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# The Acquisition of Property Rights

Stephen R. Munzer\*

I shall argue that an "historical" principle for acquiring property is philosophically plausible. Here "historical" refers, not to the complex actual course of history, but to the view that certain past actions by persons may entitle them to rights of private property. Robert Nozick's "entitlement" theory of justice is *one* possible "historical" principle in this sense.<sup>1</sup> My argument unfolds in the context of Jeremy Waldron's stimulating discussion of historical entitlement in his recent book on property.<sup>2</sup> This discussion has received very little attention in the reviews of his book that I have seen.<sup>3</sup>

Specifically, I shall advance three claims. First, Waldron mischaracterizes the nature of an historical principle of justice in acquisition. Second, Waldron is mistaken in holding such a principle to be an unfamiliar feature of our morality. Rather, this sort of principle squares nicely with the prominence of moral desert and with the lack of moral appeal in saying that someone is generally entitled to benefit from another's efforts. Third, the most

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An earlier version of this article was presented at a symposium on Professor Waldron's book at the American Political Science Association meeting in San Francisco on September 1, 1990. I learned much from the other participants—Judith Garber, Jeremy Shearmur, and Jeremy Waldron. I had a particularly fruitful conversation with Professor Waldron after the formal session. His response was especially courteous in light of the fact that some intellectual disagreements persist between us. I have also benefitted from the written criticisms and suggestions of David Dolinko, Douglas Fleming, Thomas Morawetz, Kurt Nutting, Jeremy Paul, Gary T. Schwartz, M.B.E. Smith, and Leeron Travish. I thank the members of the Law and Philosophy Discussion Group in Los Angeles for an illuminating discussion of a draft of this article. With gratitude I acknowledge the assistance of a Fellowship from the National Endowment for the Humanities and financial support from the Academic Senate and the Dean's Fund at UCLA.

1 R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 150-82 (1974).

2 J. WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 253-83 (1988).

3 See Dunn, *Claims and Contexts*, London Times Literary Supplement, May 5-11, 1989, at 489; Knowles, *Book Review*, 40 PHIL. Q. 116 (1990); Oakeshott, *Book Review*, 61 POL. Q. 363 (1990); Paul, *Can Rights Move Left?*, 88 MICH. L. REV. 1622 (1990); Pottage, *Property: Re-appropriating Hegel*, 53 MOD. L. REV. 259 (1990); Steiner, *Book Review*, 101 ETHICS 201 (1990).

plausible historical principle is, as I contend elsewhere,<sup>4</sup> a heavily qualified justification for private property that is part of a "pluralist"—that is, multi-principled—account of property rights. So my argument will give little aid or comfort to libertarians such as Nozick.

The deployment of my argument requires a brief explanation of some recent writing on property. Only with this explanation will it be plain to nonspecialists what is at stake and why it is important.

### I. THE BACKGROUND

Contemporary discussion of acquisition takes place against the backdrop of theories regarding the state of nature. John Locke conceived of this state as a situation without a society or government in which land and other things were held in common. He put forward a labor theory of property as an account of how things held in common could be reduced to private ownership. By "mixing" his or her labor with an unowned thing, a person could acquire a private property right in it.<sup>5</sup>

Comes later Nozick, who offers an engagingly written discussion of property that stands squarely in the tradition of Locke. Nozick has no use for the idea of "mixing" labor with unowned things.<sup>6</sup> But he finds great merit in the central Lockean thought that persons have property rights in themselves and their labor, and so own whatever their labor produces. He develops this thought into what he calls an historical entitlement theory of justice. This theory not only rejects utilitarian accounts of property,<sup>7</sup> it also opposes theories of justice that prescribe a particular pattern of distribution of property.<sup>8</sup> Nozick's theory of property entitlements takes this form:

1. A person who acquires a holding in accordance with the

4 S. MUNZER, A THEORY OF PROPERTY 254-91 (1990).

5 J. LOCKE, *The Second Treatise of Government* ch. v, especially § 27, in TWO TREATISES OF GOVERNMENT (P. Laslett 2d ed. 1967) (3d ed. 1698) [hereinafter J. LOCKE, *First or Second Treatise*].

6 R. NOZICK, *supra* note 1, at 174-75. J. WALDRON, *supra* note 2, at 184-91, also criticizes the idea of mixing.

7 See, e.g., J. BENTHAM, THE THEORY OF LEGISLATION 109-23, 148-98 (C.K. Ogden ed. 1931).

8 An example is Rawls' difference principle, which requires that social and economic inequalities be to the greatest benefit of the least advantaged. See J. RAWLS, A THEORY OF JUSTICE 60-65, 78-83, 302-03 (1971).

principle of justice in acquisition is entitled to that holding.

2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.<sup>9</sup>

This essay grapples with the nature and justifiability of a principle of justice in acquisition (PJA).<sup>10</sup> Some readers may see as vanishingly small the chance that anyone could write anything new about Nozick. His work has received a sustained examination at the hands of G.A. Cohen,<sup>11</sup> Thomas Nagel,<sup>12</sup> and others.<sup>13</sup> A common complaint is that Nozick's PJA is so incomplete as to be almost without content.

Waldron's book advances the ball impressively. His chapter on historical entitlement is not a clutch of cavils with Nozick's text. Instead, it questions, in perceptive detail, the very idea of a PJA. The questioning occurs in the middle of a long book that weaves together sophisticated contemporary discussions of the nature of rights and painstaking examinations of Locke and Hegel.<sup>14</sup>

Especially pertinent here is Waldron's distinction between general rights and special rights.<sup>15</sup> A general right involves an individual interest that is sufficiently important to justify duties on others because of the qualitative nature of the interest—for example, an interest in developing individual freedom. Hegel's account of property, Waldron holds, is a general-right-based theory.<sup>16</sup> A special right involves an individual interest that is sufficiently im-

9 R. NOZICK, *supra* note 1, at 151. For second thoughts, see R. NOZICK, *THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS* 286-96 (1989) (especially at 292).

10 Waldron's use of the term "principle of justice in acquisition" and the acronym "PJA" seems to presuppose that all PJAs are historical. See, e.g., J. WALDRON, *supra* note 2, at 257 and *passim*. For purposes of this paper, I follow what I take to be Waldron's usage.

11 See, e.g., Cohen, *Self-Ownership, World-Ownership, and Equality*, in *JUSTICE AND EQUALITY HERE AND NOW* 108 (F. Lucash ed. 1986); Cohen, *Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty*, 11 *ERKENNTNIS* 5 (1977).

12 Nagel, *Libertarianism Without Foundations*, in *READING NOZICK: ESSAYS ON "ANARCHY, STATE, AND UTOPIA"* 191 (J. Paul ed. 1981).

13 See, e.g., the collection edited by Jeffrey Paul, *supra* note 12.

14 G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans. 1965).

15 J. WALDRON, *supra* note 2, at 106-24 and *passim*.

16 *Id.* at 343-89. For the view that talk of *rights* and the *justification* of private property misapprehends Hegel's concerns, see Pottage, *supra* note 3, at 263, 264, 270.

portant to justify duties on others because some event, action, or transaction occurred. Locke's and Nozick's accounts of property, Waldron maintains, are special-right-based theories.<sup>17</sup> In Locke's account, the mixing of labor with unowned things is the action that justifies property rights for the laborer with correlative duties on others. In Nozick's case, the relevant event called for by his PJA is left unclear. All the same, Waldron's target is not the details of Nozick's PJA or any particular special-right-based approach. Rather, Waldron explores the overall structure of such an approach to private property. He wants to question the core "idea that individuals can, by their own unilateral actions, impose moral duties on others to refrain from using certain resources."<sup>18</sup>

The appraisal of Waldron's views will be clearer if we make the following observations. (1) People use the word "property" to refer both to things and to relations among persons with respect to things. Ordinarily the context makes evident which usage is meant. In the latter usage, the relations include the familiar Hohfeldian bundle of claim-rights, liberties, powers, and immunities.<sup>19</sup> I shall use "property" mainly in this Hohfeldian way. This usage more or less comports with Waldron's use of the term.<sup>20</sup> (2) Acquisition can be original or subsequent. Original acquisition occurs with resources that either have never been owned or though once owned have become unowned.<sup>21</sup> Subsequent acqui-

17 J. WALDRON, *supra* note 2, at 137-283.

18 *Id.* at 253. Of the reviews cited earlier, Paul, *supra* note 3, at 1625, 1628-31, devotes the most space to this phase of Waldron's book. Here he finds Waldron's case to be persuasive. Thus, in resisting Waldron's discussion of historical entitlement, I shall probably be resisting Paul as well. Paul does say, however, that qualifying a special-right-based theory with "exceptions for those in need greatly complicates the topic." *Id.* at 1631 n.21.

Paul's reflective and searching essay merits more attention than is appropriate in these pages. His inspiration comes from work, associated with communitarianism and the critical legal studies movement, that views skeptically the concept of private property, "rights analysis," and concentration on individuals. Whether Paul would find my positions on these matters more, or less, successful than Waldron's is unclear. It is clear that some loss of focus would result from addressing these concerns here.

19 W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (W. Cook ed. 1923).

20 J. WALDRON, *supra* note 2, at 26-61. Waldron relies more heavily than I do on the views of A.M. Honoré and particularly Ronald Dworkin. I do not think that this reliance poses any difficulty for the present discussion. For my understanding of property, see S. MUNZER, *supra* note 4, at 15-36.

21 The latter possibility is exemplified, in Anglo-American law, by the rule that a wild animal if captured becomes the property of the person who seizes it but reverts to an unowned state if it escapes. See generally *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805).

sition occurs with owned resources that later become the property of someone else without lapsing into an unowned state. Traditionally, Lockean theories have dealt mainly with original acquisition. Nozick's PJA seems concerned solely with original acquisition; what I call subsequent acquisition would presumably fall under his principle of justice in transfer. Waldron oscillates. As will become evident, his principal concern is historical theories of original acquisition, but his schema for a PJA also applies readily to subsequent acquisition. (3) A PJA can be unqualified or qualified. It is qualified if one or more restrictions exist on the property rights gained by the acquirer. As will emerge, Waldron's text is not always clear on whether he objects to all PJAs or only to those that lack heavy restrictions.

This background sketch glosses over many details and subtleties, but to be forthright I should display here and now my own axe for grinding. In a new book, I offer a principle of desert based on labor (labor-desert principle) as one of three central principles in a pluralist theory of property.<sup>22</sup> My book and Waldron's crossed in the mail: Mine appeared after his, and his came into my hands only as mine was going to press and I was unable to take his study into account.<sup>23</sup> If Waldron's case against a PJA is sound, that would militate to some extent against the labor-desert principle. I therefore have a vested interest in Waldron's turning out to be mistaken.

Nevertheless, the labor-desert principle differs sharply from the positions of Locke and Nozick. It is heavily qualified by elements within that principle and by a principle of utility and efficiency and a principle of justice and equality. If my theory of property as a whole is cogent, then it will be no victory for Lockean or libertarians should my criticisms of Waldron in this essay be well taken. So I have two purposes here. One is to save the labor-desert principle. The other is to show more generally that *some* PJA is philosophically plausible as *part* of the justification of rights of private property.

The debate is important because, if I am right, an historical perspective that centers on desert by labor reorients this portion of the theory of property in a moderately egalitarian direction. For over a decade and a half, under the influence of Nozick, any

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22 S. MUNZER, *supra* note 4, at 254-91.

23 *Id.* at ix.

entitlement theory of justice has appeared to support a form of libertarian capitalism that can endorse extreme economic inequality. Those who have tried to refute the entitlement theory generally suppose that a new egalitarian stance must rest on some conception of the equal worth of persons. These conceptions may invoke equal counting of persons in a utilitarian sense, equal rights to a decent and fully human life, or some other vision of equality. I agree that these conceptions support moderate egalitarianism. I even use them in my pluralist account. But it is a mistake to ignore further support that focuses on what people do by working—support that comes from the reoriented version of historical entitlement that I call the labor-desert principle.

## II. WALDRON'S CHARACTERIZATION OF A PRINCIPLE OF JUSTICE IN ACQUISITION

Waldron offers the following complex schema for a PJA: "For all  $x$  and for all  $r$ , if  $x$  does  $A$  with respect to  $r$ , then, for all other individuals  $y$ ,  $x$  acquires a right that  $y$  refrain from using  $r$ ."<sup>24</sup> In this schema,  $x$  and  $y$  range over individual persons,  $r$  ranges over resources, and  $A$  ranges over acts. To accept a PJA, Waldron writes, is to accept "that there are actions which individuals can perform whose moral effect is to place millions of others under obligations whose discharge may require them to place their own survival in jeopardy."<sup>25</sup>

This characterization of a PJA is problematic in at least two respects. First, it is unclear whether a PJA applies only to original acquisition or to subsequent acquisition as well. Waldron apparently intends that it apply principally to original acquisition.<sup>26</sup> Yet the schema just quoted applies readily enough to subsequent acquisition, too.

One type of subsequent acquisition, as defined in Part I, is transfer. Transfer can occur by way of sale, gift, bequest, or intestate succession. Consider sales. Suppose that we replace "does  $A$ " in Waldron's schema with "pays the owner of  $r$  a mutually agreed sum of money." Then  $x$  acquires a right that all individuals

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24 J. WALDRON, *supra* note 2, at 265. This complex schema replaces a preliminary formulation at 263.

25 *Id.* at 267.

26 Immediately before the section entitled "Acquisition" in which the complex schema for a PJA appears, Waldron says that for "the rest of this chapter, I shall mainly ignore the issue of transfer and concentrate on original acquisition." *Id.* at 262.

y, including the former owner, refrain from using *r*. The schema therefore applies to garden-variety cases of transfer.

It also applies to a second type of subsequent acquisition as defined in Part I. This type is adverse possession. Under the doctrine of adverse possession, a person who possesses the land of another can sometimes become the new owner of that land. The usual requirements are that the possession of the usurper must be actual, exclusive, open and notorious, hostile and under claim of right, and continuous throughout the statutory period (21 years at common law but typically less in the United States today).<sup>27</sup> Thus, if the adverse possessor occupies the resource in this way long enough, he or she gains a right that the title owner and others refrain from using the land. Adverse possession differs from original acquisition because the resource is already owned. It differs from transfer because the adverse possessor *divests* the title owner and gains a *new* title. In legal parlance, there is no "privity of estate" between the title owner and the adverse possessor.<sup>28</sup> Thus, Waldron's characterization of a PJA is problematic because, though seemingly intended to apply just to original acquisition, it in fact also applies quite easily to subsequent acquisition.

A second, much more serious problem concerns whether a PJA can be qualified. If it cannot, much of the interest of Waldron's chapter evaporates. If it can, the moral effect of accepting a PJA need not be what Waldron says it is. I shall explain.

To "qualify" a PJA is to subject it to a proviso or some other restriction that reduces the strength of *x*'s right or eliminates it entirely or that decreases or eliminates *y*'s obligations. The most familiar proviso is Locke's clause that there be "enough, and as good left in common for others."<sup>29</sup> This clause is hardly the only candidate for a suitable proviso. Other candidates include Locke's recognition of a right to the necessities of life,<sup>30</sup> his no-spoilage limitation,<sup>31</sup> Nozick's efforts to amend Locke,<sup>32</sup> and David

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27 See generally R. CUNNINGHAM, W. STOEUCK & D. WHITMAN, *THE LAW OF PROPERTY* 757-64 (1984).

28 On the new title, see *id.* at 758. For privity of estate, see, e.g., *Belotti v. Bickhardt*, 228 N.Y. 296, 127 N.E. 239 (1920) (privity of estate and "tacking" between adverse possessors); *Howard v. Kunto*, 3 Wash. App. 393, 477 P.2d 210 (1970) (same).

29 J. LOCKE, *Second Treatise*, *supra* note 5, § 27. WALDRON, *supra* note 2, at 209-18, 280-83, rejects the widely-held view that Locke intended to restrict his labor theory of acquisition with this language.

30 J. LOCKE, *First Treatise*, *supra* note 5, § 42.

31 J. LOCKE, *Second Treatise*, *supra* note 5, § 31.

32 R. NOZICK, *supra* note 1, at 175-78.



Gauthier's version of the Lockean proviso.<sup>33</sup> This short list is not exhaustive. No need exists to fix on one candidate here and now. The immediate point is that, in order to avoid making a PJA obviously unattractive, one can qualify it with a proviso that does not put the survival of others in jeopardy.

Waldron's text is unclear. One passage allows that a PJA could be "heavily qualified by a very strong Lockean proviso."<sup>34</sup> Thus the expression "qualified PJA" is not a contradiction in terms for Waldron. However, his complex schema for a PJA contains no qualification.<sup>35</sup> And he ignores the possibility of a qualification in a passage quoted earlier<sup>36</sup> and in other passages from the same chapter.<sup>37</sup>

The choice is clear. If Waldron says that a PJA cannot be qualified, a PJA, so understood, might well imperil the survival of others. But such a PJA would be a straw target. Waldron would be caricaturing defenders of a PJA before butchering them. An unqualified PJA is so hopelessly unattractive as not to be worth further consideration.

If Waldron says that a PJA can be qualified, his initial claim is extravagant. He says that to accept a PJA is to accept the possibility of actions—namely, acts of acquiring property—whose moral effect may place nonacquirers' "survival in jeopardy."<sup>38</sup> Without further argument, the asserted equivalence is implausible if one qualifies a PJA.

It is possible to expand charitably on the spirit, if not the letter, of Waldron's discussion in this way. He might concede that one can always qualify a PJA. The point is that one cannot do so in cafeteria style—by imposing gimmicky or ad hoc restrictions. I agree. But agreement on this point shows only that the tough intellectual work remains to be done. His chapter does not attempt this work. Now Waldron might add that a qualified PJA, in order to be successful, must be highly unified. It must show, he might insist, how the reasons for the qualifications spring from

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33 D. GAUTHIER, *MORALS BY AGREEMENT* 190:232 (1986).

34 J. WALDRON, *supra* note 2, at 266.

35 *Id.* at 265, quoted at text accompanying note 24 *supra*.

36 *Id.* at 267, quoted at text accompanying note 25 *supra*.

37 He writes that "if some PJA is true, then individuals are in a position to make it morally difficult or morally impossible for others to secure their own survival." *Id.* at 268. For others to discharge the duty of respecting an acquirer's property rights "may be dangerous." *Id.* at 269.

38 *Id.* at 267.

the same moral foundation as the reasons for the unadorned principle itself. This test of success is too high. Some qualifications may pass it. Others are likely to fail it—even though there may be strong reasons for the qualifications. The Conclusion touches on these concerns.

### III. WALDRON ON THE ALLEGED UNFAMILIARITY OF A PRINCIPLE OF JUSTICE IN ACQUISITION

Waldron devotes an entire section to exposing “the radical unfamiliarity of a PJA.”<sup>39</sup> He claims to have shown that “a PJA would be an unfamiliar, and maybe unwelcome, addition to a morality just like our own.”<sup>40</sup> At least three problems bedevil his argument. One is whether familiarity is an appropriate standard. The next is a misleading analysis of a possible analogy between a PJA and a duty to rescue. A third concerns the intentions of acquirers. First, though, I need to explain his argument.

Waldron argues that a PJA might be familiar if we could find some widely acknowledged moral duty that has at least these features:

- (1) the duty is owed to and benefits some individual  $x$ ;
- (2) the duty comes into existence as a result of some action  $a$  by  $x$ ;
- (3) discharging the duty may be dangerous or morally embarrassing to those who have it; and
- (4) those who have the duty have not consented to being put in that position.<sup>41</sup>

He then suggests that an analogy may lie “along the lines of our duty to rescue or come to the aid of someone who has injured himself or put himself in danger.”<sup>42</sup>

There is an initial problem in Waldron’s search for familiarity. Waldron never says that a moral principle *must* be familiar to be plausible, persuasive, sound, cogent, or correct. But much of his discussion tacitly supposes that familiarity would be strong evidence of such characteristics as plausibility, persuasiveness, and so on. And he looks carefully for an analogy. The problem lies in

39 *Id.* at 265. The section is Chapter 7, section 4, entitled “Contingent Rights”—*id.* at 266-71.

40 *Id.* at 270. He also says that “[o]n the face of it, [a PJA] seems unfamiliar and repugnant.” *Id.* at 265.

41 *Id.* at 269.

42 *Id.*

the apparent assumption that every moral principle should be familiar in the sense that it is assimilable to some other moral principle. But why may not some moral principles be *sui generis*? Familiarity is too high a standard because not every moral principle that is plausible, persuasive, etc. may be analogous to some other principle. Consider abortion. A possible view of abortion is that having an abortion differs significantly from committing murder, having a tumor removed, practicing contraception, and so on. If it is relevantly different from these other acts, then, whatever moral principle, if any, applies to abortion may find no parallel in other moral principles. Again, the duty of fair play<sup>43</sup> may not be analogous to other moral duties. Neither may the duty to keep promises. Therefore, even if Waldron could show that a PJA is unfamiliar in the sense of lacking analogies, it would hardly follow that it is not a plausible, persuasive, sound, cogent, or correct moral principle.

A second problem concerns the search for an analogy between a PJA and a duty to rescue. One reason for rejecting the analogy is connected with Waldron's earlier lack of clarity on whether a PJA can be qualified. If it cannot be qualified, acquisition may indeed put the survival of nonacquirers in jeopardy. For example, should some eager persons acquire all the food available in a state of nature, other people might starve if the acquirers' rights to the food were unqualified. Waldron apparently relies on this possibility for the third feature—namely, that “discharging the duty may be dangerous.” However, the moral duty to rescue, as usually understood, does not require a rescuer to put himself or herself at anything more than slight risk.<sup>44</sup> For a rescuer to em-

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43 For discussion of the duty of fair play, see, e.g., K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 121-58 (1987).

44 For utilitarian and deontological arguments for a moral duty of easy rescue, see Weinrib, *The Case for a Duty to Rescue*, 90 *YALE L.J.* 247, 279-92 (1980). Epstein, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151, 189-204 (1973), opposes such a duty.

Anglo-American law recognizes a duty to rescue primarily when the potential rescuer and the person in danger have a “special relationship,” for example, proprietor-customer, carrier-passenger, educator-pupil, and so on. See, e.g., *Devlin v. Safeway Stores, Inc.*, 235 F. Supp. 882, 887 (S.D.N.Y. 1964); *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1897). See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 56, at 375-77 (5th ed. 1984). Weinrib, *supra*, argues that there should be a legal duty of easy rescue. For the interplay of legal penalties for nonrescue and legal rewards for rescue, see Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 *VA. L. REV.* 879 (1986).

In the text, I shall concentrate on what I take to be a plausible moral duty of easy

brace a grave danger would be supererogatory—beyond the call of moral duty.

In fact, Waldron errs in formulating the third feature that a moral duty analogous to a PJA must possess. Earlier I argued that only a qualified PJA is worthy of consideration. If a PJA is qualified, nonacquirers need not be jeopardized. Hence Waldron has not made out a case for holding that it may be “dangerous” for nonacquirers to discharge their duties.

It is also problematic to formulate the third feature in terms of moral embarrassment. If “morally embarrassing” means pertaining to a moral duty whose discharge would cause embarrassment to the duty-holder, then perhaps the duty applies anyway. Suppose that a man leaving a brothel can save an unconscious drunk whose face lies in a puddle with virtually no risk to the safety of and with no financial cost to the rescuer, but at some risk to his reputation if his presence in the brothel becomes known. The man, I believe, has a moral duty to save the drunk.

Now Waldron’s discussion suggests that “morally embarrassing” might mean instead conflicting with prior duties owed by the duty-holder. This interpretation tallies better with his remark that a “parent may have a duty to see that his child is fed; but his ability to discharge this duty will be undermined if the resources which the child needs have been put ‘off-limits’ by the appropriation of someone else.”<sup>45</sup> The cogency of this portion of feature (3), under this interpretation, depends on the weight of the prior duties. Suppose that a woman can save an infant who is drowning in a wading pool at no risk to life or limb. If the prior duty is to meet someone at the theater on time, it would take a moral ninny to say that the woman should not save the infant. The response would be different if it *really* were the case that the woman could save the child only by failing to perform some prior nonpostponable duty to save someone else’s life.

Where does this leave us? First, the third feature is plausible only if it is reformulated in something like the following way:

- (3’) discharging the duty may be personally embarrassing or mildly onerous, but creates no substantial risk to

rescue. It applies when the potential rescuer can save someone from death or serious injury with little risk or financial cost to the rescuer. It does not require that the rescuer risk life or limb or incur great expense.

45 J. WALDRON, *supra* note 2, at 268. See also the subsequent reference to its being “morally difficult or morally impossible to . . . discharge their other responsibilities.” *Id.*

the duty-holder and does not require ignoring some prior duty of equal or greater weight.

Second, (3') comes much closer than (3) to capturing a portion of the moral duty to rescue as usually understood. There may be reasons to reject the analogy between the duty to recognize acquisitions of property and the moral duty to rescue, but Waldron does not state them accurately. Third, these two points are connected with Waldron's earlier unclarity on whether a PJA can be qualified so as to preclude jeopardizing survival.

I turn now to a final problem with Waldron's argument—a problem that concerns the intentions of acquirers. To the four features listed earlier he adds a fifth: "(5) the action *a* is performed by *x* with the intention of imposing the duty described in (1)-(4)."<sup>46</sup> Waldron adds this feature because he holds that "to perform an act with the intention of acquiring rights is necessarily to perform it with the intention of imposing duties on other people."<sup>47</sup>

This fifth feature is unsatisfactorily formulated because it ignores some difficulties with so-called verbs of propositional attitude—such as "intend," "believe," "think," "desire," and so on. The root question here is how to describe accurately what, if anything, potential acquirers must intend in doing something to gain property rights. My own view is that, in the context of original acquisition in a state of nature, it is quite difficult to specify the minimum content of an intention to gain property rights. It seems likely that acquirers must intend to claim some Hohfeldian elements—for example, claim-rights to possess and use the acquired item and a power to exclude others from it.<sup>48</sup> But whatever exactly they intend, it does not follow that they also intend all the equivalences and logical or moral consequences of what they intend. And a person who intends to impose "duties on other people" by acquiring property under a PJA may not intend to impose "the duty described in (1)-(4)."<sup>49</sup>

46 *Id.* at 269.

47 *Id.*

48 S. MUNZER, *supra* note 4, at 75-76.

49 J. WALDRON, *supra* note 2, at 269. The expression "propositional attitudes" goes back at least to B. RUSSELL, AN INQUIRY INTO MEANING AND TRUTH 210 (1940). Later discussion has centered on problems of substituting synonymous, codesignative, or coextensive terms in belief contexts. See, e.g., W. QUINE, WORD AND OBJECT 141-56 (1960); Bell, *What is Referential Opacity?*, 2 J. PHIL. LOGIC 155 (1973); Burge, *Belief and Synonymy*, 75 J. PHIL. 119 (1978); Mates, *Synonymity*, in SEMANTICS AND THE PHILOSOPHY OF LAN-

The key phrase in the formulation of the fifth feature is "with the intention of imposing the duty described in (1)-(4)." On the one hand, the phrase could mean that  $x$  intends to impose a duty that  $x$  knows and intends to have the onerous moral consequences listed in features (1) to (4). This interpretation is Waldron's view but it is implausible. If  $x$  is unaware of the correlativity of claim-rights and duties,  $x$  may intend to acquire a claim-right regarding some item but not to impose any correlative duty on someone else. Even if  $x$  knows that a claim-right has *some* correlative duty,  $x$  may be unaware *which* duty others have. Further, even if  $x$ 's property right imposes a duty that has features (1) to (4),  $x$  may be unaware of these features and so may not be able to intend them. In fact, the formulation of feature (3) is, as argued above, defective. Were  $x$  to intend a duty with features (1) to (4), his intention would be intellectually confused.

On the other hand, this phrase could mean that  $x$  intends to impose a duty that, unbeknownst to him and quite possibly unintended by him, has certain moral consequences for others. This interpretation is plausible but it is not Waldron's view.<sup>50</sup> Anyway, we have already supplied reasons for objecting to the formulation of feature (3) and substituting a weaker feature (3'). We also need a weaker version of (5). A rough stab might be:

- (5') the action  $a$  is performed by  $x$  with the intention of acquiring some rights, which rights will have various, possibly unintended, moral consequences, including a correlative duty as described in (1), (2), (3'), and (4).

The substitution of (5') makes  $x$  look less consciously uncaring and nasty than (5) does.

To sum up: At the outset, it is debatable whether a duty to recognize property acquisitions must be familiar in the sense of being analogous to some other moral duty. Furthermore, Waldron explains the features of a PJA so as to make it much less attractive than it needs to be. A suitably qualified PJA need

GUAGE 111 (L. Linsky ed. 1952).

<sup>50</sup> This interpretation seems incompatible with his references to suicide attempts that "cry for help" and a child's experimentation "with moral relations to find out what he has to do in order to oblige his parent to help him." J. WALDRON, *supra* note 2, at 269, 270.

not jeopardize the survival of others. It does not require that others ignore some prior duty of equal or greater weight. Though a duty to recognize property rights may not be analogous to a duty to rescue, Waldron fails to provide sound reasons for questioning the analogy, and he mischaracterizes the nature of a duty to rescue. Finally, someone who acquires property rights under a plausible PJA need not *intend* to impose burdensome duties on others.

#### IV. WHY A QUALIFIED PRINCIPLE OF JUSTICE IN ACQUISITION COULD BE FAMILIAR AND PLAUSIBLE

A case for a PJA that depended entirely on criticisms of Waldron would be unsatisfying. Are there any reasons for the view that a qualified PJA could be a familiar and plausible addition to a morality like our own? Indeed there are. At least two reasons exist for thinking that a *suitably qualified* PJA should be *part* of a set of principles that can justify rights to private property. The first reason is the lack of moral appeal in being generally entitled to benefit from another's efforts. The second is the prominence of deserving something in our morality. I shall investigate each in turn, but wish to stress that conducting the investigation is compatible with the criticism in Part III that familiarity is not required for plausibility. The present part meets Waldron on his own turf. And there may be an asymmetry in that while lack of familiarity need not count against a PJA, the existence of familiarity can count in favor of a PJA.

##### A. *General Entitlement to Benefit from Another's Efforts*

The first reason is that it is not morally appealing to say that one person is generally entitled to benefit from another's efforts. One version of this reason goes back at least to Locke. He seems to hold that since no one would labor without expecting some benefit, it would be unfair to let the idle take the benefit of the laborer's pains.<sup>51</sup> Lawrence C. Becker finds Locke's position, appropriately reconstructed, somewhat appealing: "It is not so much that the producers *deserve* the produce of their labors. It is rather that no one else does, and it is not wrong for the laborer to have [it]."<sup>52</sup>

51 J. LOCKE, *Second Treatise*, *supra* note 5, § 34.

52 L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 41 (1977). *See generally*

One can develop Locke and Becker by constructing what I shall call a *reductio ad dubium*. Suppose that one were to say that those who can labor on or otherwise acquire unowned things but choose not to do so *are* entitled to intercept the benefits produced by the person who works. Of course, the nonworkers do not have to exercise their entitlement. They could consent not to do so. But to require consent would grant nonconsenting nonworkers a moral immunity against being affected by the worker's labor. It would also give them a moral liberty to help themselves to the product of this labor since the worker, lacking property rights, would have no moral power to exclude them. Moreover, it would enable nonworkers to say to the worker: If you will not do something for us, we shall block your claim to any property rights in the product of your labor, no matter how hard you work. For nonworkers to insist on this point seems intuitively to be morally wrong. It is an effort to intercept the fruits of the worker's labor and seems at least distantly akin to extortion. Now any position that countenances this sort of moral wrong and interception of benefits is transparently faulty. Therefore this position is reduced to implausibility. Hence there is a lack of moral appeal in being generally entitled to benefit from another's effort.

Lest the *reductio* argument be misunderstood, I should make several points immediately. The argument, as I advance it, presupposes that any entitlement on the worker's part to property rights rests on a *suitably qualified* PJA. I elaborate on this presupposition elsewhere. The following summary is not a substitute for the arguments it summarizes. If we are talking about original acquisition in a state of nature, a plausible PJA must presuppose some things about background conditions in the state of nature, features of the laboring situation, and physical and psychological effects of laboring. There must, for example, be some assumptions about the quantity and quality of unowned things that are open to acquisition.<sup>53</sup> If we are dealing with original and subsequent acquisition in a modern society, a plausible PJA must carry many qualifications. These relate, in my opinion, to the rights held by and duties owed to others, the process of acquisition, post-acquisition changes in situation, transfer, general scarcity, and the nature of work as a social activity. For instance, we should recognize the

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*id.* at 41-43.

<sup>53</sup> The "initial labor theory" presented in S. MUNZER, *supra* note 4, at 256-66, offers one way to specify relevant presuppositions.



right of everyone to have the necessities of life.<sup>54</sup>

Moreover, the *reductio* argument shows only that nonworkers lack a *general* entitlement to benefit from the worker's efforts. It permits *special* entitlements. For instance, minor children should be entitled to benefit from the efforts of their parents. And any adult who lacks the physical or mental capacity to work is entitled to benefit from the efforts of those who do work.

Again, the *reductio* argument hardly claims that it is always impermissible for some persons to *benefit* from another's efforts. It claims only that they are not generally *entitled* to do so. In any well-functioning economy, it would be astonishing if the different jobs that different people do failed to provide mutual benefits.

Finally, the *reductio* argument supplies only a negative reason for holding that a suitably qualified PJA could be a familiar and plausible addition to a morality like our own. It does not give a reason why *workers are entitled* to benefit from their efforts by gaining property rights. It gives a reason why *nonworkers are not generally entitled* to benefit from the efforts of workers. This negative reason is still important, for it rests on some familiar features of our morality. Chief among them is the moral inappropriateness of asserting a general entitlement to benefits, produced by others, to which one has made no contribution.

Why does Waldron overlook the lack of moral appeal in being generally entitled to benefit from another's efforts? I do not know. But a possible answer looks to his chapter on Locke. Though this chapter runs to 116 pages and discusses most aspects of Locke's theory in illuminating detail, he gives short shrift to Locke's treatment of desiring "the benefit of another's Pains."<sup>55</sup> The chapter quotes this passage once but makes little of it.<sup>56</sup> It seems to refer in part to the passage later. Waldron considers the possibility that "one might say that the idle and the covetous deserve to forfeit their rights over previously common resources as a punishment for their sloth. This fits roughly with what Locke says in II.34."<sup>57</sup> It could be that *punishment* or *penalty* is what

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54 I call this the "revised labor theory," which is another term for the labor-desert principle. *Id.* at 254, 266-85. For present purposes I ignore the relations between the initial and revised labor theories and the issue of whether a fragment of the revised theory could be understood to apply to original acquisition in a state of nature.

55 J. LOCKE, *Second Treatise*, *supra* note 5, § 34.

56 J. WALDRON, *supra* note 2, at 192. He refers to other aspects of § 34 of Locke's *Second Treatise* at 147, 157, 171, 201, 218.

57 *Id.* at 206-07.

Locke had in mind. But it is philosophically more cogent to emphasize the nonworker's *lack of general entitlement* under a suitably qualified PJA. At any rate, since so much of Waldron's book is Locke-related, it may be that Waldron, having overlooked the significance of getting "the benefit of another's Pains" in Locke, overlooked other versions of this point.<sup>58</sup>

### B. *The Prominence of Desert*

A different reason for thinking that a PJA could be familiar and plausible is that our morality gives prominence to deserving something. The verb phrase "could be" is used advisedly. For the argument to go through, a PJA must refer to deserving property rights. Most PJAs—for instance, those of Locke, Nozick, and Gauthier—do not refer to deserving property rights. But some PJAs do. A noteworthy example, published some years before Waldron's book, is Becker's desert argument for acquiring property by labor.<sup>59</sup> Another example, published after Waldron's book, is my principle of desert based on labor.<sup>60</sup>

I believe that desert, broadly understood, is a familiar and prominent feature of morality. People commonly suppose that many things can be deserved—both desirable things, such as rewards, prizes, and gratitude, and undesirable things, such as punishment or condemnation for crimes. Now it may be, as George Sher argues, that no *single* principle or value grounds all varieties of desert.<sup>61</sup> There might be several such principles or values. Even so, desert remains familiar in our moral thinking. There need be nothing strange in a PJA that refers to desert.

Waldron might respond that desert, whatever its place in morality generally, is not likely to be a part, or at least a central part, of a PJA. I agree that some conceivable principles referring to desert would be silly. An example would be the following possible principle: Anyone who touches his or her nose while standing on land deserves property rights in the land. But a principle would be plausible rather than silly if we could explain why the allegedly deserving action is a good one and why property rights are a fitting benefit. I believe that the best suitably quali-

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58 Here I allude to Becker's book and not my own. I do not expect Waldron to be clairvoyant.

59 L. BECKER, *supra* note 52, at 48-56.

60 S. MUNZER, *supra* note 4, at 254-91.

61 See G. SHER, DESERT at xii, 20, 110 (1987). See generally *id.* at chs. 7 and 8.

fied PJA will refer to desert, as I argue in my book. If that argument is sound, then, *pace* Waldron, a PJA is rather more familiar and appealing than he allows.

All the same, Waldron's insightful book and my subsequent conversation with him compel me to develop my case. They have certainly spurred my constantly flagging efforts at self-criticism. Waldron's book argues against the centrality of desert in acquiring property. His arguments fall into two groups. The first group has to do with the interpretation of Locke. The second group deals with desert in a more independent fashion. In what follows, I shall suggest that the former arguments are irrelevant to the present inquiry and that the latter arguments are unconvincing. I shall then grapple with some questions about desert that Waldron propounds.

### 1. Waldron's Interpretation of Locke

Waldron contends that desert is an alternative, but implausible, interpretation of Locke.<sup>62</sup> On the one hand, he claims that "the evidence for interpreting Locke's discussion as a theory of desert is very slender."<sup>63</sup> I agree. But this point is not relevant to whether a plausible PJA could refer to desert. On the other hand, Waldron suggests, even in his discussion of Locke, that what Waldron calls the "Desert Theory"<sup>64</sup> is philosophically unattractive. This suggestion, as applied to Locke, requires the premise that we should not, in charity, attribute a philosophically unattractive theory to someone unless there is clear evidence that he holds the theory—which in Locke's case there is not. This point is also irrelevant to the present inquiry, unless the "Desert Theory" turns out, upon independent philosophical examination, to be unattractive.

### 2. Waldron's Independent Examination of Desert

Waldron's independent examination of desert, in the chapter on Locke and elsewhere in the book, does not show it to be philosophically unappealing. The discussion has at least three flaws.

First, Waldron does not distinguish sharply enough between

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62 J. WALDRON, *supra* note 2, at 201-07.

63 *Id.* at 206.

64 *Id.* at 202, 204, 205, 206.

the role of desert in original acquisition and its role in subsequent acquisition. He points out that if we give desert a role in a PJA, then perhaps it should have a role in the rights of later persons and not only of initial acquirers. He asks: "If labour counted as deserving in the beginning, why does it not count as deserving now?"<sup>65</sup> The answer is that it counts at both times. Waldron continues: "But if later patterns are assessed (and redistributed in accordance with desert) then the historical entitlement character of the Lockean theory of property is undermined."<sup>66</sup> Here the word "qualified" would be more apt than "undermined." Insofar as Waldron is making a point about Locke, we can cede him Locke. But since we are now asking about desert independently, we can see that it would make perfect sense to say that later episodes of deserving behavior—whether that behavior be acquisition, labor, or whatever—can qualify a PJA that at first deals only with original acquisition.

This shortcoming arises in another passage: "If the Desert Theory is taken as an interpretation of Locke's theory of property, the reward amounts to full and exclusive property rights in the resources one has worked on."<sup>67</sup> We can concede the consequent as an interpretation of Locke. But, viewed independently, the property rights need not be "full and exclusive." One could have a different view of labor and desert that *qualifies* rights in these resources. The labor-desert principle does exactly that.

Second, Waldron distorts and overemphasizes the role of consequentialist and compensatory considerations in desert. He lists two grounds for rewarding labor. One is to encourage desirable behavior. The other is to compensate people for work that is unpleasant or onerous.<sup>68</sup>

The former ground distorts the notion of desert, for that notion is not at bottom consequentialist. To reward deserving people may well promote the utility of those people and others. But this is a side effect. The ground or basis of desert consists of something that people do—be it work or something else. It does not lie in the fact that it would promote their utility to have a

65 *Id.* at 204.

66 *Id.* (footnote omitted).

67 *Id.* A little later Waldron writes: "But Locke's theory implies something stronger—that this reward [full value of the materials worked on] *ought* to be given and that the labourer is *entitled* to it." *Id.* at 205 (emphasis in original). Even if the assertion is true of Locke, it is not true of labor and desert viewed independently.

68 *Id.* at 204.

reward, or that it would encourage them or others to behave in a certain way in the future.

The latter ground captures part of the notion of desert. Rewarding labor may be appropriate because people expended a good deal of effort to do something that was unpleasant or onerous. But there may be other factors. So we do not yet have a full account of when rewards for labor are in order, or even whether "reward" is always the appropriate concept. Waldron therefore overemphasizes the importance of compensation.

Third, the few references to desert outside the chapter on Locke either fail to torpedo the "Desert Theory" or, perhaps inconsistently, leave room for desert after all. One is a brief reference to "moral desert"<sup>69</sup> in the chapter on historical entitlement. The reference is too fleeting to assist the discussion. A second refers to moral desert in connection with liberty and the performance of moral duty in the chapter on general-right-based arguments.<sup>70</sup> Again the reference is fleeting. In his final chapter, Waldron reminds the reader of the earlier rejection of a desert-based interpretation of Locke, and then adds:

But considerations of desert may still be relevant to the case for private property, and the argument based on desert—even if it cannot sustain the burden of justifying a system of private property—should not be dismissed until we are sure that it draws to our attention nothing that we ought to consider.<sup>71</sup>

Waldron does not elaborate. This passage makes space for desert after all. I shall return to this point in the Conclusion.

### 3. Waldron's Questions About Desert

Injecting desert into the theory of property is defensible only if we can deal with the trio of tough questions that Waldron asks about desert. Here is what he requests: "The claim that an action deserves a reward invites three questions: (1) What makes the action a good action? (2) Why should it be rewarded (as opposed to merely noted, praised or approved)? and (3) What reward is

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69 *Id.* at 257.

70 *Id.* at 309 & n.54.

71 *Id.* at 442.

appropriate?"<sup>72</sup>

(a) *An Initial Criticism.*—Prior to confronting the questions themselves, an initial difficulty that must be noted is Waldron's framing of the request in terms of *deserving a reward*. To put the matter in this way throws some of his analysis off course. And it would throw ours off as well if we were to let the matter pass unexamined. Skewing occurs because desert, not reward, is the central concept here, and it is therefore a mistake to discuss deserving property rights only in terms of reward. Stated generally, rewards are not always deserved, and things deserved are not always rewards. I shall return to this statement in connection with Waldron's last two questions.

(b) *"What makes the action a good action?"*—In this context, and at least in the standard case, working is a good action if it satisfies two conditions. The first is that it yields something—whether a product or a service—that is good in some sense or other. If, for example, a person worked mindlessly to produce things that were not "good" in any sense, then though he or she might have a right to them, it would be odd to speak of "desert." If desert applies, the product or service is typically something that the worker needs or wants. Since people tend to share many needs and wants, the product or service is usually something that others besides the worker need or want. Satisfying needs or wants is one way for something to be at least *prima facie* good. By working people produce food, clothing, and shelter, and they provide services from massages to appliance repair. All of these examples involve work that causes an effect that is good in some sense or other.

The second condition is that the worker must produce the good effect with some appropriate intention or motivation. It will suffice if, for example, the worker intends to produce food that he or she, or members of a community, need in order to survive. It seems not enough that the worker create a good result unawares or by accident. Nor would a good result launched by some evil intention seem enough. In such cases, we would be reluctant to say that the worker *deserves* property rights merely because the result was good.

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72 *Id.* at 202.

A more detailed analysis would have to dispel some of the vagueness of the reference to "some appropriate intention or motivation." The example in the previous paragraph seems clearly apt: The worker intends to produce food. Here the good intended is the good produced, and the worker goes through a process that, let us suppose, everyone understands to be an appropriate way to produce food. Other examples can raise problems. Suppose that *A*, a medical researcher, intends to cure cancer but produces a cure for diabetes instead. Here the good intended is not the good produced. Or suppose that *A* intends to cure cancer, and employs methods that other researchers justifiably regard as harebrained and idiotic. Through a fluke, *A* comes up with a cure for cancer. The good intended is the good produced. But the process followed is hardly one that everyone regards as an appropriate way to produce a cure for cancer. In both examples, *A* produces a good effect and has a good intention. Still, one can doubt whether *A* produces the good effect with "some appropriate intention or motivation," or at least whether there is a proper connection between the good effect and the intention or motivation.

A deeper analysis would have to grapple with another problem. Earlier I remarked that the two conditions are necessary "at least in the standard case." Are there nonstandard—say, fringe or satellite—cases in which one of the conditions is dispensable? Consider *B*, the malevolent rose grower. *B* detests his neighbors. The neighbors are avid flower gardeners. To make them green with envy, *B* resolves to produce a bed of splendid roses next to the neighbors' yard. *B* succeeds. Is *B*'s action of working to produce the roses a good action? It meets the first condition, for it produces something good—namely, beautiful roses. Yet perhaps it does not meet the second condition. *B*'s central intention or motivation is to make his neighbors highly envious. Someone might object that *B* must also intend to grow beautiful roses. A possible reply is that *B* might care nothing about roses and have no *intention* to produce them, and instead regarded them only as *foreseen concomitants* or *preconditions* of the envious reaction that he does intend.<sup>73</sup> If this reply, or something like it, were successful, then

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<sup>73</sup> The reply raises issues that partly parallel and partly give the reverse side of issues raised by the doctrine of double effect. Roughly stated, this doctrine holds that although certain bad effects must not be directly willed, they may be tolerated as the foreseen concomitants of one's chosen means or ends. See, e.g., P. FOOT, *The Problem of Abortion and the Doctrine of the Double Effect*, in VIRTUES AND VICES AND OTHER ESSAYS IN

*B* might not satisfy the second condition. Even so, it might be claimed that *B* still deserves property rights in the roses. The case of the malevolent rose grower suggests that there might be some nonstandard cases in which one of the two conditions is unnecessary.

(c) "Why should it be rewarded (as opposed to merely noted, praised or approved)?"—The good action deserves a reward only if a reward is the most fitting benefit for the work. At least two sorts of comparison are at stake in making determinations of fittingness. One is a comparison of benefits. The other is a comparison among persons.<sup>74</sup>

In my terminology, the most general positive category of deserved thing or response is a benefit. Waldron's discussion of the second question goes awry because he takes reward to be central. I agree that people can sometimes deserve rewards. They can also sometimes deserve property rights as a reward. Suppose that the police announce a reward of \$25,000 for actions leading to the arrest of a dangerous escaped prisoner. An amateur sleuth may deserve the money if she expends much effort in locating the escapee and makes a successful citizen's arrest. I also agree that Waldron is correct in contrasting rewards with notice, praise, and approval. Here I would add that a full account would distinguish rewards from such related items as awards, premiums, and prizes.

As pointed out earlier, rewards are not always deserved. Suppose that a clumsy person had bumped into the escaped prisoner and accidentally knocked him unconscious. The police then arrested the escapee. Here the bumbler might have a *right* to the reward. But it would be odd to say that the bumbler *deserved* it.

Furthermore, things deserved are not always rewards, and when property rights are deserved, they are not always deserved *as rewards*. If we are dealing with original acquisition in a state of nature, we need to know more about the details of that state of nature. For instance, suppose that the state of nature is such that each person works solely for himself or herself and entirely on his or her own. Although each worker may deserve property rights in what he or she produces, the property rights are not

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MORAL PHILOSOPHY 19 (1978); Bennett, *Whatever the Consequences*, 26 ANALYSIS 83 (1966); Mangan, *An Historical Analysis of the Principle of Double Effect*, 10 THEOL. STUD. 41 (1949).

<sup>74</sup> See generally J. FEINBERG, *Justice and Personal Desert*, in DOING AND DESERVING 65-67 (1970); Sterba, *Justice and the Concept of Desert*, 57 PERSONALIST 188, 191-95 (1976).



exactly a reward. For a reward suggests something that is received *from* others or *from* a community. If we are addressing original or subsequent acquisition in a modern society, we must learn much about that society to understand what benefit is most fitting. Here the efforts of workers may deserve notice, praise, or approval, but, if so, they will usually do so in addition to any property rights. Once again, the property rights, whether in products or in wages, need not be deserved exactly as a reward. A difficulty with Waldron's second question is that he seems to presuppose that property rights can be deserved only if they are a reward. This presupposition is often false. For example, wages are, even if deserved, not exactly a reward.

(d) "*What reward is appropriate?*"—If we eliminate the mostly inapposite idea of reward, we must answer why property rights could be deserved. The good action of working deserves a benefit in the form of property rights if such rights are a fitting benefit for the work done. To determine whether such rights are fitting, and, if so, exactly which sticks in the Hohfeldian bundle of claim-rights, liberties, powers, and immunities are fitting, we must look to many factors. For work in a state of nature, we should assess the relative importance of effort, ability, persistence, industriousness, luck, time spent, achievement, the difficulty, unpleasantness, or danger of the work, and other working conditions.<sup>75</sup> For work in modern economies, we must attend to the social nature of work. This nature makes relevant additional factors in assessing what is deserved. Among them are the responsibility, leadership, or motivating capacity displayed by one worker in relation to others. We can now see why Waldron is on to something when he suggests compensating people for unpleasant or onerous work.<sup>76</sup> We can also see why compensation need not be tied to reward, and why many factors bear on deserving property rights besides how unpleasant or onerous a task is.

### C. Synergy

This Part has made two points. One is the lack of moral ap-

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<sup>75</sup> Literature bearing on this assessment includes G. SHER, *supra* note 61, especially chs. 2, 4, and 6; M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 108-09, 165-83, 260 (1983); Slotte, *Desert, Consent, and Justice*, 2 PHIL. & PUB. AFFS. 323 (1973).

<sup>76</sup> J. WALDRON, *supra* note 2, at 204. See text accompanying note 68 *supra*.

peal in being generally entitled to benefit from another's efforts. Another is the prominence of desert in our morality. The two points, though independent, reinforce each other. If there is something deserving in the laborer's efforts, that makes it easier to see why it is morally unappealing to say that others are generally entitled to intercept the fruits of those efforts. And if the inaction by nonworkers lacks moral appeal, it casts light on why some efforts by laborers have a moral attractiveness that can be seen in terms of desert.

## V. CONCLUSION

I have argued for the philosophical plausibility of an historical principle of justice in acquisition. The principle is "historical" because it holds that past actions by persons may entitle them to rights of private property. The most plausible historical principle appeals to desert based on labor.

I have also tried to identify problems with Waldron's case against an historical principle. In my view, he mischaracterizes such a principle. And he mistakenly holds it to be unfamiliar in morality. In contrast, I have suggested that an historical principle tallies admirably with the prominence of moral desert and the lack of moral appeal in saying that someone is generally entitled to benefit from another's efforts.

That said, I must discourage straightway much rejoicing among libertarians. For the most plausible historical principle of justice in acquisition, which I call the labor-desert principle, not only receives heavy qualifications from within a suitably recast labor theory of property. It is qualified also, in the pluralist theory that I advocate, by a principle of utility and efficiency and a principle of justice and equality. Libertarians can take little joy in these qualifications. Indeed, as I endeavor to show elsewhere,<sup>77</sup> chief among the practical implications of the labor-desert principle is a justification not for wide disparities in income and wealth but for protecting workers' interests within business corporations.

I should like to end on a note of intellectual charity in interpretation. Waldron may be of two minds regarding desert and principles of justice in acquisition. The dominant line, supported by almost every scrap of relevant text, has us poles apart. This line fails to investigate seriously the possibility of a qualified

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77 See S. MUNZER, *supra* note 4, at 346-49, 352, 354, 355-57, 367.

principle of justice in acquisition. It also is sharply skeptical of deserving property rights.

Still, hints exist here and there of a rather different line that places us in less disagreement. Waldron does not regard the expression "qualified principle of justice in acquisition" to be a contradiction in terms. It is possible that he wants mainly to insist that qualifications be systematically related to the principle itself rather than tacked on in ad hoc fashion. And in a striking passage he appears to leave room for desert in the theory of property.<sup>78</sup> Should Waldron elaborate on these occasional hints, that might effect some rapprochement of our positions. The disagreements between us do not seem to be political or ideological. They relate chiefly to differences over the best philosophical analysis of these difficult issues. The possibility of rapprochement may seem speculative. But no speculation is needed to see that his intelligent book will force those who worry about the role of desert and historical entitlement in the theory of property to reconsider and develop their thoughts.

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78 J. WALDRON, *supra* note 2, at 442, quoted at text accompanying note 71 *supra*.