ORIGINAL ACQUISITION TODAY

An 'Original Acquisition' (OA) justification of strong private property rights, allegedly first enunciated by John Locke, has in recent decades been increasingly adopted in some circles. These writers purport to demonstrate that as property rights may exist prior to, and provide a justification for, government and other forms of social constraint; they should therefore to the greatest possible extent be immune to the latter's interference. Yet many theorists equivocate as to whether the acquisition they write of is only an in-theory possibility, or whether it has occurred historically. Both approaches have benefits necessary for the complete OA justification sought; but crucially, the two are mutually exclusive. By overlooking this problem, OA theorists leave themselves in a precarious position, their work seemingly easily dismissed. However serious attempts to address the problem have resulted in theories that lack much of what is needed for OA to justify a regime of strong property rights.

Introduction

Any theory of property, whether it favours private property, collective property or some combination of the two, must include some account of how property can first be acquired. However, the term 'original acquisition theory' is usually reserved for the views of those such as Robert Nozick (1974), Jan Narveson (1988), and A. John Simmons (1993), who are inspired by a particular reading of John Locke's work, predominantly his *Second Treatise of Civil Governmen*t (1965[1690]).[1] In such theories, explanations of acquisition are of central importance, as the way in which acquisitions are made is held to have lasting significance for the nature of just property control. Such theories seek to justify unilateral appropriation by individuals, and generally purport to demonstrate that property can exist independently of, or prior to, our social structures; and that interference with property might therefore be considered to be outside the scope of legitimate government. Yet original acquisition theories come in a wide variety of forms and operate in a number of different ways. They may seek to demonstrate that some property now

[1] For a convincing account of why this reading of Locke is mistaken, see Breakey (forthcoming). I would like to take this opportunity to thank Hugh Breakey for pointing out to me many of my unjustified assumptions about Locke's meanings and motives.

held is justifiable entirely in this way, or have the more modest aim of proving that such ownership is at least possible. Some employ an understanding of original acquisition (henceforth OA) as an act that takes place in the world; for others it is something of only theoretical importance. For example, in Nozick's (1974, pp. 174-7) understanding OA is an act which may occur in reality, however he is ambivalent as to how well this can provide a sound basis for much of today's property.

My purpose in this paper will be to examine the relevance of Lockean OA theory to debates about the distribution and control of property in the real world of today. In particular, my focus will be on the use of OA accounts to justify *strong* property rights. As we will see, the alleged ability of OA theory to do this is an important point of difference between it and other, less contentious, justifications of property. However the justification sought generally rests on ambiguities. Acquisition in the appropriate manner is presented both as something that has actually occurred, and something which need only be possible in theory. The former of these (the historic approach) is of use in mounting a defence of strong rights, the later (the theoretic) in making a case for the wide applicability of the theory. However the two approaches are incompatible with each other, and either one must be chosen or some concessions must be made. My contention will be that while the historic approach offers the only possible avenue for a defence of strong rights, this approach is unsound. As such, OA can provide *at best* a very incomplete account of just property relations, and one with little to say on the appropriate strength of property rights.

Section I – Original Acquisition Theory

The OA accounts with which I will be concerned here share a number of features. As noted, property acquisition theories of the type to be evaluated here are used to justify strong private property rights. By 'strong right', I mean an authority over one's property that is as exclusive and significant as possible, or something close to this. A strong right implies that control over a possession is entirely the province of the owner(s), and that any infringement on this by others constitutes a severe misdeed. Other factors which I will assume to be implied by the concept of 'strong property right' are that the rights in question endure over time and are transferable in full.[2] Such a scheme of rights is justified by giving an account of acquisition that does not make it contingent on contract with others or on government sanction. Contrary to writers such as Munzer (1990, pp. 16-7) and Waldron (1988, p27), property rights in this sense are understood not as a relationship between persons and others with regard to things, but principally between persons and the things themselves. Furthermore, the property rights must be justified in a way that is non-consequentialist, to prevent the strength of the rights implied fluctuating with changes in productivity, technology, population density, and culture.

One assumption that I will be working under in this paper is that some kind of limiting property is essential in any developed society. 'Property' is understood broadly here to describe any instance of a claim to control over a resource by an entity. By 'limiting property' I mean property held in such a way, and by such an entity, that some are excluded from its use. This is still a very broad concept, covering everything from collective ownership by a nation to private ownership

[2] In Honoré's (1961) understanding, it could be said that the owner's 'bundle of rights' is as comprehensive as possible.

by an individual. Indeed, every instance of ownership, barring only the common ownership of everything by everyone, instantiates this concept. It is usual in defences of OA that the need for property is asserted first, with a defence of a strong property right introduced on the basis of this at a later point. Locke wrote of a person's taking needed resources from nature:

> Was it a robbery to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.(Locke, 1965 [1690], §28)

It is the insistence upon a strong right that sets OA theories apart from other understandings of property, and this with which I want to take issue.

A good summary of the usual structure of an OA theory has been given by Leif Wenar. The theory proceeds first by describing the pre-governed society, or the 'state of nature', as well as the rights that individuals will have in this state. Next, the need for acquisition is argued for. Third, the limits on just acquisition are set out, followed by the means of just acquisition. Finally, the nature and extent of the rights generated by this acquisition are explained and justified (Wenar, 1998, p. 802). For Locke, the 'state of nature' is a condition in which there is no authority governing relations between people (Locke, 1965 [1690], §19). In his usage, the term is generally understood to describe relations between individuals, rather than a social environment in the Hobbesian sense (Simmons, 1993, pp. 16-7). For example, we can be in a state of nature regarding some people while being part of a civil society with others (Locke, 1965[1690], §19); and young children, visiting foreigners and those with a 'defect of reason' are all considered to be in a state of nature with regard to those around them (Locke, 1965[1690], §15, 9, 60). All of the earth's resources are considered to be at first commonly owned (Locke, 1965 [1690], §27, 40), however they must be appropriated if they are to be put to use (Locke, 1965 [1690], §25-6).

There is much debate about exactly what limits Locke set on just acquisition, although he does seem to have endorsed three in one form or another. These are restrictions against waste and against taking so much that others are left wanting (Locke, 1965 [1690], §31, 33); as well as a restriction against takings that have not been appropriated in the proper manner (Locke 1965 [1690], §32). On the OA theorist's reading of Locke, acquisition is achieved by mixing one's labour with resources so as to extend the rights one already holds over oneself over the resources as well (Locke, 1965 [1690], §44).[3] Because the establishment of government and compacts with others generally occurs after (and as a result of) this acquisition, and because property rights are akin (if not identical) to bodily rights, the extent to which governments and other individuals can justly interfere with private property is severely limited.[4] It is disputed whether property rights can plausibly be seen as akin to bodily rights, and even assuming this is so, whether this implies that such rights are necessarily strong rights. Other aspects of OA theory, as generally understood, are also considered problematic. For example, Wenar has questioned at length the seeming capability of some to unilaterally put others under obligations through OA (Wenar, 1998, pp. 806-17). However, as my main purpose here is to examine the possible implications of a sound OA theory for property relations today, to look in depth at most of these issues would take us too far afield. I will proceed on the assumption that such problems can somehow be resolved in the OA theorist's favour.

Section II - Historical and Theoretical Accounts

[3] An oft cited passage reads: "though the things of nature are given in common, yet man, by being master of himself, and proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property; and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniencies of life, was perfectly his own, and did not belong in common to others."

[4] Locke, 1965 [1690], §135 & 138 are cited.

The world in which we live today is a far cry from the expanse of unowned or commonly held resources in which it is envisioned that OA can occur. While it may be true that parts of Antarctica and regions beyond the earth are yet to be claimed (Simmons, 1994, p. 75), any theory of property that is to have widespread applicability today must have something to say about the vast bulk of the world's resources - those that already have claims of ownership on them. To demonstrate that claims to strong private property rights over such resources should be respected in today's world, OA theorists must do one of three things. 1) First they might try to show that today's property was originally acquired justly many years ago, and has been dealt with appropriately since. 2) Alternatively, they might try to demonstrate that although faulty acquisitions or transactions may have taken place, OA (possibly with assistance from some other theory) can justify modern holdings. 3) Finally, they might make a case that OA, as a purely theoretical construct, can demonstrate the validity of a system of strong property rights even in a world in which the approved kind of acquisition has not actually occurred. These at first may seem more like points on a spectrum than positions distinct and independent of each other. One issue on which a clear division does seem to be needed however, is on whether original acquisition is something supposed to have actually happened, or something which need only be possible in theory. Many writers equivocate on which conception they wish to embrace, however my contention will be that this is unjustifiable, and that a choice between the two must be made.

There are two main ways in which the strength of the 'privacy' of the rights sought by OA theorists can be conceived. First it can be held that interference with private property should be kept to an absolute minimum. This is just to say that the property rights should be very *private*,

and that no one but the owner should have any significant say in how something is used. Second, it can be held that such interference is not merely less-than-ideal conduct, but a serious offence that is to be strongly discouraged.[5] Needless to say, the two are not mutually exclusive and some combination of the pair will usually be the aim of a theory of strong property rights. The problem is caused largely by the second requirement, or as I will call it, the 'severity' requirement. It makes little sense to talk of a right being important, in the appropriate sense, if violation of the right is acknowledged to be an acceptable or even essential commonplace practice. While we might say that a right would be respected in an ideal world though not ours, to my mind a strong right implies one that is to be respected under virtually all conditions.

If this is the case, then it makes little sense to talk of strong rights acquired through the process of violating rights of the same kind. That theft of goods can result in one's acquiring 'severe' property rights seems, if not logically impossible, certainly difficult to accept. At least three factors contribute to this. First, it seems plausible that a person should not, except perhaps in unusual circumstances, be entitled to the benefits stemming from their wrongdoing. One needn't be a retributivist to agree that the appropriate outcome following a transgression is not *a right to* greater wealth for the transgressor. Second, it is difficult to see how two people could have competing (justified) strong rights claims over something, given that a property right would seem to be a right to exclude all others. In Hohfeld's terminology, if one has a *claim-right* to the goods, then the other will have a *duty* to respect this and will not be at *liberty* to interfere with

[5] This is certainly not to say that these are the only factors that can be used to gauge the strength of private property rights, as noted above, other features such as transferability in full and continuation over time will also be worthy of consideration.

the property held (Hohfeld, 1964[1919]). They could, perhaps, be declared to share ownership in the manner of a partnership; but given that one has here committed an injustice against the other the prospects for such a relationship seem dubious. Finally, in a world of competing parties and only finite resources there must presumably be some limits on what counts as a just acquisition. Yet unjust acquisition seems one of the most implausible of all possible foundations for rightful ownership. If one can come to possess something rightfully by means of an unjust acquisition, then there can be virtually no limits on what property is considered justly held.

OA theorists, with the exception of Simmons, don't seem to recognise a dilemma stemming from the strong property rights that they advocate. For if OA is viewed as a process which has occurred in the past, then this potentially provides the means not only to justify some modern holdings, but to prove others unjustifiable as well. Indeed, to pursue the theoretic line of reasoning (as opposed to the historic) as a successful defence of modern holdings, the OA theorist will be in the unusual position of having to make a case that actual acquisition is not merely unnecessary, but hasn't in fact happened. For if such acquisition has happened, then there will be at least some property claims which are not merely unjustified, but unjustifiable. It is for this reason that historic and theoretical accounts of OA must be clearly differentiated.

To historic OA theories, it might be objected that even if property could possibly be acquired in this way, clearly most of what is owned today has not passed through an innocent series of transactions from such an acquisition. Jeremy Waldron has stated the problem concisely:

> The [o.a] model purports to rest the legitimation of property on the integrity of chains of entitlement stretching back to the dawn of time. For Locke and Nozick, the justification of someone's controlling

> some piece of land now, depends on who he got it (bought it, inherited it, received it as a gift) from, and who that person got it from, and so on all the way back to the first human who took the land out of common use and into his exclusive possession. Break the chain anywhere, and who knows what justice now requires? (Waldron, 1994, p. 91)

If it is thought that OA justifies property rights by providing a historical account of entitlement, then it must somehow be proven that departures from the ideal of property transfers do not undermine the soundness of claims to ownership.

Government redistribution will be one factor affecting the legitimacy of modern holdings. Any instance of unjust taxation (however construed) will involve the taking of rightfully held resources. As such, anyone who has materially benefited from this – such as contractors to the government, welfare recipients and public servants – will be holders of illegitimate property. It will not be sufficient to argue that these holdings can be justified in other ways, for in cases such as these the rights claimed will be at odds with the OA based rights of others. Indeed, the scope for providing a justification for this kind of property will be inversely proportional to the strength of the rights alleged to stem from original acquisition. To the extent that property rights are held to be founded on original acquisitions, they must be distributed in a pattern deriving from this.

There are a number of other reasons for doubting the correspondence of (allegedly) just historical acquisitions with modern claims to property. It seems improbable that suitable conditions for just acquisition obtained when the first appropriations were made. The image of a state of nature, in which everyone fends for themselves in the absence of any communal restrictions, is widely

accepted to be one that has never actually existed.[6] If this is the case then it seems likely that the first acquisitions, the forerunners of today's property, were made at least in part through some kind of social compact. Furthermore, any plausible understanding of original acquisition must place some reasonable limits on what can be acquired, to prevent the unusual situation obtaining in which one person justly lays claim to everything.[7] But these limitations imply that some acquisitions will fail the legitimacy test. In addition, societal divisions have affected transfers since the time of the first acquisitions. For most of human history, there have been some who's participation in the exchange of goods has been restricted on account of their gender, ethnicity, social class, or other morally irrelevant feature. This throws into doubt the legitimacy of the transfer institutions used by others in such societies, and hence the legitimacy of their transactions. Wider geopolitical influences have shaped modern property holdings, with perhaps the most prominent example of this being reallocation following a war or conquest. And of course, the legitimacy of modern holdings will also have been compromised by the usual corrupt dealings such as theft and extortion. It would be a highly unusual OA theory that did not view many or all of these redistributive processes as morally illegitimate, and such a theory would certainly not be defending strong property rights. As such, the prevalence throughout history of events like these should be ample evidence that modern property holdings cannot be justified by direct appeal to a history of fair dealings dating back to a just acquisition.

[6] This is argued for by, for example, Waldron (1988, p. 259).
[7] This is not to say that all OA accounts do place such limitations. Feser (2005), for example, argues that there should be no limits on the amount that a person may be considered to acquire justly from the commons. As resources at first have no owner, the argument goes, there is no one who can be harmed by the first acquisition. This may well be a valid conclusion to draw from the use of OA alone in creating a theory of just property relations. However there are obvious shortcomings to such an approach, as illustrated for example by Steiner (1978).

The idea that modern property institutions can be sanctioned by appeal to a tangible act of original acquisition should by now be proven unworkable. There are a number of other ways, however, in which OA theorists can try to make their ideas relevant to the real world. This chiefly involves a conception of OA as a theoretical construct rather than an actual historical account of how property could or did come into being. Gaus and Lomasky suggest that OA is best seen as a 'thought experiment' which can help us to see the '*telos*' of property (Gaus and Lomasky, 1990, §4). By allowing us to "fix a spotlight on the intuition that producers deserve to own the fruits of their labor" (Gaus and Lomasky, 1990, p. 498), o.a can help to justify a desert based distribution of property. Such an approach may be of interest for other purposes, but it says little about the strength of the property rights that should be accorded. Another approach is taken by A. John Simmons, who writes that if OA can prove that private property rights are justifiable at least in theory, an obstacle to according such rights widely will have been removed. He argues that concerns about the history of goods will not invalidate "the most minimal sort of permissibility justification of private property which might be accomplished by an OA argument."(Simmons, 1994, p. 75)

> (S)imply showing that (and how) private property claims *can* be legitimate under certain physically possible conditions – even when these conditions are now virtually unsatisfiable in most of the world – would still constitute a sort of permissibility justification of private property. (Simmons, 1994, p. 73)

If it is accepted that the acquisition of strong property rights is conceivably possible, then it can hardly be held at the same time that this is ruled out in principle. Indirectly then, an OA theory could be seen as proving that it is at least feasible for property rights similar to those sanctioned by OA to be created in the real world. This is a valid point but not a very powerful or interesting one for our purposes here. After all, if strong property rights of the kind sought by OA are to be

achieved in practice, in the absence of OA another justification for them will still have to be found.

The incomplete natures of the above suggestions are significant, as simply abandoning an historic OA justification does not allow one to ignore the history of the property in which one is interested. As strong property rights endure over time and through transfers between rights holders, these rights can only be vindicated by tracing a series of just transfers back to a just acquisition, however the latter is construed. It seems that any attempt to justify strong property rights must have an account of how such rights can first come into being. In one way or another, a historic account of just acquisition is required. Of course, another approach which the advocate of strong property rights could take would be to argue that these rights are not existing products of past events, but rather privileges that should be accorded today. In this case, the indirect 'permissibility' justification offered by Simmons may be of some use, but even here it does not achieve much. Some other justification will still have to be given for the strength of these rights, as well as for the distribution method sought: a distribution method which will doubtless work very differently to OA.

Section III – A. John Simmons' Approach

Seemingly in response to problems like these, Simmons has suggested three adjustments to OA theory. First, he argues that, given our imperfect knowledge of the full history of most possessions, 'presumptive justifications' for some contemporary property can be constructed on

the basis of OA theory reasoning (Simmons, 1994, p. 76-8). There may at first appear to be an inconsistency here, with a system of strong property rights seemingly incompatible with presumptions of ownership over what are doubtless valuable and perhaps contested resources. One apparent downside of private property rights is their exclusive character. To simply presume that some instance of private property is acceptable is to exclude without explanation or justification many people from free access to a resource. To do this, Simmons asks that we 'assume the innocence' of at least some modern holdings (Simmons, 1994, p. 78). As noted, if the rights implied by OA are strong ones, then erring on the side of innocence seems hardly to be an option, as there is simply no margin for error. Virtually all of the property held today has been acquired and held through participation in property systems which are contrary to the requirements of OA theories. However, Simmons suggests several other changes of approach that may help in surmounting this apparent difficulty. His second adjustment is a move to what he describes as a 'non-systemic' approach. With this he rejects the notion that all property claims will be tainted by the injustices of the system of which they are a part. In defence of this he cites the analogy of a government which is justified in punishing severe crimes even if not itself strictly legitimate (Simmons, 1994, pp. 76-7). That injustice is rife in a society, he argues, might not prove that a certain individual's belongings are not deserved. It might be objected to this that, while conceivably possible, in practice no one could so carefully monitor and regulate their transactions that they could acquire a significant amount of property in a society like ours without some dealings in undeserved goods. In a technologically advanced society, any complex manufactured object will have passed through many different production processes and pairs of hands. And these production processes and roles in turn will have had a long and less than immaculate history. Simmons makes a third provision to account for this. He writes that it is not

so much the exact possessions that people own which is important, but their share in society's wealth (Simmons, 1994, p.78). This last alteration he describes as a move toward a 'patterned' distributive theory.

The last of these departures from the standard OA theory might initially seem to stand in stark contrast to OA theories such as Robert Nozick's, which held that such a patterned conception of justice is incompatible with one based on OA. Nozick presents his 'entitlement theory' as being unique among distributive justice theories in that it does not take into consideration a person's material position relative to others, or aim to maintain any 'pattern' (Nozick, 1974, pp. 155-64). However the difference may be more one of emphasis. Simmons' main argument in favour of the patterned view is an appeal based on the need for compensation should someone's holdings be interfered with (Simmons, 1994, p. 78). As there will inevitably be instances of people losing their holdings irrecoverably due to injustice, some measures must be in place to ensure that they can be compensated. Similarly, one of the three major components of Nozick's entitlement theory is 'rectification of injustices in holdings' (Nozick, 1974, p. 152). A complete understanding of just ownership for Nozick must include some means for redistributing goods that end up in the wrong hands. And as Nozick acknowledges, whatever this mechanism is, it will almost certainly have to operate with incomplete information (Nozick, 1974, pp. 152-3). Given the impossibility of determining how all of those involved or potentially involved in a series of transactions would have acted had a certain injustice not occurred, a faultless imitation of this alternate history will be impossible to create.

Simmons' approach merely takes this a step further. Accepting that the legitimacy of most property today is uncertain at best, his aim is seemingly to use an OA-based principle similar to Nozick's 'rectification of injustices' as a distributive theory independent of a wider OA-based property scheme. Even if much of modern property cannot be justified by OA, Simmons here suggests that some people can be proven to be entitled to a certain amount of wealth. He mentions self-sufficient farmers and people working for small wages on other's projects as examples of people entitled to the money that they acquire as a result of their work. In a similar way to that in which one's labour creates property when applied to unowned things, it may create an entitlement to property when applied (justly) to the property of oneself or another. The income that is earned is seen as being analogous to the wealth created though labour on untouched natural resources.

Simmons' claim, then, is that just (or at least 'presumed'-just) acquisitions can be made today in a manner similar to just original acquisition and "based squarely on Lockean principles" (Simmons, 1994, p. 77). The three alterations to OA theory suggested by Simmons function like this: The 'patterned' understanding of entitlement allows for at least some property to be considered justified, despite its lacking an entirely unblemished history. On the assumption that the analogy between acquisitions from nature and the earning of wages is sound, OA can be seen as a purely theoretic construct yet still have quite a bit to say about the nature of the rights that it sanctions. This allows for the 'non-systemic' approach, as without a patterned understanding the only OA related justification possible for an article of property would be appeal to a history of just transactions and acquisition. Without this approach, an entirely just *system* of ownership would be necessary – a faultless network of just transactions stemming right back to the first

appropriations. In turn, the adoption of patterned and non-systemic means of judging entitlement allow for 'assumptions of innocence' to be made, as past injustices of transfers, acquisitions, and other interactions can be largely ignored.

Importantly however, the patterned conception is also reliant on the other two adjustments for its feasibility. For without the non-systemic approach and assumptions of innocence, the patterned conception seems to face an immediate obstacle. Whether acquired by OA or by a means analogous to it, the historic impediments to a just system of property outlined in Section II will ensure that all acquisitions are unjust. However the non-systemic supposition is intended to prevent this, allowing Simmons to discuss the justice of an individual's holdings with reduced reference to the legitimacy of the holdings of others. This is needed to prevent a few instances of injustice quickly coming to taint all of the transactions within a society, with dishonest dealings spoiling all of those that occur as a consequence of them. The non-systemic approach in turn would not be possible without something like assumptions of innocence. These assumptions of innocence are necessary if a system of strong rights is to be created in the modern world, as it will not be clear that any property rights claimed were derived purely through innocent dealings. This circularity suggests that the three need to be seen as a single hypothesis in our examination of their legitimacy.

For Simmons' theory to achieve the goals that he sets it, it must demonstrate at least the permissibility of a system of strong property rights, and do so using reasoning that relies on OA theory. Yet the combination of the three alterations produces a theory which has little

resemblance to OA as originally conceived. There are at least two important differences not investigated by Simmons between acquisition of the kind that he sketches and Lockean/Nozickean original acquisition. First of these is the differing origins of what is acquired. Whereas OA theories concern the taking of goods that are either unowned or commonly held but unmanaged, any theory which is to operate today must be equipped to deal with property which is already exclusively owned in some sense (whether justly or not). More importantly, it occurs between people who are not in a state of nature with regard to each other, but are rather part of a civil society. As such, this kind of taking is not a unilateral act, but necessarily involves interaction and cooperation between people. In short, it bears little relation to OA, and can hardly be assumed without argument to operate under the same rules. It might be held at this point that what is occurring is a transfer, not an acquisition, and in assuming the innocence of the property prior to transfer we allow for the receiver to achieve full Nozickean strong rights. But this (as well as requiring a justification different to that given) would require a much more generous assumption of innocence than Simmons argues for. The case he makes is aimed at allowing any past history of misdemeanour to be ignored in assessing the justice of a transfer. Even if able to do this, it on its own certainly *not* up to the task of providing a justification for a full set of strong rights. It is one thing to assume the innocence of a certain arrangement of holdings if no superior alternative can be found, it is quite another to assume a system of strong property rights into being. Therefore, some other story must be told to explain how this acquisition is akin to OA.

This is further problematised by an apparent move toward weaker property rights inherent in the three assumptions. If Simmons' account of just acquisition is understood to be a process that has been going on throughout history, then it, like the other possible means of acquisition discussed in Section II, will have been in conflict with any system of just *transfers* of strong property rights. As noted, the non-systemic approach and assumption of innocence are intended to allow less consideration to be paid to the history of an item in determining the justice of its ownership. Yet what this effectively means is that the strength of rights over a possession diminish over time and through transfers. For as explained earlier, the stronger the property rights accorded, the greater will be the offence perpetrated by infringing on these rights, and so the weaker will be the claims of someone controlling property that has at some point in its history been misappropriated. There are seemingly two ways in which this tension can be resolved. First would be to acknowledge that most items of property today are not candidates for assumptions of innocence, and so cannot be used in the creation of truly legitimate property. Alternatively, it might be allowed that dealings in less-than-perfectly legitimate goods can result in legitimate ownership. Effectively, this would mean either that the strength of a right does not persist perpetually, or that rights are weak enough to be violated in the process of creating legitimate property. Either approach will render these rights less robust than the Nozickean rights sought.

It might be suggested that past acquisitions made in this manner can be treated as less than perfectly legitimate, but that from now (or from some other arbitrary point in time), with a suitable assumption of innocence, we could begin to grant strong property rights over such goods. Yet this would again be a move incompatible with the creation of the strong rights sought.

First, such a formation of a new system of rights could only be accomplished through some kind of agreement or system of consent, or by the decree of some kind of authority, and the unilateral nature of OA is a principle basis for the strong rights that it is alleged to produce. Furthermore, any property which has been declared to be innocent and held under strong rights will soon get infused into, exchanged for and confused with existing, less strongly controlled, holdings. For example, it might be held that newly extracted natural resources or properly earned wages should be held with strong property rights. But if this property is to have significant value, then it must be tradable for other goods. And as most goods in our society do not qualify as having been acquired in the ideal manner, the market for these strong ownership rights must be able to interact with the market for weaker ones. Interaction between strongly held and weakly held property in the creation of new property will be problematic, as determining the strength of rights over the new property will involve either unjustified strengthening or weakening of rights, or the creation of yet a third class of property right (and presumably the potential for even more). Effectively this means that the strictures of one or both understandings of ownership will be disregarded or blurred. If the system of strong property rights is to survive, it will have to be kept apart from the system of weaker rights. After all, if a strongly held item becomes, in the process of being traded and modified, a weakly held one, then it was never really a strongly held item in the first place. The strength of the rights over it obviously did not persist uncompromisingly. For practical purposes then (if nothing else), having only one system of ownership will be far preferable to having several unrelated systems.

A final problem with the case put forward by Simmons is that he fails to explain why strong Lockean property rights are necessary for property acquired in this way, rather than some weaker but less contentious understanding of rights. On the assumption of innocence he writes:

> Given (among other things) the importance of holdings to persons' projects and life plans and the apparent innocence of the holdings in question, I think the [assumption of innocence] takes more seriously than others the moral considerations at issue. (Simmons, 1994, p. 78)

As mentioned, given what we know of the history of any established developed economy, talk of an 'apparent innocence' is dubious. However it is the appeal to the 'importance of holdings to persons' projects and life plans' that I principally want to examine. For undeniably property holdings are significant to those who rely on the resources held. However if this is to be a defence of strong rights, then it should probably be explained why only the current claimant's projects and life plans are to be considered here, and why weaker rights would be inadequate. Yet this does not appear to be Simmons' intention. Insofar as he does explain why he believes that some acquisitions in the modern world are clearly justifiable, it is largely by appeal to examples of clear need. The examples given in support of acquiring the product of one's labour are riddled with references to "modest wage(s)", "small holdings", and "money to buy needed clothing and food" (e.g. Simmons, 1994, p. 77). That a person in need should be entitled (at the very least) to work for a living is generally undisputed, but this entitlement alone does not justify a system of strong property rights. To prove this stronger claim, it must be argued that a person prepared to work for a living is not necessarily entitled to the opportunity, and can be allowed to starve to death by potential employers who have property in excess of their needs. In summary, it seems that Locke's broader argument for property rights - that without them humans would have long ago starved - would alone be adequate for the case Simmons is making.

Simmons considers the 'central thesis' of Lockean OA theory to be that "your purposeful labour… on what is either unowned or already owned by you, can yield property for you in the product of your labour", and it is assuming the validity of this that he makes his arguments for presumptive justifications (Simmons, 1994, p. 76). Either Simmons is pursuing a system of strong private property rights, or simply some kind of a system of private property. If it is strong private property rights that he seeks to endorse, then his view can be seen as an account of just original acquisition or just acquisition through transfer. In either case, it will conflict with any system of transfers of strong property rights. If the former of these, then it also bears little resemblance to, and can gain little of its force from, traditional OA theory. If, on the other hand, Simmons' intention is merely to endorse some kind of private property system, then his appeal to OA is unnecessary and seemingly of little relevance to the case he makes.

Conclusion

I hope that I have now shown OA-based attempts to justify strong property rights over modern holdings to be self defeating. As noted, an OA theory must to some extent work on suppositions about past activities if it is to defend a regime of strong property rights. However the stronger the rights sought, the less plausible these suppositions begin to appear. To claim that contemporary property holdings should be respected as if justified by strong property rights is, incongruously, to denigrate the strength of past holdings. Furthermore, any attempt to introduce a new system of strong property rights into today's society will face the problems of a mixed system of property.

Acknowledging the insurmountable difficulties of basing a system of just property rights on OA needn't be an unpleasant commitment. In removing OA as a possible basis for our understanding of property, the way is cleared to adopt foundations more suited to the environment in which we find ourselves today, one very different from the 'state of nature'. If it was indeed possible for our ancestors, in the process of initiating the long advance to civilisation, to also encumber later generations with such onerous duties as those stemming from strong property rights, then we should perhaps be pleased that our conformity to these duties can no longer be expected.

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