A Labor Theory of Property

1. *Introduction*

The Supreme Court in several recent cases has flirted with the notion that labor gives one an entitlement to ownership:[1] a legal right to bar others from the fruits of that labor or to extract payment from them if they use the fruits without permission. Sometimes articulated in terms of "natural rights,"[2] and sometimes in terms of "fairness," this notion is at apparent odds with contract law's insistence that the only "fruits of labor" one is obligated to pay for are those one has agreed in advance to buy.

However, in recent work I have suggested that the common law of restitution might indeed support courts ordering payment to intellectual property producers,[3] and that as a functional matter such payments will not tend to undermine the contractual market system or our culture's

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1 See, e.g., Carpenter v. United States; U.S. Olympic Committee; Monsanto; Stewart v. Abend; Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218 (1985).

2 Nation at 2230 (Brennan, J., dissenting).

Similarly, a former Register of Copyrights has opined that authors' rights are the true basis of copyright. Ladd, *The Harm of the Concept of Harm in Copyright,* 30 J. COPYRIGHT SOC'Y 421 (1983).

Although one may follow Locke's terminology and call the entitlements which emanate from his system "natural" rights, I do not make the claim that Lockean analysis leads to rights which in fact are superior to those which our Constitution, legislatures and courts create, or that rights can have no justification other than those flowing from Locke. Locke's "natural law" language is used merely to identify the legal relationship which would result from one particular sort of argument. While I hope to show that the form of argument has some independent persuasive power, the goal here is less to provide programmatic guidance than to provide a heuristically interesting set of insights into the way a system of intellectual property rights might, or should work. Overall, it is hoped those insights will lead courts to being more hesitant in granting intellectual property rights than they now are.

What Locke himself meant by "natural law" is far from clear. *See, e.g.*, Laslett, *Introduction*, in J. LOCKE, TWO TREATISES OF GOVERNMENT, at 80-91 (P. Laslett 2d rev. ed. 1970) (3d ed. 1968); M. White, SOCIAL THOUGHT IN AMERICA at 265-71 (1957). *See also* SECOND TREATISE, Chapter XI at secs. 134-39; J. TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES at 121-30, 157-76 (1980).

preference for consensual rather than judicial impositions of obligations.[4]

Four questions have to be faced in any case where an author sought to assert new intellectual property rights on the basis of a "fruits of labor" argument: First, what sources of policy argument do the relevant statutes and precedent indicate are legitimate? Second, if the relevant sources of authority do not interdict reliance on general notions of morality and general patterns within the common law, do those notions and patterns make the desire to provide a "fair return for labor"--what I have elsewhere called the "restitutionary impulse"[5]--an appropriate policy for a court to pursue? Third, can a restitutionary impulse justify property? And fourth, if so, what form would these property rights take and to which subject matters would they attach?

The first of these questions is determining whether particular statutes or precedent are open to other sources that might contain "labor theory" types of argument. I have suggested elsewhere that the current copyright statute exhibits a mixture of economic and author's rights notions,[6] but a focus on legislative interpretation is outside the scope of this article. The task here is not to determine whether a restitutionary impulse as a historical matter *did* generate particular subspecies of intellectual property. Rather, our task is to determine whether, even if one gave the proponents of a restitutionary right every benefit of the doubt, the restitutionary impulse *could* do so. For our purposes, therefore, the first implicit question primarily serves as a caveat: even if a restitutionary principle is legitimate within the common law tradition, and even if it generates certain intellectual property rights, it remains necessary to inquire whether it is legitimate within particular statutory contexts.

As for the second question, concerning the legitimacy of a "labor

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3. 41 STAN. L. REV. 1343 at 1451-60.

4. Intellectual Property and the Restitutionary Impulse (University of Virginia Conference Paper, 1990).

5 *See* Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse* (1990 manuscript) [hereinafter cited as *Restitutionary Impulse*].

6 *See* Wendy J. Gordon, *Toward a Jurisprudence of Benefits*, ___ U. CHI. L. Rev ___ (1990); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1990).

additional

The key point here is asymmetrical market failure: in the usual intellectual property context, the creator who lacks a right of recovery is likely to face significant problems in selling the material to those who would wish to buy, while imposing a duty to pay on potential users is likely to encourage markets to form. * Since intellectual property rights will not therefore be likely to erode otherwise - healthy markets.

* See Gordon, Restitutionary Impulse, supra at -

theory" within the overall legal tradition, I have elsewhere suggested that the restitutionary impulse has a legitimate role in the common law. I suggested in *An Inquiry into the Merits of Copyright*[7] that the common law seems to support the notion that persons who labor to create benefits deserve some right to payment in return. That conclusion emerged, however, from a discussion of the various areas in which the common law has refused to grant restitution, and indicated that the circumstances in which restitution might be appropriately awarded were limited in nature.[8] So judicial reliance on notions of "fair return to labor" should pay close attention to circumstance and context; the mere fact that one has created something of value is not enough to give a right to restitution.

I now come to the third and fourth questions, of whether a restitutionary right can justify property. If one accepts *arguendo* that creators are entitled to a restitutionary right against intentional use of their demarked works, will such a right carry authors as far as they will wish to go?

Admittedly, a right to restitutionary payment would be an important step on the road to property, for it indicates that persons who generate benefits can have more than a mere privilege to use their best efforts to obtain payment; they may have a right to the assistance of the legal system as well.[9] But rights take many different forms. Because a right to restitutionary payment is not the same thing as a property right, a restitution-based property theory yields more limited results than its proponents seem to recognize.

A right to restitutionary payment provides its holder with an entitlement backed by a "liability rule"[10] right to compensation.[11]

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7 *See generally* Gordon, *An Inquiry into the Merits of Copyright*, 41 STAN L. REV. 1343, at 1451-60.

8 Among other preconditions, a right to restitution would be available only when one person advertently used benefits created by another which had definite boundaries and were marked as owned. *See* Gordon, *Restitutionary Impulse*, *supra* note 5, at ___.

9 The right/privilege distinction being drawn here follows Hohfeld.

10 Calabresi & Melamed

11 We are speaking here of a right to restitutionary payment, as set forth in the beginning segments of this article. In the actual restitutionary case law, a plaintiff can sometimes obtain more than simple payment.

Property, by contrast, ordinarily gives its possessors a right to set their own prices, backed by a power to exclude others altogether from the owned resource, free of judicial second-guessing. In copyright, authors can obtain injunctions completely barring others' works if they use even a few pages of the authors' copyrighted material without consent.[12]

Further, most conceptions of restitutionary desert involve some notion of proportionality, while property is an all-or-nothing grant. Even aside from the injunction issue, restitution and property might therefore yield different results. For example, since intellectual property creators build on what has come before, the rewards property would allow authors to earn in the marketplace may be more fairly attributable to their predecessors' efforts than to their own.[13] On a restitution model, those authors might be limited to recouping a reward proportionate to their own limited contribution.

For these and other[14] reasons, one cannot pass simply from a right to restitution to a right to exclude; one needs a bridge. Though some proponents of labor theories of property seem to deny this, asserting that if one has created something, one should own it,[15] most commentators recognize that some justification must be provided for property that is keyed to the right of exclusion itself.[16]

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12 Thus, in the *Salinger* case, the reclusive author was able to enjoin a biography which contained scattered quotations from his letters. Note that the remedial pattern in restitution itself can be much less harsh toward recipeints. [cite]

13 Not all observers would agree with this proposition. Rolf Sartorius, for example, suggests that even if one accepts that a labor principle merely gives an entitlement to "the value-added-on product of one's labors," "the labor theory of entitlement should result in virtually complete title" for "intellectual, artistic, and athletic activities." Rolf Sartorius, *Persons and Property*, in R.G. FREY, UTILITY AND RIGHTS 196, 204 (1984). By contrast, consider, e.g., BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT; David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981) (stressing the need of new creators to utilize what has come before).

14 *See* LAWRENCE BECKER, PROPERTY RIGHTS, at _____.

15 *See, e.g.*, LYSANDER SPOONER, THE LAW OF INTELLECTUAL PROPERTY (original date 1855), in 3 THE COLLECTED WORKS OF LYSANDER SPOONER: LEGAL WRITINGS 1, 21-30 (1971); *also see* RICHARD EPSTEIN, TAKINGS chapter 1 (treating the proviso as a sort of error.)

16 ~~Thus, for example, Lawrence Becker argues rather convincingly that if one has a restitutionary right to be rewarded for benefits generated, one should have a corresponding obligation to be~~ penalized for harms caused. A right of exclusion does not give rewards

A right based on restitution is a right to recover benefits conferred; its obligations thus tend to be proportional to the benefit generated.

John Locke developed just this sort of theory, one aimed at discovering what might justify one person in excluding others from a resource.[17]

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proportional to the net amount of benefit generated. ~~Becker therefore propounds~~ a multi-part theory to ~~indicate~~ when the particular reward known as "property" ~~should be awarded~~ a laborer. LAWRENCE BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 32-56 (1977).

Robert Nozick makes a related point about the importance of the proviso in justifying property, as distinguished from the justification needed to support a claim to restitutionary payment:

> Ignoring the fact that laboring on something may make it less valuable . . . . Why should one's entitlement extend to the whole object rather than just to the *added value* one's labor has produced? . . . No workable or coherent value-added property scheme has yet been devised . . . .
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> It will be implausible to view improving an object as giving full ownership to it, if the stock of unowned objects that might be improved is limited. For an object's coming under one person's ownership changes the situation of all others. . . . The crucial point is whether the appropriation of an unowned object worsens the situation of others.

ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 175 (1974).

Nozick concludes that "any adequate theory of justice in acquisition will contain" some protection against a grant of property worsening the situation of others in particular ways. *Id.* at 178.

Note also that Nozick does not include competitive injury among the harms which would violate the proviso, *id.*, which is the position taken by this article as well. Other commentators would disagree. *See, e.g.*, LAWRENCE BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 42-43 (1977).

17 Locke's efforts in this regard were part of his attack on Sir Robert Filmer, whose theory emphasized the divine right of kings. Filmer cast doubt on the ability of a community of equals, holding all property in common, to generate private property by any means other than an insecure and doubtful mutual agreement; he argued that "the man who held his estate from the king had greater security of possession . . . ." In response Locke "endeavor[ed] to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners." R. SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 152-53 (1973). (The second quote is from Locke's *Second Treatise*, chapter V, section 25; Schlatter quotes the same language from page 24 of the Everyman edition.)

The starting place of Locke's theory is the notion that everyone "has a property in his own person; this nobody has any right to but himself." From this Locke argues that "the labour of [every person's] body and the work of his hands, we may say, are properly his."[18] This starting premise is broader than the qualified restitutionary principle found in the common law,[19] but shows with it a common core: one has at least a prima facie claim to the work of one's hands.

To take the product of the laborer's effort is to cause harm to the laborer, and causing harm is against the law of nature.[20] Here Locke seems to take the step that can justify an exclusion right. But if the labor is mixed with something from the common to which all persons have an entitlement, the same no-harm principle dictates that the laborer should not do harm to other peoples' claim to the common.

Recognizing that although a laborer may have a strong moral claim not to be injured in regard to the fruits of his labor, and also that other persons have equally valid claims not to be injured, Locke offers what has come to be known as the "proviso" or "sufficiency condition," safeguarding the rights of all persons to the common:

> [L]abour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, *at least where there is enough and as good left in common for others*."[21]

The latter clause--the requirement that "enough and as good [be] left" if appropriation is to ~~yield properly~~ is commonly known as Locke's "~~proviso~~."

Locke thus argues that one person's joining of his labor with resources that God gave mankind[22] ("appropriation") should not give

justify denying others their prior right to use what the labor was joined to — is a no-harm condition. x

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18 Ch. V, sec. 27.

19 *See* Gordon, *Restitutionary Impulse*, *supra* note ___.

20 My interpretation here in some respects follows Olivecrona. See Olivecrona, *The Term "Property" in Locke's Two Treatises of Government*, 61 ARCHIV FUR RECHTS UND SOZIALPHILOSOPHIE 109, 112-14 (1975) (discussion of the "suum" in natural rights theory); Olivecrona, *Appropriation*, 74 J. HIST. IDEAS, at ___ ("fruits of labor" perceived by Locke as) an extension of the laborer's personality.

21 LOCKE at ch. V, sec. 27 (emphasis added).

x include in this fn material on p 5 from n. 16

that individual a right to exclude others from the resulting product, unless the exclusion will leave these other people with as much ability to use the common as they otherwise would have had.[23] In this sensibility to the rights of the non-propertied, Locke's analysis comes closer to approximating the common law of restitution, for that common law tradition shows a concern with protecting the autonomy of those persons who might be sued by laborers and other putative benefactors, and with assuring that such potential defendants not be harmed by the assertion of restitutionary legal claims.

David Lange has placed at the top of the intellectual property agenda the question of how best to define and defend the public domain.[24] The Lockean proviso provides a provocative key to those tasks of definition and defense. In the intellectual product area, the "common" is the scientific and cultural heritage. The proviso correctly insists that all persons' access to that common must be safeguarded. The proviso's concern with preserving the common has a special resonance in the intellectual property area, for our culture is one of our most important commons.[25]

The article in the following sections develops an interpretation of

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22 I argue later, see___, *infra*, that it makes no difference if the resources are commonly owned or unowned.

23 *See* note 16, *supra*.

24 *See generally* Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981), particularly at 147-48, 171-78.

25 Locke's proviso embodies a grant of natural right entitlements to the public. Judge Benjamin Kaplan put a related contention this way:

> [I]f man has any "natural" rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and "progress," if it is not entirely an illusion, depends on generous indulgence of copying.

B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2 (1966).

Also, see Graham Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. ___ (1988). Although Hughes shares my sense that the cultural heritage is a valuable common that can be analyzed using Lockean principles, he is insistent that copyright does not erode the common and that the proviso can be easily satisfied. As will appear, see ___, *infra*, my views on the latter issues are far different.

Locke's text based upon what a secular lawyer would find ethically attractive in it. Most simply stated, the core of what the article will draw from Locke is this: that creators should have property in their original works, provided that such grant of property does no harm to other persons' equal abilities to create or to draw upon the preexisting cultural matrix and scientific heritage.[26] A ~~remarkable~~ range of specific recommendations for intellectual property can be drawn from this simple prescription, including definition of the types of intellectual products capable of being owned, and specification of the package of entitlements which should constitute intellectual property rights.

Those implications will reveal themselves to be, in large part, anti-propertarian. Far from providing a stalwart support for authors' claims to monopoly, a Locke-based theory seems to support a broad area of privileged use. It restricts to a fairly narrow compass the scope of what might constitute protectable subject matters or ownable exclusive rights.

Some of the same results could be drawn from first amendment analysis. However, many courts have been less than willing to apply the first amendment vigorously in intellectual property contexts.[27] Unlike the first amendment, the proviso and the limitations based on it have the virtue of showing that such limitations are integral to property theory, and not imposed by some external source.

Before turning to a more detailed study of Locke and the implications that can be drawn from his theory, we should pause to note the kind of argument which an author might try to make, building both upon the restitutionary principle advanced earlier and upon the Lockean labor theory.

2. *Author and user arguments*

In *Intellectual Property and the Restitutionary Impulse*,[28] I suggested

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26 One might try to argue that the laborer's very efforts distinguish him from other persons. However, note the identity of the third parties with whose welfare Locke is concerned: neighbors and strangers who themselves wish to apply their effort to the common. As between equally industrious persons, the facts that one may be born first and thus have earlier access to the common is not a morally relevant ground for distinction.

27 *Falwell v. Hustler* may signal a shift toward more aggressive protection of first amendment interests.

28 *See supra* note 5.

that the common law might embrace a right to restitution when one person advertently uses demarked benefits created by another.[29] How might that tentative finding advance a hypothetical debate between an author (whom I call Harriet) and a user of her work (whom I call Peter)? Harriet might take the restitutive principle as established and then try to extend it, first to payment for a book she has written, then to payment for other things she might create, and then to ownership in both.

A. Harriet's argument in favor of a restitutionary right might go like this:

When the common law is reluctant to grant restitution for unsolicited benefits, the reluctance stems primarily from the following three problems: fear of causing harm to a recipient who is unexpectedly made to pay for something that is worth less to him than the amount of monetary recovery sought; fear of causing deleterious systemic effects such as encouraging extortion or eroding markets; and fear of imposing unjustified compulsion.[30] All of these problems are absent, Harriet would argue, and restitution is therefore proper, whenever someone like Peter intentionally makes copies of her manuscript knowing that she wishes to claim ownership in it.

First, if Peter knows he will have to pay if he makes copies, he will do so only if he expects to receive a net benefit after the payment is subtracted. Therefore, there will be no harm if he as user is required to pay. Second, granting an author restitutionary rights gives incentives for productivity rather than extortion, and encourages rather than discourages the evolution of voluntary markets. Therefore, systemic effects will be positive. Third, regarding unjustified compulsion, there is nothing unjustified about compelling someone who has no claim of right to a creator's efforts, to choose between paying for those efforts or doing without. Since these three grounds for objection do not apply, and since she has created something of value, Harriet would argue she should be entitled to be paid when others like Peter seek the privilege of making copies of her book.

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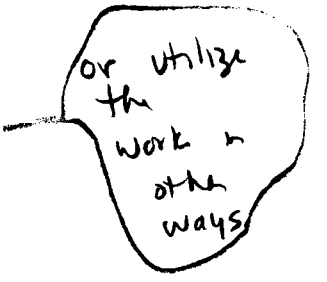
29 Common law copyright does just this. *See* _____ ("Publication"), *infra*.

30 *See* Gordon, *Restitutionary Impulse*, *supra* note 5.

Further, she will suggest, the same restitutionary logic should give her rights in other elements of value she generates. So if her book contains general ideas useful to Peter, he should be required to pay her before utilizing them. If her book should become so well known that its title or main character becomes synonymous with a particular world view, Peter should be forbidden from making satiric or serious reference to that title or character when making points of his own unless she is compensated. If Harriet herself becomes famous as a result of her efforts, Peter should make no paintings, statues or photos of her without her consent. And if the book contains research, or "hot news," or facts, or anything else that she has uncovered by her own efforts, Peter should be prohibited from using them until he has paid her, for she is entitled to "the fruits of her labor," and he should be kept from "reaping where he has not sown."[31]

She might even press the point so far as to argue (as have litigants in somewhat analogous circumstances) that if the book is published in serial form, Peter and his friends should be prohibited from betting on the outcome of the last installment unless they purchase the privilege of using her work as the basis of their gaming.[32]

Moreover, she will argue, the simplest way of giving her payment for all these things is to give her a transferable right to forbid others from utilizing her work. Then potential users like Peter will be encouraged to bargain with her if they wish to make copies, and a self-administering system will evolve. She will contend that the common law's restitutionary impulse, or its equivalent "natural right" in Lockean theory, gives her such a property right.



B. Her argument in favor of a property right might go something like this:

Though many attempts have been made to use Lockean theory as the basis for evaluating private property today, most such accounts are complex, and most conclude that the Lockean criteria can no longer be satisfied. In contemporary settings it would appear virtually impossible to find a large amount of appropriable resources not yet owned by

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31 All of these assertions of right are analyzed below; *see* _____ ("Applications"), *infra*.

32 *See National Football League v. State of Delaware*, discussed *infra* at _____ ("Applications"); *Board of Trade v. Dow Jones*, discussed *infra* at "Standards."

individuals (a "common"),[33] and harder still to find cases of appropriation which would meet the proviso's requirement of leaving "as good" for others.

For her intellectual products, Harriet says, no such straining at interpretation is necessary.[34] Since there is nearly infinite store of

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33 Courts occasionally use the phrase "public domain" and "public common" interchangeably. *See, e.g.*, Desny v. Wilder, 299 P.2d 257, 262-63 & n.5 (1956). Nevertheless, it should be admitted that the two phrases have different connotations: the "public domain" is sometimes concevied of as un-owned, while a "commons" may be owned by some discrete group. For example, the farmers historically entitled to use an English commons could probably exclude a stranger from it.

Some commentators suggest that no proviso need attach if the resources to which labor is joined are un-owned (Thomson), while others suggest that even Locke began with a "negative rather than a positive community of ownership: things belong to no one . . . ." R. SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 153 (1973). This article takes the position that a negative community of "no-ownership" is sufficient basis for the proviso, on the ground that equality of access to the cultural heritage is an independent moral imperative. *See* _____, *infra*. The article accordingly treats public common and public domain as interchangeable.

34 For example, Nozick has suggested that so long as *some* eventual appropriation of land will deprive *someone* of the opportunity to appropriate his own plot of ground, no property in land is possible. Imagine: there are 1,000 ample plots of ground in the unclaimed wilds of America. Immigrants numbers 1 through 999 each take one of these plots, and claim property in it. When Immigrant number 1,000 tries to take the last plot, a Lockean spokesperson tells him, "You can't take ownership in the last plot, because if you take it you will violate the proviso as to Immigrant number 1,001, whom we know is on her way here. By taking the last plot, you'd be leaving her with less than you'd have, and less than she could use; in fact, you'd be leaving her with nothing of the land which she owns in common with you and the rest of humanity. You're not entitled to take all the common that way. In short, any last (ultimate) potential appropriation is prohibited for it will leave some future potential appropriator frustrated without the possibility of property. You have the bad luck to be the last one." As to which, Immigrant number 1,000 may reply, "What you're telling me is that Immigrant number 999 took land which made the next comer, namely me, unable to own land. That means I'm left without 'enough, and as good' as compared with Mister 999. Therefore, awarding property to Mister 999 would violate the proviso. The penultimate appropriation should be as prohibited as the ultimate one, for it leaves two frustrated potential appropriators: myself and Madame 1,001." So number 999 would also not be entitled to property. And if the penultimate appropriation is prohibited, so would be the one before that, "zipping back" (in Nozick's phrase) to the first appropriation. R. NOZICK, ANARCHY, STATE AND UTOPIA 175 (1974).

The problem does not seem to arise for intellectual products, for which an infinite range of creations is conceivable. If infinite, there is no "end point" from which to zip.

possible novels, melodies, poems, inventions, ideas, designs, and the like, the scope of the common is broad and far-ranging. As for the moral worth of labor, creators of intellectual products seem to be creating something out of nothing, and thus would appear to be unusually meritorious candidates for rewards.[35] Professor Shaler, for example, suggests that an author is "godlike" in his ability to "create out of the ether."[36]

The proviso that "enough, and as good" be left for others also is easily met. Locke suggests the following test for determining whether the proviso is satisfied: a covetous and contentious stranger has no justification to complain of another's taking possession and ownership of land if, after the owner's appropriation, "there was as good left, as that already possessed, and more than he [the envious complainer] knew what to do with, or his Industry could reach to."[37] The number of potential intellectual products is not limited by physical constraints; the globe may be entirely taken up, but new intellectual products can continue to be made.

Thus, property in intellectual products seems strongly supported by Locke's theory[38]--more strongly than property in tangible forms,

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35 Persons who *employ* creators would also seem to be meritorious candidates for ownership under Locke, for he speaks of the servant's labor as being the master's. Of "the Turfs *my Servant* has cut," he writes, they are removed from the common by "labour that was *mine*". LOCKE ch. V, sec. 28 (emphasis altered from original). While a good deal could be said about whether creators and their employers should be treated differently, and about the meaning of this controversial passage, this article will by and large treat authors and their employees or assignees as interchangeable.

36 Shaler.

37 LOCKE at sec. 34.

38 Locke himself seems not have turned his attention to intellectual products when developing his property theory; his focus was on land, and its relation to civil society. It is clearly possible that Locke might not have conceptualized intellectual products as the proper subjects of property. (See, e.g., paragraph 44 of chapter V.) However, Locke was concerned with examining the ownership of land and capital in his society, and their relationship to government, during a period when intellectual products were of comparatively little commercial value. Any specific conclusion he may have come to regarding the issue of intellectual property should not dissuade us from taking the mode of analysis he developed for analyzing his society's valuable resources and applying it to a type of resource increasingly more valuable in ours.

property such as land.[39] Since our legal system clearly recognizes property in land, whose roots are more questionable,[40] she argues, property in one's creations should *a fortiori* be recognized.[41]

Therefore, Harriet contends, any of her creations easily pass Locke's test: even if she receives property in them, there will always be more possibilities open to strangers than they can "kn[ow] what to do with."[42] This is true, she points out, even if she has used elements of the public

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39 John Smart Mill, in the course of a utilitarian critique of land ownership, made a similar point about the favored status of *created* property using almost Lockean terms:

> When the "sacredness of property" is talked of, it should always be remembered, that any such sacredness does not belong in the same degree to landed property. No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust. It is no hardship to any one to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all. But it is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for a new-comer.

J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY, BOOK II ch. II, sec. 6, at 233 (W. Ashley ed. London & NY 1909).

40 One need not make a Mill-type analysis (summarized in the preceding note) to have doubts about current distributional patterns in the ownership of real property. For example, the typical law student or lawyer will find it more congenial to make a strong argument on behalf of granting intellectual property in one's own creations than she will to make an argument on behalf of inheritance.

41 Of course this *a fortiori* argument is not without flaw. Considerations of stability can persuade in favor of continuing established legal patterns of dealing with existing phenomena (like the use of land), regardless of how well-justified those patterns might or might not have been at the time they came into being, so that existing patterns of law do not always provide reliable guides for dealing with new phenomena as to which considerations of stability may not have the same weight. (This is one of the dangers in that mainstay of the common-law adjudicatory process, reasoning by analogy.) Nonetheless, to the extent that claims of distributional equity have any role in justifying our law of real property, those claims would seem to be stronger where the Lockean conditions can be satisfied.

42 LOCKE ch. V, sec. 34.

This quality of growth in the frontier of intellectual property is dependent upon a freedom to move forward, which may give the intellectual property "common" a different structure than the physical wilderness usually conjured up by Locke's language.

domain in her creation. Since Peter remains free to return to use those elements himself, excluding Peter from her work does not violate the proviso. Most fundamentally, Harriet asserts, she has created something new, something that Peter would not have made; almost by definition, excluding him from it does not harm him.

Harriet is not alone in assuming that giving property rights in intellectual products easily satisfies the proviso. It has often been imagined that such rights cost no one anything. For example, in regard to patents, Steven N.S. Cheung recently traced the "something-for-nothing" thesis from Jeremy Bentham, through J.B. Say and John Stuart Mill, to J.B. Clark:

> If the patented article is something which society without a patent system would not have secured at all--the inventor's monopoly hurts nobody . . . his gains consist in something which no one loses, even while he enjoys them.[43]

John Stuart Mill similarly suggested that no one ever "loses" by being prohibited from "sharing in what otherwise would not have existed at all."[44] Harriet asserts that if she creates a valuable thing, she easily satisfies the proviso, and deserves to own it and all the benefits that flow from it.

C. Responses from the community of potential users

As spokesman for the users of intellectual products, Peter has several grounds of response available to him. For example, he could continue to

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43 Cheung, *Property Rights and Invention* in 8 RESEARCH IN LAW AND ECONOMICS; THE ECONOMICS OF PATENTS AND COPYRIGHTS 5, 6 (J. Palmer & R.O. Zerbe, Jr. ed. 1986). Cheung goes on to note that contemporary economic scholarship recognizes that the patent system imposes significant social costs. On the question of whether such costs constitute a violation of the proviso, see note ___, *infra*.

44 J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY 142 (1872). Mill intimated that a non-owner had no ground to complain of injustice so long as the property right caused him no loss, and so long as those who made the desired thing "were not bound to produce it for his use." *Id.* This bears distinct similarities to the Lockean position. Professor Schlatter suggests that Mill's *Principles of Political Economy* illustrates "the coalescence of the conclusions of natural right and utility in classical economic thought." R. SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 249 (1973).

Also see Hugues, *supra* note ___.

attack the restitutionary impulse which provides the starting point for Harriet's use of the labor theory.[45] Or he might try to argue that the proviso should be broadened to protect him against additional forms of harm.[46]

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45 One set of responses here might involve Harriet's assumption that the systemic effects of a right to payment for intellectual products will be positive. Peter might point out that a grant of monopoly rights in inexhaustible products creates siginficant transaction costs, chills the creativity of later users, and imposes deadweight losses which may very well outweigh whatever incentive effects it produces.

On a more general level, Peter might argue that Harriet's entire edifice is dependent on economics. The earlier discussion in fact showed that a restitutionary right is consistent with common law patterns only where it is, in at least some loose sense, consistent with economic common sense, *see* _____ *supra*. Therefore, Peter now might insist, such a right cannot serve as a secure starting point for a non-economic labor theory of property.

Thus, if in the simple restitution context a court will decline to grant a good-doer a right to payment where such a right would be economically counter-productive, then in the more complex property context a court should similarly decline to enforce a property right where enforcement would generate more costs than benefits, *even if* the proviso is satisfied. In sum, Peter might argue, if Harriet seeks to separate her claim to property from economic and systemic concerns, she is not arguing on the basis of the common law at all. Rather, she is making a moral claim, one that the common law would not be willing to adopt outside of economic contexts where the moral claim was "affordable."

This argument is a strong one. Rebutting it would involve Harriet in identifying how much in the way of net costs the common law seems willing to accept in pursuit of giving people their just deserts. The difficulty of this task suggests that Peter's argument here is strong, and is another reason why the courts should hesitate before embracing labor theories of property.

46 For example, Peter might argue that no assertion of an intellectual property right should make him worse off in any respect than he would have been in a world without intellectual property rights.

One possible form such an argument might take is as follows: In a world without property rights, some intellectual products would be produced, though they might be lesser in number than the products that would be produced in response to the incentives that property rights provide. In a world without intellectual property rights, Peter would have free access to these intellectual products--things produced for the simple love of creativity, for example, or things produced with the expectation that lead-time advantage, status or tenure would provide adequate recompense. Therefore, Peter might claim, he is entitled to have free access to anything that would have been created in a world without intellectual property rights.

If Peter's argument is accepted, it would introduce a great deal of empirical complexity into the proviso. It would be very difficult to determine what products would, or would not,

Or he could accept *arguendo* everything that has come before, and

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be produced without property rights as an incentive.

Complexity is not the only ground for objecting to Peter's proposal. Other responses are available. First, one might reiterate that the proviso should only protect creative equality, which is the position adopted above, and demand that Peter justify his claim to being entitled to protection against all sorts of harm.

Second, one might concede *arguendo* that the proviso should give protection against all sorts of harm, but dispute Peter's version of what a hypothetical world without intellectual property right would look like. For example, one might contend that in such a world, Peter might have been so discouraged by the dearth of intellectual products that he and all his compatriots would have voted to tax themselves to subsidize authors. In that case, Peter could owe Harriet as much in his counterfactual world as he would in an intellectual property regime.

It is even arguable that a world without intellectual property rights is an impossibility--that whatever the starting point, a counterfactual Peter and his friends would have voted to (re)institute a system of intellectual property rights in order to be sure of having enough new works for a vibrant culture or successful science. *Cf.* Note, *A Theory of Hypothetical Contracts*, 94 YALE L.J. 415, 427 (1984) (suggesting that a potential beneficiary might agree to pay for something he might have been able to receive for nothing, "because he would be highly uncertain about the actual probability that the other party" would provide the service without payment.)

However, responses which depend on redefining counterfactual hypotheticals are unsatisfactory. They not only involve a high degree of factual speculation, but also implicate an extensive literature on the nature of "cause" and on the extent to which "hypothetical consent" can provide a normatively acceptable basis for policy-making.

A third rebuttal is simpler, and more securely grounded in Locke's own theory. It simply points out that Peter has offered no justification for his attempt to redefine the baseline from which "harm" should be measured. *See generally* J. FEINBERG, HARM TO OTHERS at _____ (discussing the nature of the concept "harm").

Locke never suggests that a covetous neighbor has a privilege to take whatever industrious persons might happen to produce in the absence of a right to exclude. The key for Locke is not what the neighbor might be *able* to take, but what he is entitled to:

> He that had as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired *the benefit of another's Pains, which he had no right to*, and not the Ground which God had given him in common with others to labour on, and whereof there was as good left, as that already possessed, and more than he knew what to do with, or his Industry could reach to.

demand simply that Harriet take the Lockean conditions on behalf of non-owners seriously. In the following pages, the article takes the latter tack. We learn that Harriet's argument will give authors much less than she thinks. It may give them a right to prohibit others from making complete and verbatim copies of their manuscripts in some circumstances, but many of the other benefits the consuming public may wish to draw from their works will likely be within the proviso's shelter.

3. *Virtues of Locke's labor theory*

As sketched above, Locke suggests that a person who successfully uses his or her efforts to make useful those things which no one else has used or claimed should be rewarded with property in the things, so long as other persons' opportunities to create new products are not thereby restricted. This suggests that subject to the proviso that there be "enough and as good left," people should be entitled to exclude others from the products of their labor.[47]

Ch. V, sec. 34 (emphasis added).

Thus, for Locke an appropriator's neighbors have no rights to "the benefits of another's Pains," and have a baseline entitlement only to that which their own "Industry could reach." Chapter V, sec. 34. Using such a baseline, Peter is not harmed simply by being denied access to something that Harriet would have produced in the absence of property right incentives. For Peter to challenge Locke's starting points, he would have to show why the empirical fact that an intellectual product might be available in a world without property, gives him a normative entitlement to it. That would be a hard task. *See* Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989) [hereinafter cited as *Inquiry into the Merits of Copyright*].

Note interestingly that Peter's position on this matter bears similarities to the conventional assumptions of those intellectual property cases and theories which are based upon economic policy views. Most of the literature attacking the desirability of intellectual property systems has focused on the possibility that the grant of rights is unnecessary to encourage the creation of new works. *See, e.g.*, Liebowitz; Breyer. Under such a view (made explicit most recently by William Fisher), property rights can be justified only if the additional benefit they bring into the world thorugh incentives is great enough to outweigh the benefit that intellectual property systems might take from the world by decreasing the quantity to which access is afforded. The implicit but unacknowledged assumption of such literature is that consumers are entitled to whatever price and quantity would be available without the monopoly rights characteristic of intellectual property systems.

47 Whether this also includes a right to use a legal system's force to effect the exclusion is discussed below at ___ *infra*.

Locke's theory provides an excellent starting place for seeking to articulate an underlying structure for intellectual property law because it reflects the interests and moral claims of both creators and users. Although often referred to as a "labor theory," Locke's views were not dominated by a concern for rewarding effort.[48] He also had a concern with consequences, evidenced by his imagery (dominated by pictures of successful appropriation--the nuts gathered, the land plowed to yield crops, the water caught in the pitcher),[49] by his position on the owner's stewardship responsibilities (he took the position that one who gathers a perishable harvest and lets it go to waste thereby loses his property in it, despite the labor which was put into the initial gathering),[50] and by the structure of his argument (Locke uses necessity and productivity as arguments in favor of the possibility of individually-owned property.)[51] Therefore, despite giving creators a special distributional claim, his theory contains some of what underlies the attraction of the economic and social welfare approaches to intellectual property problems.[52]

This article focuses on Locke's theory for other reasons as well. First, as already noted, "labor theory" has been quite influential in the intellectual property field. For example, when the Supreme Court recently held that intangible "products of an individual's 'labour and invention'" can be property subject to the protection of the takings clause, Locke was one of their sources.[53] His work has been used so frequently as a justification for authors' rights that Locke is sometimes

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48 On the utilitarian aspects of Locke's views, see, e.g., SCHLATTER, PRIVATE PROPERTY: HISTORY OF AN IDEA, at ___.

49 Locke speaks only of successful appropriation; the potential gap between appropriation and labor is not accounted for by Locke.

50 LOCKE ch. V, sec. 46.

51 LOCKE ch. V, sec. 26.

52 The utilitarian strain in Locke has long been recognized. *See, e.g.*, SCHLATTER, PRIVATE PROPERTY: HISTORY OF AN IDEA.

53 *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, ___ (1984) (citing to Blackstone's *Commentaries*, and Locke's *Second Treatise*, among other sources, in holding that trade secret rights can be "property" under the fifth amendment).

erroneously credited with having himself developed an explicit defense of copyright.[54]

Third, Locke's theory has many points of congruence with the structure of our positive law, lending it plausibility as a guide. Fourth, this influential, element-joining, plausible theory has much to teach us about when property should *not* be granted. If for no other reason, Locke's theory deserves a close second look in the intellectual property context where versions of labor theory are so often touted as a support for propertarianism.[55]

Criticism of a theory of property is likely to come from two quarters: from property-owners who feel the theory is too narrow in its grants of title, or from those among the propertyless who object to finding themselves barred from resources and goods which they desire. Locke's theory, generally perceived to be pro-propertarian,[56] responds to the demands of the nonpropertied in three primary ways.

The first is the encumbrance operating against waste, just mentioned. This ambiguous notion is further discussed below.[57] The second is an obligation of charity, by which Locke posits that all persons have an entitlement to survival, good against others' property-based claims of exclusivity.[58] This obligation has many parallels in our law, ranging from the privilege of necessity in the common law of tort, to the legislative pattern of taxation and welfare. It would clearly justify some uses of intellectual products. If a misanthropist developed a cure for cancer, for example, the duty of charity would oblige him to share the knowledge.

The third response is the proviso.

4. *The proviso*

The proviso serves as Locke's bedrock response to the complaints of the nonpropertied. It stipulates that property may not form unless the

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54 *See* PLOMAN, COPYRIGHT.

55 See cases cited at ____, *supra*.

56 *See* __. MACPHERSON, POSSESSIVE INDIVIDUALISM.

57 *See* ____, *infra* (discussion of "waste" in the context of new technologies).

58 *See* _____, *infra*.

appropriator leaves later comers no worse off than himself in regard to their ability to appropriate and create for themselves.[59] As Judith Jarvis Thomson has asked, if "enough and as good" is truly left, how could the proviso "fail to be a sufficient condition for property acquisition?"[60]

For Locke, an appropriation which satisfies the proviso that "enough, and as good" be left, "does as good as take nothing at all."[61] Locke argues that if the laborer's "neighbor . . . would still have room for as good and as large a possession--after the other had taken out his--"[62] then the neighbor would not be "prejudiced" and would have no "reason to complain or think [himself] injured."[63] In short, Locke justifies an exclusion right[64] by giving such rights only where exclusion will do no

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59 This is the "proviso," discussed immediately below, and at ____ *infra*.

60 Thomson, *Property Acquisition*, 73 J. PHIL. 663, 664 (1973) (suggesting that while Locke's theory provides a sufficient basis for property, it is not a necessary condition for just property formation; other bases are also possible).

Incidentally, Thomson's rhetorical question has some possible negative answers. Someone who takes a quasi-Rawlsian "common pool" approach to human abilities (see Sandel) might say property is unjustified even when the proviso is satisfied.

61 LOCKE ch. V, at sec. 33.

62 LOCKE ch. V, sec. 36.

63 LOCKE ch. V, sec. 36 (by implication).

64 There is a great deal of debate concerning the meaning that Locke gave to "property." Melvin Cherno suggests that while Locke used the term in many different senses, "it is nevertheless the case that in the chapter on property he consistently speaks of property in the narrower and more customary sense of 'possessions' owned privately . . . . [W]e may take Locke to mean 'property' as we ordinarily use the term." Cherno, *Locke on Property: A Reappraisal*, 68 ETHICS 512 (1958).

However, one might argue that Locke was simply seeking to prove that there are occasions where an individual could rightfully eat the acorns or fish he appropriated from nature without offending natural law. One can act rightfully (have a privilege, in Hohfeld's terms) without having a "right" to call upon the legal system to aid one in one's efforts. If Locke was offering only a justification for a Hohfeldian privilege of exclusion, that would not justify property. Property as we know it would include, in addition to a privilege of use and consumption, a Hohfeldian right to call upon the legal system to aid one in excluding strangers.

Since in the state of nature there was no government, Locke of course did not explicitly address whether one who had rightfully taken possession of an object also had a right to call upon the legal system to protect that object from a stranger's effort to steal it. But his

relevant harm.[65]

It is the proviso which gives Locke's theory much of its moral force.

By providing a structure in which new creators are entitled to property only when their appropriations do not restrict the resources available to other potential creators, Locke's account seems to reflect or capture most peoples' intuitions about what would constitute a noncontroversial[66] minimum[67] case of entitlement to property rights.

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theory would admit of such a right. *See* Part II, *infra* (discussion of the right to exclude). Also note that in our version of Locke, we begin not from a simple liberty to utilize one's labor, but also from a right to use the legal system to obtain payment for one's labor. If the restitutionary right is well founded (and it is indeed a "right" in Hohfeldian terms), then a right to use the legal system to exclude strangers might well follow once the proviso is satisfied.

65 Note that the proviso does not solve the proportionality problem: a little bit of effort, well placed, may still earn a creator a disproportionate amount in revenues. However, the proviso does make the issue of proportionality recede in importance. Though a creator has no clear claim to a windfall profit, a stranger who has done no creating at all has even less claim to reward. If in addition the creator's having a right to the profit makes the stranger no worse off in any relevant way, the stranger would be hard put to state a claim to share in the revenues. Robert Denicola has made a related argument concerning the ownership of merchandising marks: the proprietors of such marks may have done little to deserve them, but no one else has any better claim. [Cite.]

66 The account, as here applied, is noncontroversial from three points of view. First, many critics of Locke's theory attack the appropriateness of analyzing contemporary institutions of ownership by reference to a set of standards which could be satisfied (if at all) only in a very different hypothetical or primeval state of nature. Such criticism loses its force when the analytic focus is on a form of intangible product which, although created today, might itself satisfy the Lockean standards.

Second, from the perspective of protecting the interests of non-owners, the theory seems largely noncontroversial since the proviso seems to protect the non-property-owning persons in the world from being harmed in their use of the common by any particular grant of property.

Third, from the perspective of the interests of by owners, there is nothing particularly controversial about using Locke to identify a *minimum* domain for property. *Cf.* Thomson, *Property Acquisition*, 73 J. PHIL. 664, 665 (1976):

> I . . . suspect that if we take leaving enough and as good as a condition for property acquisition, then it will follow that there can be no private ownership of land . . . .
>
> But I think it is plausible that what Locke offers us . . . really is a *sufficient* condition for property acquisition. How could it fail to be?

In addition, it is hard to see any independent moral significance adhering to labor or appropriation. Neither is by itself good or desirable.[68] A murderer can labor over his plans, and a successful thief robs by appropriation. To judge the moral status of labor or appropriation, one needs to know something about effects, and it is this gap which the proviso fills.

By conditioning property on the proviso that there be "enough and as good" remaining in the common for third parties to use, the proviso preserves the ability of a later arrival (a neighbor, a covetous stranger) to make property for himself. In this regard, the proviso preserves the

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From owners' perspective, of course, the Lockean theory becomes more controversial when viewed as not just a miminum, but as a complete statement of governing principles. For example, Locke suggests that giving an appropriator property in what he has seized and labored upon is unjustified whenever the appropriation would harm others in a particular way; a utilitarian would probably argue instead that property might be justified even if it harmed some individuals, so long as the property award created a *net* increase in utility.

There are additional perspectives from which the Lockean standard case would be more controversial. One might, for example, mount an attack on the Lockean standards for being too generous toward property. Thus, for example, a communitarian might demand that all benefits generated by one's labor be shared ("from each according to his means") regardless of other circumstances.

67 This article accepts *arguendo* that any act of creation which satisfies the proviso is entitled to be treated as property; it is possible that acts which do not satisfy the proviso may nevertheless be appropriately treated as property under other, non-Lockean justifications for property. See Thomson, discussed in the prior note.

68 Thus, for example, Nozick asks, why should property follow from the laborer mixing his effort with common resources--after all, notes Nozick, when one dumps one's tomato juice into the sea, one merely loses the juice, and gains no claim to own the ocean. NOZICK, ANARCHY, STATE AND UTPOIA at ___.

Many of the traditional critiques of Locke amount to asking "why should property form." The proviso serves to turn that question of "why should property form" around. If the claims of the non-propertied can be satisfied by the proviso, then the more pressing question becomes "why shouldn't property form." (Becker makes a similar point about the proviso. Cite).

In suggesting that Locke's theory might lead the juice-spiller to think he had a claim over the whole ocean, Nozick simply misdescribes Locke's theory in order to illustrate quite accurately and vividly that a labor principle standing alone without a proviso is overbroad. In those cases where the proviso *can* be satisfied, however, the burden of persuasion would seem to fall on those who would *deny* that property follows from labor.

covetous stranger's equality with any laborer/appropriator who may have preceded him.[69] The proviso also has practical impact, for it sets limits on the amount of property that can be claimed by an individual.

A labor principle standing alone could be absurdly overbroad. Thus, for example, Robert Nozick has mocked the notion that property should follow from someone mixing his labor with common resources by asking: if one spills a glass of tomato juice into the sea, does that person then gain a claim to own the ocean? Though Nozick's example can be seen as a general attack on Locke's labor theories of property, in fact it would only condemn an unlimited labor principle as absurd. Once the proviso is added, Locke's answer is the same as the answer common sense would give: oceans cannot be owned.

The proviso, finally, seems to switch the burden of proof.[70] If no one is made worse off by a grant of property, and the person claiming property has some claim, however minimal, to deserve it, it is hard to see why property should not be granted. For if no one is prejudiced by exclusion, then no matter how little reward the appropriator might "deserve," he would seem entitled to exclude so long as he deserves *something*.

One can illustrate this by taking Nozick's own tomato juice hypothetical, but combining it with the proviso and giving it a slightly more realistic touch. Today there are artists whose work consists of stringing fences or wrapping areas of landscape. Suppose such an artist stirs some tomato-colored dye into the sea and changes its color slightly to match the sunset. The artist would seem entitled to keep everyone else out of the colored area, to preserve his handiwork from being marred by eddies and diluents, provided that the world offers all the boaters, swimmers and other aestheticians equally good and convenient areas of ocean for their use. So long as the proviso is thereby satisfied, and they are not prejudiced by the artist claiming this particular portion of ocean as his own, there is no reason for him not to have property in it.

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69 This symmetry is general. Just as an author may have "personality based" claims to own what he or she has made, *see* Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982), the public may have "personality based" claims to use these products to express themselves and understand their world. *See id.* at 1008-13.

70 *Cf.* L. BECKER, PROPERTY RIGHTS.

The desert basis for the "property" may be trivial (depending on one's view of this sort of art), but the claims of those who would want to disrupt this particular patch of ocean would seem even more trivial if the proviso were satisfied. Why should a vandal be privileged to drive his motorboat through the artwork, if there are equally direct and scenic routes available elsewhere?

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