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Bas van der Vossen

Chapman University, bvanderv@chapman.edu

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Imposing Duties and Original Appropriation

Bas van der Vossen

Philosophy, UNC Greensboro

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To justify property rights, two things must be shown. First, the kind of exclusive rights over goods or land that property rights involve must be justified. Second, it must be possible for such property rights to come into being. These are two separate issues. It is one thing to say that it is a good idea for there to be such rights, quite another to say that some person or procedure can bring them about.

This second matter is the topic of this essay. It defends the Lockean view that individuals can unilaterally bring about property rights through acts of appropriation. More specifically, it defends this view in light of a key concern, namely that such appropriation presupposes powers that morally equal people lack. Among equals, it is said, no one has the natural authority to tell others what they are permitted to do. And so, among equals, it is said, no one has the ability to impose new obligations on others by creating new rights for themselves.

This concern traces a fault-line in political philosophy. Contrary to the Lockean position, Kantians argue that the creation of new obligations requires legitimation through positive law in a legitimate political condition (uniting the wills of all). This, in turn, feeds skepticism about the idea that property rights can stand as moral barriers against certain state policies, including policies of redistribution. If original appropriation is not possible outside of a legitimate state, then property rights are in a real sense dependent on the laws of the state that define them.

In what follows, I develop an account of when individuals can unilaterally impose moral obligations on others. I then use it to argue that people have the ability to unilaterally appropriate property. The lynchpin of this argument is a certain kind of natural right – what I will call the natural right to own property. The precise nature of this right, I will argue, renders original appropriation consistent with the moral equality of all.

A few clarifications before we begin. First, the rights I will primarily have in mind are claim-rights, correlating to duties or obligations (I will not distinguish between the two). These duties impose *pro tanto* moral requirements on people, capable of being overridden by other moral considerations. Second, in order to keep things manageable, I will make some simplifying assumptions about the nature of property rights. Many existing legal systems combine a variety of “incidents” into complex bundles of such rights.¹ But for present purposes I will focus only on a conception of property including three very common incidents: the rights to exclusive possession, use, and transfer. Adopting this simplified conception allows us to avoid complicated issues about the detailed specification of property rights. The conclusion about appropriation below can be applied, with due modifications, to a variety of property regimes. Finally, when I say that a right is a natural right I mean that it is a moral right that all possess unless they have alienated or forfeited it. One can enjoy such rights without acquiring them or receiving them from others.

1. Appropriation and moral equality

¹ See Anthony Honoré, “Ownership”, *Oxford Essays in Jurisprudence*. A. Guest, ed., (London: Oxford University Press, 1961), pp. 107-47

Our question is whether people can move from a condition in which they do not enjoy property rights to a condition in which they do by performing unilateral acts of appropriation. An important concern, we saw, is that such acts allow people to impose new moral duties (correlative to the created property rights) on others and that such acts are incompatible with the moral equality of all.

This concern rests on a substantive conception of equality. According to this conception, morally equal individuals do not have natural authority over each other. Because morality does not appoint any among us as having superior standing, no one has the ability to determine the requirements of morality for others – none among us gets to author the moral law. Instead, we are symmetrically positioned *subject* to the moral law. Morality comes down to us, as it were, and is to be respected as such. Put in Hohfeldian terms, people lack *natural moral powers* to impose new duties on others by creating new rights for themselves.²

This concern goes back at least to Samuel Pufendorf. Pufendorf argued that because of the ‘natural equality of men’ appropriation required the consent of others. ‘[W]e can not apprehend’, he wrote, ‘how a bare corporal Act, such as seizure is, should be able to prejudice the Right and Powers of others, unless their consent be added to confirm it; that is, unless a covenant intervene’.³

² Powers are abilities to change moral or juridical relations, including claim-rights and their correlative obligations. Powers correlate to liabilities to have rights and duties changed. Below I will also use the Hohfeldian idea of an immunity, which indicates the absence of a power to have one’s rights and duties changed. See Wesley Newcombe Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, W.W. Cooke, ed., (New Haven: Yale University Press, 1919).

³ See Samuel Pufendorf, *Of the Law of Nature and Nations*, (Oxford: J. Churchill et al., 1703), 4, 4, 5. Also 4, 4, 13 and 4, 4, 14. To Pufendorf, therefore, *all* acquired rights are the consequence of acts that involve the will of those who bear their correlative duties (except

A similar thought is found in Kant's Doctrine of Right. Kant asserts that 'a unilateral will cannot put others under an obligation they would not otherwise have.'⁴ Contrary to Pufendorf, however, Kant thought that rightful appropriation was possible only in a political or civil condition, in which the wills of all are united through positive law. Such a condition, and such a condition alone, says Kant, can legitimize appropriation:

But the *rational title* of acquisition can lie only in the idea of a will of all united *a priori* (necessarily to be united), which is here tacitly assumed as a necessary condition (*conditio sine qua non*); for a unilateral will cannot put others under an obligation they would not otherwise have. – But the condition in which the will of all is actually united for giving law is the civil condition.⁵

This view is popular. For example, inspired by this view, Jeremy Waldron describes the unilateral imposition of duties as 'radically unfamiliar' and 'seemingly repugnant.' He concludes that genuine property rights are possible only under fair

for rights of parents over their children). Cf. Karl Olivecrona, "Locke's Theory of Appropriation", *Philosophical Quarterly* 24 (1974): 220–34, p. 213, William A. Edmundson, *An Introduction to Rights*, (Cambridge: Cambridge University Press, 2004), p. 25

⁴ Immanuel Kant, *The Metaphysics of Morals*, Mary Gregor, ed., (Cambridge: Cambridge University Press, 1996), 6:254

⁵ Kant, *The Metaphysics of Morals*, 6:254. See also 6:261, 6:263. Thus, for Kant (contra Pufendorf) *even* consented-to appropriation would not be fully rightful outside the civil condition. For such appropriation would remain bilateral, not omnilateral – as rightful possession requires. For this reading of Kant, see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, (Cambridge, MA: Harvard University Press, 2009), pp. 86–106, 145–59, 272–277, Leslie Mulholland, *Kant's System of Rights*, (Columbia University Press, 1990), p. 253–65, Katrin Flikschuh, *Kant and Modern Political Philosophy*, (Cambridge: Cambridge University Press, 2000), pp. 118, 136, 141–5, 159, Anna Stilz, *Liberal Loyalty*, (Princeton: Princeton University Press, 2009), pp. 45, 55.

political institutions.⁶ Similarly, Arthur Ripstein argues that ‘a united legislative will not only serves to make unilateral appropriations rightful; more generally, it explains the possibility of one person changing the normative status of another through word or deed.’⁷ The ability to impose obligations on others through appropriation, Waldron, Ripstein, and others worry, would make one into an odd kind of moral legislator.⁸

This concern should be taken seriously. We can see its force by considering its denial. Claim-rights correlate to duties and, as such, make actions for others binding. Andy’s right, say, not to be touched without his permission renders certain acts by Beth morally unavailable to her. To assert, then, that Andy has the power to create new rights for himself, and thereby to impose on Beth obligations, is to assert that Beth’s actions are under Andy’s moral control. Her freedom to move around and use things exists at Andy’s mercy. This amounts to an unacceptable kind of moral superiority. Andy’s ability to unilaterally determine what morality demands of Beth renders her objectionably subject to his will. It denies their moral equality.⁹

Indeed, if Andy did have such authority over Beth, assertions of Beth having a genuine *right* against Andy to her freedom would be moot. For Andy could always

⁶ Jeremy Waldron, *The Right to Private Property*, (Oxford: Clarendon Press, 1988), p. 265-7 and p. 280 respectively. See also Jeremy Waldron, “Kant’s Legal Positivism”, *Harvard Law Review* 109 (1996): 1553-66, p. 1557.

⁷ Ripstein, *Force and Freedom*, p. 272. See also pp. 36-7, 90, 156, 277.

⁸ See Allan Gibbard, “Natural Property Rights”, *Noûs* 10 (1976): 77-86, Leif Wenar, “Original Acquisition of Private Property”, *Mind* 107 (1998): 799-819, Stiliz, *Liberal Loyalty*, pp. 45, 55, and, in a broader context, Edmundson, *An Introduction to Rights*, p. 164. The phrase ‘odd kind of moral legislator’ is taken from T.M. Scanlon, “Libertarianism and Liberty: How Not to Argue for Limited Government and Lower Taxes”, *Boston Review*, Oct 19, 2011. For mysterious reasons Scanlon restricts this argument to only transfers of property.

⁹ Recall that this is a substantive ideal of equality, the denial of natural interpersonal authority, and not a merely formalistic one. It thus cannot be met by pointing out that Beth might have the same authority over Andy. I return to this point in section 4 below.

curtail or remove that right by exercising his moral powers. In such a situation, our rights could not provide any robust protections against the wills of others. For this reason, our natural moral endowment – that is, whatever natural moral rights and duties we have – must include protections against the unilateral imposition of new obligations by others (Hohfeldian immunities).

This concern is not about moral powers in general, but about the power to *unilaterally impose new obligations on others*. Of course Andy can gain control over acts of Beth's without at the same time arrogating to himself a position of moral superiority if Beth freely gave Andy such control, for example by consenting. Similarly, Andy's power to unilaterally remove Beth's duties does not present the same concerns. In these cases, Beth either exercised or regained moral control over her actions. The problem with unilateral appropriation, by contrast, is that appropriators seem able to unilaterally subject the actions of others to their control, and thus to objectionably subject them to their will.

This concern is of special importance to Lockean thought. For it threatens to strike right at the heart of the Lockean approach to political philosophy. If property requires political legitimation, then we should give up on the idea of government as the protector of pre-existing (property) rights, as well as possibly the Lockean project of understanding the public in terms of the private. Moreover, the same idea of equality motivates another important Lockean view: that only consent can legitimate political authority. As Locke put it, government without consent puts

people “under the will” of others.¹⁰ Thus, unless we can find an important difference between duty-imposition by appropriators and political authorities, the Lockean position becomes inconsistent – objecting to duty-imposition in one context while endorsing it in another.

Before looking at this concern more closely, it is worth noting that it is independent of another dispute about appropriation. This is the dispute about the original ownership of the earth. Some argue that appropriation requires the consent or compensation of others because the world is owned by all.¹¹ Others, departing from the same thought, claim that appropriation is unproblematic because the world is originally unowned.¹² The present argument suggests that this may be a misleading way of putting things. The problem is that property rights constitute moral relations between persons who naturally enjoy a status of free and equal moral beings. And this problem remains whether or not the world is originally commonly owned.¹³

¹⁰ See John Locke, *Two Treatises of Government*, P. Laslett, ed., (Cambridge: Cambridge University Press, 1988), II, 4, 22, 54, 57, 58, 59.

¹¹ See G.A. Cohen, *Self-Ownership, Freedom, and Equality*, (Cambridge: Cambridge University Press, 1995), chapters 2-3, Gopal Sreenivasan, *The Limits of Lockean Rights in Property*, (Oxford: Oxford University Press, 1995), pp. 24ff., John Salter, “Hugo Grotius: Property and Consent”, *Political Theory* 29 (2001): 537-55, p. 537-8. For extensive discussion and references, see Peter Vallentyne, “Left-Libertarianism: A Primer”, in Peter Vallentyne, Hillel Steiner, eds., *Left Libertarianism and Its Critics: The Contemporary Debate*, (Palgrave Publishers Ltd., 2000): 1-20.

¹² Edward Feser, “There Is No Such Things As An Unjust Initial Acquisition”, *Social Philosophy and Policy* 22 (2005): 56-80, Eric Mack, “The Natural Right of Property”, *Social Philosophy and Policy* 27 (2010): 53-78. Cf. Wenar, “Original Acquisition of Private Property”, p. 804.

¹³ The problem of duty-imposition can therefore not be met by requiring that appropriation leave “enough and as good” for others, as Sreenivasan suggests in *The Limits of Lockean Rights in Property*, or that others be compensated, as Wenar proposes in “Original Acquisition of Private Property”. The worry is not about material goods or well-being, but authority. Unsurprisingly, in other contexts neither answer would suffice.

Note also that the present concern is entirely independent of how we envisage people's natural moral endowment. That is, our question is not about whether our natural rights and duties are purely negative in nature or include positive ones as well. The question of what our natural rights and duties are is what we may call a first-order concern. By contrast, we are here considering a second-order concern: who has the authority to *change* whatever people's natural moral rights and duties may be.

2. Three ways of imposing duties

The concern above is both plausible and potentially devastating to unilateral appropriation. However, in its simplest form, it is also too sweeping. As some who defend the possibility of appropriation have observed, we know of many cases in which there is nothing mysterious or troubling at all about unilaterally imposing duties on others. We have duties not to take what others have in their physical possession, yet this allows people to impose new duties on others by physically taking and holding things. Similarly, when people take up shelter others gain duties not to disturb them, we can impose duties on others to respect our privacy by requesting that they do, people can impose obligations on others by making a legal will, and so on.¹⁴

¹⁴ These and other examples can be found in Hugh Breakey, "Without Consent: Principles of Justified Acquisition", *The Philosophical Quarterly* 59 (2009): 618-40, pp. 622-3, and A. John Simmons, "Original-Acquisition Justifications of Private Property", *Social Philosophy and Policy* 11 (1994): 63-84, p. 83. See also Gerald F. Gaus and Loren E. Lomasky, "Are Property Rights Problematic?", *The Monist* 73 (1990): 483-503, p. 492.

These authors conclude that there is no deep problem with the unilateral imposition of duties. However, this is too quick as well. For while we cannot rule out the possibility of duty-imposition altogether, this does little to remove the concern identified above. We still have good reason to be suspicious about one person having the unilateral ability to impose new duties on others. And indeed, there are equally plausible cases where unilateral imposition of new duties does look problematic. For example, I cannot impose on you the obligation to read my papers, meet me for coffee tomorrow, or help me around the house.

These are silly cases, of course, but the general point stands: we enjoy broad protections against having new obligations imposed. What we need, then, is a way of distinguishing problematic cases of duty-imposition from unproblematic ones. Developing such a distinction is the task of this section. In doing so, I will develop a more precise statement of the concern described above.

Consider two simple examples where one person can impose new duties without the consent of others:

(A) Andy shaved his head in the past. One day, Andy decides to again grow his hair. As a result, Beth now has a duty not to touch Andy's hair without his permission

(B) Long ago, Andy waived his right against Beth that she not touch him without his permission. One day, Andy retracts his permission. As a result, Beth now has a duty not to touch Andy

Both cases look like the kind of duty-imposition in which we are interested. For in both cases, (i) Andy's actions have the result of imposing on Beth an obligation that

she did not have before, and (ii) the imposition of this obligation did not require Beth's consent.

Yet neither case seems to pose the worry identified in the previous section. Despite the fact that Andy manages to change Beth's duties without her consent, it seems unnatural (indeed slightly hysterical) to say that Andy has arrogated to himself a position of moral superiority or subjected Beth to his will. The reason in both cases is the same: while Andy changed what actions are morally required of Beth, Andy did not do so by means available only to some "odd kind of moral legislator." To see this, let us look at these cases in more detail.

(A) What actions are required by our moral duties depends on two things. First, it depends on normative propositions spelling out the nature and point of our moral duties as such. Second, it depends on non-normative propositions, including those that describe facts about the external world. The practical implications of our duties are thus determined by facts described by both these kinds of propositions. As a result, for us to know what morality requires of us, we need to know what practical acts are consistent with our moral duties. Facts such as Andy's having hair can thus partially determine what practical acts are required by our duties. And by altering such non-normative facts about the world, Andy can alter what concrete duties Beth is under. Let us call these cases: *duty-alteration*.

Duty-alteration does not involve persons objectionably asserting themselves as others' moral superiors. For Andy's decision to grow his hair did not bring about any change to what *morality as such* requires of Beth: Beth's duty remained the same as it was before, a duty not to touch Andy without his permission. Andy's

decision to grow his hair only altered non-normative facts about the world and thus what practical acts of Beth's are consistent with that duty. Thus in case (A) Andy is no moral legislator for Beth; he does not have control over what morality as such requires of her. Andy only has some control over parts of the external world.¹⁵

(B) The second case we may call *duty-activation*. Here Andy (re-)activates a duty that was already incumbent on Beth. Cases of duty-activation are different from duty-alteration in that they involve Andy imposing a duty on Beth not by changing some non-normative fact about the world, but by exercising a more directly moral kind of control over her actions. In that sense, duty-activation lies closer to what the concern above claims to rule out.

However, again this is not a plausible instance of Andy objectionably acting as a moral legislator. For while duty-activation involves Andy bringing about a directly moral change for Beth, Andy still lacks the ability to determine what morality as such demands of Beth. Andy's actions merely (re-)activate a duty already incumbent on Beth on grounds that have nothing to do with Andy's decisions or will, but with the nature of morality. Beth's duty, which Andy is now (re-)activating, applies to her irrespective of Andy's decision. Much less than

¹⁵ Duty-alteration is a widespread phenomenon. It can happen, for example, when people have moral reason for coordinating their actions. If a convention exists to drive on the right side of the road, others entering the road are morally obligated to conform to the existing convention. And this convention may have come about simply as the result of Andy one day starting to drive on that side of the road, with others following suit. Again, Andy achieved this by altering only non-moral facts about the world.

pretending to author the moral law, Andy's act of duty-activation presupposes a prior right that morality affords him.¹⁶

Duty-alteration and duty-activation thus do not involve any special moral legislative authority. This explains the plausible examples offered above in support of the possibility of unilateral appropriation: these are cases of duty-alteration or duty-activation. Occupying public spaces or shelter, for example, is best understood as a case of duty-alteration. It does not lead to lasting rights over that space, but to something more like use-rights, lasting for as long as one is using that space. This is so because such cases involve the alteration of already existing duties of others, such as their duties of civility. The same is true for the right to hold what is in one's physical possession. Since no one could snatch the apple from my hand without thereby violating the duty not to touch my person without my permission, my physically taking the apple altered what physical acts are consistent with other people's prior duties.¹⁷ On the other hand, requests for privacy or the making of legal wills seem best understood as cases in which a person exercises or insists on rights already held. In the case of privacy requests, one activates the prior duties of

¹⁶ Duty-activation can take subtle forms. Suppose Beth promised Andy to help him around the house today. Andy may then unilaterally impose a duty on Beth to clean his windows, a duty she did not have before, by requesting that she do so. Andy would thereby activate that particular duty, which is subsumed under Beth's more general self-imposed duty. Here, too, Andy's action is not the source of Beth's obligation, and thus here too Andy is not pitted as morally superior to Beth. For an argument that all valid requests require pre-existing moral requirements to respect such requests, see David Enoch, "Giving Practical Reasons", *Philosophers' Imprint* 11 (2011).

¹⁷ This seems to be Kant's justification of what he called 'empirical possession' in the *Metaphysics of Morals*. It is telling that Kant did not think that such empirical possession is problematic.

others to respect one's privacy. In the case of a legal will, one exercises one's legal right to determine who gets what after one's death.

It is correct, then, to insist that unilateral duty-imposition is a common and unproblematic feature of moral life. Unfortunately, however, because they are cases of duty-alteration or duty-activation, these examples fail to show that the concern from the previous section is toothless. The point of that concern, after all, is to object against the possibility of unilateral appropriation on the grounds that such acts impose on others *new* obligations. Arthur Ripstein, for example, explicitly speaks of acquisition as imposing new obligations and contrasts this with cases in which 'one person's act does not change any other person's obligations, but merely the way in which antecedent obligations apply.'¹⁸ Similarly, Jeremy Waldron emphasizes that appropriation foists on others 'obligations which they did not have before.'¹⁹

This concern is aimed at cases that presuppose persons having the power to create genuinely new duties. Such powers would make them into moral legislators, whose wills determine the demands of morality. Whereas in neither cases of duty-alteration nor duty-activation Andy's will was what we may call the *source* of Beth's duties, this would be the case here. Let us call this: *duty-creation*. In cases of duty-creation, Andy supposedly has the ability to conjure up entirely new moral requirements for Beth, *ex nihilo* as it were, just because it is his will.²⁰

¹⁸ Ripstein, *Force and Freedom*, p. 151. The latter, according to Ripstein, requires no such thing as omnilateral authorization. See also pp. 153ff for repeated mention of these claims.

¹⁹ Waldron, *The Right to Private Property*, p. 267. See also Waldron, "Kant's Legal Positivism", p. 1557. See also Daniel Attas, "The Negative Principle of Just Appropriation", *Canadian Journal of Philosophy* 33 (2003): 343-72.

²⁰ One might wonder whether the analysis here depends on a particular way of individuating rights and obligations. Perhaps on a more coarse-grained analysis duty-

We can illustrate the concern about duty-creation by returning to the analogous issue of political authority. Such authority is problematic precisely because it seems to require that governments have the power to bring about genuinely new obligations for their subjects. This is why Locke worried that authority without consent puts people “under the will” of others. Consent solves this problem because it involves people freely taking on an obligation to obey the authority, which it can then activate.²¹

If unilateral appropriation involves duty-creation, then the concern above is damning. For acts that require duty-creation really are at odds with the fact that, among equals, no one can have such powers.

3. The natural right to own property

There is, however, a way in which individuals might be able to acquire property rights over previously unowned objects without the consent of others. The key to this, I will argue, is that among our natural moral rights figures a natural right to own property.

alteration and duty-activation do not involve the creation of new duties, but see Beth’s duty before and after Andy’s acts as identical: not to touch him without his consent. As far as I can tell, nothing of significance hangs on this as long as both the charge of duty-imposition and the solution offered individuate rights and duties in the same manner. Thus, should the coarse-grained analysis prove correct, section 4 can be read as defending, *mutatis mutandis*, a coarse-grained right to property. The same conclusion follows since such a right again avoids the problem of duty-imposition. In the text I adopt a more fine-grained analysis since it puts the Kantian concern in its strongest form.

²¹ Authorities can also, of course, *alter* duties. David Estlund distinguishes what he thinks is *genuine* authority from what he labels *side-effect* cases. Duty-alteration probably qualifies as a side-effect case. See David Estlund, *Democratic Authority*, (Princeton: Princeton University Press, 2007), p. 143. But see William A. Edmundson, “Political Authority, Moral Powers and the Intrinsic Value of Obedience”, *Oxford Journal of Legal Studies* 30 (2010): 179–91, David Enoch, “Authority and Reason-Giving”, *Philosophy and Phenomenological Research* (2012, Early View)

Andy's ability to unilaterally obligate Beth through his appropriation means that he has a Hohfeldian power to bring about obligations for her. Correlatively, Beth has a liability against Andy to have these obligations imposed. This liability represents a *conditional obligation* for Beth. She has an obligation subject to certain conditions being satisfied – in this case Andy's successfully exercising his power. And since Beth's resultant obligation will correlate to Andy's resultant claim-right, we can similarly describe Andy's power as his conditional claim-right to own what he appropriates. That is, Andy has the right to own objects if he successfully appropriates them. This, I claim, is Andy's natural right to own property.²²

This natural right to own property is not the kind of property right with which we are familiar in our everyday lives, like this or that person's right over this or that object. It is not, in other words, a right we have to any particular thing. Instead, as a conditional right, it is the right to be the owner of objects if certain conditions are satisfied. This conditional right precedes, both logically and temporally, the rights over particular objects that we ordinarily think of when we say someone has a property right.

Such a conditional right can become the kind of concrete property right with which we are familiar in everyday life by becoming attached, so to speak, to particular objects. More specifically, people's natural conditional rights to own property can be turned into regular property rights by their performing

²² I do not mean to suggest that all powers can be understood as conditional claim-rights. The judge's power to sentence the defendant, for example, might not be best understood as a conditional claim on the part of the judge. I only maintain that this analysis applies to the subset of powers that allow one to create claim-rights for oneself.

appropriative acts on unowned objects.²³ Acts of appropriation satisfy the conditions of people's natural right to own property. As such, they turn conditional rights to own property into regular rights over particular objects.

Correlative to the conditional right to own property are others' conditional obligations. These are obligations that we respect others as the rightful owners of the objects they successfully appropriate. Given that the conditional right is a natural right, we all initially owe these (natural) conditional obligations to everyone else. One person's act of appropriation, then, turns the conditional obligations of all others into regular obligations to respect her property rights over what she appropriated.

We can now see how the charge of duty-creation may be avoided. If people have such natural conditional rights to own property, and if others therefore have conditional natural duties to respect their property rights, then acts of appropriation do not involve duty-creation. Andy's conditional right, and Beth's conditional obligation, exist whether or not their conditions are satisfied. What Andy's act of appropriation does is change the content of Beth's obligation by turning her conditional obligation into a regular one.

Andy's act, therefore, does not create any genuinely new moral obligations. He is not some odd kind of moral legislator. By his appropriation, Andy manipulates certain non-normative facts about the world, facts that "trigger" his natural conditional right. Thus the property rights that result from appropriation are

²³ Henceforth I will use the term "regular" to refer to rights and obligations that are not conditional on the performance of present or future appropriative acts. Such rights and obligations can nonetheless be conditional on other facts, both because they are *pro tanto* and because of provisos introduced below.

continuous with our natural conditional rights to own property. The former just are the latter in a different form.

The same, of course, is true of Beth's duties. By his act of appropriation, manipulating non-normative facts about the world, Andy succeeds in unilaterally changing Beth's pre-existing moral duties. And so Beth's resultant regular duty just is her initial conditional duty in a different form. Acts of appropriation therefore stand to our natural rights to own property in the same way as acts of growing our hair stand to our natural right that others not touch us without our consent. This means that Andy's act of appropriation involves duty-alteration, not duty-creation.²⁴

We can express the difference between appropriation as duty-creation and duty-alteration as follows. If successful appropriation involves duty-creation, then people are to acquire an entirely new duty once certain conditions are satisfied. Such acts can be described as follows:

- (1) For all persons A and B at times t_1 and t_2 , if A performs appropriative act P on object O under conditions C at t_1 , then A has a right that B respect A as the rightful owner of O at t_2 .

Since this is a little cumbersome, let us henceforth take P to refer to an appropriative act performed on object O²⁵ under conditions C, and R(O) stand for a property right over O. We can then express the idea of duty-creation in (1) as follows:

²⁴ The cumbersome term "natural conditional right to own property" is an attempt to express this continuity of the natural conditional right and the resultant regular property right. More precise, but even more cumbersome, would be the term "natural conditional right to own the object one appropriates."

²⁵ I do not wish to exclude here the possibility that appropriative acts need not be performed *on* objects. I use the locution for simplicity.

$$(1') \quad P_{A,t1}(O) \rightarrow R_{A,B,t2}(O)$$

Coming at this from the other end, given the correlativity of claim-rights to property and duties, we might also describe the acquisition of a property right in terms of the duties for others that follow, where $D(O)$ stands for a duty correlative to a property right:

$$(2) \quad P_{A,t1}(O) \rightarrow D_{B,A,t2}(O)$$

If this accurately captured the nature of appropriation, then such acts would indeed involve duty-creation. For here it seems that if a certain condition is satisfied, a genuinely new right or duty appears, one that did not exist prior to this event.

However, we can express the idea of how appropriation leads to property rights and correlating duties in a different way as well. We can express the right in (1) as having wide scope, meaning the conditional is contained within the scope of the right operator:²⁶

$$(3) \quad \text{For all persons } A \text{ and } B \text{ at times } t_1 \text{ and } t_2, A \text{ has a right against } B \text{ that} \\ [B \text{ respect } A \text{ as the rightful owner of } O \text{ at } t_2 \text{ on the condition that } A \\ \text{performs appropriative act } P \text{ on object } O \text{ under conditions } C \text{ at } t_1].$$

The natural right to own property here is a right that the conditional within the brackets obtains. For short:

$$(3') \quad R_{A,B} (O_{t2}/P_{t1})^{27}$$

²⁶ For discussion of the difference between a narrow-scope and wide-scope reading of the right, see the Appendix below.

²⁷ I refrain from analyzing conditional rights by putting a material conditional within the scope of the right operator because such rights seem better described in terms of conditional rights proper, as I do here. For discussion, see Michael Zimmerman, *The Concept of Moral Obligation*, (Cambridge: Cambridge University Press, 1996), p. 118, note 10. The difference matters in some contexts. For example, it may stave off Judith Jarvis Thomson's

Such a wide-scope right correlates to a similarly wide-scoped conditional duty of B owed to A to respect A as the rightful owner of O on the condition that A performs P on O under conditions C. For short:

$$(4) \quad D_{B,A}(O_{t2}/P_{t1})$$

This is the idea of a natural conditional right to own property that I defend here. The idea is that people have a natural wide-scope conditional right to own property that can become a regular property right as a result of the performance of an appropriative act that satisfies that right's condition. That is, the idea is that people who have the right in (3) can obtain a regular property right to O by satisfying the condition P. Similarly the idea here is that people have natural conditional duties to respect the property rights of others over the objects they have successfully appropriated. That is, people who have the duty in (4) can come under regular duties to respect others as the rightful owners of O if those persons satisfy the condition P. As a result, in this case A's act of appropriation is not an act of duty-creation, but an act of duty-alteration – one in which a prior conditional duty is made into a regular one by A's manipulating non-normative facts (satisfying the conditional's antecedent). The natural conditional right to own property therefore avoids the problems of duty-creation.²⁸

objection that, since $D(P \rightarrow A)$ is equivalent to $D(\sim P \vee A)$, conditional obligations (or rights) have absurd implications because detachment from wide-scope disjunctive obligations has absurd implications. See J.J. Thomson, "Rights and Compensation", in *Rights, Restitution & Risk*, William Parent, ed., (Cambridge, MA: Harvard University Press, 1986), pp. 72-3. The present view escapes this objection since $D(P \rightarrow A)$ is not equivalent to $D(A/P)$ nor, it seems, does $D(\sim P \vee A)$, which causes the trouble in Thomson's argument, imply $D(A/P)$.

²⁸ It is worth noting the difference between my argument and a related view proposed by Eric Mack. The natural right defended here is basically a right of ownership, in conditional

So far all I have done is outline a possible way in which unilateral appropriation might avoid the problem of duty-creation. I have not, of course, shown that people actually have such a natural right. Defending this will be the task of the next section. Before turning to that, let me point out an interesting implication of this view. If people have a conditional right to own property, then acts of appropriation *as such* (labor, first occupancy, or whatever) need not have the moral significance that is traditionally attributed to them. After all, the property rights that result from appropriation are *derivative* of people's prior natural conditional rights.

All the *justificatory* work, therefore, happens at the stage of the prior conditional right. And the significance of acts of appropriation is merely that they satisfy this right's antecedent. It is a mistake, therefore, to think, as Waldron writes, that 'the deliberate act of acquisition is itself the sole and intrinsic basis of the obligation to respect the agent's control over the resource.'²⁹ And it is no challenge to the Lockean view that appropriation can involve labor, consequently, to point out that there is no "moral magic" in mere physical acts such as laboring. It is nothing about labor as such that makes appropriation possible. It is the effect laboring has on our natural conditional rights. The appropriator's act of labor is no more special than growing our hair.³⁰

form. Mack, by contrast, argues that all persons have a 'right *not to be precluded* from engaging in the acquisition'. See Mack, "The Natural Right of Property", 54 (my emphasis).

²⁹ Waldron, *The Right to Private Property*, p. 270

³⁰ So what kind of act might count as an act of appropriation? The natural conditional right to own property simply leaves this question open. I have attempted to provide such an account, and defend it as consistent with Locke's view, in Bas van der Vossen, "What Counts as Original Appropriation", *Politics, Philosophy & Economics* 8 (2009): 355-373.

Should we accept this view? The argument here presupposes that, in cases where person A performs appropriative act P on object O, the following argument is sound:

- (i) For all persons A and B at times t_1 and t_2 , A has a right against B that [B respect A as the rightful owner of O at t_2 on the condition that A performs appropriative act P on object O under conditions C at t_1].
- (ii) A performs P on O under conditions C at t_1
- (iii) Therefore, A has a right against B that B respect A as the rightful owner of O at t_2

Premise (i) asserts that A has a right against B that the conditional within the brackets obtain. This is what I described in (3') as $R_{A,B} (O_{t2}/P_{t1})$. Premise (ii) asserts that A satisfies the condition specified in A's conditional right at t_1 .

The syllogism is valid (see Appendix). The key claim to establish, then, is that premise (i) is true. I turn to this now.

4. Defending the natural right to own property

The natural conditional right to own property, recall, is a right to a kind of ownership, subject to certain conditions being satisfied, involving at least these three incidents: the right to exclusive possession, use, and transfer. In order to defend the claim that people have such a natural right to property, I will appeal to what I take to be the most widely accepted theory of rights, Joseph Raz's interest-theory. I do not here defend the interest-theory itself, nor do I want to preclude the possibility of defending the natural right to own property in other ways (it is

plausible, for example, that the right can also be defended on a choice-theory of rights). My aim is only to show that the natural right to own property can be defended on these grounds.

According to Raz's formulation of the interest-theory:

"X has a right" if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.³¹

On this view, two things must be shown in order to establish that someone has a certain right. The person must have morally important interests in having a right that correlates to duties for others, and these interests must be sufficient to justify those duties.

To justify the natural right to own property, then, it must first be shown that all persons have morally important interests in being able to acquire property, and specifically to unilaterally bring it about that they enjoy exclusive rights of possession, use, and transfer of property. Second, it must be shown that these interests are sufficient to justify the correlative conditional duties for others. I will take these tasks in turn.

The natural conditional right to own property serves a number of morally important interests shared by all persons. I mention three: (A) our autonomy-based

³¹ Joseph Raz, *The Morality of Freedom*, (Oxford: Clarendon Press, 1986), p. 166. Two clarifications. First, in addition to Raz's principle, I will assume that the relevant duties are owed to the right-holder. Second, just like not all powers are conditional rights (see note 22 above), not all conditional rights are powers. Two necessary conditions for a conditional right to award a power to person A are (i) the condition which activates the duty is an action of A, (ii) the duty is conditional on A's action because it is in A's interest to be able to activate the duty at will. This is the kind of right I defend here. See Raz, *The Morality of Freedom*, pp. 167-8.

interests in being able to appropriate and own particular objects, (B) our welfare-based interests in being able to help bring about and participate in a society where property exists, and (C) our interests in being able to satisfy interests (A) and (B) through *unilateral* action.

(A) All persons have important autonomy-based interests in being able to appropriate and own property. In some ways, this is obvious. Rights to the exclusive possession and use of property are instrumental in securing the necessities of life such as the food, drink, shelter, and clothing we have acquired. They protect the goods and resources we possess, and enable us to enjoy them without interference. Property rights also help us secure what we need in addition to these necessities in order to live a moderately comfortable and secure existence.

The availability of such resources increases the options and choices we have available. Property rights thus serve our autonomy-based interests. The absence of control and access to goods and resources diminishes, and in extreme cases denies, our ability to live autonomously. The ability to bring about for ourselves rights of exclusive possession and use in objects and resources is instrumental to autonomous living.

Rights to transfer serve the same interests because they offer another way of acquiring goods. Appropriation is one important way of acquisition, but we are unlikely to get all we need (let alone desire) through appropriation alone. Thus initial allocation of resources brought about through unilateral appropriations may need to change. Rights of transfer enable us to exchange what we have for other things on terms that both parties can accept. The ability to create transferable rights

in objects thus greatly increases the total set of goods and objects to which we potentially have access.

Property rights serve our autonomy-based interests in less obvious but more fundamental ways too. Central to a full and meaningful life are the projects and commitments we develop. These inevitably require control over, and use of, parts of the external world. Art requires materials, starting a business requires capital, retirement requires savings, to name but a few simple examples. The significance of control over these resources is not only that it makes our projects practically possible. The means we use to pursue our projects can become integral parts of them. The artist's use of materials, the business owner's allocation of capital, and the retiree's spending and saving decisions are constitutive elements of their projects.

Morally important connections arise, then, between our projects and the means we employ for them. And these particular means cannot be replaced, substituted, or taken away without significant loss. The ability to appropriate thus serves our autonomy-based interests in another way as well. It allows us to bring about the moral connections with the external world that become important parts of our personal projects.

Property rights serve these interests in ways that rights of mere access or usufruct cannot. Our projects require that we have *control* over our means, including the control to use or exchange them. To honor the value of people's projects, then, we must respect them as the appropriators, acquirers, and owners of property.³²

³² For similar arguments, see Waldron, *The Right to Private Property*, Mack, "The Natural

(B) The ability to bring about property rights also serves our welfare-based interests. One reason is that the autonomy-based considerations above have a clear welfare component as well. Securing the resources we need to survive, enjoy a range of genuine options, and develop projects increases our welfare greatly.

But the welfare interests served by property rights go well beyond this. Life in a society with a well-functioning system of property has enormous advantages. Most importantly, such systems provide great material benefits to all. The ways in which they do so are well-known. Property rights give consumers – those with intimate knowledge of their wants and needs – decision-making authority over what resources they acquire, possess, and use. And property rights give producers – those with intimate knowledge of their productive capacities – both the decision-making authority over how resources are allocated and the incentives to produce what consumers want. The result is high levels of production with finely matched output and demand, which benefit all.³³

Empirical evidence overwhelmingly indicates that these results require robust protections of individual rights of possession, use, and exchange. It is no exaggeration to say that there has never been a society that has managed to achieve

Right of Property”, John T. Sanders, “Projects and Property”, in David Schmidtz, ed., *Robert Nozick*, (New York: Cambridge University Press, 2002): 34–58, Margaret Radin, “Property and Personhood,” *Stanford Law Review* 34 (1982): 957–1014, A. John Simmons, *The Lockean Theory of Rights*, (Princeton: Princeton University Press, 1994), p. 275, and John Tomasi, *Free Market Fairness*, (Princeton: Princeton University Press, 2012).

³³ For similar arguments, see David Schmidtz, “The Institution of Property”, *Social Philosophy and Policy* 11 (1994), p. 46, F.A. Hayek, “The Use of Knowledge in Society”, *American Economic Review* 35 (1945): 519–30, among many others. Unsurprisingly, Article 17(1) of the Universal Declaration of Human Rights asserts the right to property. Similar to my argument here, James Nickel defends this human right, including the right to “legitimate acquisition”, because it is “necessary to promoting and protecting fundamental human interests”. See James Nickel, *Making Sense of Human Rights* 2nd ed., (Oxford: Blackwell Publishing, 2006), pp. 123–5.

and sustain significant levels of prosperity and material welfare without a system of property containing at least these kinds of rights. They are among the basic building blocks of prosperity.³⁴

Given the important interests in living under a well-functioning system of property, we all have great interests in being able to bring about and participate in such a system. This provides a second interest in the power to appropriate. The ability to appropriate gives people the means to initiate the transition from a condition in which no property rights exist to a condition in which they do. And it does so while enabling us to simultaneously serve the interests listed under (A) above.

(C) These are but some of the ways in which the ability to bring about property rights serves our morally important interests. However, the case for the natural right to own property requires something more. After all, *unilateral* appropriation is only one among several possible ways of bringing about property rights. To complete the first step of the interest-based argument, then, we must show that a unilateral ability serves our important interests better than alternative ways of acquiring property that are consistent with moral equality. I will do this by comparing the natural conditional right to Pufendorf's consent requirement and the Kantian demand for a legitimate political condition. The argument here will be that only unilateral appropriation can serve the interests above.

³⁴ For an impressive overview and argument, see Daron Acemoglu, James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, (New York: Crown Business, 2012)

The natural conditional right offers some clear advantages. Most importantly, it provides a realistic prospect of the interests listed under (A) and (B) being served. The ability to appropriate directly gives people the means to bring about property rights, thereby enabling them to serve these interests. The natural conditional right thus aligns the satisfaction of people's own interests, listed under (A), with the satisfaction of the interests of all, listed under (B).³⁵

Compared to this, Pufendorf's requirement that the duties correlative to new property rights must be self-imposed through universal consent is unpromising.³⁶ For such a requirement cannot realistically be fulfilled. As Locke famously wrote, '[i]f such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.'³⁷ Thus Pufendorf's consent-requirement fails to serve the interests in (A) and (B) as well as the natural conditional right.

The Kantian alternative that rightful appropriation requires a civil or political condition deserves to be taken more seriously. This is clearly better than Pufendorf's requirement. For no doubt the prospects of a Kantian state are better than those of universal consent. Nevertheless, the Kantian demand still fails to enable many people to serve their property-related interests. This is most clearly true for those unfortunate enough to find themselves not living under organized political rule, such as the inhabitants of so-called failed states. The Kantian

³⁵ Stronger, because people will be able to keep what they find, the right also offers people an incentive to engage in searching behavior. This will likely bring more valuable resources within the realm of owned objects and thus lead to better material prospects for all. See Boudewijn Bouckaert, "Original Assignment of Private Property", in Boudewijn Bouckaert & Gerrit de Geest, eds., *Encyclopedia of Law and Economics, Volume II: Civil Law and Economics*, (Cheltenham: Edward Elgar, 2000), p. 12.

³⁶ For a more recent statement, see Gibbard, "Natural Property Rights".

³⁷ Locke, *Two Treatises of Government*, Second Treatise, section 28

requirement seems to imply that such people cannot enjoy valid property rights. But when these people are forced off their land, when their crops and possessions are taken away or destroyed, their important interests are nonetheless crucially set back. No less than anyone else – and perhaps more – such people need the protections and abilities afforded by property rights.³⁸

Things get worse for the Kantian position if the conditions under which the existence of a political condition legitimizes appropriation become more demanding. It seems plausible that positive law cannot adequately represent the wills of its subjects unless the state has certain morally relevant characteristics, such as being democratic. But if the Kantian demand is for a democratic state, then the vast majority of people throughout history have been unable to enjoy genuine property rights. Again this means that their interests would remain frustrated.³⁹

The natural right to own property avoids these problems because it frees appropriators from the need to secure the consent of others or await the creation of legitimate political institutions. It thus serves our important interests better than these rival proposals. This establishes a *prima facie* case in favor of the natural right to own property.

³⁸ Some interpreters of Kant may find this unpersuasive, stressing that Kant allows for “provisional” property rights in these cases. However, the present argument is not intended as a critique of Kant, but a critique of a line of thought that certain authors have found in Kant. I am not sure how to understand such “provisional” rights. But the point in the text can be stated as follows: if unilaterally established “provisional” rights do not impose morally valid duties on others, then the argument in the text applies. And if they do, then their creation is relevantly similar to the kind of appropriation defended here.

³⁹ The problem runs deeper still. Even when such a state exists, its laws can unite or represent only the wills of fellow citizens. Thus, persons only enjoy genuine property rights *vis-à-vis* their fellow citizens. As Anna Stilz, defending a Kantian view, writes: ‘[the obligations correlative to property rights] bind only those subjected in common to a legitimate political authority’. See Stilz, *Liberal Loyalty*, p. 99. Even in this fortunate condition, therefore, our interests are served to only a limited extent.

To complete this case, we must successfully complete the second step of our argument. Are there compelling reasons against holding people under conditional duties to respect the things others appropriate? The most significant concern here is that the possibility of unilateral appropriation might result in an external world that is exhaustively owned. In such a world, people who did not appropriate themselves could end up without the possibility of acquiring or even using property. After all, owners might deny them access.

This possibility is problematic for two reasons. First, these people's interests would be significantly threatened. For unless owners grant them access to their property, these people will be without a place to go, without the ability to provide for their necessities, without the ability to undertake personal projects, and so on. This undercuts the case for the natural right, which depends on its ability to satisfy these interests for all.

Second, this possibility threatens to undo the commitment to moral equality around which the case for the natural right to own property is organized. Equality, I have argued, implies that people cannot determine the content of morality as such for others. Individuals lack powers of duty-creation because such powers would enable them to do just that: legislate what morality requires. However, the scenario above shows another, more indirect way in which individuals can do the same. If Andy can exercise his natural rights to property so as to deny Beth the possibility of exercising hers altogether, then Andy can still effectively determine Beth's moral options. The problem here is the same. By deciding whether Beth may acquire property at all, Andy manages to determine whether Beth can enjoy her natural

right to own property, and thus in an important sense the content of morality for Beth. Moral equals lack this ability.

To avoid these problems, a number of qualifying conditions must be introduced into the natural right to own property (referred to as conditions C in the description of the right above). Some of these qualifications are suggested by Locke, the most famous of which is that acts of appropriation should leave “enough and as good” for others to appropriate. Another is that the regular property rights that result from appropriation will have similar enduring qualifications attached. Property rights, on this view, cannot be used to exclude others from acquiring property altogether. For we cannot successfully insist on them against those who have nothing at all.⁴⁰

These qualifications have the same underlying rationale. The point of the natural right to own property is to enable persons to become owners and thereby serve their important interests. The point of the right’s qualifying conditions is to ensure that everyone has that ability to serve these interests. Given that there is, as I have argued, a genuine continuity between the natural conditional right to own property and the eventual regular property rights enjoyed by individuals, we should

⁴⁰ Locke defended these qualifications in sections II, 33 and I, 42 of his *Two Treatises of Government*. See also Nozick’s remarks about “the shadow” of the Lockean Proviso, Robert Nozick, *Anarchy, State, and Utopia*, (New York: Basic Books, 1974), pp. 180-1. Note that this proviso is entailed by the logic of the duties correlative to property rights. If the world were exhaustively appropriated, and all owners denied a propertyless person access to their land, this person would be faced with moral duties of non-trespass that she cannot satisfy. But “ought implies can” entails that one cannot be under duties that one cannot but breach. See Hillel Steiner, “Responses”, in S. de Wijze, M. Kramer & I. Carter, eds., *Hillel Steiner and the Anatomy of Justice: Themes and Challenges*, (New York: Routledge, 2009), p. 241.

expect its qualifications to have the same continuity. These are the same rights qualified by the same conditions C.⁴¹

The kinds of property acquisition that can satisfy these qualifying conditions will be those that serve the interests listed above. The possibility of unilateral acquisition serves these interests in important ways – ways that help justify the natural right to own property. But other (complimentary) forms of acquisition can serve these interests as well. The interests we have in a right to appropriate unilaterally are a special case of the more general interests we have in a right to acquire property. So we might expect that the availability of different forms of acquisition can satisfy the natural right's conditions C. Perhaps there need be no denial of the right to own property, then, if one can acquire property through exchange or labor, even when one cannot acquire property through unilateral appropriation.

Of course a number of highly complex questions arise about the precise nature of these qualifying conditions. How much must be available for people to acquire for these conditions to be satisfied? If one can only acquire property through exchange or labor, and not unilateral appropriation, do additional conditions apply? Do any of these qualifications license third parties to act on behalf of those who lack access to property? And so on. Much of the natural right's practical implications will depend on the answers to these questions. Fortunately, however,

⁴¹ Other qualifications might apply as well, such as adverse possession. One qualification is almost too obvious to mention: the objects that can be acquired through unilateral appropriation must be unowned at the time of appropriation. Again, this qualification is internal to the natural right because, without it, the right could not serve the relevant important interests.

we do not need to answer them in detail here. The point of this article is to establish the possibility of unilateral appropriation of property, not a complete account of distributive justice or even a full account of Lockean property rights. So for now it will suffice to note that suitable versions of these qualifications will remove the worries above. They preclude that those who get their appropriations in first can use their property rights to prevent others from acquiring property altogether. As such, they guarantee that the natural right to own property cannot be used to deny others the enjoyment of their own natural rights (as demanded by moral equality), or prevent others from having their property-related interests served (as demanded by the interest-theory of rights).⁴²

The natural right to own property thus serves people's crucially important interests without imposing unreasonable burdens on others. This is sufficient to justify holding people under correlative conditional duties. We can conclude, then, that all persons have a conditional right to own property. And because they do, all persons can acquire regular property rights over objects by performing acts that satisfy this right's condition.

5. Conclusion

I have asked whether original appropriation is consistent with the fact that, among

⁴² One might think that these qualifications imply a role for the state as either the one executing these provisos or the one specifying them in the face of disagreement and conflict. But while the state might be sufficient for carrying out these tasks, it is not necessary. In principle, at least, people can appropriate and enjoy property, subject to due qualifications, without the existence of a state. Such a condition will obviously have many practical problems and inconveniences, including perhaps ones that can only be addressed in organized ways. But none of this implies that property rights presuppose a state. Thus, the heart of the Lockean position I have sought to defend stands.

moral equals, no one can determine the content of morality for others. The argument for the wide-scoped conditional right to own property shows that original appropriation is consistent with this ideal of moral equality. Appropriation does not presuppose duty-creation because the regular property rights that result correlate to duties that are detached from prior conditional duties. So people who appropriate property are not determining the content of morality for others. Moreover, because of the qualifications internal to the natural right to own property, its exercise cannot preclude others from acquiring property as well. So appropriation does not allow individuals to indirectly determine the content of morality for others either.

The natural right to own property gives people the ability to appropriate and enjoy property side by side. We can all be property owners and appropriators at the same time. But not all possible conditional rights can be jointly enjoyed in this way. This is one reason why the Lockean can insist that there is an important difference between original appropriation and political authority. For even though both appropriation and authority involve the (purported) unilateral imposition of duties, and even though it is in principle possible to construct a wide-scope right to be an authority, the unilateral ability to assert oneself as a political authority for others cannot be jointly enjoyed by all. At least on standard views of such authority, we cannot all enjoy it at the same time. Therefore, unilateral political authority is incompatible with moral equality.⁴³

⁴³ There might be, as an anonymous referee suggests, a natural right to be an equal member of a democratic government. I cannot here pursue this thought in detail. If this is correct, then the Lockean has to either abandon the strict consent theory of authority or provide it with an alternative foundation.

Appendix

The argument above, recall, relies on the following syllogism:

- (i) For all persons A and B at times t_1 and t_2 , A has a right against B that [B respect A as the rightful owner of O at t_2 on the condition that A performs appropriative act P on object O under conditions C at t_1].
- (ii) A performs P on O under conditions C at t_1
- (iii) Therefore, A has a right against B that B respect A as the rightful owner of O at t_2

This argument presupposes the validity of what is called detachment from wide-scope conditional rights. Since such detachment can be problematic, this appendix explains why the argument above is valid.⁴⁴

An argument involves detachment from a wide-scope conditional right when it contains a right that a conditional obtains (the “wide-scope” conditional right), and tries to derive a right to the consequent of the conditional (contained within the wide-scope right) by asserting that the antecedent of the conditional is satisfied. That is, an argument involves detachment from a wide-scope conditional right when it tries to derive a conclusion like (iii) from premises like (i) and (ii).

In some cases detachment from wide-scope conditional obligations is invalid. To see this, consider the following closely analogous argument:

⁴⁴ For an objection to arguments like the one developed in this article based on the problems with wide-scope detachment, see Waldron, *The Right to Private Property*, p. 121. The discussion here applies to rights and correlative duties the general discussion of “iffy oughts” in Fred Feldman, *Doing the Best We Can*, (Dordrecht: D. Reidel Publishing Company, 1986) and Zimmerman, *The Concept of Moral Obligation*.

(i*) For all persons A and B, A has a right against B that [q on the condition that r].

(ii*) r

(iii*) Therefore, A has a right against B that q

This second argument is invalid. The problem is that both the conclusion (iii*) and “A has a right against B that not-r” are consistent with premises (i*) and (ii*). That is, A might have a right that B q, *or* A might have a right that B not-r. Thus, we cannot validly detach A’s right that B q from the wide-scope right in premise (i*) and the factual antecedent of that right’s conditional in (ii*).

The argument of this article does not suffer from the same problem. The main reason is that it is indexed to time. If (i) at t_1 A has a right that [B respects A as the rightful owner of object O at t_2 on the condition that A performs appropriative act P on object O under conditions C at t_1], and (ii) at t_1 A performs P under conditions C, then (iii) it does follow that *at t_2* A has a right that B respect A’s property right over O (assuming that at t_2 A still has $R_{A,B}[O_{t_2}/P_{t_1}]$).⁴⁵ The reason is that it is impossible for B at t_2 to make it the case that A did not perform his appropriative act at t_1 . And because this is impossible, B cannot (at t_2) be obligated to do so. And because B cannot be obligated to do so, A cannot (at t_2) have the correlative right. Therefore, the conclusion in (iii) follows. The argument is valid.

⁴⁵ This assumption is plausible given that the right in question is a natural right. Even though natural rights can be forfeited or alienated, in the standard case A can be assumed to continue to enjoy it.