NATURAL RIGHTS AND CONVENTION

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According to natural rights theory, both individual actions and political institutions must respect people’s natural rights—those rights that belong to people in virtue of what they are (human beings or persons), not in virtue of their particular social or political circumstances. This dissertation addresses a common worry about natural rights theory, which I call the “Conventionalist Challenge.” The Conventionalist Challenge charges that natural rights theory fails to account for the ways that people’s moral rights depend on social and legal conventions. I develop a form of natural rights theory that overcomes the Conventionalist Challenge. I argue that while people have natural rights, the precise requirements of these rights are spelled out by conventions. In fact, I argue, our natural rights morally require that we create conventions that spell out the fine-grained details of what we owe one another. This view captures what is attractive about natural rights theory—the idea that all human beings have rights that political institutions (and other individuals) must respect—without denying that our moral rights also depend in important ways on local conventions.
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INTRODUCTION

Natural rights theory is, on its surface, an attractively straightforward view about political morality: all human beings have basic moral rights that everyone—individuals and governments alike—must respect. These moral rights are independent of the legal rights created by particular political communities and place moral constraints on what kinds of laws communities may create. Consider two classic articulations of the view:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it.\(^1\)

[I]t is certain there is a such a Law [i.e., the natural law], and that too, as intelligible and plain to a rational Creature, and a Studier of that Law, as the positive Laws of Common-wealths, nay possibly plainer; As much as Reason is easier to be understood than the Phansies and intricate Contrivances of Men, following contrary and hidden interests put into Words; For so truly are a greater part of the Municipal Laws of Countries, which are only so far right, as they are founded on the Law of Nature, by which they are to be regulated and interpreted.\(^2\)

The first of these passages, a familiar one from the United States’ Declaration of Independence, testifies to the impact of the natural rights approach in political practice. The second, from John Locke’s *Second Treatise of Government*, testifies to its prominence in the history of political thought. The two share a common vision of the relationship between morality and politics: there are moral requirements that precede political institutions, and whether political institutions are morally acceptable depends on whether they respect these moral requirements.

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\(^1\) [http://www.archives.gov/exhibits/charters/declaration_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html)

\(^2\) John Locke, *Two Treatises of Government*, ed. Peter J. Laslett (Cambridge: Cambridge University Press, 1988), II.12. Italics in original. All references to Locke’s *Two Treatises* indicate the number of the treatise as a Roman numeral, followed by the number of the section.
This approach is most attractive in revolutionary moments. When one confronts gross abuses of power it seems plausible to think that they violate basic rights held by all human beings. And when one wants to construct a new system to prevent such abuses, it seems sensible to insist on a constitutional arrangement designed to protect such rights. When one turns away from revolution and constitutional design to the nitty-gritty details of everyday governance, however, evaluating political institutions in terms of natural rights begins to seem unhelpful. At first glance, natural rights do not seem useful for thinking about the fine-grained questions legislators and judges must face in forming the rules that allow people to live together. Consider nuisance law, for example. Just what kinds of behaviors count as nuisances is a complex question that seems unlikely to be settled by appeal to natural rights. How loud does the music at my neighbor’s party have to be before it is a nuisance? How messy can I allow my yard to become before my neighbors have a legitimate complaint against me? It is difficult to imagine a natural rights theory that gives precise answers to such questions.

Critics have sometimes suggested that the need for convention to settle such matters presents a problem for natural rights theories.\(^3\) Call this worry the “Conventionalist Challenge” to natural rights theory. This dissertation develops a natural rights theory that rises to this challenge. I argue both that the Conventionalist Challenge presents real problems for natural rights theory and that the Challenge can be overcome. To overcome the Conventionalist Challenge, I develop a new model of the evaluative role played by natural rights. This model retains what is attractive about natural rights theory—the idea that all human beings have rights.

that political institutions (and other individuals) must respect—while allowing that our moral
rights also depend in important ways on local conventions.

The first step in addressing the Conventionalist Challenge will be to get clear about what
the Challenge is. Perhaps because they have been busy developing their own theories of rights,
critics of natural rights theories have not developed the Conventionalist Challenge at any real
length. I do so in Chapter 1, drawing on Liam Murphy and Thomas Nagel’s well-known
argument against natural property rights. While I argue that their critique fails, I suggest that a
revised critique in fact presents a serious problem for natural rights theory in general. I argue
that natural rights theorists must overcome two problems in order to reject the key premise of the
argument: the problem of constraint and the problem of authority.

Once the content of the Conventionalist Challenge is clear, I develop a model of the
relationship between natural rights and convention designed to overcome the Challenge. On this
model, which I develop in chapter 2, natural rights are abstract moral entitlements whose precise
implications get spelled out by local social and legal conventions. This model overcomes the first
of the two problems developed in chapter 1: the problem of constraint. The problem of constraint
is the problem of showing that natural rights theory can allow convention to play a moral role
without making natural rights otiose. On my view, while natural rights do not fully determine
what our social and legal practices must look like, they place limits on what kinds of
conventional arrangements are morally acceptable.

Chapter 3 addresses the second problem raised in chapter 1: the problem of authority.
The problem of authority is the problem of explaining why established conventions shape our
rights and duties. Many possible conventions fall within the moral constraints that natural rights
provide. Why are we obligated to follow those conventions that actually arise? I argue that we
have a “duty to fill in the gaps,” which requires that we coordinate on social practices that spell out the precise requirements of our natural rights.

I close, in chapter 4, by considering some potential implications of my approach to natural rights theorizing. Most importantly, I suggest that my approach can help Lockean natural rights theorists construct a theory of political obligation that allows them to avoid the philosophical anarchism that some argue their view entails.
CHAPTER I. THE CONVENTIONALIST CHALLENGE TO NATURAL RIGHTS THEORY

It is difficult to sort out just what the substance of the Conventionalist Challenge is. Different critics have posed the Challenge in different ways. Moreover, critics tend to criticize natural rights in passing, on the way to developing their own political views that aim to capture the ways rights depend on convention. This leaves the Conventionalist Challenge underdeveloped. My goal in this chapter is to develop a formidable, clear formulation of the Conventionalist Challenge, one that is strong enough to place a burden on natural rights theorists to respond, and precise enough to make clear just what an adequate response would require.

I begin by discussing the basic commitments of natural rights theory. With this in mind, I consider several existing arguments that appear to pose a Conventionalist Challenge to natural rights theory. I argue that in their present form these arguments are irrelevant or inadequate, but that we can correct their failures in a way that allows us to construct a plausible Conventionalist Challenge. Finally, I offer brief arguments for each premise of the Conventionalist Challenge, with the aim of shifting the argumentative burden to natural rights theorists.

What are Natural Rights?

Before we try to develop the best version of the Conventionalist Challenge we will need to get much clearer about what natural rights are. This, of course, will require us to say both what rights are, and what it means for a right to be natural.

Rights

A right is a moral entitlement that is not easily outweighed by considerations of the consequences of having and exercising that entitlement. Rights carve out consequence-resistant
moral territories in which individuals are not subject to the demands of others, even if meeting the demands of others would produce better results. If I buy a doughnut for breakfast, for example, I gain a right to use it as I please. This right means that you may not take the doughnut from me, even if you would enjoy it much more than I would. Rights need not be absolute, however. My right to eat my doughnut does not mean you cannot take it from me to save the world. Rights are consequent-resistant; they need not be entirely immune to consequences.4

There are a number of different kinds of rights a person might have. It is common to follow Wesley Hohfeld in distinguishing four main kinds of rights: claim rights, liberties, powers, and immunities.5 The most familiar of these is the claim right. One person’s claim rights correlate with others’ duties. When I purchase a doughnut I acquire (among other things) a claim right that others not take it from me. By imposing this duty, the claim right carves out a kind moral space for me. A mere liberty, in contrast, does not entail a correlative duty. A mere liberty is simply an absence of a duty not to do something. Liberties, then, carve out moral space for people by providing them room to act without being bound by duties to others. Imagine, for example, that someone puts the box of doughnuts she has just purchased out in a public space in an office and tells people to take what they want. This would give me a liberty to take a doughnut, not a claim right: I may take a doughnut if and when I want (I have no duty not to), but no one else has a duty not to take it first.

4 Of course, rights might be entirely immune to consequences (though I suspect most are not). Strictly speaking, I am not making any claims here about whether any rights turn out to be absolute. In fact, for all I have said here it could be that all rights are absolute. All I am suggesting here is that whether rights are absolute is not settled by the concept of a right, but involves further normative claims.
The other two categories of rights—powers and immunities—though they sometimes receive less attention, are equally important. If I have a power, I have the ability to change my rights and duties and grant rights to others. If I have purchased a box of doughnuts, for example, I not only have a claim right to eat them as I please, but also the power to change my rights in various ways and grant rights to others. I might simply give the doughnuts to others, granting them a claim right over the doughnuts. Or I might put the doughnuts in a public place and allow anyone who wants one to take one. Then I give up my claim right, retain a liberty, and grant others a liberty. The normative power to change my rights in this way carves out a kind of second-order normative space for me, by giving me room to make important changes to my first order-normative spaces (my claim rights and liberties). While powers permit us to give up or otherwise change our own and others’ rights, immunities place limits on others’ powers. Like liberties, immunities carve out moral space for people by exempting them from others’ normative authority. Where liberties exempt people from duties to others, immunities exempt people from others’ normative powers. For example, if you have bought a box of doughnuts, and promised to give me one, then I have an immunity against your giving the right to that doughnut to someone else. You may have normative powers that allow you to change the rights you have over the rest of the doughnuts—you may give them away, sell them, and so on—but I have an immunity that prevents you from doing these things with the one doughnut that you have promised me.

While these Hohfeldian distinctions are helpful, our talk of rights often glosses over them. We only rarely use the term “right” to refer to these specific Hohfeldian elements. Most of the time we use the term to refer to the more complex rights made up by these more specific elements. It is helpful to think of these complex rights as molecular rights, each made up of
different Hohfeldian atoms. Most of the things we refer to as “a right” are complex molecular rights. Even the simple case of a box of doughnuts left out for the taking is more complex than it appears. It may seem we can describe this situation by simply attributing one kind of atomic right to everyone: everyone has a liberty right to take a doughnut. Presumably, however, matters are more complicated than this. After all, the office break room is not a Hobbesian state of nature, where each of us is entirely at liberty to do as he pleases. While each of us is free to take the last doughnut, none of us is free to violently interfere with someone else’s attempt to do so. In addition to a liberty to take a doughnut, then, each of us has a claim right to exercise that liberty free of interference. More complicated moral relationships involve still more complicated arrangements of atomic rights. Property ownership, for example, is notorious for involving a collection of rights whose precise character is rather difficult to sort out. Parental relationships involve a mind-bogglingly complex array of rights—both parents and children owe each other a great deal, and what they owe one another seems to change in important ways over time. So when someone says “that’s my car” or “he’s my son,” she has only barely begun to describe her rights. This begins to give us a glimpse of the problem that conventionalist critics have latched onto. Rights are highly complicated matters that seem to depend in important ways on social and legal convention (think about how parental rights vary in different cultures and legal systems). We might wonder whether natural rights theory can make sense of these facts.

Natural Rights

Before we can address or even fully understand critics’ worries about complexity and convention, however, we need a clearer grasp of just what it means for a right to be natural.

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Natural rights are moral rights that belong to something in virtue of the kind of thing it is, not in virtue of any particular social or political circumstances. For human beings, this means rights that belong to us as humans or persons. Consider, for example, Locke’s claim that “Truth and keeping of Faith belongs to Men, as Men, and not as Members of Society.” This is an attribution of a natural right: Locke claims that we owe one another honesty in virtue of our humanity, not in virtue of our particular social or political circumstances. While we will share Locke’s focus on humans here, it is worth noting that other beings—other highly intelligent primates, for example—may have natural rights of some kind as well.

To claim that a right is natural, however, does not require that we appeal directly to human nature in grounding it. Natural rights theory is a view about the relationship between morality and politics: all human beings possess basic moral rights that are independent of the social and legal rights accorded them by their particular political communities. One can have this view alongside any number of views about the ground of rights—Kantian respect for persons, rule-consequentialism, divine commands, and so forth. “Natural,” then, has a rather loose meaning in the phrase “natural rights.” It is meant primarily to draw a contrast with the artificial: a natural right is one that we did not make up, that is independent of the social and political arrangements of particular communities.

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7 II.14.
8 Locke, perhaps the paradigmatic natural rights theorist, illustrates this point nicely. While it seems clear that he takes rights to be natural, it is not at all clear what he takes the ground of rights to be. He appears at times to appeal to all three of the grounds I mention here. For a helpful discussion of the complexities of Locke’s view, and one way of reading it, see A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), chapters 1-2.
Natural Rights Theory

The target of the Conventionalist Challenge is natural rights *theory*. One can believe that some natural rights exist without accepting such a theory. By "natural rights theory," I mean a theory on which natural rights serve as the sole currency of political philosophy. This does not require that natural rights are all there is to morality, only that they are all that matters for *political* morality. So a natural rights theorist might allow that there are standards of self-regarding virtue that individuals ought to meet, but cannot allow that there are impersonal standards of distributive justice that are independent of individuals’ natural rights. Natural rights theory, then, offers an ambitiously unified picture of how human beings ought to treat one another: natural rights are supposed to explain at once what kinds of political institutions we ought to have, how individuals may treat one another in the absence of political institutions, and how individuals may treat one another in political society. 9

While natural rights theory tries to explain our moral rights in terms of natural rights, it does not claim that all moral rights *are* natural rights. Many of our moral rights, though they may emerge from the exercise of natural rights, are not themselves natural. For example, if I consent to have surgery, I grant my doctor a liberty right to perform that surgery. That liberty is not natural in the strict sense; all human beings do not have, in virtue of their humanity, permission

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9 Natural rights, then, are not the same as human rights, at least as this notion is often understood. While the terms “human rights” and “natural rights” are sometimes used interchangeably, human rights are often thought to play a different evaluative role than natural rights. There are many putative human rights that don’t seem to be natural rights, because they are not rights that individuals have against one another. The putative human right to an education, for instance, is not a right that individuals hold against other individuals. I don’t violate the human rights of my neighbor’s children if I fail to provide them an education. This suggests that it makes more sense to think of many human rights as rights that individuals hold against states. On this understanding of human rights, human rights allow us evaluate the actions of states, but not the actions of individuals. For a helpful discussion of this way of understanding the difference between human rights and natural rights, see Laura Valentini, “Human Rights, Freedom, and Political Authority,” *Political Theory* 40 (2012): 575-577.
to cut me open. My doctor’s right can, however, be morally justified entirely in terms of natural rights: I have a natural normative power of consent that allows me to permit people to do things that would otherwise violate my rights, and I exercised that natural normative power by signing a contract permitting my doctor to operate on me. So, while natural rights theory aims to explain what moral rights we have in terms of natural rights, it does not claim that all moral rights are natural.

*The Content of Rights*

In what follows I will often speak of the “content” of a right. It is worth saying something about what this means. A general description of a right does not immediately tell us all that it permits and requires. When Locke claims that all people have rights to life, liberty, and property, for example, we might wonder what each of these amounts to, or as I shall put it, what the precise *content* of each right is. There is often profound disagreement about what the content of such abstract rights are, even among people who agree that we have a given right. Take property, for example. People who agree that there is some kind of natural right of property might disagree about just what it permits and requires. We might disagree, for instance, about what kinds of atomic rights (Hohfeldian elements) make up the molecular right to acquire property. Do people have a normative power to acquire whatever they want or are there egalitarian constraints on this power? If there are egalitarian constraints, do these constraints take the form of an immunity against others’ acquisition under some circumstances or a claim right to a distributive share? Such questions are questions about the *content* of people’s normative power to acquire property. Similar questions arise once I acquire an object. My neighbors and I may agree that I own a piece of land, for example, but disagree about what rights I have in virtue of owning it. How low
may a plane fly above my land? Am I entitled to compensation when a neighbor pollutes the river that runs through my land? What must I do to sell my land? Is it possible, by long-term failure to use some of my land, to forfeit it the commons? These are questions about the content of my ownership rights.

The Conventionalist Challenge

With a picture of natural rights theory in place, we can now move on to the task of constructing a Conventionalist Challenge. What we are looking for is a challenge that (1) is aimed at natural rights theory in particular and (2) concerns the relationship between rights and convention. While several critics of natural rights theory have gestured at arguments of this sort, none has fully spelled out such an argument. My goal is to do just that, drawing on the gestures in the existing literature to develop a clear and careful formulation of the Conventionalist Challenge.

Metaethical Objections

It is tempting to put the Conventionalist Challenge in slogan form: “rights are conventional, not natural.” I want to begin by considering one kind of objection that can be expressed this way, but which is not a challenge to natural rights theory in particular. The objection I have in mind concerns the metaethical position presupposed by natural rights theory. The basic worry is that natural rights theory presupposes a moral epistemology and moral metaphysics that are problematic. While this objection is important, I will argue that it is not really an objection to natural rights theory as such.
Prominent defenders of natural rights theories have sometimes made rather ambitious claims about the ease of knowing what people’s natural rights are. The Declaration of Independence begins with truths that are supposed to be “self-evident.” In the Second Treatise, Locke claims that there is “nothing more evident” than the natural equality of all people\textsuperscript{10} and approvingly notes that Richard Hooker seems to think this equality “evident in itself, and beyond question.”\textsuperscript{11} These epistemic claims may seem implausibly strong. One might worry that if natural rights theory supposes that its claims are self-evident then it is simply a non-starter. Of course, we might wonder what “self-evident” is supposed to mean in these contexts, and whether it is really so extreme a notion as a critic might think. But there is a much easier response to worries about self-evidence: we may simply deny that natural rights theory, as such, is committed to such an extreme view about how we know about natural rights. Natural rights theory is a theory about what rights we have, not about how we know about them. Particular defenders of natural rights might have any number of different epistemological views. It may not be that natural rights theory is compatible with just any epistemological position, but it need not be committed to claims of self-evidence.

We might worry, however, that this reply fails to get to the root of the problem. While natural rights theorists may not be committed to the view that the content of our rights is self-evident, it does seem that natural rights theory fits especially nicely with certain kinds of epistemological and metaphysical views that we might doubt. At the very least, natural rights theory seems committed to saying that we have epistemic access to some kind of practice-independent normative truths. We might wonder both whether there are such truths and whether we could have epistemic access to them. One might press this kind of objection in a way that

\textsuperscript{10} II.4.
\textsuperscript{11} II.5.
appeals to convention. “Rights,” a critic of natural rights theory might argue, “are conventional, not natural. The only rights that exist are those embodied in observable social practice. There aren’t any rights ‘out there,’ beyond our social and legal conventions that can serve as models for those conventions. What kinds of things would such rights be? And how could we possibly know about them?”

While these worries are important, they are not worries about natural rights theory in particular. These are metaethical concerns that apply to any view according to which there are non-conventional normative truths. There is nothing in these kinds of worries that is peculiar to natural rights theory. This means that these metaethical objections apply just as well to many of natural rights theory’s competitors. Utilitarianism, for example, runs into the same problem: we might wonder whether there could be such a thing as a duty to maximize the good, or how we could know about such a duty. There is, then, nothing unusually metaethically suspect about the existence of natural rights. Worries about the metaethical presuppositions of natural rights theory, while they can be expressed using talk of convention, are not the core of the Conventionalist Challenge. If it is to be an interesting challenge to natural rights theory in particular, the Conventionalist Challenge will need to identify a problem that is peculiar to natural rights theory. These metaethical objections have too broad a range of targets and too narrow an appeal to do that.

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12 See, for example, Mackie’s well-known worries about morality in J.L Mackie, Ethics: Inventing Right and Wrong (London: Penguin, 1977), esp 38-42.

Hume’s Conventionalist Alternative

Having set aside metaethical concerns, we would do well to begin our task of constructing an effective Conventionalist Challenge by turning to the work of David Hume. Because Hume argues at length that justice is conventional, not natural, it is tempting to think that his work contains just such a Challenge. I want to argue, however, that Hume’s argument that justice is conventional does not bear directly on natural rights theory at all. His argument is deeply embedded in his theoretical framework, and because of the precise way that it is embedded in this framework it does not amount to an argument against natural rights theory. Hume’s argument that justice is conventional is part of an interesting alternative to natural rights theory, but does not provide a direct challenge to it. Hume does, however, raise some problems that may help us develop such a challenge.

The aim of Hume’s discussion of justice is to argue that justice is an artificial virtue. To understand what this means, we will need to place it in the context of Hume’s account of virtue. According to Hume, the reason we view an action, sentiment, or character trait as virtuous is because the contemplation of it pleases us. In the case of action, Hume argues that this works indirectly: we do not praise a virtuous action because of any pleasure it gives in itself, but because of the pleasure we get from considering the good motive that we believe produced the action. The praiseworthy motive, however, has to be of a particular kind. We do not, Hume insists, praise people if they act only from the motive to perform a virtuous act. This, Hume points out, “is to reason in a circle.” There would need to be some explanation of why a person

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16 Hume, *A Treatise of Human Nature*, 3.1.2.11.
acting on such a motive approves of the action that she takes to be virtuous. And this explanation, on Hume’s view, would have to involve pointing to some other motive than the desire to act virtuously. For it makes no sense to act only on the motive to perform an act that is produced by a praiseworthy motive. Yet this is exactly what acting only on the motive to do a virtuous act amounts to (if Hume is correct to assume that we judge the virtue of actions in terms of motivations). From this Hume concludes “that no action can be virtuous, or morally good, unless there be in human nature some motive to produce it, distinct from the sense of its morality.” 19

On Hume’s view, natural and artificial virtues are distinguished by the motives that produce them. In order to be a natural virtue, the motive that leads us to practice that virtue must be natural. Hume argues that justice is an artificial virtue, because there is no natural motivation to be just. In fact, because it requires us to set aside our natural selfishness and act impartially, justice seems directly opposed to our natural tendencies. “Our natural, uncultivated ideas of morality,” Hume argues, “instead of providing a remedy for the partiality of our affections, do rather conform themselves to that partiality and give it additional force and influence.” 20 Our sense of justice, then, “is not deriv’d from nature, but arises artificially, tho’ necessarily from education, and human conventions.” 21 Though Hume takes justice to be artificial, he insists that it is not arbitrary. 22 He argues that our sense of justice is a conventional solution to the problems

19 Hume, A Treatise of Human Nature, 3.2.1.7.
20 Hume, A Treatise of Human Nature, 3.2.2.8.
that arise from the combination of human selfishness and the scarcity of resources.\textsuperscript{23} The convention of justice arises because, on the whole, it is beneficial.\textsuperscript{24}

Hume’s argument does not bear directly on natural rights theory. Hume’s claim that justice is artificial is a claim that the motivations we are implicitly praising by praising just actions are not natural to human beings. This is a psychological claim, which only becomes normatively significant because of the way that human psychology and virtue are connected in Hume’s ethical theory. The argument for this psychological claim, then, will not be problematic for natural rights theory, since natural rights theorists need not reject the psychological claim. One can agree that people are not naturally inclined to praise justice (Hume’s claim that justice is artificial), but maintain that there are standards of justice that apply to all human beings as such (the claim that there are natural rights). To do this, of course, one has to deny Hume’s ethical theory. But this is precisely what natural rights theorists will want to do. It seems then, that Hume’s arguments that justice is artificial have little direct bearing on natural rights theory. If we reject Hume’s ethical framework, his arguments about moral psychology are no threat. While Hume might offer an alternative to natural rights theory, he does not offer a direct challenge to it.

This is not to say that Hume’s discussion of justice is entirely irrelevant to natural rights theory. While Hume’s argument that justice is artificial is not itself an argument against natural rights theory, some of the considerations he offers along the way may be of some help in constructing such an argument. In particular, Hume highlights a problem that natural rights theorists need to address if they wish to defend natural rights approaches to property: in many specific cases, it seems difficult to sort out what possession amounts to. Hume identifies two problems of this sort. First, it is unclear what kind of relation has to exist between a person and

\textsuperscript{23} Hume, \textit{A Treatise of Human Nature}, 3.2.2.16.
\textsuperscript{24} Hume, \textit{A Treatise of Human Nature}, 3.2.2.22.
an object for her to possess it. Possession seems to involve having some degree of control over an object, but it is unclear what degree is necessary. As a result, Hume argues, “’tis in many cases impossible to determine when possession begins or ends; nor is there any certain standard, by which we can decide such controversies.” Second, even if we could establish what kind of control possession involves, it may remain unclear what the extent of one’s possession is. Hume suggests, for example, that there is no rational standard for determining how much of an island one comes to possess when one lands on it. These problems, of course, are not yet an argument against natural rights theory. They do suggest, however, that a fruitful way to construct a Conventionalist Challenge might be to consider arguments against natural rights approaches to property. It might be possible to work out a more general Conventionalist Challenge by expanding arguments directed at natural rights approaches to property rights. Liam Murphy and Thomas Nagel offer a well-known argument that will be especially fruitful to examine with this aim in mind. Though I will argue that Murphy and Nagel fail to undermine natural rights theories of property, they provide a helpful starting point for constructing a Conventionalist Challenge to natural rights theory. If we can remedy the problems with their argument, and generalize it a bit so that it is directed at more than property rights, we will arrive at a more formidable argument against natural rights theory.

Holmes and Sunstein’s Commendable Caution

Before turning to Murphy and Nagel’s argument, however, it will be helpful to take a brief detour to consider an important limitation that arguments concerning convention and rights face. To see this limitation, it will be helpful to consider an argument that correctly takes it into account.

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26 Hume, *A Treatise of Human Nature*, 3.2.3.8.
account. In *The Cost of Rights*, Stephen Holmes and Cass Sunstein argue that rights cannot exist without taxes. Rights are costly, and unless we pay the cost, they argue, we won’t have these rights. “All rights,” they claim, “make claims upon the public treasury.” At first glance, this argument might seem to take aim at natural rights views. If rights require taxes, then clearly we cannot have rights that are independent of political institutions. On reflection, however, it is plain that Holmes and Sunstein’s claims, even if true, would present no immediate threat to natural rights views. By their own admission, Holmes and Sunstein’s arguments concern only legal rights, not moral rights. They do not aim to show that we cannot have genuine moral rights in the absence of taxation. “A legal right,” they argue, “exists, in reality, only when and if it has budgetary costs.” This claim about legal rights has no direct bearing on the question of whether we have natural moral rights. It would be a mistake, then, to immediately infer anything about natural rights theory (or any theory of moral rights) from the kinds of claims Holmes and Sunstein make about legal rights.

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29 *The Cost of Rights*, 19.
30 One might take Holmes and Sunstein to be making claims that step a bit beyond legal rights. Perhaps they intend to argue that rights cannot be enforced or socially recognized without a legal system and taxes. David Schmidtz seems to read them along these lines. He (correctly, I think) argues that such claims are simply not credible. “Our ancestors,” he points out, “were marking and defending territory long before there were governments. Even today, most protection and enforcement is not governmental but is instead in private hands.” David Schmidtz, “Property and Justice,” *Social Philosophy and Policy* 27 (2010): 90. Of course, even if Schmidtz were wrong, and rights could not be enforced and socially recognized without taxes, there would remain no threat to natural rights theory, for it would not follow that moral rights cannot exist without taxes. Holmes and Sunstein are quite right, then, to note that their claims entail nothing about moral rights.
Murphy and Nagel on Property

With the gap between moral and legal rights in mind, we can now turn to Murphy and Nagel’s argument against natural rights approaches to property. Keeping this gap in mind will allow us to see that Murphy and Nagel’s argument fails. Seeing how it fails, however, will allow us to construct a more promising Conventionalist Challenge to natural rights theory.

Murphy and Nagel argue that property rights cannot be used to evaluate the tax system, and they suggest that this undermines the claim that property rights are natural rights:

Private property is a legal convention, defined in part by the tax system; therefore the tax system cannot be evaluated by looking at its impact on private property, conceived as something that has independent existence and validity… One can neither justify nor criticize an economic regime by taking as an independent norm something that is, in fact, one of its consequences.31

The argument appears to run roughly as follows:

P1: Property rights are defined in part by the legal system

P2: If property rights are defined in part by the legal system, then they cannot serve as an evaluative standard for the legal system.

C: Property rights cannot serve as an evaluative standard for the legal system.

Just what this argument amounts to depends on whether “property rights” (“private property” in the quotation above) refers to moral or legal rights. Murphy and Nagel never clarify which they are referring to. I will argue this a fatal error. There is no way of reading “property rights” in this argument that produces a successful argument against natural rights approaches to property.

The way Murphy and Nagel motivate their argument suggests that they mean it to begin with claims about legal rights. They make a big deal of the fact that “the conventional nature of property is… perfectly obvious.”32 Surely they do not mean by this that the conventional nature

of moral property rights is perfectly obvious. It is not at all obvious whether the moral rights I have over my car are “defined by the legal system.” Moreover, such a claim would be question-begging. Murphy and Nagel cannot begin their argument by simply asserting that moral property rights are partly defined by the legal system. That may well be what is in dispute between them and some defenders of natural rights approaches to property. Of course, critics of natural rights theories of property could always give an independent argument for the claim that moral property rights depend in important ways on convention (a possibility to which we shall return in due course). They cannot begin their argument, however, by simply asserting that this is obvious.

If Murphy and Nagel’s argument is supposed to begin with claims about legal rights, then there are two ways we might read it, neither of which yields a successful argument. On one reading, every use of “property rights” in the argument refers to legal rights:

P1: Legal property rights are defined in part by the legal system

P2: If legal property rights are defined in part by the legal system, then they cannot serve as an evaluative standard for the legal system.

C: Legal property rights cannot serve as an evaluative standard for the legal system.

This argument is no threat to natural rights theory, since a natural rights theorist need not reject its conclusion. It is not legal property rights, but moral property rights that natural rights theorists claim are an evaluative standard for the legal system. This formulation of the argument, however, tells us nothing about moral rights. If Murphy and Nagel’s argument is to be of any interest it will have to show that there is some problem with moral property rights serving as evaluative standards for the legal system.

In order to argue that moral property rights cannot serve as evaluative standards for the legal system, Murphy and Nagel’s argument would need to look something like this:
P1: *Legal* property rights are defined in part by the legal system

P2: If *legal* property rights are defined in part by the legal system, then *moral* property rights cannot serve as an evaluative standard for the legal system.

C: *Moral* property rights cannot serve as an evaluative standard for the legal system.

On this reading, “property rights” refers to legal rights in the first premise, and to moral rights in the conclusion. Premise 2 provides a bridge between the two: if *legal* property rights are defined in part by the legal system, then *moral* property rights cannot serve as an evaluative standard for the legal system. The trouble with this version of the argument is that its second premise engages in precisely the kind of non sequitur that Holmes and Sunstein are so careful to avoid. We cannot immediately infer anything about moral rights from the fact that legal rights are conventional.

Murphy and Nagel’s argument, then, fails to establish that there is any kind of problem with a natural rights approach to property. It is worth noting, however, that it is not entirely clear how ambitious Murphy and Nagel intend their argument to be. Their primary concern in *The Myth of Ownership* is to criticize the claim that people are morally entitled to their pretax income, a claim that they take to be part of what they call “everyday libertarianism.” This aim is more modest. It wouldn’t require rejecting all natural rights approaches to property, only those natural rights theories that claim that people are morally entitled to their pretax income. As the provocative title of their book suggests, however, Murphy and Nagel draw conclusions that step well beyond this. They take themselves to have shown that property rights are not a moral barrier to taxation. They claim that property rights are a creation of the legal system, and “one can neither justify nor criticize an economic regime by taking as an independent norm something that

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33 *The Myth of Ownership*, 15.
is, in fact, one of its consequences.\textsuperscript{34} This means rejecting not only natural rights theories of property, but also any other view that takes property rights to constrain taxation. Other defenders of property rights, though they have declined to defend a natural rights approach to property, have argued that Murphy and Nagel’s argument fails to establish this radical conclusion. There are ways, these critics suggest, of grounding property rights without appeal to natural rights.\textsuperscript{35} I have argued that Murphy and Nagel are not even entitled to claim that there is a problem with natural rights theories of property. The “perfectly obvious” fact that legal rights are conventional simply cannot support that conclusion.\textsuperscript{36}

The Conventionalist Challenge

While the argument that Murphy and Nagel give against natural rights theories of property is flawed, I want to suggest that it contains the seeds of a more plausible argument against natural rights theory at large. Developing such an argument, however, will require us to make substantial changes to Murphy and Nagel’s argument. First, we will need to eliminate its unworkable inference from claims about legal rights to claims about moral rights. Then, since we

\textsuperscript{34} The Myth of Ownership, 9.
\textsuperscript{36} It may be that when Murphy and Nagel take aim at the idea that property rights are “natural” they are attacking a descriptive claim: the claim that property rights, as a feature of social life, will exist even in the absence of a state, because they are connected in some way to human nature. Showing that this claim is false, of course, would not immediately tell us whether property rights—understood normatively, not descriptively—can serve as evaluative standards for the legal system. So even if the claim that property is “natural” in this descriptive sense were false, that fact would not entail Murphy and Nagel’s conclusion. Moreover, if Murphy and Nagel are taking aim at this claim about human nature, they face a number of other problems. For a discussion of these problems, see Christopher Bertram, “Property in the Moral Life of Human Beings,” Social Philosophy and Policy 30 (2013): 404-424.
are interested in more than property rights, we will need to expand the argument to apply to natural rights in general.

What we learn from Murphy and Nagel is that it is a mistake to try to begin an argument against natural rights theory by pointing to the “perfectly obvious” fact that legal rights are conventions. There is, however, a more direct approach critics of natural rights might take. While it would be question-begging for critics of natural rights to begin an argument by taking for granted that moral rights are conventional, this does not mean they cannot argue that our moral property rights depend on convention in some important way. If they first make an argument for the claim that our moral rights depend in important ways on convention, then they can go on to argue that this presents a problem for natural rights theory. I want to suggest that this style of argument is a more promising way of cashing out the worry that natural rights views cannot make sense of the ways that our rights depend on convention.

If Murphy and Nagel’s argument concerned only moral property rights, it would look something like this:

P1: Moral property rights are defined in part by the legal system.

P2: If moral property rights are defined in part by the legal system, then they cannot serve as an evaluative standard for the legal system.

C: Moral property rights cannot serve as an evaluative standard for the legal system.

To develop a viable Conventionalist Challenge to natural rights theory, we will need to make this argument more general in a few ways. First, as we have already noted, we will need direct the argument at more than property rights. This seems plausible. It seems likely that any right basic enough that we are tempted to think it is natural will need to have its content spelled out by convention. Consider a right to bodily integrity or self-ownership, for example. It is hard to imagine settling the question of how much unwanted noise counts as a violation of someone’s
rights over her body without some kind of convention. This problem seems likely to apply to any of the kinds of basic rights we are tempted to think are natural. So we should broaden the argument to include any such basic rights.

And this is not the only way the argument needs to be broadened. Murphy and Nagel’s argument is framed in terms of legal convention. But there are social as well as legal conventions, and we are trying to formulate an argument that is about convention in general. For this reason, we should remove references to specifically legal convention. The first premise also makes too narrow a claim about convention. Its claim that moral rights are defined in part by convention would be unacceptable to a critic of natural rights who thinks that moral rights are defined entirely by convention. This is easy to fix by adding the phrase “at least.” These three changes produce a more general argument:

P1: Our most basic moral rights are defined at least in part by convention.

P2: If a right is defined at least in part by convention, then it cannot serve as an evaluative standard for convention.

C: Our most basic moral rights cannot serve as an evaluative standard for convention.

This argument, however, is too general. Its conclusion—that our most basic rights cannot serve as standards for convention at all—is stronger than we want. Of course, critics who think rights are merely convenient fictions might be willing to accept this argument. But other critics of natural rights who do not reject the idea of rights altogether will not accept this argument. What we want is an argument that anyone, including defenders of rights who reject natural rights theory, could use to show that natural rights theory has some special problem with convention. To do this, I suggest we reframe the argument as follows:
P1: Our most basic moral rights are defined at least in part by convention.

P2: If a right is defined at least in part by convention, then it cannot be a natural right.

C: Our most basic moral rights cannot be natural rights.

This argument has the right form. It suggests that natural rights theory has some special problem capturing the way that convention shapes rights.

While the basic form of this formulation of the argument is right, its precise meaning still needs clarifying. Specifically, it is not clear just what it means for convention to “define” a right. Rights might be “defined” in two senses. On one hand, to define a right might mean to describe it at the most general level—a right to self-ownership, for example, might be described as a right to control one’s body and powers. It seems natural to call this a “definition” of the right of self-ownership. But this is not the sense of definition in play when someone claims that our moral rights are defined in part by convention. The idea is not that we cannot give an abstract description of our rights without convention, but rather that we need convention in order to determine exactly what our rights require us to do. For example, while we may be able to define self-ownership in the abstract, convention may be necessary to sort out just what specific moral entitlements people have in virtue of it. It is not clear, for example, how much unwanted noise someone may make before it constitutes a violation another’s self-ownership. We might think that this is something that can only be worked out by convention. We could describe what convention does in such cases as “defining” a right, but that seems a bit odd. If convention is necessary here, it is not to determine what any given natural right *is* in the abstract, but rather to tell us what that right *amounts to* in practice. We should rephrase the argument to capture this:
P1: The specific requirements and permissions generated by our most basic moral rights are determined at least in part by convention.

P2: If the specific requirements and permissions generated by a right are determined at least in part by convention, then that right cannot be a natural right.

C: Our most basic moral rights cannot be natural rights.

This captures the common worry about natural rights and convention: the precise requirements of our most basic rights seem to be shaped by convention, but that seems to imply that our rights are not natural rights.

**Shifting the Burden**

While this formulation of the Conventionalist Challenge seems to have the right structure, it cannot stand alone. A successful defense of the Conventionalist Challenge would require demonstrating the truth of each premise. This would require further argument. Since I think that it is possible to develop a natural rights theory that can overcome this Challenge, I obviously do not think a decisive argument in favor of both premises can be given. I do, however, want to argue that the Conventionalist Challenge is plausible enough to demand a response. This will require saying something in favor of each premise.

*In Defense of Premise 1: The Need for Convention*

The first premise of the Conventionalist Challenge claims that our most basic moral rights depend in important ways on convention. An argument for this premise might begin with the cases like those Hume mentions in his arguments that property is conventional—cases in which convention seems necessary to provide us practical guidance about how to treat one another. Consider a case of this kind offered by Loren Lomasky:
Suppose that A views from a mountaintop a vast expanse of virgin territory, rides around half of it, places boundary markers to set off a quarter of it, grazes his cattle over an eighth of it, fences in a sixteenth, clears a thirty-second, and plants a sixty fourth. How much of the land that A first saw does he “have”? When the morally minded B comes by, how much of the land should he feel obliged to acknowledge as belonging to A? If B eventually settles downstream from A, and A dams up the stream to create a pleasant lake for himself, have B’s property rights been invaded?

There are no clear answers to these questions. Or, rather, there is no one best answer that can be deduced from the theory of basic rights. Persons will be unable to know and act on property rights that are ill-specified, and therefore it is requisite for the success of an order of rights that some determination be made. Social conventions are necessary to give concrete form to concepts such as appropriation, sale, bequest, and externality.37

In this passage Lomasky is basically giving an argument in favor of the first premise of the Conventionalist Challenge. The idea is that in complicated cases like this there is no way our basic rights can give us the kind of practical guidance we need to know how we ought to treat one another. People may have a basic right to acquire property, but knowing that they have such a right does not give us guidance about what actions count as legitimate acts of appropriation. The precise practical implications of our rights seem to be something we settle by social and legal convention, not something we discover by theorizing about natural rights.

In Defense of Premise 2: Two Burdens for Natural Rights Theory

Arguing that the precise content of our basic rights must be specified by convention, however, is not enough to undermine natural rights theory. Natural rights theorists could easily accept the first premise of the Conventionalist Challenge and reject the second. Indeed, the most sophisticated recent defenders of natural rights theory have suggested views that do just that. A. John Simmons notes the “intriguing possibility”38 that the precise content of natural rights could be filled in by convention. Eric Mack allows that abstract natural rights do not determine a

38 A. John Simmons, The Lockean Theory of Rights, 270. Also see 104, 316.
uniquely acceptable body of concrete rights, and that we must settle more concrete matters among ourselves through local mechanisms, such as judicial decision-making. Both views amount to a rejection of the second premise of the Conventionalist Challenge. Both reject, that is, the claim that a basic right whose content is spelled out by convention cannot be a natural right. Nor does their position seem unreasonable. It’s not clear why we should think that there is any conflict between a right’s being natural and its being spelled out by convention. Why not think that people have basic natural rights that are somewhat vague and the conventions of particular communities spell out the precise requirements of these rights in specific ways? A defense of the second premise of the Conventionalist Challenge must give us reason to think that a view of this sort isn’t plausible. I want to suggest two such reasons: the Problem of Constraint, and the Problem of Authority. While I will not claim that these problems present a decisive argument against the kind of view suggested by Simmons and Mack, I will argue that these problems place the burden on them to say more. It will not be enough for them simply to note the logical possibility of a view on which we have natural rights whose precise practical implications are determined partly by convention.

To see the first problem, it is helpful to return to Murphy and Nagel. Recall that Murphy and Nagel are worried that conventional rights are unable to serve as evaluative standards for legal convention. Something like this worry is what is behind the second premise of the Conventionalist Challenge. If a right’s precise content depends on convention, then we might worry that it cannot play the kind of role that a natural right is supposed to play. A natural right is supposed to be a universal moral requirement that applies to all human beings and constrains

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the kinds of conventions (especially the kinds of legal conventions) they can make. We might wonder whether rights whose content is spelled out by convention can play that role. The reason for this worry is that it seems like convention is doing all the action-guiding work. If we want to know, for example, what it means to acquire property, we would not look to natural rights, but to convention. This seems to undermine the whole point of natural rights—to provide moral constraints on the kinds of institutions human beings are permitted to set up. This suggests a burden for natural rights theory: if natural rights theorists want to follow Simmons in rejecting the second premise of the Conventionalist Challenge, then they will need to be able to give an account of the relationship between general natural rights and specific moral entitlements that allows natural rights to play a significant role in constraining convention. Call this the Problem of Constraint.

This is not the only burden natural rights theorists face if they reject the second premise of the Conventionalist Challenge. Even if they could vindicate the idea that natural rights constrain conventions in an important way, they would need to explain why an extant convention that meets the constraints provided by natural rights is authoritative. If natural rights do not determine what specific conventions we are morally required to follow, but are simply constraints that limit the set of acceptable conventions, then there will always be some convention other than the established one that is equally acceptable. Some people who must follow the established convention may strongly prefer others that would also meet the constraints imposed by natural rights. What makes it permissible to expect them to follow it anyway? Call this problem the Problem of Authority. Mack flags this problem, and notes that he has not offered a solution to it. He admits that he does “not have an account of why precisely the actually emergent and abstractly acceptable structure of rights has moral traction for us while the other
unrealized structures do not. In order to reject the second premise of the Conventionalist Challenge, however, natural rights theorists will need to be able to provide such an account. It is hard to imagine at first glance what this might look like. If our basic natural rights give us no guidance about which of several conventions to pick, it is difficult to see what natural rights-based explanation there could be for why the convention we in fact settle on has a normative authority that the others lack.

**Responding to the Conventionalist Challenge**

I have suggested that the Conventionalist Challenge is a serious problem for natural rights theorists and that they have a burden to respond it. I believe, however, that it is possible to develop a natural rights theory that can overcome this Challenge. The best way to do this, I suggest, is to accept the first premise of the challenge and reject the second. It seems to me that disputing the first premise is likely to be fruitless. To reject this premise would be to insist that the content of the basic rights imagined by natural rights theorists, can be worked out entirely from the armchair. That view seems rather less than promising. It is difficult to imagine, for example, a natural rights theory that would allow us to deal with the convoluted sort of cases Lomasky provides without resorting to convention. It seems more promising for natural rights theorists to try work out in more detail Simmons’ “intriguing possibility” that the precise requirements of natural rights are specified by convention.

As we have already seen, doing this will take some work. It will require us to deal with the Problems of Constraint and Authority. I take on both of these tasks in the following chapters. In Chapter 2, I address the Problem of Constraint by providing a model of the relationship

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between convention and natural rights on which natural rights have enough content of their own to provide meaningful constraints on convention. In chapter 3, I tackle the Problem of the Authority. I develop the problem more carefully, and then suggest that the solution is a duty that I call the “Duty to Fill in the Gaps.” This duty requires that we establish conventions to specify the contents of underspecified rights.
CHAPTER II. CONSTRAINTS ON CONVENTION

In chapter 1, I formulated the Conventionalist Challenge to natural rights theory:

P1: The specific requirements and permissions generated by our most basic moral rights are determined at least in part by convention.

P2: If the specific requirements and permissions generated by a right are determined at least in part by convention, then that right cannot be a natural right.

C: Our most basic moral rights cannot be natural rights.

I suggested that it would best for natural rights theorists to accept the first premise and dispute the second. That is, natural rights theorists should maintain that we have natural rights, but allow that the practical implications of these rights are partly determined by convention. Natural rights theorists who make this move, however, face two challenges—the Problem of Constraint and the Problem of Authority. In this chapter, I offer a response to the Problem of Constraint.

I begin, in section 1, by offering a picture of the relationship between natural rights and convention. I suggest that the content of natural rights is often “gappy” and that convention is well-suited to fill in these gaps. In section 2, I respond to the claim that the moral picture painted in section 1 does not allow natural rights to play a meaningful role in constraining convention.

Natural Rights and Convention

As we noted in Chapter 1, some proponents of natural rights theory already seem to accept that natural rights are shaped by convention in some way. Simmons notes the “intriguing possibility”\(^{41}\) that the precise content of natural rights could be determined by convention. In a recent defense of a natural rights approach to property and self-ownership rights, Mack proposes

\(^{41}\) A. John Simmons, *The Lockean Theory of Rights*, 270. Also see 104, 316.
Neither Simmons nor Mack, however, develops this “intriguing possibility” at length. A full defense of natural rights theory against the Conventionalist Challenge will require that we say much more about what it means for convention to help determine the content of natural rights.

Mind the Gaps: Why We Need Convention

Before we can understand what it means for the content of natural rights to be partly determined by convention, we need to see why this is necessary. In chapter 1, we considered Lomasky’s argument that convention is necessary to specify the precise requirements of our basic moral rights. Lomasky asks us to imagine a case in which a person does several things to different parts of a large tract of land: he looks down on all of it from a mountaintop, he rides around some of it, fences in some of it, and clears some of it. Lomasky argues that it is not plausible to think that a theory of our basic rights can settle exactly how much of the land this person is entitled to. And even if it could, there would remain questions about what he is entitled to in virtue of owning it.

Cases like these will present a serious problem for natural rights theory, if the theory is supposed to provide precise guidance in such cases. Natural rights theorists, however, can deny that natural rights theory is designed to give this kind of guidance. Mack does just that:

I need to emphasize that it is not the role of armchair philosophy—even natural rights philosophy—to discover and disclose the precise contours of persons’ nitty-gritty rights. Those precise contours do not exist out there in the nature of things or as theorems that are deducible from Lockean axioms. So, it is not the business of a Lockean theory of rights to determine whether or not the owner/operator of a well-established water mill has a right against individuals living upstream that they not significantly diminish the flow of water that turns his mill. It is not the business of this or any other philosophical theory to

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42 Eric Mack, “Elbow Room for Rights.”
determine exactly how loud the noise has to be that emanates from \textit{A’s} property in order for \textit{B} to have a right to enjoin \textit{A’s} drum playing. The relatively concrete rights that are reasonably ascribed to individuals in a given society—e.g., the right not to be subjected to noise over a certain decibel level—provide a structure of reasonably expected liberties and immunities that facilitate peaceful coexistence and voluntary cooperative interaction among those individuals. A theory of rights can only provide an abstract framework for that relatively concrete structure.\textsuperscript{44}

Mack draws an important distinction here between concrete and abstract rights. This distinction is matter of degree: rights are concrete to the degree that they give us guidance about how to act, by prohibiting, requiring, or permitting particular acts or specific kinds of acts. Consider, for example, my right not to have my car taken by my neighbor when I leave the keys in the ignition so that the windows can defrost on a cold winter morning. This right is extremely concrete, since it protects me against a specific kind of behavior by a particular person. In contrast, my ownership right over my car is a bit more abstract. When I say I own my car, I say something about what I am entitled to, but the precise concrete implications are not yet entirely clear. Just what ownership entails will depend on social and legal context. More abstract still is what Mack calls the “right of property,”\textsuperscript{45} a right not to be prevented from participating in a practice of property that meets certain constraints. While (as we shall consider at length in due course) this right has meaningful implications about what kinds of social practices are acceptable, it has few direct implications about what particular people owe one another.

According to Mack, our natural rights are rather abstract rights, like the right of property or the right of self-ownership. These abstract rights often will not immediately help us resolve concrete problems. The abstract right of self-ownership, for example, may require that I not be a nuisance to my neighbor, but it does not spell out precisely how much noise counts as a nuisance. This means that theorizing about natural rights will not allow us to “discover and

\textsuperscript{44} Mack, “Elbow Room for Rights,” 199-200.
disclose” our concrete rights. A full account of our abstract rights, on Mack’s view, “does not single out one set of particular judgments, rules, and practices—one particular set of concrete rights—as that which is required by these abstract rights.”\textsuperscript{46} Rather, natural rights theory provides a kind of abstract framework for thinking about what kinds of arrangements of concrete rights are morally acceptable.

If Mack is correct, then our abstract natural rights do not provide us a full picture of how we ought to treat one another. There is a sense in which, on this view, the content of natural rights contains gaps: while natural rights provide some guidance about how we may treat one another, they leave many specific moral questions open. These open questions must be settled by some sort of concrete social or political convention, rather than by a philosophical theory of abstract rights.

Consider a few examples. First, take the abstract right of self-ownership or bodily integrity. It is hard to imagine any abstract conception of such rights that will allow us to settle all of our disputes about how we may treat one another’s bodies. A conception of the right of self-ownership will not help us determine, for example, exactly how much I may bump into people on a busy street. This is not to say that the abstract right of self-ownership provides no guidance at all. It would clearly rule out my stabbing people who are in my way. But, beyond ruling out such extremes, our abstract rights do not seem to give much precise guidance about how much physical contact is morally acceptable. As Mack notes in the passage quoted above, we face a similar problem with sound. While it may be clear that I have a right not to be subject to certain extreme noises (imagine that my neighbor produces such noise that I will experience hearing loss if I do not wear earplugs), it is not at all clear whether certain moderate noises

\textsuperscript{46} Mack, “Elbow Room for Rights,” 200.
violate my rights over my body. How loudly and at what hours may the tenant in the apartment above me play his accordion before it becomes a nuisance (supposing, perhaps generously, that the playing of the accordion itself is not a nuisance)? This question seems unlikely to be settled by appeal to an abstract right of self-ownership. Whatever moral guidance this abstract right gives, it seems to leave a gap here.

Natural property rights seem similarly gappy. Suppose, plausibly, that we have some kind of natural normative power to acquire property. Even if we can resolve standard philosophical disputes about this abstract right (for example, whether there are any egalitarian constraints on the right to acquire property), it will remain unclear precisely what kinds of actions do and do not suffice to establish ownership. This is what Lomasky’s case shows: there are a number of actions one might take to try establish ownership over something, and it is difficult to see how a full account of our abstract natural rights could settle, in all the detail we need, which of them count as legitimate acts of appropriation. Moreover, even if we could sort out what kinds of actions established ownership we would have a further challenge. As Hume points out, it is often unclear what the boundaries of the things we possess are.\footnote{A Treatise of Human Nature, 3.2.3.8.} This problem is all the more puzzling when we move beyond possession to ownership. If I own land, for example, how high above the earth do my rights extend?\footnote{This problem was raised by Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936).} It is hard to imagine a natural rights theory giving a precise answer to this question from the armchair.

What these examples suggest is that our natural rights are rather abstract. While our natural rights may provide some guidance, there are many cases where they do not appear to give us the fine-grained direction that we need in order to live together in morally acceptable ways.
How Convention Fills in the Gaps

I have suggested that natural rights theorists should allow that convention can fill the gaps we have just surveyed. What this means, of course, is less than clear. When Simmons briefly considers this “intriguing possibility,” he suggests that convention serves in some way to fill in the content of our rights, but it is our natural rights that ground our rights. Mack’s terminology of abstract and concrete rights allows us to put this idea more clearly: the specific content of our concrete rights is partly determined by convention, but the moral force of those concrete rights is grounded in our abstract natural rights. This is, at first, glance, a bit puzzling. How could our natural rights require us to look to something other than themselves (namely, convention) to find out what they require us to do?

In order to see how convention can play this moral role, we will need to consider the role convention plays in our social lives. This, of course, will require us to say something about what we mean by convention. Since the publication of David Lewis’s seminal book Convention, philosophers have spilled a great deal of ink arguing about what convention is. We will not wade into that debate here. What is important for our purposes is to identify a set of practices that play a particular role in our social lives. Whether this set of practices perfectly captures the concept of convention is not our concern. The practices of interest to us are those identified in Robert Sudgen’s definition of convention:

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49 A. John Simmons, The Lockean Theory of Rights, 270. Also see 104, 316.
I shall therefore define a convention as a practice $P$ which regulates behavior within some population, and in relation to some class of interactions, such that:

1. Within that population, people generally conform to $P$.
2. Each person is motivated to conform to $P$, provided almost everyone else conforms.
3. Counterfactually, there is at least one other practice $P'$ which could regulate behavior in the same population and for the same class of interactions, such that if people generally conformed to $P'$, each person would be motivated to conform to $P'$.

Notice that this definition leaves open the question of whether people are motivated by self-interest, by norms, or by some mixture of the two. A convention is simply a set of mutual expectations that exists and is self-sustaining, given people’s motivations, but which is not the only such set which could exist.\(^5\)

A convention is a social practice that people are motivated to conform to, provided that others do likewise, and to which there is some alternative. Consider, for example, the social practice of driving on the right side of the road in the United States. Almost no one has a preference simply for driving on the right side of the road. We drive on the right because we have a preference to drive on the same side as everyone else (rooted, of course, in a preference to avoid head-on collisions) and we expect everyone else to drive on the right. This generates a self-sustaining set of mutual expectations: so long as we all expect that everyone else will drive on the right, we will all continue to do the same.

Sugden describes convention as a kind of “social practice.” It is worth briefly considering what this means. When some philosophers (most notably John Rawls and Alasdair MacIntyre) discuss social practices they have in mind something that is intentionally designed and has explicit rules.\(^5\) The paradigm case of a practice of that kind is games—chess has become a well-worn example. Such practices have explicit rules (as Rawls emphasizes) and often aim to

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achieve certain kinds of goals or goods (as MacIntyre emphasizes). Though Sugden doesn’t explicitly define “practice,” he clearly has something much looser in mind. The paper in which this definition of convention occurs discusses the difficulty of learning conventions. The conventions that are difficult to learn are precisely those that do not have explicitly defined rules or goals. Sugden expresses puzzlement, for example, at Canadian traffic conventions about what to do when one reaches a crossroads where there is no traffic sign (which are different from the British conventions with which he is familiar).\(^5^3\) If this is a social practice, it is not of the kind that involves easily available, agreed-upon rules. This is a much simpler kind of social practice: a common pattern of behavior. Compare this notion of a social practice to that of an individual practice. For example, I try to avoid going more than about 10 miles per hour over the speed limit. This is an individual practice (an individual pattern of behavior). If most people in traffic adopted this practice, it would be a social practice (a common pattern of behavior). If we follow this social practice, and each of us prefers to drive at this speed provided nearly everyone else does, then this will produce a set of self-sustaining mutual expectations—a convention.

Conventions often allow us to establish common practices about morally important things that our abstract natural rights only offer vague guidance about. Most of our conventions (or, at least, the most familiar of our conventions) about such morally important matters are established by law. Different communities have different legal standards about what counts as a nuisance and different legal rules about things like how to acquire property, what kinds of specific rights come with the ownership of different kinds of property, and what kinds of responsibilities people have for their property. These rules provide far more fine-grained guidance than our abstract natural rights can give us. Of course, law is not the only way to establish conventions about

rights. Informal social conventions can also play this role. For example, residents of large cities may establish social conventions about how much physical contact (or how much risk of it) is appropriate on a busy street. Similarly, particular communities develop informal conventions about what counts as a nuisance—how messy people’s yards can be, how much noise people can make at what hours, and so on.

The Moral Importance of Convention

Conventions make it reasonable to expect things from one another. When there is an established convention of driving on the right side of the road, for instance, it is reasonable for me to expect others to continue to drive on the right in the future. And once we know what it is (epistemically) reasonable to expect from one another, it often becomes (morally) reasonable for us to expect things of one another. That is, once a convention is established we may often place moral demands on people to follow it. If there is a convention in place in my apartment building according to which people are always quiet by 11:00 p.m. or so, and my neighbor decides to loudly play the drums at midnight, it seems reasonable for me to insist that he stop. In general, in fact, it seems reasonable to expect others to follow social or legal conventions about property, nuisance, and the like. For instance, though the particular documents one must sign to establish ownership over a house or car are conventional (they could be other than they are, and if they were different, we would all choose to fill out those different forms instead), we ought to treat people who have filled out these forms as owning their homes and cars. Though this means of establishing ownership is in one way arbitrary—it could be other than it is—it seems reasonable for us to expect one another to respect it.
We might worry that natural rights theory cannot explain why convention is morally significant in these cases. After all, the rights and duties to which convention gives rise are not themselves natural rights. The particular bundle of rights I have over my car, for example, does not belong to me in virtue of my humanity or personhood. It is tempting to infer from this that there are no such things as natural rights. But that would be too quick. The fact that the particular conventional rights that we have over our bodies and our property are not themselves natural does not entail that they cannot be justified in terms of natural rights. In fact, natural rights theorists who admit that our natural rights are rather abstract have a straightforward explanation for why our conventional rights are morally important: because they help to spell out for us in more detail what our natural rights require. Consider my rights over my body, for example. My abstract natural rights do not determine precisely how much noise my neighbors may make before they wrong me. There is not some precise decibel level at which unwanted noise becomes a violation of people’s rights over their bodies. We do, however, have social and legal conventions about noise-making. These conventions, natural rights theorists can argue, inherit the normative significance of the natural rights whose content they help spell out. While it is my abstract natural right of self-ownership (or whatever abstract natural right grounds my rights against excessive unwanted noise) that explains why people ought not to make too much noise, it is convention that determines precisely what “too much noise” amounts to. So when there is a convention of keeping quiet after 11:00 in my apartment building, I ought to follow it. I owe it to my neighbors not to be a nuisance, and around here that means being quiet after 11:00.

Often, of course, there is nothing at all morally wrong with violating conventions. If you violate a fashion convention it does not seem reasonable for me to blame you morally or put any serious pressure on you to change your behavior. In this case convention does not seem to give
rise to any moral rights or duties. Natural rights theory can explain this: conventions give rise to moral rights and duties when and only when they are needed either to help us follow or to spell out in a more concrete way the abstract moral requirements of natural rights. This explains why conventions about things like nuisance and property give rise to rights and duties, but those about fashion and etiquette do not. People do not have moral rights against bad fashion or poor table manners. They do have rights over their bodies and some kinds of rights to acquire and own property.

The Problem of Constraint

This picture of the relationship between rights and convention allows natural rights theorists to accept the first premise of the conventionalist challenge and reject the second. The idea is that, although convention spells out the precise content of our abstract moral rights, these abstract rights are natural. In fact, natural rights theorists can argue, the very thing that allows conventions to have moral significance is the fact that they serve to spell out the content of our abstract natural rights.

One might worry, however, that this view makes natural rights rather unimportant. It may appear that natural rights do nothing more than locate matters about which we are morally required to follow some kind of common practice. They tell us, for example, that we are morally required to have shared standards about what counts as a nuisance or what is necessary for property acquisition. But they do not seem to do much to guide action or even to constrain our choice of conventions. One might worry, then, that natural rights theorists are able to defend the existence of natural rights only by undermining their significance. This is the Problem of Constraint. In order to address this problem, we must provide an account of the ways that natural
rights place meaningful constraints on us. We need to show that natural rights do more than just identify domains in which conventions are morally significant. I will argue that natural rights do two things beyond this: they justify constraints on individual actions and constraints on justified conventions.

Two Kinds of Constraints

I have claimed, following Mack, that our natural rights do not fully determine our concrete rights. That is, our natural rights do not provide precise guidance about what kinds of things we must and may do. Acknowledging that abstract natural rights do not fully determine our concrete rights, however, does not mean that they do not determine some of our concrete rights. This fact has been implicit in some of the cases we have considered. For example, while the abstract right of self-ownership does not (apart from convention) give a clear verdict about what hours my neighbor may play his accordion, it does prohibit him from making so much noise that my hearing is permanently impaired. You do not treat someone as owning his body if you subject him to deafening noise against his will. Similarly, while natural rights do not determine precisely how much people may bump into me on a busy street, it is clearly a violation of my self-ownership if someone stabs me because am in his way. You do not treat someone as owning his body if you stab him to make space on a busy street. In both cases, an abstract natural right (self-ownership) justifies a more concrete right (the right against being deafened without one’s consent, or the right not to be stabbed on the street). When abstract rights justify concrete rights in this way, they justify constraints on individual action.

Noting these constraints on individual action, however, will not suffice as a response to the Problem of Constraint. Natural rights theorists who accept that rights are shaped by
convention acknowledge that abstract natural rights often do not provide a lot of direct action-guiding constraint. When it comes to property, for example, precisely what particular actions people should and should not perform seems to depend rather heavily on convention. So in these cases, if natural rights are to play a meaningful evaluative role, they must provide constraints of a different kind: constraints on what kinds of conventions are justified. Some of these constraints will follow from the constraints on individual actions: in order to be justified, a system of conventional rights must accord with the limited set of concrete rights that are immediately required by abstract rights. So, for example, a fully justified convention will not permit my neighbor to deafen me without my consent. Other moral constraints on convention will be more structural. For example, if our conventions are to give us morally acceptable guidance, they must never give us contradictory guidance (for we cannot be both morally required and not morally required to do some specific action).

An Illustration: Constraints on Property Conventions

Precisely what constraints our natural rights place on conventions will depend on what those rights are. That, of course, is something that natural rights theorists disagree about. So in order to fruitfully explore what natural rights-based constraints on convention might actually look like, we will have to explore a particular view about what abstract natural rights people have, and show how those rights would constrain convention. We need not endorse the particular natural rights view we explore, but we need to get a sense of what kinds of constraints on convention might follow from some particular view. It will be fruitful to build on Mack’s view, since he has already begun dealing with some of the problems we have raised here. As we noted above, Mack acknowledges that his view about abstract rights will be consistent with multiple
possible conventions about concrete rights. He has also done quite a bit already to show how these abstract rights constrain our concrete conventions. In fact, Mack explicitly develops a set of constraints on a justified property system.

On Mack’s view, people have “a basic moral claim… to be allowed to pursue their own good in their own way,” which he calls the “ur-claim.” Mack argues that our other abstract natural rights—a right of self-ownership, a right to have promises and contracts kept, and a right of private property, for instance—are justified in terms of the ur-claim. They are justified that is, because they allow people to pursue their own good their own way.

Mack argues that we should understand property as a practice, which must meet certain constraints in order to be justifiable. The natural right of property, Mack argues, is “a right not to be precluded from participation in a justifiable practice of private property.” Mack grounds this right in the ur-claim:

[S]ince acquiring and exercising discretionary control over extrapersonal objects is at least close to essential to agents’ pursuing their own good in their own way, part of the proper codification of this ur-claim is the right of all agents not to be precluded from engaging in the acquisition and discretionary disposal of extrapersonal objects.

Mack argues that a right of property is required by the ur-claim because in order to pursue their own good their own way, people need to be able have property. The right of property is, as he puts it, part of the “codification” of the ur-claim. What he seems to have in mind here is that the right of property is part of a set of rights—self-ownership, property, etc—that tell us in more detail what the ur-claim requires. These rights are justified in terms of the ur-claim and spell out what it demands of us, providing a more detailed code of conduct (thus “codification”).

55 “The Natural Right of Property,” 56.
56 “The Natural Right of Property,” 63.
57 “The Natural Right of Property,” 54.
Mack argues that justifying the practice of property in terms of the ur-claim will place constraints on what kind of property systems are justified. He suggests that a justifiable practice of property has four key features:

The practice will be coherent insofar as the entitlements generated by acting in accordance with its rules are compossible. It will be transparent insofar as the entitlements generated under it can be readily identified. It will be comprehensive insofar as it facilitates the establishment of private rights over all extrapersonal objects (except for those objects, if any, which are not appropriate candidates for private ownership). A more moralistic and difficult to formulate feature is that the practice must be inclusive. All persons must be equally eligible to participate in the practice. I will say—with somewhat less than total precision—that a practice of private property is justifiable if and only if it instantiates these features to a reasonably acceptable extent.\(^58\)

The first constraint, coherence, will rule out as unjustified property regimes where people have conflicting entitlements. This does not mean people cannot have different kinds of rights over the same objects. When I rent a car, for example, both the rental company and I have rights over the car. This does not violate the coherence constraint, since the rights each of us have are different (e.g., the rental company has a right to sell the car and I do not). In order to violate the coherence constraint, a system would need to attribute to people specific entitlements that conflict. The second constraint, transparency, requires that property regimes assign identifiable entitlements. This rules out property regimes in which it is impossible or extremely difficult to determine who owns what. This will require (among other things) having clear boundaries between people’s property, so that we know what belongs to whom. It is important, for example, that neighboring farmers know where one farmer’s field begins and the other’s ends. The third constraint, comprehensiveness, requires that property systems assign rights over all objects that are appropriate candidates for ownership. This will obviously rule out socialist systems in which people are not permitted to have private property. But it does not require everything be subject to

\(^{58}\) “The Natural Right of Property,” 63. Italics in original.
private ownership. We might think that private ownership of courthouses, for example, is inappropriate. Or someone might argue that certain important religious or historical artifacts ought not to be subject to private ownership. If nothing else, it seems like a justified property system will not treat children as objects to be owned. The final constraint of inclusiveness, Mack notes, is more “moralistic” than the others. This constraint rules out systems that do not treat all people as equally eligible to be participants. Anyone to whom the ur-claim applies must be permitted to participate in the same way in the property system. We might spell out this notion of participation in terms of normative powers: a justified property system must allow everyone to whom the ur-claim applies the same basic normative powers (the power to acquire property, the power to transfer property, the power to make contracts, etc.). Since the ur-claim presumably applies to all people capable of living their own life their own way, this rules out systems in which members of a particular gender, race, etc. are prohibited from owning property.

While these constraints rule out some property regimes, they leave open some rather important moral questions about property systems. They tell us rather little, for example, about redistribution. While they require that property be in private hands, they do not tell us anything about whether and when it is permissible to take it from some hands and put it in others. Neither a highly egalitarian system with radical wealth redistribution nor a strictly libertarian one where redistribution is prohibited seem to be ruled out. Mack’s constraints also do not address the many important questions about property systems that do not concern which objects are owned by whom. For example, could a property system be justified if it allowed people to have farms and factories, but wouldn’t let them sell their crops or products? Could a property system be justified if it allowed people to own whatever objects they pleased, but mandated who entered which professions? These questions do not concern who has authority over what object, but what kind
of authority is involved in owning an object. Questions of this kind—about which rights come with ownership—have long been a central problem in discussions of property rights.\textsuperscript{59} Ownership of an object typically includes a number of distinct rights (or “incidents” of ownership as they are often called, following A. M. Honore\textsuperscript{60})—the right to use things, the right to exclude others from using them, the right to sell them, and so forth. Thinking in terms of justifying a practice, as Mack does, can help make this problem more tractable, since it avoids the need to identify a specific set of rights that fit into the one true bundle of rights that constitute \textit{real} ownership. The trouble is, many important questions about our property rights concern not which objects are subject to ownership, but what kinds of rights come along with ownership. Mack’s constraints do not address that question.

There are, however, resources in Mack’s view to justify further constraints on property systems. For example, Gerald Gaus argues that a system of property aiming to respect Mack’s ur-claim will need to have two features: it will need to be “strong” and “extensive.”\textsuperscript{61} A strong property system is one in which property rights are stringent, and thus “only weighty moral reasons, or reasons of great and pressing social utility, could justifiably override one’s rights.”\textsuperscript{62} This presumably does not require that we have \textit{maximally} stringent property rights, which cannot be infringed for any reason, but only that our rights meet some threshold of stringency. A system of property rights will be strong, then, to the degree that the many incidents of ownership held in that system meet some threshold of stringency. Since it will be difficult, if not impossible, to

\textsuperscript{61} Gaus, “Property,”105-108.
\textsuperscript{62} Gaus, “Property,” 105.
pursue one’s own good in one’s own way if one lacks relatively stable, secure rights over the things one owns, respect for people’s ur-claims will require a strong property system. A property system is extensive “insofar as, for any given asset X, it is the case that there exists some nongovernmental agents or agencies that hold each of the incidents of the property rights bundle.”63 There are two primary ways, Gaus notes, that property rights fail to be extensive: when incidents of property are left in the commons and when they are controlled by government. Both can be a threat to people living lives their own way. Leaving things in the commons often leads to waste and conflict, and “this conflict undermines secure expectations of how one can go about fulfilling one’s projects, and living according to one’s values and aims.”64 Government control, Gaus argues, can be equally dangerous. Government actions “typically advance the values of some over those of others,” and for this reason “government decision is at best a compromise and at worst a case of mere conflict.”65 Extensive property rights in contrast, create domains in which individuals can make their own choices about what values to live by. If we are to respect each person’s ur-claim, then, we are going to need a system of property that is reasonably extensive.

These two constraints limit eligible property systems more strictly than Mack’s constraints. For instance, where Mack’s constraints are silent about how stringently property rights protect people from redistribution, the strength requirement justifies a presumption against redistribution that must be overcome by weighty reasons. And given that on Mack’s view the ur-claim is the only source of natural rights, it may be that such redistribution cannot be justified at all, since there may be nothing that could trump the presumption against redistribution. This

63 Gaus, “Property,” 106.
64 Gaus, “Property.” 107.
limitation goes much further than Mack’s constraints, which provided no obstacle to redistribution at all. The extensiveness requirement also goes further than Mack’s requirements, though it can be understood as a kind of extension of Mack’s comprehensiveness requirement. According to Mack, a property system is “comprehensive insofar as it facilitates the establishment of private rights over all extrapersonal objects (except for those objects, if any, which are not appropriate candidates for private ownership).”

Extensiveness takes the basic idea behind comprehensiveness a step further: whereas comprehensiveness requires only that all appropriate objects be subject to private ownership, extensiveness requires that the many different kinds of rights one can have with respect to objects be privately held. There would be something strange about caring about comprehensiveness but not extensiveness. This would mean being concerned that property systems not prevent people from having access to all appropriate objects, but being unconcerned that they get a meaningful bundle of rights over those objects. Extensiveness avoids that strange concern by requiring that we put not just objects, but the various rights that can be had over them, into private hands. This will be much more constraining than the comprehensiveness requirement.

We can also use the strategy of appealing directly to the ur-claim to justify further constraints, even on aspects of the property system that do not involve objects at all. For example, as we noted before, there are a number of important questions about how people conduct their economic life—whether they will have freedom of occupational choice, whether and when they may start a business, and so on—that we might expect a natural rights theory to have some bearing on. Thinking in terms of the ur-claim allows us to see that Mack’s view in fact has plenty to say about this. Consider for example, an economic system in which freedom of

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occupational choice is restricted. Such a system would undermine people’s abilities to construct their work lives in ways that reflect their values about what work is worth doing, how much it is worth doing, and so on. Or consider a system we mentioned above in which people can own a farm or factory but cannot sell their crops or products. Such a system arguably undermines many people’s right to live their lives their own way, since many people’s values and life plans are entrepreneurial (they want not just to make things, but to make things that other people will want to voluntarily buy from them). Even systems that allow people to have productive property, but place restrictions on the distribution of this property—Rawls’s “property-owning democracy,” for example—seem to run afoul of the kind of right of property Mack defends. Property systems of this kind would violate the ur-claims of people whose life plans include developing an entrepreneurial venture ambitious enough that it goes beyond their distributive share of productive property.68

The Problem of Constraint as a Problem for Particular Forms of Natural Rights Theory

Of course, one might have a different view about the content of our natural rights than Mack’s. Natural rights theorists agree that we have natural rights, but may disagree about which rights we have and what we are entitled to in virtue of them. So Mack’s view about which natural rights we have is only one of many possible natural rights theories. There might be other natural rights theories on which the content of our basic abstract rights are quite different. If a more egalitarian view about the content of our abstract right of property were correct, for

68 These arguments about the importance of productive property to people’s life plans follow those of John Tomasi. Though Tomasi is arguing within a Rawlsian framework, his arguments are easily translated into the kind of natural rights approach we are working in here. See John Tomasi, *Free Market Fairness*, 76-84.
example, it would permit substantial redistribution. Or if a communitarian view about our basic
natural rights were true, our property rights would not need to be so strong and extensive
(because on this sort of view rights are less about letting me live as I please and more about
creating conditions that let us pursue our projects as a community).

Natural rights theories other than Mack’s are just as capable of overcoming the Problem of Constraint. While they may place fewer constraints on government interference with individuals than Mack’s more libertarian view does, other theories would still justify a great many constraints on acceptable conventions. They would simply justify rather different constraints than exist on Mack’s view. A more egalitarian set of abstract rights, for instance, would presumably require that a justified system meet standards of distributive justice. This requirement is a constraint, and a rather demanding one. As Robert Nozick famously emphasizes, maintaining a pattern of distribution will require that we interfere with people to maintain that pattern. “Patterned principles of distributive justice,” he notes, “necessitate redistributive activities.”69 The requirement that we engage in those redistributive activities can be a quite demanding one that will place strict limits on what kinds of legal conventions are acceptable. So while an egalitarian set of abstract rights might justify fewer protections against government interference with individuals than Mack’s view, this does not mean it places any fewer constraints on what counts as a justified convention.

What this shows is that natural rights theories of a variety of kinds can overcome the Problem of Constraint. But this doesn’t show that all forms of natural rights theory can do so. There will be some natural rights theories that cannot overcome the Problem of Constraint. There are (at least) two kinds of theories that will fail in this way. First, someone might claim that we

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have only a handful of relatively concrete natural rights. Consider, for instance, a view on which all we are entitled to in virtue of our humanity or personhood is not to be subjected to a few kinds of extremely awful treatment—being killed for no reason, being raped, being tortured, and so on. All this view does is proscribe a few rather concrete behaviors. It tells us far too little about how our social lives must look to provide a helpful set of constraints on the kinds of political institutions we may create. Of course, someone who rejects natural rights theory in favor of some other approach to thinking about justice (e.g., a view on which justice is a matter of impersonal standards of justice rather than individual rights and duties) might well wish to affirm that people have a few highly concrete natural rights that do not tell us much about how our broader social order should be. But someone who wishes to defend a full-fledged natural rights theory will need to defend a broader set of rights that bear on more aspects of our social lives.

A natural rights theory might also fail to overcome the Problem of Constraint in the opposite way: by attributing rights to people that are too abstract to produce any meaningful constraints on convention. Imagine, for example, a natural rights theory on which people have one basic natural right: a right to be a part of a system of social cooperation. This right is extremely abstract. That is, it has very few implications about what kinds of actions or social practices are morally acceptable. It will probably require that we create conventions, but so long as those conventions establish some kind of system of social cooperation, anything goes. This view arguably fails to overcome the Problem of Constraint. It fails, that is, to allow natural rights to play a meaningful constraining role. Of course this view is far from what any natural rights theorists actually defend. In general, in fact, the kinds of views about natural rights that would
fail the Problem of Constraint seem like obvious nonstarters, at least as foundations for a full-
fledged natural rights approach to political philosophy.

The Problem of Constraint, then, is not so much a problem for natural rights theorizing in
general, but a problem that any particular natural rights theory must address in order to be
plausible. The natural rights theories that will fail to address the Problem of Constraint are likely
to be either implausible (like the view that we have one extremely abstract right that requires
conventions but places no moral constraints on what they should be) or more suited to
philosophers who accept some other theory of justice (like the view that we have a small number
of rather concrete natural rights that don’t tell us much about what our social and legal
conventions should be).

Conclusion

In this chapter I developed a model of the relationship between natural rights and
convention. On this model, natural rights are abstract requirements whose precise content gets
spelled out by local social and legal conventions. While natural rights do not fully determine
what our social and legal practices must look like, they place limits on what kinds of
conventional arrangements are morally acceptable. Natural rights theorists who develop an
account of abstract rights that fits this basic model can overcome the Problem of Constraint. I
illustrated this by considering some of the implications of Eric Mack’s natural rights theory.
Understanding the abstract right of property as Mack does places serious constraints on the kind
of property conventions that can be justified. Other views about our natural property rights—
more egalitarian or communitarian views, for instance—seem just as well situated to defend
serious constraints on our property systems (though those constraints would be quite different
from those Mack defends). The only view for which the Problem of Constraint seems a serious one is a natural rights view on which the content of our natural rights is extremely abstract. The Problem of Constraint, then, may be an effective objection to a particular sort of minimalist natural rights theory, but is not a problem for natural rights theories in general.

At this point, I should address a natural frustration: for all this talk about determining the precise content of natural rights, I have said rather little about what the precise content of people’s natural rights actually are. There are a couple of reasons for this. The first is that I am not defending a particular natural rights theory, but defending the project of natural rights theorizing in general. My goal is to develop an attractive general approach to natural rights theory, one that acknowledges the ways our rights depend on conventions. I am not defending a first-order view about what specific abstract natural rights we have. I have used Mack’s view as an illustration of how one might defend a specific view of the general sort I am defending, but I have not argued that Mack’s is the correct view about what natural rights we have. Without defending a view about what rights we have, I cannot make fine-grained claims about how people on the ground should treat one another.

Moreover, even if I did defend a particular view about what rights we had, there would be serious limits to what I could say about what individuals on the ground should actually do. On the general approach to natural rights theorizing I have defended, I cannot say everything there is to say about what people’s rights actually are on the ground, at least not from the armchair. Like Mack, I acknowledge that “it is not the role of armchair philosophy—even natural rights philosophy—to discover and disclose the precise contours of persons’ nitty-gritty rights… A theory of rights can only provide an abstract framework for that relatively concrete structure.”

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This is a feature not a bug. It is simply not plausible to think that we can sit in our armchairs and draw up a complete moral blueprint for our social and political institutions.

I do not mean to suggest, however, that there is nothing to be said about the practical implications of the approach to natural rights theory I have defended. There is an important set of questions I have not yet addressed: if a set of conventions meets whatever constraints are imposed by natural rights, what are we obligated to do in response to those conventions? And what should we do if we lack conventions about such morally important matters? Answering these questions will require a fuller account of why it is that established conventions have the kind of moral authority necessary to affect our rights and duties. In the next chapter I give such an account.
CHAPTER III. THE DUTY TO FILL IN THE GAPS

In chapter 2, I suggested that natural rights theorists could claim that conventions “inherit the normative significance of the natural rights whose content they help spell out.” The idea is that our duties to respect people’s natural rights will require us to follow established conventions, provided that they meet the constraints imposed by those rights. So if there is an established convention that treats you as the owner of your land, and the convention meets the constraints imposed by natural rights, then I have a moral duty not to use that land without your consent. The content of this duty, however, depends on the established convention. There might be some other equally acceptable convention under which you would not have been able to acquire this land, or under which you would have had a different bundle of rights over it. If that other convention were in place, then we would have different rights and duties.

On this view, established conventions have a kind of moral authority: they generate rights and duties that we would not otherwise have. On a little reflection, this is puzzling. It is hard to see how natural rights theory can account for this. There are many possible conventions that meet the constraints imposed by natural rights. Why should we obey the established convention? What about the established convention gives it—rather than the many other possible conventions that meet the constraints imposed by natural rights—moral authority?

In chapter 1 I called this the Problem of Authority. Unlike the Problem of Constraint, natural rights theorists have not begun addressing the Problem of Authority. Mack acknowledges that such a problem exists, but has not offered a solution to it. He does “not have an account of why precisely the actually emergent and abstractly acceptable structure of rights has moral traction for us while the other unrealized structures do not.”71 In this chapter I offer such an

account. I argue that we have a “duty to fill in the gaps,” which requires us to establish and follow conventions that specify the precise requirements of our rights.

It Takes a Village to Respect Rights

Imagine that I move in to a new apartment complex and I want to avoid being a nuisance. I often play guitar, and want to make sure that I do so only at hours and volumes that would respect my neighbors’ rights. What would it take to do so? Part of the answer, I will argue, is that I will need to coordinate with my neighbors. If I want to fully respect one neighbor’s rights, I will need my other neighbors’ help; I cannot do it alone. It takes a village to respect rights.

To see why this is, it will help to start by considering the implications of the Mack-inspired natural rights theory whose details we explored in chapter 2. On that view, my neighbors’ rights against nuisances are ultimately rooted in their ur-claim. At bottom, what my neighbors are entitled to is morally protected space to pursue their own good their own way. It is not as easy as it may seem to determine whether my actions leave my neighbors such space. In fact, it will often be impossible to evaluate whether some particular action leaves my neighbors room to pursue their own good their own way. We can often correctly judge that an individual action—deafening my neighbors, for instance—has failed to do so. But to determine whether an action succeeds in leaving people the space their rights require, we cannot evaluate that action in isolation. In order to leave my neighbors space to pursue their own good their own way, I will need to do more than make sure that each of my individual actions does not, on its own, prevent them from having such space. I will need to make sure that my overall pattern of actions leaves them that space. If I play electric guitar loudly for an hour, for example, that alone will not prevent my neighbors from having space to live their own lives their own way. But if I repeat
that action 15 times a day, with short breaks in between, such that my neighbors never have more than a few minutes of quiet at a time in their own home, they won’t have the kind of space their rights require. Whether my playing guitar for an hour respects my neighbors’ abstract rights, then, depends on how it fits into my overall pattern of action.

Even my overall pattern of action, however, will not be enough to leave my neighbors space to lives of their own. Whether one neighbor has that space will also depend on how my other neighbors behave. If I loudly play electric guitar three hours a day, that may not immediately prevent the person in the apartment next to mine from having space to live a life of her own. But if she has four other neighbors who do equally noisy things, all at different times, then it will be as if one person has been making loud noise for fifteen hours a day. That would fail to provide her the space she needs to live her own life her own way just the same as if I had made all the noise myself. This shows that people’s having the kind of space demanded by the ur-claim requires coordination of some kind. If my neighbors are to have space to live their lives their own way, then the way they are treated on the whole, by all their neighbors, must leave them that space.

I have been arguing in terms of Mack’s ur-claim, assuming our other abstract natural rights are rooted in it. But the argument does not depend on Mack’s view. The same argument will apply to any rights whose purpose is to create some kind of domain of individual discretion. We do not have to think that creating such domains is the only thing required by natural rights (one might think, for example, that people owe one another positive assistance of some kind). But so long as we think some part of the aim of our natural rights is to create separate moral spaces that leave people some degree of discretion over their own lives, then we will need to
coordinate to make sure that our individual actions, though each seems acceptable on its own, do not add up in a way that imperils that discretion.

**The Importance of Conventions**

I have argued that individuals have to coordinate in order to leave one another the kinds of space that their rights require. Coordination, however, requires information. In order for me to act in ways that leave my neighbors space to live lives of their own I need information of two kinds. First, I need to know how my neighbors are going to behave, so I can adjust my behavior accordingly. If, for instance, I want to make sure my noise-making respects my neighbors, I will need to know how much noise to expect them to make at what times. Without knowing what to expect of my neighbors, I will have no way of knowing whether the noise I add to the mix will make the overall pattern of behavior objectionable. Second, I need to know how changes in my behavior will affect my neighbors’ behavior. Imagine that my neighbors typically stop making noise at 9:00 p.m. and I (correctly, let’s suppose) judge that my playing loud music from 9:00 until 10:00 won’t add an objectionable amount of noise. Before I could be sure that my actions wouldn’t lead to an objectionable social pattern of action I would also need to know how my actions would affect others. Even if my playing music at that hour would not, on its own, make the overall pattern of action fail to leave anyone room to live her own life her own way, it might have indirect effects that are problematic. For instance, it might tempt others to begin to make noise at later and later hours in the future. In order to know whether my actions will lead to a social pattern of action that leaves people the space their rights require, then, I will need to know what others are likely to do in response to my actions.
Conventions provide both kinds of information that I need in order to respect my neighbors: information about how they will behave and information about how changes in my behavior will affect theirs. Recall that conventions are sustained by conditional preferences—preferences to act in a particular way provided that everyone else does. So once a convention is established, I can predict both that people will keep following it, and that my following it will not lead them to change their behavior. When a convention establishes an equilibrium in which everyone has the domains of discretion their rights require, all that individuals will have to do to be sure their actions don’t undermine such domains is to continue to follow the convention.

The impact of convention on our ability to know how to leave one another domains of discretion is greater than we typically recognize. I have pointed out that whether my making various noises *during the day* amounts to a rights violation will depend on how other people act. But this assumes that we have a convention in the background in which most people are sleeping and being quiet at night. Imagine, however, what would happen if we had no such convention, and everyone kept totally different and unpredictable hours. It would become nearly impossible for me to figure out whether my noisemaking was a nuisance. I would have no way of determining whether my actions were leaving my neighbors space to pursue their own good their own way. Can I play a little bit of loud music at noon? Can I have a few friends over for dinner and have a loud conversation? What hours would it be appropriate to throw a party? When am I entitled to complain to my neighbors about the noise at their party? In a world without any conventions about what hours we keep and what kind of noise we make, these kinds questions will be impossible to answer.

Or consider property acquisition. Part of respecting people’s abstract right of property is allowing them a normative power to acquire rights over objects. This normative power, however,
must have limits. People are not entitled to every unowned item they claim. If you are part of the first group to arrive in an uncolonized frontier—Mars, say—you cannot simply lay claim to all of the land you see. If everyone is to have room to live her own life her own way, then acquisition has to be restricted in some way. This means that if I want to respect others’ claims to property, I need not treat all of their claims of acquisition as legitimate. I need not, for example, respect your claim to own all of Mars. On the other hand, I cannot insist that none of your claims are legitimate. If you build a home on a small, unclaimed piece of land, I should probably respect your claim over the home. But in between these extremes what counts as an acceptable claim is unclear. How much land can you claim around the house you build before your neighbors should no longer respect your claim? Our natural rights do not provide a precise answer to this question. In order for your normative power of acquisition to serve its function, however, you must have a precise answer to this question. In order for you to make use of your normative power of acquisition, you need to be able to know when it is reasonable for you to expect others to respect a claim you make. And in groups of more than a handful of people this will be nearly impossible to figure out in the absence of a convention. If everyone in your society simply does her best to find some plausible middle ground between accepting all of your property claims and accepting none of them, it will quickly become impossible for you to anticipate what acts of acquisition will be respected. Worse, it may turn out to be impossible for you to satisfy the conflicting standards of all the people in your community. In order for you to have the kind of reliable normative power your abstract right of property entitles you to, then, your neighbors will need to find a way to coordinate on some kind of common expectation about what kinds of claims on property will be treated as legitimate. This is why property conventions are so deeply
important: in a society of sufficient size, without convention it will be nearly impossible to have stable expectations about what claims to property will be treated as legitimate.

Of course, conventions aren’t the only way to get the kind of information we need in order to respect one another. In sufficiently small groups of people some kinds of conventions may be unnecessary. In a single household, for example, it may be relatively easy to anticipate who will make noise at what times and to know how a change in one person’s behavior will affect another’s. In this setting, getting the information one needs from others in order to respect them is as simple as paying attention to their patterns of behavior. Similarly, giving others information they need is as simple as following intelligible patterns of behavior. This is not to say that among small numbers of people stable conventions will never be necessary. Sometimes even two people will need to establish conventions. A couple that shares a single bathroom, for instance, may need to establish a convention about who uses the sink or shower at what times during their morning routine. Given the limited amount of time they have each morning, it may be impossible for them to respect one another without establishing such a convention. I don’t mean to insist, then, that conventions are never necessary in small groups of people. The point here is simply that, all else equal, interactions among larger groups of people (e.g., a large city) will require more conventions and more complex conventions than those that occur in small groups (e.g., a single household).

The Duty to Fill in the Gaps

People’s abstract natural rights entitle them to protected domains of discretion—spaces in which they are permitted to live as they please. What I have just shown is that whether one person has meaningful discretion over her life will depend on the combined impact of the actions
of all of her neighbors. This means that if people’s rights are to be respected, their neighbors
must coordinate. It is now worth considering what each individual is obligated to do in virtue of
this. How do I, as one neighbor among many, respect others’ rights?

I cannot, on my own, create the domains of discretion that my neighbors are entitled to.
That requires the coordination of all of my neighbors, and their actions are out of my control. All
I can be obligated to do, then, is to take the best option that is open to me, as an individual, to
allow others the space their rights require. This will mean I have two duties:

1. Avoid actions that, on their own, suffice to prevent others from having the domains of
discretion their rights entitle them to.

2. Do what I can to help create and maintain social patterns of action that establish the
domains of discretion others’ rights entitle them to.

The first requirement is simply a duty to respect those moral boundaries that are justified directly
by people’s abstract rights. While our natural rights are abstract, they do have some concrete
implications. It is not permissible to kill people without reason, to deafen one’s neighbors, or to
treat as illegitimate every attempt that others make to acquire unowned objects. Our natural
rights have determinate implications in these cases. This is because these are cases in which one
person’s actions, taken alone, clearly imperil the kind of discretion that others’ rights entitle them
to. The first of the above duties simply prohibits these clearly unacceptable actions.

Avoiding such actions, however, is not enough. If people are to have the abstract moral
spaces their natural rights entitle them to, then their neighbors must do more than just avoid
actions that suffice on their own to prevent people from having domains of discretion. While
people are entitled to have domains of discretion, their natural rights don’t specify precise,
complete boundaries for those domains; they provide general constraints that these domains must
meet. Whether people have domains of discretion that meet these constraints will depend on the combined actions of all their neighbors. This is where the second duty comes in. It requires that we do what we can to help establish coordination on a social pattern of behavior that leaves people spaces of the sort their rights call for. Call this duty the “duty to fill in the gaps” (since it requires us to create the social patterns of behavior that fill in the gaps between the determinate moral boundaries that follow directly from our abstract rights). When an existing convention establishes the needed social pattern of behavior, the duty to fill in the gaps requires us to follow it. When there is no convention in place, and the establishment of a convention is the only feasible route to coordination (the number of people involved are too many for uncoordinated, conscientious individual action to suffice), then the duty to fill in the gaps requires that individuals make a reasonable effort to establish such a convention.

What is involved in one person’s making a reasonable effort to establish a convention depends on how it is reasonable for that person to expect others to behave. If there is no social movement toward coordinating on an acceptable convention, the duty to fill in the gaps requires only that individuals make a good faith effort to start one. How much this requires will depend on how willing others are to coordinate and whether the individual is in a position to determine others’ willingness to coordinate. In many cases, all the duty to fill in the gaps will require of an individual is that she gather enough information to determine that any efforts to coordinate will be fruitless. Sometimes, however, things are already headed in the right direction. If there is a social movement in the direction of developing an acceptable convention, or if there is an emerging pattern of social action that has a good chance of becoming a stable convention if enough people follow it, then the duty to fill in the gaps requires individuals to get on board with the movement or follow the emerging social pattern of action. Imagine, for example, that until
recently my neighbors have made loud noise at all sorts of different hours, to such a degree that the overall pattern of action is unacceptable. But suppose that one group of neighbors has begun keeping a common set of hours—staying quiet each night from around midnight until 8:00 a.m. The duty to fill in the gaps requires me to start following this pattern of action, in an attempt to contribute to the development of an acceptable convention.

This case is, of course, a rather simple one, in which there is only one pattern of action that promises to involve into an acceptable convention. If there are multiple patterns of actions emerging among different groups, and they all have some promise of evolving into a stable convention that would meet the constraints imposed by natural rights, then the duty to fill in the gaps requires that individuals pursue the option that has the best chance of producing an acceptable convention. Imagine, for instance, that a couple of groups of my neighbors have begun to follow different noise-making patterns: one group has started keeping quiet between midnight and 8:00 a.m., while another group is quiet between noon and 8:00 p.m. The duty to fill in the gaps requires me to join the group whose pattern of action has a better chance at successfully evolving into a convention that will allow all of us to respect one another.

The duty to fill in the gaps makes sense of a feature of natural rights theory that would otherwise be rather puzzling. I have claimed that there are “gaps” in the guidance provided by our natural rights that can be filled in by convention. At first glance this might seem to commit me to the rather worrisome position that there are mysterious holes in morality, such that when there are no conventions in place there is simply no moral truth about what we are obligated to do. But that is not the view. The duty to fill in the gaps tells us what to do in that situation: establish conventions.
The idea here is that genuine respect for one another requires us to work out the finer details of what this respect amounts to. This does not mean, however, that we owe every human being an answer to the question of what we owe them. The duty to fill in the gaps requires that we form conventions when doing so is the best available means to produce the kind of coordination needed to respect abstract rights. Such conventions, then, will only be necessary among people who interact in ways that make rights relevant. There is no need, for example, for me to form property conventions with someone who lives in a small village on the other side of the world, with whom I will never have any contact. I only need to form conventions with respect to people with whom I can reasonably expect to interact. For similar reasons, I do not need conventions concerning all of my rights with respect to the people with whom I do expect to interact. Doing business over the phone with someone on the other side of the country, for example, will require us to have some kinds of conventions about property, but will not require us to have a common convention about what kind of noise counts as a nuisance. The duty to fill in the gaps does not, then, require us to create a comprehensive set of definitive conventions that applies to all of humanity. What it requires is that people who expect to interact with one another establish conventions with respect to the kinds of interactions they expect to have. The result is that a rights-respecting society will practice what we might call “convention federalism,” in which different conventions provide structure to different levels of social interaction: simple, broad conventions that cover large groups of people who interact with one another in rather minimal ways, and more complex and detailed local conventions that address the kinds of moral problems that local communities experience.

I have argued that we sometimes have a duty to “create” or “establish” conventions. It is worth adding two caveats about this language. First, it is not meant to imply that conventions
must be created deliberately. Conventions that have evolved allow us to coordinate just as well as conventions that are created intentionally. Often, as in the case of the common law, evolved conventions do much better than we might have done deliberately. Second, it is not meant to imply that individuals act wrongly if the needed convention is not established. Since a single individual cannot create a convention on her own, she cannot have a duty to do so. All that the duty to fill in the gaps requires is that individuals make a reasonable effort to establish an acceptable convention. So if I’m a conscientious person in a neighborhood full of people who don’t care about being a nuisance, there may be nothing I can do to establish a convention about nuisance that meets the constraints imposed by natural rights. I should certainly try to encourage others in the direction of such a convention, perhaps by acting in ways that would be acceptable if everyone acted that way. But once I have done that, I have done my duty. I cannot be blamed for the fact that no convention is established.

One might argue that we have a more minimal duty: that all we owe one another is to avoid disrupting already established social patterns of behavior that leave people the domains of discretion their rights demand. This more limited duty would require us to follow existing rights-specifying conventions but not to contribute to establishing new ones. Insisting we have only this more minimal duty, however, would require denying that people are in fact entitled to protected domains of discretion. Having morally protected space to live as you please requires that your neighbors coordinate. So if you are entitled to have that space, then you are entitled to the coordination of those people whose actions effect whether you have that space. For example, in order for me to have a normative power of acquisition that is stable enough to serve its moral function, my neighbors need to coordinate on standards about what kinds of claims count as legitimate acts of acquisition. To deny that my neighbors are obligated to create a convention
about such matters is to deny that I am entitled to have the normative power of acquisition that requires such a convention.

This does not mean that the duty to fill in the gaps always requires a positive effort to create a convention when none exists. It is possible to discharge one’s duty to fill in the gaps by simply avoiding interactions with others that bring rights to bear. I might, for instance, discharge my duty to help establish an acceptable social pattern of noise by simply making no noise at all. The reason this discharges my duty is that my actions have no effect on whether the overall social pattern of action leaves people domains of discretion. Most of the time, however, my actions do impact whether the social pattern of action leaves people domains of discretion. When this is the case, I ought to do what I can to try to coordinate with others in such a way that the overall social pattern of action that results leaves everyone the domains of discretion their rights require.

**A Duty to Keep to Yourself?**

One might worry that the possibility of completely avoiding actions that affect others’ domains of discretion presents a problem for the argument for the duty to fill in the gaps. Why not simply say that what we owe one another is to keep to ourselves—that is, to always act in such a way that our actions have no effect on whether others have the domains of discretion their rights require? Call this putative duty the “duty to keep to yourself.” By “keeping to yourself” I do not mean respecting a complete, determinate set of moral boundaries. Like the duty to fill in the gaps, the duty to keep to yourself rests on the assumption that such a set of boundaries does not exist. The duty to keep to yourself, however, requires us to respond to the lack of such boundaries not by helping to create them, but by acting in such a way that our actions do not
contribute to the social problem that would require us to create those boundaries. Where the duty
to fill in the gaps would require me to pursue and follow conventions that settle what counts as a
nuisance, a duty to keep to myself would require me to avoid making noise at all. Where a duty
to fill in the gaps would require me to contribute to the creation of property rules, a duty to keep
to myself would require to me to avoid making any property claims that are not unquestionably
valid. These actions—making noise or making potentially contentious property claims—would
not be violations of determinate moral boundaries specified by people’s natural rights. But they
would contribute to a social problem that would require the establishment of conventions. The
duty to keep to yourself would require people to avoid all behavior that contributes to this
problem.

The trouble with the duty to keep to yourself is that it is self-defeating. People’s rights
entitle them to morally protected domains in which to live their own lives. People won’t have
such spaces if there is a duty to keep to yourself. If we had a moral duty of this sort, we would all
be morally required to spend our whole lives trying to avoid doing the smallest thing that could
contribute to a social pattern of action that would fail to allow people the space their rights
require. I could never so much as exhale without the consent of the people around me, because
that would contribute in a small way to a problem that would require the establishment of
conventions about air pollution. Such a duty is self-undermining: in the name of providing
everyone moral space to exercise discretion about how to live her own life, this duty requires that
we spend every waking moment of our life avoiding miniscule wrongs.

This argument for rejecting the duty to keep to yourself employs a form of what Mack
calls “Elbow Room Reasoning.”72 Mack uses this reasoning to defend libertarian property and

72 Mack, “Elbow Room for Rights.”
self-ownership rights against the charge that they would not permit obviously acceptable minor intrusions (like small amounts of unwanted noise or pollution). He argues that the justification of these rights—that they allow people to live their own lives their own way—precludes their being read so strictly as to rule out all minor intrusions. This reasoning does not, of course, apply only to the libertarian view Mack defends. Any plausible natural rights view, libertarian or otherwise, will allow people some kinds of domains of discretion, and any scheme of rights and duties that morally requires people to spend all of their time avoiding tiny wrongs will fail to leave people domains of discretion. What I have called the “duty to keep to yourself” would require just that. Of course, the kind of minor wrongs the duty to keep to yourself would require us to avoid are a bit different than the kinds of wrongs that the theory Mack rejects would prohibit. Mack rejects a view on which people have extremely demanding, highly determinate rights. On that view, the wrongs we must avoid are small boundary crossings. The duty to keep to yourself does not prohibit minor boundary crossings (for it rests on the assumption that the relevant boundaries do not yet exist). Rather, it prohibits all actions that affect others in ways that might contribute to the need to create boundary-establishing conventions. Like a fully determinate, extremely stringent set of rights, however, such a duty is self-undermining: such a duty would fail to allow people the very discretion that it is meant to protect.

What this shows is that conventions can fail to respect people’s abstract rights in two ways. The more obvious way they can fail is by not giving bearers of rights sufficient room to live their own lives. But the problems with the duty to keep to yourself show us that there is another, subtler way conventions can fail: by making people’s roles as respecters of rights too burdensome. The duty to fill in the gaps requires us to establish conventions that avoid both of these mistakes.
Solving the Problem of Authority

The argument for the duty to fill in the gaps provides the solution to the Problem of Authority, which asks what makes the established convention superior to other conventions whose content is equally acceptable. My answer should now be clear: established conventions produce the coordination that we need in order to respect rights. The fact that a possible convention meets the constraints imposed by natural rights only means that it would be acceptable to follow that convention if it were established. It does not mean that actions that would accord with the convention are morally acceptable when considered in isolation. A convention that allows people to play loud music during the day, for instance, is no better from the point of view of natural rights than one that allows it in the middle of the night. But it does not follow that there is no difference between my playing loud music during the day and my playing loud music at night, given that one of those conventions is already in place. If the established convention is to be noisy during the day and quiet at night, then my playing loud music for a few hours in the middle of the night is a nuisance.

The duty to fill in the gaps, then, requires us to follow established conventions that spell out our rights, not merely possible (though equally acceptable) ones. What we owe one another is not to act in a way that would be rights-respecting if we properly coordinated with one another. What we owe one another is to actually coordinate with one another in a rights-respecting way.\textsuperscript{73}

\textsuperscript{73} It is perhaps worth noting that the problem of authority would still be solved even if we only had the more minimal duty not to undermine existing rights-respecting coordination (and thus we lacked a duty to actively work to establish new conventions). That more limited duty would still require us to follow established conventions.
A Caveat About Following Conventions

The duty to fill in the gaps, however, may not require that we always follow an established convention, even when the convention serves to spell out our natural rights in accord with the constraints generated by those rights. There are two possible reasons for this. First, the rights whose gaps the convention fills in may not be absolute. If a right isn’t absolute, we shouldn’t expect the conventions filling in its gaps to be. Second, we may be permitted to violate authoritative conventions when we can do so in a way that doesn’t undermine rights-respecting coordination. On such occasions it will be possible to fail to follow the going convention without failing to comply with the duty to fill in the gaps.

To see how this is possible, first consider what it takes to violate the duty to fill in the gaps. When there is an established convention that meets the constraints imposed by natural rights, violating the duty to fill in the gaps will mean acting in a way that undermines the acceptability of the social pattern of action established by the convention. There are two ways to do this. One way is to perform actions that, on their own, suffice to make the overall social practice unacceptable. My playing loud music in the middle of the night, for example, makes the overall social pattern of action fail to leave some people the kind of moral space we owe them. While playing loud music at night is not intrinsically wrong (it would be acceptable if everyone slept during the day and made noise at night), it makes the overall pattern of noise in my neighborhood unacceptable. Since I am the person responsible for making the pattern unacceptable, I have violated my duty to fill in the gaps. The other way to undermine coordination on an established, acceptable convention is by acting in a way that undermines others’ motivations to follow the convention. This can happen even if my actions do not make the overall social practice objectionable in the short run. For example, if I am noisy just half an
hour after the conventional time to be quiet, this may be trivial enough that the overall pattern of noise in the neighborhood is not objectionable. But if my actions undermine others’ motivations to continue to follow the convention, then I undermine the stability of coordination and thus violate the duty to fill in the gaps.

It is possible to fail to follow a convention but avoid both of these kinds of violations of the duty to fill in the gaps. Sometimes this is simply because the convention is coarse grained and some actions that deviate from it don’t contribute to the kind of moral problem that the convention is need in order to solve. For instance, if my neighbors are all away for the weekend or are all deaf, then there’s no need for me to follow the convention of being quiet at night. In other cases, though, it might be acceptable to violate a convention, even if my doing so contributes in a small way to the social problem that the convention is needed to solve. Imagine, for example, that I make noise for half an hour past the conventional time, but my doing so will not undermine anyone else’s motivations to comply with the convention. If this is trivial enough that it does not prevent the overall social practice from leaving everyone the discretion over her life required by her natural rights, then it will be permitted by the duty to fill in the gaps.

This shows that there are some cases in which the duty to fill in the gaps itself does not require us to follow the established, acceptable convention. There may be another reason, however, that my failing to follow the convention is wrong in such cases: I am not doing my fair share in establishing a convention, because I am free riding on the efforts of others to coordinate. It seems plausible to think that two people who have the same duty also have duties to one another to do their part in discharging that duty. Imagine, for example, that you and I promise a friend that we will cut his grass and feed his dogs while he is out of town, but you rely entirely on me to do it. While no wrong may have been done to our friend, it seems as if you have done
some kind of wrong to me. Or consider parental duties: if one of a child’s parents contributes little or nothing to the child’s upbringing, the neglectful parent wrongs not only the child, but also the other parent who took on the bulk of the cost of raising the child. These cases suggest that when multiple people have a duty to achieve the same goal, they have a duty to one another to do their fair share in doing so.\textsuperscript{74} If such a duty of fairness exists, my failure to follow the established convention would violate it, even if my actions do not undermine coordination on an acceptable convention.\textsuperscript{75}

Whether we have duty of fairness or not (the previous paragraph is not meant to settle the matter), the duty to fill in the gaps will almost always require that we comply with an established, acceptable convention. In order to permissibly fail to follow a convention, I would need to be justified in believing that my doing so would not affect others’ compliance and would not, when combined with others’ conventional behavior, undermine anyone’s right to live her own life her own way. Of course, such circumstances are unusual, and my being in a position to know that such circumstances obtain is even more unusual. So even if I do not have a duty of fairness, I should nearly always follow established conventions that spell out the precise requirements of natural rights. Given my epistemic limitations, this will be the best way for me to sure that I am not undermining coordination on a rights-respecting convention.

\textsuperscript{74} This fair share is probably best understood in terms of a threshold: so long as I do a certain part of the work in fulfilling the duty, I have done my part. This means the other people who share the relevant duty cannot obligate me to more by doing more work than is necessary. They may be able to reduce what I owe in virtue of a fairness duty if they voluntarily fulfill the duty for both of us, but they cannot \textit{increase} my obligations by going above and beyond what duty requires. All that a duty of fairness would require is that each of the set of people who share a duty do some reasonable share of the work needed to fulfill it. What exactly counts as a reasonable share will depend on what must be done to fulfill the particular shared duty.

\textsuperscript{75} Presumably this would apply only when one’s violating a convention contributes to the problem the convention is needed to solve. I would not be free-riding, for instance, if were able to make more noise because my neighbors were all out of town or deaf.
Changing Conventions

The view about the moral authority of conventions that I’ve just defended places a lot of moral weight on established conventions. It might appear that this leaves little room for conventions to change once they are in place. But that appearance is deceiving. Existing conventions will have moral authority only so long as they meet the constraints imposed by natural rights. Since many existing conventions do not meet these constraints, they ought to be changed. Moreover, previously acceptable conventions often become unacceptable over time. Having a completely acceptable set of conventions today does not guarantee that those same conventions will be acceptable in the future. The kinds of social interactions we engage in are constantly changing, and sometimes they change in such a way that a set of rights that once would have allowed us to live together in mutual respect is no longer adequate. This means that on the view I have defended, there will be plenty of room for changes in conventions over time. In fact, such change will often be required.

Consider, for example, rights over airspace. Before the emergence of commercial air flight, the common law addressed this question simply: people who owned land owned all of the airspace above that land—their property was supposed to extend to the heavens. This approach worked fine to settle the kinds of disputes it was designed to settle, about such things as whether one person’s buildings could reach into the space over another person’s land. But the principle that people’s property reaches to the heavens posed a serious problem for commercial flight: if taken literally, it would make it impossible to fly over someone’s land, even miles above it, without her consent. This led to a number of legal disputes, which eroded this principle, or at

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76 For a fascinating discussion of the history of air space rights, see Stuart Banner, Who Owns the Sky?: The Struggle to Control Airspace from the Wright Brothers On (Cambridge: Harvard University Press, 2008).
least its literal reading. In *Hinman v Pacific Air Transport*, for example, the court decided that the common law must be understood only to give land owners “full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land.”77 It was no longer plausible to take the idea that people’s property extended to the heavens literally. Large scale commercial flight represented a new form of interaction that our previous conventions were not designed to deal with. The principle that people’s property extended infinitely above their land would have been a perfectly acceptable solution to questions about whether people could build buildings that reached over other people’s land. But once commercial flight emerged, a legal convention that had been perfectly acceptable needed to be reevaluated.

We are on the brink of another similarly radical change. The number of hobbyists flying small aerial drones is growing, and there have already begun to be disputes about where these drones may fly.78 If Internet retailers like Amazon.com have their way, it may not be long before drones become a common delivery method. The possibility of the widespread use of drones raises a whole host of questions about the drone-related rights: where can these drones fly? May they only fly above public streets or may they fly over private property? How high must they fly? May people prohibit drone flights over their property? If so, at what height? What kinds of cameras may drones be equipped with? What kinds of privacy rights do people have against the use of drone cameras near their property? How would such rights be enforced? If we are to create an arrangement in which both land owners and drone owners know how to treat their neighbors with respect, we will need establish answers to these questions. To do this, we will

77 *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936).
need to go beyond the rules we have established for much larger aircraft, like airplanes or helicopters.

The moral of this story is that when new forms of social interaction emerge, our rights-specifying conventions must evolve to govern those interactions. So establishing morally acceptable conventions that leave people the kinds of moral spaces required by their rights is not a once-and-for-all affair. It will sometimes require amendments and additions to account for new social conditions that are impossible to anticipate in advance.

**Conclusion**

In this chapter I have argued that we have a “duty to fill the gaps.” This duty requires that we establish an overall social pattern of action that leaves people the space required by their abstract natural rights. This duty explains why established conventions that spell out the requirements of our natural rights have a moral authority that merely possible but equally acceptable conventions do not: the established conventions allow us to actually coordinate to create the kinds of moral spaces that natural rights require that we create. This means that when acceptable rights-specifying conventions are in place, we ought to follow them. But this does not mean slavishly upholding the status quo. For one thing, the status quo will often include conventions that do not meet the moral constraints imposed by natural rights. For another, even a perfectly acceptable set of rights-specifying conventions will need to be changed to accommodate new forms of human interaction.

On this view, precisely what we owe one another is context-sensitive. While we do have certain basic natural rights that everyone must respect, different societies may develop different ways of respecting these rights. Even two perfectly just societies may differ in the conventional
ways they spell out the details of what their members owe one another. Moreover, as time passes and we come to interact in new and different ways, even a single society may need to develop different ways of respecting rights. As a result, even a perfectly just society will often have to change its rights-specifying conventions. What rights people have, then, will vary not just from society to society, but across time within a given society.

One way to approach natural rights theory is to treat natural rights as a precise blueprint for our social lives, which social and legal conventions must simply imitate in order to be acceptable. On that model of natural rights theory, the goal of theorizing about rights is to produce a complete and coherent set of rights. On the view I have defended, in contrast, the production of a complete and coherent set of rights is not merely a theoretical achievement but also a practical one, and an extremely difficult one at that. It requires not only that we establish conventions that meet the moral constraints imposed by natural rights, but also that we update these conventions when new forms of social interactions render established conventions morally obsolete.

This suggests that a common way of distinguishing views about rights is mistaken. It is tempting to think philosophical views about rights fit into two broad types: either individuals have rights that our social and political institutions must be sure to respect, or they are the sort of things that our social and political institutions must create. The view I have developed here, however, provides a third option: we respect rights in part by creating rights.
CHAPTER IV. POLITICAL IMPLICATIONS

In the first three chapters I developed an approach to natural rights theory designed to allow it to overcome the Conventionalist Challenge. On my view, while everyone has natural rights, the precise requirements of these rights are spelled out in different ways by different local conventions. In fact, I argued, our natural rights morally require that we create conventions that spell out the fine-grained details of what we owe one another. This addresses the Conventionalist Challenge: natural rights theory can explain the ways that conventions shape our moral rights, and it can do so without rendering natural rights irrelevant. The resulting view captures what is attractive about natural rights theory—the idea that all human beings have rights that political institutions (and other individuals) must respect—without denying that our moral rights also depend in important ways on local conventions.

Now I want to suggest two interesting political implications of this approach to natural rights theory. First, I want to suggest that the duty to fill in the gaps might serve as a fruitful starting point for the development of an account of political obligation. Such an account should be particularly attractive to Lockean natural rights theorists, whose rights theory might otherwise seem to force them into philosophical anarchism. Second, I want to argue that the approach to natural rights theory I have defended here involves a fundamentally different approach to thinking about the relationship between justice and morality than we might expect from natural rights theory. On the kind of view I have defended, justice depends partly on the customs and laws of particular communities. This, I will argue, places plausible forms of natural rights theory as much in the tradition of Aristotle as of Locke.
Political Obligation and the Duty to Fill in the Gaps

In chapter 3 I argued that if we have abstract natural rights, then we have a “duty to fill in the gaps.” This duty requires us to follow or establish conventions when doing so is the best available route to establishing the kinds of social patterns of action necessary to respect people’s abstract rights. In this section, I want to suggest that the duty to fill in the gaps may sometimes permit us to coercively establish the needed conventions by law. If this is correct, it forms the basis of an account of political obligation that promises to be especially helpful for Lockean natural rights theorists, whose views are often thought to lead to philosophical anarchism.

The basic impulse behind the account of political obligation I want to sketch is simple: we need the state to establish conventions that we can reasonably expect that people will not establish voluntarily. The duty to fill in the gaps requires that we establish social patterns of action that meet the abstract requirements specified by people’s natural rights. When conscientious but uncoordinated individual action cannot create those patterns of actions, then we must establish conventions. Sometimes it’s reasonable to expect that people will not establish these conventions voluntarily. When that’s so, I will suggest, the state may legitimately use force to establish the needed convention, and individuals are obligated to follow the convention that results.

The Difficulty of Coordination

The account of political obligation I will sketch depends on the claim that it is often reasonable to expect that people will fail to establish the conventions that are required in order to respect one another’s abstract natural rights. It’s worth considering why this is. It is not, I will suggest, simply because of culpable moral and epistemic failures.
Imagine a group of people who are perfectly disposed to do their part to respect abstract rights. Suppose that they recognize that respecting one another’s abstract rights requires the establishment of conventions, and they want to do their part to establish those conventions. These people have to settle on one member of a set of acceptable conventions, none of which is decisively superior to the others in terms of respect for natural rights. Call this set, borrowing a term from Gerald Gaus, the “eligible set” of conventions. Even people who are disposed to do everything within their power to fulfill the duty to fill in the gaps will have trouble coordinating on one member of this set. There are at least three reasons for this: strong non-moral preferences, limits on their ability to know others’ preferences, and limits on their ability to communicate.

The first problem with coordinating on an acceptable convention is that people might have strong non-moral preferences for some members of the eligible set. Even if they are perfectly disposed to follow any acceptable convention that is established, prior to the establishment of a convention people might have strong preferences about which members of eligible set to establish. They might recognize they aren’t entitled to complain if they do not get their way, but still have a preference for some conventions over others. If people’s non-moral preferences conflict, they are, at the very least, unlikely to settle into an acceptable convention without deliberating together. This problem can arise even in rather small groups. A group of four roommates living in a small house, for instance, may not have much trouble settling into a respectful convention about noise-making if everyone is predisposed to keep similar hours. But if two of the roommates are night owls who prefer to stay up all night playing music and then sleep until mid-afternoon and the other roommates keep more normal hours and tend to make a lot

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79 Gaus, *The Order of Public Reason*, 321ff. Though I borrow the term from Gaus, I am not using it to refer to the same thing as he does. Gaus’s “socially eligible set” is a set of social moral rules whose members everyone has reason from their point of view to accept. I am concerned with a set of conventions, whose members meet the constraints imposed by natural rights.
noise in the early morning then they will have to work together to settle on some kind of compromise. Of course, the same forces that make it difficult to coordinate without deliberation will also make it difficult to settle on a result during deliberation. Even if all four roommates are disposed to follow any convention that is agreed upon, their non-moral preferences for different conventions may make it difficult for them to reach an agreement.

This four-person scenario, of course, is far simpler than most of the problems we face in establishing a convention. When we need to coordinate on conventions with larger groups of people two further problems emerge. The first is that it is difficult to know what to expect of people whom we do not know. It may be possible to tell whether your roommates are likely to follow suit if you generally try to not to make much noise after midnight. In larger groups of people, however, it becomes much harder to know what others preferences over conventions are. It may even be difficult to determine who is affected by a given convention. And even if we could determine who is affected by a convention and what kinds of conventions they prefer we would face a further problem: it is difficult to communicate with the relevant parties to try to come to some kind of agreement. This means that even if people’s preferences aren’t that far apart we might have trouble establishing conventions because people aren’t able to communicate their preferences to one another.

The difficulty of coordinating becomes even worse when we introduce even a few ignorant, morally corrupt, or disinterested people. So far we’ve supposed that people are doing their best to respect rights and that they all have the same beliefs about what conventions are eligible. Even in that situation people will have trouble coordinating. But there is a wide range of other problems that emerge when we relax these assumptions. The most obvious problem is that some people simply don’t care about respecting others’ rights. But there are many more subtle
obstacles to coordination. Some people will have false beliefs about what conventions are eligible (i.e., false beliefs about which conventions meet the constraints imposed by natural rights). As a result they may resist an eligible convention or insist that we consider an ineligible convention. Even people who correctly identify eligible conventions might insist on changing from one eligible convention to another at a great cost. And some people will simply be apathetic about conventions that don’t appear to bear much on their quality of life. When we introduce all of these complications, coordinating becomes even more difficult.

Given these problems, it is reasonable to expect that people will sometimes fail to coordinate on eligible conventions. Often our situation in establishing a convention is like that of a bus full of people trying to decide to go to dinner. Even if all the people on the bus have agreed to go to dinner provided that the choice of place meets certain basic constraints, they may have great difficulty deciding on a single place to go. The larger the bus is, of course, the larger the problem. In a large enough bus it will be reasonable to expect any attempt for the group to settle on a restaurant to be futile. We face a similar problem with conventions: in a sufficiently large group of people, it is reasonable to expect that people will fail to coordinate on a convention that falls within the eligible set.

Legitimacy

I will now suggest that the fact that we can reasonably expect people to fail to coordinate on eligible conventions can ground an account of both political legitimacy and political obligation. I will treat these notions—legitimacy and political obligation—as distinct. A state is
legitimate when it may permissibly create and enforce laws. 80 Legitimacy, as I will use the term, is not simply the flipside of political obligation. The fact that the state can permissibly create and enforce laws (legitimacy) does not entail that people have a moral duty to obey them (political obligation). I must, then, provide independent arguments for legitimacy and political obligation. I begin with an argument for legitimacy.

I have just argued that it is reasonable to expect that people will often fail to voluntarily coordinate on eligible conventions. This has an important moral implication: people’s abstract rights (which require the creation of eligible conventions) will go unrespected. This, I would argue, makes it legitimate to interfere to coercively establish the needed convention. This is because it is permissible to force people to respect a right when it is reasonable to expect that it will not be respected. For example, if I hand you some money and you run away with it without giving me the item I’m paying for, I (or someone else) may chase you down and take the money back. I have to wait until it’s reasonable to expect that my right will be violated. But once I reasonably expect that, I can coercively intervene to enforce my right. This reasoning explains why it is permissible to coercively create eligible conventions. It is often reasonable to expect that people will fail to establish the conventions needed to respect one another’s abstract rights. When that is so, it is permissible to force people to respect those rights. This is what the state does by creating and enforcing laws that establish common conventions that flesh out the precise requirements of our abstract rights—laws about what kinds of acts count as legitimate acts of acquisition, court decisions about what counts as a nuisance, rules regulating our driving to prevent the imposition of excessive risk on others, and so on.

This shows that it is permissible for the state to coercively create conventions required by abstract natural rights. We tend to think, however, that only the state is morally permitted to do this. For my part, I am not sure whether this must always be true. It is, of course, usually true that only the state is morally entitled to make and enforce laws. The explanation of this on the account I’ve just given is instrumental: the state is uniquely situated to provide the sort of credible threats of punishment needed to induce people to establish a new convention. When the state is uniquely situated to establish eligible conventions, and it is acting to do so, this justifies the state’s monopoly over such matters.

**Political Obligation**

As we noted above, legitimacy does not entail political obligation. The fact that the state may permissibly create and enforce laws does not entail that people have a moral duty to obey those laws. One must provide a separate account of political obligation. Providing such an account requires more than showing that people often have moral obligations to do the things that the law requires. A political obligation is not simply a moral obligation to follow the law, but a moral obligation to follow the law because it is the law. Many of our obligations to follow the law are not of this kind. We are obligated, for instance, to follow laws that prohibit murder, but not because it is the law. This duty is not a political obligation. In order for us to have political obligations, the law must make a moral difference: it must cause us to have duties we would not have in its absence.

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81 I will use “duty” and “obligation” interchangeably. Sometimes people use “obligation” to refer only to moral requirements that are acquired (by contract, for example). This distinction is typically set aside in discussions of political obligation, and I shall follow that practice here.
This feature of political obligations is often described as *content-independence*. Political obligations are content-independent because they do not rest on the specific content of the law. The obligation to obey laws that prohibit murder, in contrast, is *content-dependent*: it simply depends on the law’s content matching the content of our pre-existing moral duties. The law doesn’t change anything morally in this case. In order for us to have a *content-independent* duty to obey the law, the law needs to be able to add to our obligations, not merely demand that we do what we are already morally required to do. Content-independence, however, needn’t be unlimited. A theory of political obligation does not need show that we are obligated to follow the law *no matter what its content* (indeed, that seems wildly implausible). What it needs to show is that there is some reasonably large set of possible laws such that we would be obligated to obey any of that set if it is made law.

This is precisely what the duty to fill in the gaps entails. Recall that the duty to fill in the gaps requires that we take our best available means to create conventions that settle the content of our rights. When the state creates and enforces laws, this changes what our best available route to establish conventions is. As we noted above, the state often creates laws that, if followed, would produce conventions that our rights demands—conventions about what kinds of acts count as legitimate acts of acquisition, what counts as a nuisance, what rules of the road to follow to avoid imposing excessive risk on others, and so on. When the state credibly threatens to punish people for violating these laws, then it becomes reasonable to expect most people to follow them. This means that following the law becomes the most promising route to establishing an eligible convention. Since the duty to fill in the gaps requires us to take the most promising route to establish needed conventions, it requires us to follow the law in such cases. This requirement is, within limits, content-independent. So long as the convention that would be
produced by following a law would be eligible, we should follow it. The law, then, does not merely ask us to do things that match the precise content of our pre-existing duties. It changes our moral situation—if the law were different, we would have different precise duties. How high pilots are obligated to fly above my land, for example, depends on what the law requires of them. There is not some pre-existing specification of how high the right over my land extends. But we need to settle this somehow in order to respect one another. If it has been settled by law, and our settlement is eligible (if it does not, for instance, allow planes to fly as low as they wish or extend everyone’s property infinitely above the ground) then the duty to fill in the gaps requires us to abide by that settlement.

The Particularity Requirement

The account of political obligation I have just sketched explains the duty to obey the law by appeal to a natural duty (the duty to fill in the gaps). Accounts of political obligation that rest on a natural duty have a well-documented difficulty meeting the particularity requirement—a requirement on plausible theories of political obligation formulated by Simmons\textsuperscript{82}. The particularity requirement requires that theories of political obligation explain why people are obligated to obey the laws of their particular state. Natural duty views often fail to explain this. Simmons criticizes Rawls’s view that our political obligations are explained by a natural duty to support just institutions on these grounds.\textsuperscript{83} Simmons argues that a natural duty to support just institutions cannot account for why we have duties to obey the laws of our particular state. There


\textsuperscript{83} Simmons, \textit{Moral Principles and Political Obligations}, Chapter VI.
may be many just institutions in the world and a duty to support just institutions doesn’t explain why I should comply with the laws of one just state rather than those of another.

The view I have sketched is well suited to deal meet the particularity requirement. The duty to fill in the gaps has a kind of particularity built in. Each of us has a particular set of people with whom we are likely to interact with in ways that bring rights to bear. The duty to fill in the gaps tells us we owe it to these people to settle what we owe them, not to everyone. So I have a duty to obey the laws of the United States and not those of Canada because the laws of the United States are those that I actually expect to impact the behavior of the people with whom I will interact in rights-relevant ways. When I visit Canada, of course, I have to obey those of their laws that allow me respect the rights of the people with whom I interact in ways that bring rights to bear. This view avoids the problem faced by other natural duty views: it can explain which laws we should obey when.84

Commonsense Exceptions to the Duty to Obey the Law

Like most theories of political obligation, the theory I have proposed here places limits on our obligation to obey the law. We have already noted one: on this view, we are only obligated to obey laws that we need in order to help us coordinate on the conventions necessary for us to respect one another’s natural rights. But there is a further exception. Sometimes, even when the law would, if followed, establish an eligible convention, we will not be obligated to follow the law. This is because sometimes the convention actually formed in response to a law

84 The duty to fill in the gaps cannot explain special obligations citizens might have to their own states that aren’t rooted in the fact that the territory of that state is where most of their morally important social interactions occur. If people have duties to serve in the military of states in which they are citizens, for instance, the account of political obligation I’ve proposed would not explain this. It seems plausible, however, to think that people do not have such duties unless they deliberately acquire them by consent.
turns out to differ from the behavior the law itself requires. In such cases, the duty to fill in the
gaps requires individuals to follow the actual convention on the ground. If I have a duty to
establish an eligible convention, and there is such a convention in place that is slightly different
than the law (but is also eligible), then I should not undermine successful coordination to follow
the law.

This result is a feature, not a bug, of the duty to fill in the gaps. The rare cases in which
this occurs are cases in which most people recognize we needn’t obey the law itself. Consider
speed limits, for instance. Legal speed limits rarely result in a social convention of driving under
the speed limit. On the Interstate in the United States, for example, a speed limit of 70 miles per
hour often results in a convention of going somewhere between 70 and 75 in the right lane and
between 75 and 85 in the left lane. In these circumstances, the duty to fill in the gaps requires us
to follow the convention, not the law. We need to coordinate on a roughly similar speed in order
to avoid imposing excessive risk on one another. To do this, we will need to follow the
established convention on the road, not the merely possible one suggested by the speed limit.
The law, however, may still play an important role here. Perhaps having a legal speed limit is
necessary to help us coordinate on the convention we end up with. When someone gets onto an
unfamiliar road, they need to know roughly what speed to expect others to be driving so that they
know how to begin following local conventions. Especially on large highways, where high
speeds are possible, it might be hard to effectively coordinate when entering a new road without
some legally established and enforced speed limits. If this is true, then this would make the
creation and enforcement of legal speed limits legitimate (because we can reasonably expect that
without such enforcement, people will not coordinate their speeds in respectful), but drivers
would not have an obligation to follow the law itself. Far from being an odd implication, this
result—that legal speed limits may be legitimate, but drivers are obligated to follow conventions on the road rather than legal speed limits—just seems like common sense.

Paying the Cost of Coordination

The duty to fill in the gaps requires that we establish eligible conventions. I have argued that when laws require us to follow the needed conventions we are obligated to obey the law. Establishing these conventions, however, requires more than simply following the relevant laws. It also requires that someone create, apply, and enforce the relevant laws, which requires legislatures, courts, and police. And these cost money. We should wonder both whether the state may permissibly tax people to pay these costs and whether people are obligated to pay.

The account of legitimacy I have proposed will permit the state to tax. I have argued that the state may permissibly coerce people to establish eligible conventions when it is reasonable to expect people will not establish them voluntarily. People must coordinate in order to respect rights, and when they fail to do so voluntarily, it is permissible to force them to do so. The same reasoning applies to paying the cost of coordinating. We owe it to one another to coordinate. Coordinating is costly, so if we are to coordinate, we must pay the costs of coordination. If it is reasonable to expect that people will not pay these costs voluntarily, then it permissible to force people to pay these costs. So taxation to support the making of law is legitimate under the same circumstances as the making of law: we may force people to pay the costs of coordination when we can reasonably expect that people will not do so voluntarily.85 The government’s right to tax

85 Of course, these two things might come apart. There might be some conditions under which it is reasonable to expect that people will not coordinate on eligible conventions without coercion but reasonable to expect that people will voluntarily pay for the creation, interpretation, an enforcement of law. Imagine, for example, a small, primitive society with a leader whom the members pay to make laws and adjudicate disputes. Even if everyone voluntarily pays this
is also limited in the same way that its right to make law is: it may only tax to support institutions needed to make and enforce laws that establish rights-specifying conventions.

It seems, then, that the state may legitimately tax people to support the basic institutions needed to make law. It is less clear whether people are obligated to pay taxes. The duty to fill in the gaps requires that we not undermine successful coordination on eligible conventions. Obviously, if coordination on a particular eligible convention is established by the enforcement of a law and the enforcement of this law is supported by taxation, then that coordination will collapse if too many people fail to pay taxes. Some people, however, might be able to evade taxes undetected, in a way that doesn’t harm the overall system of coordination. Such people would not violate their duty to fill in the gaps if they evaded taxes. The duty to fill in the gaps itself, then, cannot require that we *always* pay taxes. It would permit people to evade taxes when doing so is undetectable enough to avoid harming the stability of coordination. As I suggested in Chapter 3, however, it seems plausible that people have a duty of fairness to do their fair share in the creation and maintenance of gap-filling conventions. If we have such a duty, then evading legitimate taxation is not permissible, even when the particular act of evasion doesn’t harm the system of coordination.

*A Solution to a Lockean Problem*

A theory of political obligation that relies on the duty to fill in the gaps seems especially promising for Lockean natural rights theorists. Locke’s theory of political obligation is widely considered to have failed. As a natural rights theorist, Locke is committed to the view that person to play this role, enough people might be tempted to break some of the laws from time to time that coercive enforcement is required to get people to follow it. Under such conditions it is permissible to create and enforce laws, but taxation would be illegitimate.
governments must respect people’s natural rights. He also believes that the only way for this to happen, given that governments are coercive, is if they are established by consent. The combination of these two positions raises a now familiar problem for Locke’s view: governments in the real world simply do not have the consent of many of their citizens. If Locke is right that only consent can produce political obligation, then most people lack political obligations. In light of this fact, it seems natural to draw the conclusion, most prominently defended by Simmons, that a consistent application of Lockean views leads to philosophical anarchism. Moreover, it is tempting to think that this anarchism is the inevitable result of the view that people have extensive, stringent natural rights. It is natural to think that the only way to exercise political authority over someone who holds such rights is by their consent. If the view I’ve sketched above is right, however, then there is a non-consensual ground for political obligation that is rooted in people’s natural rights.

Lockeans should welcome this escape from philosophical anarchism. According to Lockean philosophical anarchism, the state is always morally optional; there are no states of nature that we are obligated to leave. This means that even in the worst states of nature, we may not impose a political solution. As a result, we are stuck waiting for people’s consent in precisely the situation where we are least likely to get it. On the view I’ve suggested, however, the only time it is not obligatory for us to establish political institutions is when we have managed to find non-coercive ways of establishing conventions settling what our rights are (or it’s reasonable to expect that we’re on the way to doing so). This gives us the result we would expect from a

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plausible theory of political obligation: the better people are at solving their own moral problems are, the less it is permissible to solve them coercively with political institutions.

**Non-Aristotelian Political Animals**

The view that is emerging is different than we might expect from a natural rights theory. It might be tempting to think of natural rights theory as an extremely—perhaps excessively—individualistic approach to political philosophy. On the view I have defended, however, what people owe one another depends in important ways on the conventions of particular communities. This view, I want to suggest, belongs as much in the tradition of Aristotle as of Locke.

**Political Animals**

There are two respects in which my view resembles that of Aristotle. The first is that it is a view on which human beings are political animals. I do not mean that I affirm Aristotle’s claims that “Man is by nature a political animal” (1253a1-3). As I have argued elsewhere, there is a way of affirming that human beings are political animals without making any claims about whether they are political by nature in Aristotle’s sense. One can affirm what I call the “normative political animal thesis” without affirming Aristotle’s natural political animal thesis. The normative political animal thesis makes the following claim:

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The Normative Political Animal Thesis: some part of the basic human normative situation (i.e., whatever basic goods, rights, duties, virtues, etc. determine how human beings ought to live) depends on politics.90

The central concept here is that of the “the basic human normative situation.” This refers to the basic set of considerations that determine how people ought to live. What fits in this set will be different in different ethical theories. According to consequentialism, the basic human normative situation includes a duty to promote the good along with facts about what things are good (since together these determine how we ought to live). For a Kantian, it will include the categorical imperative. According to Aristotle, it will include the human goods and virtues at which our nature is aimed. The basic human normative situation includes those things that determine how all human beings ought to live. The basic human normative situation, then, is not the same as an individual’s normative situation. On a hedonistic utilitarian view, for example, the basic human normative situation consists only of a duty to promote the good and the fact that the good is pleasure and an absence of pain. My individual normative situation, however, will also include further facts that determine how I ought to behave—facts, for instance, about what tends to bring pleasure and pain to me and the people I interact with. Such local facts are important, but they do not determine how all human beings ought to behave, so they are not part of the basic human normative situation.

The normative political animal thesis is the claim that some part of the basic human normative situation depends on politics. Aristotle himself, of course, defends such a view. According to Aristotle, we ought to live according to our natures. Thus the basic human normative situation includes facts about the goods and virtues at which human nature is directed.

90 “Non-Aristotelian Political Animals,” 296.
And, according to Aristotle, life in a political community is among these ends.\textsuperscript{91} This means that, on Aristotle’s view, we cannot give an account of the basic human normative situation (the goods and virtues at which human nature is directed) without mentioning politics. The natural rights theory I’ve defended has the same structure, but a different view about the basic human normative situation. On my view, the basic human normative situation includes abstract natural rights. These rights are part of the basic human normative situation because everyone has them and everyone must respect them. The precise content of these rights, however, gets spelled out in different ways by the conventions of different communities. So exactly what someone is entitled to in virtue of having abstract right of property, for instance, depends on the property conventions of a particular society. This is an affirmation of a form of the normative political animal thesis: our most basic rights partly depend for their content on the conventions at work in our particular political communities.

\textit{Natural and Political Justice}

The idea that human beings are political animals is not the only common ground between Aristotle’s political philosophy and the form of natural rights theory I have defended. They also share a common view about justice. To see this similarity, we must first consider two different models of the role of natural rights. The first is what we might call the “blueprint model” of the role of natural rights: our natural rights are supposed provide a precise and compete moral blueprint for how we ought to treat one another, and our laws must simply follow that blueprint. Locke sometimes seems to accept this model. For instance, he writes:

\textsuperscript{91} This characterization rests on a particular reading of Aristotle. For more on this, see “Non-Aristotelian Political Animals” 293-295.
It is certain there is such a Law [i.e., the natural law], and that too, as intelligible and plain to a rational Creature, and a Studier of that Law, as the positive Laws of Commonwealths, nay possibly plainer; As much as Reason is easier to be understood than the Phansies and intricate Contrivances of Men, following contrary and hidden interests put into Words; For so truly are a greater part of the Municipal Laws of Countries, which are only so far right, as they are founded on the Law of Nature, by which they are to be regulated and interpreted.\textsuperscript{92}

Locke claims here that the natural law is simple and straightforward and our legal systems are unnecessarily complicated. The idea is that our laws are meant to mimic the natural law, and our legal systems typically make things more complicated than they need to be. While this doesn’t require the blueprint view, it does seem to suggest it. Locke’s remarks here suggest that the natural law is easy to discover and apply and that our laws simply need to be made to align with the natural law.\textsuperscript{93}

The rights theory I have developed rests on the rejection of the blueprint view. While it is doubtless true that many legal systems contain laws that are little more than “Phansies and intricate Contrivances,” the idea that natural law is easy to understand and follow, without customs and laws in place to help spell it out, seems implausible. It seems likely that the truth is the opposite of what Locke asserts in the final sentence of the above quotation: if anything, it is local laws and customs that help us to interpret natural law, not vice versa. To return to our well-worn example, our neighbors’ natural rights may require us not to be a nuisance to them, but it is hard to imagine that there is some universal standard that specifies exactly what counts as nuisance. That seems like something that can and should be sorted out differently by different communities.

\textsuperscript{92} II.12. Italics in original.
\textsuperscript{93} I am not claiming that Locke accepts the blueprint view, only that this passage suggests it. Elsewhere he seems more sensitive to the difficulties of applying natural law.
The alternative to the blueprint model is what we might call the “constraint model.” On this model, our natural rights are abstract rights, and thus do not fully spell out all the details of what our social practices about rights must look like. But this does not mean they are impotent. As we saw when considered the implications of Mack's Locke-inspired set of abstract rights in Chapter 2, abstract natural rights can place substantial moral constraints on both individual conduct and social practices. Lockeans, then, do not need to abandon Locke’s idea that laws are “only so far right, as they are founded on the Law of Nature.” They simply must understand this claim differently than the blueprint model does. On the blueprint model, this claim is treated as a claim that every detail of our laws must mimic the natural law. On the constraint model, this claim means only that our laws must meet the abstract requirements of natural rights, whatever they are; it does not suppose that these requirements are complete.

The blueprint model makes the structure of natural rights theory quite similar to Aristotle’s. According to Aristotle, justice is partly natural and partly political:

Of political justice part is natural, part legal,—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent” (1134b18-20). This view is strikingly similar to the natural rights theory I have defended: there are some standards of justice that apply everywhere the same, while there are others that are determined by the rules of particular communities. Of course, Aristotle’s views about what natural standards of justice there are and about how these standards of justice are related to other normative concepts (rights and virtue, for instance) are different. The structure of the Aristotle’s view, however, is

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94 Ibid.
the same: there are basic standards of justice that every community must follow, but these
standards leave room for local variation. This is the structure a plausible natural rights theory
must have. A view on which justice is entirely natural—which is what the blueprint model of
natural rights theory insists—cannot meet the Conventionalist Challenge. A view on which
justice is entirely conventional (Hobbes’ or Hume’s view, for instance) would no longer be
natural rights theory. But a view on which justice is partly natural and partly conventional can
meet the Conventionalist Challenge and retain the attractions of natural rights theory. This is
precisely the sort of view I have developed here.

One upshot of the Aristotelian structure of the theory I have defended is that it
undermines complaints that natural rights theory rests on some kind of “atomic individualism.”
This might be a fair concern about some versions of the blueprint model of natural rights theory.
On my view, however, individuals do not enter into social life with a complete and perfectly
defined set of moral boundaries around them that others must respect. A rights-respecting
society, then, is not merely a set of contracts made by individuals who have no obligations to
cooperate. A rights-respecting society will require a complex, many-layered web of social and
legal conventions. What any two individuals in such a society owe one another will not be
deducible from their natural rights and the contracts they have made with one another. What they
owe one another will depend on the conventions that their particular communities have
developed to give precise form to their abstract rights. Respecting rights is a community project.
Wendell Berry says that a river is “a barrier and yet a connection.”96 I have argued that the same
is true of rights. Rights require us to leave one another space to live our own lives. Doing that,
however, requires us to work together.

BIBLIOGRAPHY


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