Mine Alone? Property, Authority, and Unilateral Acquisition

ABSTRACT

This paper develops an objection to unilateral acquisition of private property, and thus to standard arguments for the sorts of natural property rights that are often offered up as constraints on 'redistribution' taxation. I begin by clarifying the prima facie problem with unilateral acquisition, arguing that it is first and foremost a moral problem about the arrogation of authority, rather than a metaphysical problem about the 'transformation' of moral reality. But, I argue, no account of authority in the more familiar political case allows it to be arise without authorizing practices. Among other reasons: absent social practices, there is no way for putative subjects of complex authority relations to know that these relations are in place. Without this knowledge, subjects of putative authority relations are not obligated to obey, after all. This epistemic point, I argue, presses against the reality and/or moral relevance of 'natural' authority in property as well, whether we try to justify it in terms of general utility, individual interests, or fundamental rights.

I. Is taxing taking?

A central question of contemporary politics concerns the 'size' of government: the amount of revenue the government ought to take in, relative to the product of the economy as a whole. On one way of framing it, this question concerns how much money and other property the government is permitted to *take* from private citizens, using measures like income taxes. This way of framing the issue puts a thumb on the scale for limited government. That your property is yours is a reason for the government not to

take it and spend it, a reason which needs to be outweighed by the importance of the value produced or disvalue prevented by allowing the government to have, use, or transfer it instead.

As Liam Murphy and Thomas Nagel point out, this 'everyday libertarian' way of thinking about the justification of taxing and spending involves a tendentious presupposition about the nature of property rights.[1]. Particular property rights can only constrain the morality of taxation to the extent that they are metaphysically prior to the state-legal system of which taxation is a part. Otherwise, to appeal to a property rights in arguing about what sort of tax system we should have is to make a kind of category mistake.

To see what they mean, imagine a group of children who have been playing basketball, and are now considering playing a game with different rules. The kid who 'possesses' the ball according to the rules of basketball cannot complain that a change of game would 'take' the ball from him. If the kids should keep playing basketball, that is because of independently specifiable rights or values – the children's rights to play the game they collectively want to; the fact that basketball is more fun than soccer; the fact that they may run out of time to play if they have to reset the field. Similarly, if I have the status 'owner of my house' only because the tax-cum-property system exists and deserves deference in its present form, then whether my house is appropriately subject to tax has to be decided without reference to my ownership in it; rather, we have to appeal to

[1] Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002). I will say I dissent from their claim, their, that the social nature of property rights is "perfectly obvious"; if it were then the argument of this paper would not be required!

considerations reflecting the relative moral merits of alternative tax and property systems.[2]

One way – not the only way, but a prominent and prima facie plausible way – to resist this pro-tax argument is to insist with the 'everyday libertarian' that owning the house is nothing like possessing the ball in a game of basketball: it is not a fact that presupposes any social practices at all. This would be to say that property rights in particular things are entirely *natural*, in the sense of: *not at all artificial,* or creations of any social practices whatsoever. To resist taxes in *this* way, the libertarian has to establish that property rights can come into existence absent any social practice that recognizes them.[3]

This paper presses a challenge to this most robust sort of libertarian objection to redistributive taxation, explaining just how difficult it would be to acquire any but the most rudimentary rights in things without the assistance of social practices. I begin by refocusing the theoretical lens, pointing out that the problem of justifying property is a problem of justifying a form of *practical authority*, a kind of power to determine what others ought to do by saying so.[4] This means that the problem of unilateral acquisition is

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[2] Their point is thus not, pace Brennan and van der Vossen, the Warren/Obama point that property owners 'didn't build' everything they own, on their own. The claim is not (by analogy) that the kids not presently in 'possession' of the ball have also contributed to the playing of the game and so deserve consideration (or a say, or some such) – that's a substantive moral claim. It is, rather, metaphysical point that 'possession' is a constitutive element of the rules, not something external to them; this has the moral/ethical implication that when we justify the rules possession itself is part of what must be justified. [Cite B & V].

For (sympathetic) discussion of the Warren/Obama 'You Didn't Build That' argument, see Sean Aas, "You Didn't Build That: Equality and Productivity in a Complex Society," *Philosophy and Phenomenological Research* 98, no. 1 (2019): 69–88, https://doi.org/10.1111/phpr.12410.

[3] There are, note, several other ways, including some that appeal to property rights themselves; see section VI for some brief discussion.

[4] [How this differs from Ben Bryan (per Christmas I think it's that his concern is about the authority of rules rather than the authority of rights-holders)]

both more general, and more morally pressing, than is typically supposed – not a problem about the metaphysics of duty-creation, but rather about the morality of one person coming to be in charge of another, without the participation of them or anyone else.

I begin in the next section by clarifying the most serious problem unilateral acquisition poses for natural property rights – not a metaphysical problem, but a moral one; and then not a problem, entirely, about moral equality, or consent, but rather simply about how one person can put themself in charge of another. In section II I canvas the most familiar, going accounts of the production of authority in the political case, arguing that none of these accounts allows for the unilateral creation of authority relations. I go on to diagnose the deeper reason for this – it is, I argue, because, in cases with the complexity of political authority (and: most claims of property), subjects are not in a position to know that they are obligated to obey an authority unless there are social practices in place to tell them who to obey, when, and generally authority relations do not obtain in cases where their contours are not knowable by those who would be subject to them. This argument, I show, poses a serious problem for natural property rights – without, in the process, necessarily generalizing to rule out any natural rights whatsoever.

. I. The Problem with unilateral acquisition

To see the problem with natural property rights, we can begin by looking at property itself. Your property is that which you have property rights in. Property rights, in turn, are powers to decide what happens with a thing – who can use or otherwise interact with it. These are not magic powers: they do not give us the power to determine what will

happen, in the material world, merely by decision. Rather, they are *moral powers*: they allow us to determine, not what does happen, but what *should* happen, and in particular what others *should* or *should* not do, regarding certain things. These obligations and permissions are determined in turn, not by what we want or wish, but by what we *say*, or don't say: I may not want you to my party, but if I invited you, you are nonetheless permitted to come.[5] Property, in particular, is, as Larissa Katz puts it, "probably best thought of as a kind of office: an impersonal, stable and enduring position of authority"[6]

This observation, that to have property is to have a kind of authority, akin to a political office, is commonplace enough. Yet, it's implications for the problem of unilateral acquisition are underappreciated. In particular, it can help us to correct some tempting misconceptions about the problem of unilateral acquisition.

The Problem is not about the *novelty* of facts, duties, etc.

The first misconception is that the problem of unilateral acquisition is somehow a metaphysical one, about the 'newness' of the duties, obligations, or requirements that arise when someone acquires unilaterally. This concern with newness both overrates and underrates the power that would be involved in this putative exercise of natural rights. It overrates it if it reads the acquirer as a kind of miniature divinity, conjuring moral facts from nothingness. No such powers are needed; the 'fact' of acquired authority would come

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[5] David Owens, "The Possibility of Consent," *Ratio (New Series)* XXIV, no. December (2012): 53–72, https://doi.org/10.1002/9781118368794.ch4.

[6] Larissa Katz, "Philosophy of Property Law, Three Ways," in *Cambridge Companion to Law and Philosophy (Forthcoming)*, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076251; see also David Owens, "Property and Authority*," *Journal of Political Philosophy* 0, no. 0 (2019): 1–23, https://doi.org/10.1111/jopp.12190.

not from the will of the acquirer, but rather from the source, whatever it ultimately is, of the deeper principle that implies that anyone who performs acquisitive acts of such-and-such a kind thereby acquires authority of thus-and-so a type.[7] But the image of the acquirer as a duty-creator, if it overestimates her metaphysical powers, may also underestimate her moral ones. Since property is a kind of authority, any old property-owner can make 'new' moral obligations out of the materials her office gives her. What is distinctive about unilateral acquisition is not that it makes us legislators, at all – that's the just the usual implications of having a right in the first place – but that, unusually, it allows to appoint *ourselves* as such.

The Problem is not about inequality

A second misconception about unilateral acquisition is that the moral problem with it, insofar as there is a moral problem, is primarily a problem about 'equality'. This is assumed by both critics and defenders; critics think it puts some (early-comers, say) over others morally speaking; defenders say that the powers involved are morally innocuous since everyone has them.[8] But we need not be concerned that the powers involved in unilateral acquisitions are held unequally to be concerned about them. Correlatively: we need not be unconcerned with them, if we think they can be held equally by all. For: it is

[7] This, I think, is the ultimate lesson of Bas van der Vossen, "Imposing Duties and Original Appropriation," *Journal of Political Philosophy* 23, no. 1 (2015): 64–85, https://doi.org/10.1111/jopp.12029. His points are thus immune, I think, to the objections of Jesse Spafford, "Does Initial Appropriation Create New Obligations?," *Journal of Ethics and Social Philosophy* 17, no. 2 (2020): 228–38, https://doi.org/10.26556/jesp.v18i1.952. Spafford's objections do not go through if novelty in moral requirements (and obligations, and duties, and anything else you like) is only problematic absent principles explaining and justifying it.

[8] [quotations]

simply not true, in general, that authority is prima facie objectionable to the extent that it is *unequal*.

To see this, first compare two models of egalitarian marriage. On one, each partner can veto any action whatsoever that the other partner would like to take. On the other, the veto extends only to some smaller class of actions that affect both partners, or the relationship as a whole. Both models are egalitarian; in both cases, authority is equal. But the first model involves *too much* authority, relative to the second. Political examples of excessive, but equal, authority, abound, as well – exemplified, most clearly, by the phememenon of illiberal democracy, which in perfected form would be a society where everyone has equally excessive power over everyone else.[9]

Similarly, so the thought could go, for norms allowing unilateral acquisition of private property: the question is not (only!) whether they give some more authority than others, but rather whether, perhaps, they give everyone a kind of authority that no one should have. Seeing the problem as, only, a problem with moral equality, sees it as less of a problem than it in fact is.

The Problem is not (only) about the absence of consent

The final misconception concerns what it means for acquisition to be 'unilateral'. The term literally means 'one-sided', involving just one persons or party. But it is often glossed much more substantially, as acquisition without a particular kind of involvement, viz., *consent*.[10] However, consent is, neither, obviously necessary nor obviously sufficient to

[9] [cite]
[10] [quotations]

solve the intuitive moral problem concerning unilateral arrogation of authority in property.

Consent is not obviously sufficient to establish authority because my agreement to put you in charge of me is not, obviously, sufficient for you to be in charge of me. First, I have to have the right to give up my freedom to you, in this way. It is not obvious that this is *always* the case (Locke denies it, as does Jefferson, following him) or even (as Robert Paul Wolff has infamously argued) that it *ever* is.[11] As to necessity, from the political case, we are familiar with any number of accounts on which authority can be assumed without the agreement of all who are subject to it – accounts that cite duties of gratitude, or reciprocity, or justice, rather than duties to keep promises, as the basis of our duty to defer to political authorities. There is a substantial question – pursued below – about whether these accounts provide a good model for unilateral acquisition of authority in property. For this question to be substantial, however, 'unilateral acquisition' cannot simply be acquisition without consent. It must, rather, be something more literally 'unilateral': something more like acquisition of authority without anyone else intentionally participating at all. Since, I take it, intentional participation in the production of a person's authority would have to involve representing, or, as I will (stipulatively say) *authorizing* it, we should understood the problem with unilateral acquisition as a problem about the absence, not only of consent specifically, but of *authorization* more broadly.

[11] John Locke, *Second Treatise of Government*, 1690; Robert Paul Wolff, *In Defense of Anarchism* (University of California Press, 1970).

The real Problem

Thus, I propose to understand the problem of unilateral acquisition as a problem concerning how one person can acquire *any* (not just: unequal) authority over anyone, without *anyone*'s else's intentional participation (whether by agreement, or not). Understood in this more general way, the problem with it becomes easier to see. To wit:

(1) To acquire unilaterally is to come to have authority over some other person, without anyone else's intentional participation; [above]

(2) It is quite hard to acquire authority without anyone else participating; hard enough as to be impossible, with respect to the kind of authority we would to have in property to support natural rights objections to taxation

(3) Thus, we cannot acquire tax-blocking property rights in anything, unilaterally

(4) [and thus] we do not have tax-blocking natural property rights

(5) [and thus] certain kinds of libertarian arguments against government 'takings' cannot succeed (though others still might!)

1, a definitional claim, has received such argument as it can receive already; the burden of the argument will be on 2 (and, secondarily, to show the interest of 3, on 4 and 5). The following sections pursue an argument for that claim, at length, to wit:

(2a) no account of political authority allows it to arise unilaterally (in the foregoing, consent-independent, sense);

(2b) the reasons for this is that, in cases where who has what authority depends on the consequences of different possible distributions of authority, it is not possible for others to know whether unilateral claims to authority are indeed justified

(2c) who has what authority in property depends on the consequences of different possible distributions of property on all plausible accounts – *including* non-consequentialist accounts;

(2d) and authority claims (in these cases at least) are not justified if others cannot know they are justified

Thus;

(2) It is quite hard to acquire authority without anyone else participating; hard enough as to be impossible, with respect to the kind of authority we would to have in property to support natural rights objections to taxation

II. Political Authority, without Practices?

So: unilateral acquisition is, fundamentally, a matter of putting oneself in charge of others, absent any intentional participation on anyone else's behalf. As noted above, the political case provides a number of possible models for this; none, however, ultimately support it. Indeed, in all such cases much more than mere participation is required to produce authority: all of these accounts require rich sets of social practices, for any sort of

complex standing office of authority to arise. Seeing why authority cannot be acquired unilaterally in the political case, should help us to see why it would be so hard to acquire it unilaterally, in the case of property.

Problems with self-investiture are, perhaps, easiest to see on views which require the *consent* of the governed to justify the authority of the government.[12] Whether explicit or 'implied', consent cannot produce political authority without the knowing participation of others in the generation of this authority relation…

This is obvious enough if we assume that explicit consent is required, on the model of a promise to obey the state – you cannot promise to obey me, without representing me as an authority (that, after all, is what you have promised to do!). But even 'tacit' consent, if it is to be consent, still has to involve some actual participation on the part of consenters: if not an affirmative act of agreement, then some other act or omission which consenters can understand to have the same, authority-conferring, results [13]. And it is hard to see how a performance could be counted as tacit consent, unless there were some standing social practice which represented certain actions or omissions on the part of particular ruled subjects as accessions to the authority of particular rulers. How else could these subjects be expected to recognize, on reflection, that the actions that 'tacitly' constitute obligation-producing consent actually do so?

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[12] John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1988, 1689); A. John Simmons, *Moral Pinciples and Political Obligations* (Princeton University Press, 1979), http://books.google.com/books?id=2_mSGPeKdWQC.

[13] Simmons, *Moral Pinciples and Political Obligations*, 77f.

Views that focus on *gratitude, fair play*, or other forms of reciprocity also seem, if less obviously, to require actual authorizing practices, to generate authority.[14] We owe reciprocity *to* the participants of an actual social practice; if no practice is in place, there are no benefits received or burdens borne. Moreover, unless we are in a position to recognize that that practice has certain characteristics, it is hard to see why reciprocity would require obedience *specifically,* rather than allowing us to repay in some alternative coin of equal value. In particular, unless what we benefit from is *specifically* the obedience of others to some authority mutually recognized as such, it is hard to see why fair play or gratitude requires us to obey, as opposed to doing or providing something else of value instead, in exchange for the benefits we derive from other's obedience.

[14] On gratitude see A. D. M. Walker, "Political Obligation and the Argument from Gratitude," *Philosophy & Public Affairs* 17, no. 3 (1988): 191–211, https://doi.org/10.2307/2265244. On fair play, H.L.A. Hart, "Are There Any Natural Rights?," *The Philosophical Review* 64, no. 2 (1955): 175–191, https://doi.org/10.2307/2182828; John Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy*, ed. S Hook (New York: New York University Press, 1964).

A more promising inspiration for 'natural' authority in property, from the political authority literature, appeals not (only) to the benefits we receive from authority-conferring practices, but (also) to the agent-neutral value of these practices themselves. The idea here would be that we have a *natural duty* to promote just institutions. Where these institutions do not exist, this can come to a duty to help bring them about. [15] Insofar as just institutions involve authority relations, these *natural* duties might seem to explain how such relations can come into being without the assistance of standing social practices.[16]

This style of argument is promisingly general: it could establish duties to obey authority in property as well as duties to obey political authority. It is, however, obviously not valid as it stands. For, as Simmons points out, from the fact that I have a duty to promote Y, and that X promotes Y, it does not yet follow that I have a duty to promote X. If there is another way to promote justice, besides obeying the local authorities, then I can satisfy my natural duty of justice by doing that instead.[17]

This *particularity* problem may or may not be soluble, in the case of political authority. But, I argue, it is very difficult to imagine a solution to it which does not appeal to some *prior, particular authorizing* relation between the putative rulers and the putative ruled. Jeremy Waldron starts to give us a sense of why.[18] He points out that the particularity problem can arise not just across territories, but also within them. If a duty to promote

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[15] John Rawls, *A Theory of Justice*, Rev. ed (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 99f.

[16] See for instance David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008), 136–58.

[17] Simmons, *Moral Pinciples and Political Obligations*, 31–35.

[18] Jeremy Waldron, "Special Ties and Natural Duties," *Philosophy & Public Affairs* 22, no. 1 (1993): 3–30.

justice entails a duty to respect authority, something must single out one of the many possibly just sets of authority relations as the one that will in fact realize justice. The natural duty of justice itself does not do this. Justice is not so determinate, naturally, as to single out only one possible set of authority relations as the objectively correct one: at most it offers principles which delimit some set of mutually inconsistent conventions, each of which would be just enough to deserve deference if implemented.

The duty to promote just institutions thus produces a kind of collective action problem: it gives each of a collection of agents a reason to want to see an end realized, without providing each individual member of that collection with the reasons they would need to perform all the specific actions involved in realizing the end.[19] Justice sufficient for authority can be realized in many different profiles of institution-building action. But not just any mix of profiles will serve: if you do what is required in profile A, and I what is required in profile B, (sufficient) justice will not reign, even if it would reign if we both did our parts together in A, or both did our parts in B. As we know from a tradition starting with Hume, and elaborated by David Lewis, what is needed to solve these sorts of coordination problems, in cases of any complexity, is *information:* I need to know whether you will try to promote justice via A, or via B; you need to know the same about me.[20]. And since what we will each have reason to do depends on what we know, about the other, each of us needs to that higher-order information, too: even if we knew everyone

[19] Ben Bryan, independently, notes and discusses a related set of problems for that strain of the *natural law* tradition that seeks to justify the authority of law in terms of the contribution of legal practices to the common good. Ben Bryan, "The Conventionalist Challenge to Natural Rights Theory," *Social Theory and Practice* 43, no. 3 (2017): 582ff, https://doi.org/10.5840/soctheorpract20178314.. The argument in the text is, I believe, more general than his [why?].

[20] David Lewis, *Convention* (Cambridge, MA: Harvard University Press, 1969); David Hume, *A Treatise of Human Nature* (Oxford: Oxford University Press, 2000).

wanted to promote justice, by obeying authority, we would still need common knowledge about *how* each will attempt to do so, so we can all do it in more or less the same way, obeying more or less the same people on more or less the same occasions.

III. Confidence games: no consequentialist case for property without practices

This epistemic observation, I now argue, provides an approach to rebutting each of the three main strategies for establishing that robustly natural property rights would be violated by otherwise-justifiable government actions, like the imposition of taxes. Morally binding property rights might be justified in virtue of their consequences – (i) for the rights-holder, or (ii) for everyone. Alternatively, (iii) they might be justified as part of some fundamental sphere of personal sovereignty, worthy of deference whatever the consequences thereof. Each of these, I argue – even the last – requires a response to an analogue of the Simmons/Waldron particularity problem regarding the production of political authority; none is likely to have it.

Agent-Neutral Consequentialism

Begin with agent-neutral, consequentialist sort of view, a view that says that our reasons to respect property rights come from the importance of the goals property system achieve. A version of this view that is meant to justify *unilateral* acquisition has to maintain that there is a relation between this goal and a particular profile of authority claims that suffices to validate claims without the assistance of an authorizing practice. So for instance: it would have to maintain that every instance of labor- mixing of a certain

kind generates authority for these reasons; or that each first occupancy does so, or some such.

Any such argument, however, faces a severe form of the particularity problem. To infer a duty to defer to the property claims of those who have performed certain acquisitive acts, from the fact that a value like justice would be served by a similar general pattern of deference, agents need to be reasonably confident that others will perform in *that* pattern, or a sufficiently similar one, if they themselves do so. Otherwise they have to worry that their deference, and any attendant sacrifices, will be pointless, powerless to promote the value that would be promoted if others deferred as well. This might be the case even if everyone wants justice and knows that everyone else does too: the problem is that they don't know what others will, specifically, do, to try to realize justice. But: given that everyone knows everyone else is in this predicament, and is therefore not likely to perform (even if well-motivated) no one has any reason to believe that their performance will produce any positive value at all – unless, that that, is there is some authorizing practice in place, that all can look to, to guide their own behavior and predict the behavior of others.

Agent Relative Consequentialist

Consider next the other, agent-relative sort of consequence-involving justification of particular property rights, as in an interest-based account of rights applied to property.[21] These might seem to avoid problems of assurance. . It might seem, for instance, that in

[21] See again, among many other things, van der Vossen, "Imposing Duties and Original Appropriation."

many cases it will be fairly obvious to everyone involved that interfering with someone's property will harm *them* in particular, and that deferring will help them – whatever the effects may be, on the system as a whole. You have built a farm, with your bare hands; no complex game-theoretic reasoning is needed for me know that I should not trample your crops. And this might seem like the beginning of a case for property rights on an 'interest-based' view of rights more generally; for, to have a right, on such a view, is simply to have an interest which is, in this way "a sufficient reason for holding some other person(s) to be under a duty."[22]

On reflection, however, this argument raises the same epistemic issues for subjects of authority relations as does the standard 'economists' justification thereof. I come across a plot of land; you claim that you have made this 'your' farm, meaning: what you say, goes, with respect to it. How am I to know whether, and when, and I should defer to your commands, in this locale? For you to have a right that I do so, your interests in the land have to give me a *sufficient* reason for deference – meaning, a reason to defer to you, that outweighs any countervailing reasons.[23] In particular, your interest in unchallenged authority over these items will have to outweigh (i) other potential user's interests in benefitting from the items in question; (ii) other claimant's interests in proclaiming the

[22] Joseph Raz, quoted in ibid., xx

[23] Note that it is not enough, here, for your interests to give me a sufficient reason not to interfere with your ability to derive basic sustenance from your house and land. As Anna Stilz points out, that fact would not support a property right (of the sort that could constrain taxation), but rather something less – something closer to usufruct (or, just use, minus *fruct*). Indeed, it is not clear that interests give even very robust rights to use: my interests might be served just as well if you interrupt my use of a thing, to secure my sustenance, so long as in so doing you provide me with better means to protect my interests, or protect my interests yourself, directly. For this reason, interest-based 'natural' rights to use will not be enough to constrain any remotely morally plausible tax systems – all of which leave everyone with more to use than they would have in a state of nature. Anna Stilz, "Unilateral Appropriation and Property," 2016.

same sort of authority you proclaim, over those items; and (iii) everybody's interests in being free from your authority, with respect to these things or any other.

It is hard to see how this could be the case simply because your own interest in authority has such enormous intrinsic weight, or special peremptory force, that other reasons could not outweigh or cannot compare to it.[24] Rather, it will have to be because it makes sense to give interests of this kind this sort of weight, as against any reasons not to do so. And this, it seems, will only be the case if a general policy of granting these sorts of interest this sort of weight produces something else of value, or accomplishes some other normatively significant task.

So, just as in the case of general consequentialist justification of property, agent-relative justification does, after all, require reference to the broader consequences of individual acts and/or policies of deference to unilateral claims to property. For, we cannot know whether a particular act of compliance, or a policy of complying with property claimants of particular kinds, will produce the effect that (still) justify them, unless we know that others will comply too, in similar circumstances. If we do not know this, then we are not in a position to know that the interests like those of the claimant outweigh any interests that would be served by non-compliance.

IV. Consequences for non-consequentialists

[I'm not very confident in this section as written – very curious to hear your thoughts!]

[24] Or, anyway, hard to see how this could be the case if your interest is supposed to *underlie* the right; a view that, by contrast, puts rights first in the order of justification might say that the very fact that you have an absolute property right generates a very weighty interest. I consider rights-first views in the text, below.

It may seem that the foregoing reasoning – focused as it is on the *effects* of accepting rights claims– will carry little force against that current of libertarian thinking that insists that property rights are possessed as a deontological matter, not because of the positive consequences of recognizing them.[25] It turns out, though that is far from clear how we could construct a morally plausible theory of natural property rights which does not make some appeal to the value or disvalue of the consequences of those rights in justifying them. And, per above, even a little consequence-dependence is enough to generate big epistemic problems for unilateral claims to authority, like property claims.

To start to see this, note that rights might be 'basic' in this philosophical sense, not grounded in the promotion of other values, without being at all 'basic' or 'simple' to understand in particular cases. Does acquisition require mixing of labor, taking control, or simply giving a sign? What particular actions constitute mixing of labor; and, when these actions are performed, which particular rights in which particular thing are acquired? Is there a 'proviso' that limits your ability to acquire, depending on the effect of acquisition on others? Should that be understood in terms of leaving 'enough and as good' [26], or in some other way?

A deontological libertarian might, to be sure, insist that knowledge of answers to these questions, no matter how hard to get, is nonetheless in some important sense still *accessible*. After all, a hallmark of these kinds of view is that rights derive from principles which, not being based on contingencies about consequence, seem instead to be

[25] As in a common reading of Nozick (*op. cit.).*
[26] **(Locke 1689, 2.27)**

grounded in principles of fundamental morality that are at least relatively *a priori*, accessible to the 'natural' reason of all. Moreover, because consequence-independent in justification, these principles seem to bind us irrespective of our predictions about the performances of others: there is no doubt that we will accomplish something of importance by respecting them, even if nobody else goes along.

This last point seems right, so far as it goes: if we could be *sure* that fundamental morality required us to defer to other's property-related claims, in such-and-such a way, regardless of consequences, then it might be good enough that by deferring in this way we do what we are morally required to do – whether or not we accomplish anything else in the process. If we had that certainty, to offload our judgment to a social practice for the sake of promoting prosperity or protecting the interests of those we interact with would be to make an unacceptable tradeoff of the good against the right.

It is, however, unlikely that we have this certainty – *even supposing*, for sake of argument, that what ultimately determines who has authority over which part of the world is consequence-independent natural, individual, rights.

To see this, notice first that it is often if not always extremely difficult to tell whether someone has performed the actions that would give them a natural right over a previously unowned thing. It has always been manifestly morally implausible that new authority in property, with all the burdens it places on others, could be justified without some explanation as to why simply 'getting there first' is of such enormous moral significance. The typical way to handle this is what is usually called a 'proviso'; an account of which acts

of acquisition are immune to this kind of complaint. Locke says that this requires leaving "enough, and as good". Later interpreters have tended to focus on one or the other – a *sufficientarian* standard, emphasizing leaving *enough* for others;[27] or a *comparative* standard, leaving things in some sense no *worse* than they were before. And then, cross-cutting this distinction, there is a further distinction between whether the requirement applies to act-tokens, so that actual acquisitions have to leave enough or as good, or that pattern of such acquisitions has to do so. Within each category there are many further choices to be made, about what counts as "enough"; "as good"; and further choices, perhaps under-appreciated, as to how to understand the relationship between act-types/token and their consequence.[28]

Canvassing these possibilities is a task for another time [and probably, another philosopher] My point for now is simply that decades of post-Nozickian argumentation about these provisos have not come even close to settling matters. And different views here make a substantial difference as to what would have to be true for individual, particular, acquisitions to be justified. The existence and persistence of these disagreement suggests that no philosopher party to them should be entirely confident in their own views.[29] This source of uncertainty seems all the more serious for the large majority of people that would be bound by unilaterally acquired authority. Sometimes, to be sure, philosophers get themselves confused about something that ordinary people have

[27] Mack, Wendt,. etc.

[28] I have in mind here the kind of problems that arise in discussion of direct and indirect consequentialism – for the former, are the consequences that matter actual? Expected? For the latter, what assumption are we to make about the compliance of others in

[29] Cite epistemology of disagreement

no trouble with. But there is little reason to believe this is the case here – ordinary people rarely have cause to think about acquiring from unowned nature, and I see little reason to believe that there is some natural consensus they come to when they do.[30]

Here, however, is the rub, for attempts to defend unilateraly acquired authority without appeal to consequences. Given uncertainty about the nature of the relevant rights, recourse to consequences re-enters, and thus so too do all the problems regarding it posed above. For. tradeoffs plausibly forbidden in cases of deontic certainty must, it seems, be allowed, where we are not sure what fundamental morality requires. It might be wrong to kill one person to save ten others if you are sure they are innocent; but it seems as if there is some number of people such that, if you are *not sure* an apparent aggressor is innocent, you can kill that that one possibly-guilty person to save that larger number of others. After all, without some such sliding standard, absolute prohibitions like these would be paralyzing, given that our actual predicaments almost always involve some degree of uncertainty.[31] We would be frozen, unable to promote any important value out of concern that we would thereby violate a right.

[there is probably more to say here; any ideas or references on how a libertarian deontologist might understand the relationship of rights and risks, so as to avoid this problem?]

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[30] See Ostrom, cited below, for discussion of the many different ways people deal with natural resources in practice.

[31] See here Frank Jackson and Michael Smith, "Absolutist Moral Theories and Uncertainty," *The Journal of Philosophy* 103, no. 6 (2006): 267–83, https://doi.org/10.2307/20619943. For a (plausible) recent account of what should drive the standard, see Seth Lazar, "Deontological Decision Theory and Agent-Centered Options *," *Ethics* 127, no. April (2017): 579–609.

It is not clear, after all, then, that a deontological view of property rights allows us to abandon the concern for consequences that generates the epistemic problems canvassed above – the problems that require social institutions as a solution. Thus, all but the most (probably, unreasonably!) confident deontological defenders of natural property rights have reason to concede that those who would be bound by an act of acquisition are not, after all, in a position to know that the relevant duties of deference obtain, unless and until there is a social practice to tell them who has the power to produce these duties, when.

V. On unknowable authority

It appears, then, that, in property as in politics, it would be difficult or impossible for those who are supposed to be obligated to respect unilateral property claims to know that they have the relevant obligations. It might be objected, however, that it is one thing for rights to be *unknowable* without social institutions, and quite another for them to depend on those institutions *metaphysically*, for their very existence, as the Murphy and Nagel argument might seem to suppose.[32] Generally, to argue that a set of facts are difficult to know, is not to show that they are not after all facts. Some facts may be unknowable, in practice or even in principle.

In this section, however, I argue that there is reason to believe that practical authority relations of the kind that characterize property rights cannot obtain, when they are

[32] Though, it would be fair to ask whether these facts, if unknowable, could play the argumentative role liberals like Murphy and Nagel reject. If not, then one would not need to accept the arguments of this section to endorse the inference from the epistemic lemmas just established, to the moral-methodological conclusion that unilaterally acquired property rights should not constrain the choice of property system.

epistemically inaccessible in the particularly profound and pervasive way that unilaterally acquired property rights would be inaccessible. This, anyway, is true on the most prominent and plausible recent accounts of practical authority *per se*. To wit:

So for instance, on Gerry Gaus's influential interpretation of a "justificatory liberal" approach to authority, I can have authority over you only to the extent that you *have a reason* to do what I say.[33] But, Gaus argues (following Bernard Williams and others), we do not have reasons we are not in a position to appreciate. If I have no way of knowing that the person who put up the 'no trespassing sign' owns the land, then after seeing the sign, I still have no reason not to heed it. Given the points made above, this view of authority will make it very difficult to see how someone could have property in the absence of evidence-giving institutions.

Gaus's conception of authority is of course controversial, grounded as it is in a contentious 'internalist' conception of the normative reasons we have. [34] A more capacious 'externalist' view of our reasons would not support a Gausian argument against natural property rights: I might have a reason not to cross your land, whether I am in a position to know it or not.

However: internalism about reasons is not the only reason to resist unknowable authority relations. Witness Joseph Raz, a prominent reasons-externalist:

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[33] Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge University Press, 2010), 205–58.

[34] Anthony Taylor, "Public Justification and the Reactive Attitudes," *Politics Philosophy & Economics*, 2017, https://doi.org/10.1177/1470594X17695070.

> *"The point of being under an authority is that it opens a way of improving one's conformity with reason. One achieves that by conforming to the authority's directives, and [...] one can reliably conform only if one has reliable beliefs regarding who has legitimate authority, and what its directives are [...] Therefore, to fulfill its function, the legitimacy of an authority must be knowable to its subjects."*[35]

The passage speaks for itself: authority relations are a poor tool for improving our responsiveness to reasons if we are not in a position to know that they obtain.

Raz's instrumental conception of authority is, of course, not uncontroversial either; many are inclined to think that our reasons for respecting authority do not derive from what it would take to respond better to reasons we have anyway. Among other things, this instrumentalism does not seem to capture our sense that the duties authority generates are at least sometimes owed directly *to* the authority figure, grounded in something about *them* rather than in our own interest in getting practical reason right.[36] It seems especially hard to deny that this is what we should say about authority in property: if you wrongfully trespass on my property, you wrong *me* specifically. And the case of property makes it hard to see how, per Raz, this directedness could come down merely to a relation to our interests: after all, some wrongs involving property are *mere* trespasses, not harmful in any rights-independent way.[37]

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[35] Joseph Raz, "The Problem of Authority: Revisiting the Service Conception," *Minnesota Law Review* 90, no. 1979 (2006): 1025, https://doi.org/10.3868/s050-004-015-0003-8. For a more elaborate argument to a similar conclusion, see Daniel Viehoff, "Authority and Expertise," *Journal of Political Philosophy* 24, no. 4 (2016): 414–16, https://doi.org/10.1111/jopp.12100.

[36] Stephen Darwall, "Authority and Second-Personal Reasons for Acting," in *Morality, Authority, and Law* (Oxford University Press, 2013), 135–50, https://doi.org/10.1093/acprof:oso/9780199662586.003.0008.

[37] For examples (and discussion) see Arthur Ripstein, "Beyond the Harm Principle," *Philosophy & Public Affairs* 34, no. 3 (2006): 215–45; Owens, "Property and Authority*."

Once we insist that property rights must involve fundamentally *directed* duties of deference, however, it becomes even more difficult to see how these duties could arise where those who would be bound by them are not in a position to know that they have arisen. So, for instance, Stephen Darwall's influential non-instrumentalist account of authority and rights, geared to capture directedness, implies that your authority can give me a directed duty only if you are in a special position to hold me to account, via 'personal' reactive attitudes like resentment. These attitudes, however, have epistemic conditions – among other things, they are not warranted towards people who did not have access to the knowledge they would have needed to avoid the conduct in question. Note that this does not mean that the view precludes the existence of directed duties whose violation is merely *excused* – say, by ignorance. The claim is instead that, if I have *no excuse* for my non-compliance with your will than you have warrant for 'personal' reactive attitudes towards me – directed forms of blame like indignation and resentment.[38] In many cases ignorance of a directed duty will indeed function as an excuse: I did not see your toe there; when you call me to account for stepping on it, I inform of you of this, and you are satisfied.

However: in cases where I, indeed, have no excuse, and yet it seems that the personal reactive attitudes would not be warranted, I cannot owe you an obligation, on a Darwallian view. This, I argue, is what happens if I harmlessly cross into 'your' land in circumstances where I have no way of knowing with any confidence that you have ownership that precludes my crossing, because there is no social practice in place to tell

[38] Stephen Darwall, "Bipolar Obligation," in *Morality, Authority, and Law* (Oxford University Press, 2013), 20–39, https://doi.org/10.1093/acprof:oso/9780199662586.003.0002.

me. Ignorance in these cases affects our mutual reasons for reactive attitudes differently, than when it functions as an excuse. An excuse, I take it, is a potentially effective, warranted response to a warranted demand for accountability: you say to me 'hey, that's my toe!'; I, now aware of something I wasn't before, respond 'oh! I didn't realize'; both of us leave assured that each has recognized the legitimate claims and interests of the other. By contrast, when you say 'hey, that's my land'; I am not yet warranted in saying 'oh, I didn't realize'; at most I can say 'Is it? I'm not sure'. The situation does not resolve, in the way it does where there is an excuse – I leave feeling confused, you leave feeling aggrieved. Thus, there is here no excuse, properly speaking. Yet, you really do lack warrant for blaming me; I do not meet epistemic conditions that apply to both personal and impersonal forms of blame. In such cases, therefore, I do not owe you a duty of deference, on Darwall's view. But then, you, in those cases, have no power to produce obligations on others, directed towards yourself; and thus, no authority-involving rights, with respect to things you think of as your property.

VI. Are there *any* natural rights?

So: we can't know what property rights we and others have, without social conventions to tell us – any more than we can know who, specifically, we owe political allegiance to, without practices that tell us who specifically occupies the relevant office. And in both cases – but perhaps, even more so in the case of property – it seems that the epistemic inaccessibility of these putative facts about authority makes it hard to see how they could obtain after all.

At this point, one might object: doesn't this prove too much? Are there any natural rights at all?[39] In response, note first that many things that are called 'natural rights' do not involve specific, complex, authority relations in the way the foregoing arguments against natural property suppose. Many of these assertions of 'natural right' are simply claims about how social institutions should be structured – not claims about particular powers particular people have. My 'natural right' to, say, free expression – or, to 'property' abstractly' – is not perspicaciously presented as a power to impose obligations on others to produce for me a liberal order; rather, it is equivalent to the fact that I am wronged if this order is not produced. This kind of right thus does not pose the problems considered above, regarding natural or 'original' authority; these kinds of natural rights do not involve specific authority relations, in anything like the way that particular property rights do.

Still, some will think there are clearly other authority-involving natural rights held by particular people in particular things – our rights in our bodies and their parts, if nothing else. This, they might argue, is why a regime that redistributed eyeballs or blood products would be unjust – because it would violate those particular rights, not, or not only, because it would violate some general right all have against such an order.

For my part, I suspect that our body rights may be less natural than they first appear, and that a different explanation of the injustice of bodily redistribution will therefore be required, one that does not appeal to natural rights.[40] But for now I will simply note that

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[39] See for instance: Gerald Gaus and Loren Lomasky, "ARE PROPERTY RIGHTS PROBLEMATIC ?," *The Monist* 73, no. 4 (1990): 483–503.

[40] For an argument against fully 'natural' body rights, and an attempt to explain why bodily redistribution is nonetheless not permitted, see Japa Pallikkathayil, "Persons and Bodies," in *Freedom and Force: Essays on Kant's Legal Philosophy*, ed. Sari Kisilevsky and Martin J Stone (Oxford: Hart, 2017), 44–64. For the shape of my alternative, see Sean Aas, "(Owning) Our Bodies, (Owning) Our Selves?," *Oxford Studies*

nothing in the arguments proffered *here*, against natural authority in property, or politics, is in any obviously irreconcilable tension with belief in natural body rights, any more than for natural rights in general. This is for two reasons.

First, recall that the epistemic problems for natural rights to authority in property, or politics, are most pressing with respect to the *acquisition* thereof – what is really hard to know, in both cases, is (i) what it takes to have gotten authority, over a certain domain; and (ii) who, among those who are claiming authority, has actually done what it takes to produce the power to obligate others. It is natural to think, however, that body rights are not acquired – that what happens, say, when I move into a doorway, or grow some hair, is that something about *a thing* changes, while my rights over it remain basically the same. If that is right, then arguments targeting unilateral *acquisition,* as the key problem for natural property rights, have no obvious purchase against the supposition of natural rights in bodies.

Again, I myself suspect instead that body rights can be intentionally acquired, in some cases at least – think of implanting a pacemaker, or receiving a transplant; and, moreover, that expansions of my authority require justification whether I produce them by my own choices or not. Still, those who take a more conventional traditional line on the body needn't worry that my arguments against natural property pose any obvious problems for natural body rights. And in any case, other differences between body rights and property rights remain.

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in Political Philosophy 9 (2023): 213–40.

Critically, for the sort of conventionalist line against natural property pursued here, there seems to be far less *indeterminacy* in the specification of our bodies, than in the specification of our estates in ordinary property. That is to say, among all the many ways that we might *in principle* assign authority with respect to body parts, a small subclass is much more obviously plausible than the rest. These, roughly, are those where we grant each person rights in all, if perhaps not quite *only*, the parts of one specific human organism.[41] That this subclass is *salient*, in this way, is the sort of consideration that could make an enormous difference to our ability to predict the behavior and behavioral predictions of others – and thus, to be confident that our own pattern of forbearance from bodily incursion will be answered with sufficiently similar forbearance on the part of others, so that we will all have appropriately satisfied our duties to promote justice by thusly forbearing. If there is, in the case of the body, a different route to this sort of confidence, then there is in politics, or in property, then epistemic argument regarding the latter two cases need not, necessarily, afflict the former. Whether, in the end, this (or anything) saves natural body rights, from concerns about indeterminacy, is admittedly not yet clear. My point for now is simply that it is far from obvious, at present, that epistemic arguments against natural property rights entail a rejection of natural body rights, as well.

VII. Property rights: social, but not political?

We can conclude: genuinely unilateral acquisition of full-on *property* rights, rights in things that are not already parts of *us*, would indeed be 'odd', allowing individuals to

[41] For relevant recent discussion, see Ian Carter, "Self-Ownership and the Importance of the Human Body," *Social Philosophy and Policy*, 2019; Sean Aas, "Prosthetic Embodiment," *Synthese* 198, no. 7 (2021): 6509–32, https://doi.org/10.1007/s11229-019-02472-7.

invest themselves with the power to transform the obligations of others in complex and highly significant ways. These kinds of complex authority claims are in more familiar, political, cases, invariably justified by reference to authorizing practices.

This essential role for social practices in undergirding authority, I argued, is no accident, nor is it unique to the political case: practical authority cannot play its distinctive inter- and intra-personal deliberative roles unless subjects of authority are in a position to know who is in charge of what, when. This poses a problem for fully unilateral acquisition whether property is justified solely by reference to valuable ends, or only partly so. Either way, it is very difficult to know that any particular pattern of compliance is required of us, because it is difficult to know that others know this as well. Unilateral acquisition would thus put us in a kind of perpetual constitutional crisis: beset by conflicting claims to authority, with no way of knowing which authority is worth deferring to. It is very difficult to see how anybody's authority claims could be objectively valid, in a situation like this.

That much at least established, it now seems fair to say that defenders of unilateral acquisition bear a substantial argumentative burden: they have to show us how the claims of property owners could obligate us, if we are not in a position to know that these claims are valid – or how, despite appearances, we could come to know this.

Suppose that this burden cannot be met. What would this mean, for how we can justify the social institutions that affect who gets to control which bits of the world? If valid claims to authority over external resources cannot be acquired unilaterally, but must

instead be authorized by some particular kind of social practice, then the practices are morally prior to the property claims. The Murphy/Nagel point would seem to follow: claims about who has which property rights are justified by, and thus do not justify, claims about the moral quality of the practices that authorize acquisition of property.

This, I believe, would be a significant result, affecting how we should structure our thinking about distributive justice in general and taxation in particular. However, as noted above, establishing the impossibility of full-on property rights in pre-social conditions, or their irrelevance in the here and now, still falls short of establishing the sort of 'no-taking' justificatory framework regarding (inter alia-) taxation that 'high' (non-'classical') liberals like Murphy and Nagel seem to infer from their rejection of natural right. For, it may yet be that property depends essentially on some knowledge-providing practices or other, but not on the *state,* with its taxes; thus, that taxes take what those non-state practices constitute, presumptively, as ours.[42] So, for instance, we might think that property is a creature of the common and/or customary law - a set of practices that, though presently enforced through the state and its tax apparatus, predates and/or is independent of it.[43] Or, as some anthropologists have suggested, it may be possible for non-legal practices to constitute property rights – whether in the absence of a state, or in contravention of its official rules [44]. If so, then a question arises as to whether the state's decision to tax might

[42] This seems to have been Hume's view (Hume, *A Treatise of Human Nature* Book 3 Section 5). For related discussion, see Christopher Bertram, "Property in the Moral Life of Human Beings," *Social Philosophy and Policy* 30, no. 1–2 (2013): 21, https://doi.org/10.1017/S0265052513000198.

[43] As on one reading of F. A. Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order* (Chicago: University of Chicago Press, 1973).

[44] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990), https://doi.org/10.1017/CBO9781316423936; Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1994).

not violate rights provided institutionally, but by an altogether different, non-state set of institutions.[45] Such a view could fare much better, epistemically, than a full-on natural rights view, since practices seem capable of providing epistemic determinacy whether they are imbricated in state coercion or not.

This kind of view, therefore, merits more attention than it has received, in the recent literature on taxation and the moral basis of property rights. Still, it also bears a heavy explanatory burden, if it is to do what it would have to, in that discussion. The relevant rights-securing practices need to have an authority separate from and least sometimes superior to that of the state, so that they can ground property claims as constraints against state interference. It will not be easy to establish this sort of authority for non-state practices in the first place – much less, to show that this sort of customary/traditional authority persists as a constraint in cases where democratic states propose tax policies that would (but for these putative pre-political but yet 'post-social' rights) promote justice. To show that even an ideal, democratic state has the power to produce obligations is hard enough; to show that merely customary practices – operating *against* an otherwise just state – can put some under the authority of others, in complex and demanding ways, seems even more difficult to accomplish.

That said, the jury is very much out on these difficult questions concerning the conditions under which different social practices can obligate us, where they c conflict. This, I propose, is where the action ought to be in the debate about taxation and the

[45] For an analogous argument regarding rights against slavery (established by non-state practices even where states ignore or violate them) see [Darby book, Chapter 6]

'artificial' status of property rights: not *whether* property rights are social constructs, but rather, which social practices can have the moral power to construct them, and why.