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## The demandingness of Nozick's 'Lockean' proviso

Interpreters of Robert Nozick's political philosophy fall into two broad groups concerning his application of the 'Lockean proviso'. Some read his argument in an undemanding way: individual instances of ownership which make people worse off than they would have been in a world without any ownership are unjust. Others read the argument in a demanding way: individual instances of ownership which make people worse off than they would have been in a world without that particular ownership are unjust. While I argue that the former reading is correct as an interpretive matter, I suggest that this reading is nonetheless highly demanding. In particular, I argue that it is demanding when it is expanded to include the protection of non-human animals; if such beings are right-bearers, as more and more academics are beginning to suggest, then there is no non-arbitrary reason to exclude them from the protection of the proviso.

**Keywords:** Robert Nozick, Lockean proviso, right libertarianism, animal rights, property rights, climate change, non-identity problem

In the last few years, there has been a small increase of interest in the philosophy of Robert Nozick, with a number of authors critically but sympathetically engaging with his political thought. Papers approaching Nozick in this way are offered in Ralf M. Bader and John Meadowcroft's (2011) edited collection on *Anarchy, State and Utopia*.

A recurring interpretative problem, and one frequently present in the background of Bader and Meadowcroft's anthology, surrounds Nozick's use of the so-called 'Lockean' proviso. The Lockean proviso serves as a potential limit on an individual's freedom of unrestrained acquisition, be that appropriation of the unowned or the accumulation of holdings through legitimate transfer (purchase, inheritance, etc). Interpretations of this important aspect of *Anarchy, State and Utopia (ASU)* fall broadly into two groups. Nozick's proviso can either be seen as completely undemanding, meaning that, in practice, there is no limit on acquisition, or so demanding that it would illegitimate basically all ownership. In this paper, I am first going to argue that the undemanding reading of the proviso is correct as an interpretation of Nozick, and that those who read Nozick's use of the proviso in the highly demanding way are mistaken. However, I will then argue that even this 'undemanding' proviso could offer significant protection for certain individuals, and therefore significant curtailment of acquisition and private property, in certain cases. In order to illustrate this point, I am going to examine the application of the proviso for the protection of non-human animals.

### **The 'Lockean' proviso**

It is possible that a particularly ardent defence of capitalism, or, in Peter Vallentyne's words, a kind of "radical right libertarianism" (2011: 160), would set no limits on acquisition. If an agent was able to acquire a monopoly on the world's supply of water, so be it. If the capitalist was able to claim all foodstuffs in a vast barren landscape, so much the worse for those living there. However, Nozick follows John Locke by denying that appropriation or acquisition is always legitimate, endorsing a variation of the so called "Lockean proviso". In his *Two Treatises of Government*, Locke writes that persons may appropriate objects through mixing their labour with the object, "at least where there is enough, and as good, left in common for others" (2003: §27). Locke uses

the examples of acorns or apples taken from woodland (2003: §28), before going on to discuss at length the practice of enclosing the common land (2003: §32-4), a controversy contemporary to his work. Locke comes to the proto-libertarian conclusion that “no man’s labour could subdue, or appropriate all; nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to intrench upon the right of another, or acquire to himself a property, to the prejudice of his neighbour, who would still have room for as good and as large a possession (after the other had taken out his) as before it was appropriated” (2003: §36).

Nozick is clear that he finds Locke’s proviso to be ambiguous (Nozick, 1974: 176), but that he considers “any adequate theory of acquisition” to have a proviso “similar” to how he says we may interpret Locke (Nozick, 1974: 178). Nozick is concerned with satisfying “the intent behind the ‘enough and as good left over’ proviso” (1974: 177), rather than the letter of it. What this makes clear is that, in interpreting the Nozickian proviso, we do best to leave Locke behind. Nozick’s proviso (hereafter, *the* proviso), though based upon it, likely differs from Locke’s.

Nozick opens his discussion of the proviso with an uncontroversial example:

If I appropriate a grain of sand from Coney Island, no one else may now do as they wish with *that* grain of sand. But there are plenty of other grains of sand left for them to do the same with. Or if not grains of sand, then other things. Alternatively, the things I do with the grain of sand I appropriate might improve the position of others, counterbalancing their loss of the liberty to use that grain. The crucial point is whether appropriation of an unowned object worsens the situation of others. (1974: 175)

Almost all readers will agree that no wrong is done in appropriating a grain of sand from a beach. However, there exist some plausible cases of appropriation, acquisition or ownership such that injustice is done. Among others, Nozick uses the examples of monopolies of waterholes in deserts and of a desert island to which shipwrecked sailors arrive uninvited (1974: 180). In these cases, there is injustice in the ownership if the owners refuse others the chance to drink at their waterholes, or if they push the sailors back into the ocean. Both extremes – grains of sand versus desert waterholes – seem clear; the difficulties are in identifying the relevant differences between the two and in drawing a line between harder cases. For Nozick, the key question is whether the appropriation makes someone worse-off than they would be compared to some baseline. “The difficulty”, however, “in working such an argument to show that the proviso is satisfied is in fixing the appropriate base line for comparison. [... A]ppropriation makes people no worse off than they would be *how?*” (Nozick, 1974: 177) Nozick himself concedes that the issue requires more examination than it is offered in *ASU* (1974: 177), but, typically, he does not return to the question. Joachim Wündisch is right to say that this discussion “leaves much to be desired, although the force of the proviso obviously hinges upon the interpretation of this very baseline” (2013: 206).

### **The undemanding reading**

During his discussion of the proviso, Nozick is keen to stress the benefits of ownership, not for the owner of a given holding, but for others. He asks, then

Is the situation of persons who are unable to appropriate (there being no more accessible and useful unowned object) worsened by a system allowing

appropriation and permanent property? Here enter the various familiar social considerations favoring private property: it increases the social product by putting means of production in the hands of those who can use them most efficiently (profitably); experimentation is encouraged, because with separate persons controlling resources, there is no one person or small group whom someone with a new idea must convince to try it out; private property enables people to decide on the pattern and types of risks they wish to bear, leading to specialised types of risk bearing; private property protects future persons by leading some to hold back resources from current consumption for future markets; it provides alternative sources of employment for unpopular persons who don't have to convince any one person or small group to hire them, and so on. (Nozick, 1974: 177)

It is through consideration of these points that Nozick suggests that “the intent” behind Locke’s argument is met (Nozick, 1974: 177). Whether these arguments in favour of ownership are sound is less important than what they are included to indicate: Nozick believes, and wants his readers to believe, that private property, on the whole, is good for people (Ryan, 1981: 338-9). It is not the purpose of this paper to endorse or reject Nozick’s arguments in favour of private property as such, only to analyse the proviso. For the purposes of this paper, I will read Nozick sympathetically, and assume that he is broadly correct. David Schmidtz considers Nozick’s claims, and recognises the importance of them in his observation that many of the advantages of appropriation are enjoyed not by the appropriators, but by future generations. Comparing the Americans of today with the settlers in Jamestown, Schmidtz says

Philosophers are taught to say, in effect, that original appropriators got the good stuff for free. We have to pay for ugly leftovers. But in truth, original appropriation benefits latecomers far more than it benefits original appropriators. Original appropriation is a cornucopia of wealth, but mainly for latecomers. The people who got there first literally could not even have imagined what we latecomers take for granted. Our life expectancies exceed theirs by several *decades*. (Schmidtz, 2011: 210-211)

The importance that Nozick places in these claims and the way he ties them to the proviso suggest that his baseline is a world without appropriation. That is, particular ownership is unjust due to the proviso *only* when that ownership results in someone finding themselves in a worse-off situation than they would have been if there was *no ownership at all*. Further, due to the huge benefits that accrue from the institution of private property, Nozick believes that the proviso will rarely be applicable. It is important to note at this point that, while the proviso read in this way is undemanding in that it (supposedly) will limit acquisition only in extreme cases, it is actually rather demanding intellectually. This is because it requires that the lot of each individual person be compared to the lot of a person in some counterfactual world; this means that blanket declarations about the acceptability of private property are inappropriate (I shall return to this later). There is a further difficulty in tying the negative experience of a particular person to a particular acquisition. If A is in a position such that she is worse off in a world with acquisition than she would be in a world without acquisition, then she might reasonably claim that the proviso has been violated. However, identifying which individual's (or group's) ownership of which holding(s) has worsened A's situation is not easy. In Nozick's own examples, the identification is easy, but more

complex examples (questions about climate change, for instance, will be raised later in this paper) are not hard to imagine.

The proviso, understood in this way, may sound like it has a utilitarian, and therefore un-libertarian, flavour (Fried, 2011: 248; Ryan, 1981: 339). Barbara Fried is generally critical of the internal consistency of Nozick's account of ownership, saying that there are at least three mutually inconsistent accounts in *ASU* (Fried, 2011: 232-3). Fried is, I suggest, broadly correct about the proviso when she says that the level of any compensation owed to those who are negatively affected by appropriation "is set to a level sufficient to return the expropriated to the same place on the indifference curve they would have occupied in the absence of private property" (2011: 248). However, Fried is incorrect when she concludes that "Nozick's motivation for doing away with consent is the immense utilitarian benefits to be derived from allowing private appropriation out of the commons" (2011: 248). Nozick himself denies that he is making some kind of consequentialist appeal, saying that his considerations of the benefits of private ownership enter "*not* as a utilitarian justification for property" (1974: 177. Emphasis Nozick's). Instead, Nozick is asking whether "the situation of persons who are unable to appropriate (there being no more accessible and useful unowned object) [is] worsened by a system allowing appropriation and permanent property" (Nozick, 1974: 177). The question is not whether *society* has benefitted from the institution of private property, but whether *any individual person* is worse off than they would have otherwise been (Bader, 2010: 38-9; Wündisch, 2013: 208). The former is significantly stricter, and allows for limits on appropriation in a great many more possible situations. Gerald Cohen puts it well when he says that Nozick's argument "demands attention to the fate of each person, taken separately" (Cohen, 1995: 86). As Cohen explains:



The argument is not: whatever makes people better off is a good thing, and private property makes people better off; but: anyone has the right to appropriate private property when that makes nobody worse off, and the appropriation of private property in general makes everyone better off (and therefore not worse off). (Cohen, 1995: 85)

Nozick offers an argument of the same form as the proviso, though with a different object, in the opening pages of *ASU*. There, he says that “a rationale for the state’s existence” would be if the state “would be an improvement” on the “the most favoured situation of anarchy” (1974: 5). As written, this sounds utilitarian, but it is not Nozick revealing his “true utilitarian colors”, as Fried suggests (2011: 241). Instead, Nozick is suggesting that if the state would be an improvement *for every person* (allowing that it may be an improvement to some only through compensation) then it could be justified by that alone. He clearly endorses the same form of argument in favour of civilisation generally. Though not everyone would be owed compensation for no longer being able to partake in those things that civilisation denies them, such compensation “would be due those persons, if any, for whom the process of civilization was a *net loss*, for whom the benefits of civilization did not counterbalance being deprived of these particular liberties” (Nozick, 1974: 178-9). Wündisch cautions that we should not misinterpret this comment as being about private property (2013: 207-8), and he is correct that private property and civilisation are different things. Wündisch, though, does recognise that the argument is of the same *structure* as the proviso (2013: 216).

It is perhaps due to a running-together of the separate arguments about civilisation and private property that Thomas Scanlon mistakenly suggests that Nozick should be read as suggesting that the proviso limits acquisitions or transfers in cases

where they would leave “third parties worse off then [sic] they were in the state of nature” (1981: 109). The matter is actually more complex, as a world without ownership is not necessarily a world in any particular state of nature. Instead, the baseline to which the proviso makes reference is the counterfactual world which makes gradual process, but extremely slow process due to the lack of ownership. Wüdisch recognises this, though he is right to identify the problems with developing it, not least the possible non-identity problems (2013: 218-9), an issue to which I shall return later in this paper.

### **The demanding reading**

The major alternative reading of the baseline against which the proviso must be tested is the counterfactual world in which the specific appropriation in question did not occur. Richard Arneson seemingly reads Nozick in this way, as he writes that Nozick believes that “[e]ach person can acquire full ownership over unowned material resources (pieces of the Earth) by staking out a claim to them, so long as her claiming ownership and maintaining ownership leaves others no worse off than they would have been under a system under which *these* resources remain unowned and freely available for use by anyone” (2011: 19. Emphasis mine. cf. Bader, 2010: 28-9). Vallentyne, too, writes that “Nozick interprets this proviso as requiring that no one be worse off ... than she would be if the resource remained unowned” (2011: 160), claiming that it is just a “slip on [Nozick’s] part” when he asks if the situation of individuals is “worsened by a system allowing appropriation and permanent property” (Vallentyne, 2011: 166; cf. Nozick, 1974: 177). If this is a slip, the purpose of the long description of the benefits of private property for society which immediately follows it is unclear. Elsewhere, Vallentyne does not read this kind of thinking as a slip on Nozick’s part, but as a way Nozick “sometimes” interprets the proviso. Vallentyne claims, however, that, given Nozick’s theoretical approach, “this appeal to systems is inappropriate” (Vallentyne, 2012: fn. 2).

In general, this would be true, but, as I have demonstrated, the proviso is part of a particular kind of argument which Nozick uses repeatedly in *ASU* in which systems in their entirety are considered, though, importantly, from an individualistic perspective. As such, this argument retains the spirit of libertarianism, even if a consideration of whole systems is unusual.<sup>1</sup>

I will here offer three arguments against this demanding interpretation, which, combined with my previous arguments in favour of the undemanding interpretation, will hopefully demonstrate its inadequacy. First, what is striking about this reading of the proviso is that it is highly restrictive. Schmidtz says that “[v]irtually no one ... believes that any particular act of initial appropriation, in a world of scarcity, stands much chance of satisfying” the proviso read in this way (1990: 504). He elsewhere lists Judith Thompson, Barbara Fried, Virginia Held, J. H. Bogart, Rolf Sartorius and Jeremy Waldron as prominent thinkers who have made this claim (Schmidtz, 2011: 210). This gives us good reason to reject this reading of Nozick’s proviso, as Nozick himself is

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<sup>1</sup> Both Cohen and Will Kymlicka may also be read as offering this demanding reading of the proviso, but I suggest that their interpretation is actually not so different from my own. After correctly identifying that it is often hard to tell whether Nozick is interpreting Locke or developing his own proviso (Cohen, 1995: 74), Cohen suggests that the proviso “requires of an appropriation of an object *O*, which was unowned and available to all, that its withdrawal from general use does not make anyone’s prospects worse than they would have been *had O remained in general use*” (1995: 76; cf. Kymlicka, 2002: 115). However, he later goes on to say that Nozick modifies Locke’s proviso so that it considers “not what might or would have happened *tout court*, absent the appropriation, but what would have happened on the special hypothesis that the world would have remained commonly owned” (Cohen, 1995: 83). (Confusingly, Cohen uses the phrase “commonly owned” to mean “owned by no one”, rather than “owned by everyone”.) “Nozick intends thereby”, Cohen says, “to ask whether such people are worse off than they would have been had such a system never developed” (1995: 85). Kymlicka, too, despite sometimes appearing to believe differently (e.g. 2002: 115-6), stresses that the tragedy of the commons displays that “virtually any system of property ownership” meets the proviso (2002: 119).

quite clear that he believes “that the free operation of a market system will not actually run afoul” of the proviso (1974: 182). Second, Wünderlich offers a scenario to challenge this “lenient” interpretation of the proviso (2013: 209). Imagine a world in which A and B have logging businesses, and in which C, tired of the high price of timber, claims a forest for herself. This seems to be a perfectly reasonable Nozickian scenario. However, in entering the market, C causes the price of wood to drop, worsening the position of A and B. It is clear that A and B would be better off in a world in which C had not appropriated the woodland, but it seems highly strange to suggest (or read Nozick as suggesting) that they are therefore owed compensation from C. Third, Nozick is quite careful in the examples that he chooses of cases in which a claim of ownership is illegitimate. He is concerned that the proviso should “handle correctly the cases (objections to the theory lacking the proviso) where someone appropriates the total supply of something necessary for life” (1974: 179). As such, his examples concern not whether someone appropriates (for example) the total supply of emeralds in the world, or all of the most beautiful beaches, but “all the drinkable water in the world”, all the waterholes in a desert, or the entirety of an island on which castaways (through no fault of their own) find themselves (Nozick, 1974: 179-80). It is true that A is made worse off if she wants an emerald, but all emeralds happen to be owned by B, who does not want to sell them. This is the kind of situation which would be made illegitimate by the lenient interpretation of the proviso, but it is very noticeably not the kind of scenario that Nozick uses. I suggest that Nozick uses these life and death situations precisely because they are the only sort of situation in which individuals are left worse off than they would be in a hypothetical world free of appropriation. “[T]he baseline for comparison”, Nozick tells us, “is so low as compared to the productiveness of a society with private appropriation that the question of [the proviso] being violated arises only in the case of catastrophe (or a desert-island situation)” (Nozick, 1974: 180-1).

## **The proviso and non-human animals**

I have demonstrated why I interpret Nozick's proviso as a protection from instances of ownership that place someone in a position such that they would be better off in a world free of appropriation. However, I now wish to critically examine Nozick's own suggestion, with which I finished the previous section, that "the baseline for comparison is so low as compared to the productiveness of a society with private appropriation that the question of [the proviso] being violated arises only in the case of catastrophe" (1974: 180-1). At least initially, this seems to be correct. In day to day life, even in a hypothetical highly oppressive capitalistic society, it is hard to imagine that A's ownership of a particular holding could be so bad that B would be better off living in a world without any appropriation, given Nozick's claims about the productiveness of a society with private ownership (which I am accepting for the purposes of this argument). One way to challenge Nozick is to find a group of individual rights-bearers who do not share in the immense benefits of appropriation which he considers near-universal. If such a group is found, then, we might assume, the proviso can actually be highly demanding: as members of such a group do not experience the benefits of appropriation generally, any appropriation which has a negative impact upon any one of them will leave her in a position such that she would be better-off in a world without appropriation. This means that such an appropriation would be in violation of the proviso.

It is my contention that this group of individual rights-bearers who do not share in the benefits of private property are non-human animals. Right libertarian political theorists are generally somewhat hostile to animal ethics, with works from Nozick (1997: 205-10), and other prominent right libertarians like Jan Narveson (1977, 1983, 1987, 1989, 1999) and Tibor Machan (1985, 1991, 2002, 2004), challenging animal

rights positions, sometimes aggressively. However, in a number of places, Nozick himself said positive things about the moral status of non-human animals,<sup>2</sup> and theorists are now starting to consider the possibility of a “libertarian animal rights” (Ebert and Machan, 2012). Importantly, Nozick is able to offer no political protection to non-human animals, something he strongly implies he wishes to do (1974: 38-9), unless he is willing to extend rights to them. This is because, for Nozick, rights represent the whole of political philosophy, which is a subset of moral philosophy concerning what can be *demand*ed or *enforced*, rather than merely *recommended*, which is the domain of moral-but-not-political philosophy (Nozick, 1981: 499-503; Vallentyne, 2011: 147; Wolff, 2003: 22). As such, there is potentially an argument to be made that Nozick was willing to extend certain rights to (at least some) non-human animals, but pursuing this point will take us from our topic. The reader does not need to commit to the idea that Nozick supported animal rights in order to explore this issue here. Suffice it to say that there are a large number of *other* academics and activists, including a growing number of political theorists (including this paper’s author), who do unequivocally support

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<sup>2</sup> He was quite clear that they “count for something” (Nozick, 1974: 35) and considered the treatment of non-human animals an important matter (Nozick, 1997: 109-10). In his personal life, he was certainly a moral vegetarian, and perhaps a moral vegan (cf. Nozick, 1981: 523). Nozick’s oft-quoted maxim of “utilitarianism for animals, Kantianism for people” is, by his own admission, “too minimal” (1974: 39). Indeed, he says that “[e]ven for animals, utilitarianism won’t do as the whole story, but the thicket of questions daunts us” (1974: 42). Nozick’s subsequent discussions of the status of non-human animals do not make reference to this maxim. These discussions include an exploration of assessing moral status in terms of “organic unity” (Nozick, 1981: 415-9, 440-4; Nozick, 2006: 162-6; cf. Arenson, 2011: 32-3; Nozick, 1981: 451) and a cautious endorsement of *ahimsa* and nonviolence towards all sentient beings (Nozick, 2001: 280-2; Nozick, 2006: 212-4). As such, there is no reason to privilege the notion of “utilitarianism for animals”, which Nozick did not truly endorse himself, when we are discussing the place of non-human animals in Nozick’s philosophy. There is more to be said about this important issue, but constraints of space mean that it can be discussed no further here.

extending rights to non-human animals. The problem is this: if some non-human animals are rights-bearers, that is, beings entitled to political protection, then there seems to be no reason why they should be excluded from the protection of the proviso. If a rights-bearing non-human animal (say, a pig) is made worse-off by a particular appropriation to the extent that she would be better off in a world without appropriation, that appropriation is illegitimate. While some (but by no means all) non-human animal companions may be understood to have benefitted from the institution of private property in the way Nozick understands humans to have done so, the vast majority of free-living non-human animals experience no benefits from private property. This means that any appropriation which negatively affects them will be in violation of the proviso, and, importantly, may not be something for which compensation can easily be provided.

Let us consider a simple example. A corporation acquires a large area of woodland containing a number of rights-bearing non-human animals with the intention of destroying it. Grant the plausible assumptions that industrialised logging (possible only because of historical appropriation) will have a more adverse effect on the resident non-human animals than gathering wood by hand, and that said non-human animals have experienced few if any of the benefits of private ownership that Nozick attributes to humans in general. The corporation now risks harming the non-human animals to the extent that they would be better off living in a world in which there was no appropriation. However, these non-human animals cannot be adequately compensated with some kind of financial restitution. Even if the Nozickian takes the step of assuming that almost all injuries and losses (excluding the loss of one's own life) can in principle be compensated in the human case, it is not clear how she could sensibly take the same approach concerning non-human animals. Options open to the corporation, if they are keen to continue with their logging operation, may include enhancing an area of the

woodland so that the non-human animals can live more comfortably (though they have less space) or moving the non-human animals to some other location (taking care not to harm either the beings moved or the beings already resident in the new location). These are not strictly acts of compensation to rectify a violation of the proviso, but attempts to limit harm so that the proviso is not violated to begin with. What is obvious is that both of these possibilities are extremely costly to the corporation, requiring significant time, expertise and resources. However, if the corporation is unwilling or unable to engage in them (or something like them) then *the ownership of the woodland is in violation of the proviso*. And this is the case even though the proviso has been understood in the undemanding way – the way that Nozick himself assumed would mean it was rarely applicable.

The proviso, then, if applied to non-human animals in a parallel way to how it is applied to humans, can actually serve as a highly demanding constraint on the free exercise of appropriation and ownership. The idea can be taken further, as there are ways that ownership can affect non-human animals completely unlike the way it affects humans. Take the interest-based rights approach of Alasdair Cochrane (2012), who argues that though non-human animals possess certain key rights (such as, in most circumstances, the right not to be killed or used in painful ways) they possess no right against being owned. Adding Nozick's proviso to this framework would allow protection of owned non-human animals beyond simply the protection of their negative rights. Specifically, owned non-human animals would have to be granted opportunities for positive experiences such that they were no worse off as property than they would be if they lived in a world without ownership, and so were unowned. It would therefore *pro tanto* be illegitimate to keep a companion dog (Helen) in such a small space that she experienced significant frustration, to feed her a diet which left her malnourished and sickly, or to deny her contact with other dogs. If a person was to treat Helen thus, they



would be in violation of the proviso unless they were able to adequately ‘compensate’ her for her loss of these freedoms. For instance, to counterbalance the denial of contact with other dogs, Helen’s owners could allow her considerable contact with human children; Helen and the children could play together, exercise together and have a loving relationship with one another. In this case, while Helen has lost something through another’s ownership of a particular holding (specifically, another’s ownership of her), she seems to be in a better (or, at least, no worse) position than she would be in a world without any ownership at all.

### **Anthropogenic climate change**

In the case of Helen and the case of the woodland, matters are relatively simple. The issue becomes significantly more complex in the case of anthropogenic climate change. This is because it is a situation in which rights-holders are adversely affected by the actions of others, possible only because of their ownership of certain holdings (buildings, vehicles and so forth) in which identifying a *particular* responsible relationship of ownership is impossible. Let us take a concrete example. The state of Kiribati is comprised of dozens of low-lying islands in the central Pacific. Anote Tong, Kiribati’s president, was recently quoted in *The New Yorker* as saying that “[a]ccording to the projections, within this century, the water will be higher than the highest point in our lands” (Morais, 2014). Assuming that this is correct, the people of Kiribati will soon be without a home, due to industrialisation elsewhere in the world. This industrialisation is possible only thanks to private ownership, and so the humans of Kiribati might reasonably appeal to the proviso; if they are left to drown, and perhaps even if they are rescued but then abandoned, they would have fared better in a world without appropriation. The ownership which has led to this situation is thus unjust. In the case of the human inhabitants of Kiribati, the proviso is fairly demanding, though not

overwhelmingly so. Some agent or group of agents could take responsibility for supporting the people of Kiribati in their diaspora, or could support the building of defences to protect the islands themselves. Take Teima, an inhabitant of Kiribati. According to the proviso, Teima would be owed only enough to ensure that her life goes no worse than it would in a world without appropriation. Given that Teima has already benefitted from the institution of private property (the technological, distributive and economic structures of Kiribati are only successful because of historical and current ownership), this is incredibly minimal. Specifically, Teima would probably only be owed transport from the island and subsequent access to the various benefits of private property Nozick identifies. Simply ensuring that Teima was transported to (for example) Australia, probably with her family and either with her belongings or with some small financial compensation for her loss, would likely be sufficient according to the undemanding reading of the proviso.

Initially, it seems that identifying the agent or agents responsible for ensuring that Teima, and the other people of Kiribati, are transported from the island and/or minimally compensated for the trouble they have received is exceedingly difficult, as it seems that a great number of relations of ownership are together causally responsible for Teima's situation. Such consideration is not strictly required, however; providing that *somebody* ensures that Teima would not fare better in a world without appropriation than she does in this world, no ownership is in violation of the proviso on Teima's account. Compare: Imagine Adams's life was significantly worsened by Smith's ownership of A and Jones's ownership of B, such that Adams would fare better in a world with no appropriation. Assume that Smith's ownership of A and Jones's ownership of B are equally problematic for Adams, but neither is individually so problematic that it alone would violate the proviso. Assume also that Adams could be adequately compensated by a payment of no less than £10,000. In this situation, the

most equitable way for Adams to be compensated would be for Smith and Jones to pay Adams £5,000 each. However, this is not necessary from Adams's point of view, as Adams is adequately compensated no matter *where* the £10,000 comes from. Thus, if Smith paid Adams £10,000, this would mean Smith's ownership of A was no longer unjust, and it would also prevent Jones's ownership of B from being unjust. (Naturally, this would even hold if Thompson compensated Adams, despite the fact that Thompson has had no dealings with Adams, Smith or Jones previously. It is not the *act of compensation* which is important, but the *goodness that the compensation provides*.) Importantly, if no agent was able or willing to ensure that Smith was adequately compensated, this makes *all* responsible relationships of ownership illegitimate: Smith's ownership of A and Jones's ownership of B are both unjust.

I now return to Teima and Kiribati. If no one was willing to rescue/compensate her, all relationships of ownership which have contributed to Teima's situation would be unjust. Thus, every ownership which contributes to climate change – for instance, every ownership of a car regularly driven, every ownership of a factory which produces greenhouse gases, and every ownership of electrical goods powered by the burning of fossil fuels – would be illegitimate. It would therefore be in the rational interests of all those who owned such things to ensure that Teima, and the other people of Kiribati, are adequately compensated. If they fail to do so, their ownership would be unjust.

Now consider the non-human animals of Kiribati. I shall focus on the endemic bokikokiko, or Kiritimati reed warbler (*Acrocephalus aequinoctilis*). When Kiribati “sinks”, individual warblers will see their homes (and, indeed, all land they have ever known) destroyed, irretrievably. It is clear that any given warbler living freely on Kiribati would fare better in a world without any appropriation if left to drown. We can conceive of some parallel actions being taken with the warblers of Kiribati as could be taken with the humans of Kiribati, and as was explored in the woodland case. The

warblers could be captured before being transported to some other warbler-friendly environment, taking care not to disrupt the wildlife (if any) at the new location. Unlike the humans of Kiribati, it seems safe to assume that the warblers have received no benefits already from the institution of private property. Therefore, to “compensate” these warblers for the stress, both physical and mental, likely involved in the transport process, their new habitat would have to be preferable for them to how Kiribati would be in a world without appropriation. If this last step is not taken, then the lives of the warblers are still worse than they would have been in a world without appropriation, and so the warblers’ advocates would still be able to appeal to the proviso. If the comparison is between an entire life on Kiribati, or a life on Kiribati, followed by stress, followed by a life somewhere as good as Kiribati, then clearly a life in a world without appropriation is preferable. If, however, the comparison is between an entire life on Kiribati, or a life on Kiribati, followed by stress, followed by a life somewhere better than Kiribati, then the world without appropriation is not clearly preferable for the warblers, and so the proviso is not violated.

Once again, the proviso, even its “undemanding” form, is revealed to be highly demanding. The warblers of Kiribati must be rescued and transported to a (very highly) appropriate new home. Not only that, but *each individual warbler* must be rescued; the proviso requires that attention is paid to each individual, not merely collectives. If no one is prepared to fund this rescue and rehoming effort, then *all* relationships of ownership minimally responsible for the plight of the warblers (that is, all those contributing to anthropogenic climate change) are unjust. If such a rescue is impossible, then this suggests that all such relationships of ownership are illegitimate anyway. To put this another way, such relationships of ownership, even without directly violating rights, would have already made the life of at least one rights-bearing being worse than it would have been in a world without appropriation, and made it worse in such a way

that said being cannot be adequately compensated. This means that the proviso is, potentially, not merely highly demanding, but *radically* demanding, calling into question a great many relationships of ownership. Bernard Williams once observed that Nozick's entitlement theory of justice is neither a friend of capitalism as it is practiced today, nor of how some right libertarians would like to see it practiced. The theory, he suggested, actually shows how almost all that is owned today is owned illegitimately (1981: 35-6) In another classic paper, David Lyons (1981) explored the idea that a Nozickian right libertarian should demand a return of much of the United States to the descendants of unjustly treated Native Americans. Perhaps, similar to how these authors view the entitlement theory, the proviso shows us the deep injustice involved in almost all actually-existing ownership. If this is so, then the demandingness of the proviso, contrary to what Nozick himself thought, is comparable to the demandingness of any theory radically critical of private property.

### **Possible objections**

I shall now consider some possible objections to my above analysis.<sup>3</sup> One might object that applying the proviso to Helen is not possible. Assume Helen is a border collie, a popular dog breed for companionship and agricultural purposes. Border collies were first bred at the beginning of the 20<sup>th</sup> century, and such selective breeding was possible only because dogs were the property of humans, and only desired because sheep were the property of humans. It therefore seems reasonable to suggest that Helen could not exist in a world without appropriation. As such, the application of the proviso to non-human animals runs up against the non-identity problem (NIP). Importantly, however,

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<sup>3</sup> I shall not consider the obvious counter that non-human animals are not rights-bearers, and so cannot be protected by the proviso. Such an objection is too great to be dealt with here.

the proviso also encounters the NIP concerning humans (Wünderlich, 2013: 218-9). A world without appropriation would have a significantly different history to our current world; even though people like Smith *may* exist in a world without appropriation, Smith herself would not, meaning that the NIP poses a striking challenge to the proviso even before the introduction of non-human animals. Nozick's argument could perhaps be rescued by a suggestion that the proviso is not truly comparing A's situation in a world with acquisition to how A would have fared in a world without acquisition, but comparing A's situation now with the situation of A<sub>1</sub>, who lives in a world without acquisition and who is *sufficiently similar to A*. Under this reframing, if someone sufficiently similar to A could not exist in a world without appropriation, A could not be protected by the proviso. Take Smith, a paradigmatic human adult in our world. Someone sufficiently similar to Smith in a world without appropriation would have comparable physical, social and mental attributes; this other person, Smith<sub>1</sub>, would not *be* Smith, but the goodness of Smith<sub>1</sub>'s life in the world without appropriation would be the appropriate point of comparison for the goodness of Smith's life in our world. If Smith is sufficiently disadvantaged by some instance of ownership such that Smith<sub>1</sub>'s life is better than Smith's, then Smith might reasonably appeal to the proviso to illustrate the injustice of that ownership.

Applying this to Helen, we compare the goodness in Helen's life to the goodness of Helen<sub>1</sub>'s life. Though Helen<sub>1</sub> could not be a border collie, she may be a free-living wolf or dingo; wolves, dingoes and border collies are of the same species, with more or less comparable life histories and faculties. Assuming Helen is a fairly typical border collie, Helen<sub>1</sub> would be a wolf or dingo with many collie-like traits. When applying the proviso to Helen, we will ask not how Helen would fare in a world without appropriation, as Helen could not exist in a world without appropriation, but how Helen<sub>1</sub> would fare in a world without appropriation. The Helen/Helen<sub>1</sub> comparison may

not differ substantially from the Smith/Smith<sub>1</sub> comparison. It is conceivable that the arrival of Europeans in the United States was possible only because of the institution of private property, and so, if Smith happens to be of mixed European/Native American heritage, Smith has a heritage which it would be impossible for Smith<sub>1</sub> to possess, just as Helen has a heritage which Helen<sub>1</sub> cannot have. If the proviso cannot protect Helen because of the NIP, then it cannot protect many humans for the same reason. I hold, however, that this slight reformulation allows the proviso to sidestep the NIP while still keeping its character and appeal.

While it is one thing to say that we can conceive of a being sufficiently like Helen in a world without appropriation, it is another to say that we can conceive of a being sufficiently like Ellie, a chicken kept for egg production. Ellie, like all “laying hens”, and all other animals other farmed for flesh, milk and eggs, has been bred to become an animal machine. Ellie lays ten times as many eggs as Ellie<sub>1</sub> (the most similar being to Ellie in a world without appropriation) would, leading to extremely brittle bones (as Ellie uses up a disproportionate amount of calcium for the production of eggshells), internal problems (her reproductive system is not well-adapted to produce so many eggs, resulting in uterine prolapses and other issues) and a completely different life history (even ignoring her confinement and slaughter, which are the issues at stake, Ellie begins laying eggs long before Ellie<sub>1</sub> would). Ellie and Ellie<sub>1</sub> do not seem to be sufficiently similar in the way that Smith and Smith<sub>1</sub> are, or even the way that Helen and Helen<sub>1</sub> are. As such, to say that Ellie, due to some relationship(s) of ownership O, is worse off in a world with appropriation than Ellie<sub>1</sub> would be in a world without appropriation is *not* to say to say that O violates the proviso. As Ellie and Ellie<sub>1</sub> are not sufficiently similar, trying to use the proviso to protect Ellie would be like claiming that O violates the proviso because it leaves Smith worse off than Jones<sub>1</sub>. Such a claim

completely changes the character of the proviso, meaning that it loses much of its appeal.

As such, under my conservative reformulation, Ellie has no recourse to the proviso: she exists only due to private property, and so it is meaningless to ask how her life would go in a world without private property, and we cannot even ask how the life of someone *sufficiently similar* to her would go. This is not, however, to say that Ellie is doomed to her grim life as a laying hen. While it seems that the proviso can offer her no protection as conceptualised, the proviso is logically subsequent to basic negative rights. This means that someone seeking to protect Ellie cannot appeal to the proviso (as someone seeking to protect Helen may), but they could easily appeal to Ellie's rights. It is not the purpose of this paper to develop or defend a Nozickian list of negative (animal) rights. However, we can say that even if Ellie's rights are not violated by her being owned, her owner could easily be said to violate her rights by cutting her beak, keeping her in a highly cramped environment or sending her to slaughter, all of which are standard in industrial (including "free-range") egg production. Even if the proviso cannot protect Ellie in the way it can protect Helen and Smith, Ellie does not *need* the proviso in order to still command respect as a being in her own right. The proviso is intended to protect rights-bearers beyond their basic negative rights; it does not replace their rights.

At no point does Nozick write as if the proviso protects non-human animals in the way I have argued it could, but, assuming that non-human animals have rights, there seems no good reason to exclude them from the proviso's protection. To counter another possible objection, it is important to note that we cannot simply say that a world without appropriation would be unkind to non-human animals as humans would hunt and kill them, thus saying that our current world (or a given hypothetical world) is better for non-human animals because they do not face some (or all) of the persecution



for human resources that they would otherwise face. When Nozick asks whether the state will be preferable to the state of nature for everyone involved, which I have already argued employs the same form of argument as the proviso, he says we must

focus upon a nonstate situation in which people generally satisfy moral constraints and generally act as they ought. Such an assumption is not wildly optimistic; it does not assume that all people act exactly as they should. Yet this state-of-nature situation is the best anarchic situation one reasonably could hope for. Hence investigating its nature and defects is of crucial importance to deciding whether there should be a state rather than anarchy. (Nozick, 1974: 5)

So, too, here; we must compare the situation of non-human animals in a state without appropriation in which people generally respect the rules they should, which includes a general respect for non-human animal rights-bearers. When we compare this situation with current practices, even current practices minus the obviously rights-violating industries such as pastoral husbandry, a great many practices are potentially open to critique on the grounds that they violate the proviso.

### **Concluding remarks**

I have argued that, in terms of correctly interpreting Nozick's thought, the proviso should be read in the undemanding way; i.e., ownership (through appropriation or acquisition) is unjust if it leaves some other rights-bearer in a worse position than they would be in a world without any appropriation. However, contrary to Nozick's own view, I have suggested that, even when read in this way, the proviso may remain very

demanding. This is because of a way it may relate to non-human animals. If non-human animals have rights, and there are many reasons for us to believe that they do, then there seems to be no reason to exclude them from the protection of the proviso. Importantly, however, the vast majority of non-human animals do not share in the immense benefits offered by a society in which appropriation, acquisition and ownership are possible, even assuming that Nozick is correct about these benefits in the case of the vast majority of humans. As such, the baseline against which the lives of non-human animals must be compared is not the very high one against which we compare the lives of humans living in a world of appropriation, but the very low one of how well-off a given non-human animal might be expected to be in a world in which humans exist, but do not own anything.

The consequences of this are radical. I have explored three kinds of cases in which the proviso can offer significant protection to non-human animals, either limiting what humans may do with that which they own, demanding costly and difficult “compensatory” programmes from humans to certain non-human animals, or else calling into question the justice of a great many of our holdings. These cases were the example of human ownership of, and subsequent destruction or modification of, non-human animal habitats, human ownership of non-human animals themselves, and, most problematically of all, destruction of non-human animal homes due to anthropogenic climate change, something possible only because of relationships of ownership. It is this final concern, more than any of the others, which calls into question almost the entire institution of private property. If humans are unable to protect rights-bearing non-human animals from being killed or harmed as a result of anthropogenic climate change, the proviso calls into question the justice of all of our ownership which has led to climate change. This would mean that the proviso, even on its “undemanding” reading, is about as demanding as a constraint on private property can be.

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