

Liberties, Not Rights: Gauthier and Nozick on Property

David Gauthier's *Morals by Agreement* is an ambitious attempt to understand morality as the outcome of a rational agreement among persons, each concerned to promote her own interest.¹ In this paper, I will focus only on Gauthier's theory of the initial bargaining position: specifically, his attempt to derive property rights from a moral principle called the Lockean proviso.² I argue that the derivation fails, and that the true implications of the moral principles that Gauthier invokes are quite different. These principles imply that persons have extensive liberties to use physical materials, but relatively few rights against interference by others in this use. Since Robert Nozick's argument for an extensive system of property rights is similar to Gauthier's, I briefly argue that it likewise fails.³ I conclude that in order to defend property rights, Lockeanism needs to start from a moral foundation richer than those offered by Gauthier and Nozick.

1. Non-coercion and the Lockean Proviso

Let us first place Gauthier's discussion of rights and property within the context of his larger project. At the core of Gauthier's contractarianism lies his theory of rational bargains and cooperation. This consists in the answers to three questions (treated in his fifth, sixth, and seventh chapters, respectively). First, taking for granted that we shall reach a workable agreement, how would rational bargainers distribute the fruits of cooperation? Second, can it really be rational, as the first question assumes, to abide by this agreement? Third, what is the initial position from which a fair and rationally sustainable bargain is made? The third question is our focus.

Gauthier claims that it is rational to comply with a bargain, and so rational to act cooperatively only if its initial position is non-coercive. Since this does not provide an adequate positive characterization of the initial position, Gauthier adds that each individual accepts a constraint on her interaction with others—the Lockean proviso. The proviso ensures that all effects of taking advantage are removed from the original position. Gauthier argues that it is rational for utility-maximizers to accept the constraint of the proviso, insofar—but only insofar—as they anticipate beneficial cooperation with their fellows. The proviso moralizes the state of nature, but only insofar as we conceive the state of nature as giving way to society (pp. 192-93).

Gauthier considers two alternative theories of rational contract that allow coercion in the initial bargaining position. James M. Buchanan identifies the initial bargaining position with the "natural distribution" of goods that would result from non-cooperative interaction (including any coercive interaction the parties would deem advantageous).⁴ John Nash identifies it with the *threat point*—the outcome that would be realized were each person to act on her maximally effective threat strategy.⁵ Gauthier rejects both of these alternatives, but I will discuss only his criticism of Buchanan. (He rejects Nash's approach for essentially the same reason.)

Buchanan supposes for simplicity a two-person world with one scarce good. This good "falls down" on each person in fixed quantities. Each may invest effort in obtaining some portion of the good that originally fell down on the other ("predation"), and may make a counter-investment in defense against predation by the other. The eventual stable result of this interaction is what Buchanan calls the natural distribution.

Both parties stand to benefit from an agreement that relieves them of the need to prey and defend. If they take the natural distribution as the initial position, and reach a bargain from there, the share of goods each receives reflects her relative standing in the natural distribution (p. 194).⁶ Thus, if I am a more successful predator and defender than you are, our bargain shall require you to give me some of the good which originally falls down on you.

Gauthier objects that you would be irrational to comply with such an agreement. Buchanan's theory relies on the threat of a return to the natural distribution to elicit compliance. But the threat is unreal, for a return to the natural distribution benefits no one (p. 196). By giving me some of the good, you would permit a predator to reap where he had ceased to sow, and would invite others to engage in predation and coercion as a prelude to bargaining (p. 195). Gauthier contends that rational cooperation, in Buchanan's simple world, lets each person simply enjoy the good that falls down on her. Let us grant that rational persons will not allow the terms of the bargain to be measured against a coercive initial position.⁷ Still, it does not follow that they will agree to the distribution that Gauthier posits. Suppose that one portion of a good falls from the sky and bounces off my head, while another bounces off yours. What rational or moral significance could that possibly have? Though we have labeled your taking of the items that fell on me "predation," we should not allow that label to mislead us. We will return to this point after discussing the Lockean proviso.

According to Locke, one may appropriate from the commons that with which one mixes one's labor, provided that one uses the acquisition (or at least does not waste it), and provided also that "enough, and as good" be left in common, "more than the yet unprovided could use."⁸ This "enough and as good" requirement is Locke's original "proviso." Gauthier, following Nozick, discards the letter of Locke's proviso in order to capture its spirit: "to ensure that the situation of others is not worsened."⁹ However, simply to forbid worsening the situation of others, as Nozick does, is too strong. There are situations in which one could avoid this only by worsening one's own position. Thus, Gauthier's Lockean proviso prohibits worsening the situation of others except where this is necessary to avoid worsening one's own position (p. 203). Where worsening the situation of others is necessary to avoid worsening one's own, one must minimize the loss imposed on others. Where worsening of one's own situation is inevitable, one may minimize this worsening (p. 206).

Whether I worsen your situation is judged by comparing what actually results from my action with what you would expect,

ceteris paribus, in my absence. Similarly, I better my own situation insofar as I prefer the outcome of interaction with you to what I should have expected otherwise, in your absence or unavailability for interaction. The proviso prohibits me from bettering my own situation through interaction that worsens your situation. This, Gauthier claims, expresses the underlying idea of not taking advantage (p. 205).

Locke intended his "enough and as good" proviso to constrain the acquisition of objects such as land or goods. Gauthier's Lockean proviso plays a larger role, constraining all interaction among persons who hope to reach a cooperative agreement with their fellows. Each person is free to promote his own interests by any strategy, unless specifically forbidden by the proviso to do so (pp. 205-6). The proviso thus defines morality, as it were, among persons who have yet to make a social contract. Further, it defines persons' rights, in that Gauthier conceives rights as what each person brings to the bargaining table, rather than being the outcome of agreement (p. 222).

It bears repeating that the proviso does not prohibit one from harming another, but only from bettering one's own situation (relative to what one would face in the other's absence) through harming the other. Gauthier provides a helpful example. If you live upstream from me, and dump your wastes in the river, your worsening of my situation need not violate the proviso. If this is the only way in which we interact, you are no better off than you would be in my absence: you do not better your own situation through interaction with me (pp. 211-12).

With this in mind, before examining how Gauthier proceeds from proviso to property rights, let us briefly return to Buchanan's simple world. In this world, portions of the single scarce good fall down on each of the two inhabitants. Gauthier thinks that the initial bargaining position will ban the taking of any portion that originally fell down on the other person. I objected to this assumption; now I will establish this objection by applying the proviso. I shall assume that the good's falling on a particular person is mere happenstance (rather than, say, being well-aimed by a whimsical deity who seeks to provide each person with a certain quantity). Thus, in one person's absence, the good that

would otherwise bounce off her head would fall directly on the ground instead, where the other would eventually find and consume it. This being so, one does not better one's situation by taking that portion of the good, as one would be completely free to take it in the other's absence. Therefore, the proviso does not specifically forbid one to take it, and one is therefore free to do so. I conclude that the question upon whom a portion of the good falls has no rational or moral significance as the basis for an agreement.

2. From Proviso to Rights in Objects

Gauthier describes four steps by which the proviso rationalizes and moralizes the state of nature. I will focus on the second and fourth steps, which concern rights to the use and to the exclusive use of external objects.¹⁰ In the first step, the proviso gives each person an exclusive right to the use of his own powers without hindrance from others (p. 209). The second step extends this right to the effects of exercising one's powers:

Suppose that in the state of nature I cultivate a plot of land, intending to consume its produce. Here my exercise of my powers is quite independent of any other person, and so I do not better myself through interaction. Even if I worsen the situation of someone who would otherwise have cultivated the land, this worsening is incidental to the benefit I receive. My activity cannot violate the proviso. Now suppose that some other person seizes the produce of the land which I have cultivated. Then she does better herself as a result of my activity, and furthermore worsens my situation from what it would have been in her absence, by depriving me of the fruits of my labour. Her activity does violate the proviso. (p. 210)

We may see that Locke's concern with labor and use finds a place in Gauthier's treatment. For the other person betters her position only if the produce were created through my labor, and worsens mine only if I had some intended use for the produce (p. 210).

By this argument, Gauthier intends to demonstrate "a right in the effects of one's labour, but not an exclusive right to their possession." For if someone were to seize the produce while compensating me for my effort and my intended use, my situation would not be worsened, and the proviso would not be violated. Such compensation must leave me without any net loss in utility,

but it need not be as much as I would receive if I had exclusive ownership of the produce, and could sell it in the marketplace (p. 211). In other words, the proviso requires full compensation, not market compensation.¹¹

The rights claimed at this stage of the argument are thus relatively weak, but the true implications of the proviso are even weaker, as I now wish to show. Recall that, without violating the proviso, I may cultivate this land and thereby worsen the situation of someone who would otherwise have cultivated it. In that case, the affected person could take a portion of the produce, which increases her utility by an amount corresponding to the decrease she suffered when she had to cultivate poorer land instead. When she takes this portion, she need not compensate me at all, since she does not better her situation through interaction with me. Rather, through this seizure, she is merely restoring her position to the level at which it would be in my absence. If I am an inept farmer, she might even take all of the produce, perhaps without even reaching the level of well-being she would enjoy in my absence.

These considerations demonstrate that we must be cautious in using Gauthier's phrase "the effects of one's labour." In one sense, the produce of the land I cultivate is an effect of my labor. However, it is not the effect of my labor alone; its creation depends on fertile land, sunlight, and other natural resources, some of which may be in scarce supply. This is an important stumbling block for "labor" theories of initial property acquisition, which no one has yet shown how to surmount. As Nozick remarks, though one owns one's labor, and mixes it with something, it is not clear that ownership of the labor seeps over into the rest.¹² We have just seen that if someone's interest in the "fruits of my labour" stems from the natural resources which are embodied there, she may take some of these without violating the proviso.

To make the point vivid, suppose that I have grown corn on this highly fertile land, and she cannot consume corn (being allergic to it, say). Interested in the minerals formerly present in the soil, she seizes the corn, takes it to the land she is cultivating, and burns it, thus enriching the soil there, so that it becomes as fertile as the land I have cultivated. She then grows wheat. Once again, though

she worsens my situation, she does not better her own, for in my absence she would simply cultivate the richer land, and save herself much trouble.

3. From Proviso to Exclusive Property Rights?

Let us move on to the fourth step in Gauthier's discussion, skipping the third, which does not concern exclusive rights to objects.¹³ We suppose that several families live on an island, and that the head of one family, Eve, seeks a certain area of the island for her family's exclusive use. Gauthier writes:

How may we assess this proposed right? First we must ask whether someone, in seeking exclusive use of land or other goods, violates the proviso, bettering her situation through worsening that of others. If not, then we must ask whether some other person, in interfering with a claim to exclusive use, violates the proviso. If so, then the proposed right is established. (p. 215)

We have cause to object to this formulation of what we must ask. The objection will be clearer if, first, we review Gauthier's answers to his own questions.

Gauthier begins by "considering the effects of granting a claim to exclusive control." Eve clearly intends to better her situation, "in relation to the base point set by the terms of the problem—that is, in relation to the system of common use" (p. 215). But she need not worsen the situation of her fellows:

They are, it is true, to lose their right to use in common the land that she appropriates. They are to be obliged to enter into exchanges with her that she voluntarily accepts, rather than merely paying her full compensation, should they use what she produces. Now we might suppose that Eve seeks a portion of the island so large that she would leave her fellows worse off than before But she need not seek such a large appropriation. Planned intensive cultivation made possible by her security of tenure may well make it possible for her to live better on a part of the island sufficiently small that others would also be better off, living without her on the remaining land, than they were when all used the entire island in common. For of course, in seeking a private holding, Eve proposes to give up her right in the remaining commons.

Furthermore, the other inhabitants of the island may also benefit from new opportunities to trade their products for some of the goods resulting from Eve's more intensive cultivation. (pp. 215-16)

Eve's seeking exclusive use of the land therefore does not violate the proviso.¹⁴ The proposed right passes the first test.

Now we must consider whether interference with Eve's claimed right would violate the proviso:

This interference must take one of two forms; it may tend to restore common use, or it may involve only a transfer of exclusive use. Given the benefits of Eve's appropriation, the restoration of common use could not but worsen the situation of most persons. The benefits brought about by Eve's security of tenure would no longer be forthcoming. Any benefits that the person seeking to restore common use might hope to obtain would be purchased at the expense of most of his fellows, in clear violation of the proviso. The transfer of exclusive use ... is even more evidently in violation. (p. 216)

The proposed right passes the second test as well: interference with Eve's claim would violate the proviso. Eve's right is vindicated.

Eve is able to live on a small area of land through planned intense cultivation, which is made possible by her *security of tenure*.¹⁵ But in what does that consist? It might consist in the fact that others *ought* to keep off, that they are morally bound not to interfere in her intended use without her prior consent. But whether they are so bound is precisely what we are asking; we cannot presuppose that they are without begging the question. Nor does it do us any good to suppose hypothetically that the others are so morally bound (though it might be useful to suppose, toward a *reductio ad absurdum*, that they are not so bound). So let us suppose instead that Eve's security of tenure consists in others' in fact keeping off, and perhaps their following a convention of keeping off. In that case, whether she ever enjoys such security is more a matter of what others do than what Eve does. Restoring common use may never become an issue if others do not go along with Eve's proposal.

A similar problem of interpretation besets the question of "whether someone, in seeking exclusive use of land or other goods, violates the proviso" (p. 215). Are we to understand "exclusive use" as a purely factual matter—say, the facts that Eve issues the statement "This is my land!" and that others follow certain conventions with respect to Eve and this land—or does it involve a moral dimension, namely that others are morally obliged not to use what she produces without her consent?¹⁶ Only the former

approach allows us intelligibly to ask whether Eve's appropriation violates the proviso. But only the latter is consistent with the rest of what Gauthier writes. Let me explain.

Only the morally loaded interpretation of "exclusive use" is consistent with one of the considerations Gauthier advances. In evaluating whether Eve, in seeking exclusive use, would violate the proviso, he writes: "[The others] are to be obliged to enter into exchanges with her that she voluntarily accepts ... should they use what she produces" (p. 215). Furthermore, the purely factual interpretation leaves the matter of exclusive use mainly in the hands of the others. All that Eve's action in "seeking exclusive use" could amount to, on this interpretation, would be her (perhaps merely continued) use of a certain land area, and her issuing proposals or demands to her fellows—which seems not to capture what Gauthier has in mind.

We must conclude that one person's "exclusive use" implies moral duties for other persons. But then we must also conclude that Gauthier is making a category mistake. In asking whether Eve's seeking exclusive use violates the proviso, he is asking whether the existence of a moral duty (the duty of others not to interfere with Eve's use of this land) violates a moral principle (the proviso). More precisely, either he commits this error, or he equivocates between this morally loaded sense of "exclusive use" and the alternative, purely factual sense.

When put so starkly, it may be hard to believe that Gauthier could be making this mistake. The assumption that a certain moral obligation holds could be inconsistent with a moral principle, but it is transparent that only actions, not the existence of moral obligations, can violate moral principles. However, Gauthier may have been misled by his statement of the problem: specifically, by the term "initial acquisition." Gauthier introduces the discussion of the Lockean proviso by stating that in a rational cooperative agreement, each individual's endowment, which he brings to the bargaining table, must "have been initially acquired by him without taking advantage of any other person" (p. 201). Insofar as "acquisition" involves action performed by the acquiring person—and it does involve overt action, such as using the object—this action can be assessed according to a moral principle like the

proviso. But insofar as "acquisition" also involves a change in the moral relationships between persons, with respect to the object, it is not something to be assessed according to a moral principle, but rather derived from one.

Though the purely factual interpretation of "exclusive use" does not fit well with some of what Gauthier writes, it behooves us to evaluate the argument so interpreted.¹⁷ We are then interested in the effects of Eve's enjoying a *de facto* right to exclusive use of the land. That is, we shall suppose that she cultivates this land intensely, and tells her fellows to keep off, and that her fellows respond as Eve wishes, abiding by a policy of keeping off (perhaps in hopes of later benefiting by trading with her). It is clear that Eve's actions do not violate the proviso. But do the actions of another person, who interferes with her *de facto* right in a way that tends to "restore common use", violate the proviso? No, they do not.

The person who "restores common use"—call him Proudhon—takes some of the land's produce and compensates Eve for her labor and intended use. Because there is compensation, these actions would not worsen Eve's situation. They might worsen the situation of persons other than Eve, but would not do so through interaction with those others. Proudhon does not take advantage of the others, because they do not provide the advantage he receives.¹⁸

Gauthier might object that, in order to avoid worsening Eve's situation, Proudhon must provide market compensation, rather than merely full compensation. That is, Proudhon must enter into an exchange with Eve that she voluntarily accepts. Gauthier might claim that the appropriate baseline for determining whether Eve's situation is worsened is her enjoyment of a *de facto* right to exclusive use. However, the baseline set by the proviso is how Eve would fare in the absence of interaction with Proudhon. Though in his absence she might still persuade *others* to trade with her on mutually acceptable terms, the benefits she would receive from such trade are already included in full compensation—they come under the heading of "her intended use." Proudhon need not offer an exchange that she voluntarily accepts. This is most relevant if, in a market transaction, Eve could successfully demand greater

payment from Proudhon than from any other trading partner. For if the reverse were true, Proudhon would have to pay more to fully compensate Eve than the produce of "her" land is worth to him.

I conclude that however we interpret "exclusive use," Gauthier's argument fails. The proviso does not imply any exclusive rights to land or other goods. To make matters worse, others may in some cases take a portion of the fruits of one's labor without providing any compensation at all. They may do this when one's use of certain natural resources to produce the "fruits of one's labour" forces the others to use poorer resources. (I use the word "forces" advisedly, for the proviso may not prohibit others from plowing "my" crops under and planting different ones—though self-interest may caution against this, since I might well respond in kind.)

Before turning to different arguments for property rights, let me comment on the significance of these criticisms for Gauthier's overall project. The property rights that he describes serve to determine the initial bargaining position for each party to the social contract. The failure of Gauthier's attempt to establish these rights means that the initial bargaining position is quite different from the one he envisions. But it does not mean that there is no initial bargaining position. Nothing in my discussion prevents Gauthier's theory of rational bargaining, agreement, and compliance from being applied to the initial position given by the true implications of the proviso. How this changes the outcome of the social contract is an interesting question, but I will not pursue it here.

4. The Failure of Nozick's Alternative

Gauthier follows Locke and Nozick in denying that the original distribution of property is an outcome of the social contract. Instead, these philosophers attempt to derive property rights from moral principles which apply in the state of nature.¹⁹ Gauthier and Nozick posit a broadly libertarian set of moral principles, allowing individuals a wide range of liberty, but prohibiting them from inflicting certain abuses on others. I will argue that the flaws in Gauthier's arguments are not peculiar to his treatment of property,

but reflect problems facing other libertarian theories of initial property acquisition.

Gauthier's arguments fail to ground extensive property rights not because his moral principle prohibits one from using objects, but because it fails to prohibit others from interfering with this use in many circumstances. Therefore, while a weaker moral constraint on the actions of persons in the state of nature would not help matters, a stronger set of constraints would be more promising. And other classically liberal theorists do take the state of nature to be governed by moral constraints stronger than the "proviso" as understood by Gauthier: after all, that principle permits the infliction of great harm on others as long as one does not thereby benefit relative to what one would enjoy in the other's absence. I will focus on Nozick, showing that his account of initial property acquisition faces the same obstacles that Gauthier's faces. I will then consider a way in which libertarian-minded Lockians might bypass these obstacles.²⁰

Nozick's moral constraints prohibit aggression (pp. 33-34). One is thereby prohibited from harming others even when the only alternatives involve worsening one's own situation. For example, Nozick writes that polluters must compensate those who suffer costs as a result of the pollution (pp. 79-81). He does not let this depend on whether the polluters might thereby make themselves worse off than if the sufferers were simply absent.

However, there are ways that one could make others worse off (than they would be in one's absence) that do not constitute aggression—we shall encounter some of these ways shortly. So we might wonder whether there are ways in which one could violate Gauthier's proviso—improving one's own situation by worsening that of others—which do not constitute aggression. If so, a principle prohibiting aggression does not, on its own, imply all the constraints which are implied by Gauthier's proviso. However, there are independent reasons to believe that Nozick advocates those constraints. He writes that individuals "are not resources for others" (p. 33)—strongly suggesting that one may not "take advantage" of others, in the sense in which Gauthier's proviso prohibits taking advantage. He also allows that persons may be prohibited from profiting from "unproductive exchanges,"

which have the feature that "if they were impossible ... one of the parties to the potential exchange would be no worse off" (p. 85). I will therefore interpret Nozick's moral constraints as including both Gauthier's proviso and a blanket prohibition on aggression.

There are ways that one could worsen the situation of others, relative to the situation they would enjoy in one's absence, without aggressing against them. One clear example would be continuing to breathe in an area where (through no fault of anyone trapped there) there was a limited air supply. Others will die sooner, and may have less chance of rescue than they would if one committed suicide; but one is nevertheless not committing aggression by breathing. Another example would be consuming a limited resource, such as oil—or indeed, oxygen in the scenario just sketched. Like Gauthier's, Nozick's moral constraints allow persons wide latitude to make use of land and other resources. Unfortunately, also like Gauthier's, they allow others considerable latitude to interfere in this use.

Recall the person who seizes some of the produce from the land I have cultivated, while compensating me for my labor and intended use. We have already seen that her actions do not violate the proviso. Moreover, it is not obvious that they constitute aggression against me.²¹ There certainly need be no physical aggression against my person involved. And since her actions do not make me worse off, it is hard to see any other way in which they could constitute aggression.

Consider next the person who is interested only in the natural resources embodied in the "fruits of my labour," and wishes to put these materials to a use incompatible with mine. As we saw earlier, Gauthier's proviso allows her to seize these materials without compensating me. Does a constraint against aggression prohibit this? She does not physically aggress against my person. However, she certainly worsens my situation—does this show that her actions constitute aggression? No, because if she were to let me continue to use these materials, I would be worsening her situation. (Even if she seizes the materials, her position may be worsened, since the ways in which my labor has transformed the raw materials may be a nuisance to her.) If worsening the position of

others were sufficient to make one an aggressor, then I would be the aggressor here.

We should note that there is nothing in the views of Gauthier or Nozick which requires me to sit by and allow this person to seize these materials. Rather, she and I are both morally at liberty to compete for the use of natural resources and to attempt to keep the other from interfering in this use. (Under Nozick's moral constraints, we may not physically aggress against each other in the process.) Perhaps this competition will reach an equilibrium wherein each of us is willing to invest much effort in defending her ongoing use of materials, and little or no effort in seizing materials which the other is using. However, such a result would then be dictated by prudence, and not by morality.

I have not yet addressed Nozick's argument for the possibility of initial appropriation of property. My treatment will be extremely brief, because Nozick does not explicitly address the obligations of persons other than the would-be appropriator. As we have seen, it is these obligations (or rather, the lack of them) that pose the greatest obstacle to deriving rules of initial appropriation. Since Nozick discusses at length the question of whether the appropriator worsens the situation of others, what seems the best reconstruction of his argument makes it closely similar to Gauthier's. I shall understand Nozick as claiming that if the appropriator does not worsen the situation of others, then for them to interfere with her claim would constitute taking advantage of her. But as we have already seen in the case of Eve and the islanders (section 3, above), this is not correct. Others may avoid taking advantage of Eve, short of granting her the property right which she claims.

Nozick's argument suffers from another difficulty as well. To ground his claim that the others are not made worse off, Nozick appeals to the efficiency and increased social product brought about by a system of private property (p. 177). However, the efficiency considerations which he advances apply to the system as a whole. That does nothing to show that the particular individual, making the particular claim in question, does not worsen the situation of any of the others. Simply put, the problem is: who owns what? The mere fact that the private property system

as a whole benefits a person does not obligate him to abide by it—he might have thought up a different system which would also benefit others but would benefit himself even more.²² Nozick's argument is strangely incongruent with his rejection of the idea that a system that benefits everyone obligates everyone.²³

5. Conclusion

The failure of Gauthier's argument to justify the moral constraints entailed by a system of property rights does not reflect problems peculiar to his treatment. Rather, these problems face any attempt to derive rules of initial appropriation from broadly libertarian moral principles. However, there is a way to avoid these problems and still claim that property rights may obtain prior to (or in the absence of) a social contract.

I allowed that the goods one has labored to produce may, in some circumstances, be taken by others without this constituting aggression. However, this conclusion may be avoided by reinterpreting "aggression" so that interference with a person's ongoing use of land or goods constitutes "aggression," and is therefore prohibited. In order to advance the case for property rights, "aggression" must not be held to include preemption of a person's potential use of a scarce resource.

There are two problems with this maneuver, however. First, it reduces the plausibility of the non-aggression principle, and increases the burden of justifying that principle. Second, and aggravating the first, the vagueness surrounding "use" must be eliminated or at least drastically reduced. The extent of the thing "used," and the difference between actual and merely potential use must be clarified.²⁴

One who would defend private property by this argument must interpret "use" in such a way that the extent of things used, and the ways in which one must interact with things to be using them, create rights roughly corresponding to those of private property as we know it. These rights would include the rights of gift and exchange. I could then be "using" something simply because I intend, at some point, to allow someone else exclusive use of it,

whether as a gift or as part of an exchange. However, if the "non-aggression principle" prohibits interfering with "use" in precisely this sense, then we could no longer claim to be deriving rules of property acquisition from more basic moral principles. Instead, these rules would be built into a principle of "non-aggression"—a principle quite different from a simple constraint against physical attacks on one's person.²⁵

When we attempt to derive rights of use and exclusive use of land and goods from moral principles which prohibit aggression or the taking of advantage, we find that there are quite limited rights of use, and no rights of exclusive use. Instead, persons are at liberty to compete for the use of natural resources, interfering in the uses made by others, sometimes without compensation. Neither Gauthier's nor Nozick's state of nature includes an extensive system of property rights.²⁶

Notes

1. David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986). All page numbers cited from Gauthier in the text will refer to this book.
2. The original proviso may be found in John Locke, *Two Treatises of Government* (London: Awnsham Churchill, 1690), second treatise, ch. V, paras. 27, 33.
3. Gauthier borrows the term "Lockean proviso" from Robert Nozick's discussion of initial property acquisition in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 174-82. All pages cited from Nozick will refer to this book.
4. James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press, 1975).
5. John Nash, "Two-person Cooperative Games," *Econometrica* 21 (1953): 128-40.
6. We assume, following Gauthier, that the agreement is based on the principle of "minimax relative concession"—Gauthier's account of how a rational bargain proceeds from its initial position.
7. Not that I don't have my doubts. In justifying the "minimax relative concession" principle of rational bargaining, Gauthier writes that one bargainer's larger stake, compared to the stake of the other party, "increases the pressure on her to reach agreement" (p. 139). That is, one of the factors motivating her to make concessions is the fear that otherwise, no agreement

to cooperate will be reached. This seems to be the same threat to which Buchanan appeals and Gauthier objects. I will not press this point, however. I am interested in accepting the non-coercion principle, and the Lockean proviso, and seeing what follows for property.

8. Locke, second treatise, ch. V, para. 33.
9. Nozick, *Anarchy, State, and Utopia*, p. 175; cited by Gauthier, p. 203.
10. James O. Grunebaum points out that Gauthier's form of ownership does not grant the "owner" all the rights commonly thought of as being entailed by private ownership ("Ownership as Theft," *The Monist* 73 (1990): 556-60.) We shall ignore such comparisons, confining our attention to the rights of ownership which Gauthier does claim.
11. Gauthier follows the terminology of Nozick in *Anarchy*, pp. 57, 63-65.
12. Nozick, p. 174.
13. In the third step, as we intend to enter into market relationships, all costs imposed on others by one's activities require full compensation. For example, you are no longer free to pollute the river without compensating me, for by doing so you reduce my catch of fish, and increase my demand for the fish you catch. You thereby put yourself at an advantage in market interaction with me. Thus, not only do you worsen my situation, but now (through the market) you better your own by polluting the river (pp. 211-14).
14. Samuel Freeman points out that the benefits that the others expect to receive from Eve's efficient use include future benefits. But if others are to be satisfied with these future benefits, they must be prudent; and prudence is not part of rationality as Gauthier defines it ("Morals by Appropriation," *Pacific Philosophical Quarterly* 71 (1990): 288). Gauthier's arguments thus require substantial empirical claims. I shall set aside this objection here, arguing that there is a fundamental conceptual difficulty with the argument for Eve's right to exclusive use.
15. Grunebaum in "Ownership as Theft," pp. 558-60, objects that because of the limitations on Gauthier's form of ownership, owners may lack sufficient security of tenure to use property efficiently. We shall set aside this objection.
16. No deep divide between "is" and "ought" need be assumed here. A rough-and-ready distinction will suffice for our purposes.
17. Some passages strongly suggest that Gauthier at least sometimes gives "appropriation" a purely factual interpretation. Samuel Freeman rightly objects ("Morals by Appropriation," p. 290, citing Gauthier, p. 318) that property is not a physical relation, but a normative relation between persons with respect to an object. Though aimed at a different passage, Freeman's criticism provides some support for my charge that Gauthier is confused over the normativity of appropriation.
18. I ignore the complications surrounding Gauthier's step three—the necessity for compensation for all imposed costs in the marketplace—because I

assume that one who "restores common use" is not interacting in the marketplace.

19. Grunebaum contrasts social contract theories which make the original distribution of property prior to the social contract, and those which make it part of the contract, and points out that Hume also made original distribution prior to the contract or convention. However, an important difference is that Hume makes present possession the basis of this distribution, rather than deriving it from moral principles. See David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Oxford University Press, 1964), p. 490; and James Grunebaum, "Ownership as Theft," p. 547.
20. Locke's own constraints, requiring one to leave "enough and as good" for others, are even stronger than Nozick's. However, taking this requirement seriously prohibits acquisition of scarce or potentially scarce goods, as Gauthier remarks (p. 202). Locke's law of nature also requires one, "when his own preservation comes not in competition, ... to preserve the rest of mankind" (second treatise, ch. II, para. 6). I wish to focus, however, on the implications of principles which prohibit only the infliction of certain abuses or harms on others.
21. This is not to deny that a concept of "aggression" could be specified, which would count this as an act of aggression. I consider one way of doing this in the concluding section, and I try to indicate some of its disadvantages.
22. Freeman presses a similar objection against Gauthier ("Morals by Appropriation," pp. 288-89). Freeman questions whether utility-maximizing persons will converge on any one system of property. This brings into question, as we have not, whether rational utility maximizers will indeed accept Gauthier's proviso.
23. Against Herbert Hart's "principle of fairness" Nozick writes: "One cannot ... just act so as to give people benefits and then demand (or seize) payment" (p. 95). Yet Nozick allows persons to act on a system of property, which includes rules of appropriation, and then demand compliance. See Herbert Hart, "Are There Any Natural Rights?," *Philosophical Review* 64 (1955): 185f.
24. One of the merits of Gauthier's approach is that it does not suffer from a comparable problem regarding the extent of the things in which one has rights. The extent is determined by the proviso: it must not be so large as to make others worse off; nor may it include things which others could seize without worsening one's situation.

Eric Mack defends a version of classical liberalism which includes what he calls the Practice theory of property rights ("Self-Ownership and the Right of Property," *The Monist* 73 (1990): 519-43). In contrast to Act theories, which take property rights to arise simply through various exercises of self-ownership, the Practice theory posits a natural right to others' compliance with a system under which each agent can secure protected control over external objects. In the abstract, many different practices

(embodying different entitlement-conferring rules) may be justifiable; however, if one of these is currently established, its rules alone are binding. This appeal to an established, justifiable practice, where one exists, helps resolve the problem of determining the extent of a thing appropriated.

25. Mack ("Self-Ownership") requires that a practice of property, in order to be justifiable, must incorporate the plausible claims of Act theories of private property to the effect that certain exercises of self-ownership create entitlements to extra-personal objects. A more fully developed Practice theory would specify which these plausible claims are, that must be incorporated. In so doing, I suggest, it could not be deriving rules of property from a constraint against aggression.

Loren Lomasky comes to a similar conclusion, with regard to a principle of non-interference rather than non-aggression. In *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), Lomasky writes: "In order for life to be possible, social determinations will have to be made concerning which causal effects [on others] will be deemed cases of (impermissible) interference" (p. 103). And in particular, "moral and legal rights to property must arise as the product of social decision rather than be read off the moral landscape" (p. 120).

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