scholars commonly raise three main adequacy objections. First, 'without a prior theory of ownership, it is not self-evident that one owns even the labour that is mixed with something else.' Thus, Haslem's gathering did not entitle him to own the manure unless he had property in the labour he or his servants performed while gathering the manure. Second, 'even if one does own the labour that one performs, the labour theory provides no guidance in determining the scope of the right that one establishes by mixing one's labour with something else.'⁵ Did Haslem's gathering establish an entitlement only over the manure ... or also over some or all of the highway? Last, in practice, more often than not property law refrains from grounding property claims in labour. Although the labourer acquired property in the *Haslem* case, far more often, property doctrines frequently ignore or disregard

³ Locke 1689b/1988, Second Treatise, s.27, p.287; see *ibid.*, Second Treatise, s.40, p.296

⁴ Epstein 1998, 9; see *ibid.*, 9-39

⁵ Rose 1985, 73

labour-based arguments. Doctrines associated with accession vest ownership of tangible resources in the owner of the land on which the resources reside (or, in which the resources are affixed). For example, if people discover a beehive on an owner's land after considerable effort and research but without the land owner's consent, the *ratione soli* doctrine gives the owner of the soil (*solum*) a decisive reason (*ratio*) to own the bees. Instead of praising the hive-finders' 'labor and skill,' courts classify their conduct instead as a 'trespass, which can avail the [finders] nothing' and is 'injurious to the rights of property.'⁶ The accession principles that settle acquisition claims in the bee dispute apply as well to soil, trees, domesticated animals, and minerals. If property law follows the principles at work in bee cases most of the time and labour theory only in cases (to be blunt) involving cow manure, 'that discrepancy complicates the standard Lockean defence of private property.'⁷

In this Chapter, I argue that these impressions reflect several major errors about the character and reach of labour theory. Labour-based principles have been out of fashion for at least half a century in scholarly discourse. As a result, contemporary property scholars have little feel how terms like 'labour' and 'use' relate to property doctrine. Indeed, each of the two sets of criticisms just recounted corresponds to a significant gap in property scholars' understanding.

To begin with, legal scholars are not as familiar as they should be with philosophical scholarship about labour theory. At least in American scholarship, most property scholars assume that a scholar can understand most of what needs to be known about

⁶ *Fisher v. Steward*, 1 Smith 60, 61 (1804)

⁷ Merrill 2010, 497

Locke's labour theory by consulting Robert Nozick's *Anarchy, State, and Utopia* (1974)⁸ and Jeremy Waldron's *The Right to Private Property* (1986).⁹ The adequacy criticisms just recounted are informed by Nozick's and Waldron's critiques of Locke. Since these critiques were published, however, labour theory has been reconsidered at length in at least six books on legal or political philosophy.¹⁰ Two of those works have converged on an alternative interpretation of labour, to which this chapter will refer as 'productive labour' theory. In this interpretation, 'labour' refers to 'purposeful activity, directed to useful ends, and which secures preservation in the primitive state and improves human life once basic necessities have been met.'¹¹ I call such labour *productive* to accentuate this interpretation's signature characteristic: Ownership of an object is not morally justifiable unless the owner asserts it to deploy the object for 'productive use,' understood as activity 'satisfying needs or supplying the conveniences of life.'¹² One of this Chapter's two main goals is to familiarize legal scholars with the political-philosophy literature on productive labour and use.

Separately, labour theory suffers because of significant gaps between legal and philosophical scholarship. When scholars in political philosophy study moral rights, they tend to focus on the foundations for such rights. They may acknowledge that moral rights cannot be secured without being instituted, or implemented, or (Locke's

⁸ See *ibid.*, 497-99

⁹ For two recent examples not otherwise considered extensively in this Chapter, see Singer 2011, 14; Dagan Forthcoming. Alexander & Peñalver 2012 question Nozick's use of and fidelity to Locke, 53-56, but their critiques of Locke's justifications for exclusive private property, 46-49, are skeptical for reasons similar to Waldron's.

¹⁰ See Kramer 1997; Sreenivasan 1995; Tully 1993, 96-136; Simmons 1992, 222-352; Buckle 1991, 125-90; Munzer 1990, 254-91. Two other, earlier books also deserve pride of place: Tully 1980; and MacPherson 1962.

¹¹ Buckle 1991, 150

¹² Simmons 1998, 210

term) ‘settled’ in law, customs, and government institutions.¹³ Political-philosophy scholars assume that questions about how moral rights are implemented deserve to be studied in scholarship about law. Since legal scholars assume that it makes as little sense to ‘implement’ a ‘right’ as it does to square a circle, however, they have not followed up on political philosophers’ suggestions how to fill their research agendas.¹⁴ The second main contribution of this Chapter aims to fill this void between political philosophers and legal theorists. Using property doctrines, this Chapter shows how a theory of labour, grounded in natural law and rights, may prescribe laws and policies appealing *both* to ‘fairness’ and ‘welfare’¹⁵—reconciling each to the other and thus avoiding incoherence.¹⁶

To keep the following argument manageable, this Chapter illustrates how productive labour theory applies to three related doctrines. This Chapter focuses most closely on the doctrine of capture. Capture supplies the doctrine by which individuals appropriate unowned chattels, like the manure in *Haslem*. Locke’s most vivid illustrations of labour theory come from the acquisition of tangible articles – nuts, water, and animals.¹⁷ Like capture doctrine itself, these examples raise a fundamental policy question: Why *should* any individual be able to appropriate an otherwise-common resource, to the exclusion of all others? Next, this Chapter studies ‘lost capture’ disputes, in which a plaintiff

¹³ Locke 1689b/1988, s.38, 45, p.295, 299

¹⁴ Consider for example Blackman (2011), which studies the capture case *Pierson v. Post* (1805). Blackman recognizes that the judges relied on natural law labour theories in *Pierson*, and he seems quite open to such theories. When Blackman critiques the policy implications of *Pierson*’s holding, however, he relies on exclusively on economic analysis. See also McDowell (2007)

¹⁵ Kaplow & Shavell 2002

¹⁶ I thank Philip Hamburger, John Simmons, Joe Singer, Jeremy Waldron, and Tom West for convincing me to emphasize this contribution.

¹⁷ Locke 1689b/1988, ss.28-30, pp.288-290

complains that a defendant wrongly deprived him of a rightful prospective advantage in finishing a capture. These cases clarify the precise limits of labour theory, because they highlight problems that arise when concurrent labourers compete to appropriate a single asset. Finally, because accession-related land rules conflict with capture doctrine, this Chapter examines the fixture and *ratione soli* rules as well.

In relation to these doctrines, this Chapter proves the following two theses. First, productive labour theory justifies: why would-be owners should have limited legal liberty interests in pursuing opportunities to capture; why they should have broad property interests in appropriating unowned chattels; and why ownership of basic chattels should be vested in a land owner when those chattels sit on or are affixed to the owner's land. This justification may not be 'optimal' in the sense that it is superior to any other possible justification for property rights. In other words, the Chapter does not prove that productive labour theory regulates acquisition and accession more convincingly than economic legal analysis,¹⁸ Kantian normative theory,¹⁹ or many other

¹⁸ Although this Chapter cannot conduct an exhaustive contrast between labour theory and economic legal analysis, let me at least list the main differences that such a comparison would need to consider. Economic analyses of other property doctrines are inconsistent with black-letter law in important respects. Such analyses also prescribe that legal rules focus on facts that create overwhelming information problems for courts and other legal regulators. Claeys 2010b, 1388-1394, 1437-1445. Economic analysis often explains or justifies legal doctrine in relation to efficiency and utility when these criteria do not state normative reasons for action that any citizen regulated by a law would find binding. Many examples of such analysis misconceive of the 'rights' that the private law enforces, or underestimate the importance of property's multilateral structure. Claeys 2012, 134-140. Such analysis sometimes has trouble explaining whether certain and how to tally interpersonal utility, and sometimes it also founders trying to determine whether certain policy consequences should count as social 'costs' or 'benefits.' In addition, many examples of economic legal analysis are tone-deaf about the relation between law and social acculturation. See Claeys Forthcoming b.

¹⁹ I believe and assume here that medieval natural law and early Enlightenment natural rights theories of politics justify law more convincingly than Kantian theories. The former ground legal obligations teleologically, in egoistic normative interests related to individual flourishing; the latter in deontological normative interests that make prescriptions from *a priori* conclusions

possible rivals. Yet this Chapter does show that productive labour theory is 'permissible,' i.e., that it is at least sufficient if not necessary to justify a legal system's enforcing the acquisition rules discussed here.²⁰

Separately, because the judges who developed the doctrines studied in this Chapter subscribed to labour theories quite like Locke's, these doctrines illustrate how legal doctrine may and should 'settle' the positive law of property.²¹ In this Chapter, I use acquisition and related doctrines to illustrate the relation between labour-based natural-rights morality and legal practice. Productive labour theory focuses acquisition-related doctrines while leaving lawyers a reasonable amount of flexibility about how those doctrines' contents should be specified.

This Chapter's argument proceeds as follows. Parts I through IV restate the foundations for labour-based property rights relying on productive labour theory, focusing specifically on the insights needed to apply those foundations to capture, lost capture, and *ratione soli* doctrines. Part I defines and justifies a natural-rights liberty

about deontological morality. In general, the former seem more satisfying because they are more attentive to human psychology than the latter. Claeys 2009, 892-916. Among other things, because the obligations they prescribe are egoistic, natural-law and -rights theories are more likely than Kantian theories to prescribe rules likely to be obeyed and enforced stably in practice, with less hypocrisy or shirking. Again, however, one would need to compare how both approaches justify acquisition and accession doctrine to see whether my suspicions are correct. For a Kantian critique of labour theory and labour-based capture doctrine, see Drassinower 2006, 192-96. I thank Avihay Dorfman for encouraging me to discuss the objections I consider in this and the preceding footnote.

²⁰ Simmons 1994, 66-69

²¹ When I justify and examine particular acquisition or accession doctrines in this Chapter, I will do so assuming that the officer responsible for the doctrine's content seeks conscientiously to make it conform as much as possible to the prescriptions of productive labour theory. That said, Locke himself doubted whether it was necessary or likely that most political communities would demand their officials to be this conscientious. In Chapter 5 of the *Second Treatise*, Locke's justification for exclusive property rights works whether the citizens agree to secure natural rights or merely converge on a 'tacit and voluntary consent' around such rights and an economy with exchange and money. (See Locke 1689b/1988, *Second Treatise*, s.50, p.301-302)

interest in productive labour, and Part II extends that interest to property. Parts III and IV show how labour-based property rights justify two legal principles related to accession: (in Part III) exclusive control over land and chattels, and (in Part IV) accession principles. Parts V through VIII demonstrate my second thesis. Part V examines how property rights are settled in ‘lost capture’ disputes, Part VI does the same in relation to capture doctrine and variations on it, and Part VII does so for the fixture and *ratione soli* doctrines. Part VIII then makes some general observations about the relation between productive labour theory and legal practice.

I. The Moral Right to Labour Productively

A. The Intellectual Context for Lockean Rights

Contemporary property scholarship has lost its feel for labour theory in large part because it has lost its feel for theories of natural law and rights that shaped Anglo-American law. During the eighteenth and nineteenth centuries, rights-based and utilitarian sources of obligation came to seem separate;²² Locke’s accounts of rights, morality, and political obligation precede that separation.²³ So let me begin by defining general terms important to Locke’s accounts of rights, morality, and political obligation, and by restating a justification for a right to engage in productive labour. In case it

²² MacIntyre 1984

²³ Olivecrona 1974. Accord Alexander & Peñalver 2012, 36-37

needs saying, any such ‘restatement’ can only scratch the surface of Lockean property scholarship.²⁴

Like other medieval or early Enlightenment theories, Locke’s account of natural rights is egoistic. Psychologically, humans are hardwired to pursue things that they perceive to be good or happiness-supplying and in which they perceive themselves to be deficient.²⁵ Descriptively, humans are capable of reasoning deliberately how to judge and rank different apparent goods,²⁶ and of reasoning practically how to exercise dominion over inferior things to acquire those goods.²⁷ This background determines the character of normative obligations for Locke. People are obligated to pursue their goods, but they also have rights to engage in activity reasonably likely and necessary to acquire those goods. Because human goods ground both duties and rights, duties and rights have the character they have in interest (or benefit) theories of rights.²⁸ Locke confirms as much in an aside in the *Second Treatise*. Locke justifies law ‘in its true Notion ... not so much [as] the Limitation as *the direction of a free and intelligent Agent* to his proper Interest,’ and as ‘prescrib[ing] no farther than is for the general Good of those under that Law.’²⁹

²⁴ The following account relies substantially on Simmons 1992 and Buckle 1991 to describe productive labour theory and property rights. The account relies less on Simmons and Buckle and more on Myers 1999 and West 2012 to describe the (what West, Myers, and I believe to be the eudaimonistic and virtue-theoretic) normative foundations of such labour and rights. That said, Simmons 1992, 58-59 is probably right that Locke’s main rights-claims may be grounded on overlapping foundations.

²⁵ Locke 1700/1979, II.xxi.31-69, p.250-81

²⁶ *Ibid.*, II.xxi.46, 262-63

²⁷ Locke 1689b/1988, First Treatise, s.30, p.162

²⁸ See Simmons 1992, 92-94

²⁹ Locke 1689b/1988, Second Treatise, s.57, p.305

When Locke refers to moral ‘rights,’ he assumes a meaning for ‘right’ consistent with these egoistic, interest-based priors. For Locke, a moral ‘right’ consists of a strong normative interest³⁰ comprising two more specific interests. One of those interests is a claim-right, a negative right the actor holds to exclude others from interfering with his legitimate authority to make decisions in a particular field of choice. The other specific interest is a liberty, an affirmative capacity to pursue one’s own gratification or well-being within the scope of that legitimate authority.³¹ A moral right (back in the broader sense) is ‘moral’ if it has binding force and if its force is pre-political and non-conventional.³²

Medieval and early Enlightenment natural law and rights theories portray individuals as being entitled to a sphere of free moral agency called the *suum* (‘his own’),³³ encompassing the individual’s rights to life, body, liberty, reputation, and other more specific rights. The moral right to labour is one of the rights included in the *suum*. The right to labour is the right to engage in activity reasonably likely and necessary to help the actor pursue ‘prosperity.’ Every person has a ‘natural Inclination . . . to preserve his Being.’ It is reasonable to infer that this inclination has a ‘purpose, to ... use ... those things which were serviceable for his Subsistence, and given him as means of his

³⁰ In this Chapter, I use ‘interest’ in the sense in which it was used in Feinberg 1984, 33-34, unless context requires otherwise.

³¹ When I speak of ‘claim-rights’ and ‘liberties,’ I mean what Wesley Hohfeld called (respectively) ‘claim-rights’ and ‘privileges.’ Hohfeld 1913, 28-44. Simmons 1992, 92-93 (following Feinberg 1970) refers the same incidents as ‘rights’ and ‘moral powers.’ I use the corresponding Hohfeldian terms because Simmons’s terms are likely to seem idiosyncratic to many political-philosophy readers and most legal readers. See Kramer 1996, 15-23

³² Simmons 1992, 87-94

³³ See Olivecrona 1974, 222-25

Preservation.’³⁴ ‘Prosperity’ encompasses preservation and the other goods people may justifiably pursue.³⁵ Although ‘prosperity’ at least gestures toward human excellence,³⁶ most of the time it focuses on ordinary and mundane ‘civil goods’: ‘life, freedom, the wholeness of and freedom from pain in the body, and the possession of external things, such as a landed estate, money, equipment, et cetera.’³⁷ To capture these tensions in ‘prosperity,’ I will in the rest of this Chapter refer interchangeably to ‘prosperity’ and to ‘self-preservation and -improvement.’

B. Labour As a Moral Right

The right to labour productively comes to mean the right to use one’s person and planning faculties to pursue prosperity so specified. Labour includes a Hohfeldian liberty to engage in ‘purposeful activity, directed to useful ends, and which secures preservation in the primitive state and improves human life once basic necessities have been met.’³⁸ Labour also entails a claim-right to be free all from interferences with the power except those resulting from exercises of the same power. Similarly, ‘use’ consists of the application of one’s own person or other inputs to pursue prosperity in a manner consistent with other individuals’ pursuing prosperity concurrently. That is why, for

³⁴ Locke 1689b/1988, First Treatise, s.86, p.223

³⁵ With one caveat—Locke deliberately avoided using the term ‘prosperity’ in the *Two Treatises*. Locke reported King James I to have said, in a 1603 speech to Parliament, that he ‘acknowledge[d] himself to be ordained for the procuring of the Wealth and Property of his People.’ In the original, the King had promised to procure the ‘Wealth and *prosperitie*’ of the people.’ Locke 1689b/1988, Second Treatise, s.200, p.399 & n.4-11

³⁶ I believe Locke deemphasized perfection and excellence for fear that they would destabilize politics in Christian political communities. See Claeys 2009, 916-34; Claeys 2008. Locke’s deliberate avoidance of the term ‘prosperity’ confirms this interpretation.

³⁷ Locke 1689a/1988, 66 (my translation). See Claeys 2008

³⁸ Buckle 1991, 150. Accord Simmons 1992, 273

example, Locke contrasts the ‘use of the Industrious and Rational’ with the ‘Fancy and Covetousness of the Quarrelsome and Contentious.’³⁹ In this sense, ‘use’ is inherently productive use. The moral right of labour is the right to ‘use’ persons and things only in the course of ‘activity of improving for the benefit of life.’⁴⁰

When ‘labour’ is conceived to have such a character, the conception makes short work of the first adequacy objection recounted in the Introduction. Labour’s productive character accounts for why and in what senses ‘one owns even the labour that is mixed with something else.’ People are capable of deliberating about and discerning what is good for them. They may choose among different goods and means, and they may then act to implement their choices. Those capabilities are normative. In the *Haslem* case, Haslem ‘owned’ a sphere of purposive action in which to search for resources useful to his farm because he ‘owned’ his own moral agency.

II. Property Acquisition in Labour Theory

The institution of property extends the scope of labour (and the *suum*)—from actors to assets on which they hope to act. After all, ‘the Condition of Humane Life, which requires Labour and Materials to work on, necessarily introduces *private Possessions*.’⁴¹ Yet this extension requires considerable elaboration and qualification. If any person has an interest in labouring on an asset, then all do. As Locke acknowledges at the beginning of ‘Of Property,’ it is reasonable to presume that the whole world has been

³⁹ Locke 1689b/1988, Second Treatise, s.34, p.291

⁴⁰ Buckle 1991, 151

⁴¹ Locke 1689b/1988, Second Treatise, s.35, p.292

‘given ... to Mankind in common.’ It then comes to ‘seem[] a very great difficulty, how any one should ever come to have [an exclusive] *Property* in any thing.’⁴²

A. Extending Labour from the Person to Things

There are three basic limitations on the right and power to appropriate external assets.⁴³ One limit is internal—do not waste. This limitation distinguishes Locke’s theory of property from Nozick’s *Lockean* theory. Nozick does not recognize the responsibility to use or the duty not to waste as limitations on appropriation.⁴⁴ Locke does. The priority to enjoy an external asset is limited by a condition ‘well set, by the Extent of [the appropriator’s] *Labour, and the Conveniency of Life.*’⁴⁵

Even if the first appropriator avoids waste, his property claim continues to be qualified by two external limitations.⁴⁶ One of these limitations requires that each gatherer leave ‘enough, and as good left in common for others.’⁴⁷ (For ease of exposition, I refer to the ‘enough and as good’ limitation here as the ‘sufficiency’ limitation.⁴⁸) The sufficiency limitation embodies the labour interests of all: Because every member of a political community has the same right to exercise his moral agency, each deserves an equal opportunity to labour on external assets for his own personal prosperity. In addition,

⁴² Ibid., Second Treatise, s.25, p.286

⁴³ See Waldron 1988, 157-62

⁴⁴ See Nozick 1974, 175-182 (treating the sufficiency limitation but not discussing the use or non-waste limitation)

⁴⁵ Locke 1689b/1988, Second Treatise, s.36, p.292

⁴⁶ Labour-grounded property rights have other external limitations—in particular, claims by children on support from parents. Locke 1698/1988, First Treatise, s.87-93, p.224-28; Kendrick 2011. I do not consider these limitations in text because they do not significantly shape the acquisition or accession doctrines to be discussed in Parts V through VII, below.

⁴⁷ Locke 1689b/1988, Second Treatise, s.27; s.33, p.288, 291

⁴⁸ See Waldron 1988, 209-18; MacPherson 1962, 208

although appropriators ordinarily deserve to be left alone to use their own appropriations for their own personal uses, in an extreme case, one person's need to preserve his own life or safety can take priority over another's less-urgent needs. That extreme case gives rise to the charity proviso.⁴⁹

B. The Social Character of Productive Appropriation

Many scholars assume that Lockean property rights are asocial or even anti-social. Although this assumption comes from sources too numerous to recount here,⁵⁰ Waldron deserves significant credit for reinforcing it. Waldron interprets Locke 'to derive the existence of special rights of private property from the general right to subsistence.' (Waldron means by a 'general right' a right that does not arise out of any particular relationship or transaction between individual persons, and by a 'special right' one that does.) When Waldron finds Locke's justification for special rights 'unsuccessful,'⁵¹ he holds Locke's justification for property to a standard that Locke himself did not try to meet. In Locke's account, property rights are general rights, subject to general qualifications and responsibilities.

Let me illustrate by applying productive labour theory to an example using Hohfeld's analytic vocabulary. Assume that Michael, Steve, and Nick inhabit an island, that the island does not belong to and is not governed by any organized political community,

⁴⁹ Locke 1689b/1988, First Treatise, s.42, p.170

⁵⁰ See, e.g., Austin, this Volume, (conference manuscript p. 19) (criticizing state-of-nature accounts of property on the ground that they overemphasize 'the normative significance of a person-thing relation'); Kant 1797/1991, 88 ('possession is nothing other than a relation of a person to persons').

⁵¹ Waldron 1988, 106-107, 128

and that the only other inhabitants are deer.⁵² Before any deer are caught, Nick, Steve, and Mike have Hohfeldian powers to appropriate the deer, each claiming deer caught as his own private property. The interest of each resident in unowned deer is correlatively subject to a Hohfeldian liability, of losing the opportunity to appropriate any deer captured first by one of the other inhabitants. Assume Mike appropriates six deer. When he does so, he acquires claim-rights and liberties against Nick and Steve, to repel them from interference with his use or enjoyment of the deer. Naturally, Steve and Nick are subject to duties and exposures correlative to any reasonable efforts Mike takes to protect his secure possession of the deer. These relations all seem unilateral because they flow from Mike's unilateral action on the deer.

Yet Mike's interests are qualified by the Lockean limitations. Obviously, if Mike kills the deer frivolously and lets their carcasses be 'putrified, before he could spend [them], ... he invade[s]'⁵³ Steve and Nick's rights and they may take deer from him the deer he is wasting. Less obviously, Mike's power, claim-right, and liberty are all qualified by liabilities, duties, or exposures embodying the sufficiency limitation and the charity proviso. Assume that all the unowned deer on the island die as the result of a natural catastrophe. If Nick and Steve need deerskins for clothing, the sufficiency limitation entitles them to exercise a claim-right and power to take two of Mike's deer each, and it imposes on Mike a duty and liability to suffer their takings. If Nick and Steve each need one carcass's worth of venison to survive the upcoming winter, the charity proviso gives

⁵² With acknowledgments (and apologies) to *The Deer Hunter* (1978).

⁵³ Locke 1689b/1988, *First Treatise*, s.37, p.295

them similar powers and rights each to take one. If all three owners need three deer to survive, Nick, Steve, and Mike are all justified in fighting to acquire or protect three.

Contrary to Waldron's portrait of Locke's argument, none of the inhabitants establishes a special right in a deer by engaging in a personal transaction, i.e., killing or capturing a deer. Now, the inhabitants' conventional property rights may confer on them legal rights more exclusive and monopolistic than were suggested by the interlocking moral relations recounted in the previous two paragraphs. Nevertheless, at this point, we are focusing only on the foundations for those conventional rights. Nonconventional foundations set normative standards by which property laws and other conventions may be measured—but the latter need not embody the relations prescribed by the former in every detail.

Yet why allow appropriation that is unilateral or exclusive in any respect? The blunt answer: If people could not acquire property rights without prior social coordination, 'Man [would] have starved, notwithstanding the Plenty God had given him.'⁵⁴ The subtle answer: Labour and the limitations on property supply an 'effectual truth' that seem realistically likely to ground property rights on foundations as stable and humane as possible.⁵⁵ To use the terms on which Carol Rose relies in her contribution to this volume, Locke's theory of labour (like his understanding of politics generally) assumes that people can act as Hawks or as Doves, and that human reason can judge when different individuals should opt to act as Hawks or Doves in different repeat act-situations.⁵⁶ Owners may be predicted and should be expected to act as 'Hawks'— i.e.,

⁵⁴ Ibid., Second Treatise, s. 28

⁵⁵ Zuckert 2005, 266; see Myers 1999, 194

⁵⁶ cite Rose contribution this volume (attributing Sugden 1986/2004)

irascibly to repel threats to their property—when they have claimed that property for productive labour. Yet non-owners may also be predicted and should be expected to act as Hawks—i.e., irascibly to limit owners’ property claims—when owners violate the waste and sufficiency limitations or the charity proviso. In all other situations, non-owners may be predicted and should be expected to suffer property appropriation like Doves. It is realistic to expect members of a political society to converge on practices and institutions that respect the strengths of these competing claims in different situations. Property rights then come to be socially obligatory because they are ‘necessary for maintaining a harmonious social order. Since any withdrawal from private property would endanger society at large, withdrawal is contrary to the rational dictates of natural law.’⁵⁷

C. Productive Use as a Limit on Labour

Even if the right to labour generates social rights and obligations in relation to acquisitions, perhaps it provides ‘no guidance in determining the scope of the right that one establishes by mixing one’s labour with something else.’⁵⁸ In particular, as Waldron and Nozick have argued, perhaps labour provides no guidance because the idea of

⁵⁷ Buckle 1991, 166

In his contribution to this volume, Jeremy Waldron finds Hume’s theory of property more persuasive than Locke’s because Hume grounds property more exclusively in consent and social agreement than Locke does. [cite when have full ms]. Briefly, I have two responses. In principle, consent supplies no legitimate authority to bind citizens unless it is connected to a reason for action appealing to their personal interests. In practice, if a society agreed to let consent legitimize property rights and laws, whether or not the consented-to institutions secured citizens’ property rights, Locke would predict that citizens would cease applying themselves to the ‘use of the Rational and Industrious’ and concentrate on being ‘Quarrelsome and Contentious’—to agitate to transform the public opinion that shapes consent. (Locke 1689b/1988, Second Treatise, s. 34)

mixing labour creates category mistakes.⁵⁹ Nozick asked whether someone could claim ownership of the Atlantic Ocean by pouring tomato juice marked with traceable radioactive molecules in it, and Waldron hypothesized a ham sandwich dropped in cement.⁶⁰ True, the ‘mixing’ image⁶¹ is somewhat hyperbolic. Even so, if understood as a metaphor, it clarifies how labour limits property rights while justifying them.

Productive labour theory does not confer property rights on any mere effort applied to an object. It justifies ownership over the object as it justifies labour—as a means reasonably necessary to accomplish some aspect of the actor’s self-preservation or -improvement. When labour is understood as prosperity-producing activity, it provides far more guidance to property rights than the tomato-juice and ham-sandwich hypotheticals suggest.

First, productive labour theory does not establish property claims in mere exertion, only in activity that could contribute to some aspect of the actor’s prosperity. Haslem was entitled to appropriate the highway manure if he intended to use it on his farm or to give or trade it to someone else who would use it similarly. By contrast, an actor does not feed anyone or accomplish any other productive use by burying a ham sandwich or pouring off tomato juice; the actor who does both has ‘chosen foolishly to waste [his] tomato juice and ham sandwich.’⁶²

Second (and somewhat contrary to the thrust of the mixing metaphor), moral rights to labour productively need not always justify rights of private property. In the tomato-

⁵⁸ Rose 1985, 73

⁵⁹ Waldron 1988, 185; Nozick 1974, 174-75; see also Kramer 1996, 149-50

⁶⁰ Nozick 1974, 174-75; Waldron 1983, 43

⁶¹ Locke 1689b/1988, Second Treatise, s.27, p.288

⁶² Mossoff 2002, 163. Accord Olivecrona 1974, 226

juice hypothetical, the mismatch between pouring away and productiveness is not the only problem; the ocean ('that great and still remaining Common of Mankind'⁶³) is also a bad candidate to be claimed as private property. Ocean water has few or no private human uses; it has many common uses, especially fishing and travelling. Similarly, although manure may be used most productively when owned and consumed exclusively, a highway is used most productively when many people are granted rights to travel on it. That difference supplies one reason (though surely not a reason sufficient by itself) why Haslem's manure-gathering did not entitle him to claim he had appropriated the highway.

D. The Communicative Function of Productive Labour

Separately, labour focuses the scope of property by virtue of having an equality component.⁶⁴ As A. John Simmons explains:

[T]he right of self-government ... is ... a right only to such freedom as is compatible with the equal freedom of others. To try to control for one's projects external goods that have already been incorporated into the legitimate plans of others, would be to deny to others that equal right. We may make property with our labour only in what is not already fairly taken as 'part of the labour' of another.⁶⁵

Because 'productive use' is a normative interest held by political equals, productive labour theory stresses labour's communicative function much more than contemporary

⁶³ Locke 1689b/1988, Second Treatise, s.30, p.289

⁶⁴ Ibid., Second Treatise, s.4, p.269

⁶⁵ Simmons 1992, 275

property scholars appreciate. 'Labor must show enough seriousness of purpose to 'overbalance' the community of things' that exists because 'the World [was given] to *Adam* and his Posterity in common.'⁶⁶ For 'things of use,' the best way to show that purpose is 'to use them.'⁶⁷

This requirement highlights further problems with the tomato-juice hypothetical. Onlookers' social perceptions of things are keyed to their pre-political normative expectations. That which they expect to contribute to human prosperity, they perceive in entities and combinations whose uses lend themselves to human prosperity. People perceive manure as capable of being owned privately, but they perceive highways as commonses open to all travelers. Similarly, they perceive fish as good candidates for appropriation and ocean water as a bad one. (Note how the 'ocean' is a singular entity while 'fish' come in separate entities.) On one hand, people's perceptions of ocean water accord with their expectations that the water be used as a common pathway; on the other hand, these perceptions accord with the fact that it would be extremely difficult, by labour or any other marker, to 'put a distinction between' a few water molecules and the ocean remaining in 'common.'⁶⁸ Radioactive carbon atoms do not adequately overcome these boundary-marking problems. If the can owner continues to claim private property in the juice after it is poured, he blurs the boundaries his fellow citizens reasonably expect owners to maintain between their own property and common resources.

⁶⁶ Locke 1689b/1988, Second Treatise, s.25, p.286

⁶⁷ Simmons 1992, 272.

⁶⁸ Locke 1689b/1988, Second Treatise, s.28, p.288

III. Control Rights in Labour Theory

Even if an appropriator deserves property in the tangible objects he appropriates, the appropriations do not automatically determine what sort of property he acquires in those objects. Legal property rights differ considerably. One way to sort the differences is along a continuum ranging from ‘usufructs’ or ‘use rights’ to ‘control rights.’ As an ideal type, usufructs entitle owners only to consume or use an asset. The beneficiary of a usufruct must continue to use the object consistent with use patterns previously established, and his intended uses must be consistent with use claims of other would-be users.⁶⁹ (In temperate jurisdictions, traditional common law rights to river flow have many characteristics of usufructs.⁷⁰) By contrast, many assets are clothed with rights of exclusive control, possession, and disposition, to which I will here refer as ‘control rights.’ As an ideal type, control rights entitle an owner to determine near-absolutely how an asset may be used, by giving him the right to exclude others with few or no questions asked.⁷¹ (In political communities with well-developed money economies, land and chattels are protected by control rights.⁷²)

⁶⁹ Claeys Forthcoming a, 4-10.

⁷⁰ Ibid., 6-8.

⁷¹ As I have explained elsewhere, Lockean property rights in land and chattels do institute many use-based priorities and exceptions: to name a few, adverse possession, Claeys Forthcoming b; nuisance, see Claeys (2010b), 1398-1430, and a privilege to jostle a chattel accidentally as long as the jostling does not cause damage to the chattel, see Claeys (2010a), 398-401. When no such priorities or exceptions apply, however, land and chattel owners reserve residual authority to control their things’ uses. ‘Control’ describes that residual authority.

⁷² For a more comprehensive list, see Lueck 1995, 411 Table 1.

Locke's theory of labour declares a moral use right. The conditions on legal usufructs parallel and embody the moral responsibility not to waste (i.e., to use) acquired property and the sufficiency and charity limitations. Because Locke's theory is grounded in use, it does not justify control rights straightforwardly. Indeed, *Of Property* focuses on that disjunction; the chapter answers how use-based property rights entitle any person to hold '*Property ... exclusive of all the rest of [Adam's] Posterity.*'⁷³ The answer: In theories of natural law or rights like Locke's, positive laws need not and often should not parallel strictly the moral principles they implement. Labour supplies a non-conventional 'Foundation' for property⁷⁴—but it justifies and requires the exercise of prudent judgment to implement the foundations it lays. For some assets—say, riparian water in temperate climates—legal use rights appropriately secure labour-based moral use rights. Paradoxically, however, for land and chattels, legal rights of exclusive control secure labour better than usufructs.

The case for control rights rests on several overlapping arguments. Some of these arguments are virtue-theoretic. If people do not control the resources they need for their own self-preservation or -improvement, they grow to be not only spoiled but also child-like and psychologically dependent. By managing assets for his own long-range life plans, an owner comes to be 'rational,' 'industrious,' and 'Master of himself, and *Proprietor of his own Person.*'⁷⁵ Control rights also align property with deontological aspects of human morality. As Simmons explains, while '[s]elf-preservation requires only rights of use or access ..., [s]elf-government is only possible ... if the external things

⁷³ Locke 1689b/1988, *Second Treatise*, s.25, p.286

⁷⁴ *Ibid.*, *Second Treatise*, s.44, p.298

⁷⁵ *Ibid.*, *Second Treatise*, s. 34, 44, 291, 298-99. See Myers 1999, 137-244; Locke 1693/1996, s.33-39, 45, 75, 105, 110, p.25-30, 32, 53, 77, 81-82

necessary for carrying out our plans can be kept, managed, exchanged (etc.) as the plans require.⁷⁶ As the Introduction recognized, control rights also promote consequentialist goals; they encourage labourers to produce value truly useful to human preservation or improvement on the order of 100 times greater than could be extracted from tangible resources by correlative usufructs.⁷⁷

Of course, these arguments provoke further objections. One states that it is impossible to endow owners with exclusive control over tangible resources without denying to non-owners equal access to those resources for their own self-preservation or -improvement.⁷⁸ Or, if a theory of labour justifies such denials, it must be incoherent, perhaps a utilitarian theory dressed in rights-talk. Here more than anywhere else, contemporary scholars misunderstand productive labour theory because they project anachronistic and inapposite philosophical distinctions onto the theory. Such objections assume that a right cannot count as a 'moral' right unless it has a characteristic that many non-philosophical legal scholars call 'absolute' and different philosophers call 'deontological,' 'inviolable,' or 'imprescriptible.'⁷⁹ All of these terms refer to a requirement according to which a person may not justly be deprived of a moral right without his prior consent. Many theories of natural law or rights justify moral rights coherently without being 'absolute' in this sense; productive labour theory is one of those theories. Because labour theory is part of a practical theory of politics, it justifies officials' reasoning practically, especially by making the best indirect-

⁷⁶ Simmons 1992, 275

⁷⁷ Locke 1689b/1988, Second Treatise, s.43 p.298

⁷⁸ See Singer 2011, 14

⁷⁹ Kramer 1996, 128; Nagel 1995, 89-95; Waldron 1985, 13, 19, 158, 184

consequentialist forecasts they can in conditions of limited information.⁸⁰ Public officials may and should institute a system of conventional control rights if it seems practically more likely than alternatives to secure and enlarge citizens' non-conventional labour rights.

To be sure, when public officials make such practical determinations, they must respect a constraint that *resembles* the 'absoluteness' criterion discussed in the previous paragraph. In another usage, commonly associated with John Rawls, 'deontology' measures theories of politics by whether they make the Right lexically prior to the Good.⁸¹ Although Locke's and Rawls's theories of politics differ in many particulars, Locke's theory is deontological in the same limited, formal sense as Rawls's. For most practical purposes, Lockean politics makes '*the preservation of the Society*' and 'the publick good' coterminous with the preservation 'of every person in it' and 'the enjoyment of their properties in Peace and Safety.'⁸² In Rawls's taxonomy, the preservation of every person's safety and property counts as the Right. In any case where the bare survival of the community does not demand otherwise, the securing of the safety and property of all citizens counts as the Good. In Rawls's sense, then, Locke's account of the Right is lexically prior to his account of the Good.⁸³

⁸⁰ Munzer 1990, 273-74, suggests that labour-desert claims need to be limited by principles of utility and efficiency external to labour theory. Productive labour theory makes indirect-consequentialist arguments admissible, as economic and other utilitarian normative theories do. Yet productive labour theory requires lawgivers to use such arguments to determine how best to secure moral rights *internal* to the theory.

⁸¹ Rawls 1971, 30-32

⁸² Locke 1689b/1988, Second Treatise, s.134, p.355-356. But see Myers 1999, 139-177 (suggesting that the Right and the Good are coterminous in Locke's general understanding of normative value, even if his theory of politics deemphasizes the Good and focuses on the Right).

⁸³ See Zuckert 2005, 263-366; Myers 2005, 235

This formal deontology criterion, however, does not prevent productive labour theory from using legal coercion to reorder property rights. The criterion institutes a burden of justification. For control rights to be justifiable, they must at least not diminish and should (preferably) enlarge citizens' concurrent moral powers to acquire assets and then labour on them. Here, 'citizens' refers to *all* citizens, not merely owners but also non-owners. Yet the burden of justification may be satisfied, as Locke illustrates by comparing the lot of a day labourer in England with that of an aboriginal king in North America.⁸⁴ As Buckle explains,

In the money economy, ... subsistence, and even flourishing, becomes (for most people) no longer dependent on landed property, nor on the existence of an unappropriated common, but on deriving an income sufficient for life's purposes. So the purpose of the 'enough, and as good' clause, in the stage of the money economy, is satisfied if incomes provide a reasonable living.⁸⁵

Of course, this justification fails if those who lack property cannot earn wages. It also fails if wages do not give non-owners opportunities at least as robust as the opportunities they would have in a community without property rights or exchange to acquire life-preserving or -improving goods. That said, I assume here that the English and American political systems satisfy these requirements tolerably well. Moreover, to

⁸⁴ Locke 1689b/1988, Second Treatise, s. 41 p.296-297

⁸⁵ Buckle 1991, 159. G.A. Cohen argues that this response 'justifies private property only as long as appropriation generates an expanding common for the privately unendowed to forage on, and ... therefore fails to justify actual private property in the real and fully appropriated world.' Cohen 1995, 188. Locke's argument, however, does not hinge on how many resources are available for appropriation from common property; the opportunity to purchase goods in market exchanges replaces the opportunity to appropriate from common-pool resources.

the extent that these systems fall short of providing non-owners with the requisite opportunities to acquire the means of survival, their shortcomings may be addressed in fields separate from acquisition-related property law. In particular, public officials may limit the scope of control rights and recognize the sufficiency and charity limitations by instituting redistributive income taxation and public welfare programs.⁸⁶

Others criticize Locke's argument on the ground that Locke engages in an 'interesting exercise in armchair empiricism'⁸⁷ when he defends his contention that '[t]is *Labour* indeed that *puts the difference in value* on every thing.'⁸⁸ Perhaps the criticism here is that Locke makes a consequentialist argument in support of a broader moral argument. Yet not only Locke but also many contemporary moral theorists find it 'irrational, crazy,'⁸⁹ to suggest that a moral theory could justify a claim that we have certain rights without considering the consequences the existence of such rights would entail.

Perhaps the criticism is that Locke's consequentialism is informal or casual. If that is the objection, armchair empiricism often generates sensible prescriptions.⁹⁰ It takes considerable imagination, planning, practical intelligence, and effort to transform wild land into a productive farm; it is not unreasonable to judge that 99% of the crops' value for human prosperity is attributable to the transformation and cultivation of the land.⁹¹

As long as it seems practically likely that surplus crops will make their way to non-

⁸⁶ Cf. Simmons 1992, 333-352

⁸⁷ Merrill 2010, 498

⁸⁸ Locke 1689b/1988, Second Treatise, s.40 p.296

⁸⁹ Rawls 1971, 30

⁹⁰ Indeed, as Part VIII explains, throughout his writings, Locke supplies many persuasive reasons why it is unreasonable to expect any more than armchair empiricism in practice.

⁹¹ See Locke 1689b/1988, Second Treatise, s.37-41, p.294-297

owners through exchange, the property system secures labour-based moral rights for all citizens by establishing and protecting the control rights of farmers.

IV. Accession in Labour Theory

The justification for private property developed in the last two parts is ambiguous in an important respect: When someone appropriates an article and claims control rights over it, how far do the 'article' and the rights run? This is one of the problems raised by *Haslem*: Is ownership over the manure settled somehow by ownership of the land on which the manure sits? Locke alludes to this problem. At one point, he that 'whatsoever [an occupant] enclosed, and could feed, and make use of, the Cattle and Product was also his.'⁹² Why does the land owner's occupancy of the land automatically entitle the occupant to claim ownership over the cow?

In property law, the policy issue here is often called one of 'accession'; because this term is used differently in different fields of law and scholarship, let me clarify how I will use the term in this Chapter. In its earliest and narrowest usage, *accessio* refers to a situation in which an asset C, owned by A, is merged with asset D, owned by B, to create a new asset, E. In Roman law, *accessio* determines whether A or B owns E. This usage contrasts with *specificatio* (in which A transforms or improves D into E) and *confusio* (in which C and D are not merged but still commingled so that they cannot be sorted apart).⁹³ Black-letter English and American legal treatises⁹⁴ and seminal American

⁹² Ibid., Second Treatise, s. 38 p.295

⁹³ See Arnold 1922

⁹⁴ See, e.g., Kent 1826/1971, 2: 293-98; Blackstone 1766/1979, 2: 405-06

cases⁹⁵ construe the term ‘accession’ to refer to any situation in which ownership of C entitles A with a claim to own some other thing E as an accessory to C; in this usage, ‘accession’ encompasses not only *accessio* but also *confusio* and *specificatio*. Today, some scholars maintain that accession refers primarily to a principle for establishing ownership over property, which is distinct from and competes with acquisition or first possession.⁹⁶ (In this usage, a paradigm case of accession occurs when A’s riparian land C grows to include accreted land.) Others maintain that accession ‘doctrines about [allocating] newly discovered resources are really doctrines about defining the boundaries of already-owned ones.’⁹⁷ (Locke’s newly occupied land and the cattle and crops on it provide a paradigm case for this view of accession.) In my opinion, all of these usages and examples raise a common problem: how properly to scale several individuals’ claims of ownership in relation to one or more entities that are either owned or capable of ownership. If I were writing on a blank scholarly slate, I would call the policy issue a ‘scaling’ problem; since the term ‘accession’ has stuck in law and scholarship, I follow prevailing usage.

When understood as a scaling problem, accession renews the ‘no guidance in determining the scope of the right’ criticism against labour theory. Productive labour theory does not specify any particular scope to property rights on a one-size-fits-all basis. Yet it does have several responses that help focus property’s proper scope. Let me explain by critiquing Simmons’s response:

⁹⁵ *Lampton’s Executors v. Preston’s Executors*, 1 J.J. Marshall’s 454 (Ky. Cir. 1829)

⁹⁶ See Merrill 2010, 460

⁹⁷ See Newman 2011, 270 n.70; see Smith 2007, 1766-67

The amount of property that we make by our labour is determined by the nature of the activity. We can take that which is necessary to our projects ... but our property runs only to the boundaries of our implemented projects (and perhaps reasonable windfalls from those activities) not to just whatever we might envision): it is 'the spending [labour] on our uses' that 'bounds' our property.⁹⁸

Simmons is surely right that labour limits the scope of any person's property claim in the strictest sense of 'claim.' Assume someone has laboured legitimately on an unowned asset (where 'legitimately' imports all the qualifications acknowledged in part II above). As a matter of strict right, such a labourer deserves to continue using a thing on which he has laboured, only to the extent that, and as long as, the thing is reasonably necessary for him to produce plans for his prosperity. That limitation weakens fencers' claim to land not immediately under their fences and landowners' claims over manure.

Simmons is also right that appropriators may claim 'reasonable windfalls'—but his suggestion here requires considerable elaboration and qualification. Assume that unowned asset E has not yet been laboured on but is entangled considerably with assets C and D, both of which *are* being laboured on by (respectively) owners A and B.

Although neither A nor B's labour entitles them to claim E in the strictest sense of 'entitle,' productive labour theory permits the law to assign ownership of E if such an assignment seems a convenient or prudent means to encourage labour by A, B, and others similarly situated. Since productive labour theory allows and encourages

⁹⁸ Simmons 1992, 276 (quoting Locke 1689b/1988, Second Treatise, s. 51 p. 302). I thank Henry Smith for encouraging me to develop the argument explained in this and the next two paragraphs.

indirect-consequentialist reasoning, property law should deal with the relevant issues indirectly, by settling claims to resources in the class to which E belongs in all recurring disputes with the salient features of A and B's dispute. Indeed, Locke justifies private ownership with a similar argument. Locke argues that '*labour makes the far greatest part of the value of things, we enjoy in this World.*'⁹⁹ Strictly speaking, this argument entitles a labourer only to a lien on an external asset to the extent that he has laboured on it.¹⁰⁰ To expand the lien into absolute ownership, one needs an indirect-consequentialist argument as sketched in the last Part. Such an argument must explain why the lienholder is better-positioned than anyone else to use the resource over which he holds a lien, most productively, to the general benefit of the entire community.

Moreover, productive labour theory also identifies the considerations that should inform a public official's sense of what assignments seem convenient or prudent in an accession dispute. Two factors loom large—the productive and communicative aspects of labour, as discussed above in sections II.C and -D. As for labour's productive aspects, the public official should ask whether assets like C, D, and E will generate the greatest supply of benefits useful to human prosperity if assets in E's class are treated as standalone objects of ownership, accessories to assets in C's class, or accessories to assets in D's class. Separately, the prudent official should consider whether assets in E's class seems easily perceived as being 'part' of assets in C or D's class. Labour's productive and communicative aspects 'will usually—though not perfectly—tend to complement and reinforce each other, because the way in which human beings conceptually divide the material world into distinct 'objects' is closely tied to the

⁹⁹ Locke 1689b/1988, Second Treatise, s.42 p.297

¹⁰⁰ See Epstein 1979, 1226

usefulness of the objects identified.’¹⁰¹ So E is a ‘reasonable windfall’ to ownership of C or D depending on how these considerations apply in relation to particular assets, their relation to connected assets, and their likely intended uses.

Although these inquiries are not perfectly determinate, they are determinate enough to dispose of hard test cases. Some have wondered whether a king can appropriate an unowned continent when his explorer sets foot on it, or whether an astronaut can appropriate Mars for his country by clearing a place on it.¹⁰² In both cases, certainly not. As an original matter, the explorer’s and astronaut’s claims of ‘peculiar Right’ are limited to ‘[w]hatsoever [they] tilled and reaped, laid up and made use of,’ or ‘whatsoever [they] enclosed.’¹⁰³ The relevant inquiries are also determinate enough to provide useful guidance to common situations. In *Haslem*, the Connecticut supreme court rightly treated the manure as a entity separate from the public highway. Because highways are intended for human travel, the manure seemed ‘a nuisance that affected public health and the appearance of the streets.’ The manure would have made a much more natural accessory to farm land or other private land.¹⁰⁴ When a person encloses cattle in the course of fencing land, the fence communicates a clear intention to appropriate and manage the future use of both the cattle and the enclosed land. When a farmer plants corn, he entitles himself to the land reasonably ‘necessary to ... the activity of growing corn for the support of life.’¹⁰⁵ Because most people appreciate why

¹⁰¹ Newman 2011, 271. Newman makes this generalization while relying on and interpreting the policy implications latent in Roman accession in law. Yet Roman property law is grounded in norms about ‘use’ considerably similar to ‘use’ as justified in productive labour theory.

¹⁰² Rousseau 1762/1973, l.ix, p.197; Nozick 1974, 174

¹⁰³ Locke 1689b/1988, Second Treatise, s.38 p.295

¹⁰⁴ *Haslem v. Lockwood*, 37 Conn. 500, 506 (1871)

¹⁰⁵ Simmons 1992, 276

that control is necessary,¹⁰⁶ they appreciate the motivations to fence and respect fences. Fencing comes to be understood as the prelude to productive use of land fenced in.

This justification for accession helps rebut a distributive criticism Merrill has made against accession doctrine:

[T]he principle of accession means that private property has built into its very operation a set of doctrines that mean the rich get richer.... [I]t is disappointing but not surprising that Lockeans have ignored the principle of accession in their various accounts of why private property is justified. Accession can be powerfully efficient, but it is problematic on the grounds of individual desert favored by Lockeans.¹⁰⁷

When Merrill refers to 'Lockeans', he really means 'Nozickeans,' for by his citations his intended targets are really Nozick and Richard Epstein when Epstein followed Nozick closely.¹⁰⁸ Merrill's criticisms are inapplicable to productive labour theory, especially in land cases. To begin with, because accession presumes that land has already been distributed, even if accession makes the division of property slightly more unequal, the increases in inequality are bound to be minor at most. Next, as this Part has explained, the moral interest in productive labour sets a ceiling on accession. Owner A of resource C may claim resource E as an accessory only to the extent that E is reasonably necessary to, or a reasonable windfall from, his likely intended uses of C. In addition, as Merrill himself acknowledges, one of the main functions of accession doctrine is to assign

¹⁰⁶ Or, if they do not, they seem anti-social in that respect, and there is nothing morally wrong with holding them to a higher standard of sociability toward others' property.

¹⁰⁷ Merrill 2010, 499

¹⁰⁸ See *ibid.*, 497-499

control over a resource to a person who 'has the capacity to function as the owner of some prominently connected asset.'¹⁰⁹ That explanation states in utilitarian terms a labour-based point: The owner of prominently-connected asset C is best-positioned 'put[] the difference of Value' in accessory E.¹¹⁰ To the extent that non-owners are less likely than A to discover or use E productively, they cannot claim to suffer harm because A's ownership of C and E precludes them from finding and using E.¹¹¹ (Nor may non-owners complain if someone else discovers E, notifies A, and buys E from A; A 'uses' E for his own and others' prosperities if he sells it to someone who can use it more productively than he can.¹¹²) Perhaps non-owners may object that E should have been left as an unowned resource, where they could appropriate it for to satisfy the needs the sufficiency limitation entitles them to pursue. As Part III explained, however, if the political community has secure property rights and a well-functioning market, A's discovery and use of E may be practically more likely to generate for non-owners jobs, incomes, or a wider range of useful products than they would get from usufructs over E.

V. Lost Opportunities to Capture in Doctrine

To this point, I have proven my first claim: Productive labour theory is persuasive enough to supply a foundation for legal acquisition doctrine and to withstand criticisms commonly associated with Waldron, Nozick, and the supposed gulf between theories of rights and utility. In the rest of this Chapter, I turn to my second claim, that Anglo-

¹⁰⁹ Ibid., 489

¹¹⁰ Locke 1689b/1988, Second Treatise, s.40, p.296

¹¹¹ Ibid., Second Treatise, s.32-33, p.291

¹¹² See *Goddard v. Winchell*, 52 N.W. 1124, 1125 (Iowa 1892).

American capture, lost capture, and accession-related doctrines all illustrate how positive law may and should implement labour foundations.

I begin with lost capture doctrine, for it embodies the normative relations explained in Part I. Consider a situation in which several claimants concurrently discover and race to appropriate the same tangible resource. The pursuer who actually appropriates the resource may harm the others by denying them access to a resource they had hoped to acquire for themselves. Morally, however, as long as all the pursuers pursue using ordinary means,¹¹³ the appropriator's conduct does not wrong any of the other pursuers. All were labouring productively to attempt to appropriate the same resource; none wrongs the others by exercising the same moral power as they exercise more successfully than they do.

Anglo-American tort law embodies that basic policy settlement, as is obvious from the seminal 1707 decision *Keeble v. Hickeringill*. Keeble built large traps to lure ducks into ponds on his property. His (somewhat eccentric and perhaps mad) neighbour Hickeringill fired gun shots on his own property. Keeble alleged that Hickeringill shot not in the course of any beneficial activity but rather only 'intending to damnify the plaintiff in his vivary ... and deprive him of his profit.' The jury found for Keeble and awarded him 20 pounds in damages. Chief Justice Holt concluded that Keeble had a valid action.¹¹⁴

¹¹³ In text, 'ordinary means' refrain from attacking any of the other pursuers, and pursue the resource intending in good faith to use it for one's own prosperity.

¹¹⁴ *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 1127-1128 (1809) (1707); see Solly (1949)

Casebook authors intuit that *Keeble* is related to acquisition.¹¹⁵ Holt's opinion explains why Keeble's complaint and judgment are exceptions to a general rule of free pursuit and acquisition. Keeble could not bring trespass to protect any proprietary ownership interest in ducks he had not yet caught. Nor could he bring trespass to protect his interest in operating his trade completely free of unfair competition. Holt grounded this limitation in the fact that Keeble and Hickeringill both deserved equal natural law moral powers to catch ducks:

[E]very man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle.

Unfair competition scholars appreciate that *Keeble* announces seminal lessons about their field.¹¹⁶ Holt's opinion portrayed 'unfair competition' as the residue of competitive activities not justified by legitimate exercise of the moral power to labour. Hickeringill's conduct toward Keeble was wrongful because it was malicious, but here 'malice' states a narrow exception to a strong presumption that most competition is legitimate. If unfair competition principles did not specify narrowly what means of competition are 'unfair,' competitors would use the law to harass other competitors. One duck hunter might sue another solely on the ground that he suffered 'harm' from

¹¹⁵ See Merrill & Smith 2007, 92-95

¹¹⁶ See McKenna 2007, 1877-1878

not catching as many ducks as he did before the latter started hunting; or the former might contrive a sophisticated economic argument why the local community could only support one decoy operation. Holt's reasoning created a strong presumption against these or other similar arguments. After all, 'if a man doth [a competitor] damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff.' Holt confirmed as much when he compared the *Keeble* case to a precedent in which an older school sued a new competitor for building a better school and luring students to it.¹¹⁷

Keeble's claim was not covered by the presumption in favour of competition because the presumption presupposes that efforts to appropriate resources must be *productive*—that is, intended to enlarge the labourer's legitimate prosperity. Holt suggested that the plaintiff in a case like Keeble's could prevail if he could show that the defendant performed 'a violent or malicious act' instead of competing in good faith. Here, 'malice' is best understood as a tendency to diminish the prosperity of the victim without significantly enhancing the prosperity of the actor. To illustrate, Holt contrasted the school case as decided with a hypothetical in which the school master of the established school assaulted students to scare them from going to the new school. Competitors had natural rights, Holt concluded, to be free from the latter but not the former. So specified, liberty interests in competing indirectly produced good social consequences: '[T]here is great reason to give encouragement thereunto,' he explained, 'that the people who are so instrumental by their skill and industry so to furnish the

¹¹⁷ *Keeble*, 103 Eng. Rep. at 1129

markets should reap the benefit and have their action' against malicious disturbance of their trade.¹¹⁸ Because Hickingill's gun-shooting interfered with and was found to be motivated solely by a desire to interfere with Keeble's trade, the shooting was wrongful and tortious.

VI. Acquisition in Doctrine

A. The Basic Test for Capture

Anglo-American law uses the capture rule to settle appropriation claims over chattels not yet owned, and not covered by any accession-related or other relevant doctrine. The manure in the *Haslem* case fits this profile because it lay on a public highway. So does the fox in the seminal American capture case *Pierson v. Post*; that fox was susceptible to capture only because it had been chased onto 'a certain wild and uninhabited, unpossessed and waste land, called the beach.'¹¹⁹

It is at least permissible and in all likelihood quite prudent to employ the capture doctrine as the legal backstop for appropriation. Productive labour theory does not categorically require a society to make its acquisition rules track Locke's images of nut gathering, water scooping, or nut gathering. That said, Locke used these images because they illustrate powerfully the non-conventional expectations and moral interests by which citizens should judge the legitimacy of their society's conventional property rules. These images' impressiveness make them likely to supply a persuasive and stable template for legal acquisition rules.

¹¹⁸ *Id.* at 1128, 1129

¹¹⁹ *Pierson v. Post*, 3 Cai. R. 175, 175 (N.Y. 1805)

Anglo-American property law builds on these images using principles of occupancy (for land) and capture (for chattels, our main focus here). According to Blackstone, these rules assign things to ‘the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use.’¹²⁰ Lawyers understand occupancy and capture rules to have two elements: an act of taking, and some declaration of intention to appropriate. These elements supply a first approximation. When an individual completes these elements in relation to an unowned tangible asset, it is reasonable to presume that the individual is or is imminently about to use the asset to satisfy some aspect of his prosperity. A person may satisfy the ‘act’ requirement either by labouring on the asset (skinning a deer, or eating it) or by ‘put[ting] a distinction between’ the thing and the commons (netting the deer).¹²¹ By definition, the eating deploys the thing to life-preserving or -improving use. Even if the netting does not automatically translate into present consumption or transformation, it remains valuable because it ‘increases the supply of goods available for human life, and thereby improves human life.’¹²²

In addition, the occupancy and capture tests both make legal doctrine accomplish productive labour’s communicative function. In both tests, the claimant’s act must declare, or be accompanied by a statement declaring, an intention to establish dominion over the resource for future use. In the case of the deer, eating constitutes both present control and productive use. The netting claims control, but that control is universally understood as the prelude to future use. By contrast, consider another of Nozick’s

¹²⁰ Blackstone 1766/1979, 2:9. Accord 2 id. at 258

¹²¹ Locke 1689b/1988, Second Treatise, s.28, p.288

¹²² Buckle 1991, 150. See Locke 1689b/1988, Second Treatise, s.37 p 294

counterexamples, an attempt by an airplane pilot to appropriate land by flying over it and surveying it.¹²³ Although the survey is not as egregious a candidate for appropriation as Nozick's tomato juice hypothetical, it still fails to appropriate the surveyed land. The survey does not appropriate by satisfying immediately any need related to human preservation or improvement. Nor are onlookers likely to construe it as the prelude to imminent preserving or improving activity, as they would understand fencing.¹²⁴ Socially, the survey seems to lack 'enough seriousness of purpose to "overbalance" the community of virgin land.¹²⁵

Still, Blackstone's tests for occupancy and capture accord with productive labour theory only presumptively, because they do not expressly require that the appropriator use the land or chattel appropriated productively. For example, there is a disjunction between legal appropriation rights and the moral duty not to waste. Capture doctrine entitles Mike to claim exclusive ownership of a deer carcass, even if he does not immediately eat or skin the carcass. Here, legal doctrine presumes that Mike has plenty of egoistic incentives to use the exclusive control the law gives him to use the carcass for his benefit. Because this presumption seems practically reasonable, property law may legitimately refrain from including an affirmative 'use' element in capture doctrine; it may instead reserve backstops only for exceptional cases. In particular, the doctrine of adverse possession entitles someone to dispossess an owner of his property if the

¹²³ Nozick 1974, 174

¹²⁴ Locke 1689b/1988, Second Treatise, s.32, p.290-291

¹²⁵ Simmons 1992, 272

dispossessor appropriates it and the owner neglects to claim the property back for longer than the applicable statute of limitations.¹²⁶

Blackstone's test creates another disjunction, for it does not incorporate any limits embodying the sufficiency limitation. Morally, Mike's legal right to appropriate deer under the common law test is defensible only as long as Nick and Steve continue to have ample opportunities to acquire deer and other resources for their legitimate life-preserving or -improving needs. Here, as part III explained, public officials remain responsible for monitoring citizens' opportunities to labour for their own prosperities.¹²⁷

B. Constructive Capture

Separately, at the level of generality stated by Blackstone, the capture test seems structured consistent with an assumption that acquisition's labour-securing and -encouraging function always aligns with its claim-communicating function. This assumption is sensible as a starting presumption. In the absence of any more information, 'those persons who, by their industry and labour, have used such means of apprehending' resources may reasonably be expected to use those resources to benefit themselves and others in the community.¹²⁸ Because this generalization is just a presumption, however, it may be rebutted as other facts come to light. As *Of Property* itself suggests, Indians acquire property in deer by killing them, and a fisherman

¹²⁶ See *French v. Pearce*, 8 Conn. 439 (1831); Claeys Forthcoming b

¹²⁷ The capture test does not embody Locke's charity proviso, either. But the test does not need to embody that doctrine, because the doctrine is embodied in the privilege of necessity. See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910); *Ploof v. Putnam*, 71 A. 188 (Vt. 1908)

¹²⁸ *Pierson v Post*, 3 Cai. R. 175, 178 (N.Y. 1805)

acquires property in fish and whales when he ‘catches [them] in the Ocean,’ but perhaps the mere pursuit of a hare justly establishes a property over it.¹²⁹ Better to relax the strictness of property’s claim-communicating function, Locke must have assumed, to encourage property’s tendency to encourage labour to discover and pursue hares.

Ordinarily, lost capture and capture doctrines reward only the first clear capturer. In exceptional cases, however, property law may justifiably reward the first finder by entitling that finder to property. For an exception to be appropriate, officials must determine that there exists a bigger mismatch between the pursuit and successful capture of the resource than usually exists. They must also identify a proxy for successful capture that seems practically likely to preserve property law’s claim-communicating function.

Consider *Haslem*. Haslem and his servants engaged in productive labour. By Haslem’s intelligent direction and the servants’ manual effort,¹³⁰ both ‘increase[d] the value’ of the manure; they transformed droppings that were ‘comparatively worthless ... owing to [their] scattered condition upon the highway’ into a resource that could make someone’s farm more productive.¹³¹ Yet their labour did not satisfy the most literal understanding of capture doctrine’s ‘act’ requirement. After Haslem and his servants left, it was at least plausible for passers-by to assume the manure piles had been left for the taking. Nevertheless, the organization of the manure into piles had at least some tendency to put passers-by on notice that someone was in the process of appropriating the manure. In the circumstances, the court instituted a reasonable compromise. By

¹²⁹ Locke 1689b/1988, Second Treatise, s.30, p.289-290

¹³⁰ Both the direction and the effort count as labour. See Locke 1689b/1988, Second Treatise, s.28, p.289

¹³¹ *Haslem v. Lockwood*, 37 Conn. 500, 507 (1871)

entitling Haslem to a 'reasonable time to procure the means to take [the manure] away,' the court linked his acquisition right to his moral responsibility to complete his appropriation claim quickly as he could (the court suggested one day). Ordinarily, the capture rule does not expressly require the capturer to labour immediately on the thing. In a case in which a court agrees to institute a constructive proxy for capture, however, the responsibility to labour helps determine the contours of and limits on the proxy the court adopts.

Similar exceptions justifiably apply to some kinds of whaling. For most fish and whales, fishermen abide by a 'fast-fish-loose-fish' norm—a norm of actual capture. However, this norm does not apply well to whales which sink to the bottom of the ocean when killed and resurface later. Without a variation from the fast-fish-loose-fish norm, whaling would 'necessarily cease, for no person would engage in it if the fruits of his labour could be appropriated by any chance finder.' In response, in the North Atlantic during the nineteenth century, whalers came to adopt an 'iron-holds-the-whale' custom. This custom awards property to the first whaler to sink his (marked) lance or harpoon firmly in the whale. To qualify, the whaler must continue in hot pursuit of the whale, and after the whale carcass is found the whaler must pay a reasonable finder's fee to the finder. The finder's fee encourages beachfront owners to labour to bring whale carcasses into commerce. But the main reward and encouragement—property over the whale—should go to the person who engages in the most labour-intensive activity—finding and killing the whales. Like the reasonable-time proviso in *Haslem*, the hot-pursuit requirement conditions a whaler's acquisition claim on converting his 'constructive' capture into actual capture as soon as he can. And the marked lance

supplies a workable proxy for actual capture; it requires from the whaler ‘the only act of appropriation that is possible in the nature of the case.’¹³²

To be sure, it may not always be appropriate to institute a constructive-capture exception—or, it may be difficult to determine whether to institute an exception or instead abide by a bright-line rule. For example, many English or American judges would probably rule against Locke’s hare chaser until he actually killed or confined the hare. New York judges departed from Locke’s suggestion for hares in *Pierson*, the fox case. Post flushed out a fox, was in hot pursuit of it, and claimed to be close to catching it, but Pierson reached it first and clubbed it to death. Pierson argued for, and the New York supreme court decided the case with, a rule of actual capture: A fox hunter may not acquire legal possession over a fox without wounding it mortally, seizing it, or confining it in a net. Post argued for, and dissenting Judge Livingston would have decided the case using, a rule letting hot pursuit qualify as constructive capture.¹³³

The choice between these two rules is not fully determined by labour norms or common-sense practical judgment. Some treatises suggested a hot pursuit rule was

¹³² *Ghen v. Rich*, 8 F. 159, 162 (D. Mass. 1881); see *Bartlett v. Budd*, 2 F. Cas. 966 (D. Mass. 1868); *Taber v. Jenny*, 23 F. Cas. 605 (D. Mass. 1856); Ellickson 1989

Ghen and similar cases teach another lesson: It may be reasonable for legal acquisition rules to track customs by which private parties voluntarily resolve acquisition disputes. That said, before relying on customs, officials should consider two questions. One is how well the custom seems to accord with the general prescriptions of labour theory—i.e., how well they help citizens enjoy or produce goods ‘*really useful* to the life of Man.’ Locke 1689b/1988, Second Treatise, s.46, p.317. Separately, where labour theory generates a range of permissible acquisition rules without requiring any single one, officials may choose to rely on a custom on the ground that the custom already ‘settles’ the dispute. *Ibid.*, s.38, p.295.

¹³³ Compare *Pierson v. Post*, 3 Cai. R. 175, 175-176 (N.Y. 1805) (argument of Pierson’s counsel), 177-78 (Tompkins’ opinion for the court) with *id.* at 176-77 (argument of Post’s counsel), 181-82 (Livingston, J., dissenting).

acceptable; many others required seizing or wounding.¹³⁴ In addition, the idea of ‘labour’ is indeterminate that both the majority and the minority opinions cited it in support of their positions. Writing for the court, Judge Tompkins concluded that ‘encompassing and securing such animals with nets and toils ... may justly be deemed to give possession to those who, by their industry and labor, have used such means of apprehending them.’ In dissent, Judge Livingston asked rhetorically (and not a little sarcastically): ‘what gentleman ... would ... pursue the windings of this wily quadruped, if... a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?’ Ultimately, the majority decided the case focusing on labour’s claim-communicating function; it preferred the killing, wounding, or confining rule ‘for the sake of certainty, and preserving peace and order in society.’¹³⁵ This practical judgment is not unreasonable, but it is not beyond criticism because it assumes empirical premises that may be reasonably disputed. If two or more individuals are in hot pursuit of the same fox, an actual-capture rule makes it more likely than a constructive-capture rule that one individual might shoot another accidentally in the course of trying to catch the fox. At a formal level, no one can say with certainty whether more people will be injured by the error costs of an actual-capture rule (accidental shootings) or the corresponding costs of the constructive-capture rule (quarrels that escalate into fights). Ideally, to settle the choice between those costs, judges would need empirical information. Yet that data is often unlikely to be available. How easy is it for a social scientist—let alone

¹³⁴ Tompkins relied primarily on Justinian, Fleta, and Bracton in support of the rule of actual capture, see *id.* at 176-78, while Livingston relied on Barbeyrac to defend constructive capture, see *id.* at 181-82.

¹³⁵ *Pierson v Post*, 3 Cai. R. 175, 178-179 (1805); *id.* at 181 (Livingston, J., dissenting).

a judge—to forecast whether hunters will be provoked by a capture rule to duel farmers who kill foxes they are chasing? In the absence of such data, productive labour seems to frame the right questions, and it is not illegitimate to ask judges to rely on their practical judgment in the absence of thorough empirical data.¹³⁶

The foregoing discussion of *Haslem*, *Pierson*, and the whale cases help correct another mistaken impression about labour theory—that ‘notice to the world through a clear act’ and ‘reward to useful labour’ are separate (note the plural) ‘principles.’¹³⁷ If notice and capture-encouragement and -reward were two separate utilitarian principles, it might be hard to identify the utilitarian meta-principle that helps make them commensurable. By contrast, productive labour theory make notice and capture-encouragement and -reward two corollaries of a single principle. Each goal deserves to be promoted only to the extent that it contributes to a state of affairs in which politically-equal citizens have equal opportunities to labour concurrently on individually-owned assets. In most cases in practice, reasonable officials should be able to determine whether an asset more resembles an ordinary animal or mineral on one hand or a whale on the other hand. Even if foxes and other animals in hot pursuit create close cases for the capture

¹³⁶ *Pierson* is a hard case in another respect; it tests the boundaries between capture and lost capture doctrine. See McDowell 2007. Among other things, there may have been prior animosity between Pierson’s (old money, farming) family and Post’s (new money, wartime-equipment-supplying) family. Pierson may have appropriated the fox to spite Post and his family, and to send a message that local farmers did not approve of the sport of fox-hunting. Here, it was advisable to do what the New York courts did: Decide the relevant issues in abstraction from complicating background social rivalries. As a matter of capture policy, better to let the first clear capturer decide how to ‘use’ the fox. If the case had been decided on using *lost* capture doctrine, it should have been dispositive that a substantial number of local residents would have found it ‘productive’ to have the fox killed and eliminated as a predator on their livestock. That possibility could and should have generated a *per se* presumption that Pierson did not act maliciously by killing the fox as soon as possible.

¹³⁷ Rose 1985, 77. My criticism in text follows Mossoff 2003, 412.

doctrine, these close cases do not undermine the labour-based approach to capture generally.

C. Multiple Proprietary Claims

Ordinarily, black-letter doctrine holds that possession rights should be assigned in all-or-nothing fashion. The custom relied on in *Ghen* and other whaling cases, however, entitled whale finders to reasonable finder's fees. This custom makes sense. Because it is so time- and effort-intensive to appropriate a whale into human commerce, it is justifiable to give two individuals rewards for doing so—the whaler, and the finder. The law of sunken ships and treasure provides another example. The legal system secures owners' control and future use by returning stolen or lost articles to owners; this general principle applies to sunken goods when it is feasible to find the owner of a sunken wreck or treasure. In such cases, finders and recoverers deserve restitution but not possession or ownership. When true owners are unavailable, however, productive labour theory recommends that triers of fact follow a series of presumptions. The first presumption is to award boats or treasures to the parties who actually recover—i.e., capture—them. First-finders override the claims of actual recoverers only if and when they mark off their claims and then proceed in good faith and with reasonable diligence to recover the boats.¹³⁸ Yet both the first finder and the first recoverer contribute in different ways to the recovery of sunken goods. In the abstract, there is no way of saying whether the captain who finds a wreck or the one

¹³⁸ See *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981); *Brady v. Steamship African Queen*, 179 F. Supp. 321 (E.D. Va. 1960); *Eads v. Brazelton*, 22 Ark. 499 (1861)

who salvages it successfully contributes more to the reintegration of the wreck into human commerce and use. In some circumstances, it may be reasonable to award the finder property and order restitution to the salvor; in others, the opposite assignments may be reasonable.

Here, productive labour theory justifies and encourages the same style of indirect-consequentialist reasoning as is used in the progression from actual capture to constructive capture. The law begins with a 'rule'-level presumption in favour of single acquisition and ownership, like the presumption in favour of a bright-line actual capture requirement. As the preference for actual capture is rebuttable, however, the one-owner presumption is also rebuttable, when the asset is unlikely to be discovered without rewarding different contributions to the discovery and recovery of the asset.¹³⁹

VII. Accession Policy and *Ratione Soli* Doctrine

Again, however, acquisition doctrine operates as something of a backstop, in *unowned* areas like beaches, highways, and oceans. Quite often, the most effective way to enlarge citizens' free exercise of their labour rights is to give them legal rights that operate with little express reliance on the underlying moral rights. Chancellor Kent certainly appreciated as much. Although he justified civil property rights on natural rights grounds in his *Commentaries*, he acknowledged readily that acquisition had 'become almost extinct,' and 'made to yield to the stronger claims of order and tranquility'

¹³⁹ I thank Daphna Lewinsohn-Zamir for encouraging me to discuss this issue more fully.

associated with the alienation of property.¹⁴⁰ What Kent said of alienation is also true of accession; in most cases, the *ratione soli* rule and other related accession doctrines secure labour-based property rights more effectively than capture rules do. Productive labour theory can explain, just as well as other theories of property, why accession ‘dominates first possession’ in practice.¹⁴¹

Consider *Fisher v. Steward*, the beehive case discussed in the Introduction. Fisher and several associates had found the beehive while trespassing on Steward’s land, Steward had appropriated the hive, and the New Hampshire supreme court held that Steward’s appropriation and possession were lawful. Although the court rejected the claim by Fisher et al. that their ‘labor and skill’ entitled them to the hive,¹⁴² in so doing the court did not necessarily reject labour theory. It takes four separate practical judgments before it can be said that labour-based moral rights justify the positive-law holding in *Fisher*, and not all of these judgments are uncontroversial. Nevertheless, if a public official consulted simple and obvious observations about how people use land, trees, and bees, he might reasonably conclude that *Fisher’s* holding represents a reasonable way to secure in law property rights grounded in the moral right to labour. The first move is the move explained in Part III: If Steward ‘owns’ his land, the best way to promote labour is to endow him as ‘owner’ not merely with a usufruct but rather with broad legal rights of exclusive control, use, and disposition over his land. Each of the next three judgments relates to a separate application of the accession policies discussed in Part IV.

¹⁴⁰ Kent 1826/1971, 2:290, 255-76

¹⁴¹ Merrill 2010, 460

¹⁴² 1 Smith 60, 60-61 (N.H. 1804)

Accession doctrines differ sharply in application, depending on how the proposed ‘principal’ and ‘accessory’ resources in question relate to one another. Legally, the most obvious difference is this: Some accession-related doctrines apply as bright-line rules (say, the riparian doctrine of accretion¹⁴³), while others apply as general standards varying in application to the totality of particular circumstances (say, the doctrines regulating the merger (*accessio*) or substantial transformation (*specificatio*) of goods¹⁴⁴). To reconcile these and many other accession-related doctrines, however, leading early Anglo-American legal authorities justified accession in the same general terms identified in Part IV. According to Blackstone, accession applies when a ‘given corporeal substance receive[s] afterwards an accession by natural or by artificial means, as by the growth of vegetables [or] the pregnancy of animals,’ but not in cases in which ‘the thing itself ... [is] changed *into a different species*.’¹⁴⁵ Blackstone stresses the perception-related aspect of accession doctrine. Entity B deserves to be treated as a legal accessory to entity A if it seems an outgrowth of or extension from A’s ‘corporeal substance,’ but not if it seems ‘a different species.’ Kent explains accession in similar terms, but he also exempts cases in which B’s poem is written on A’s parchment, on the ground that the written manuscript belongs to the ‘author[, who] has a higher, and, consequently, the *principal interest* in’ it.¹⁴⁶ For Kent, the owner of entity A deserves to own entity B as an accessory if his labour to create A creates a normative interest in B; in this situation, accession focuses on the previous and likely future uses of A and B. In

¹⁴³ See *Nebraska v. Iowa*, 143 U.S. 359 (1892).

¹⁴⁴ See, e.g., *Wetherbee v. Green*, 22 Mich. 311 (1871).

¹⁴⁵ Blackstone (1766), 2:404 (emphasis added)

¹⁴⁶ Kent (1826), 2:296 (emphasis added). Here, Kent noted Roman law to the contrary, pronounced it “absurd,” and recommended that readers follow French principles in conformity with the principles explained in text. *Id.*

a similar vein, one early accession case acknowledged that it is ‘very difficult to ascertain any principle of uniform and universal application, on which the [standard] is itself founded,’ but then encouraged the law to identify the owner with ‘the principal interest’ in the asset or assets in question.¹⁴⁷

To be sure, these legal tests are circular. One asks whether the proposed accessory is perceived so closely with the proposed principal asset that the former should be deemed an accessory to the latter; the other asks whether the former seems likely enough to be used beneficially as a package with the latter that it ought to be deemed a legal accessory to the latter. Notwithstanding this circularity, however, the tests provide enough guidance to focus legal inquiries into the issues needed to settle the *Fisher* case.

The first application runs from Steward’s land to the trees on his land. Although there may not be perfect or irrefutable empirical information, it seems safe to rely on armchair empirics to conclude that trees are accessories to land. In doctrine, trees are deemed accessories because they are classified as fixtures and fixtures are automatically accessories.¹⁴⁸ To be sure, this *per se* classification could be challenged. In human perception, trees seem less intertwined with land than soil seems. At the same time, because trees are rooted in ground, the law does no violence to human perception if it classifies a tree as part of the same *res* or ‘entity’ as land. In addition, it seems practically certain that trees and lands are used more productively if treated as a combined entity. If Fisher and friends could have appropriated trees on Steward’s land, they would have deserved and received implied easements of access to tend and enjoy

¹⁴⁷ Lampton’s Executors v. Preston’s Executors, 24 Ky. (1 J.J. Marsh.) 454, 459 (1829)

¹⁴⁸ See, e.g., Brown 1975, s.16.1-.2, p.514-522, Kent 1827/1971, 2:295

their trees. Such easements would require Steward and similarly-situated land owners to monitor their boundaries. Such monitoring would make it more difficult for owners to enjoy their land to the fullest. In addition, a land owner may reasonably be expected to account for trees and how well they fit in with his plans for the long-range management of his land. No surprise, then, that, in the *Fisher* case, Fisher and the other plaintiffs did not even contest Steward's ownership of the tree.¹⁴⁹

So next, in a case like *Fisher*, the conscientious judge must determine whether Steward's exclusive control over the land and tree entitle him to corresponding control over the beehive. Doctrinally, that question presents another possible extension of the fixture doctrine. The answers to the two questions accession policy makes relevant are not settled as decisively in relation to the beehive as they are in relation to the trees. That said, in *Fisher*, the court was almost certainly correct to conclude that the hive was an accessory to the land-and-tree. The court reasoned that it 'is much more consonant to our ideas of property to say, that the bees and honey in the [land owner's] trees belong to him in the same manner and for the same reason as all mines and minerals belong to the owner of the soil.' Since land owners are entitled to exclusive control over their land, and fixture doctrine entitles them to claim mines and minerals as accessories to their land, it is reasonable to presume that owners deserve ownership over lesser articles like beehives on the same grounds. The court then turned to the policies that might reverse the presumption created by the mine and mineral analogies: 'Will it be pretended that plaintiffs thereby acquired a right to the tree? If they acquired a title to the honey, they must necessarily have a right to take it away, to cut down the tree, to

¹⁴⁹ See *Fisher v. Steward*, 1 Smith 60, 60 (N.H. 1804)

pass over the defendant's land for the purpose, &c.' In other words, the court forecast the consequences likely to follow if the hive (or the hive and tree together) were treated as an entity separate from the land. As the court understood, if the hive were a separate object of property, hive owners would be entitled to implied easements to traverse owners' land and service their hives—like the easements non-owners enjoy in rural communities to graze livestock or gather sticks.¹⁵⁰ Correctly, the court worried that such an easement would 'interfere[] with the rights and property clearly vested in defendant; [such an easement] is inconsistent with 'the defendant's property]; it lessens its value at least.'¹⁵¹ Behind the veil of ignorance, the 'interference' created by rights of access are much less justifiable for beehives than they are for grazing grass or sticks. The latter are far more urgent than the former to preserve the lives of inhabitants and their livestock.

The last extension runs from the land-and-tree-and-hive to the bees. Doctrinally, this extension involves not the fixture rule but the *ratione soli* rule. Anglo-American property law has long distinguished *domitae naturae* from *ferae naturae*, domesticated and wild species of animals. (Note that these presumptions are usually applied species by species, consistent with productive labour theory's indirect-consequentialist tendencies.) The *ratione soli* rule parallels the fixture rule; it assigns ownership over domesticated animals to the owner of the land in relation to which the animals have an *animus revertendi*, a habit of returning because their a domicile is located on that land. By contrast, for wild animals, property law entitles land owners only to the exclusive opportunities to catch such animals on their own lots. If a hunter manages to lure a

¹⁵⁰ Blackstone 1766/1979, 2:35

¹⁵¹ *Fisher*, 1 Smith at 61

duck off of a land owner's land before catching it (as Keeble did to ducks on Hickeringill's land), the hunter captures the animal.¹⁵²

Here, too, none of these rules are strictly required by labour theory or the information and judgment that theory makes relevant. Nor do these sources require that or settle whether accession policies should be applied animal by animal, species by species, or using Blackstone's two-track distinction between domestication and wild disposition. Even so, the common law settlements of these issues are not unreasonable. By making domesticated animals accessories of land, the *ratione soli* rule folds ownership of animals likely to be used in a manner that complements the use of land into ownership of the more-valuable land. And Blackstone's two-track distinction settles ownership of the most common and valuable animals (horses, dogs, and livestock) while providing a tolerably clear and easy-to-apply rule for other species.

VIII. On the Relation Between Legal Property and Moral Rights to Labour

As applied in Parts V through VII, productive labour theory may seem to many readers an unusual moral theory. A theory of legal rights cannot really be 'moral,' such readers may assume, unless it requires legal doctrine to embody or declare its prescriptions expressly. A few of the doctrines or cases just recounted appeal expressly to labour: *Haslem*, the whale cases, Holt's opinion in the duck case *Keeble*, and (at least in some respects) the fox case *Pierson*. Yet many more cases and doctrines seem not to rely on labour theory. In *Pierson*, the court declined to encourage labour in the pursuit of foxes

¹⁵² See Brown 1975, s.2.4, p.17

as the whale cases did later for whales. In *Fisher*, the court expressly rejected the claim by Fisher and his associates to own the beehive by virtue of their ‘labor and skill’;¹⁵³ *Fisher* is representative of many other applications of the fixture and *ratione soli* rules. Similarly, many readers may lodge the squaring-the-legal-circle objection: Labour theory seems to prescribe a ‘specific structure of ownership whereby people [are] entitled to nothing more and nothing less than the concrete fruits of their labour,’ and that such prescriptions are inconsistent with ‘consequentialist skeins of argument.’¹⁵⁴ The rules of decision in *Pierson*, any trespass case, and (especially) accession-driven decisions are inconsistent with that expected structure.

Some renditions of labour theory may have one or both of these characteristics; productive labour theory has neither. Productive labour theory supplies the foundations for the acquisition and ownership of property. The theory then permits public officials to secure those foundations reasoning practically and indirect-consequentially. Quite often, the theory encourages officials to institute a formal legal rule as a first approximation, but then to relax that approximate rule as more facts come to light. In lost capture disputes, courts presume that most pursuits of resources are legitimate and not wrongful, but then leave a plaintiff-pursuer free to prove that a defendant-pursuer acted ‘maliciously’ in the specialized sense explained in part V. In capture disputes, courts presume that manual capture is a workable proxy for appropriation; they relax and revise the concept of ‘capture’ as appropriate to encourage the beneficial gathering of resources that are cost- or labour-intensive to appropriate. In fixture and *ratione soli* disputes, courts build on presumptions about

¹⁵³ *Fisher v. Steward*, 1 Smith 60, 61 (N.H. 1804)

¹⁵⁴ Kramer 1997, 128

exclusive control and immovable resources, to presume that fixtures and tame animal species are best controlled by the owner managing land.

In such reasoning, labour rights and consequential reasoning are not inconsistent. Different legal presumptions, forms, and variations are all judged by how well they secure concurrent labour rights to all interested parties. Moreover, in such reasoning, there is nothing inconsistent or paradoxical about rejecting appeals to labour in specific cases. *Fisher* confirms this lesson. As section II.D explained, productive labour theory requires that labourers mark off the resources on which they mean to labour. When citizens so labour, it follows that others ‘ought not to meddle with what was already improved by another’s Labour.’ But since labour interests are social, and since property rights can vary widely in character, non-conventional property rights must be ‘settled’ in law or other conventional authorities.¹⁵⁵ That background helps explain why the New Hampshire supreme court treated Fisher and his associates not as labourers but as trespassers. The boundary rules demarking Steward’s land were justified by their tendency to encourage the productive use of land and to settle property disputes; Fisher and his associates violated those boundaries.

When productive labour theory is portrayed in this practical light, some readers may raise other objections.¹⁵⁶ In easy cases, settled by the capture rule or specific accession doctrines, perhaps ideas about ‘natural rights’ or ‘labour’ seem to contribute little or not at all to the substantive rules of decision. In hard cases, although public officials may cite ‘natural rights’ or ‘labour’ as policy goals, perhaps these terms contribute less to the legal rules finally adopted than pragmatic policy analysis seems to contribute. So

¹⁵⁵ Locke 1689b/1988, Second Treatise, s.31, 45, p.291, 299

¹⁵⁶ I thank James Penner and Greg Keating for raising the following objections.

portrayed, productive labour theory may seem indeterminate. Or, perhaps the ‘rights’ grounded by labour norms are too weak or tentative to serve as strong trumps against private aggression or unjust government action.

Although these objections raise issues too far-ranging to be settled decisively here, a few responses are in order. To begin with, it is unrealistic to expect a theory of rights to apply directly and concretely to practice. Locke justifies labour as ‘[t]he measure,’ the ‘great Foundation,’ and the ‘*begin[ning of] title of property*’—but when justified on labour-based foundations property claims must still be ‘settled’ in conventional sources.¹⁵⁷ Labour-based claims need settlement especially because they structure property rights in accordance with correlative social obligations. Nozick’s account of property rights may generate clearer starting prescriptions than productive labour theory does, but it can manage to be clearer because in it property is subject to fewer correlative obligations than it is in productive labour theory.¹⁵⁸ And it is worth sacrificing considerable clarity to accommodate property’s social character. A stable system of property must accomplish two functions: not only to order property rights in accordance with labour theory but to make that ordering popular and durable. Because productive labour theory states a social theory of property, it gives every citizen a stake in the political order’s property laws. If the political process is tolerably well-ordered, property laws will accommodate both the labour claims of owners and the non-waste, sufficiency, and charity claims of prospective owners and non-owners. Precisely because productive labour theory leaves the exact boundaries of positive acquisition

¹⁵⁷ Locke 1689b/1988, s.36, 44, 51, 45, p. 292, 298, 302, 299

¹⁵⁸ See Nozick 1974, 151 (‘A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.’)

and accession rules open-ended for settlement, it leaves the laws free to accommodate these competing claims in the manner that seems to the citizenry likely to strike the best balance of being just and politically sustainable.

Last, these objections make unrealistic epistemological assumptions about how determinate a moral theory of rights may be. Productive labour theory identifies an ideal state. Although judges and other officials must reason about practical consequences how best to actualize that ideal state, it is no small accomplishment to identify that ideal state. If readers find indeterminate the practical reasoning needed to implement productive labour theory, they are holding not only Lockean theory but also most political and legal practice to unrealistic expectations. When Locke theorizes about human practical action, he stresses that humans operate in a ‘State of *Mediocrity*.’ In this state, it is realistic for theorists to aspire only to ‘Judgment and Opinion, not Knowledge and Certainty.’¹⁵⁹ This epistemological mediocrity is an obstacle for even the best observers on human life; ordinary public officials suffer from many more limitations. Different individuals have different dispositions, needs, and life circumstances.¹⁶⁰ In the best cases, those differences make it difficult for most public officials to understand most citizens’ interests disinterestedly and sympathetically—and in practice those officials’ capacities for judgment are clouded anyway by ‘Passion or Interest.’¹⁶¹ Take all these limitations together, and a political leader is ‘wise,’ even

¹⁵⁹ Locke 1700/1979, IV.xii.10, p. 645

¹⁶⁰ See Locke 1700/1979, II.xxi.55, p.269-70; West 2012, 33-35

¹⁶¹ Locke 1689b/1988, Second Treatise, s.38, 45, 136, p.295, 299, 358-59

‘godlike,’ if he manages ‘by established laws of liberty to secure protection and encouragement to the honest Industry of mankind.’¹⁶²

Given all of this epistemological and political mediocrity, it is reasonable and just for a system of law to secure labour first through simple legal forms and to appeal back to moral foundations only in extreme cases. If most men reason as badly as often the last paragraph suggested, ‘[h]earing plain commands, is the sure and only course to bring [most men] to obedience and practice’ and is ‘likelier to enlighten the bulk of mankind, and set them right in their duties, and bring them to do them, than by reasoning with them from general notions and principles of human reason.’¹⁶³ At least in the first instance, then, property rights should be structured with forms that embody commands. On one hand, most citizens reason poorly in practice about general matters like the legal foundations of property rights. On the other hand, as section II.B explained, when property laws mark off property rights tolerably clearly, most citizens may be trusted reliably to assert and protect their own property and respect the property of others. If people associate property with the image of capture, or with Blackstone’s paean to property as ‘sole and despotic dominion,’¹⁶⁴ conventional property rights should be attractive and vivid enough that citizens may assert them vigorously against unjust action by neighbours or the government. Only in the cases in which legal forms stray considerably from labour foundations—whale-hunting, or

¹⁶² Ibid., s.42, p.298

¹⁶³ Locke 1696/1965, s.243, p.178-179. The commands to which Locke refers here are scriptural commands about individual ethics. Yet what Locke says about scriptural commands applies equally persuasively to legal and other political commands. See Locke 1700/1979, II.xxviii.8-9, p.352-53.

¹⁶⁴ Blackstone 1766/1979, 2:2

treasure-salvaging—does it become appropriate for public officials to recalibrate the forms more closely to fit their foundations.

Conclusion

When Lockean labour theory is grounded in productive use, it grounds ownership of property in each person's non-conventional right to acquire and deploy external assets to satisfy some aspect of his self-preservation or -improvement. In acquisition doctrines, productive labour theory focuses laws on securing to all citizens concurrent equal opportunities to acquire and use assets, each to labour for his own distinct though productive goals. This productive rendition of labour theory is more persuasive and internally coherent than the interpretations of Lockean labour theory most influential in American legal scholarship on property—those presented by Nozick and Waldron a generation ago.

Separately, although this productive account of labour does not totally determine the content of property doctrine, it strikes a sensible and realistic balance between focus and flexibility. At the deepest level beneath practice, productive labour theory supplies property regulation with an overriding focus. One level beneath practice, the theory justifies officials' instituting useful indirect-consequentialist presumptions and working paradigms. At the level closest to practice, productive labour theory supplies focused practical goals on which officials may focus as they apply or refine those intermediate presumptions. Although this style of practical reasoning is far from determinate, if acquisition disputes are a reliable guide it is good enough for government work. And if

Locke's theory of labour is good enough for government work, it deserves much more respect that it enjoys among contemporary property scholars.

Bibliography

Alexander, G. & Peñalver, E. M. (2012) *An Introduction to Property Theory* (Cambridge, UK: Cambridge University Press)

Arnold, E. C. (1922) 'The Law of Accession of Personal Property' 22 *Columbia Law Review* 103-120

Bartlett v. Budd (1868) 2 F. Cas. 966 (D. Mass.)

Blackman, J. (2011) 'Outfoxed' 51 *American Journal of Legal History* 417-460

Blackstone, W. (1766) *Commentaries on the Laws of England* A. W. B. Simpson intro. & ed. (Chicago: University of Chicago Press, 1979)

Brady v. The African Steamship Queen (1960) 179 F. Supp. 321-324 (E.D. Va.)

Brown, R. A. (1975) *The Law of Personal Property*, 3d ed. (Chicago: Callaghan & Co.)

Buckle, S. (1991) *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press)

Claeys, E. R. (2008) 'The Private Society and Public Good in John Locke's Thought' 21 *Social Philosophy and Policy* 201-234

Claeys, E. R. (2009) 'Virtue and Rights in American Property Law' 94 *Cornell Law Review* 889-947

Claeys, E. R. (2010a) 'The Right to Exclude in the Shadow of the *Cathedral*: A Response to Parchomovsky and Stein' 104 *Northwestern Law Review* 391-409

Claeys, E. R. (2010b) 'Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights' 85 *Notre Dame Law Review* 1379-1446

Claeys, E. R. (2012) Comment, 'Exclusion and Legal Theory: A Comment on *Property As the Law of Things*' 125 *Harvard Law Review Forum* 133-150

Claeys, E. R. (Forthcoming a) 'Intellectual Usufructs: Trade Secrets, Hot News, and the Usufructuary Paradigm at Common Law,' <http://ssrn.com/abstract=1889231>

Claeys, E. R. (Forthcoming b) 'Locke Unlocked: Productive Use in Encroachment, Adverse Possession and Labour Theory,' <http://ssrn.com/abstract=1759551>

Cohen, G. A. (1995) *Self-Ownership, Freedom, and Equality* (Cambridge, UK: Cambridge University Press)

Dagan, H. (Forthcoming) 'The Public Dimension of Private Property,' <http://ssrn.com/abstract=2045487>

The Deer Hunter (1978)

Drassinower, A. (2006) 'Capturing Ideas: Copyright and the Law of First Possession' 54 *Cleveland State Law Review* 191-204

Eads v. Brazelton (1861) 22 Ark. 499-516

Ellickson, R. C. (1989) 'A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry' *Journal of Law, Economics & Organization* 83-97

Epstein, R. A. (1979) 'Possession as the Root of Title' 13 *Georgia Law Review* 1221-1243

Epstein, R. A. (1998) *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (Reading, Mass.: Perseus Books, Inc.)

Feinberg, J. (1970) 'The Nature and Value of Rights' 4 *A Journal of Value Inquiry* 243-257

Feinberg, J. (1984) *The Moral Limits to the Criminal Law: Harm to Others* (New York: Oxford University Press)

Fernandez, A. (2009) 'The Lost Record of *Pierson v. Post*, the Famous Fox Case' 27 *Law and History Review* 149-178

Fisher v. Steward (1804) 1 Smith 60-62 (N.H.)

French v. Pearce (1831) 8 Conn. 439-447

Ghen v. Rich (1881) 8 F. 159-162 (D. Mass.)

Goodard v. Winchell (1892) 52 N.W. 1124-1126 (Iowa)

Haslem v. Lockwood (1871) 37 Conn. 500-507

Hohfeld, W. N. (1913) 'Some Fundamental Conceptions As Applied in Legal Reasoning,' 23 *Yale Law Journal* 16-59

Kant I. (1797) *The Metaphysics of Morals* M. Gregor trans. (Cambridge: Cambridge University Press, 1991)

Kaplow, L. & Shavell, S. (2002) *Fairness Versus Welfare* (Cambridge, Mass.: Harvard University Press)

- Keeble v. Hickeringill (1707) 103 Eng. Rep. 1127-29 (reported Q.B. 1809)
- Kendrick, L. (2011) 'The Lockean Rights of Bequest and Inheritance' 17 *Legal Theory* 145-169
- Kent, J. (1826-30) *Commentaries on American Law* (New York: Da Capo Press, 1971)
- Kramer, M. H. (1997) *John Locke and The Origins Of Private Property: Philosophical Explorations of Individualism, Community, and Equality* (Cambridge, UK: Cambridge University Press)
- Lampton's Executors v. Preston's Executors (1829) 1 J.J. Marshall's 454-470 (Ky. Cir.)
- Locke, J. (1689a) 'Epistola De Tolerantia Ad Clarissimum Virum' in R. Klibansky ed. & J. W. Gough trans. *Epistola De Tolerantia: A Letter on Toleration* (Oxford: Clarendon Press, 1968)
- Locke, J. (1689b) *Two Treatises of Government*, Peter Laslett ed. (Cambridge, UK: Cambridge University Press, 1988)
- Locke, J. (1693) *Some Thoughts Concerning Education, in Some Thoughts Concerning Education and of the Conduct of the Understanding*, R. W. Grant & N. Tarcov eds. (Indianapolis: Hackett Publishing, 1996)
- Locke, J. (1695) *The Reasonableness of Christianity*, George W. Ewing ed. (Washington, DC: Regnery Gateway, 1965)
- Locke, J. (1700) *An Essay Concerning Human Understanding* P. Nidditch ed. (Oxford: Clarendon Press, 1979)
- Lueck, D. (1995) 'The Rule of First Possession and the Design of the Law' 38 *Journal of Law & Economics* 393-436
- MacIntyre, A. (1984) 'Hume on the "Is" and the "Ought"', in *Against the Self-Images of the Age* 2d ed. (South Bend, Ind.: University of Notre Dame Press)
- MacPherson, C. B. (1962) *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press)
- McDowell, A. (2007) 'Legal Fictions in *Pierson v. Post*' 105 *Michigan Law Review* 735-776
- McKenna, M. (2007) 'The Normative Foundations of Trademark Law' 82 *Notre Dame Law Review* 1839-1916
- Merrill, T. W. & H. E. Smith (2007) *Property: Principles and Policies* (New York: Foundation Press)

Merrill, T. W. (2010) 'Accession and Original Ownership,' 1 *Journal of Legal Analysis* 459-510

Mossoff, A. (2002) 'Locke's Labour Lost' 9 *University of Chicago Roundtable* 155-164

Munzer, S. R. (1990) *A Theory of Property* (Cambridge: Cambridge University Press)

Myers, P. C. (1999) *Our Only Star and Compass: Locke and the Struggle for Political Rationality* (Lanham, MD: Rowman & Littlefield)

Munzer, S. (1990) *A Theory of Property* (New York: Cambridge University Press)

Nagel, T. (1995) 'Personal Rights and Public Space' 24 *Philosophy & Public Affairs* 83-107

Nebraska v. Iowa (1892), 143 U.S. 359-370

Newman, C. M. (2011) 'Transformation in Property and Copyright' 56 *Villanova Law Review* 251-325

Nozick, R. (1974) *Anarchy, State, and Utopia* (New York: Basic Books)

Olivecrona, K. (1974) 'Locke's Theory of Appropriation' 24 *Philosophical Quarterly* 220-234

Pierson v. Post (1805) 3 Cai. R. 175-182 (N.Y.)

Ploof v. Putnam (1908) 71 A. 188-190 (Vt.)

Rawls, J. (1971) *A Theory of Justice* (Cambridge, Mass.: Harvard University Press)

Rose, C. (1985) 'Possession as the Origin of Property,' 52 *University of Chicago Law Review* 73-88

Rousseau, J. (1762) *The Social Contract, in the Social Contract and the Discourses* G. D. Cole trans. (New York: Alfred A. Knopf Inc., 1973)

Simmons, A. J. (1992) *The Lockean Theory of Rights* (Princeton, NJ: Princeton University Press)

Simmons, A. J. (1994) 'Original-Acquisition Justifications of Private Property,' 11 *Social Philosophy & Policy* 63-84

Simmons, A. J. (1998) 'Makers' Rights,' 2 *Journal of Ethics* 197-218

Singer, J. W. (2011) 'Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity,' 86 *Indiana Law Journal* 1-16

Smith, H. E. (2007) 'Intellectual Property as Property: Delineating Entitlements in Information' 116 *Yale Law Journal* 1742-1822

Solly, A. R. (1949) 'Edmund Hickerlingill: Eccentric' 58 *Essex Review* 127-134

Sreenivasan, G. (1995) *The Limits of Lockean Rights in Property* (New York: Oxford University Press)

Sugden, R. (1986) *The Economics of Rights, Cooperation, and Welfare* (New York: Palgrave MacMillan, 2d ed. 2004)

Taber v. Jenny (1856) 23 F. Cas. 605-609 (D. Mass.)

Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560-573 (5th Cir. 1981)

Tully, J. (1980) *Discourse on Property: Locke and His Adversaries* (Cambridge, UK: Cambridge University Press)

Tully, J. (1993) *An Approach to Political Philosophy: Locke in Contexts* (Cambridge, UK: Cambridge University Press)

Vincent v. Lake Erie Transportation Co. (1910) 124 N.W. 221-222 (Minn.)

Waldron, J. (1983) 'Two Worries About Mixing One's Labour' 33 *Philosophical Quarterly* 37-44

Waldron, J. (1988) *The Right to Private Property* (Oxford: Clarendon Press)

West, T. G. (2012) 'The Grounds of Locke's Law of Nature' 29 *Social Philosophy & Policy* 1-50

Wetherbee v. Green (1871) 22 Mich. 311-322

Zuckert, M. (2005) 'Reconsidering Lockean Rights Theory: A Reply to My Critics' 32 *Interpretation: A Journal of Political Philosophy* 257-268