

## TAXATION AND THE MORAL AUTHORITY OF CONVENTIONS

BY FABIAN WENDT\*

*Abstract: Lockeans regard taxation as a—perhaps sometimes permissible—infringement of moral property entitlements. This essay discusses whether, or in what form, this charge is defensible. In doing so, it will explore the truth and the limits of the conventionalist reply of Murphy and Nagel to Lockean challenges to taxation. It argues that there is a moral rationale for property conventions that is independent of the question whether and how one can acquire natural, pre-conventional property rights in the state of nature, that this rationale sets a moral standard for how good property conventions are and whether they are justifiable at all, and that once property conventions are in place, people's moral property entitlements are at least partly determined by these conventions, sometimes even by unjustifiable ones that ought to be reformed. Because taxation can be a part of property conventions, taxation as such is not an infringement of moral property entitlements. But the essay will also argue that some taxation—excessive taxation—does infringe on moral property entitlements. This is because the moral rationale for property conventions sets some standards for what owners should be entitled to, and so excessive taxation will infringe upon moral entitlements that are partly not convention-based.*

KEY WORDS: taxation, conventions, natural rights, private property, authority

Lockeans regard taxation as a—perhaps sometimes permissible—infringement of moral property entitlements. In this essay, I would like to discuss whether, or in what form, this charge is defensible. In doing so, I will explore the truth and the limits of the conventionalist reply put forth by Liam Murphy and Thomas Nagel to Lockean challenges to taxation. I will argue that there is a moral rationale for property conventions that is independent of the question whether and how one can acquire natural, pre-conventional property rights in the state of nature. This rationale sets a moral standard for how good property conventions are and whether they are justifiable at all, and once property conventions are in place, people's moral property entitlements are at least partly determined by these conventions, sometimes even by unjustifiable ones that ought to be reformed.

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Because taxation can be a part of property conventions, taxation *per se* is neither theft nor an infringement of moral property entitlements. That is the truth in conventionalism. But I will also argue that *some* taxation—excessive taxation—does infringe upon moral property entitlements. This is because the moral rationale for property conventions sets some standards for what owners should be entitled to, and so excessive taxation will infringe upon moral entitlements that are partly not convention-based.

### I. TAXATION AS THEFT

The Lockean tradition, broadly conceived, views property rights as natural, not conventional. Even a Robinson Crusoe can, far away from other people and independently of legal (or other) conventions, acquire property entitlements in the canoes he (or she) builds. For John Locke, the crucial mechanism is the mixing of one's labor with external resources,<sup>1</sup> but there could be other mechanisms as well. According to Dan Moller, for example, investing labor and adding value to a resource are factors that ground property entitlements, but, depending on the circumstances, discovering a resource, creating it, or simply having prior control over it can do the job.<sup>2</sup>

Once one thinks about private property along these lines, taxation immediately looks problematic. If people have property entitlements antecedently to the state and social conventions, how can the state legitimately expropriate people by way of taxation? The most radical thinkers in this tradition have thus equated taxation with theft or robbery. Lysander Spooner writes:

Taxation without consent is as plainly robbery, when enforced against one man, as when enforced against millions; and it is not to be imagined that juries could be blind to so self-evident a principle. Taking a man's money without his consent, is also as much robbery, when it is done by millions of men, acting in concert, and calling themselves a government, as when it is done by a single individual, acting on his own responsibility, and calling himself a highwayman. Neither the numbers engaged in the act, nor the different characters they assume as a cover for the act, alter the nature of the act itself.<sup>3</sup>

Similarly, Murray Rothbard writes:

Taxation is theft, purely and simply even though it is theft on a grand and colossal scale which no acknowledged criminals could hope to

<sup>1</sup> John Locke, *Second Treatise of Government*, in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960 [1689]), §§ 27–30.

<sup>2</sup> Dan Moller, *Governing Least: A New England Libertarianism* (Oxford: Oxford University Press, 2019), 49–55.

<sup>3</sup> Lysander Spooner, *An Essay on the Trial by Jury* (Boston: John P. Jewett and Company, 1852), Appendix. See also Lysander Spooner, *No Treason: The Constitution of No Authority*, in *No Treason: The Constitution of No Authority and A Letter to Thomas F. Bayard*, ed. J. Martin (Larkspur: Pine Tree Press, 1966 [1867]), 17.

match. It is a compulsory seizure of the property of the State's inhabitants, or subjects.<sup>4</sup>

In one interpretation, the "taxation is theft"-charge amounts to the following:

*Property rights-based challenge to taxation (I)*

1. Theft is morally impermissible.
2. Taxation and theft are morally on a par.
3. Therefore, taxation is morally impermissible.

Now, while it is obviously true that both taxation and theft are coercive takings of money, there also are obvious differences between theft and taxation: taxation is legal and widely regarded as legitimate, theft is not; taxation is expected, institutionalized, and to some extent automated (for example, when a sales tax is automatically added to a purchase), while theft is unexpected and thus disruptive and in some instances traumatizing. Loren Lomasky has emphasized how outrage about taxation is phenomenologically very different from outrage about a thief: it is not directed at a particular incident and a particular person, but rather it is "some amorphous feeling that things are other than they ought to be."<sup>5</sup> For all those reasons it is thus not very plausible to assume that taxation and theft are morally on a par.

Not even all instances of theft are morally on a par. How bad an instance of theft is depends on the motive of the thief, on what is stolen, and on who it is stolen from. A thief who is in dire straits and steals an apple is arguably doing something less blameworthy than a greedy and malicious thief who steals the savings of a poor old man or woman. Similarly, not all forms of taxation are morally on a par. A tax scheme that discriminates against some minority group is certainly worse than a tax scheme that doesn't. And so on.

The first premise in the above argument is problematic, too. Theft is normally impermissible, of course, but there are circumstances in which it isn't. If stealing your fresh bottle of diet coke is the only way to save the world from being destroyed, then arguably stealing your diet coke is morally permissible. It may even be morally permissible to steal for self-interested reasons in severe emergency situations. In other words, theft as

<sup>4</sup> Murray Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998 [1982]), 162. Nozick compares taxation to forced labor. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 169. For a sympathetic review of Rothbard and Nozick on taxation, see Edward Feser, "Taxation, Forced Labor, and Theft," *The Independent Review* 2 (2000): 219–35.

<sup>5</sup> Loren Lomasky, "Libertarianism As If (the Other 99 Percent of) People Mattered," *Social Philosophy and Policy* 15 (1998): 350–71, at 363.

well as other infringements of property rights are merely pro tanto morally wrong.

A more convincing version of a property rights-based challenge will thus drop both premises. First, taxation and theft are not morally on a par. The truth behind the equation of taxation and theft may simply be that both are infringements of property rights, and maybe some proponents of the “taxation is theft” slogan in the end mean nothing more than that.<sup>6</sup> Second, infringements of property rights are merely pro tanto morally wrong. In the next section, I will spell out a more plausible version of a property rights-based challenge along these lines.

## II. TAXATION AS AN INFRINGEMENT OF MORAL PROPERTY ENTITLEMENTS

Michael Huemer states that taxation “is a non-voluntary transfer of property that initially belongs to the taxpayer [ ... ], [a]nd this makes taxation a violation of property rights, whatever the state does with the money subsequently.” He takes it that this does not preclude non-anarchists from trying to argue that some taxation is nevertheless overall justified “to prevent something *much* worse from happening.”<sup>7</sup> This is a more plausible property rights-based challenge to taxation. More formally:

### *Property rights-based challenge to taxation (II)*

1. Taxation is an infringement of moral property entitlements.
2. Infringements of moral property entitlements are pro tanto morally wrong.
3. Despite being pro tanto morally wrong, infringements of moral property entitlements are morally permissible under conditions  $\phi$ .
4. But conditions  $\phi$  are not given in the case of taxation (or at least *some* taxation).
5. Therefore, taxation (or at least *some* taxation) is morally impermissible.

<sup>6</sup> Michael Huemer, for example, defends the “taxation is theft” slogan, but says that equating taxation and theft does not all by itself show that all taxation is morally impermissible. To him, the point of the equation is rather to emphasize that the coercive taking of money by state-agents is as much in need of justification as the coercive taking of money by non-state agents (and that both are pro tanto wrong). This basically amounts to the property-rights-based challenge to taxation that I introduce in the next section. See Michael Huemer, “Is Taxation Theft?” <https://www.libertarianism.org/columns/is-taxation-theft> (2017).

<sup>7</sup> Michael Huemer, “Is Wealth Redistribution a Property Rights Violation?” in Jason Brennan, Bas van der Vossen, and David Schmidtz, eds., *Routledge Handbook of Libertarianism* (London: Routledge, 2017), 259–71, at 265.

Taxation is obviously not an infringement of *legal* property entitlements; what I legally own is what I own *after* taxation. Therefore, the property rights-based challenge to taxation has to be about *moral* property entitlements, not legal ones, which is made explicit in the first three premises.

Infringements of property entitlements are pro tanto morally wrong, but sometimes—rarely, perhaps—are morally permissible due to other, more important moral considerations. It is morally permissible to break into somebody's car if this is the only way to save a child from certain death. It may sometimes be morally permissible to break into a cabin in the mountains to find shelter from a severe thunderstorm. One can conveniently distinguish between “infringements” and “violations” of property entitlements: infringements are pro tanto morally wrong and may or may not be morally impermissible all things considered, while violations *are* morally impermissible all things considered. It should be noted, though, that even when infringements of property rights are permissible, they are still just that, infringements of rights, and so compensation is morally required.

Debates around natural property rights and taxation have typically centered on what the infringement-permitting conditions  $\phi$  are and whether they can vindicate at least some taxation. Libertarian anarchists have argued that even core functions of the state like arbitration and security could be privatized and be provided more justly and efficiently by private companies. Accordingly, they hold that *no* taxation amounts to a morally permissible infringement of property entitlements (even though, in principle, infringements of property may be permissible sometimes). Non-anarchists on the other hand will concede that at least *some* taxation—for example, taxation that is necessary to finance core state functions like the provision of law and order and other essential public goods—amounts to a morally permissible infringement of property entitlements but insist that taxation beyond that is an impermissible violation of property entitlements.

Of course, there is disagreement about what the underlying moral principle is (that is, what the conditions  $\phi$  are). I will just mention four candidates, without any claim to completeness. The underlying moral principle could be a fairness principle that obligates everyone to contribute to indispensable public goods that cannot adequately be provided without the state, and that on the flip side allows the state to coercively collect the contributions.<sup>8</sup> It could be a Samaritan principle that allows the state to do things that are necessary to save everyone from the perils of a Hobbesian state of nature, but would otherwise be impermissible.<sup>9</sup> It may be an “anti-paralysis postulate” that attenuates property rights such that they are permissibly infringed if this is necessary to preserve the point of having such

<sup>8</sup> George Klosko, *The Fairness Principle and Political Obligation* (Lanham: Rowman and Littlefield, 1992); Moller, *Governing Least*, 73–78.

<sup>9</sup> Christopher H. Wellman, “Toward a Liberal Theory of Political Obligation,” *Ethics* 111 (2001): 735–59.

rights in the first place.<sup>10</sup> Or it could be that a properly limited power to tax is conferred on the state as part of a hypothetical social contract among self-interested citizens.<sup>11</sup>

My discussion of this second version of a property rights-based challenge to taxation will center on the first premise, the premise that taxation is an infringement of moral property entitlements. If taxation is not an infringement of moral property entitlements at all, then it could neither be a permissible nor an impermissible infringement of moral property entitlements.<sup>12</sup>

### III. THE CONVENTIONALIST REPLY

The view that taxation is not an infringement of moral property entitlements at all has prominently been suggested by Liam Murphy and Thomas Nagel.<sup>13</sup> Here is one version of their argument:

There is no market without government and no government without taxes; and what type of market there is depends on laws and policy decisions that government must make. In the absence of a legal system supported by taxes, there couldn't be money, banks, corporations, stock exchanges, patents, or a modern market economy—none of the institutions that make possible the existence of almost all contemporary forms of income and wealth. It is therefore logically impossible that people should have any kind of entitlement to all their pretax income. All they can be entitled to is what they would be left with after taxes under a legitimate system, supported by legitimate taxation—and this

<sup>10</sup> Eric Mack, "Nozickian Arguments for the More-than-Minimal State," in R. Bader and J. Meadowcroft, eds., *The Cambridge Companion to Anarchy, State, and Utopia* (Cambridge: Cambridge University Press, 2011), 89–115. For my discussion of Mack's theory see Fabian Wendt, "Political Authority and the Minimal State," *Social Theory and Practice* 42 (2016): 97–122.

<sup>11</sup> Geoffrey Brennan and James M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Indianapolis, IN: Liberty Fund, 2000 [1980]), Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985). For an overview of classical liberalism and taxation see Charles Delmotte and Daniel Nientiedt, "Classical Liberalism: Market Supporting Institutions and Public Goods funded by Limited Taxation," in Robert F. von Brederode, ed., *Political Philosophy and Taxation: A History from the Enlightenment to the Present* (Singapore: Springer), 135–150.

<sup>12</sup> The debate about what conditions  $\phi$  are and whether they vindicate some forms of taxation would then become obsolete (or at least it would have to be reframed, as it is in the third version of a property rights-based challenge below).

<sup>13</sup> Liam Murphy and Thomas Nagel, *The Myth of Ownership* (Oxford: Oxford University Press, 2002). See also Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 1999) and Liam Murphy, "The Artificial Morality of Private Law: The Persistence of an Illusion," *University of Toronto Law Journal* 70 (2020): 453–488. For classic conventionalist takes on private property see Thomas Hobbes, *Leviathan*, ed. J. Gaskin (Oxford: Oxford University Press, 1996 [1651]), chaps. 13, 24, and David Hume, *A Treatise of Human Nature*, eds. D. Norton and M. Norton (Oxford: Oxford University Press, 2000 [1740]), book 3, part 2, sections 2–4.

shows that we cannot evaluate the legitimacy of taxes by reference to pretax income.<sup>14</sup>

Murphy and Nagel's main goal is to show that one cannot appeal to pre-tax moral property entitlements to evaluate the legitimacy of specific forms of taxation like, for example, progressive taxation (what they call "tax justice"). But if one cannot appeal to pre-tax moral property entitlements to discuss tax justice, one also cannot appeal to pre-tax moral property entitlements to challenge taxation per se.<sup>15</sup>

So, what is their argument? The above quote invites an interpretation according to which taxation is not a violation of moral property entitlements because the state may coercively collect a contribution for providing the framework for the market economy that makes all income and wealth possible in the first place. But on this interpretation, Murphy and Nagel would not challenge the first premise of our argument—the premise that taxation infringes on people's moral property entitlements. They would merely offer another take on what conditions  $\phi$  are and how they vindicate taxation as a permissible infringement of moral property entitlements.<sup>16</sup>

I do not think this is how one should interpret them, though. Elsewhere, they write:

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.... The conventional nature of property is both perfectly obvious and remarkably easy to forget. We are all born into an elaborately structured legal system governing the acquisition, exchange, and transmission of property rights, and ownership comes to seem the most natural thing in the world. But the modern economy in which we earn our salaries, own our homes, bank accounts, retirement savings, and personal possessions, and in which we can use our resources to consume or invest, would be impossible without the framework provided by government supported by taxes. This doesn't mean that taxes are beyond evaluation—only that the target of evaluation must be the system of property rights that they make possible. We cannot start by taking as given, and neither in need of justification nor subject to critical evaluation, some initial allocation of possessions—what people originally own, what is theirs, prior to government interference.<sup>17</sup>

<sup>14</sup> Murphy and Nagel, *The Myth of Ownership*, 32–33.

<sup>15</sup> Murphy and Nagel mention this more radical libertarian take briefly (*The Myth of Ownership*, 31).

<sup>16</sup> This is one of Moller's replies to Murphy and Nagel (*Governing Least*, 70–71).

<sup>17</sup> Murphy and Nagel, *The Myth of Ownership*, 8.

Here they are clearer about why it matters that the state provides the institutional framework for a market economy, in particular the legal system. It is not that citizens owe some contribution for it; it is that they cannot claim to have any property entitlements prior to it. And since taxation is a part of said institutional framework, they cannot claim to have pre-tax moral property entitlements.

The following is thus what I think is a stronger interpretation of Murphy and Nagel's conventionalist reply to property rights-based challenges to taxation:

*The conventionalist reply:*

1. Once property conventions are in place, moral property entitlements are at least partly determined by them.
2. Tax laws are among the property conventions that at least partly determine moral property entitlements.
3. Therefore, taxation is not an infringement of moral property entitlements.

The conclusion, it should be noted, is the negation of the first premise of our above second property rights-based challenge to taxation. So, if the conventionalist reply is convincing, it cuts the challenge off right from the start.

#### IV. SOME CLARIFICATIONS

Let me add a few clarificatory notes on the conventionalist reply. Murphy and Nagel are not perfectly clear on this (for example when they say that the "conventional nature of property is both perfectly obvious and remarkably easy to forget"), but to be interesting, the first premise of their conventionalist reply must be about *moral* property entitlements, not about legal ones. It is trivially true that *legal* property entitlements are determined by legal conventions, and if we read the first premise along those lines, then this leads to the equally trivial conclusion that taxation is not an infringement of legal property entitlements. What we need for a conventionalist reply to the property rights-based challenge to taxation, though, is the conclusion that taxation is not an infringement of *moral* property entitlements. So, the first premise must be understood as saying that people's *moral* property entitlements are determined by property conventions.

When we think of property conventions, we usually think of *legal* conventions. Strictly speaking, though, the relevant conventions need not be legal ones. Legal conventions are just one type of convention, and property-determining conventions can also take the form of more informal social norms or customs. I will here work with what I hope to be a minimal understanding of what conventions are in general and what legal

conventions are in particular. I take conventions to be rule-governed regulations of individual behavior, and legal norms (laws) to be conventions that are more formally enacted and enforced by appropriate political institutions. These should be understood at best as necessary conditions, but certainly not as sufficient conditions, and so I hope that what I say is compatible with more elaborate theories of conventions and the law. In our societies, property conventions are enshrined in property law, but also in contract law and tort law and other areas of law insofar as they concern property.<sup>18</sup>

The first premise in the conventionalist reply as I presented it, is silent on whether people can acquire natural property entitlements in the absence of property conventions. Murphy and Nagel and other conventionalists will deny that they can, of course, but my argument in this essay will neither rely on the affirmation nor the rejection of the possibility of natural property entitlements in the absence of property conventions. The first premise is also silent on whether conventions *fully* determine moral property entitlements. It says that once property conventions are in place, they “at least partly” determine moral property entitlements. To anticipate, my argument will rely on the idea that there are property entitlements within property conventions that have a nonconventional basis. But this nonconventional basis does not consist in entitlements that were acquired in a state of nature.

Let us move on to the second premise in the conventionalist reply, which says that tax laws are among the conventions that (at least partly) determine people’s moral property entitlements. Once the first premise is accepted, the second premise is relatively straightforward, as far as I can see. Tax laws are a part of property conventions as we know them. When the state raises the income or sales tax, then you will own less money than you otherwise would, for example, and a carbon emissions tax affects what one may do with one’s factory without incurring an additional tax burden. If this is so, and if legal conventions regarding property in general have the power to determine people’s moral property entitlements, then it seems hard to deny that tax laws have that power, too.

To defend the conventionalist reply to the property rights-based challenge to taxation (in its second form), we will have to defend the idea that property conventions have the moral authority to determine not only people’s legal or conventional property entitlements, but also their *moral* property entitlements. This is what I turn to now.

## V. THE MORAL AUTHORITY OF PROPERTY CONVENTIONS

Why do property conventions have the moral authority to determine not only people’s legal or conventional property entitlements, but also their

<sup>18</sup> For an overview of U.S. property law, see Thomas W. Merrill and Henry E. Smith, *Property* (Oxford: Oxford University Press, 2010).

*moral* property entitlements? The answer, in a nutshell, is that property conventions have a moral rationale; they are something good and useful for us. If conventionalists about private property were to deny even *that*, they would arguably have a hard time explaining even basic moral principles like the wrongness of stealing. In any case, the conventionalist reply as I presented it, does not deny that property conventions have a moral rationale; we need to appeal to some moral rationale for property conventions to make sense of the claim that property conventions can determine people's moral property entitlements, and thus to make sense of the conventionalist reply.

One reason why property conventions are useful is that natural, pre-conventional property entitlements are too vague and indeterminate to be able to adjudicate all conflicts that may arise.<sup>19</sup> Locke notes this, for example, when he cites the lack of established and well-defined law as one of the reasons to leave the state of nature: "There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them."<sup>20</sup>

Pre-conventional property entitlements can be indeterminate in three respects: First, their *object*—what is owned—may be indeterminate. For example, in the absence of relevant conventions, there is no moral truth about exactly how deep under the earth a landowner can claim to have property entitlements in, say, recently discovered oil. Second, the *content* of property entitlements—what one may or may not do with what one owns—may be indeterminate. Without conventions there is no moral truth about exactly how much air pollution from a factory is tolerable, for example. Third, the relevant *processes* may be indeterminate, in particular how one may acquire, transfer, waive, or enforce one's property entitlements, and how one can make redress claims after one's property entitlements were violated. Without conventions it is up in the air by what processes one could acquire ownership rights in things like, for example, exchange-traded funds, and without conventions it is arguably morally indeterminate at what time and under what circumstances redress claims from historic injustices have faded.

<sup>19</sup> For discussion see A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 269–71, Bas van der Vossen, "What Counts as Original Appropriation?" *Politics, Philosophy & Economics* 8 (2009): 355–73, Eric Mack, "The Natural Right of Property," *Social Philosophy and Policy* 27 (2010): 53–78, Eric Mack, "Elbow Room for Rights," in David Sobel, Peter Vallentyne, and Steven Wall, eds., *Oxford Studies in Political Philosophy Volume 1* (Oxford: Oxford University Press, 2015), 194–221, Anna Stilz, "Property Rights: Natural or Conventional," in Brennan, van der Vossen, and Schmidt, *Handbook of Libertarianism*, 244–58, Huemer, "Is Wealth Redistribution a Property Rights Violation?" Ben Bryan, "The Conventionalist Challenge to Natural Rights Theory," *Social Theory and Practice* 43 (2017): 569–87, Billy Christmas, "Answering the Conventionalist Challenge to Natural Rights Theory," *Res Publica* 27 (2021): 329–345, Billy Christmas, *Property and Justice: A Liberal Theory of Natural Rights* (London: Routledge, 2021), chap. 7.

<sup>20</sup> Locke, *Second Treatise of Government*, §124.

But all of this presupposes that it is a good idea to have private property in the first place. Obviously, I cannot provide a full defense of private property here, but some sketchy remarks should suffice for our context. A first argument is that well-enforced and well-defined private property conventions are necessary for market economies to thrive and produce the wealth that allows people to live better lives.<sup>21</sup> A second argument is that private property conventions are needed if we want people to be able to live independent, self-directed, autonomous lives.<sup>22</sup> Both, I take it, are fairly familiar and widely accepted arguments in support of the practice of private property,<sup>23</sup> and it is important to note that they are independent from Lockean stories about how one can acquire natural, nonconventional moral property rights from the state of nature.

As suggested above, pointing at this (twofold) rationale behind the practice of private property is to explain why property conventions have the moral authority to determine moral property entitlements, and hence why the first premise of the conventionalist reply is true. Some will deem this naïve, though: Merely pointing at the utility (or otherwise appropriateness) of some institution certainly is not enough to show that people have a moral duty to respect or support or comply with it.<sup>24</sup> To claim otherwise would mean that we would all be morally conscripted and duty bound regarding countless useful organizations and institutions, which is just implausible and incompatible with a commitment to liberty.

In reply, let me first notice that (almost) everyone in fact seems to accept that property conventions have the authority to determine moral entitlements. (Almost) nobody thinks that it is generally just fine to steal what

<sup>21</sup> For empirical data see the Index of Economic Freedom (<https://www.heritage.org/index/>). The classic treatment of property that appeals to the utility of property conventions is Hume, *A Treatise of Human Nature*, book 3, part 2, sections 2–4.

<sup>22</sup> See, for example, Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987), Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), Mack, "The Natural Right of Property," David Owens, "Property and Authority," *Journal of Political Philosophy* 27 (2019): 271–93, Fabian Wendt, "The Sufficiency Proviso," in Brennan, van der Vossen, and Schmidtz, *Handbook of Libertarianism*, 169–83, Fabian Wendt, "The Project Pursuit Argument for Self-Ownership and Private Property," *Social Theory and Practice* 48, no. 3 (2022): 583–605. One might argue further that recognizing property is part of human nature, as suggested, in different ways, in Chris Bertram, "Property in the Moral Life of Human Beings," *Social Philosophy and Policy* 30 (2013): 404–24, and Bart Wilson, *The Property Species: Mine, Yours, and the Human Mind* (New York: Oxford University Press, 2020).

<sup>23</sup> For overviews of philosophical justifications of private property, see Lawrence Becker, *Property Rights* (London: Routledge and Kegan Paul, 1977), James O. Grunebaum, *Private Ownership* (London: Routledge and Kegan Paul, 1987), Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988).

<sup>24</sup> See Bryan, "The Conventionalist Challenge to Natural Rights Theory," 582–83, and Christmas, "Answering the Conventionalist Challenge to Natural Rights Theory," for a reply. Simmons has famously argued that the mere fact that some just or useful or otherwise appropriate institution "applies to us" (like the "Institution for the Advancement of Philosophers" might apply to us) is not enough to show that we are bound to comply with or support that institution, as long as we have not voluntarily submitted to it. See A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), 147–56.

others legally own. This does not mean that property entitlements are regarded as maximally stringent and as trumps over all other moral considerations, of course, but this is also not what I am claiming here. For the purposes of this essay, I think it would therefore be good enough to just make the assumption that people are right about the moral authority of property conventions, given that there also is a plausible rationale for having property conventions.

Yet it is true that simply pointing at the usefulness (or otherwise appropriateness) of an institution is all by itself not enough to establish that people have a moral duty to support or respect or comply with it and with the (conventional) entitlements it generates. The missing link, I think, is that people have a *natural moral right* to acquire property in line with property conventions,<sup>25</sup> and the reason why people have this right is, again, that private property conventions enable people to live their lives independently and autonomously. Natural moral rights protect basic human interests, and there is a basic human interest in living under private property conventions. More specifically, I argue elsewhere that both a natural right to acquire property in accordance with property conventions and a sufficientarian distributional standard for property conventions can be grounded in the idea that persons should be able to live as project pursuers.<sup>26</sup>

But this natural right to acquire property in line with property conventions may not be the only mechanism that explains why property conventions can give rise to moral duties to comply with them and the entitlements they generate; another is that property conventions, as long as they are overall useful, generate *legitimate expectations* to be honored, and people's legitimate expectations have a (pro tanto) moral force that translates into moral entitlements and correlating moral duties.<sup>27</sup>

## VI. UNJUSTIFIABLE PROPERTY CONVENTIONS

I conclude that taxation is not *as such* an infringement of moral property entitlements, and that the conventionalist reply is so far successful. Taxation is part of property conventions, and so it codetermines what people's moral property entitlements are in the first place. But at this point some may say that this is fine and makes sense as long as the property conventions are fine

<sup>25</sup> This is argued in Mack, "The Natural Right of Property," and I develop my own take in Wendt, "The Project Pursuit Argument for Self-Ownership and Private Property." Invoking such a right can also help overcome the problem of unilateral duty-imposition. See Bas van der Vossen, "Imposing Duties and Original Appropriation," *Journal of Political Philosophy* 23 (2015): 64–85.

<sup>26</sup> Wendt, "The Sufficiency Proviso"; Wendt, "The Project Pursuit Argument for Self-Ownership and Private Property."

<sup>27</sup> For a recent discussion of legitimate expectations see Alexander Brown, "A Theory of Legitimate Expectations," *Journal of Political Philosophy* 25 (2017): 435–60. Another possibility would be to appeal to moral duty to respect others as agents. See Laura Valentini, "Respect for Persons and the Moral Force of Socially Constructed Norms," *Noûs* 55, no. 2 (2021).

and make sense. But not all property conventions are equally good, of course, and some property conventions may be so bad or unjust or otherwise problematic that they just cannot be said to determine people's moral property entitlements. We should thus turn our focus to the following third version of a property rights-based challenge to taxation:

*Property rights-based challenge to taxation (III)*

1. *Some* taxation infringes on moral property entitlements.
2. Infringements of moral property entitlements are pro tanto morally wrong.
3. Despite being pro tanto morally wrong, infringements of moral property entitlements are morally permissible under conditions  $\phi$ .
4. But conditions  $\phi$  are not given in the case of taxation that infringes on people's moral property entitlements.
5. Therefore, taxation that infringes on people's moral property entitlements is morally impermissible.

This is a more moderate property rights-based challenge to taxation than the ones we dealt with so far, since it is not a property rights-based challenge to taxation *as such*, but to *some* taxation. To evaluate it, we will again focus on the first premise, which now claims that *some* taxation infringes on people's moral property entitlements.

A plausible candidate for property conventions (including tax laws) that infringe on moral property entitlements would be *morally unjustifiable* property conventions. What we will have to ask, therefore, is whether the conventionalist reply remains defensible even regarding unjustifiable property conventions: Do even unjustifiable property conventions have the moral authority to determine moral property entitlements? If they do, then the first premise of the property rights-based challenge to taxation in its current form could be rejected: we would still not have found an instance where taxation (and property conventions more generally) infringe on moral property entitlements.

To start, the above sketch of the rationale behind the practice of private property can help develop criteria for the relative *quality* of different property conventions. If market economies are to thrive, and if people are to have the space to live as autonomous project-pursuers, then people need to have *reliable control* over what they own. For that reason, a central virtue of property conventions arguably is stability.<sup>28</sup> This, in turn, explains why property rights should be well-defined and transparent, why the system of property conventions has to be coherent, and why property rights must be properly enforced, and violations of property rights rectified

<sup>28</sup> Hume agrees that "possession must be stable" (*A Treatise of Human Nature*, 322).

accordingly. Additionally, the relative quality of property conventions depends on their congruence with broader moral principles; property conventions may not exclude some groups of people, for example, and the burdens and benefits associated with property conventions must be distributed fairly. Finally, if there are natural, nonconventional standards for property entitlements, property conventions obviously must align with them.

For our purposes it does not matter too much what exactly the criteria for the relative quality of property conventions are. What matters is that there *are* such criteria; these criteria will then also determine whether a particular system of property conventions is morally justifiable at all. The relative quality of property conventions is a gradual matter, while moral justifiability, as I would like to understand it, is a threshold; conventions above the threshold are morally acceptable, conventions below the threshold are not. When they are not, then there is a moral imperative to reform the conventions, addressed at those who are in a position of responsibility, usually the relevant politicians. Even when conventions are above the threshold, there may still be good reasons to reform them, but these reasons for reform would not amount to a moral imperative. Whether property conventions meet the threshold of justifiability depends not only on their intrinsic quality, but also on what feasible alternatives there are. The same property conventions may be morally justifiable when there are no better alternatives available, but not justifiable when there are.<sup>29</sup>

To understand the status of people's moral property entitlements under unjustifiable property conventions, it may help to first think about their entitlements when conventions are simply absent rather than unjustifiable. For example, there are, I think, no conventions about runners' entitlements to the sweat they leave on the street, probably because there is no practical pressure to have such conventions. In the absence of such conventions, it just seems that people's entitlements to their sweat are indeterminate. Not completely indeterminate, to be sure; it is quite clear that somebody unrelated to me who never encounters my sweat is not the exclusive owner of it. But within the range of possible justifiable conventions that could regulate property entitlements to sweat, it is indeterminate which one is to prevail. So in the absence of conventions, the relevant moral entitlements simply seem to remain indeterminate.

Is the situation different when there *are* conventions in place, albeit unjustifiable ones? If property conventions are unjustifiable, are people's

<sup>29</sup> One may ask why I assume that there is such a threshold—why not just stick with the assumption that there is a gradual scale of better and worse property conventions, some feasible, some not? The simple answer is that I assume that some people bear responsibility for property conventions and may have moral duties to reform them. The concept of a moral duty is binary—either you have one, or you don't—so there must be some threshold at which it comes into existence. Of course, a duty may be more or less stringent, and acting upon it may come with higher and lower degrees of urgency. But this does not change the fact that one either has it or not.

moral property entitlements indeterminate within the range of possible justifiable conventional specifications? I think it depends on whether the unjustifiable conventions still count as overall useful, as doing more good than harm.<sup>30</sup> When they do, then the unjustifiable conventions still determine people's moral entitlements, even though there is a moral imperative for them to be reformed.<sup>31</sup> When they do not, then people's moral entitlements remain indeterminate, just as they are in the sweat case.

One might think that if a convention is overall useful, then it is also justifiable. But this is not so, at least on my stipulative characterization of justifiability: A convention may be unjustifiable because it is so much worse than other feasible conventions (and accordingly people in responsibility will have a duty to reform the convention), and yet it may still be overall doing more good than harm.

Since, as explained above, property entitlements should be well defined and settled, usually even unjustifiable property conventions will have to count as useful. If that is the case, then these conventions still determine people's moral property entitlements, even though there is a moral imperative to reform them. It seems, then, that even unjustifiable property conventions do not infringe upon pre-conventional moral property entitlements. Under unjustifiable conventions, people's moral property entitlements are either indeterminate or, more likely, they are still determined by the unjustifiable conventions.

Some may find the claim that even unjustifiable property conventions can determine people's moral property entitlements implausible or even scandalously conservative. But I think that it captures what most people are inclined to think; namely that it is (pro tanto) morally wrong to steal, even when the current property conventions are in many respects bad and unjust and ought to be reformed. The reason why unjustifiable property conventions can still have this moral authority is that they are still overall useful; thus, the mechanism that explains why the usefulness (or otherwise appropriateness) of property conventions can give rise to moral duties to comply with them and the entitlements these duties generate is still at play—

<sup>30</sup> One may also suggest that unjustifiable property conventions still determine moral property entitlements when having them is still better than having no conventions on the matter at all. A problem with this idea is that there may be different, equally reasonable ways to bundle conventions or laws into packages, and depending on how one does it there will be different answers as to whether or not it is better than having no laws at all in the requisite realm. See Andrew Lister, "Public Justification and the Limits of State Action," *Politics, Philosophy and Economics* 9 (2010): 151–76, at 156–59. Gaus suggests that only "justificatory dependent" issues should be dealt with at once. See Gerald Gaus, *The Order of Public Reason* (Cambridge: Cambridge University Press, 2011), 495–97, 521–22.

<sup>31</sup> Even philosophical anarchists say that one may have conclusive moral reasons to comply with unjustifiable law. See Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), chap. 14; Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), 263–67; also Simmons, *Moral Principles and Political Obligations*, 193. Admittedly, this is not quite the same as saying that even unjustifiable laws can determine moral entitlements, but it seems only a short step away.

whether the mechanism is a natural right to acquire property in line with property conventions, the legitimate expectations that property conventions generate, or both.

But it should also be emphasized that the moral entitlements that are generated by unjustifiable property conventions are probably less stringent than the ones generated by justifiable property conventions. Accordingly, the claim that unjustifiable property conventions usually still determine people's moral property entitlements is compatible with the claim that civil or even uncivil disobedience with regard to private property is sometimes morally permissible under unjustifiable property conventions, at least if the moral permissibility of disobedience is not supposed to imply that no moral entitlements are (permissibly) infringed on the way.<sup>32</sup> It is also compatible with denying that those who hold property under unjustifiable conventions deserve redress when the unjustifiable conventions are reformed and made justifiable. Finally, to be clear, of course there are unjustifiable property conventions that *cannot* count as useful. Property conventions that allow for involuntary slavery and thus sanction violations of self-ownership are an obvious example.

## VII. CONFISCATION AND TAXATION

In the previous section I discussed the idea that morally unjustifiable property conventions might lack the moral authority to determine people's moral property entitlements. I argued that even unjustifiable property conventions usually do have the moral authority to determine moral property entitlements, and so the conventionalist reply still stands with regard to the property rights-based challenge to taxation (in its third version). In this section, I will discuss another attempt to show that at least *some* taxation infringes upon moral property entitlements, and thus to defend the property rights-based challenge to taxation (in its third version) against the conventionalist reply. The idea is to compare taxation to confiscation. To evaluate it, we will look at confiscation first.

The most plausible instance of a confiscation that infringes on moral property entitlements would be a confiscation of something to which the owner has natural, nonconventional property entitlements. Let's assume that Robinson Crusoe had natural, pre-conventional property rights to his canoe, acquired during his lonely days on the island; now he lives in a society with property conventions and has been expropriated, and the canoe has been given to someone else. Are the current conventions infringing on his moral property entitlements? Are his current moral property entitlements to be identified with his pre-conventional entitlements? It

<sup>32</sup> What I say also does not presuppose that there is a (pro tanto) moral duty to obey the law just because it is the law. All it presupposes is that there is a (pro tanto) moral duty to respect people's moral entitlements, and these moral entitlements happen to be at least partly determined by property conventions, which are more often than not legal conventions.

seems to me that it would be somewhat odd to say that he still somehow “owns” the canoe from a moral perspective. After all, he has been *expropriated*, and there even is a new *owner* of the canoe.<sup>33</sup> Once legal conventions are in place, talking of moral ownership seems to presuppose legal ownership, at least when it comes to external resources.<sup>34</sup> On the other hand, certainly the *act of expropriation* infringed upon his moral property entitlements. If it was unjustifiable, then Robinson also retains a *better moral claim* to the canoe, and accordingly the canoe should be returned to him and thereby made his legal and moral property again. Even though both “being a moral owner of X” and “having a (better) moral claim to X” express entitlements to X, distinguishing between the two seems like good linguistic hygiene (although not too much depends on it). The former presupposes legal ownership, the latter does not.

What should we say about the new legal owner? She obviously has legal property entitlements to the canoe; whether she also has moral property entitlements to the canoe will depend on whether the relevant property conventions are still overall useful. If they are, then we would have a situation where the current owner’s legal property entitlements are still reflected in correlating moral property entitlements, even if the confiscation was unjustified and Robinson retains a better moral claim to the canoe (and it ought to be returned to him). Again, this may sound provocatively conservative, but I don’t think it is. I think it rather captures quite accurately that we will usually want a wrongful expropriation to be reversed within the legal system, in accordance with the relevant procedures. As long as these procedures are not initiated and the property is not returned, we will rightly begrudge the current situation, but we will not want to imply that current legal entitlements are morally completely void, such that it would be morally completely unproblematic to bypass legal procedures and just take the canoe. And even if we think it is all things considered morally permissible for Robinson (or anyone?) to just take the canoe, we would still want to say that this is because the infringement of pro tanto moral property entitlements (generated by useful conventions) was outweighed in this case.

But what is the relevance of Robinson cases? It is sometimes suggested that property conventions should track what people are entitled to on a natural, pre-conventional basis. As Nozick famously explains, a distribution of holdings is just when everybody is entitled to what one has, and one is entitled to what one has if one acquired it by just procedures from the state of nature (à la Robinson) or via a just transfer from somebody who was

<sup>33</sup> See also Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 343.

<sup>34</sup> Things are different when it comes to self-ownership. Slaves may be legally owned by slaveholders, but morally they remain self-owners. One cannot morally own persons against their will, and so self-owners also cannot lose their moral self-ownership rights against their will.

entitled to it.<sup>35</sup> What does this tell us about today's property entitlements? Almost nothing that is legally owned today has a clean record of title transfers that goes back to an equally clean appropriation from the state of nature. To the contrary, the history of property is a history full of illegitimate expropriations and aggressions.<sup>36</sup> Almost all property we are dealing with has been shaped by legal conventions and customs for many, many years, and we hardly know what to look for when we are told that these conventions should track pre-conventional property entitlements. I don't think this means that all current property titles are morally void; it rather shows that Nozick's entitlement theory cannot be right (or at least that it cannot be the full story).<sup>37</sup> There is a case for property conventions—which I sketched above—that is independent from theories about how people can acquire pre-conventional moral property entitlements from the state of nature. There may still be some convention-free islands where nonconventional moral property rights have been generated by isolated Robinson Crusoes. But obviously the relevance of such cases is fairly limited.<sup>38</sup>

Yet pointing this out is not enough to save the conventionalist reply. After all, one may not need pure Robinson cases to identify nonconventional moral property entitlements. If I legally own the rocks in my garden, then I will also own the statue I build with them, not only because legal conventions allow me to build statues from my rocks, but also independently from the legal conventions, simply because I should have control over what I own and thus be at liberty to transform my rocks into a statue. This is a moral principle that is independent of what specific legal conventions say. A confiscation of the statue would thus infringe on *partly* nonconventional moral property entitlements that I have with regard to the statue. The entitlements would be "partly" nonconventional, in this instance, since I wouldn't have moral property entitlements to the statue if I had not owned the rocks in the first place based on property conventions.

To agree with this point, one need not assume that it is possible to acquire fully natural property rights in a state of nature. Nothing here depends on

<sup>35</sup> Robert Nozick, *Anarchy, State, and Utopia*, 150–53. References to natural property entitlements held in a state of nature are not only made by Nozick, of course. To give another example, Epstein refers to an "original set of entitlements" relative to which the state is to be a Pareto-superior move. See Richard A. Epstein, "Taxation in a Lockean World," *Social Philosophy and Policy* 4 (1986): 49–74, at 53.

<sup>36</sup> For a study on the "prehistory of private property" see Karl Widerquist and Grant S. McCall, *The Prehistory of Private Property: Implications for Modern Political Theory* (Edinburgh: Edinburgh University Press, 2021).

<sup>37</sup> The virtue of stability—which I suggested above is the core virtue for property conventions—explains why property conventions need not make sure that all property titles have a clean record of title transfers that originate in some equally clean acquisition from the state of nature. As long as there is nobody with a *better* moral claim to a particular property title, property titles should be respected. For elaboration see Bas van der Vossen and Fabian Wendt, "Property Rights in the Face of Historic Injustice," unpublished manuscript.

<sup>38</sup> Cases of expropriation of Native Americans are *not* such cases, of course. They are rather cases where moral property entitlements grounded at least partly in prior property conventions are violated.

the existence of Robinson cases. To endorse the idea that some property entitlements are partly nonconventional (that is, natural), one merely needs to accept that there is a moral rationale for the practice of private property. If there is such a rationale, then property conventions cannot take any random form—they are to be in line with what justifies property conventions in the first place. As mentioned earlier, a central virtue of property conventions is to give owners stable control over what they own. This is why it seems so plausible that if I own the rocks, I will also own the statue I create with them. More generally, justifiable property conventions must give owners *some* (not necessarily maximal) control rights, rights of exclusion, and rights of transfer with regard to what is owned. In that sense, core entitlements regarding what one owns are not grounded in conventions, but rather in the moral rationale for having property conventions in the first place.

Let us now apply this to taxation.<sup>39</sup> Taxation can infringe upon partly nonconventional moral property entitlements, just like the confiscation of a statue can. This is because, as explained, justifiable practices of private property must grant owners some control over what they own. When somebody is taxed, the act of taxation can interfere with the taxee's partly nonconventional entitlements to her money. To be sure, one does not have partly nonconventional entitlements to one's full pre-tax income, if there are justifiable tax schemes. But once taxation transgresses what is justifiable, it infringes upon partly nonconventional property entitlements of the taxee.

It is indeterminate how much of her money the taxee would be allowed to keep in the absence of the excessive taxation, though. A property rights-based challenge to taxation cannot presuppose that taxation is unjustifiable as such, and so it cannot presuppose that the taxee would keep *all* of the money that is taxed away by unjustifiably excessive taxation. What she would keep is rather indeterminate between what all the different justifiable tax proposals that are feasible would leave her. This is different from the confiscation of statues; we can assume that we would simply own the statue in the absence of the confiscation.<sup>40</sup> Nevertheless, once taxation moves outside the set of justifiable tax schemes, it starts to infringe upon partly nonconventional property entitlements.

To say that taxation sometimes infringes on partly nonconventional moral property entitlements is consistent with my above claim that even unjustifiable property conventions usually determine moral property entitlements. Compare confiscation: The *act of expropriation* infringes on moral property entitlements, but once the original owner is expropriated, she can no longer be said to be the moral owner of the statue or whatever was confiscated—talk of moral ownership in external resources presupposes

<sup>39</sup> For detailed analysis the parallels and differences between confiscation and taxation see Epstein, *Takings*, chap. 18.

<sup>40</sup> For somewhat similar reasons, Moller argues that historic injustices that concern specific tangible property is to be treated differently from historic injustices that concern intangible property (*Governing Least*, 225-26).

legal ownership. At the same time, in the case of unjustifiable confiscation the original owner still has a *better moral claim* to the statue, and accordingly the statue ought to be returned to her and thereby made her legal and moral property again. But the new owner will now usually have moral property entitlements to the statue, simply because the (overall useful) current conventions confer property entitlements to him. The same happens in the case of taxation that infringes on partly nonconventional moral property entitlements: The *act of taxation* infringes upon the taxee's moral property entitlements, but afterward the taxee no longer has moral property entitlements in the money that was taxed away—talk of moral ownership in external resources presupposes legal ownership. Rather, in the case of unjustifiable taxation, she still has a better moral claim to the money that was taxed away, and it ought to be returned to her and made her legal and moral property again.

Some may wonder whether one needs to invoke the idea of partly natural entitlements to make my point. Confiscations can also infringe on moral property entitlements that are simply grounded in prior property conventions alone, without any nonconventional criteria being invoked. As we have seen, if one legally owns something, then one also has moral entitlements to what one owns (at least if the property conventions are to count as overall useful). Confiscations infringe on these moral entitlements. This does not mean that eminent domain cannot be justified, as long as proper compensation is provided, but it does mean that it infringes upon (pro tanto) moral property entitlements that are grounded in prior property conventions alone.

I think this is true about confiscation in general, but it doesn't seem to hold for taxation. A recipient of income cannot claim to have convention-based moral property entitlements to anything beyond what is left after taxation. Neither can the payer of the income claim to have convention-based powers to transfer the money at any other than the current rate of taxation. The difference is that confiscations are extraordinary, one-time infringements of otherwise stable property entitlements, while taxation is a rule-based practice that applies to all income transfers (or whatever is taxed). Without the idea of partly nonconventional property entitlements, taxation thus could not be said to infringe upon moral property entitlements. The analogy with confiscation does not carry that far.

## VIII. CONCLUSION

I distinguished three versions of a property rights-based challenge to taxation. One equates taxation and theft; one regards taxation as such as an infringement of moral property entitlements; one regards *some* taxation as an infringement of moral property entitlements. I argued that only the third version is convincing.

Some taxation—excessive taxation—infringes on partly nonconventional moral property entitlements. These partly nonconventional property entitlements are grounded in the moral rationale for having a practice of private property in the first place.

The conventionalist reply to property rights-based challenges to taxation is thus not fully successful, even though it *is* successful with regard to the more ambitious versions of it. But the view I laid out still maintains some moderately conventionalist spirit: I argued that there is a moral rationale for property conventions that is independent from the question whether and how one can acquire natural, pre-conventional property rights in the state of nature, that this rationale sets a moral standard for how good property conventions are and whether they are justifiable at all, and that once property conventions are in place, people's moral property entitlements are at least partly determined by these conventions—sometimes even by unjustifiable ones that ought to be reformed.

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