

Entrepreneurship, Entitlement, and Economic Justice

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Nozick's entitlement theory of justice plays a crucial role in his carefully and brilliantly crafted case for the minimal state. Acceptance of the theory, it appears, sweeps away with one stroke all those demands for state interference with the market that rest on the claims of distributive justice. The persuasive elegance with which Nozick develops his position can leave few thoughtful, moralist critics of uncurbed capitalism unimpressed, at least, by the strong claims which Nozick advances, precisely on the grounds of economic justice, for the free market. It will be the thesis of this paper, however, that Nozick's theory of entitlement, important though it undoubtedly is for any defense of the morality of *laissez faire*, does not—at least without significant reformulation—solve all the difficulties that may be alleged to exist in respect of the justice of the market. Pursuing this theme, we will offer a suggestion for supplementing (or perhaps reformulating) Nozick's theory which may not only equip it to handle the difficulties to which the paper draws attention, but may, in fact, render its defense of the morality of the market even more straightforward and subject to fewer qualifications than Nozick apparently believes to be necessary.

Nozick's theory depends, in its application to the market, largely on the view that with few definite exceptions, the market reflects adherence to the principles of justice both in the *original acquisition of holdings* (from the natural state) and in subsequent *transfers of holdings*

in market transactions. The difficulties to which this paper draws attention pertain to the claim that the market is fully consistent with the principles of justice in transfer. This claim carries conviction, it will be shown, only if we are prepared to incorporate into our entitlement theory certain somewhat novel views concerning the morality of the *entrepreneurial* role. But, we will then argue, recognition of this aspect of the entrepreneurial role makes it no longer useful to distinguish, as sharply as Nozick does, between justice in original acquisition, on the one hand, and justice in transfer on the other. So that, while the entitlement theory may, it will turn out, indeed be deployed to defend the morality of the market—and with fewer reservations, perhaps, than in Nozick's own statement—this will have been achieved only through a fairly substantial reformulation of that theory.

I. Justice in Transfer, Voluntariness, and Error

For the purposes of this paper, we accept Nozick's entitlement theory of justice without reservation. If an object was originally acquired justly from nature, and if all subsequent transfers of the object have been justly accomplished, then, we will say, the present holder of that object holds it justly—and no aesthetic or moral considerations concerning desirable distribution patterns can, without injustice, permit the state to tamper with the rights of the present holder. The issue that concerns us is whether this theory, when applied to the results of the

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free market, can certify these results as being in accord with just principles. Let us, for the time being, accept Nozick's own conclusion¹ that the free operation of the market system is consistent with past acquisition of initial holdings. Our concern will be with the justice of market transfers.

Now Nozick has not, he explains,² attempted in his book the task of specifying the details of the principles of justice in transfer. The general outlines of his position on the justice of market transfers are, however, clearly implied: What has been acquired through market transaction has been justly acquired for the simple reason that such transactions are *voluntary*. The money which a professional athlete receives from spectators eager to watch his performance is justly his because those who paid have done so willingly. They preferred to watch the athlete (at the given money price) rather than to retain the money (without witnessing the performance).³ Because a property system excludes the taking of anyone's goods or money without his consent (whether by theft or fraud)—because, that is, such a system permits transfer only by gift or voluntary market exchange—it follows that such a system has room only for transfers that are just.

The view assigning so critical a role to voluntariness in just transfers is, surely, a highly appealing one, and we will accept it fully as the basis for our own discussion. Involuntary transfers, we have said, are ruled out in the market by definition—only voluntary exchanges qualify as market transactions. The question which we wish to raise has to do with the extent to which *error*, in the decisions of market participants to engage in exchange, erodes the voluntariness—and hence the justice—of the transfers effected by such exchange. Now it might appear that

consistent application of our definition of market transactions as being voluntary, avoids any difficulty (for the justice of market transfer) arising out of error. If, say, a seller sells an item in error, then either the error was so serious as to impair definitively the voluntariness of the sale, or it was not. That is, either the error on the part of the seller was so fundamental that we are compelled to say that he did not *really* wish to sell at all (i.e., that his consent to sell was given utterly erroneously and was thus no consent at all) or else it was not sufficiently serious to impair the voluntariness of the sale. If the error was sufficiently serious as to render the sale involuntary, then we should simply pronounce the exchange to be a total mistake and thus not a permissible market transaction at all. Unjust though we must consider the purchase to have been, it was, we should say, not a market transaction but simply an involuntary transfer. If, on the other hand, the voluntariness of the sale was *not* undermined by the error, then the transfer remains a just one. Either way, it would seem, the possibility of error presents no problems for the justice of market transfers. (Defenders of the market have, after all, always made it clear that fraudulent transactions are a form of theft and are—with or without state action—to be expunged from the market system.)⁴ But surely a fairly persuasive case can be made for a less comfortable view of the matter. Such a case may perhaps gain plausibility from a consideration, first, of the degree to which the market process *depends*, in fact, on the profitability of entrepreneurial trading with market participants who have—at least to some extent—erred.

⁴See the discussion of this point in J. S. Mill, *Principles of Political Economy* (Ashley Edition, London: Longmans, Green and Co., 1909), pp. 796ff; M. N. Rothbard, *Power and Market* (Menlo Park: Institute for Humane Studies, 1970), p. 34; H. B. Acton, *The Morals of Markets* (London: Longmans, 1971), p. 4; Nozick, *op. cit.* p. 152. See also the discussion in G. Tullock, *The Social Dilemma* (Blacksburg: University Publications, 1974), p. 11.

¹R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 178–182.

²*Op. cit.* p. 153.

³See Nozick, *op. cit.* pp. 160–164. See also Nozick's extensive discussion of the voluntariness of market transactions, pp. 262–265.

II. Equilibrium, Disequilibrium and Error

For the economist's model of market equilibrium it is not only possible, but indeed necessary, to imagine a world without error. As Hayek explained forty years ago, equilibrium is defined as the state of correct foresight.⁵ Were, then, a market economy to be an economy continuously in equilibrium, it would be indeed easy to defend the voluntariness—and hence the justice—of all market transfers, since every one of them would reflect decisions made with complete awareness of market conditions. In no way could it be claimed that any exchanges were entered into out of ignorance.

But it is now well understood that the function of equilibrium models is hardly to portray the real world states of affairs. Rather such a model serves to illuminate the nature of the equilibrating market forces which are at work during the states of disequilibrium which, in fact, prevail at all times.⁶ And it is of the essence of states of disequilibrium that the decisions being made are quite different from those which would have been made in an errorless world. It is, further, the case that insight into the equilibrating forces of the market generated by the conditions of disequilibrium reveals them to operate through entrepreneurial discovery (and exploitation) of the *very errors which are characteristic* of disequilibrium. A simple example is able to illustrate the matter very effectively.

It is one of the features of models of competitive equilibrium that no more than one price can, in the market for a given good, prevail during the same period. Before equilibrium has been attained, however, many prices for the same good may be simultaneously paid and

accepted by different buyers and sellers. The disequilibrium situation, in which many prices prevail in this way, generates a spontaneous equilibrating tendency toward the elimination of such gratuitous price differentials. The existence of a price differential constitutes an attractive opportunity for entrepreneurial profit. Eager seekers of profit will tend to grasp these opportunities until their competitive activity has squeezed out all such opportunities, i.e., until prices have become uniform throughout the market.

Consideration of this simple example immediately shows how heavily the equilibrating process rests on the profitability of acting to take advantage of the errors of others. We notice at the very outset that the multi-price situation characteristic of disequilibrium reflects widespread ignorance on the part of buyers and sellers. Those who paid the higher prices were clearly unaware of the sellers who were prepared to accept (and in fact did accept) lower prices; and those sellers who accepted the lower prices were obviously unaware of the buyers who offered and paid the higher prices. The entrepreneur who discovers and moves to exploit the profit opportunities presented by the multi-price situation is buying at low prices from those who are unaware of the possibility of selling at higher prices. He, on the other hand, is buying at the low prices *in order to* sell at higher prices (to those who are, in turn, unaware of the possibility of buying at lower prices). The equilibrative aspects of the market process depend, in an essential way, upon the lure of the profits made possible by the errors of those with whom the entrepreneur deals. In fact, the insights gained from the simple illustrative example we have used apply not only to this simple case but to the most complicated of markets, involving production in any number of stages, inputs in any number and in any variety, and outputs of any degree of multiplicity and heterogeneity. The coordination and allocative properties of competitive markets depend entirely on the attractiveness of pure entrepre-

⁵F. A. Hayek, "Economics and Knowledge," *Economica* IV (1937), in *Individualism and Economic Order* (London: Routledge and Kegan Paul, 1949), p. 42.

⁶L. von Mises, *Human Action* (New Haven: Yale University Press, 1949), p. 249. See also F. H. Hahn, *On the Notion of Equilibrium in Economics* (Cambridge: Cambridge University Press, 1973), pp. 7ff.

neurial profit opportunities; such opportunities arise only out of the less than perfect omniscience of those from whom entrepreneurs buy, and of those to whom they sell.

The question we wish to raise concerning the justice of market transfers thus emerges fairly clearly. If the market depends heavily on the exploitation of profit opportunities made possible only by the errors of others, and if goods purchased from sellers who sold only as a result of error, and money received from buyers who bought only as a result of error, be considered unjustly acquired—then surely the justice of the market has been unsalvageably compromised. It will not do to declare that transactions entered into in error—being “involuntary”—are excluded by definition from the class of market transactions—since a market process without “erroneous” transactions is unthinkable. The only logical possibility for defending the general morality of market transactions must be to maintain that the errors which characterize disequilibrium markets do *not* affect the voluntariness of the transactions completed. The profits won by entrepreneurs taking advantage of the errors of others are, one would have to maintain, not unjust, as measured by Nozick’s “voluntarism” yardstick of justice in transfer. Can such a position, we must ask, in fact be maintained?

III. The Morality of Entrepreneurial Profit: A Brief Digression

It will be seen that the question we have raised about the justice of market transfers generally has led us to question, in particular, the justice of pure entrepreneurial profit.⁷ The

⁷It ought perhaps to be emphasized that it is not only a relatively small class of business entrepreneurs the justice of whose acquisitions is being questioned. As von Mises pointed out (*Human Action*, p. 253) every acting individual displays entrepreneurial characteristics. Since almost all market transactions involve less than perfect omniscience, the errors which they reflect might seem to cast a shadow over the justice of *all* market transfers. Pure entrepreneurial

form in which we have posed this last question makes it rather different from other challenges to the morality of profits. It may be useful to digress very briefly in order to explain this difference. The roots of the matter lie, in the first place, in the theory of profit which one chooses to embrace, and, in the second place, in the theory of justice which one wishes to apply.

Most criticisms of capitalism made on moral grounds have denounced profit as unjust. Usually such criticism has rested on one or other of the theories of economic justice which Nozick has, persuasively, rejected in favor of the entitlement theory. Entrepreneurial profits are likely to violate many of the patterns of distributive justice that one might wish to promote. In addition, the critics saw profits as generated by, say, the exploitation of labor, or by the unfair exercise of economic power; or what they were criticizing as profit was not pure entrepreneurial profit at all, but the interest on capital.⁸

The question which we, on the other hand, have raised in this paper about entrepreneurial profit (and indeed about all market transfers) rests on what has been described as an *arbitrage theory of pure profit*,⁹ and has been raised against the specific background of Nozick’s entitlement theory. The arbitrage theory of profit sees profit as generated by the existence of different prices in different parts of the market for what are, economically if not physically, identical goods. Such differentials can arise only as a result of imperfection in knowledge.

profit may be present, to some extent, in any sale and in any purchase.

⁸For some discussion of the morality of profits, and of the arguments of its critics, see H. B. Acton, *The Morals of Markets* (London: Longmans, 1971), Chapter 2.

⁹See von Mises, “Profit and Loss,” in *Planning for Freedom* (South Holland: Libertarian Press, 1952), pp. 108ff; see also I. M. Kirzner, *Competition and Entrepreneurship* (Chicago: University of Chicago Press, 1973), pp. 85ff.

So that it is this theory of profit which, in the context of Nozick’s “voluntariness” criterion of justice in transfer, is responsible for the question which we have raised.

IV. Optimum Ignorance, Deliberate Mistakes, and Genuine Error

We return to consider the possible challenge to the justice of market transfers, arising out of the errors on the basis of which market transactions are completed. In this section we discuss (and reject) one possible way of dismissing this challenge altogether. In subsequent sections we proceed to examine the question itself.

One way in which one might reject the challenge of injustice based on error, is to deny altogether the possibility of genuine error. One might, that is, maintain that while market transactions are indeed frequently entered into as a result of incorrect knowledge or expectations, this *never* involves genuine error. After all, one who knows that his vacation may be ruined by bad weather and nonetheless travels to the resort and occupies his hotel room, cannot, when bad weather indeed arrives, be said to have *really* erred (in the sense of having consented to do something which he did not “really” wish to do). After all, he *deliberately* erred; he deliberately risked his money; he gladly took his chances; every transaction which he entered was a wholly voluntary one. To the extent that *every* decision made in error is made either through deliberately accepting an uncertainty (such as the incidence of bad weather), concerning which accurate knowledge is simply unavailable, or through deliberately choosing not to spend the resources necessary to remove the possibility of error¹⁰—every decision has been

¹⁰To do this is again to deliberately accept an uncertainty—viz. the possibility that, *without expenditure of the resources needed to remove the possibility of error*, error may occur—concerning which accurate knowledge is simply unavailable. There is no way, without expenditure of those resources, to know whether error will or will not occur.

deliberately and hence voluntarily made. A deliberate decision not to acquire costly knowledge is, after all, made voluntarily. If we rule out deception (where, for example, an entrepreneur *misleads* a seller into thinking that no one else is prepared to pay a higher price),¹¹ the fact that a seller sells to an entrepreneur at a low price (knowing full well that diligent search *might* yield the possibility of selling at a higher price) can surely not raise doubt concerning the voluntariness of the sale (even though it remains true that, were the seller in fact to have known that higher prices were being paid, he would not have sold at the lower price).

This line of argument, it will be observed, denies that *genuine* error (in the sense of a decision being made in *unwitting* ignorance of pertinent information) can be made at all. *All* mistakes are seen as the result of deliberately assumed risk. No mistakes can raise questions concerning the voluntariness of decisions made.

The writer has elsewhere argued at length that genuine error can and does indeed occur.¹² Without repeating that discussion here, it will simply be pointed out that decisions are often made in ignorance of the very need and/or the possibility, of acquiring (possibly freely available) information. It is one thing to know that one is ignorant, and to deliberately maintain one’s ignorance because of the high cost of gaining knowledge. It is quite another to be ignorant simply because one has no inkling that one *is* ignorant, because one has no idea that information exists, or indeed that there is any

¹¹We prefer, for present purposes, not to press this position in even more uncompromising form—which might maintain that one who has been deceived has, again, merely refrained deliberately from spending the resources necessary to ensure against deception.

¹²I. M. Kirzner, “Economics and Error” (unpublished paper presented at Austrian Economic Symposium, Windsor Castle, September, 1976). The view denying scope for error within economic analysis has been stated by G. J. Stigler, “The Existence of X-Efficiency,” *American Economic Review*, (March, 1976), pp. 213–216.

such thing *imaginable*—in the relevant context—as “information.” Surely the latter kind of ignorance is abundantly present; genuine error is alive and well. We cannot rule out the possibility that market decisions have been made, not out of deliberately accepted ignorance, but out of genuine error. The “voluntariness” of such decisions still calls for examination.¹³

V. Mistakes: Law and Morality

The question of erroneously made decisions has, of course, been treated thoroughly by jurists in regard to the law of contracts. And the kinds of error occurring during disequilibrium that have given us concern—where, say, sellers would not have sold at the prices they accepted had they known the true eagerness of buyers elsewhere in the market—are, in the legal literature, *not* seen as affecting the validity of transactions completed. Providing the entrepreneur-buyer did not explicitly deceive the seller concerning the facts—extrinsic to the goods sold—about which he has been misinformed (and providing no fiduciary-type relationship between them exists that might render the buyer’s silence concerning the truth, a form of implied deception), the law finds no grounds to invalidate market transactions into which one of the parties has entered under mistaken assumptions concerning present or future market conditions. “Tacit acquiescence in the self-delusion of another, if nothing is said or done to mislead, or silence which does not make that which is stated false, draws with it no legal liability,”¹⁴ we are told. And the kinds of self-delusion referred to include that of the land-

¹³Despite our insistence on the prevalence of genuine error, we must of course readily grant that many cases in which an entrepreneur appears to be exploiting the ignorance of others, *do* result merely from the deliberate judgment of others (in the face possibly of the very same information available to the entrepreneur) concerning a future which, they are well aware, is highly uncertain.

¹⁴G. S. Bower and A. K. Turner, *The Law of Actionable Misrepresentation* (London: Butterworths, 1974), p. 104.

owner who sells his land for the price of grazing land when in fact it contains valuable minerals, or who is ignorant of the fact (known to the buyer) that a railroad is intended to pass through it. “If the parties are at arm’s length, neither of them is under any obligation to call the attention of the opposite party to facts or circumstances which lie properly within his knowledge, although he may see that they are not actually within his knowledge.”¹⁵ The law thus takes a hard-boiled view of commercial transactions—an attitude often loosely and imprecisely identified as *caveat emptor*—which does not see a mistake (except where it was *induced* by one’s trading partner) as legitimate cause for the invalidation of a completed transaction or commitment. Apparently the law does occupy a position close to that (rejected in the preceding section) which sees a mistake merely as the deliberately-assumed gamble that failed, rather than as representing lack of true will to participate in the transaction as it turned out.¹⁶

But the *legal* validity of entrepreneurial transactions in disequilibrium markets is not at all what is of concern to us in this paper and was never in question. Of course, the legal system within which the capitalist economy operates recognizes the validity of the market transactions which make up the system. We have been concerned with possible challenges to the morality of that very legal system which sustains capitalism. What answer, we have been asking, can one give those who might contend that market transfers violate Nozick’s canons of justice in that error (which invariably charac-

¹⁵S. E. Williams, *Kerr on Fraud and Mistake* (6th Edition, London: Sweet and Maxwell, 1929), p. 76.

¹⁶For a fascinating pioneer discussion of both the morality and the law surrounding exchanges made on the basis of incomplete or faulty information, see Gulian C. Verplanck, *An Essay on the Doctrine of Contracts: Being An Inquiry How Contracts are Affected in Law and Morals by Concealment, Error, or Inadequate Price* (New York, 1825). Verplanck shows remarkable awareness of the element of pure (entrepreneurial) profit in all exchanges, and of how this implies the impracticality of a legal system which would insist on “full disclosure” in all exchanges.

terizes market transactions) introduces an ineradicable moral stain of *involuntariness* into the very fabric of these transactions? It is noteworthy that the jurists expounding the hard-boiled attitude of the law toward mistake go out of their way *not* to defend the morality of those who benefit by the law’s tough-mindedness. “No doubt” we are in fact told, “such dealings would be repugnant to a man of high honor and delicacy . . .”¹⁷ The view of fraud which is taken by the law is carefully distinguished from the view of moralists.¹⁸ It will not do simply to denounce moralists who fail to include, in their assessment of the morality of market transactions, the enormous social benefits generated by these transactions. To be sure, these benefits ought not to be overlooked by the moralist.¹⁹ But Nozick’s demonstration of the justice of the free market cannot, surely, be pronounced complete if the *voluntariness* of market transfers, upon which Nozick’s case depends, can possibly remain under a cloud. What does one say to the critic who argues that the law permits the gullible to be *cheated*? (“Fraud is difficult to prove” is a repeated refrain; and, anyway, what is not *technically* fraud may, to men of honor, be seen as cheating all the same.) And, in the broadest of senses, can it not be said that the market process *depends* on (at least a mild form of) “cheating”?²⁰

¹⁷Bower and Turner, *op. cit.* p. 106.

¹⁸Williams, *loc. cit.*, An oft-cited opinion of Cardozo does, however, appear to argue that the law simply reflects the “morals of the market place”; so that where (as in the case of partners) morality calls for loyalty to one another, or where (as in the case of trustees) morality calls for not “honesty alone, but the punctilio of an honor the most sensitive . . .” this should and will find expression in the law. (See the quote in H. Manne, *Insider Trading and the Stock Market* (New York: Free Press, 1966), pp. 20-21.)

¹⁹See von Mises, *Human Action*, p. 147. For a recent plea not to reach conclusions concerning the morality of particular economic practices (specifically, insider trading) before thoroughly exploring the welfare consequences of these practices, see Manne, *op. cit.* p. 15.

²⁰See e.g. Manne, *op. cit.*, p. 18.

VI. On Cheating and the Just Price

No examination of the possibility of injustice in market transfers can avoid some reference to recent discussions of the medieval just price doctrines. Earlier scholars had understood the medieval writers to have seen *cost of production* as the criterion for justice in pricing. An unjust price for a good was one which diverged from its true value, as defined by production costs (with the latter “determined by a fixed standard of living on the part of the producers and . . . not to include any element of *interest*.”)²¹ An unjust price was thus seen as unjust not primarily because it involved deceit by the one party (or at least an error on the part of the second), but simply because justice requires that each party to an exchange receive the true value of what he has given up. If divergence from the true value is described as involving “cheating,” this must then mean, either, merely that without deceit it would presumably be impossible to secure more than the true value of what one gives up, or that to cheat is to be *defined* purely in terms of divergence from true value. (Compare the phrase used by Nozick in describing the old question about the possibility of profits: “How can there be profits if everything gets its full value, if no *cheating* goes on?”)²² For decades after 1870 economists found it necessary to explain how inadequate such a conception of justice in transfer, ignoring all demand considerations, must be considered. And in Nozick’s entitlement theory little room seems to be assigned for divergence from production costs as a criterion for injustice in transfer. (In referring to the possibility of “gouging,” Nozick seems quite content to leave to buyers the responsibility of looking out for themselves.)²³

More recently, however, historians of medieval

²¹W. J. Ashley on the “Just Price” in R. H. I. Palgrave (Editor), *Dictionary of Political Economy*, (London: MacMillan, 1896), Vol. II, p. 500.

²²Nozick, *op. cit.* p. 262 (italics in original).

²³Nozick, p. 161.

economic thought have emphasized references in the scholastic writings to *market price* as the criterion for justice.²⁴ And such references are occasionally couched in language suggesting that to take advantage of imperfect knowledge of market conditions on the part of one's trading partner is to violate the canons of the just price.²⁵ But it would appear to be incorrect to ascribe to the medieval writers the concern for the possible injustice of disequilibrium market transfers we have expressed in this paper. Whether, with Schumpeter and de Roover, one is prepared to credit Aquinas and the medieval writers with a sophisticated understanding of the relationship between cost of production and long run equilibrium price, or whether, with Hollander, one is not prepared to do so, it seems fairly clear that for Aquinas actual market price is understood as being always the equilibrium price. It was because the market price was, therefore, seen as expressing the true value of a good (reflecting "the entire set of objective and subjective elements which forms the community estimate"²⁶) that it was considered unjust to take advantage of a buyer's ignorance of the market price. It is true that pure profits were, as Hollander has explained, generally frowned upon by Aquinas, but this was clearly on grounds of other than the taking advantage of the ignorance of one's trading partners. In

²⁴B. W. Dempsey, "Just Price in a Functional Economy," *American Economic Review*, (September, 1935), reprinted in J. A. Gherity (Editor) *Economic Thought, A Historical Anthology* (New York: Random House, 1965); R. de Roover, "The Concept of the Just Price: Theory and Economic Policy," *Journal of Economic History* (December, 1958), in Gherity, *op. cit.*; J. A. Schumpeter, *History of Economic Analysis* (New York: Oxford University Press, Part 2, Chapter 2; J. T. Noonan, *The Scholastic Analysis of Usury* (Cambridge: Harvard University Press, 1957); S. Hollander, "On the Interpretation of the Just Price," *Kyklos* 18:4, (1965); M. N. Rothbard, "New Light on the Prehistory of the Austrian School," in E. Dolan (Editor), *The Foundations of Modern Austrian Economics* (Kansas City: Sheed and Ward, 1976).

²⁵See e.g. the view of Cajetan, cited in de Roover, *op. cit.* p. 29.

²⁶S. Hollander, *op. cit.* p. 625.

other contexts it was clearly not considered unjust to take advantage of another's ignorance. A number of writers have drawn attention to Aquinas' view that a seller may charge a high price for grain in a place where it is dear, even though he knows that others are following with more supplies—a fact which, if known to the buyers, would have led them to refuse to pay the present higher price.²⁷ Clearly a price paid only out of ignorance of the true facts does not, in their view, by itself mark it as unjust.

Aquinas' justification for this permissive position clearly implies that the market price at a given instant is the true equilibrium price relevant to questions of justice. The current high value of the grain is its true current value. The anticipated arrival of additional supplies of grain can be expected to lower the market price *in the future*, so that a seller who sells at today's price does not act unjustly in failing to disclose what will happen in the future.²⁸ One can understand that if the market price is considered the just price because it reflects the current "community estimate" of value, then information concerning the future possessed by a single market participant may not be seen as altering the present community estimate; and his exploitation of his superior information need not, therefore, be seen as unjust according to the criterion adopted. But if, as in this paper, one questions the justice of market exchange precisely because it occurs under conditions concerning which one of the parties is ignorant (so that his consent to the deal might be said to hinge on a wholly erroneous perception of the relevant circumstances), then the scholastic insight into the justice of market price has not helped us answer our question. Our awareness that market prices are never equilibrium prices does not encourage us to accept the market prices as just because they are somehow expressive of *all* relevant circumstances. These

²⁷See de Roover, *op. cit.* p. 28; Hollander, *op. cit.*, p. 624.

²⁸See Hollander, *ibid.*

prices we must recognize, necessarily reflect the very errors which have occasioned our concern.

VII. The Base for the Justice of the Market: The Ethical and Economic Building Blocks

It will be argued during the balance of this paper that the difficulties we have raised concerning the justice of disequilibrium market transactions can be resolved definitively by (a) accepting a particular *ethical judgment*, and consistently applying it in conjunction with (b) the acceptance of a particular *economic insight* into the nature of disequilibrium market transactions. The ethical judgment referred to has been called the "finders, keepers" ethic.²⁹ The economic insight is that which permits us to perceive the discovery of a hitherto unknown market use for an already owned resource or commodity as the discovery of (and consequently the spontaneous establishment of ownership in) a hitherto *un-owned* element associated with that resource or commodity. We will argue that acceptance of the morality and justice of a market system does imply the acceptance of these ethical and economic ways of seeing things. Many who consider a market system just may not perhaps have explicitly articulated their own position to themselves in precisely these terms, but upon reflection they will probably recognize our exposition as faithful to their own view. It should be noted that it is not the purpose of our discussion of these ethical and economic ways of seeing things to insist on or persuade the *acceptance* of these views. Our purpose is only to show that there exist plausible (and, at least implicitly, apparently widely accepted) moral and economic insights upon which a consistent defense of the justice of the market can be constructed. These insights, we will discover, remove the difficulties which we have encountered so far. Moreover, they can be easily grafted onto a suitably re-

²⁹H. M. Oliver, *A Critique of Socioeconomic Goals* (Bloomington: Indiana University Press, 1954), p. 42.

formulated entitlement-theoretic interpretation of market justice. Let us consider separately and more carefully each of these ethical and economic insights—building blocks for the construction of the case for the justice of the free market.

VIII. Finders, Creators, and Keepers

The "finders-keepers ethic" has been discussed only slightly in the literature on the ethics of private property.³⁰ In fact, it seems fair to conclude that most writers on the justice of private acquisition from nature of hitherto unheld resources do *not* accept the finders, keepers ethic. The mere fact that an individual has stumbled on a rich deposit of a valuable natural resource does not (without at least some effort on his part, say, some mixing of his labor with the resource) entitle the discoverer, on this view, to claim title to it merely on the grounds that he *found* the resource deposit. Mere discovery has not placed the discoverer, on this view, in any kind of privileged position with respect to the hitherto unheld resources. If the rest of mankind were seen, up to the present, as enjoying rights of access to and common use of these hitherto unheld resources, then these rights are seen as in no way dislodged by the mere event of the discovery.

In order to introduce plausibility into the notion of finders-keepers,³¹ it appears necessary to adopt the view that, until a resource has been discovered, *it has not*, in the sense relevant to the rights of access and common use, *existed at all*. On this view it seems plausible to consider the discoverer (of the hitherto "non-

³⁰See the writer's "Producer, Entrepreneur, and the Right to Property," *Reason Papers* (Fall, 1974), and its discussion of the views of Oliver (*op. cit.*).

³¹It seems particularly important to distinguish the "finders, keepers" ethic from the ethic of "first come, first served" which Professor Vickrey, for one, has described as of dubious equity. (W. Vickrey, "An Exchange of Questions between Economics and Philosophy," 1953, reprinted in E. S. Phelps (Editor), *Economic Justice*, Penguin Books, 1973, p. 58.)

existent" resource) as, in the relevant sense, the *creator* of what he has found.³² It becomes, then, fairly easy to understand how the finder can be held justly entitled to keep that which he has "created."

It should be noted that ownership-by-creation is quite different from ownership-by-just-acquisition-from-nature (as the latter is spelled out in, say, Nozick's entitlement theory). Ownership by acquisition occurs against the prior background of *given* unheld resources (even if no one is aware of their very existence). Acquisition is, in fact, a kind of "transfer" (from nature to the first holder). Ownership by creation, on the other hand, involves no notion of transfer at all. The finder-creator has spontaneously generated hitherto non-existent resources, and is seen, therefore, as their natural owner.

The adoption of a finders-keepers ethic does not, of course, rule out scope for acquisition from nature in the usual (Nozick's) sense.³³ The first man to land on Mars can hardly claim title to it as its "creator." In order to establish just ownership in an unheld resource the existence of which everyone is fully aware, it is certainly necessary to follow the criteria considered appropriate to just acquisition from nature.

Moreover (and this will be of some importance later in this paper), it does not seem necessary to choose between either adopting the finders, keepers ethic absolutely or accepting it not at all. It seems possible to view some kinds of "creation-by-discovery" as conferring just natural ownership, while in other criteria (perhaps those in which discovery was *wholly* accidental, or those in which discovery by one came on the heels of years of exhausting search

³²The notion of the discoverer as creator should, of course, be linked with the view of F. H. Knight that it is not the factors of production which produce the output, but the entrepreneur who decides to enlist the services of these factors. (F. H. Knight, *Risk, Uncertainty, and Profit*, 1921, p. 271). See also F. B. Hawley, *Enterprise and the Productive Process*, (New York: Putnam, 1907), pp. 85, 102, 112, 127.

³³Below we discuss the (very limited) recognition of the ethical significance of *discovery* in Nozick's system.

by another), one may not be so prepared to recognize the actual discoverer as the sole just keeper of his find. Certainly the case in which the ethics of finders' remaining keepers might be invoked calls for systematic analysis and classification. Our purpose has merely been to emphasize the possible role which a finder-creator view of discovery can play in a theory of justice.

IX. Entrepreneurial Discovery and Creativity

We turn to consider the second of the building blocks referred to earlier: the economic insight that the discovery of a hitherto unknown market use for an already-owned resource or commodity constitutes the discovery of a hitherto *un-owned* element associated with that resource or commodity. In the conventional view (apparently shared by Nozick), once a unit of resource has been acquired, ownership has been established in it with respect to *all* its properties and powers, whether these have been known or imagined, or not. In the view being now considered, on the other hand, those aspects of a thing which are unknown, remain, so-to-speak, non-existent. Their discovery constitutes the discovery of a hitherto unknown, "non-existent," and hence un-owned dimension of the thing. An owner owns only those aspects of "his" property of which he is aware. Acceptance of this way of viewing the matter has far-reaching implications for the perception of the entrepreneurial role in the market.

The entrepreneur perceives and exploits opportunities in the market which others have not noticed. He discovers, for example, that a quantity of oranges is being sold (for eating purposes) throughout the market at \$5, while consumers would gladly pay a total of \$12 for these same oranges converted (at a total manufacturing cost, above that of the oranges, of \$4) in the form of orange juice and marmalade. Entrepreneurial discovery of the \$3 profit opportunity—of buying oranges for \$5 and selling them for \$8 (i.e., the \$12 obtainable from the

sale of juice and marmalade less the other costs of \$4)—represents, in the view under present discussion, the discovery of \$3 value in the oranges which did not previously exist. Up to the moment when the entrepreneur's vision "saw" the juice and marmalade which the oranges represent, oranges had value only for eating—a value which the market set at \$5. The entrepreneur has discovered \$3 additional value in the oranges. He may, then, be held to have "created" this additional value in these oranges.³⁴ It is as if the entrepreneur found orange juice and marmalade in nature, where no one had perceived their existence; he has "created" the orange-resource that can provide juice and marmalade.

Pursuing the matter further, it may be held that *any* price differential discovered and exploited by the entrepreneur constitutes the discovery of hitherto unknown and non-existent value (even where no new, physically different, use is entailed). If orange juice can be bought at \$3 (in one market) and sold at \$4 (with no additional costs involved) in a second market, this means that those who were buying and selling at \$3 did not know of the presence of those sufficiently eager for juice to be willing to pay \$4 for it. Entrepreneurial discovery of this may, then, be seen as the discovery in the first market of a hitherto unsuspected intensity of potential value in orange juice. The entrepreneur may be held to have "created" this additional value by introducing these oranges to the second market.

³⁴It was Schumpeter (*Theory of Economic Development*, Harvard University Press, 1934, translated from the German work published in 1911) who emphasized the *creative* role of the entrepreneur. It should perhaps be noted that the writer has elsewhere demurred from Schumpeter's view of the entrepreneur as *disrupting* earlier states of response (I. M. Kirzner, *Competition and Entrepreneurship*, pp. 72f). The position taken here in the text is not, the writer believes, inconsistent with his earlier insistence on the *equilibrating* role of the entrepreneur, seen as responding to the existence of as yet unexpected opportunities. For individuals in a society, of whom none has as yet perceived the existence of a profitable opportunity, this opportunity

It should be observed that this view of entrepreneurial discovery and creativity arises out of an understanding of the entrepreneurial role in a strictly "arbitrage" sense.³⁵ In this view the entrepreneur adds nothing to the production process other than his alertness to the production possibilities already existing. He provides no "services," managerial or other; he simply notices that inputs can be obtained at a total outlay less than the sales revenue obtainable from output. We see the entrepreneur as "creator" not in the sense of the physical producer, but strictly in the sense of his being the discoverer of an available opportunity.

X. Entrepreneurship and the Exploitation of Error

Acceptance of the finders-keepers ethic and of the economic insight into entrepreneurial discovery discussed in the preceding sections, clears away the difficulties surrounding the justice of disequilibrium market transactions to which attention has been drawn in this paper. The central feature which distinguishes the market in disequilibrium from the model of market equilibrium can, after all, be stated in terms of the scope open for *entrepreneurship*. In the equilibrium model all profitable opportunities have been already discovered and exploited, nothing remains for entrepreneurs to discover and to create. In the disequilibrium market, it is precisely the changes introduced by entrepreneurial discovery of existing errors (and the consequent opportunities for profit), which constitute the market process (and which

may properly be said not yet to exist: its first discoverer may be properly seen as its creator. Nonetheless the theorist analyzing the social role of entrepreneurial discovery is surely entitled to point out that, prior to the discovery of a productive opportunity, its "existence" did mean that society had failed in some sense to achieve its greatest possible level of output. It is not improper, at *this* level of discourse, to insist on the entrepreneur as *responding* to the opportunities "out there," of which he becomes aware.

³⁵See note 9 above.

are, in fact, the *meaning* of the label describing the market as a disequilibrium one).³⁶

It follows that entrepreneurial profits captured during the disequilibrium market process can be defended as "new" value which entrepreneurs have discovered (and thus "created"). The equilibrating market process is thus perceived not simply as economic theory has traditionally shown, as a process tending to correct the "misallocation of resources," but as a process of the continued net *creation of values*—as it were *ex nihilo*—as goods tend to move from lower valued to higher valued uses.

But what of the difficulty, spelled out in earlier portions of this paper, that such entrepreneurial activity in disequilibrium has involved transactions with trading partners who would never have bought or sold (at the prices they accepted) had they known the true state of the market? What of the possibility that these transactions, having been made in error, lack the critical element of true voluntariness, that the consent given to these sales and purchases was in reality no consent at all? Reflection shows that, given the basis of the views discussed on the preceding pages, these difficulties no longer obtrude.

If a man sells oranges (knowing full well their usefulness for marmalade and juice) because of some serious misunderstanding on his part, we may wish to say that the sale "really" lacked consent and is thus invalid. The oranges (including their potential in producing juice and marmalade) were his; without genuine consent they cannot justly become owned by another. But consider the man who sells oranges for \$5, because he is unaware that, as potential raw material in producing juice and marmalade they are worth \$8 to the entrepreneur to whom he sells. The shadow clouding his consent arises from the existence of the \$3 of additional value concerning which he is ignorant. But we have seen that this additional \$3 value may well be

³⁶See Kirzner, *Competition and Entrepreneurship*, Chs. 1, 2.

held *never to have been possessed by the seller at all*. This \$3 value was discovered (indeed *created*) by the entrepreneur's purchase and subsequent sale. So that the error on the part of the seller (on the basis of which we sought to invalidate the sale) can, on the present view of things, hardly be held to affect the conclusiveness of the consent of the seller to the sale of *that which was his to sell* in the first place.

It thus turns out (not at all accidentally) that the reasoning which justifies pure entrepreneurial profit (on the grounds that the entrepreneur has "created" previously non-existent value), is at the same time able to protect the purchaser, or the seller, of any good at a disequilibrium price from the charge that it was sold to him or purchased by him only on the basis of error (and hence of flawed consent). Market transfers are just, on this view, because no one consents voluntarily to a transaction except insofar as it gives him a satisfactory exchange for that which he sees himself as giving up. And until someone discovers that what is given up is more than the owner sees, no more than that exists, in the sense relevant to this view of economic justice.

It should be observed that this justification of entrepreneurial alertness to the errors made by others does *not* extend to the justification of fraud, properly defined. Nor does it necessarily rule out the possible view that at least some cases of non-fraudulent exploitation of error be considered morally questionable. Fraud is not covered (by the reasoning which justifies market transfers) because fraud involves the deceitful *inducement* of error (either positively, or—where a fiduciary-type relationship exists—tacitly) on the basis of which consent is fraudulently obtained. And even some cases of non-fraudulent exploitation of error may be condoned—despite an otherwise general acceptance of the justification of disequilibrium market transfer we have discussed. It seems entirely possible (as noted earlier) to restrict one's adoption of the "finders, creators, keepers" ethic to some kinds of entrepreneurial finds and

creations only. Perhaps one may feel that to take advantage of one's prior knowledge of information that will be commonly known in 5 years' time is justified, but that exploiting one's knowledge of that which everyone will surely know in 5 minutes is going too far.³⁷ The point of our discussion has not been to show that all possible forms of entrepreneurial exploitation of error sanctioned by the law are rendered immediately morally acceptable by application of the finders-keepers ethic. The purpose has been to show that this ethic can plausibly be deployed to rebut possible blanket-condemnation of market processes on grounds of error and consequent lack of genuine consent.³⁸

XI. Modifications in the Entitlement Theory

We are now in a position to spell out the way in which Nozick's entitlement theory calls for modification, if it is to serve effectively to demonstrate the possible justice of the market system. The entitlement theory maintains the following definitions: (a) a distribution of holdings is just if everyone is entitled to the holdings he possesses under the distribution; (b) one is entitled to a holding only (i) if he has acquired

³⁷Samuelson has derided the social utility of the vast speculators' profits won by entrepreneurs several seconds more nimble than their fellows in assessing new information (*Weltwirtschaftliches Archiv*, 79, December, 1957, p. 209). One may question the validity of Samuelson's argument at the utilitarian level (see e.g. Kirzner, *Competition and Entrepreneurship*, p. 224; also "Producer, Entrepreneur, and the Right to Property," *Reason Papers*, Fall, 1974, p. 13), while recognizing the possibility that one may *not* choose to extend one's finders, keepers ethic (if, indeed, one subscribes to it at all) to defend the morality of the case discussed by Samuelson.

³⁸To put the point somewhat differently, the discussion in the text *has* sought to show that *all* market transactions can be seen as in no way involving imperfect consent. This was done on the basis of the insight that all entrepreneurial gain reflects, not exploitation of error, but creation (i.e. "finding") of new value. At the same time this may *not*, of itself, be seen as *justifying* all cases of such gain, since one may not wish to recognize the justice in which *every* finder, under *all* conceivable circumstances, becomes a keeper.

it from the unheld state in accordance with the principle of justice in acquisition, or (ii) if he has acquired it in accordance with the principle of justice in transfer, from someone else entitled to the holding.³⁹ Our discussion calls for modification of Nozick's view that these latter definitions under (b) "exhaustively cover the subject of justice in holdings."⁴⁰

For Nozick, the justice of holdings depends "historically" on the justice of the original acquisition from the unheld state, and on the justice of each of the subsequent transfers of the holding. Our discussion of the finders-keepers ethic, and its application in the justice of entrepreneurial creation, indicates first, that Nozick's definitions have not definitively covered all cases of holdings that may be held just, and, again, that the lines drawn by Nozick between original acquisition and acquisition by transfer, are not as sharp as Nozick's discussion suggests.

The framework of Nozick's definitions sees things as being held either as the result of original acquisition from an unheld state, or else as the result of acquisition by transfer from a previous holder. Our discussion has pointed out a third possibility: that of a thing being held as the result of the holder's having, in the relevant sense, "created" it *ex nihilo*—i.e., by finding it.⁴¹ To be sure, the possibility that a thing has been, at one level of discourse, "created" from the state of "non-existence," does not preclude its having been acquired (either "originally" or by transfer) from what, at a different level of discussion, is treated as an earlier state of existence. Oil discovered in an unsuspected location may, at one level, be treated as not having existed before; but at another level, it already did exist before. Nozick's schema is certainly an exhaustive one at this latter level; but our discussion has shown

³⁹Nozick, pp. 150-151.

⁴⁰Nozick, p. 151.

⁴¹See the following section for a discussion of the (limited) degree to which Nozick appears ready to recognize an ethical role for pure discovery.

that discourse may be fruitful when conducted at a level at which the third possibility we have mentioned enters as an important additional class of holdings.⁴²

And recognition of this possibility, the holding of a thing as a result (not of its acquisition from the unheld state, or from a previous holder, but) of its having been "created," introduces a certain fuzziness in the sharpness of the line drawn by Nozick between holdings resulting from original acquisition and those resulting from acquisition by transfer. In Nozick's schema transfer involves only the acquisition of a previously held thing. For us transfer may well involve (besides the acquisition of that which was already previously held) the "creation" of an entirely new dimension of the holding—something not only, not previously held, but also something that did not, in the relevant sense, exist previously altogether.⁴³ It is recognition of this complexity in transfers, especially in market transfer, which has enabled us to perceive the possible justice of the entrepreneurial discoveries that may be expressed in disequilibrium market purchases and sales.

Another implication of our discussion, for the entitlement theory, relates to the justice of original acquisition. As we will see in the following section, it appears that some of Nozick's views which flow from his treatment of the justice of original acquisition, arise from his decided lack of enthusiasm for the possibility that many cases of original acquisition may qualify, at least in part, for justification under the finder-creator, finder-keeper ethic. To the implications of this possibility we now turn.

⁴²For the biblical version of an entitlement theory based on *Divine* Creation, see Psalms 24:1, 2; 115:16.

⁴³In objection, either to the argument of the text itself, or to its application of the finders, keepers ethic, it can be argued that if I discover new, hitherto unnoticed value in my neighbor's property, that additional value ought, on the finders, keepers ethic, be mine *without* any transfer of the property at all. To the extent that the "new value" can be consumed without violating the rights of the neighbor, this seems not unreasonable. (One thinks of the legal questions

XII. Nozick and the Lockean Proviso

As mentioned earlier in the paper, Nozick has not, in his book, attempted to spell out in detail the proper principles of justice in original acquisition or in acquisition by transfer. Nonetheless, Nozick has devoted a good deal of attention to what he has termed the "Lockean Proviso." And, while Locke himself enumerated the "proviso" in relation to original acquisition from nature, Nozick has pursued its implications insofar as it introduces complications into the justice of acquisition by transfer.

Locke's theory of justice in original acquisition as requiring only that the would-be appropriator of an un-owned object mix his labor with it, was qualified by the proviso that there be "enough and as good left in common for others."⁴⁴ Nozick explains that by this qualification Locke meant "to ensure that the situation of others is not worsened."⁴⁵ While Nozick sharply limits the scope of the Lockean proviso as it enters into his own entitlement theory of justice,⁴⁶ he does, without hesitation, strongly accept the principle that justice in original acquisition requires that such acquisition shall leave no one else in a worse situation than he would have been without it. In fact, Nozick seems almost relieved to be able to invoke this principle in order to deal with cases (involving appropriation of the entire stock of a limited, life-giving resource), to which critics of the private property system have traditionally pointed as exemplifying the injustice of the system. The case of "someone who comes upon

raised when it was discovered, through the invention of flying, that air rights over land were more valuable than hitherto realized.) In general, where consumption of the newly discovered value cannot occur without violating existing rights, it will be in the interest of the discoverer to buy up *those* rights, in order to enjoy the new values which *he* has discovered.

⁴⁴John Locke, *An Essay Concerning the True Origin, Extent, and End of Civil Government*, Chapter V, section 27.

⁴⁵Nozick, p. 175.

⁴⁶Nozick, p. 178.

the only water in the desert several miles ahead of others who also will come to it and appropriates it all"⁴⁷ is a violation of the "proviso" surrounding original acquisition. And even, Nozick argues, where one appropriates only one of many water holes in the desert, if it subsequently happens that all the other holes dry up, the Lockean proviso stringently limits what he can do with "his" hole.⁴⁸

The emphasis which we have placed in this paper on the role of discovery and "creation" in justifying title to a holding enables us to question the rather sweeping scope which Nozick, at least, in principle, assigns to the Lockean proviso. (*In practice*, Nozick believes "that the free operation of a market system will not actually run afoul of the Lockean proviso.")⁴⁹ Clearly, once we admit that the discovery of an unknown thing justifies the holding of it by its finder on the grounds that, in the relevant sense, he "created" it, as it were *ex nihilo*, the entire basis of the Lockean proviso becomes vulnerable to challenge. Is it really true that, where a discoverer appropriates all of a limited deposit of resource, he is *worsening* the situation of others—for whom this deposit was completely unknown and "nonexistent?" This question seems so obviously to call for a negative answer that indeed Nozick finds himself forced by it to accept, in effect, a limited finders-keepers ethic. Nozick circumscribes the Lockean proviso by observing that where a researcher synthesizes a new substance (out of easily available raw materials) he may justly refuse to sell except on his terms since by so doing he does not harm others (who are free to

⁴⁷See Nozick, pp. 179–180, and the footnote on p. 179.

⁴⁸Nozick's position on this point has potentially far-reaching implications for the justice of monopoly positions in production obtained through sole acquisition of needed resources. For a discussion *not* involving the issue of the justice of such monopoly cases, but from the perspective of their alleged harm to society, see Kirzner, *Competition and Entrepreneurship*, pp. 236–242, (where various considerations are weighed against one another.) The discussion

do what he has done). Moreover, Nozick adds, one who appropriates the total supply of a new substance by finding it "in an out-of-the-way place" has not worsened the situation of others: "if he did not stumble upon the substance no one else would have." But Nozick immediately qualifies this by pointing out that in the latter case, "as time passes, the likelihood increases that others would have come across the substance," justifying, Nozick suggests, possible limitation on bequest by the first discoverer.⁵⁰

Nozick's limited recognition of the exemption of discovery from the Lockean proviso does not appear to go nearly far enough. For Nozick even appropriation of an object following its discovery may, we have seen, be considered to worsen the situation of those (possibly in later generations) who "would have" found the object for themselves. But our insight into the "creative" aspect of discovery suggests a different view of the matter, on two separate grounds. First, we must maintain that one who *might* at a given date have "created" an object *ex nihilo* has hardly been hurt by the fact that a second individual in fact "created" the object first, at an earlier date. It was the latter individual who was the "creator" not the former. A finders-keepers ethic cannot, it must be maintained, confer any claim on those who *might have*—but did not in fact—"create." Nozick's concern for the "harm" done to those who would have themselves discovered the new substance, is based on the view that, whether discovered or not, the new substance *has* always "existed" (both for present and future generations). So that the *basis* of

in the subsequent paragraphs in the text (questioning Nozick's views) points, on the other hand, not to any vindication of monopoly producers from possible charges that their activity in some sense harms society, but to a defense of the moral legitimacy of monopoly resource ownership (even were it to be shown that the rest of society would, in some sense, be better off were such monopoly not to be present).

⁴⁹Nozick, p. 182.

⁵⁰Nozick, p. 181.

Locke's proviso—that others have some claim on un-owned objects, requiring that they therefore not be harmed by appropriation—applies also to *undiscovered* substances. But if we recognize that an undiscovered substance does *not* in the relevant sense, exist for those who are not aware of it, then Nozick's concern loses its justification.

But, perhaps, even more important is a *second* reason why we cannot share Nozick's view that the discoverer of a new substance is justified to the holding of it only to the extent that it would not have been discovered by others. For Nozick, Lockean acquisition of an unowned object from nature seems to be held justified only in the *negative* sense that such appropriation (where, of course, it does not violate the "proviso") has not harmed others. That is, one who has mixed his labor with the un-owned resource (of which there is ample left for others) has not acquired just title on the basis of any powerful positive moral claim. He has acquired title because mixing one's labor with the resource *is* the act of appropriation—and compliance with the Lockean proviso ensures that no *injustice* is involved in this acquisition. But acceptance of a finders-"creators," finders-keepers ethic confers just title on the discoverer—"creator" not in the negative sense (that such title involves no injustice to others) but in the positive sense that justice requires that the "creator" be recognized as the owner of what he has "created": to deny the "creator" title would be to inflict injustice on him. From this view of the ethics of "creation" it is by no means clear that Locke's proviso has necessary relevance to discovery at all. If *justice requires* that the "creator" of an object be recognized as its owner, then this *may* remain true even if it might be shown that others (who might, say, have otherwise discovered the object for themselves) can be considered as having been rendered worse off by the "creation."

The considerations advanced in the preceding paragraphs tend to exempt from the Lockean

proviso a substantial proportion of the cases—all those involving discovery—which Nozick includes under the heading of "original acquisition from the unheld state." (On this basis, the troublesome water-hole-in-the-desert cases must, where they have involved discovery, be viewed as indeed involving no violation of strict justice—despite whatever other moral structures one may invoke to criticize selfish behavior on the part of a just owner, especially in situations involving threat to life.) Moreover, it should be pointed out that consistent application of reasoning developed in an earlier section of this paper suggests that the Lockean proviso cannot claim necessary relevance even for cases in which discovery does not seem obviously to be involved. It was argued (in earlier sections of this paper) that genuine entrepreneurial discovery and "creation" may occur even with respect to objects whose existence is known to all.

Consider then the case (referred to only by implication, in Nozick's discussion) of the unheld sole water hole in the desert (which *everyone* in a group of travellers knows about), which one of the travellers, by racing ahead of the others, succeeds in appropriating. For Nozick this case, involving as it does no discovery at all, clearly and unjustly violates the Lockean proviso: the other travellers who in the absence of appropriation by their fellow, would have all enjoyed some water without cost, are now forced to pay a price (even a "monopoly price") for that same water. For us, however, this view is by no means the only one possible. We notice that the energetic traveller who appropriated all the water was not doing anything which (always ignoring of course, prohibitions resting on the Lockean proviso itself) the other travellers were not equally free to do. The other travellers, too, could have raced ahead. Assuming (for simplicity) that all the travellers were of equal strength and speed there would have ensured a "gold-rush" in which each would have, let us say, captured

some water. As it happened, the other travellers did *not* bother to race for the water. May it not be that they were less alert, entrepreneurially, to the possibility that someone else might indeed appropriate all of the water than the energetic traveller? Should we not, then, say that the latter was the first to "discover" the true market value of the unheld water? For the others the water was indeed known, but the worthwhileness of its appropriation was not known. (Perhaps they mistakenly thought there was more water available than could possibly be drunk; perhaps they mistakenly thought that no one would or could race across the desert at a faster speed than that at which they were travelling, or perhaps they gave the water no thought at all.) It does not seem obvious that these other travellers can claim that they were *hurt* by an action which they could themselves have easily taken, had they been as alert as the successful appropriator. What, one must ask, even under conditions involving the appropriation of *known* substances—is so obviously acceptable about the Lockean proviso, as interpreted by Nozick?

XIII. The Justice of the Market

It turns out, then, that the insights into entrepreneurial discovery, which we have dis-

cussed earlier, coupled with the possibility of a finders-keepers ethic, have not only solved the difficulties raised in the first half of this paper, but have enabled us to perceive possible justification for the free operation of a market system with fewer qualifications than those Nozick, on the basis of the Lockean proviso, was impelled to introduce.

A finders-keepers ethic, we have observed, may *not* be found compelling. And even if the basic idea is accepted, there remains ample room for moral reservations concerning particular cases of application of the ethic. Nonetheless there does seem to be a certain plausibility in the notion of ownership through creativity. It is this plausibility which may help explain how so many observers of the market appear to find it consistent with economic justice in the face of the denunciations of the moralist critics of capitalism. This paper has explored the sources of this apparent plausibility, and has scrutinized its ability to serve as possible support for the morality of the market. For this purpose Nozick's entitlement theory has served as a crucially important framework. That our discussion has suggested certain modifications in the framework itself, has, it is hoped, been one of the paper's positive contributions.