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The Entrepreneurial Theory of Ownership

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ABBREVIATIONS AND DEFINITIONS OF CORE SPECIAL TERMS

ETO – The Entrepreneurial Theory of Ownership developed in this work. This is a theory that justifies the right of private ownership by grounding it in acts of entrepreneurial discovery.

PDIO – Private Duty Imposition Objection, an objection against historical entitlements theories of ownership which stresses the fact that such theories allow private persons to unilaterally impose duties on one another

RDO – Right Displacement Objection, an objection against historical entitlements theories of ownership which stresses the fact that such theories allow private persons to unilaterally displace each other's rights.

Deep Private Ownership – a normative idea according to which the way in which resources are to be used should be decided unilaterally by an individual owner of each resource.

Deep Public Ownership – a normative idea according to which the way in which resources are to be used should be decided by a procedure that takes equal account of the needs of all members of the respective community**.**

Entitlement theories – a family of views that grounds ownership over specific things in particular historical events: appropriations, transfers, acts of rectification.

Brute objects – all objects in the universe that are not resources.

Resources – objects which are perceived as useful by at least one person.

Use-judgment – a mental act which puts a brute object on the one hand and a human end on the other hand into a certain relationship: the object can be means to that end

Owner's Liberty – the liberty of the owner to use her owned resource, an aspect of the right of ownership

Owner's Claim-Right – the claim-right of the owner to demand that others do not use her owned resource, an aspect of the right of ownership

Owner's Power – the power of the owner to transfer her owned resource to others, an aspect of the right of ownership

Owner's Immunity – the immunity of the owner from expropriation, an aspect of the right of ownership

CHAPTER I. INTRODUCTION

1.1. The statement of the problem and the method employed

In *Anarchy, State and Utopia* (1974, 153–182) Robert Nozick discussed the potential of so-called "theories of historical entitlements" (henceforth, entitlement theories) which he presented as an alternative to traditional approaches to distributive justice. Typically, theories of distributive justice are primarily concerned with a certain pattern of distribution of resources that they aim to achieve and sustain. Property rights are evaluated and justified on the basis of the impact – positive or negative – they have on this pattern.[1]

Entitlement theories employ a different approach. They claim that certain historical events – like acts of just appropriation or just transfer – can create morally valuable relationships between individuals and specific objects. In virtue of these relationships, individuals acquire a moral right of private ownership. Property rights are seen as a legal manifestation of this deeper right that constitutes a basis for their evaluation and justification. While traditional approaches claim that distributive concerns have moral precedence over historical entitlements, for entitlement theories it is the other way around: they are willing to accept any distribution of property rights as long as those rights are justly acquired. In this way while the traditional approach to distributive justice is forward-looking, Nozick's approach is backward-looking. The former starts with a desired distributive pattern and infers entitlements from it, while the latter starts with entitlements and uses them as a justification of a distributive pattern.

Nozick himself did not offer any *specific* entitlement theory. He only offered a general form which such theory should follow: it should specify the rules of just acquisition, just transfer and rectification. He offered some discussion of necessary conditions these rules should satisfy – notably, the Lockean Proviso (Nozick, 1974, 174–182) – but did not suggest any actual content for such rules.[2] Other philosophers, however, developed theories more or less along his blueprints (Christmas 2021; Lomasky 1987, 111–151; Mack 1990, 1995, 2010; Narveson 1999, 2010; Otsuka 2003; Sanders 2002; Van der Vossen 2015; Wendt 2022). There are, of course, older theories of similar kind – the Lockean theory of property rights fitting this bill most clearly (Locke 1980 II: sec. 22–51).[3]

However, none of the attempts to develop Nozick's project have won much support: most contemporary philosophers do not believe in entitlement theories – and for a good reason. Entitlement theories conceive private ownership as a

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[1] In different forms this view is articulated in e. g. (Murphy and Nagel 2002, 188; Nili 2019; Rawls 1999, 235, 242–251; Thomson 1990, 322–347).

[2] In this reading of Nozick I follow (Waldron 1988, 254–255).

[3] In recent decades a number of scholars tried to reintroduce Lockean theory of property in the modern context, most importantly Jaworski (2011, 2012), Kramer (2004), Simmons (1992, 222–306), Sreenivasan (1995) and Tully (1980).

natural right that morally belongs to individuals irrespective of and prior to any government decrees and social conventions, just like, say, the right to life. Observe, however, that the right to life is acquired by individuals at the moment of their birth and persists with them until their death. By contrast, persons are normally born propertyless and need to acquire property rights in the course of their lives through the appropriation of unowned objects and transfers from others. Both these methods of acquisition cause specific problems that make one doubt that property rights can be pre-social in the way other natural rights are.

When it comes to appropriation of unowned objects entitlement theories face the following conundrum. Entitlement theories typically ground appropriation in a certain physical manipulation with the appropriated object and they need to assume that there is a right to perform such manipulation before any private ownership title is created. But once they assume such a right, they need to also admit that some people's right to manipulate a certain object gets displaced as a result of other people's appropriation of that object. As appropriation happens unilaterally, this displacement does not require the consent of the holders of said right. Under entitlement theories, therefore, individuals routinely get their normative status diminished without their consent – a feature that most clearly goes against our sense of justice.

Entitlement theories typically try to overcome the difficulty above by pointing out that the opportunity to appropriate protects a certain important interest of individuals – important enough to outbalance the weight of the problem I identified. Such interests have been variously identified as their self-ownership (Locke 1980 II: sec. 27–28) or their right to non-interference (Christmas 2021) or their right to engage in projects (Lomasky 1987, 111–151; Sanders 2002; Wendt 2022). But even if these arguments succeed, this kind of considerations would only establish their right to use a particular object and exclude others from using it. By themselves they seem insufficient to establish some other rights that are typically associated with the right of ownership – most particularly the right to transfer one's ownership to others (Stilz 2018). The content of the right to transfer is the power to imbue others with all the rights and privileges of the owner and, intuitively, it has nothing to do with the exclusive use of the object in question. The right to transfer, therefore, seems to require a justification which is separate from the justification of exclusive use, but entitlement theories rarely provide one.

Traditional entitlement theories, as I will argue, do not have a satisfactory answer to these (and some other) problems. This is the reason behind their low popularity. There is, however, one approach that, in my opinion, has a potential to overcome the criticism I outlined: Israel Kirzner's finders-keepers rule as introduced and defended in Kirzner (1978, 1989). Under finders-keepers rule, "an unowned object becomes a justly owned private property of the first person who, *discovering its availability and its potential value*, takes possession of it" (Kirzner 1989, 98, emphasis mine). In this way, initial appropriation is importantly similar to the activities of entrepreneurs, as described in other work by Kirzner (1973).

Kirzner pointed out that the debates surrounding the issues of distributive justice have a blind spot: they start with the assumption of full knowledge concerning the resources which are up for distribution. In reality, however, this knowledge is not present by default but has to be acquired, and a proper approach to distributive justice should account for that.

Kirzner's ideas have received little attention from political philosophers and usually get rejected without much discussion (Cohen 1995, 185; Waldron 1988, 200–201). As Kirzner did not develop his insights into any kind of systematic normative theory of ownership and did not engage directly with the most powerful criticism of entitlement theories, it made his work easy to ignore.

This work is a presentation of a theory which is built upon Kirzner's ideas but rectifies the above-mentioned defects. I call it "the Entrepreneurial Theory of Ownership" (ETO). Besides Kirzner's works, ETO borrows many elements from the work of Billy Christmas (2021) who justified the right of ownership as a right of non-interference – one would not be wrong to represent ETO as a synthesis between these two approaches. Other inspirations for ETO are (Russel 2004; Williams 1992) – both papers emphasize the entrepreneurial aspect of Lockean labor.

In this thesis I will argue in favor of the following claims:

1) Kirzner's observation that resources need to be discovered before they can be used can serve as a foundation for a rigorous philosophical theory of ownership which can serve as a development of Nozick's project of historical entitlement theory – ETO.
2) ETO provides a robust philosophical justification for the right of private ownership as a natural right – the idea I will label in this work as *Deep Private Ownership*.
3) ETO is resistant to arguments which are typically advanced against historical entitlement theories of ownership and poses serious challenges to their rivals.

My primary method in this enterprise will be conceptual analysis. I will develop a special conceptual apparatus the purpose of which is to put Kirzner's claims in a rigorous form and employ it to demonstrate that the status of the right of ownership as a natural right follows with necessity from a set of uncontroversial normative and empirical assumptions. I will also use this conceptual apparatus to show that the resistance to the idea of ownership as a natural right stems from a conceptual confusion that is concealed in ordinary language but becomes evident once the specific categories of ETO are employed.

In the next two sections of this chapter, I am going to take a closer look at the concept of ownership I am going to deal with in my work. I will first distinguish between ownership as a moral concept and ownership as a legal concept in Section 1.2. In Section 1.3. I will distinguish between two conflicting views on the question of who the ultimate subject of ownership is: Deep Public Ownership and Deep Private Ownership. This distinction, I believe, would allow for a deeper understanding of the conflict between Nozick and his followers on one hand and the mainstream view on distributive justice on the other hand. It will also clarify the nature of the claims I am going to make in this work and uncover the true

theoretical stakes behind the arguments I am going to present. In Section 1.4. I will present a brief overview of the current state of the debate around the nature of property rights. Finally, in Section 1.5. I will discuss the overall strategy I am going to follow in presenting my case and the structure of my work as it is defined by this strategy.

1.2. Ownership in moral philosophy, law and the philosophy of law.

As the nature of property rights is the subject of a massive debate in the field of philosophy of law, the first order of business is to distinguish clearly the subject of this work from the subject of that discussion to avoid any possible confusions. This is what this section will be about.

Legal philosophy takes the legal institution of property rights as given and tries to make sense of it and uncover its internal logic. The classical example of such work is the text by Tony Honoré (1961) where he analyses the concept of ownership by breaking it into multiple "incidents", specific rights and powers associated with this legal institution. The nature of the connection between these incidents is now the central debate in this branch of philosophy. Some authors claim that the institution of ownership is nothing more than a loose collection of narrower rights only held together by historical tradition (Cohen 1935; Grey 1980; Singer 2000). This is the so-called Bundle Theory of ownership. Others respond that there is in fact a logical unity between different components of property rights (Epstein 1985; Mossoff 2003). This later tradition develops the concept of Full Liberal Ownership – an extensive right to use owned resource, exclude others from using it and alienate it that cannot be broken into constituent parts without destroying the whole. A middle path between these two extremes is to look for the core component of property rights that holds everything else together and that is alone necessary while all other components are contingent. Among the possible candidates for such core component are the right to exclude (Merrill 1998; Penner 1997, 2020), the right to be protected from particular harms (Breakey 2011b), the right to set an agenda for the object of property (Katz 2008), the power to change the normative status of others with respect to the object of property (Dorfman 2010; 2014), the immunity from expropriation (Attas 2007) and others.

These debates are not relevant for the subject of this work. I will explore ownership not as a legal concept but as a moral concept. Instead of looking for an internal logic in existing law, I will embark on a search for moral facts that ground existing law and make the institution of ownership justified.

As I see it, the subject of my work and the subject of philosophy of law are in the following relationship. At start we have a level of moral facts that should guide individuals' interactions with each other. This is the level with which I am concerned. Then we have the level of positive law that tries to build a system of enforceable rules on the basis of these moral facts. This is the level with which

practicing lawyers and policy-makers are concerned. And finally, positive law is guided by an internal logic of its own, often implicit and concealed even from its authors and practitioners. This is what the philosophy of law studies.

I assume that there is no straightforward logical path from one level to another. Moral facts do not fully determine the content of positive law and even less do they determine its logical structure.[4] Whenever we transition from one level to the other, there would be additional considerations at play that are abstracted away at the previous level. In this way, a particular conclusion about the moral level does not commit us to any conclusions with respect to the content or internal logic of positive law. For example, the view that property rights have no logical unity can be associated with the rejection of the idea of private ownership as a moral right. Yet I do not assume that there is any obvious logical implication here.[5]

In contrast to the debates in the philosophy of law, moral philosophy does not consider itself bound by the existing legal rules and does not take it as its task to "explain" these rules or to fit its conclusions into them. It is rather the other way around: moral philosophy would demand law to conform to its tenets. For that reason, it would not trouble me at all if the theory I am going to introduce in this work would lead me to conclusions which are at odds with the way ownership is understood in the current legal order.

It should be noted, however, that even though this work is primarily concerned with ownership as a moral phenomenon, I will also need to talk about the respective legal entitlements throughout the work. To keep the terminology consistent and make it transparent whether I am talking about law or morality I will use the term *"the right of ownership"* when I talk about the moral right and I will use the term *"property rights"* when I talk about legal rights.

Now, as I, hopefully, made clear what I will not be doing in my work, allow me to say a few words about what its subject will be and explain the content of the concept of ownership I am going to use. I will start from the assumption that ownership as a moral problem inevitably arises from the fact that we find ourselves in the situation of resource scarcity. Humans need to use material objects to achieve their goals but there are always fewer suitable objects than goals that can be achieved by a certain collective of humans. As using resources in a chaotic and disorganized manner would lead to extremely inefficient use, the collective needs to accept a certain way of deciding which resource would be assigned to

[4] Kramer (1998, 46) offers a distinction between entitlement as an unspecified demand for protection and right as the very same protection legally formalized. Within the context of this distinction it might be said that what I am going to study here is more ownership as an entitlement than a right narrowly understood.

[5] See (Gauss 2012) for a possible way of how these two views can be reconciled.

which goal as authoritative for everyone.[6] And in principle there are two possible solutions to this problem:

1) The goals for each resource are unilaterally assigned by a specific individual – its owner.[7]
2) The goals for each resource are assigned through a procedure that involves decisions made by more than one individual.

It is between these two answers that the main debate in the moral philosophy of ownership takes place. And it is to this debate that my work is a contribution. ETO justifies the first answer and provides ample ammunition against the second one.

In my work I will refer to the first answer as Deep Private Ownership and to the second one as Deep Public Ownership. The term "Deep Public Ownership" was introduced by Shmuel Nili (2019). To my knowledge he was the first philosopher to explicate and describe the related concept. The term "Deep Private Ownership" is my own creation but it is, of course, inspired by Nili's work: it is the opposite of the idea he introduced.

The term commonly used in literature to represent the idea of Deep Private Ownership is "historical entitlements theories of ownership". As mentioned before, this concept was developed by Nozick (1974, 153–182). I see entitlement theories as a special case of the Deep Private Ownership approach. They also claim that each resource should be seen as owned by a single agent who has an authority over its fate. On top of that they commit to the idea that this moral relationship emerges as a result of a certain historical event that concerned both the resource and the owner.

While entitlement theories are, conceptually, a special case of Deep Private Ownership approach, to my knowledge there are no plausible theories of Deep Private Ownership that would not also be entitlement theories.[8] ETO also is an entitlement theory. The relationship between all these concepts is, therefore, such: entitlement theories are a subset of Deep Private Ownership theories which covers all currently existing elements of this set. And ETO, in turn, is an element in the subset of entitlement theories.

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[6] I see this formula as a reformulation of Nozick's definition of ownership as a moral right to decide how a particular thing should be used (Nozick 1974, 171). This definition of ownership is widely accepted in literature, employed by such different authors as Waldron (1988, 39) and, more recently, Nili (2019, 354).

[7] Notice that even though this formula looks remarkably similar to the idea of agenda-setting as the core of the right of ownership advanced in (Katz 2008) the related concepts are different. Katz's paper is a work of legal philosophy where she tries to uncover logic that governs existing positive law. But the formula I give here belongs to the realm of moral philosophy. Instead of explaining what the law is, it provides guidance on what the law should be. In other words, it is two similar answers to two different questions.

[8] Any Deep Private view needs to identify some sort of connection between a specific individual and a specific thing and it is hard to come up with such a connection that would not originate in a historical event.

In this work I will often use the terms "Deep Private Ownership" and "entitlement theories" as synonyms. I will, however, favor the term "entitlement theory" when talking about the theories of ownership developed by others and the term "Deep Private Ownership" when talking about ETO.

In the next section I will take a closer look at the ideas of Deep Public and Deep Private Ownership and the distinction between them.

1.3. Deep Private Ownership and Deep Public Ownership

Bill and Jane are walking together through a forest. They see a watermelon lying on their path. They both want to eat it.

When we ask how the watermelon should be divided between them, the most immediately intuitive answer would probably be that that it should be split equally. If we think more about this situation, we can come up with more sophisticated answers. We, for example, can take note of the fact that Jane is hungrier than Bill; or that Jane has a crate full of her own watermelons back at home; or that it was Jane's idea to go in that direction. All these considerations can potentially alter our idea of how the watermelon should be split between the two. We can split it in an unequal way or even give it to one of the claimants in full.

An important feature of our thinking, however, would be the idea that circumstances and interests of *both* parties should be taken into account. It is reflected in our first intuitive idea of equal split: the default solution, until we know anything about the difference between the predicament of the individuals involved, is to count their claims as having equal weight because there is no difference between them.

But imagine now a slightly different scenario. Once again, we have Jane and Bill walking through the woods. Only this time there is no watermelon; instead, after the two wandered far enough away from the populated areas, Jane turns to Bill and says that she wants to cut off his arm and eat it.

Observe how our procedure for evaluating Jane's claim here would differ from the one we employed in the watermelon case. Most of us would respond rather adamantly that Jane has no right to do it. We would likely come to this conclusion before learning anything about Jane's backstory and there would be very little that can move us away from it. It would not matter that Jane is starving or, maybe, has some medical condition that requires her to feed on human flesh to survive. We would say it is her problem, not Bill's. Perhaps, the only thing that would make cutting off Bill's arm admissible in our eyes can be the fact that Bill agrees to such treatment – and, I suspect, some of the readers would say that even Bill's consent would not be enough.

These two scenarios give us the key to understanding the difference between the conceptions of Deep Public and Deep Private ownership and illuminate the true theoretical stakes in this debate. Deep Public Ownership treats all material resources as the watermelon is treated in the first scenario. It assumes that they should be divided in accordance with some procedure that would take everyone's

needs into account; "public" in this context is nothing more than the most general name for any institution or a system of institutions that would ensure that the interests of all members of a certain collective are protected.[9] This is how Alan Ryan formulated this principle:

> [T]he moral position implicit in both Mill's and Marx's views – that the right or the power to determine work and production should be determined by the social function of such rights and powers – has become a commonplace except among libertarians. The result is not, of course, that there is any consensus on the virtues of socialism or capitalism, only a consensus that 'it's his' invites the further question, 'What good does its being his do for everyone else?' (Ryan 1984, 177).

Deep Public Ownership can, therefore, be defined as a normative idea according to which the way in which resources are to be used should be decided by a procedure that takes equal account of the interests of all members of the respective community. "Takes equal account" in this context does not necessarily mean that resources should be divided equally. Some needs could be still deemed more urgent than others and individuals with those needs would get a larger share of resources. But it means that if the needs are weighed differently, it happens because of the intrinsic nature of these needs but not because of whose needs are compared.

Deep Public Ownership does not imply public ownership in a legal sense. The end result of deliberation about the proper distribution of resources could be the decision to assign a broad control of each resource to a particular individual.[10] In a similar way, in the example above Bill and Jane can decide that each of them would get one half of the watermelon with the right to do whatever one wants with it without consulting the other one. The important part, however, is that the initial distribution should be decided by them jointly, or at least, should somehow account for the interests of both.

Deep Private Ownership, however, would treat the watermelon scenario as the arm scenario. It claims that material resources, by Nozick's expression, "come into the world already attached to people having entitlements over them" (Nozick 1974, 160). Just like in the arm scenario, it is solely up to the owner to decide what happens with the watermelon and no other person has any say in it. Deep Private Ownership, therefore, can be defined as a normative idea according to

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[9] In modern context we would see all citizens or even all persons as members of the public and we would naturally assume that the respective institution would be representative democracy of some sort. But observe that the principle of public ownership is neutral with respect to which share of population counts as the members of the public. A polity where only a minority of population has full voting rights can be seen as living under the regime of Deep Public Ownership, provided that the political institutions aim to account for the interests of all members of this minority in decisions related to property rights.

[10] A good illustration of this approach is presented in (Essert 2013) where ownership is conceived as a particular type of public office.

which the way in which resources are to be used should be decided unilaterally by an individual owner of each resource.

These considerations lead us to an important conclusion. Observe how in the watermelon scenario we encounter the familiar logic of distributive justice. We distribute resources between the multitude of individuals, each of whom has some sort of claim on them. Discovering the principles of such distribution is the task that John Rawls set out to resolve in *A Theory of Justice* (1971) – probably the most influential book of contemporary political philosophy.[11] This is the task to the solution of which a myriad of his followers and critics contributed and which occupied the minds of many thinkers before him, starting from Aristotle or most probably even earlier.

But observe that in the arm scenario there is no place for considerations of distributive justice. There is no act of balancing between the interests of Bill and Jane. Bill's interests are the only thing that matters and also (possibly) whether Bill consented to his arm being taken away, or not.

If we treat all resources in accordance with the logic of the arm scenario, it would mean that almost the entire field of distributive justice would get extinguished. The principles of distributive justice would only be applied at the level of private households, when, for example, a mother would need to decide how to divide a pie between her children. But they will have no application at the level of community as a whole.[12]

It is in this context we need to understand Nozick's repeated analogies between property rights and marriage and love (1974, 168, 237–238). He tries to demonstrate the absurdity of the principles of distributive justice by asking questions like whether ugly people should be compensated for the fact that no one wants to marry them. Property rights for him are as deeply personal as romantic relationships. These analogies, however, do not impress his opponents. As Murphy and Nagel put it with respect to a similar issue: "Egalitarian liberals simply see no moral similarity between the right to speak one's mind, to practice one's religion…and the right to enter into a labor contract… unencumbered by a tax bite" (Murphy and Nagel 2002, 65).

Nozick's romantic analogies make clear the true theoretical stakes of the debate and the scale of ambition of the idea of Deep Private Ownership. The goal is not to propose another theory of distributive justice; the goal is to supplant the entire field.[13] The debate is not about whether rich people are entitled to their wealth and whether the poor have a right to welfare; the debate is about a fundamental political principle around which the society is organized. Either we all control our resources jointly or each of us controls her resources separately.

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[11] On public ownership as the necessary foundation of Rawlsian theory see (Holt 2017).

[12] The idea of ownership as having logical priority over the idea of distributive justice in this way can be found (not necessarily in a formulation similar to mine) in (Gerson 2012; Schmidtz 2010, 2011). See also (Nozick 1974, 149–150)

[13] It is unclear whether Nozick himself would see it the same way. He certainly aimed to replace what he termed as "patterned" theories of distributive justice.

Despite the depth of the theoretical disagreement, Deep Public and Deep Private Ownership do not necessarily lead to any immediately apparent practical differences. As I already pointed out, the principle of Deep Public Ownership is compatible with a system of property rights under which ownership is predominantly private. The practical difference between the two approaches is more in the logic the state is supposed to follow, and in their flexibility when it comes to assigning property rights; it is more in the potential of the system of property than in its actual shape. Under Deep Public Ownership all property is by default public and any privatization of it requires justification. Under Deep Private Ownership it is the other way around. Both approaches have opposite starting points and even though it is in principle possible for them to converge in the middle when it comes to practical matters, it is not particularly likely that their policy suggestions would ever be fully identical. Another important difference is the strength of the immunity attached to private property rights. Under Deep Public Ownership this immunity is necessarily weak because private property is only valuable as long as it is instrumental for the achievement of public goals; the moment it stops being useful, there is no more reason to respect it. Deep Private Ownership, by contrast, values private property non-instrumentally, and this would typically result in a very strong immunity.

Deep Private Ownership is a counter-intuitive idea. It is no accident that in the watermelon scenario the first movement of our mind is towards the public solution. It is the purpose of this work to uncover the roots of this intuition and demonstrate how it is fallacious. I will talk a bit about my approach to this task at the end of this chapter. But here I want to present the reader a puzzle that, I hope, would shake her certainty that the plausibility of Deep Public Ownership is obvious. It will also be instrumental to demonstrating the conflict between the two approaches to ownership from a different angle and showing how distributive justice theorists habitually misunderstand the point of their opponents.

Let me explore a case presented by Bruce Ackerman. To explain the principles of distributive justice Ackerman asks us to imagine a spaceship of colonists which arrives to a newly discovered planet filled with mana – a magical resource "capable of transformation into any physical object a person may desire". Colonists gather in the assembly hall and discuss the principles of initial distribution of this resource (Ackerman, 1980, 31). A number of options are discussed and rejected (Ackerman, 1980, 31–68). One of the first principles brought to our attention looks like this:

> RUSHER: I say that the first person who grabs a piece of mana should be recognized as its true owner.
> COMMANDER: Well, this rule is both harmonious and complete. What reason can you give for thinking it's preferable to its competitors?
> RUSHER: Because people who grab first are better than people who grab second. (Ackerman, 1980, 38)

This principle – a caricature of entitlement theories – appears to the author as so ridiculous that he does not even bother refuting it. What he fails to see is that his colonists, taken as a group, have just appropriated this entire planet in accordance with this very principle. Their collective claim on mana has exactly the same nature as the claim of first-grabbers in Rusher's proposal: they were the first to come to the planet and grab it. But at no point in his book does Ackerman make an attempt to justify it.

So, here is my puzzle. The individual claim of first-grabbers is so stupid that it does not warrant refutation; and yet, the very same collective claim of colonists is so obvious that does not warrant justification. Why? What makes the principle of Deep Public Ownership so much more intuitive than the principle of Deep Private Ownership? [14]

Ackerman is no exception among distributive justice theorists. Even though, as I argued above, the validity of their entire field depends on the validity of Deep Public Ownership, they seldom bother to justify it and if they do, this justification is cursory at best. To my knowledge, the principle of Deep Public Ownership wasn't even fully explicated until (Nili 2019). Before that point, the problem only received attention in the context of global justice where we have a potential for the conflict between *different polities* who would have competing claims over resources (Risse 2012; Stilz 2011).[15] But it was hardly considered by anyone that the same kind of conflict can arise between polities and their members.

I will look more closely at potential justifications of Deep Public Ownership in Chapter III. Here I want only to draw attention to the fact that Deep Public Ownership seems to rely on a principle similar to the one of entitlement theories and deserves the same kind of critical scrutiny.

1.4. The principles of Deep Private and Deep Public ownership in contemporary philosophical and legal literature

The previous section should make clear the fundamental distinction between Deep Public and Deep Private approaches, but the problem here is that almost no one defended any of those in an explicit way. So a reader might wonder how exactly this distinction maps on the positions which currently exist in the literature and what is the relationship between what I am going to discuss in this work and things discussed by other philosophers. The purpose of this section is to provide clarity on this matter.

A detailed analysis of arguments which are typically provided both for and against Deep Private and Deep Public Ownership will be presented in Chapters II and III. There I will engage with many of the authors mentioned in this section

[14] This objection is hinted at in (Nozick, 1974, 178).

[15] I suspect it is no accident that Shmuel Nili also worked in the field of global justice before he published his paper on Deep Public Ownership.

on a deeper level. Here, however, I will rather try to introduce the reader to the literature on the philosophy of property rights as it is seen from the perspective of the Deep Private versus Deep Public debate.

I will need to draw upon literature from two broad camps: that of law and the philosophy of law, and that of political philosophy. Political philosophers, surprisingly, have relatively little to say about ownership. Most of them accept the idea of Deep Public Ownership implicitly and only think of ownership in terms of legal property rights. Ownership, in their minds, becomes a handmaid of distributive justice in the sense that considerations of distributive justice fully determine the content and extent of property rights. With few exceptions, almost all discussion of ownership that appears in philosophical literature comes either from libertarians, who subscribe to the Deep Private Ownership doctrine which motivates their interest in the subject, or from people who argue against them.

By contrast, lawyers and philosophers of law have written extensively about ownership. However, the question of normative justification of ownership is rarely in their focus. As I mentioned above, they rather debate the internal logic of extant property law and when they bring up the question of normative justification of ownership, it is more in relation to this debate than for its own sake. For these reasons, they are not as useful for my project as one could think if we judge by the overall volume of their works alone. Still, they are not to be ignored: even though the topic of normative justification of ownership is not their focus, they do have a wealth of relevant insights and observations.

Both political and legal philosophers can be roughly divided into five groups on the basis of their stance on Deep Private versus Deep Public debate.

The first group is what I call Deep Public Radicals. They believe that private property rights are fully subjugated to the rights and interests of the community as a whole and are not particularly valuable by themselves. The authors of this group are either indifferent to private ownership or view it as a necessary evil. Most of contemporary distributive justice theorists belong to this category. Prominent examples include John Rawls (1971; 2001), Ronald Dworkin (1977), Richard Arneson (2011), Carl Knight (2009), Robert Goodin (1995), David Miller (1989), Marc Fleurbaey and François Maniquet (2011), Michael Walzer (1983), Rowan Cruft (2019).[16] In most cases they do not defend the Deep Public thesis explicitly; instead, it transpires as a self-evident starting point of their work, as evidenced by the example from Ackerman (1980) I cited in the previous section. Important exceptions here are *The Myth of Ownership: Taxes and Justice* by Liam Murphy and Thomas Nagel (2002) and *The Cost of Rights: Why Liberty*

[16] Most of these authors would maintain that there is a right to personal property which can be seen as natural and can be defined apart from public interest (e. g. Rawls 2001, 114). This does not make them any less radicals under my view. They typically construe this right as an extension of the right to substantive autonomy but this is orthogonal to the substance of the debates between Deep Public and Deep Private principles. The question at stake, as I said earlier, is the fundamental political principle at the foundation of society, which primarily manifests in the mode of control over large industrial property. The debate is not about whether individuals have a right to keep their personal belongings or not.

Depends on Taxes by Stephen Holmes and Cass Sunstein (2000). These two books defend the Deep Public thesis in a very explicit way, and they can be considered as manifestos of this position.

In legal literature Deep Public radicalism is known under a different guise: as a thesis that corrective justice is fully subsumed within distributive justice (the implication being that violations of property rights only matter because of their distributive implications). This idea is defended in e.g. (Dagan 1999).

The second group is Deep Public Moderates, which contains the majority of contemporary legal thinkers. Even though they endorse a Deep Public principle overall, they still express believe that private property has certain intrinsic moral importance that should be reflected in a political constitution of society. Their main difference from Radicals is, therefore, that they view private ownership as a fundamentally good thing, even though they deny it ontological primacy.

A typical representative of this group is Jeremy Waldron who authored *The Right to Private Property* (1988). Contrary to what Deep Public Radicals would say, he believes that private property is a natural right. However, he argues that it is not a "special" right – that is, a right to control a specific object – but rather a "general" right – the right to have certain amount of wealth under one's exclusive control (1988, 423–445). Note that under this view the ultimate right of ownership in a "special" sense still belongs to the state. Waldron is quite clear on that:

> But at a deeper level of theoretical analysis, it is clear that 'ownership' by the state or its agencies is in quite a different category from ownership by a private firm or individual. It is the effect of a decision by a sovereign authority, which determines the rules of property, to retain control of a resource itself, and not to allow a resource to be controlled exclusively by any private organization. (Waldron 1988, 40–41)

This quote captures why Waldron, despite recognizing the value of private ownership, is still on the Deep Public side of this debate. He conceptualizes ownership as a right which belongs by default to the public, which the public might choose to either grant to a private individual or *retain* to itself.

Great many legal scholars expose similar views with various modifications. Prominent examples here are (Becker 1977; Harris 2002; Singer 2000). Stephen Munzer (1990) offers a pluralist justification of private property rights on the basis of utility, efficiency, justice, equality, and labor-desert. As you can see, both Deep Private and Deep Public motivations are lumped together here; however, Munzer is at pains to show that Deep Public considerations take precedence.

A curious take on the idea of Deep Public Ownership is offered in (Gerhart 2013). Gerhart argues that private property ultimately depends on authorization by the community, which puts him into a Deep Public camp, but emphasizes that "community" here should not be seen as synonymous to the state. Rather, he traces the normative justification of property to legal customs that develop in communities organically and precede state institutions.

But probably the strongest and most sophisticated variation of Deep Public thesis is offered by modern Kantians (Brudner 2013; Ripstein 2009; Weinrib 2003), whose ideas have drawn a lot of attention lately after the pathbreaking works of Ripstein and Weinrib. They believe that private appropriation can be allowed and justified on one condition: that appropriators act not as private individuals but as *the representatives of the public*. Here is how a prominent advocate of this tradition explains this idea:

> Indeed, since private ownership flowed from an atomistic conception of the person now superseded, that right can survive the transition to the new order only if instrumentally (and so contingently) justified by the common welfare. Accordingly, property rights are now viewed as having been allocated to private decision-makers because their free bidding for scarce resources will, it is thought, alone produce socially optimal outcomes (Brudner 2013, 264).

Let me now move to the third group of thinkers. They have a hybrid position: in one respect ownership is Deep Private but in other respects it is Deep Public. Typically, they distinguish sharply between two types of rights an owner has: the right to control a resource on the one hand, and the right to derive income from it on the other hand. The former are natural rights which exist independently of any public recognition, but the latter stem from public authorization. The appeal of this view is that it aims to integrate two conflicting intuitions. On one hand we feel that a subsistence farmer, who sustains herself from a previously unused parcel of land, would have a right to it even in the state of nature; on the other hand, people often balk at the idea that private ownership of large industrial enterprises is a natural right. Prominent advocates of this kind of view are John Christman (1994), James Penner (1997; 2014; 2020) and Anna Stilz (2018).

Next, we can move to the group I call Deep Private Moderates. These authors believe in the principle of Deep Private Ownership, but they put some kind of limit on it, such as some form of the Lockean Proviso: one can only freely appropriate as long as enough, and as good, is left for others. While many of the more radical thinkers also subscribe to this principle in some form (Nozick, for example), in this moderate group we have those who believe that the Proviso has significant distributive implications.

This group mostly consists of left libertarians, who adopt the Lockean Proviso to justify an egalitarian version of libertarianism (Otsuka 2003; Steiner 1994; Steiner and Vallentyne 2000; Vallentyne 2000; Vallentyne 2003) and those modern Lockeans who believe that Lockean Proviso has significant redistributive implications (Simmons 1992; Sreenivasan 1995). But there are others who share similar beliefs, most prominently John Finnis (1979).

Finally, there are Deep Private Radicals. This is the most typical libertarian position which accepts the Deep Private thesis in an unqualified or mostly unqualified form. In this group we have Robert Nozick (1974), Loren Lomasky (1987), Jan Narveson (2010), Eric Mack (1990; 2010), Billy Christmas (2021)

and many others. Israel Kirzner (1989), whose ideas provide a foundation for ETO, also belongs to this category.

ETO stands together with the authors of this last group in defending Deep Private Ownership thesis in its most radical, most unqualified form. The central idea of ETO is that ownership is grounded in an act of discovery and any discovery is fundamentally private as it happens inside individual consciousness. Therefore, the right which stems from discovery must also be deeply private.

In the next section I will offer a brief outline of how I am going to defend this thesis in my work.

1.5. The structure of this work

The purpose of my work is to present the Entrepreneurial Theory of Ownership as philosophical grounding for the principle of Deep Private Ownership and to provide arguments in favor of it. But ETO – as any other philosophical theory – only fully acquires meaning when put into the context of other philosophical views with which it is in an intense dialogue.

Some of these views put challenges towards the idea of Deep Private Ownership and thus motivate the development of the complicated theoretical apparatus of ETO. Others, on the other hand, contain important ideas that find in ETO their further development and expression.

For these reasons, the following two chapters will be dedicated to establishing the context within which ETO exists. Chapter II will be dedicated to the challenges facing the Deep Private Ownership view, while Chapter III will explore similar challenges to the Deep Public approach.

The initial conclusion of these two chapters will be that Deep Public Ownership currently has a significant theoretical advantage over its rival. It has fewer problems and it does offer a persuasive solution to those problems, while Deep Private view struggles with multiple objections advanced against it. It is in this context that the significance of ETO can be understood. The theory offers tools that would allow to resolve the issues of the Deep Private approach, while also putting to doubt the answers which Deep Public Ownership can give to its own problems.

Chapter IV will introduce the basic categories of ETO. It will familiarize the reader with a rather specific and counter-intuitive way in which ETO views the world. It is only in the context of this worldview that the following can be understood.

In Chapter V I will develop the normative argument in favor of ETO, while explaining its views on initial appropriation and transfer in the process. I will use the apparatus introduced in Chapter IV to show that private ownership can be framed as an aspect of natural liberty – the freedom to act without restrictions as long as your actions do not violate the rights of others. This chapter will establish the right of private ownership as a *defeasible* right. In Chapter VI I will examine which moral principles can potentially compete with it and argue that there are none, thus establishing the right of private ownership as an absolute moral right.

Chapter VII, however, will put the right of private ownership within certain bounds. I will identify principles which determine temporal and spatial boundaries of the objects of ownership and also show how private ownership can sometimes manifest as common ownership.

Finally, Chapter VIII will be dedicated to the theoretical impact of ETO. In this chapter I will go through all the challenges to Deep Private Ownership I registered in Chapter II and show how ETO resolves them. After that I will come back to the problems of Deep Public Ownership described in Chapter III and show how the considerations, introduced by ETO, make those problems much more serious than they initially appeared. This chapter will conclude my work.

Chapter II. Challenges to Deep Private Ownership

2.1. Introduction

In this chapter I will explore the challenges faced by the idea of Deep Private Ownership. These challenges are quite numerous and mostly stem from the internal tension that lies at the core of the idea. The concept of Deep Private Ownership needs to simultaneously fulfill two tasks that impose contradictory demands on it. On the one hand, it needs to present the right of ownership as a natural right which implies deep and stable connection between the subject and the object of said right. On the other hand, it needs to account for the fact that property rights in modern market economies are highly fluid: things change owners often and easily.

To fulfill these two tasks simultaneously a theory needs to possess a high degree of complexity. It needs to account for all the various ways in which property can change owners without having the idea of deep moral connection between the owner and the object compromised. Now, I am not claiming that this task is impossible – otherwise I would not offer this work to your attention. But it presents lots of difficulties that need to be overcome. A survey of these difficulties is the subject of this chapter; much later, in Chapter VIII, I will show how ETO provides tools necessary to deal with them.

Objections I will explore here can be subdivided into three groups. I'll start with some general problems with the logic of initial appropriation: Right Displacement Objection (RDO) and Private Duty Imposition Objection (PDIO). They both point out that initial appropriation is intrinsically morally problematic but for slightly different reasons. RDO claims that appropriation displaces a pre-existing right of use, while PDIO claims that it allows private individuals to unilaterally impose duties on others. These two objections will be covered in Section 2.2.

If we accept the moral significance of RDO and PDIO, then we need to find such justification of initial appropriation that would overcome the power of these two objections. In Section 2.3. I will investigate whether existing arguments in favor of appropriation are up to this task and conclude that they are not. I will first critically examine the concept of self-ownership that grounds most of such arguments and then examine other rights that can play a role in the justification of appropriation.

Finally, in Section 2.4. I will move away from appropriation and look at the host of disparate problems related to transfers of property titles between owners. I will explore the following issues: the absence of a logical connection between the arguments that justify appropriation and the power of transfer; the lack of justification for owner's right to receive income from their property; the threat to political stability of the community created by the possibility of uncontrolled accumulation of property in private hands; and last but not least – the fact that we hardly can justify any existing property titles by tracing them through a chain of just transfers to the moment of appropriation.

Section 2.5. will summarize the chapter.

Before I proceed, I need to make a quick note on one final question that might interest the reader. Nozick, in his classical statement of entitlement theories, claimed that property rights can be acquired by initial appropriation, transfer and rectification (Nozick 1974, 152). As I said, I am going to cover problems related to appropriation and transfer and one might wonder how rectification happened to be lost here. I will respond to this concern immediately below.

Rectification, as I understand it, is a complex phenomenon that covers several situations that are different in nature.

Firstly, one might understand under rectification the situation where the owner restores her possession of the object that was earlier unjustly taken from her. For example, Jane got her watermelon stolen and later got it back. I do not take such situation as a proper case of rectification because no change of ownership takes place. Jane remained the owner of the watermelon even while it was in possession of the thief, because theft does not carry the normative effect of change in ownership titles. The only relationship that changed was the one of possession, which is a factual, not normative relationship. And when Jane gets back her watermelon it is this factual relationship that gets changed again while the moral relationship of ownership persisted unchanged throughout the entire story. There was, therefore, no "restoration" of ownership when the watermelon was returned.

A different case of rectification is when a person was assigned ownership over an object as a compensation for certain wrong suffered by this person in the past. Consider the same case of watermelon theft but this time the thief ate the watermelon before she was caught and, instead of returning the watermelon, was forced to give Jane a bag of lemons as a compensation. In that case the change of ownership does happen. However, I do not consider it different from the case of transfer for our purposes: most of the things I have to say about transfers apply to this situation as well.

And now, with rectification out of the way, let me move to the logical problems of appropriation.

2.2. The logic of appropriation

The complexity of the issue I am going to explore in this section requires me to further subdivide it into subsections. I will first introduce the Right Displacement Objection (3.2.1); then I will make a detour and explore why the Lockean proviso does not provide a satisfactory response to it (3.2.2.). Finally, I will discuss Private Duty Imposition Objection and how it is related to the Right Displacement Objection (3.2.3.).

2.2.1. The Right Displacement Objection

To explain The Right Displacement Objection (RDO) I will use Locke's labor theory of property by way of example: in Locke's theory this problem is most

salient but, as it will become clear, it would reappear in any entitlement theory that shares one critical feature with the Lockean approach.

According to Locke private property rights are initially established through performing labor on an object (1980 II, 28). Performing labor can generate normative consequences only if it was within your right to perform this labor in the first place. Therefore, Lockean ownership cannot emerge from a normative vacuum. It presupposes a prior existence of a different right which, at the very least, should have the following two properties:

(1) It should allow the right-holder to perform actions on objects.

(2) It should be equally shared between all agents who can appropriate.

Locke recognized this right by claiming that originally the Earth and all its resources belonged to "mankind in common" (1980 II, 25–26). The exact content of this right is a subject of debate in the literature, but this debate does not concern me now.[17] I will focus here on the interpretation of Lockean common ownership that is minimally necessary to make appropriation through labor possible – the interpretation to which he is forced to commit if he wants to justify private ownership. Under this reading, original common ownership is simply the right of non-exclusive use which everyone has in respect to unowned objects. Pufendorf (1934, 4.4.2.) labeled this right as "negative communion". I will hereinafter call it the original right of use.[18]

There is a different argument for the original right of use that does not rely on the notion of appropriation at all. It can be seen as nothing more than a liberty to use unowned objects, a manifestation of the principle of natural liberty – a deeply intuitive idea that by default one is free to do whatever she wants and any limitation on this freedom should be justified. If an object is unowned, there cannot be any moral reason preventing individuals from using it, because any such reason would already constitute some form of ownership.

The original right of use can be better understood if we employ the analysis of jural relations introduced in (Hohfeld 1917).[19] It distinguishes between four types of legal relationships which persons can have between in each other. Each relationship consists of two corresponding legal positions. Two of these pairs: *claim-right* versus *duty* and *liberty* versus *no-right* are relevant for my purposes here.

To have a claim-right means to have a normatively protected opportunity to demand that someone else performed a particular action or withheld from performing a particular action. Claim-rights are complemented by duties: to have a duty means to be under an obligation to comply with the demands of the holder of a claim-right. To have a liberty means to have a normatively protected opportunity to perform a particular action. Liberties are complemented by no-rights:

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[17] For a good review of existing positions see (Simmons 1992, 238).

[18] Some libertarian authors claim that there is a conceptual problem with such a right because unappropriated resources are by definition unowned and there can be no rights to them (Feser 2005, 58–59). They fail to see that "unowned" only means the lack of exclusive rights but there is still space for a non-exclusive right of use.

[19] For a good modern exposition see (Kramer 1998, 7–59).

the person against whom the liberty is held does not have a right to force you to perform the action or to stop you from performing the action.

While a liberty is a right to perform actions on your own, a claim-right is a right to demand actions from the other. While a no-right is a prohibition to obstruct the liberty of the other, a duty is an obligation to submit to the other when she demands that an action be performed or withheld. Liberty means the absence of duty with an identical content, while claim-right means the absence of the respective no-right.

The right of private ownership, as it is traditionally understood, includes both a claim-right to demand that others do not use the property of the owner and a liberty to use said property as the owner sees fit.[20] The original right of use, however, only includes a liberty to use the objects but does not include any claim-rights that would stop others from using them. To understand why this is so, recall that the original right of use is the minimal normative requirement that makes appropriation through physical actions permissible. For this purpose, we need a liberty to perform respective actions, but we do not need anything beyond that.

The right of private ownership that emerges after appropriation is the right of exclusive use belonging to one particular individual. It is, therefore, incompatible with the original right of use belonging to all. It means that when appropriators claim objects as their own, they displace a previously existing right that all their neighbors enjoyed. Or, to put it into Hohfeldian terms: appropriation constitutes a *power* to alter the rights and duties of others and, in particular, it contains a power to take away from others their original right of use. In this way appropriation harms others without their consent, which means that it incurs certain normative costs which the Lockean theory needs to justify. In other words, the theory needs to do more than just show that labor has normative significance. It needs to show that this significance is high enough to, in Locke's words, "overbalance the community of land" (1980 II, 40).

Locke offers two ways to alleviate this problem. Firstly, he qualifies his theory by saying that one can only appropriate unowned objects as long as "there is enough, and as good, left in common for others" (1980 II, 27). This claim can be understood in the sense that there can be no right to appropriate when this would materially damage interests of others. Therefore, there can be no complaint that appropriation displaces the original right of use, since the complaint applies only when appropriation is harmful, i.e. when as a result of appropriation, "enough and as good" is not left in common for others.

The Proviso requires a lengthy treatment, so I will put it aside for the moment and come back to it in the next subsection. Here I will move straight to the second solution that is present in Locke.

One might argue as follows. The original right of use is unsuitable for using resources for long-term projects, because it is non-exclusive. It does not stop

[20] It also includes some other elements described by other Hohfeldian relationships (for example, the *power* of transfer and the *immunity* from expropriation) but for my current purposes they are irrelevant.

others from interfering and repurposing the resource in question for their own goals. Without the possibility to unilaterally appropriate, the original right of use is, therefore, of little value; its value is mostly gained exactly from the fact that it allows appropriation. It means that while it is true that appropriation harms other potential users, they would be harmed even more if the capacity to appropriate were removed because most of the value of their right would be lost.[21]

David Schmidtz (1990) pushes this line of argument particularly forcefully. He argues that if resources are left in common, it practically guarantees that they will be wasted from overuse as there would be no individual incentive to consume them in a sustainable way: if you limit your own consumption of a particular resource, you would simply give it up to be consumed by others. Guided by this idea Schmidtz, essentially, flips the logic of Lockean Proviso: if we want others to have access to resources, we need to appropriate them and thus bring some order, rationality and sustainability to their consumption.

The problem with this response is that private appropriation is not the only way in which the access to commons can be limited and controlled.[22] There is an alternative solution to this problem which goes back all the way to Pufendorf (1934, 4.4.4. – 4.4.6.): the original right of use can be transformed into deep public ownership by means of social contract.[23]

As I will argue in detail in the next chapter, this alternative solution to the tragedy of commons has some clear normative advantages over appropriation: namely, it does not have the normative defect of private displacement of the original right of use, because social contract by its very nature implies some form of endorsement by the entire collective. It means, that to argue for private appropriation, it is not enough to point out how it is economically reasonable to put the use of resources under some form of control. As Schmidtz himself concedes, all he was able to show in his paper was that simply leaving resources in commons is in most cases untenable and *some form* of ownership needs to be established but it is not yet clear what kind of ownership must it be – public or private (1990, 508, 515). And to that we may add that Deep Public Ownership limits access to resources just as well, as Deep Private Ownership with the added benefit that it does not allow private individuals to displace the original right of use. In this way, Deep Public Ownership seems to provide an altogether superior alternative to private appropriation.

Once we acknowledge this, we will be able to see how Lockeans entrap themselves once they concede the necessity of the original right of use. This right makes appropriation possible, but it simultaneously opens the path to deep public ownership that seems to have all the advantages of appropriation but none of its

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[21] In Locke's words: "If such a consent [for appropriation] as that was necessary, man had starved, notwithstanding the plenty God had given him" (II, 28).

[22] As pointed out in (Grunebaum 1987, 57–66; 1990, 545–6). See also (Waldron 1988, 252).

[23] It is especially baffling that Locke, of all people missed this alternative as it is exactly what he proposed to do with private executive power (1980 II, 87–89). He argues that to transfer private executive power "tacit consent" is sufficient but for some reason only explores the option of explicit consent in the case of the original right of use.

defects. Consider the following scenario that would nicely illustrate the power of this objection. Imagine that we complemented our model of deep public ownership with a rule of distributive justice that prescribes the government to distribute resources in accordance with the pattern that would have emerged under Lockean rules. Such approach would perfectly emulate all the alleged positive practical effects of the Lockean approach while also solving at least some of the normative problems that are internal to it.

Though I use the Lockean theory as an example here, it is apparent that other ETs can be vulnerable to this problem. Even those authors who do not commit themselves to the Lockean paradigm emphasize that appropriation should manifest in a physical action performed on the appropriated object, as this action would serve as a publicly visible sign that this particular object now belongs to that particular person (e. g. Mack 2010, 73–74; Ripstein 2009, 105; Van der Vossen 2009, 363). But the fact that such action is permitted entails that there is a Hohfeldian liberty to perform it. Therefore, as long as appropriation requires a physical action to be performed, we need to concede that there is the original right of use understood as a liberty to perform physical actions with unowned objects. And once we concede this, we need to conclude that unilateral appropriation displaces a liberty that earlier belonged to others. And that, in turn, gives the Deep Public Ownership approach a normative advantage that cannot really be counterbalanced.[24]

This finishes my presentation of the Right Displacement Objection. Essentially, it questions the internal consistency of Deep Private Ownership theories. They are forced to adopt some version of the original right of use to make appropriation possible. But the original right of use also makes Deep Public Ownership a more attractive alternative to Deep Private Ownership.

Before I proceed, however, let me explore in more detail the response to RDO that I earlier only briefly indicated: the Lockean Proviso.

2.2.2. The Lockean Proviso

I believe that there are two problems with the Proviso. Here is the first one. As Varden (2012) showed, it implies that property rights cannot be established in the state of nature. This is because appropriators by themselves can never know that there is in fact "enough and as good left for others". To make such a conclusion you, on the one hand, need to have exhaustive information about the resources available for appropriation and, on the other hand, you need to know the needs of all individuals in the relevant community. Only then will you know whether your appropriation harms anyone and, therefore, whether it is lawful. The assumption, which I will grant, is that someone's appropriation cannot be lawful unless her appropriation not only satisfies the proviso, but is also in some way known to

[24] RDO is rarely presented in literature in the way I have presented it here. The closest examples I know of are (Grunebaum 1987, 80–85; Epstein 1979, 1227–1228). It is much more customary to frame it as the duty imposition objection discussed below.

satisfy the proviso. However, to demand that appropriators themselves know all that is hardly more realistic than to demand everyone's consent on appropriation – a requirement which Locke rejects (1980 II, 28–29). One needs something like a public authority to establish this and to determine, on the basis of this knowledge, who owns what. But to concede that such an authority is necessary would mean to abandon Locke's entire project according to which property rights exist before the civil society is created.

The second problem is that any unowned object is in some way unique and once it is appropriated, there would be no possibility for anyone else to appropriate exactly the same object. In this sense, things left in common would never be "as good". Therefore, there can be no appropriation that would satisfy the requirements of the proviso.

I believe that the argument in (Nozick 1974, 176) is similar in spirit to this one, though stated differently. On the subsequent pages Nozick tries to formulate his own version of the Proviso, which would allow appropriation in most normal cases but would disallow things like appropriating the only source of drinking water in the desert. His idea is that appropriation should not make anyone worse off because of the fact that the thing that was appropriated is no longer in general use (Nozick 1974, 178).

Cohen (1995, 74–88) points out two problems with this version of the proviso. Firstly, he points out that there are multiple scales along which a person can become worse off; appropriation might make others better off in one sense but worse off in other sense. Imagine, for example, a world where Jane appropriated all the land but offered others a salary that more than offsets the income they could have received from working the land she appropriated. In this scenario others are better off in a narrow economic sense but worse off in the sense that they are now fully dependent on Jane and her salary for survival (Cohen 1995, 80). It is arbitrary in such cases to only evaluate individual's situation from a narrow economic perspective and discard all others. At the very least, the position of non-appropriators would always become worse in the sense that they are no longer able to use the particular object that was appropriated; this specific opportunity might be intrinsically valuable for some of them and we have no reason to disregard this fact for normative purposes.

Another problem that Cohen points out is that Nozick restricts himself to comparing two situations: the world before appropriation where everyone has a liberty to act on objects but no one has a right to exclude others, and the world after appropriation where resources have become privately owned. Nozick's argument is that appropriation is justified as long as in the second of these worlds no one is worse off than in the first one. But to justify appropriation Nozick would also need to explore all the possible alternatives to it – for example, the one where some system of public ownership is introduced under which the use of resources is collectively regulated (Cohen 1995, 82). As unilateral appropriation precludes the establishment of such arrangements it needs to be shown that it does not make

anyone worse off in comparison. It can hardly be said that Nozick (or anyone else) succeeded in that.[25]

The literature on the Lockean proviso is too massive to even attempt to survey it here. The majority opinion seems to be that, if properly understood, it either leads to significant limits on the power to appropriate or allows large-scale state intervention for redistributive purposes. None of it seems to be compatible with the spirit of the idea of Deep Private Ownership.

2.2.3. The Private Duty Imposition Objection

As any perceptive reader would have noticed, RDO is very similar to another popular objection against entitlement theories, namely, the Private Duty Imposition Objection (PDIO).[26] This objection claims that by appropriation individuals unilaterally impose duties on others without their consent which makes the practice of appropriation morally objectionable. Just like in RDO, the charge against ETs is that unilateral appropriation harms others, but the harm in this case is not the loss of a right but the imposition of a duty.

Here is how Waldron (who explored the problem in the greatest detail) describes it:

> [An entitlement theory] indicates a way in which, by performing an acquisitive act A, an individual can put not himself but *everybody else* under obligation. By his act, he acquires not duties but rights, and thousands of other people, including people he has never spoken with, people he has never met, people who have never even heard of him, suddenly find themselves labouring under obligations which they did not have before (Waldron, 1988: 267).

So, when the owner appropriates a thing for herself, she does not just create a moral relationship between herself and this thing. She also creates a moral relationship between herself and members of the respective community in the form of a duty not to interfere with the way she uses it. This duty is imposed on people around her without their consent.

This does seem odd but why is it bad? It is not yet clear what exactly about private duty imposition allows us, in the words of Leif Wenar, to consign ETs to "philosophical bestiary" (Wenar 1998, 807). Waldron addresses this concern with the suggestion that private duty imposition makes life too difficult for those who would find themselves on the receiving end of duties created through appropriation:

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[25] Essentially the same argument against Nozick is independently developed by John Christman, in (Christman 1986, esp. 174–6).

[26] In different forms it has been advanced in (Attas 2003; Gibbard 1976; Harris 2002, 202–203; Spafford 2021; Waldron 1988, 253–283; Wenar, 1998).

> …individuals are in a position to make it morally difficult or morally impossible for others to secure their own survival or discharge their other responsibilities; they may make it impossible for others to do these things without doing wrong (Waldron 1988, 268).

A different version of the same argument is offered by Wenar (1998, 807–816): private duty imposition would allow individuals to inconvenience each other with too onerous burdens.

I do not believe that this is a good explanation of why private duty imposition is by itself a reason to reject Deep Private Ownership. It assumes that the lack of free access to natural resources (which would be the consequence of appropriation for those bound by the respective duties) constitutes a severe burden. This assumption, however, is very obviously false, at least, in the modern era. Few people today earn their living through Lockean exercises like berry picking or hare hunting. Instead, most people are doing wage labor which provides for a much more comfortable means of survival than those available to our ancestors. The demand for wage labor, however, is not frustrated by private appropriation – arguably, it is the other way around.[27] In light of this fact, it is not obvious at all that private duty imposition within the context of Deep Private Ownership brings any serious difficulties to the losers of the appropriation game.

It may be argued, however, that private duty imposition is bad not because of its consequences but intrinsically. The best explanation of this idea can be found in (Dorfman 2014, 439). The author argues, in a slightly different context, that the natural right of private ownership would necessarily violate the principle of moral equality between persons because it puts some individuals in a position to alter the normative status of others without their will. This argument can be used for our purposes. It goes like this. All moral persons are equal in their freedom. But private duty imposition allows one to bind another person into a duty without her consent. Binding another person with a duty without her consent unfairly limits her freedom and allows one to assume a superior moral position towards her. In this way private duty imposition violates our initial assumption of moral equality, which means that any normative theory which allows for it is unjustified. Deep Private Ownership does allow for private duty imposition; therefore, it is unjustified.[28]

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[27] This point is emphasized in (Mack, 1995: 70–76, Schmidtz, 1994: 45–46). One can also read Locke as making similar claims (1980 II, 37–41). Observe that once we accept the assumption that the possibility of private appropriation maximizes social welfare via higher economic efficiency, distributive justice theories which exclude such a possibility might turn out to be more onerous for most people than ETs. We do not need to accept this assumption, of course, but we hardly want to make this debate dependent on its accuracy.

[28] Scanlon, I think, alluded to this kind of argument when he noted that a rights-based justification of private property makes the owner "an odd kind of moral legislator" (Scanlon, 2011). Ripstein and Weinrib reconstruct Kantian version of PDIO along the same lines (Ripstein, 2009: 148–159; Weinrib 2003, 816).

Notice that this argument does not depend upon any contingent features of private ownership such as whether it makes those who fail to appropriate worse off. This is because a violation of moral equality is intrinsically bad, even when it does not lead to any negative consequences. For example, earlier I pointed out that in modern conditions those who fail at appropriation can make a living by selling their labor to others with relative ease, hence, the duties, imposed on them by more successful appropriators, are not onerous. It is nonetheless true, however, that wage-earners occupy a position such that other people (for example, property owners) define wage-earners' abilities to provide for themselves. They can earn their wages only insofar as there is market demand for their skills. Their freedom is limited by the whims of their employers in a way that the freedom of a hunter-gatherer is not. One might say that this very fact puts a wage-earner at a normative disadvantage, even though a hunter-gatherer is almost surely much poorer in practical terms.

One may mistake this for the same objection as RDO under different terminology. RDO states that through the actions of appropriators others lose Hohfeldian liberty to use the objects; PDIO states that new duties get imposed on people through the actions of appropriators. Under the Hohfeldian framework, removing a liberty is the same thing as imposing a duty and the inverse. Both objections, therefore, appear to be identical.

But consider the following case proposed by Bass Van der Vossen:

> Andy shaved his head in the past. One day, Andy decides to again grow his hair. As a result, Beth now has a duty not to touch Andy's hair without his permission (Van der Vossen, 2015, 69).

Observe how Beth acquires a duty in this scenario but not at the expense of any pre-existing liberty. The liberty to touch Andy's hair that gets negated here is purely virtual: it does not exist before the duty emerges and, of course also does not exist after it emerges, forever remaining nothing more than a shadow of a corresponding duty.

This case shows why there is a reason to distinguish between displacing someone's right and imposing a duty on them. Even though the liberty that gets cancelled out as a result of appropriation always has the same content, its origin can be different depending on your views on the moral status of unappropriated objects. In some cases, no pre-existing liberty gets negated when the duty is imposed, but even in these cases the question of whether the imposition of the respective duty is justified remains open.

To explore this question let us first consider the hair case more closely: as a matter of fact, Van der Vossen offers it as a counterexample to PDIO, rightly pointing out that nothing appears to be morally wrong with duty imposition in this case. To explain this intuition, Van der Vossen argues that what happens in

the beard case is not "duty creation" but "duty-alteration".[29] Andy does not impose a new duty on Beth but changes the description of a previously existing duty not to touch his body without permission. His body now also includes hair and, therefore, the implications of the duty not to touch it correspondingly broadened. Relying on our perception that growing hair is morally unobjectionable, Van der Vossen concludes that duty-alteration, in contrast to duty creation, does not imply any arbitrary moral power of one person over another because what gets changed in this process are not normative facts but only physical facts. He further argues that a similar thing happens in case of appropriation. The appropriator does not impose new duties on others but only alters the content of an already existing duty to respect property rights. Therefore, appropriation does not imply any arbitrary moral power of one person over another (Van der Vossen 2015, 69–75).

Jesse Spafford (2020) gives the following response to the hair case. He argues that Van der Vossen assumes that duties cannot exist with respect to non-existing objects, but this assumption is unfounded. And once we abandon this assumption, we can see that the duty not to touch the hair existed all the way before the hair was grown. In this way the act of growing the hair changed nothing normatively speaking, in contrast to the case of appropriation where there is, in fact, no duty to respect property rights before the appropriation. Therefore, Van der Vossen's analogy between these two cases is false.

The idea of duties with respect to non-existing objects appears exotic but I can offer a more elegant response to the hair case which, I think, captures the spirit of Spafford's argument. The distinction Van der Vossen makes does not answer to PDIO, because the difference between imposing a new duty and making an already existing one more onerous is unimportant. We can represent all duties that apply to us as a set of actions that are prescribed or prohibited. It is immaterial how exactly we would break this set into specific duties. What is material is the size of this set, the overall number of actions with respect to which we are bound by a duty. Anything that adds new actions to this set worsens, other things equal, our normative situation, irrespective of whether we describe it as creating new duties or as extending those that exist.

If the argument above refutes Van der Vossen's solution to PDIO, we still need to explain our moral intuitions in the hair case, as one could hardly doubt that nothing wrongful happens in this scenario. For this purpose, let me introduce additional complexity to the analysis above. As I previously indicated, we can distinguish between actions we are allowed to perform and actions we are forbidden to perform. In addition to that, actions can be broken down into those that are physically possible to perform and those that are physically impossible to perform.

As long as an action cannot be performed physically, it has no practical significance whether its performance is allowed. For that reason, I would only say that

[29] Van der Vossen actually uses two slightly different concepts, "duty-alteration" and "duty-activation". As the distinction between them is not important for me here, I will refer to both as "duty-alteration" for simplicity sake.

an individual is free to perform a particular action only when it is *both* allowed and possible to perform.

These considerations make it possible to make sense of the hair case. Before the hair was grown, touching it was physically impossible – there was no hair. After it was grown it has become physically possible to touch it, but this physical possibility is cancelled out by a normative prohibition imposed on this act. What was earlier impossible physically has become impossible normatively for no net change in freedom. Therefore, even though we can represent hair-growing as an imposition of a duty to not touch it, this action does not make anyone's normative situation worse.

The case of appropriation appears to be different. It is very much physically possible to perform actions with unappropriated objects but after appropriation they become normatively prohibited. Appropriation, therefore, does diminish the set of actions available to others, thus reducing their freedom.

The analysis above allows a clearer understanding of how RDO and PDIO relate to each other. I see RDO as a stronger argument for two reasons. Firstly, there are quite many cases where there is nothing wrong with duty imposition: in fact, a typical line of defense against this objection of behalf of supporters of Deep Private Ownership is to advance a variety of counterexamples.[30] But it would be much harder to explain that there is nothing wrong with displacing another person's liberty. Secondly, PDIO claims that Deep Private Ownership is inconsistent with a moral principle that is external to it: that one private individual cannot have power over another. In this way it leaves open the option to reject this competing principle. RDO, by contrast, claims that Deep Private Ownership is inconsistent internally: it has to rely on the original right of use to justify appropriation but once we embrace this right, we are forced to choose deep public ownership over a private one.

An apparent advantage of PDIO is that the front of its attack is broader: it also captures cases where duty is imposed without any pre-existing liberty being displaced. But as my analysis shows this advantage is illusory. PDIO relies on a powerful intuition that there is something wrong with imposing duties on others without their consent. But as Van der Vossen's hair case illustrates, the underlying reason for such intuition is found in duty imposition's resultant reduction in the freedom for those on whom the duty is imposed. Once we consider cases of duty imposition that do not produce this result, a sense of wrongness disappears. In other words, duty imposition is only wrong when it comes at the expense of a pre-existing liberty.

For that reason, I believe that RDO is simply an improved version of PDIO. But it is important to note that, also despite appearances, there is no logical equivalence between the two objections. To show that PDIO only has teeth where it overlaps with RDO we needed to additionally establish that it is not wrongful to impose a duty when it does not happen at the expense of pre-existing opportunities that an individual had.

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[30] See e. g. (Gauss and Lomasky 1990, 492–493; Simmons 1994, 83–84).

With that I will conclude my exploration of the logical problems with appropriation. I have established so far that the very possibility of appropriation seems to entail the original right of use. But that, in turn, entails that appropriation would negate a pre-existing liberty of others, worsening their normative situation. In that context it becomes especially important for ETs to offer a strong justification of appropriation – strong enough that it would be able to overbalance the normative defect I identified. In the next section I will explore the existing approaches to the justification of appropriation and argue that all of them have serious defects.

2.3. The justification of appropriation

Since Locke (1980 II, 27–28) justifications of appropriation typically employ the concept of self-ownership. The argument usually goes along the following path: it is first assumed that individuals own themselves and then it is argued that this initial self-ownership can spread to unowned objects with which they interact, like some sort of a virus. Locke famously claimed that ownership is spread through the process of "mixing one's labor" with natural objects but other (typically, simpler) mechanisms of spread are possible. The nature of this spread is difficult to explain by self-ownership alone, hence the justifications of appropriation often involve some other right that operates in conjunction with self-ownership (or sometimes is represented as an aspect of self-ownership). I will refer to this right as "Supplementary Right" from now on. While self-ownership establishes the fact of original ownership of self, Supplementary Right explains how this original ownership can "infect" the objects that are external to self.

In this section I will start with exploring the idea of self-ownership in more detail (subsection 2.3.1.). After that I will briefly review the candidate rights that are said to operate alongside self-ownership (subsection 2.3.2.).

2.3.1. Self-ownership

There are two ways, I think, in which the concept of self-ownership can be understood. Firstly, we can understand it as owning our person, "self" in a very literal sense. This understanding, however, immediately runs into the charge of incoherence. As Kant said, one cannot own a person (even oneself) because only things can be owned and a person is not a thing (Kant 1963, 195). And this is not some sort of ethical dogma. "Person", understood as the subject of action and experience, does not exist in the material realm. It cannot be used, cannot be possessed, cannot be transferred. All typical powers we as owners have with respect to our property are meaningless if we try to apply them to persons.

Perhaps, we need to understand self-ownership as a metaphor for some other right – for example, the right to personal sovereignty (Thrasher 2019) or the right to self-governance (Simmons 1992, 273–277). But even as a metaphor it does not quite work. One cannot be denied self-governance directly. Individual's mind is inaccessible to others, no power in the world can control what thoughts we think

and what decisions we make in its privacy. Self-governance can only be denied indirectly, by controlling our body or our environment. For example, a person can be tied up or put in a cell. It would not limit her ability to control herself but would put a limit on things that can be achieved externally by exercising said control. If I am tied up I still can make a choice to move my hand, I will just be unable to execute this choice. If we draw the analogy with property in external things, it would be similar to building a wall around someone's plot of land: the plot is still in her possession but she cannot, for example, grow anything on it because the sunlight is gone. It could be seen as a violation of one's property in a land plot but it is a different violation than walking into the land plot directly and destroying the crops manually. My point is that there is no analogy to this second kind of violation when we talk about the right to self-governance because it is impossible to invade inside one's mind in the same way we can walk into one's land plot.

But perhaps it is not a problem. Simmons also characterizes the right of self-governance as the right to control one's life (1992, 273) and Mack – as a liberty to bring one's world-interactive powers to bear on the world (Mack 1995, 2002, 2015). These are thicker formulations: they include the right not to just control self but the right to control what happens to self. Such a right would protect from indirect interventions. We can say that we are still in control of ourselves when we are put in a cell, but we surely are no longer in control of our lives.

But under this interpretation there is no natural limit as to how far the right to control one's life extends. The material world is naturally interconnected and everything what happens in it affects our lives in one way or another. The right to control one's life can imply the right to control all events that happen in our vicinity. For example, if I am denied a job, I can interpret it as an infringement upon my right to control my life. But, of course, if I can force someone else to employ me, it will be a similar infringement from her perspective.

It follows that this right needs to be in some way limited and balanced with the similar rights of others. But to find the principle that could govern such a balance we need to give additional content to the right itself. For example, we can say that controlling one's life means having control over the resources necessary to sustain one's life. Or we can say that a mere opportunity to obtain such control is sufficient and this last possibility will further branch out, depending on what exactly we understand under "opportunity".

This discussion shows that if we understand self-ownership as the right to control one's life, then its content is indeterminate and would depend on our other normative commitments (Arneson 1991; Fried 2004, 76). And, indeed, even though self-ownership is typically invoked to justify libertarian political views, some authors used it as an argument against absolutist understanding of property rights and for taxation and the redistributive state (e. g. Christman 1991).

The proponents of self-ownership sometimes argue that it is the only thing that can protect us from slavery (Narveson 1988, 68). But this reasoning commits what Attas called "the fallacy of exhaustive ownership" – the idea that everything should be owned by someone and if we do not own ourselves, it should be the

case that we are owned by someone else (Attas 2003, 6). Under this reasoning any non-consensual duties should be classified as a form of slavery: to have a non-consensual duty means to have no control over one's life and to have no control over one's life means that someone else controls it (Nozick 1974, 171–172).

This idea misses the fact that if we are not free to control our life in some respect, it does not follow that someone else controls it. Principles of distributive justice can be such that they put upon us a duty to help others but do not give others the power to command our choices. For example, it could be the case that we have a non-consensual duty to pay taxes to maintain systems of education and healthcare that work for everyone's benefit. In this scenario others would benefit from the taxes we pay but they would have no power to direct our choices. In fact, we would even keep the freedom to refrain from working and, in this way, to avoid being taxed. Even though it is true that others benefit from our efforts, it is not true that they control us. Our lack of self-ownership does not transmit into ownership by others.[31] As Cohen has put it, "…'nobody' is the answer to some questions of the form: who has the right to decide whether or not I do A?" (Cohen 1995, 233).

The attempt to interpret self-ownership as the ownership of self leads nowhere. It finds no support in our anti-slavery moral intuitions and, on top of that, lacks clear content. Let us then try our luck with a different approach. We can view self-ownership as literal ownership of our body as a physical object.[32]

With this interpretation we run into the same problem as before: our relationship with our bodies is too different from our relationship with external things. We cannot lose possession of our bodies. When we use our bodies we do it in a different sense than another person would use them: we control them directly by means of the nervous system, while others can only control our bodies indirectly, using their own bodies as proxies. There is a difference between objects that belong to us and objects that are constitutive parts of us. The former are in principle separable from us, the latter are not.

Daniel Attas (2003, 17–18) draws another important distinction. We can use our body as subjects – for example, when we lift a cup of coffee – or we can use our body as an object – for example when we raise a hand to cover our eyes from the sun. The difference here is that in the first case our body is acting while in the second case it is acted upon. Someone else could grab my hand and cover her eyes with it but someone else could not take my hand and use it to lift a cup of coffee, unless I would cooperate. The fact that we can only use as subjects our own bodies but not the bodies of others suggests that our relationship with our bodies is unique and cannot be fully covered by the concept of ownership that was initially designed for external things.

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[31] For a more detailed presentations of this argument see (Attas 2003, 10–11; Breakey 2011a; Cohen 1995, 231–236).

[32] See (Cohen 1995, 109; Steiner 1994, 232; Otsuka 2003, 12; Vallentyne 2000, 2).

The proponents of the notion of self-ownership typically point out that this notion is necessary to explain certain moral intuitions. Consider, for example, the case of compulsory redistribution of eyes (Christman 1991, 28–46; Cohen 1995, 70, 243–44; Nozick 1974, 206). Suppose that half of the population is born with a normal pair of eyes and the other half is born eyeless. Suppose that transplantation technology allows to transplant eyes from one person to another without much difficulty. In this scenario there seems to a rationale for a compulsory state-run scheme where each of the naturally sighted is forced to donate one of her eyes to one of the naturally unsighted so that everyone would have the sense of sight. Most people, however, would feel great moral discomfort from this idea. This moral discomfort, as it might be argued, should be explained by the fact that deep down we all believe that our eyes are our property in the sense that only we can decide what can be done with them. And that shows how the self-ownership thesis has intuitive appeal.

Kasper Lippert-Rasmussen (2008, 96–107) modifies this example to demonstrate that our moral revulsion in that case has nothing to do with the implicit recognition of self-ownership:

> …let us consider an eye redistribution scheme in which half the population is born with two pairs of eyes and the other half with no eyes. In sighted individuals, one pair of eyes is located normally and fulfills the usual function. The other pair is located inside the human body, say, in the shoulder. Although this latter pair would enable those who have them to see if they were surgically moved to the eye sockets, they play no role where they are. Indeed they cannot perform any visual or other bodily function without being moved. Suppose further that the body of a person born with two pairs of eyes will expel the spare pair when that person reaches twenty years of age. The pair can then easily be reabsorbed into the shoulder of its owner, or the owner can transfer his spare eyes to a blind person (2008, 98).

Observe how in this scenario we would typically find eye redistribution scheme much less objectionable than in the first scenario, if objectionable at all. But this change in moral evaluation is puzzling if we explain our objections to eye redistribution by the intuition of self-ownership: non-functional eyes are as much a part of our body as a functional pair and we own them just in the same sense. This scenario suggests that our objections are explained not by the implicit belief in self-ownership but by some other considerations. It appears that the idea of sacrificing well-being of one individual for the sake of another is indeed unappealing, but well-being is not what the concept of ownership is ultimately about. The concept of ownership arises as a response to the political question of who the ultimate controller of a particular segment of material world is. Owning things – your own body included – can serve as means for promoting well-being but the modified eye redistribution scheme shows that ownership is redundant for this purpose and, indeed, counter-productive because it allows individuals to withhold resources that can be more effectively used by others. If what we are concerned with is well-being, it is more logical to infer from this concern the right

to well-being, not the right of ownership. It will not give us excessive powers – like, the power to control the extra pair of eyes we do not use. On the other hand, it would give us claims against others when they are in possession of resources that we need more – the kind of claims that the right of ownership does not supply. Even though it still seems intuitively plausible that we have some right with respect to our own body, it is not necessarily the case that this right is in any way similar to the right of ownership. Jason Brennan and Bas Van der Vossen come close to this idea when they define self-ownership as follows:

> On the one hand, self-ownership offers protections (in the form of Hohfeldian claim-rights) against unwanted incursions on one's person. On the other hand, self-ownership offers the freedom (in the form of Hohfeldian liberties) to use one's person. (Brennan and Van der Vossen 2018, 209)

Notice, however, that "the freedom to use one's person" is, as I discussed earlier, inherently indeterminate as its content depends on the amount and nature of control we are willing to allow individuals over their environment.[33] This fact leaves only one aspect of self-ownership intact: the right against unwanted incursions. This is very similar to the right that Attas labeled as "original freedom" (2003, 17). Such a right, while granting the control over one's body, would not grant much else – for example, a control over any kind of fruits of said body (Attas, 2003, 19–20). In this way it is markedly dissimilar from the right of ownership.

With that observation allow me to wrap up the discussion of self-ownership. Its conclusion, I think, should be that this concept is plagued with numerous problems. The intuitions that are usually cited in its support fail to do their job on a closer examination and the content of this concept is indeterminate, except if we define it so narrowly that it would not be able to do any normative work by itself. Recall how in my description of the debate between Deep Private and Deep Public Ownership (1.3.) I characterized the central assumption of Deep Private Ownership as the idea that things we own relate to us in the same way as our body parts. In the light of this assumption, it becomes obvious that self-ownership is nothing more than a rhetorical trick on the behalf of Deep Private Ownership theorists. They label the relationship between us and our person as "ownership" to create an impression that the relationship between us and our property is just as close and intimate (Ryan 1994, 256). But this equivalence is exactly what their opponents deny, and they need to prove, and it is inadmissible for them to use it as a starting point of the argument.

What this discussion means in the larger context of my work is that self-ownership cannot help in the justification of initial appropriation. The simplistic description of appropriation as "spreading around" self-ownership does not work

[33] Brennan and Van der Vossen fully realize that. Self-ownership in their view is not the starting point of liberalism but its final conclusion and its exact content varies depending on our other assumptions (2018, 209–210).

because there is no self-ownership in the first place. With this in mind, we need to take a closer look at the mechanism that is allegedly responsible for spreading out the ownership.

2.3.2. Supplementary Rights

Before I move to the review of specific supplementary rights that can potentially serve as a justification of appropriation, I want to draw the reader's attention to one important argument against the existence of such rights that was advanced by Rowan Cruft (2006; 2019, 210–214). He pointed out that any justification of private property should rely on some sort of interest of the individual that we deem important enough to warrant legal protection. But the very fact that this interest is so important gives us a reason to believe that it grounds a claim not just to non-interference but also to assistance. The claim in question might be much weaker than the claim to non-interference but it should have at least some weight. In this context Cruft points out the following. Whatever interest we believe to have such normative weight, we cannot escape the conclusion that after a certain amount of property is accumulated by an individual, the beneficial effect it has upon advancing this interest hits the point of diminishing returns. Every next unit of wealth we acquire would be less useful for us than a previous one and at some point the usefulness of additional wealth would become unnoticeable. Suppose we believe that property rights are necessary to secure the interest in self-preservation and comfort. In that case we can easily justify ownership over a house, some clothing, food supplies. We can even justify ownership of a small business that provides a stream of income sufficient to maintain dignified livelihood. But we would struggle to explain how expanding the business twofold (or tenfold) would materially strengthen our ability to preserve ourselves.

Recall now the earlier observation that the interest in question also gives a claim to assistance comes in. We have acknowledged that this is a weak, possibly very weak claim. But if the beneficial effect of ownership decreases, it will necessarily, at some point, hit a level where it is not strong enough to outweigh even the weak assistance claim. To continue with the above example, the fact that our interest in self-preservation gives others a normative reason not to trespass on our small business also means that we have a normative reason (even though maybe a weaker one) to help others to preserve themselves. And there will be a point where the effect of additional wealth on our self-preservation will be so small that our duty to help others will start to win over.

Cruft concludes from the above that private ownership cannot be justified individualistically because the relative strength of its justification would always depend, in this manner, on the broader social context, most notably, on the position of others relative to the owner. I do not believe that such strong a conclusion is warranted. Some interests are such that they do not generate assistance rights because no external assistance is possible. Imagine, for example, that there I have an interest in doing X *by myself*. Any assistance here would defeat the very point of the interest because it would mean that X is not done by myself. It could be

that the interests protected by the principle of Deep Private Ownership are of that kind. But I do think Cruft's argument puts a restriction on our list of options from which we can choose a supplementary right that can justify appropriation. The right in question should not entail assistance rights or it should not have its effect diminished with the amount of accumulated wealth. This restriction, for example, excludes such rights as self-preservation or substantive autonomy from our consideration.

In the rest of this subsection I will explore three rights that, I think, satisfy this requirement: the right to enjoy the fruits of one's labor, the right to participate in ownership-establishing practices, and the right to non-interference.

2.3.2.1. The right to enjoy the fruits of one's labor

The right I am going to explore here appears in Locke's Second Treatise and can be defended by two very distinct arguments. The first one is the claim that we extend our self-ownership into external things by "mixing labor" with them (The Labor-mixing Argument) (1980 II, 28). The second argument is slightly different. Instead of claiming that we are putting some aspect of our personality into an object by labor, it simply states that all or almost all of the value of this object is created by labor (The Value-creation Argument) (1980 II, 36, 42, 43). If we then assume that we own the value we create – another assumption upon which this second argument relies – it would follow that whenever we add value to the object, we receive a claim to own it. For if anyone else were allowed to use it without our permission, our right to the value we created would be violated.

Let me first establish clearly how exactly these arguments are distinct. The Labor-mixing Argument rests on two normative premises. The first one is the principle of self-ownership explored above: the idea that individuals own themselves. The second one is that this initial relationship of ownership can be spread around by performing labor on objects in the outside world.

The Value-creation Argument has only one normative premise: the claim that persons own the value they create. This claim could be seen as one of the aspects of self-ownership but could also stand alone: one can endorse this claim without committing herself to the self-ownership principle more generally. Furthermore, in contrast to the labor-mixing argument, there is no need to claim that certain intrinsic properties of labor allow us to spread our original self-ownership around. This is because in The Value-creation Argument what is important is not the act itself but its result: the fact that you added value. This is why normative properties of labor as an activity are immaterial.[34]

In this way the Value-creation Argument comes with much lighter normative assumptions than the Labor-mixing Argument. But this advantage comes with a price: if what makes the thing your own is the result of your action, not the action itself, you need this result to actually occur. In this way, the second normative

[34] For more on the distinction between the Labor-mixing and Value-creation arguments see (Cohen 1995, 177; Kramer 2004, 146–150). Kramer, notably, emphasizes that Locke himself meant to employ only the former of the two.

assumption of the Labor-mixing argument is traded for an empirical assumption: the claim that all (or, at least, almost all) value, which objects have, is created by labor (Locke 1980 II, 40, 43).

Recall now our earlier discussion: the right of the appropriator clashes with the original right of use and needs to be strong enough to outcompete it. If the empirical assumption of the Value-creation Argument is true, then the claim of an appropriator could be judged strong enough: if she made the object usable in the first place, others can hardly complain that their right to use it was lost. But if the object had value and could be used even before any labor was applied, then the argument loses most of its power: as the appropriator creates only a part of the object's value, she cannot demand ownership rights over the whole object. At best, she can ask for some weaker right which would properly reflect her contribution.

In this way, the Value-creation argument depends critically on its empirical component. With that in mind, let us examine its accuracy.

Here is how we can reconstruct Locke's argument for this assumption. Assume that we have a parcel of land A which yields 1 unit of value. Imagine now that this land plot gets improved by our labor into A+ and after improvement it yields 10 units of value. Locke claims that only one unit of value out of 10 can be attributed to the contribution of the land itself because such was the amount of its yield before any improvements. Another nine units should be attributed to the contribution of labor which went into the improvements.[35] And then Locke claims, plausibly, that the relationship between productivity of improved and unimproved land we can observe in the real world is of about the same magnitude.

To understand what is wrong with this logic, consider the inverse example. Imagine that we have an amount of labor A which is not applied to any kind of material resource at all. The amount of value produced by such labor would most likely be zero or close to zero. But then we give this laborer some materials to work with and label this combination of materials and labor as A+. It seems plausible that A+ would yield us value – let us say, 10 units of it. So, should we conclude that all these units of value should be attributed to materials and none of them to labor? This conclusion is about as plausible as the one in our previous case – and yet exactly the opposite.

The real conclusion, of course, is that we cannot produce anything with just one factor of production. We always need to combine, at the very least, human labor and material resources on which this labor operates and, taken alone, any of these factors would be entirely useless. Modern economic science claims that, other things being equal, the productivity of the factor of production is equal to its market price.[36] As market price on land in actual world is hardly zero, Locke

[35] Locke's numbers vary. First he claims that the relationship is 9 to 1, then 99 to 1 and, finally, 999 to 1 (1980 II, 40, 43).

[36] This is a simplification. For example, I omit the fact that economists deal with marginal productivity instead of productivity but for our purposes here this is unimportant. For more on the economic side of the issue see (Varian 2010, 353–354).

seems to be wrong in his empirical assumption. It means that the Value-creation Argument loses most of its force, if it is not defeated entirely.[37]

Let me now turn to the Labor-mixing Argument. It rests on two normative assumptions: that we own ourselves and that we can spread out this relationship of ownership to external objects by performing labor on them. The self-ownership assumption I already examined at length in the previous subsection. Let us take a look at the second assumption here.

There are, as I see it, three problems with it. Here is the first one: why mixing something we own with something we don't own would give us ownership over the resulting mixture? Nozick brings forth the following example: imagine that we own a can of tomato juice and we pour it into the ocean. Would it mean that we have come to own the ocean in this way? Or, more plausibly, it would mean that we forfeited our tomato juice? And if the latter is true, why then we should believe that we come to own natural resources by mixing our labor with them? (Nozick, 1974, 174–175).

If we are somehow able to resolve this problem, we would immediately run into the second one. Under the Lockean model the spread of ownership only happens when an appropriator invests her labor into an unowned object but any subsequent act of mixing labor with the same object by others would have no normative effect at all – in fact, it would constitute a trespass. So, why these right-generating properties are limited only to the first instance of labor? If we claim that by performing labor on an object we put something into it which makes it our own, then it should be true not only for the first laborer but also for all the subsequent ones. It appears, that we should end up with a number of people with ownership claims to the same object and it is hard to explain why the strength of these claims should depend on who labored earlier but not, for example, on who has put in more labor.[38]

The third problem is that there is no clear rule on how intense the interaction should be for it to count as labor and what is the boundary of the object that is acquired as a result. Our actions affect everything around us and in that sense our labor constantly gets "mixed" with everything we touch (Christmas 2021, 75). Surely, no one would defend such an extensive view on what constitutes labor-mixing, but the point is that the argument does not contain any internal criteria that would allow to put any kind of limit on the process of ownership-spread.

The discussion above, I think, shows that the supposed right to the fruits of one's labor is a poor way to justify appropriation, both taken together with the principle of self-ownership and by itself. Let me turn to the next candidate right.[39]

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[37] For a lengthier discussion of this argument with the same conclusion see (Cohen 1995, 182–185).

[38] See (Waldron 1988, 176). The value-creation argument, of course, runs into a similar problem: what do we do with the claims of people who improved the object after the first person?

[39] For a lengthier exploration of the nature of the process of labor-mixing see (Munzer, 1989).

2.3.2.2. The right to participate in the practice of private ownership

Erick Mack (1990, 2010) and Bas Van der Vossen (2009, 2015) promote the view that individuals don't have a natural right to any specific object in their property but rather a right to demand that others participate in a social practice within which objects are assigned to individuals as their private property. This right, in turn, can be further justified on, for example, consequentialist grounds. One can argue that individuals need a stable and secure access to material goods to flourish and this sort of access can only be provided by the right of ownership.

This argument faces an immediate objection: there can be a large variety of social practices that can secure the access to individual goods. Most notably, it is not at all necessary that such practices would have anything to do with the right of private ownership as it is normally understood. Some sort of socialist regime under which individuals can have consumer goods in their personal property (and, in fact, are guaranteed to have such goods in personal property) but all means of production are publicly owned would do the job just as well. Here is where an additional limitation needs to be introduced: the practice in question needs to be compatible with the principle of self-ownership. Presumably, it can be shown that no other system than the system that allows unilateral appropriation can satisfy this criterion. However, it is also true that this criterion allows for multiple different rules of appropriation and transfer, all of which would be systems of private ownership (Mack 1990, 536). In contrast to the Labor-mixing Argument we no longer say that appropriation is an extension of our self-ownership. Instead, we are saying that an opportunity to appropriate is the necessary condition for realization of self-ownership and that others have a duty to provide us with such an opportunity by complying with the practice of private ownership (Mack 1990, 534–536).

The right to the practice of private ownership allegedly allows to solve multiple problems within entitlement theories. Firstly, such theories typically justify our entitlements to external things by means of one particular right-conferring act. But Mack argues that there is no single act that both has right-conferring properties and can be observed in all cases of acquisition of ownership (Mack 1990, 529–530). It is true that there are paradigm cases where the force of ownership right seems intuitively plausible: for example, the fact of you working in a field does seem to give moral protection against a third party who would intrude and destroy the crops. Entitlement theories draw upon such cases for support. But there are also cases where ownership right has no apparent intuitive justification, for example receiving an inheritance from a distant relative you never met or winning a lottery. Practically speaking, ownership originates from a variety of sources and it is hard to find a common theme between all of them that could serve as a moral justification. But if we would speak of these property-conferring events as elements of a broader social practice the problem will disappear. We would no longer need to explain how each such event has moral significance. We would only need to demonstrate the moral significance of a broader practice they are parts of.

Secondly, the right-to-practice approach allegedly resolves the private duty imposition problem (Van der Vossen 2015). Appropriation does not create new duties for us but merely individuates an object of an already existing duty. Others have a natural duty to participate in the practice of private ownership; in that respect their normative situation remains unchanged as a result of appropriation. All that appropriation does is specifying what exactly others need to do to properly follow the practice.[40]

Finally, the right to practice of private ownership solves most of the transfer-related problems that I will cover in the next section. The source of many of these problems is the fact that entitlement theories need to explain how transfers can have the same normative properties as appropriation. But if we need to justify not individual acts but the practice as a whole, of which both appropriation and transfers are parts, the problem disappears.

The main weakness of this approach is, I think, that it is critically dependent on the notion of self-ownership. For even if we have an interest in access to material resources, there are multiple ways to satisfy it and the practice of private ownership is only one of them. It is the necessity to be compatible with self-ownership that allegedly makes the practice of private ownership stand out favorably among its competitors. But, as we saw, there are many problems with the notion of self-ownership: it is indeterminate and not particularly intuitive. It is not even clear that the practice of private ownership is compatible with it: if, for example, we understand self-ownership as substantive autonomy, as actual, not formal opportunity to determine the course of one's life, then it can be argued that the practice of ownership actively diminishes such opportunity for those who have poor skills in this practice.

In that respect, it is unclear that the right to the practice of private ownership can satisfy the filter imposed by the assistance-rights argument with which I started this section. If we justify this right in a consequentialist manner, we need to deal with the fact that the positive consequences of private ownership diminish with the increase in the amount of property owned. It is possible that the right to practice would prescribe to penalize large estates, suggesting, for example, that they should be subject to redistribution or even confiscatory taxation. This would go against the spirit of the Deep Private approach as it insists that the pattern of wealth distribution does not matter morally when it comes to property rights.

For these reasons, I do not believe that the right-to-practice approach can be a satisfactory justification for appropriation. One way to save it could be to refrain from consequentialist reasoning altogether and instead justify the right-to-practice by reference to the more fundamental right to non-interference.[41] In that case this approach mostly collapses into the view I am going to explore in the next subsection.

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[40] See 2.2.2. for my reservations about this approach.

[41] Mack alluded to such possibility in (2010, 58–64).

2.3.2.3. The right to non-interference

The right to non-interference as a justification of appropriation appears, in different forms, in (Lomasky 1987, 111–151; Sanders 2002; Wendt 2022). However, I believe, the best version of this justification is presented in the recent book of Billy Christmas (2021) and this will be the version I am going to explore in this section.

Traditionally justifications of property rights focus on the right to exclude others as the core component of ownership and take their main task to be justifying this particular element. Christmas offers a different view where the core of ownership is the right to use. The right to exclude is seen as nothing more than a supplementary right that is only introduced to facilitate use. It is not seen as something valuable intrinsically but only as valuable as far as it is necessary to make use unobstructed (Christmas 2021, 60–68).

This focus on the use-component of ownership allows for the view under which the right of ownership is nothing more than a natural extension of the right to non-interference. We start with the idea that individuals have the right to be protected from interference in their activities as long as they do not interfere with anyone themselves. This idea is very intuitive; in fact, it is similar to the natural liberty argument that I cited as a justification for the original right of use in 2.2. After that we observe that activities of individuals need to involve external objects and it seems unobjectionable that as long as we use these objects, snatching them from our hands or obstructing our use of them in some other way would constitute interference with our activities. The right to non-interference would protect us against such intrusions. This point was known since Kant (1991, I.I.I – I.I.IV).

In this manner we would be able to justify the right to use those objects with which we operate at any particular moment of time. Christmas, however, takes a step further. He points out that in many cases it is essential for the activity that the objects remain available for us even when we do temporarily cease to use them. Christmas puts the point as follows:

> Take the use of clothes made from animal hides, silk, wool, or cotton. The subsumption of these objects into the activities of their users does not cease when they are hung up at night and one goes to sleep, nor when one changes out of one set and into another. Their use is typically longer term than that and, when it is, therefore demands that others not snatch them the moment we take them off. (2021, 209–210).

Once we recognize this, we would see how the right to exclude others is a natural extension of the right to use, just as the right to use itself is a natural extension of the right to non-interference. And these inferences allow us to justify appropriation: an object becomes ours the moment we start using it (in ways that do not interfere with the activities of others) because it becomes a part of our ongoing activity that is protected by the right to non-interference.

The biggest advantage of this approach to justification of appropriation is its simplicity. It does not rely on any controversial normative assumptions, its only assumption is the right to non-interference which is very intuitively plausible. Most notably, it does not need the notion of self-ownership (Christmas 2021, 48–51). The right to non-interference can justify appropriation all by itself. The approach does not make complex metaphysical claims about putting some aspect of our personality into objects thus making them our own. To appropriate a thing, we simply need to start using it in any way.

One might respond that it is not always the case that the use of objects necessitates the exclusion of others, but even this problem Christmas turns into an advantage. He points out that, indeed, use does not always generate private ownership and, when the manner of use is non-exclusive, it can create public or collective ownership over a certain resource commonly used by a group of people (2019; 2021, 90–102). In allowing multiple forms of ownership this approach offers a more varied kit of normative tools than we typically expect from Deep Private views.

The right-to-non-interference approach is attractive – but not without flaws. I have already mentioned that the right to non-interference is justified in a manner very similar to the justification of the original right of use. This leads us to a puzzle: in 2.2. I inferred that private ownership clashes with natural liberty, but Christmas sees private ownership as a manifestation of natural liberty. Let us look closer at how the same argument can lead to such different conclusions.

The source of the difference is that in the case of the original right of use natural liberty is understood simply as freedom to grab whatever object you fancy and do things with it. Naturally, the right of ownership would restrict such liberty. But under the right-to-non-interference approach natural liberty extends its protection not just to acts upon an object you immediately hold but also to an *opportunity* to act upon an object that is a part of an ongoing project of yours. On the other hand, it does not cover the freedom to use objects that are engaged in someone else's project because such an action would count as interference in their affairs and thus will not be protected by the right to non-interference. Once we reconfigure natural liberty like this, we would be able to present it as a grounding of the right of private ownership, instead of its enemy.

But if we reframe the right to non-interference in this manner, it starts to seem very arbitrary. If we want to protect not just ongoing actions but also the opportunity to act, then it is unclear why we should limit protected opportunities only to actions upon those specific objects with which we have already interacted. A broader class of protected opportunities seems no less justified.

Christmas would have two responses to this objection. The first one is that any right needs to be physically grounded in some way, have identifiable borders, otherwise the scope of its protection remains indeterminate (2021, 125–126). He argues that when we act upon a particular object, we create such physical anchor by showing that our right to non-interference extends to our activity with that object and not with some other one. But this response only works if we want the right to have an opportunity of action to cover only some specific group of

objects. What if we want it to cover all the objects in the world? That would be the natural conclusion if we would push the right to an opportunity to act to its logical end. In that case the content of this right is always determined, and we would not need any physical anchors to help us to pin it down.

At that point Christmas would advance his second response. He would say that it is a requirement for any right to be compossible, which means that it should be possible for all individuals to realize it at the same time.[42] This is because the very purpose of rights is to resolve conflicts and rights that give individuals conflicting claims are unable to fulfil that function (Christmas 2021, 39). He would further point out that the right that would protect the opportunity to act upon all objects in the world fails the compossibility test: the only way to secure such an opportunity for one individual is to deny it to all others. The right to the opportunity to act can only be compossible if it is limited to certain objects or, in some cases, to certain non-exclusive actions upon a particular object, and the limits are configured in such a way that the actions of one individual do not interfere with the actions of others. In this configuration such a right would manifest as a collection of property rights, private and common.

I do not think this response is satisfactory. Christmas is essentially saying here that to resolve the conflicts over natural resources we need to assign them to individuals in a seemingly arbitrary manner (most people would see giving an advantage to anyone who happened to start using a resource first as morally arbitrary). A natural retort here is that if this is the only way in which the right to non-interference can function then we need to conclude that the right to non-interference cannot be justified. In saying that, one does not need to deny the intuition that individuals have *interest* in non-interference and this interest is worthy of moral protection. But private ownership is not the only possible form in which such protection can be supplied. One can argue that the only way to resolve conflicts over natural resources in a non-arbitrary way is to establish a public body that would be a final authority on the matters of how natural resources should be used. This public body, the argument would go, would take care of everyone's interest in non-interference while properly accounting for all factors that determine whose interest is more urgent in each particular case, instead of distributing property titles in random fashion as Christmas proposes. In other words, an attractive alternative to the individual right of non-interference is the right of deep public ownership.

I think that even though Christmas offers an idea that is much more simple, elegant and intuitive than self-ownership, he commits the same mistake. He assumes what he is supposed to prove: that the only way the use of natural resources can be regulated is some sort of deep private ownership regime where the use of resources is a matter of individual decisions. It is in this context he asks the question of how we can make such decisions compossible and comes up with his system of private property as an answer. He does not have a good response to those who start with a different assumption: that the use of resources should be

[42] In that he follows (Steiner 1994).

ultimately decided by collective deliberation. And that, in turn, means that the right to non-interference cannot be a solution to the Right Displacement Problem.

The right to non-interference concludes my survey of possible supplementary rights and also concludes my analysis of possible justifications of appropriation. The results so far are disappointing for the supporters of Deep Private Ownership: none of the options examined is strong enough to outbalance the original right of use.

In the next section of this chapter I will move to the problems that appear with the second path to acquisition of private property rights: the transfer.

2.4. The problems with transfer

In this section I am going to survey four problems that are not necessarily logically connected with each other but still share a single theme: they emerge from the fact that entitlement theories need to justify the institution of transfer and account for its implications. I will start with the most basic problem: the fact that there is no logical connection between appropriation and transfer. After that I will move to the right to receive income and its questionable implications. Then I will look at the threats to political stability that could be generated by uncontrolled transfers and I will finish the section by exploring the idea that the justification of present-day property rights cannot rely on an uninterrupted chain of transfers.

2.4.1. The right to appropriate does not entail the right to transfer

Assume that despite all the problems I explored above we are somehow able to justify appropriation. We would show that an individual can unilaterally acquire a right of exclusive use over an object that was previously accessible for all, thus overriding their original right of use. Even if we succeed in that, it still would not follow that this right of exclusive use can be freely transferred to others. The ability to transfer would imply the ability to change the normative status of a different person, to abandon your right of exclusive use and give such a right to her. It would be a Hohfeldian power and the arguments that support appropriation only aim to justify a claim-right to exclude others. There is no obvious logical connection between them.[43]

The immediate response here would be that if we concede that there is a power to appropriate, there is no particular logical leap to the power of transfer. If we made peace with the idea that an individual can impose duties on others in relation to herself, there is no reason imposing such duties in relation to a third party should represent a problem.

There are two problems with that response. Firstly, the power to appropriate and the power to transfer are different in one important respect. The power to

[43] For a more detailed exposition of this argument see (Cruft 2019, 220–226; Stilz 2018, 71)

appropriate belongs to all individuals equally and extends to an equally indefinite set of objects. The power to transfer is unequally distributed: individuals possess it only with respect to their property, the value of which can differ a lot. This inequality makes the power to transfer much less intuitive than the power to appropriate and requires additional explanation.

Secondly, Deep Private Ownership theories put a lot of effort into portraying ownership as a pre-social right, as something that is justified by a deep, intimate connection between an individual and the things she owns. It is odd to say that this connection can be so easily broken and transferred to someone else. In fact, the most paradigmatic natural rights are inalienable: you cannot give away your right to life or your right to freedom. And the big part of the reason why is the fact that the respective goods cannot be separated from you: your life cannot be lived by someone else instead of you. And this constitutes another reason why the power to appropriate is more intuitive than the power to transfer. If there is a personal connection between me and my property, it is natural to say that such a connection can only be created by my personal effort. It is much weirder to have it created *for* me by someone else.

The supporters of Deep Private Ownership, it seems, want to have their cake and eat it too: they want there to be a strong moral connection between persons and their property when it comes to the protection of their property from the intrusions by others. But they also want this connection to be weak when it comes to transfers. The very fact that property can be separated so easily and, in fact, the constant movement of things from one owner to another is a normal part of social life suggests that there is an important difference between the right of ownership and other natural rights.

The right-to-practice approach circumvents this difficulty (and, more generally, most of the transfer-related problems). It claims that there is no natural right to specific things, only the right to demand that others participate in a practice where things can be owned. No personal connection between individuals and their property is claimed and transfers are just seen as a normal part of the practice of ownership and do not need to be explained in terms of prior ownership rights.[44] Following this approach, however, would come at price of having to deal with its weaknesses, most notably, with the reliance on the concept of self-ownership (see 2.3.2.2.).

Billy Christmas (2021, 77–81) suggests a different way to resolve this problem. Recall that he sees ownership as an extension of the right to non-interference: it is protected only as long and to an extent as it is necessary to safeguard your activities. If you cease all projects in which a particular thing you own is engaged, a third party using this thing will no longer interfere with you, which means your ownership is effectively abandoned. In this way, his view necessarily allows you a way to disown your property.

[44] For a good example of the application of the right-to-practice approach to the problem of a moral connection between owners and their things see (Shoemaker & Van der Vossen 2022).

But once you are no longer an owner of this thing, it can be appropriated anew by someone else. This fact paves the way for the following idea: acts of "transfer" are nothing more than a conjunction of two acts: abandonment by the previous owner and re-appropriation by the new one. In that way we do not need to introduce the power of transfer as a specific Hohfeldian power and deal with all the complications I described above: transfers are fully explained by the power to appropriate. No special theory is required in that respect.

I find this view unconvincing. It necessarily requires there to be a moment of time when the thing under transfer is unowned: otherwise, the new owner would not be able to appropriate it. But that, in turn, means that if a third party would be able to insert herself into this very moment and snatch the thing from under the nose of the intended new appropriator, the parties of the would-be transfer would have no legitimate objections against it. As Christmas himself emphasizes, it is normal for justice to operate on the first come – first served basis (2021, 39).

Christmas, I think, might object that such a thing would never happen in practice as the gap between the abandonment and re-appropriation is infinitely small, as the participants of the transfer pre-arranged these events. I am, first of all, unconvinced that practical impossibility matters here. The fact that property can be lost in transfer to a third party even in theory implies a view on ownership that is deeply at odds with our normative intuitions. It is very hard to see, from a commonsense viewpoint how an intruder grabbing a watermelon I am trying to give to my friend is not a thief. There is a difference between the intent to throw away a thing and the intent to pass it to someone else and it is unclear why the rules of justice should not account for this difference.[45]

This discussion suggests a deeper problem with Christmas' account: the very concept of transfer implies that this is something owners do.[46] Here is how an eminent lawyer explains this idea:

> Consider a change in the factual possession of a copy of Leviathan. If I hand my copy to you, then you are now in factual possession, but your factual possession is simply that—it is not as if you have assumed my factual possession. As regards the fact of possession, the same result would obtain whatever events led to my loss of possession and your assumption of it. The idea of transfer, on the other hand, is inherently intentional, involving my putting you in factual possession with the intention that you will assume possession as a consequence of my doing so, and your taking possession with an intention to do so. Such a transaction may not, strictly speaking, bespeak a power on my part to transfer, but it identifies a particular way in which we understand that my factual possession is relinquished and yours realized. In the absence of such an understanding of this particular way of effecting the change in possession from me to you, we would not conceive of any other way of doing so as functionally equivalent to a transfer. So, the directional abandonment conception of transfer is only conceived of as a transfer by analogy with the real thing. To my mind, the order of explanation really must go in that

[45] For this argument see (Ripstein 2009, 112).
[46] Cf (Kant 1991, 94).

> order. By reversing the reasoning, we could conceive of transfers as functional equivalents of directional abandonments. But we don't. This should bolster our sense that the distinction between transfer and either directional abandonment or novation is robust, and that our understanding of the former is prior to our understanding of the latter. (Penner 2014, 257)

This is further evidenced by the fact that in some circumstances you can be made (at least, provisionally) an owner even without your knowledge or explicit consent. Consider the example of inheritance. Property rights of the former owner cease when she dies and then the property remains in a sort of a legal limbo until the heirs accept inheritance. And even if we say that the acceptance is nothing more than a legal technicality and the re-appropriation happens earlier, it still cannot always happen at the very moment of the death of the previous owner: heirs often would not even know she died for hours or days. Under the abandonment – re-appropriation approach the property would be simply unowned until the heirs take it and any random person is free to appropriate it. I do not think Christmas wants this conclusion.

I believe that any theory of transfer should account for such cases by providing a description of transfer as primarily an action on the part of the owner. The problem of the abandonment – re-appropriation approach is that it does the opposite. It is the receiver who is the active party while all that is required from the owner is to *cease* activity (stop using the thing), not to perform any.

And with that I will conclude this subsection. So far, we did not find a satisfactory way to explain how the power of transfer can originate through unilateral appropriation.

2.4.2. The right to income

Some authors advance the following objection against the Deep Private approach. Of all the powers associated with ownership the most impactful and the most socially consequential in the modern context by far is owner's ability to receive income from their property – by means of selling it, renting it out or in any other way.

This ability, however, cannot possibly be justified merely by a reference to any kind of individual action. We cannot ground it in an event that only concerned the owner and the object she appropriated. This is because the amount of received income depends on much more than the interaction between the owner and her property. It also depends (and often to a much larger extent) on the situation in the society in the whole, on whether the resource which the owner possesses is valued by others. In this way the value of the resource is created not by its owner but by the society as a whole. For that reason, it is unjust if the owner can exploit this value by receiving income from her property without anyone else having any say in it.[47]

[47] See (Christman 1994; Fried 1995; Taylor 2005)

Barbara Fried illustrates this reasoning by the following example:

> Imagine that in the 1950s WC [Wilt Chamberlain – the text is a commentary on Nozick's famous thought experiment] bought a parcel of vacant land in a sparsely populated county adjacent to New York City for $5,000 in cash, which cash he had saved from his earnings as a day-laborer. Over the ensuing twenty years, economic, demographic, and other social changes spurred large numbers of people who worked in New York City to emigrate to the suburbs, driving real estate prices up 500-fold or more. By the early 1970s, WC's land is worth $250,000. (Fried 1995, 235–236)

In this example, Fried argues, WC only has claim on the amount of value equal to what he had initially invested in the land plot, that is, $5000. He cannot have any natural right to the rest. The value equal to $245000 was not created by WC's effort and was not even a result of any change in his land plot. The change of value happened due to changes in the environment in which this land plot is situated. WC cannot be regarded the owner of that share of value because he had nothing to do with it. The state can tax the added value away without violating WC's rights (1995, 236–239).

One way to respond to this is to say that these complaints do not constitute a separate argument. The notion of right to income is taken from legal literature on the subject of property (Honore 1961 108, 117–118). It might be a useful concept for lawyers but one might wonder why we need it at all when we talk about property from the philosophical perspective. Taylor rightly observes that the right to income is nothing more than the right to transfer being exercised by the other side of a particular transaction (Taylor 2005, 469–471). WC's right to receive income from selling the land plot for $245000 is the same right as the right of the buyer to transfer the ownership of $245000 to WC. The next obvious step in this reasoning would be to say that the right to income does not add anything to the concept of ownership which is not already implicit in the right to transfer. If we justify the right to transfer, the right to income will also be automatically justified. And that, in turn, means that the problem under discussion is fully reducible to the one explored in the previous section.

Fried tries to avoid the problem by the following reasoning:

> Even if one accepts the principle stated in "justice in transfer" that whatever X owns he can give to WC, X did not give the $250,000 to WC. He gave it to the economic owner of the land to which WC holds title, in order to obtain ownership himself. If, as Left Locke would maintain, WC owns only $5,000 of the value of the land (arguably plus a fair return on the investment), and holds title to the remaining $245,000 in effect as a trustee of society, he has no more right to retain the entire $250,000 than he would were the land encumbered by a private lien (Fried 1995, 239).

The idea here is that what WC owns is not the land itself but its value and only to the extent this value can be attributed to his effort. As Liberty Fitz-Claridge

pointed out in her response to Fried's paper, this notion would lead to bizarre implications: "If we commit to saying that WC is not entitled to the added value of his land, on the grounds that the builders of New York are responsible for it, this would imply that New York entrepreneurs are not entitled to much of their profit" (Fitz-Claridge 2015, 66). And if we bite the bullet and accept all such implications, it "would destroy the incentive to create surplus value in the first place by destroying its anticipated benefits and rewarding only "raw" labour" (Fitz-Claridge 2015, 67).

Still, I do not think that the right to income objection can be dismissed on the grounds I stated. The point of the objection, after all, is not that we cannot explain the right to income by the reference to the concept of transfer. It does not seek to attack the right of private ownership on logical grounds but rather draws our attention to the fact that if we see it as natural right, it would be fundamentally at odds with social reality. The idea is that the value of objects we own is in large part not an intrinsic property of objects themselves but the effect of social context in which we exist. And this is what makes Deep Private Ownership implausible, because this approach disregards this fact by claiming that it is only up to the owner to decide how the respective value should be exploited.

Fitz-Claridge tries to deal with this problem by rejecting the assumption underlying this objection: that "people should not be rewarded for that which they did not work to earn" (2015, 62). She argues that the amount of respective effort cannot be possibly quantified and we need to generally back away from the question of who owns what. Instead, we need to ask a different question: "What kinds of laws and institutional rules promote the correction of errors or inadequacies in the distribution of property?" (2015, 66). And, she claims, the response to this question would lead us to a historical entitlements system (2015, 68).

There are two reasons why this response is unconvincing. Firstly, to identify an error in the distribution of property (or to design a system that would identify errors) we need to know what the correct distribution would be – otherwise we would not even know that the distribution we observe is wrong. And to know what distribution is correct we still need to answer a fundamental question of who owns what, so Fitz-Claridge is not able to circumvent the issue here. Secondly, even though Fried's proposal allows for taxing away the entire entrepreneurial profit and thus killing the incentive to "correct errors", it does not necessitate it. The assumption is that in designing the tax system the government would take into account all relevant factors – including the benefit of creating productive incentive. It's worth pointing out, however, that it is hardly the case that we can only create such incentive by allowing the owners to keep every single cent paid to them by their buyers. In many cases some part of the income would work as an incentive just as well as the entire income. Fitz-Claridge creates a false dichotomy here between confiscatory taxation and a completely hands-off approach.

The lack of justification for the right to income, therefore, represents an important objection to Deep Private Ownership that should be dealt with separately from the justification of the right to transfer. Existing responses to this objection are not quite persuasive.

2.4.3. The effects of unregulated transfers on political equality

The principle of Deep Private Ownership grants owners strong protections against any outside intrusion into their property, including taxation (it should be minimal or non-existent). It also allows for the unlimited right to transfer property to others. Taken together, these two rights lead to the possibility of unlimited accumulation of wealth by successful owners. And that, in turn, means that the distribution of wealth in the society can become highly unequal.

Now, there are two ways in which this fact can be used against the Deep Private Ownership principle. Firstly, one can assume that equal distribution of wealth is intrinsically valuable and the very fact that Deep Private Ownership does not allow to pursue this value on the social level constitutes a reason to abandon this doctrine. This, however, is an unpromising strategy: a natural response would be to reject this assumption and claim that whatever moral principle is behind the right of ownership outweighs the value of equality. In that case, the conclusion of this debate would depend on fundamental beliefs about the nature of justice and it is very difficult to argue about those.

However, a different and much more dangerous argument can be made. One can argue that the inequality in wealth inevitably leads to inequality in political power; and once the wealthy solidify their grip on political power, they would have a strong incentive to lobby legislation that would create inequalities in market conditions in their favor or even directly redistribute to them the wealth that rightfully belongs to the less powerful members of society. This process, of course, would make the wealthy even more politically powerful, thus creating a vicious spiral of legislative degradation. In this way strong private property rights and stringent protection of the right to transfer would lead, in a paradoxical way, to the destruction of the very system of property rights. They will create powerful property-owning elites that would use their power to rob others of their property.

Hints of this argument could be found in the works of relational egalitarians (Anderson, 1999; Scheffler, 2010) but it was pushed, most forcefully, in an important paper by Karl Widerquist (2009). In his article Widerquist demonstrates how the consistent application of the right to transfer can easily lead to a situation essentially analogous to Deep Public Ownership. A particularly successful individual can concentrate the ownership of all land in her hands and start to rent it out to all others who live in the country. After that she can introduce an analogue of taxation (labeled as "rent payments") and the analogue of regulations (labeled as "rules of conduct for tenants"). She would be a state in everything but name. We can imagine how eventually the land others hold from her would start to count as property in legal sense and she would occupy the place of public authority who would hold the ultimate right of ownership in a moral, if not legal sense. The community will find itself in the situation of de-facto Deep Public Ownership.

In this way, the system of Deep Private Ownership seems to be internally unstable and carries within itself the seeds of its own demise. As far as I know there is no principled response to this argument. It is telling, for example, that (Rodgers 2009) – a paper specifically written as a response to Widerquist – ends up simply

biting the bullet and claiming that the possibility Widerquist describes exists but is not problematic. This is hardly a satisfactory answer.

2.4.4. The irrelevance of historical entitlements

Suppose that an entitlements theory of ownership is successful in proving everything it claims. Suppose it provided an ironclad justification for its rules of original acquisition and its rules of transfer. Even in that case it will face a potentially fatal problem.

The problem in question is of epistemic character. If we claim that the property rights need to be justified by reference to acts of original acquisition followed by uninterrupted chains of transfers, then we would often need to deal with really long histories. It is true in particular when it comes to the rights to land, and these are the rights on which most other property rights depend as it is a crucial factor of production. These histories, firstly, are often concealed from us: tracking down all transfers up to the point of original acquisition might be impossible. Secondly, in great many cases we know for certain that at some point in distant (or even not so distant) past the ownership title was established illegitimately from the viewpoint of any reasonable entitlements theory (for example, by forceful expropriation from previous owners).[48]

It follows from these facts that entitlements theories cannot justify any modern system of property rights. As a matter of fact, their logic dictates massive disruption of existing property system and large-scale redistribution in favor of the descendants of those who were robbed of property centuries ago. Such redistributive project is practically unfeasible because in many cases we cannot know who the rightful owner of particular property should be and it would mandate assigning property rights to people who have no discernable claim to them despite some obscure events that happened in ancient times. These implausible implications strongly suggest that there is something wrong with the very logic of historical entitlements.

There are, as far as I know, two main strategies to deal with this problem. The first one is to say that entitlements theories do not really attempt to justify every particular property title. Instead, they rather try to justify the system of property rights taken as a whole by explicating the connection between property rights and production. The story of appropriation and subsequent transfers is intended as a thought experiment designed to explain what the telos of property rights under ideal conditions would be, not as an actual justification of existing property rights (Gaus and Lomasky 1990, 496–498). The second one is to say that with respect to current property rights we need to at least presume their legitimacy. It is argued that with respect to most of them there would be no way to override this presumption (Simmons 1994, 77–78).

[48] This argument is advanced in e. g. (Kymlicka 1990, 158–159; Mautner 1982) and many other places.

I believe both these strategies fail. The problem of the first one is that, under the assumptions of entitlements theories, the only way in which the connection between property and productivity can be preserved is through strict observation of rules of just appropriation and just transfer: otherwise, wealth starts to fall into the hands of unproductive members of society. If these rules were not in fact followed, it means that the system of property rights as it now exists cannot be justified. Moreover, once we acknowledge that any realistic system of property rights would not be able to perfectly track the validity of all transfers and would allow an unjust transfer to happen once in a while, we would need to conclude that any system of property rights would eventually degrade to the state where the pedigree of all or most titles is compromised. In this way, any system of property rights is inherently unstable: it does not have an internal mechanism that allows for the correction of mistakes over time, a single unjust transfer in a chain makes the rights of all subsequent owners forever unjustified.

These considerations also explain why the second strategy is not promising: the presumption that by default property rights are justified is highly dubious given the number of mistakes accumulated in the system through history. Simmons gives the following examples of what he believes to be an untainted right of ownership:

> If, say, I earn a modest wage as a gardener on another's property, or I sell vegetables grown on a small plot of my own, and I use the money to buy needed clothing and food for myself and my family, one might argue for a presumptive justification of my (or my family's) claim to property in the clothing and food, based squarely on Lockean principles. (Simmons 1994, 77).

But observe that even here we cannot, with good consciousness, assume that property rights of the protagonists of these cases are justified. The initial property title on the land on which the gardener works was likely established in an unjust way. It makes the property of all subsequent generation of owners invalid, together with all the income they obtained. They did not have the right to the money they paid to the gardener which means that the gardener also did not have the right to her wages. The same logic applies to the vegetable vendor: there is likely something wrong with the pedigree of the income of those people who buy from her. In this way once a compromised title would appear in the system, it would spread injustice throughout it. The core problem here is that there is a way in which property rights can be corrupt – but there is no internal mechanism within the system that fixes this corruption. Which means that without external interference the system can only get further and further away from justice through time.

2.5. Conclusion

As we have seen, the internal complexity of the idea of Deep Private Ownership generates numerous challenges to both the mechanics of appropriation and the mechanics of transfer. Traditional historical entitlements theories do not seem to have resources to respond to most of these challenges in a convincing manner.

In the next chapter I will review the problems that appear in the Deep Public Ownership view.

Chapter III. Challenges to Deep Public Ownership

3.1. Introduction

Let me start by underscoring the following difference between Deep Private and Deep Public Ownership. Under Deep Private Ownership respective moral rights are in constant flux: unowned objects are appropriated, already owned objects are transferred, the structure of moral rights is constantly changing. This fact, as we have seen is the source of a major headache for the proponents of Deep Private Ownership. Deep Public Ownership avoids these complications due to the fact that the public is (at least, theoretically) a stable, unchanging entity that exists indefinitely and owns everything on the respective territory. Legal rights might be in flux but the moral situation is always the same: the public owns everything. The thorny issues of appropriation and transfers we explored in the previous chapter are simply inapplicable here.

Due to this feature the Deep Public Ownership is inherently much less problematic than its Deep Private counterpart. The price of this simplicity is the fact that Deep Public Ownership generates incredibly complex issues of distributive justice. Once we agreed that the public is the sole owner of all resources, we need to decide how the public would distribute these resources between the needs of its members. This is the part where things start to become complicated under this view and the related difficulties might surpass those that appear in the Deep Private Ownership. But if we take Deep Public Ownership in isolation, this view is seductively straightforward.

There are, I believe, two problems the Deep Public Ownership view faces. The first one is the question of whether we need to deal with a single "global" public or with a multitude of smaller "publics" co-extensive, for example, with the borders of modern nation states.[49] This is not an easy question. The globalist view has implications that I think would be troubling for many readers. It implies, for example, that nations have no right to control their natural resources and need to submit to economic control on behalf of global institutions. And once you discover that giving control of the resources to the people who so clearly have nothing to do with them goes against your moral intuition, you need to ask yourself, why this intuition applies when it comes to the conflict between nation states and the global community but does not apply to the very same conflict on a lower level: between individuals and their own nation states.

But the nation-state view is no better because it is so clearly arbitrary, especially given how globalized and interconnected modern economy has become. It is not clear at all why "the public" which owns everything exists on the level of nation states specifically, but not on the level of specific regions of states on one hand or on the level of our planet or even entire galaxy on the other hand. Once you start asking the question whether we should take the interests of hypothetical aliens into account when we decide what we do with natural resources on Earth

[49] See (Risse 2012) for an influential argument for the former view.

and how these aliens are different from the people in, say, Uganda, you would understand the difficulties involved in the concept of "the public".

In my work, however, I am not going to pursue this line of criticism and grant my opponents that they have a fully satisfactory response to these issues. Instead, I am going to focus here on a different problem – the one I touched upon in the first chapter: how can Deep Public Ownership be justified? What are the moral facts in virtue of which we come to believe that everything is publicly owned?

This is not a well-explored question: Deep Public Ownership is rarely justified in any explicit way and when it is, the argument is usually quick and superficial. In that respect, the supporters of this idea are a mirror image of their Deep Private counterparts: they more assume the truth of their approach than try to argue in favor of it.

And yet, there are five possible arguments that can be inferred from the vast literature on distributive justice and also from the polemics with libertarians:

1) The Deep Public approach is conceptually necessary: it follows from the very concept of ownership that its ultimate subject is the public (The Conceptual Argument).
2) Deep Public Ownership is justified by the fact that all resources are created by the collective effort (The Collective Effort Argument).
3) The Deep Public Ownership is the approach that the parties of social contract would choose from behind the veil of ignorance (The Veil of Ignorance Argument).
4) The Deep Public approach is the only one under which certain important humanistic values can be realized (The Humanism Argument).
5) The original right of use was transformed into the right of Deep Public Ownership when civil society was created (The Kantian Argument).

These arguments are not necessarily incompatible with each other. They often go hand-in-hand in the writings of the same author and sometimes the author would not see them as distinct. The division I introduced here is purely analytical in nature. It should not be construed as the description of actual differences that appear in literature.

In Sections 2–6 of this Chapter I will explore each of these arguments. After that, in Section 7, I will share some concluding thoughts with respect to relative strengths and weaknesses of both Deep Private and Deep Public approaches.

3.2. The Conceptual Argument

The first argument essentially presents Deep Public Ownership as an aspect of state sovereignty. It aims to show that the state being the ultimate owner is implicit in the very concept of ownership. And as the state derives its sovereignty from the fact that it represents the public, it follows that Deep Public Ownership is the only logically possible view and the proponents of its Deep Private alternative are simply confused.

Formally, the argument can be represented as follows:

P1 The public (represented by the state) is the ultimate decider with respect to the question of what should be done with resources.

P2 It is implicit in the concept of ownership that the ultimate decider with respect to the question of what should be done with resources is the ultimate owner of resources.

C The public is the ultimate owner of resources.

As P2 is uncontroversial – this is the concept of ownership both approaches share (see Section 1.2. above) – let me focus on the proof of P1.

Consider the following. Deep Private Ownership is nothing more than a set of instructions the state needs to follow when it chooses how to determine and enforce property rights. It means at the final stages of the application of both Deep Private and Deep Public approaches the same thing happens: the government assigns legal property rights to specific individuals or to itself. The only difference is the content of the rules in accordance with which property rights are assigned but this difference is immaterial. What is material is that this very fact automatically makes the government the ultimate decider with respect to the question of who owns what. And if we believe that in that case the government acts on behalf of the public, it means that the public is the ultimate decider.

The Deep Private Ownership view cannot avoid the substance of this conclusion as long as it recognizes government's right to enforce and define property rights. Ownership is not the starting assumption but rather the end of a chain of reasoning that can only start with distributive considerations. Here is how Murphy and Nagel explain it:

> Evaluation must decide how "mine" and "yours" ought to be determined; it cannot start with a set of assumptions about what is mine and what is yours. The right answer will depend on what system best serves the legitimate aims of society with legitimate means and without imposing illegitimate costs. That is the only way an essentially conventional system of property, and therefore a tax scheme, can be justified. The justification may refer to considerations of individual liberty, desert, and responsibility as well as to general welfare, equality of opportunity, and so forth. But it cannot appeal, at the fundamental level, to property rights. (Murphy and Nagel 2002, 75)

A similar argument can be found in Dworkin:

> This popular argument [that government regulations restrict freedom] is silly because it assumes that government can be neutral about the results of the economic race. In fact, everything the government of a large political community does – or does not do – affects the resources that each of its citizens has and the success he achieves. <…>
>
> A community's laws and policies constitute its political settlement. Tax laws are of course central to a political settlement, but every other part of the law belongs to that settlement as well: fiscal and monetary policy, labor law, environmental law and policy, urban planning, foreign policy, health care policy, transportation policy, drug and food regulation, and everything else. Changing any of these

> policies or laws changes the distribution of personal wealth and opportunity in the community. <…>
>
> So we cannot avoid the challenge of equal concern by arguing that the resources an individual has depend on his choices, not government's choices. They depend on both. <…>
>
> It is a clumsy evasion to say that a laissez-faire policy, which simply means one set of laws rather than another, is not the act of government. (Dworkin 2011, 353–354).[50]

So, the charge here is that there is, in fact, no alternative to Deep Public Ownership because under Deep Private Ownership we still end up with the government deciding who owns what. The only difference, the proponents of this argument say, is that in the case of the Deep Public approach the government would apply the principles of distributive justice that are explicitly justified as such. Under the Deep Private approach, on the other hand, the government would need to use the principle of historical entitlements the irrelevance of which for the problem of just distribution can be easily demonstrated.[51]

Still, I believe that despite its superficial persuasiveness The Conceptual Argument is invalid because P1 and P2 equivocate on different meanings of what it means to be "the ultimate decider". What the government is doing under the Deep Private and the Deep Public approaches is similar in form but importantly different in substance. Consider these two propositions:

(1) Bill has grown this watermelon, this is why it belongs to him

(2) Bill is a good person, this is why I hereby grant him this watermelon

(1), that corresponds to Deep Private Ownership, is a descriptive claim. If we were asked to justify it, we would need to refer to external facts. Namely, we would need to prove that Bill has actually grown the watermelon and that there are mind-independent normative reasons that make this fact sufficient to justify his ownership. In this way, the justifications which the Deep Private approach generates would refer to objective relationships between individuals and things they own. The job of the government is to discover these relationships and give them legal protection.

By contrast, (2), that corresponds to the Deep Public Ownership, is a performative. Under (2) we are required not to discover facts but to create them. In (2) ownership is grounded not only in objective facts but in the fiat of whoever made the statement – let us say government.

Notice that even if the government is bound by the rules of distributive justice and is obligated to reward Bill's 'goodness', it still has a freedom to choose which

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[50] For similar arguments see also (Christman 1994, 174; Miller 1989, 26).

[51] Note that the sources I cited above in some cases allow for a different interpretation. They can be said to make a different argument – that the right of deep public ownership appears as a reward that the government receives for its efforts in the enforcement and determination of property rights. This argument, I believe, is much weaker and can be easily parried as it does not really show why the government is owed any sort of reward in the first place and why this reward should come in the form of the deep public ownership specifically.

object will be given as a reward. Consider the following example: we have two identical watermelons which the government needs to divide between Bill and Jane in accordance with the following principle of justice: everyone should receive an equal amount of welfare. Even in this very simple situation the government has at least three equally moral ways to proceed:
1) Give Watermelon 1 to Bill and Watermelon 2 to Jane
2) Give Watermelon 1 to Jane and Watermelon 2 to Bill
3) Cut both watermelons in half and give Bill and Jane a half of each
When the government chooses between these three options, there are no mind-independent moral or natural facts which can be used as guidance: it is free to select any of them. Contrast it with the Deep Private approach where there is no such discretion: the government would need to determine which watermelon is grown by whom and allocate them accordingly. While under the Deep Private Ownership the government *discovers* rights, under the Deep Public Ownership it *creates* them.

This difference matters because the authority to discover moral facts is justified differently from the authority to create moral facts. In the former case one only needs to demonstrate epistemic expertise. Anyone competent to discover facts about the ownership has a right to determine and enforce respective property rights. It is not required to have any sort of special moral power to do it because the respective moral sanction is provided by a pre-existing moral fact of ownership. By contrast, to be able to create moral facts of ownership, the government needs to have a peculiar moral power to decide whose interests and in which manner a particular resource is to serve. It means that for Deep Public Ownership it is critical that the government acts on behalf of an entity that has the respective moral authority – "the Public". By contrast, representation of any sort is unnecessary for Deep Private Ownership. A tyrannical but competent government can assign property rights and demand that they are respected because the moral authority of these rights is independent from the authority of the government that determines and enforces them. There is no such option for the case of Deep Public Ownership.

Under Deep Private Ownership the function of the government is epistemic and communicative: to learn what the content of ownership rights is and make it known to others. It is very possible that without the government this function cannot be fulfilled. But it does not mean that the moral authority of the state plays any role in the moral justification of property rights. It might be true that property rights cannot be properly determined outside of the civil society in the sense that there would be no way to distinguish between the actions which violate them and the actions which do not. But to infer from it that before the civil society is created the rights do not exist at all would be the same thing as to say that Pluto did not exist before it was discovered. Even in the state of nature some actions are objectively lawful and some are not, we just do not have reliable means to tell which of them are which. In this way, the Deep Private approach might need the

state to properly implement a system of property rights but it does not mean that the rights cannot be justified without a reference to the state and its actions.[52]

This point can be illustrated by an instructive contradiction in Anna Stiltz's views. In (2011, 580) she argues that the state is "necessary to provide a unitary and public interpretation of the rights of individuals and to enforce these rights in a way that is consistent with those individuals' continued freedom and independence from one another". She proceeds to explain, in a Kantian manner, how the government can resolve inconveniences of the state of nature connected with the lack of assurance and determination in property rights. She makes the important point that the government does not need the consent of the governed because it borrows its moral authority from the legitimacy of a system of property law it enforces (2011, 581). But for this to be true the state needs to restrict itself to epistemic functions exclusively, because only in this way can its authority be grounded in pre-existing moral facts. However, in (Stiltz 2018) the same author rejects the notion that property rights are fully natural. She argues that the right to transfer property is conventional (2018, 250–255). But in that case the government cannot rely on the pre-existing legitimacy of property rights when it justifies their enforcement: when it comes to transfer there is, under her view, no moral facts independent of the government fiat and the government, therefore, would need the power to create such facts. From where would it derive such power if not from consent?

The falsity of this entire approach can be more clearly understood when we try to apply it to rights that are traditionally considered to be natural. Just as the government determines what should be considered a violation of property rights, it also determines what should be considered a violation of any other right. Let us take the right to choose sexual partners as an example. As a matter of fact, it is the government who decides what constitutes a violation of it in the sense that it is up to government how to formulate the respective criminal law. But hardly anyone would conclude from this that it is the government's prerogative to control our sex life and we do not have any say in it. To the contrary, it is quite common to criticize laws made about this matter from the moral point of view, implying that the government is anything but a final moral authority here. For example, for a long time many countries had a law under which rape was not prosecuted if committed by a marriage partner. Some countries even have such laws today. We consider them morally repugnant – and rightly so. We do not come up with arguments like "without the government people would not be protected from sexual assaults at all, therefore, the government should have full freedom to decide under which circumstances to do it". And yet, this is essentially the argument Murphy and Nagel advance in favor of Deep Public Ownership (Murphy and Nagel 2002, 16–17).

[52] Varden (2012: 420–426) explores related issues a bit while arguing that the Lockean proviso cannot be enforced by natural executive right. She, characteristically, misses the distinction I have identified here.

Of course, a proponent of Deep Public Ownership would respond here that the right to choose a sexual partner is a different matter: it is a natural right while property rights are conventional and for that reason we treat them differently. The point, however, is that, as I demonstrated, it is also the case for the rights like this that they need government to define them and enforce them. Therefore, this fact alone does not tell us anything about whether a particular right is natural or conventional.[53]

I believe it follows from the above that The Conceptual Argument in favor of Deep Public Ownership clearly fails. It is true that both approaches would require the government to make certain decisions related to property rights, but the nature of these decisions is importantly different. Let me turn to the next argument in favor of the Deep Public Ownership in the next section.

3.3. The Collective Effort Argument

Another popular argument in favor of the Deep Public Ownership is a scaled-up version of Lockean labor theory: human wealth has been created by a collective effort, therefore, all members of the respective collective should own it.[54] Let me present this argument formally.

P1 Ownership needs to be assigned to the entity which created the respective resources or its representative if the entity has no agency of its own.
P2 All resources were created by the Collective.
C1 The ownership has to be assigned to the Collective.
P3 The Collective has no agency of its own.
P4 The Public represents the Collective.
C2 Ownership has to be assigned to the Public.

I will accept P1 for the sake of argument. P3 essentially says that a simple collection of individuals does not have agency and needs to be represented by some sort of organization. I do not believe this is controversial. P4 says that the Public is a representative of the relevant collection of individuals. I will say more about this premise in the second half of this section. For now, however, I will focus on P2 as it seems to be the crux of the matter and explore the arguments for this premise and against it.

It is argued in favor of P2 that individual inputs into the collective creative effort are so heavily intertwined and interdependent between each other that it would be a misguided project to try to disentangle them and attribute each unit of created wealth to any particular individual. Here is how one philosopher explains the argument:

> From the point of view of justice, the attempt, independent of moral principles, to credit specific bits of output to specific bits of input by specific individuals

[53] For a similar argument see (Brennan, Van der Vossen 2018, 203–205).
[54] The analogy between this view and Locke's argument is pointed out in (Ripstein 2009, 89).

> represents an arbitrary cut in the causal web that in fact makes everyone's productive contribution dependent on what everyone else is doing. Each worker's capacity to labor depends on a vast array of inputs produced by other people—food, schooling, parenting, and the like. (Anderson, 1999, p. 321).[55]

A typical libertarian response to the Collective Effort Argument would be to reject P2. Libertarians argue that there is no particular problem in disentangling individual contributions and tracking each part of the collective creative effort to its individual source: this is what the market does. Yes, it is true that any wealth creator relies heavily upon the input of numerous other people. Jane, for example, would not be able to build a house all by herself. An architect would have to draft up a project of the house, construction workers would have to perform the works with contractor's managerial team organizing and supervising them, suppliers would have to bring construction materials to the site and so on. But it would not follow that all these people would become the collective owners of the house, because their individual contributions would be paid for by Jane and through it become Jane's property. In this sense there would be only one contributor to the house-building project: Jane.[56]

This response is hardly convincing because not all contributions, made by others, were bought and paid for on the market by the individuals who ended up being owners. We heavily rely on goods like family upbringing, education, Internet resources (which are mostly free), various type of infrastructure, the simple fact that anyone born today has access to the entirety of intellectual and cultural heritage of humanity. It could easily be argued that most of the goods that make us efficient and productive workers we received for free from people who live around us and who lived before us.

Let us leave P2 be and take a closer look at P4 instead. P4 says that the Public is a proper representative of the collective of creators but is it so?

Let us get back to the house-building example. As I established, even after Jane paid to all the people who directly participated in the construction – architects, workers, suppliers – she cannot claim the full credit for the fact that the house was built. She needs to share this credit with everyone who has made any kind of beneficial contribution to her life and – by extension – to her productive ability: family, teachers, neighbors, ancestors and others.

This creates a very large set of individuals who deserve their share of credit. But this set will still be limited. A newborn baby on the other side of the world has nothing to do with Jane's house. Or a young student who lives in a different city and who never was employed. This last one, however, would count as a member of the public as long as she lives in the same country as Jane. She will

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[55] In different forms this argument is present in works of many other thinkers (see e. g. Rawls 1999 4; Munzer 1990, 280–283). Note, however, that some approaches to distributive justice are compelled to reject it. For example, this argument is incompatible with luck egalitarianism as luck egalitarians believe that even those who do not participate in wealth creation are entitled to participate in distribution (Arneson, 2011, 42–49).

[56] For this argument see e. g. (Huemer 2018, 260–262).

be the co-owner of the house, even though she did not contribute to its construction.

On the other hand, the set of people who contributed to the construction of the house would include individuals who are not members of the respective public. Those would be numerous foreign nationals but, even more importantly, those would be numerous dead people. If we trace the productive contributions that went into creation of any particular artifact back in time, we would discover that the further back we go, the higher is the number of people who can claim a share of credit. Jane has two parents herself but each of them also has a couple of parents of their own and on and on it goes exponentially back in time. The same would be true for the authors of all scientific discoveries and inventions that facilitated the construction: most of them would be people who died long time ago.

A further problem is that while it is true that multiple people contributed to any act of creation, there is no reason to assume that the contribution of each of them was equal. It is far more natural to adopt a different assumption: that only few individuals made substantive contributions (those who stand closest to the productive act, most likely) while the contribution of others was minuscule. The Collective Effort argument follows the general logic of the labor theory: ownership is justified by the labor that was "mixed" into the object, the only difference is that the labor is conceptualized as essentially a collective activity. But if we adopt this logic, it is hard to see that why the difference between the contribution of different individuals should not matter when it comes to the distribution of control over resources. Yet the practical conclusion is that it has no weight at all because the higher amount of productive effort expanded by individuals does not translate into the higher ability to influence public decisions.

In this way, while it is true that there is a certain collective of people behind each productive effort, this collective has nothing to do with "the public" understood as the set of persons who have the right of political participation in a particular society. These two sets only very narrowly intersect; on top of that, the decision-making procedures within "the public" do not respect the fact that the productive effort made by different individuals is not equally distributed. P4 therefore is false and it is completely arbitrary, therefore, to infer anything like Deep Public Ownership from the fact that all the wealth is collectively created.

One might respond to this reasoning as follows. It is practically impossible for each object to be literally owned by the specific collective of people responsible, directly and indirectly, for its creation. Firstly, it would be too costly to determine who the members of each such specific collective of creators are and secondly, as I pointed out above, most of the members of such collective are dead. This practical impossibility makes acceptable the adoption of the Deep Public doctrine as a legal fiction of a sort. To recognize the body that represents the society as a whole as an owner of all the wealth created in that society is simply a way to respect the fact that all production is fundamentally collective.

I do not find this response convincing. If we decide to go into the legal fiction territory at all, then I would argue that a more accurate legal fiction would be to

recognize the individual immediately responsible for the creation of a particular artifact as an owner. Firstly, she would stand closest to the act of creation, her contribution would be the most direct and – probably – the most impactful. Secondly, all other individuals who participated in the act of creation would be either tied with the immediate creator in some way (parents, teachers) or would be people who voluntarily chose to share their creativity with others for free (inventors and visionaries of the past). In this way the immediate creator would have some claim to be a representative of all those participants of the creative act who care to be represented in that context; and, on the other hand, we would avoid the issue of giving people who had nothing to do with the creation of a particular object a share in its ownership.

Let me now repeat the argument from the beginning of the section with a modified P4:

P1 The ownership needs to be assigned to the entity which created the respective resources or its representative if the entity has no agency of its own.
P2 All resources were created by the Collective.
C1 The ownership has to be assigned to the Collective.
P3 The Collective has no agency of its own.
P4 *The individual immediately responsible for the creation represents the Collective.*
C2 The ownership has to be assigned to the individual immediately responsible for the creation.

This argument is different from the Collective Effort Argument only in P4 and, as I argued, the modified P4 is more plausible. The conclusion of the modified argument, however, is the Deep Private Ownership regime. Therefore, even if we accept other premises of the Collective Effort Argument, we still need to accept the Deep Private Ownership at the end of it. Which makes the Collective Effort Argument a poor way to argue for the Deep Public Ownership.

With that conclusion let me move to the next section in which I will consider the Veil of Ignorance Argument – a more sophisticated variation on the same theme as the Collective Effort Argument.

3.4. The Veil of Ignorance Argument

The Collective Effort Argument, as it was presented above, shares one important assumption with the Deep Private Ownership theories. Despite its name, it is still in one important sense individualistic. It tacitly believes that the right of ownership should be given as a reward to those individuals whose productive effort is responsible for the creation of the respective object. Its objection to the idea of Deep Private Ownership is that it fails to fully respect this principle by arbitrarily focusing on some types of productive contributions while ignoring the other types. And this assumption is also the underlying reason for its failure because Deep Public Ownership shows even less respect for it, as I argued in the previous section.

One does not need, however, to accept the assumption that the right of ownership should be a reward for individual productive effort. In fact, there is a good argument against it. It can be shown that individual productive capacity is fundamentally determined not by one's choices but by the external circumstances of birth: environment and genes. If this is true, then it makes no sense why individuals should be rewarded for something that is purely a product of luck.

If we reject the principle that ownership should be a reward for exercising productive capacity, then what principle should we adopt? John Rawls (1999, 118–123) proposes the following thought experiment to answer this question. He offers us to imagine a group of individuals placed behind the veil of ignorance. They have forgotten all their personal circumstances: they do not know in what family they are born and what talents they have. In this situation, as Rawls argues, they would strive to find an answer to the question of ownership that would be acceptable for them irrespective of their natural gifts and starting positions. The solution they would end up with should be accepted by us, real individuals in the real world, as the most just solution.

Rawls does not explicitly discuss the choice between the Deep Public and the Deep Private regimes. He is more concerned with the question of how we should distribute resources than with the more basic question of to whom the resources belong. But to even ask the Rawlsian question about just distribution one has to assume the Deep Public Ownership regime as I explained above (see Section 1.3.). We can say, therefore, that when Rawlsian parties start deliberating on the principles of justice, they already tacitly choose to adopt Deep Public Ownership.

Let me present the argument in a formal way. It would look like this:

P1 The principle of ownership that would be chosen by the individuals behind the Veil of Ignorance is the correct principle of ownership.

P2 The individuals behind the Veil of Ignorance would choose Deep Public Ownership.

C Deep Public Ownership is the correct principle of ownership.

This is what I call the Veil of Ignorance Argument. It employs the same intuitions as the Collective Effort Argument but pushes them further and, if sound, presents an attractive alternative to it. All the defects I identified in the previous section are now gone. We can no longer argue that Deep Public Ownership would arbitrarily reward people who did not contribute to the production as the point now is that anyone *could have contributed* to production under different circumstances. And that, in turn, means that everyone should have a say in decisions related to the management of resources, irrespective of whether she has any personal connection with them or not. Once this is understood, the Deep Public Ownership follows naturally as the conclusion.[57]

[57] Nozick points out that Rawls does not explain how his theory applies to products that are not the result of social cooperation (1974, 184). He makes an instructive mistake here in his interpretation of Rawlsian theory. The point is that the productive ability is social by its very nature, it is not something that can "belong" to an individual. In this way, all product is social.

Still, I believe that this argument can be refuted because it runs into a problem that would be common for any approach that tries to employ the veil of ignorance as a tool. For the sake of the argument, I will grant my opponents the first premise – that we need to use choices made behind the veil as moral guidance – but will take issue with the second one – that Deep Public Ownership would be chosen.

This premise, I believe, runs into the following problem. Individuals behind the veil of ignorance are specifically constructed in such a way that any individuating features are eliminated. But if this is the case, how can we establish any relationship of identity between them and the real individuals they are supposed to represent?

Let me explain what I mean by an example. Suppose that Bill and Jane are the original individuals and Bill-2 and Jane-2 are the same individuals behind the veil of ignorance. Within the framework of Rawlsian social experiment Bill-2 and Jane-2 conclude the social contract as the representatives of Bill and Jane respectively. Being such representatives, they care about the interests of their original selves and would only agree to such terms that leave no possibility that their original selves end up in a bad position. This is the incentive that drives their choices and that would force them to choose Rawlsian principles of justice and, by extension, the regime of the Deep Public Ownership that is necessary to realize them.

But notice that Bill-2 and Jane-2 have no memories or character traits specific to their prototypes and are, in fact, identical to each other (Rawls 1999, 120). What, then, is our reason to say that Bill-2 represents Bill and Jane-2 represents Jane? It seems that we have just as strong a reason to say that it is other way around: Bill is represented by Jane-2 and Jane is represented by Bill-2. Furthermore, it is also equally reasonable to say that both Bill-2 and Jane-2 represent Bill and Jane is left without representation.

These considerations spell trouble for the entire Rawlsian system. We have introduced the veil of ignorance because we wanted to leave open for the parties the possibility that they may end up disadvantaged after the veil is lifted. But individuals behind the veil do not need to identify themselves with their disadvantaged counterparts. They have an equally good reason to identify themselves with advantaged individuals only and frame their social contract accordingly. In fact, there is no reason they cannot all identify themselves with one particularly lucky person, and give this person a despotic power over everyone else.

The above means that it cannot be determined what decision will be made behind the veil of ignorance because the whole set up has a fundamental internal contradiction: it both tries to eliminate egoism and rely on it. The experiment, on one hand, asks us to imagine individuals stripped of all personhood and, on the other hand, assumes that they would show special care towards their personal fate and design a system of rules with their own individual well-being in mind. But self-interest would not have any meaning to Rawlsian individuals because behind the veil of ignorance they have no self left.

There might be two responses to my criticism. The first one is that Rawlsian individuals retain their identities to an important extent. One can try to argue that we can abstract away their productive capacity but there still would be a difference between them (this is not what Rawls says, however). I do not believe it is possible. Our productive capacity is not some isolated, contingent skill, like the ability to read or play chess. It is nothing less than the ability to make choices and perform actions and there is no single personal trait that does not somehow contribute to it. Abstracting this away means abstracting away our very person. The Rawlsian thought experiment, when you think of it, implicitly relies on some sort of naïve Platonism that imagines individual "soul" as a thing in itself, free from any concrete properties which make it a *particular* soul. I do not believe anyone nowadays would take such a view seriously.

Another response is that maybe I take the thought experiment that Rawls offers too seriously and literally. It is nothing more than a metaphor. After all, "to say that a certain conception of justice would be chosen in the original position is equivalent to saying that rational deliberation satisfying certain conditions and restrictions would reach a certain conclusion" (Rawls 1999, 120). We do not really believe that there are artificial individuals making decisions, we only try to restrict our thinking in a specific way.

But the contradiction exists on this level also. Rawls rightly identifies that justice should be in some sense impersonal and this is what he wants to emulate. But instead, he creates a thoroughly personal and subjective perspective. But this personal perspective belongs to no one in particular which means it can belong to anyone specifically, depending on what outcome we want to get from our model.

Assume for a moment that Bill is a horrible person who deserves suffering and death. A truly impersonal perspective should be able to recognize it and prescribe to deal with Bill accordingly. But as Rawlsian agents behind the Veil still retain the connection to their original selves, they would refuse to serve justice to Bill out of the fear that this is the person they would end up being after the veil is lifted. They are still guided, after all, not by sense of justice but by egoism, only of a very specific kind. As they fear to become Bill after the Veil is lifted, they end up all *identifying* themselves with Bill.

In this way the very idea of just deserts disappears from Rawlsian system. Instead of thinking about justice per se, he wants us to think about maximizing the well-being of the least fortunate member of society once certain other conditions are met (Rawls 1999, 65–68). The only reason he is able to argue that her well-being *constitutes* justice is because he wants us to both abstract away from self-interest and to be guided by self-interested. Specifically, we need to be guided by self-interest when it comes to those least fortunate and ignore it when it comes to well-being of everyone else. At the final stage of his reasoning Rawls resorts to the very same trick I suggested above: as it is indeterminate what real person each individual entity behind the Veil represents, you can single out any particular person and make her personal well-being the very locus of justice.

The Veil of Ignorance Argument, therefore, fails as a justification of Deep Public Ownership just as surely as the cruder Collective Effort Argument, despite

its initial promise. It critically relies on a contradictory assumption that individual interests both do and do not matter. But nothing can be grounded in a contradiction.

3.5. The Humanism Argument

Recall the theoretical stakes in the debate between the Deep Private and the Deep Public approaches I described in Chapter I. What is at stake is the fate of the entire field of distributive justice: it needs to be supported by the Deep Public Ownership to have any relevance.

Back then I used this fact to point out that the field of distributive justice is in a precarious situation: it depends on a different concept that is theoretically underexplored. This logic, however, can be reversed. One might argue that the principles of distributive justice *have* to be realized because this is necessary to safeguard the important humanistic values that motivate our interest in the field. Which values are those I leave here open. It can be fairness or charity – anything the reader takes as her reason to be passionate about distributive justice. The point is that if we care about these values and they cannot be realized without the field of distributive justice, then the relationship between distributive justice and Deep Public Ownership turns on its head: we need to adopt the Deep Public Ownership exactly because it facilitates these values. Let me put it formally:

P1 A regime of ownership that is necessary to safeguard the important humanistic values has to be adopted.

P2 The important humanistic values can only be safeguarded through the application of the principles of distributive justice.

P3 The principles of distributive justice can only be applied under the Deep Public Ownership regime.

C1 The Deep Public Ownership regime is necessary to safeguard the important humanistic values (from P2, P3).

C2 The Deep Public Ownership regime has to be adopted (from P1, C1).

This is what I call the Humanism Argument. I believe that Shmuel Nili who introduced the concept of the Deep Public Ownership implicitly relies on it. In his paper (2019) he does not offer any attempt to ground Deep Public Ownership in more fundamental principles. Rather he argues, for example, that the Deep Public Ownership model can justify important limitations on the activities of private owners such as anti-discrimination laws or minimum wage laws that are at great tension with the Deep Private model (2019, 357–360). In this way, the Deep Public Ownership is supported not as some sort of moral fundamental but simply as a tool necessary to achieve socially desirable ends.[58]

I believe that both P1 and P2 are false. It is not the case that the field of distributive justice is necessary to safeguard the humanistic values that motivate

[58] I believe (Singer 2000) should also be read as making this argument. See also the relevant discussion in Brudner (2013, 281–284).

it and it is also not the case that we need to choose the regime of ownership that facilitates the realization of these values.

Let me start with the latter claim. Observe that the principles of distributive justice can easily be extended beyond material resources. Let us take human mating behavior. One can argue, in a way similar to the one of luck egalitarians that attractive people are only attractive because of luck and do not deserve their mating success. And, conversely, unattractive people are single through no fault of their own. To alleviate this obvious injustice one might propose a set of state laws that would "redistribute" mating privileges just as current tax laws redistribute wealth and force attractive people to enter intimate relations with the unattractive ones.

The logic of the argument above goes in perfect parallel with many arguments advanced in the field of distributive justice. This is what we should in fact do if we believe that whatever values motivate the considerations of distributive justice need to be pursued *at all costs*. And yet I do not know any theorist who would seriously support the proposal I outlined.[59] In fact, it is safe to assume that almost all of my readers would regard the society I described as a repulsive dystopia.

What this thought experiment, I think, shows, is that whatever values we put at the foundation of our views on distributive justice, they are limited in scope. We are unwilling to extend them to the area of our lives that we consider private. However, the division between public and private spheres is exactly what is at question in the debate between Deep Private and Deep Public Ownership. We need to determine whether ownership is a public or private matter before we determine that the principles of distributive justice have any say in the way ownership rights are managed. For that reason, the argument that distributive justice requires a particular ownership regime to function has no relevance. Once again, this is a familiar theme: to advance this argument would mean, for the proponents of the Deep Public approach, that they assume what they are supposed to prove, thus mirroring the behavior of their opponents in the self-ownership debate.

Let me turn now to P2: that distributive justice is necessary to pursue the important humanistic values.

Distributive justice becomes necessary once we adopt the Deep Public Ownership model. If we say that all resources are owned by the public, we need then to say what exactly the public should do with them. Typically, we would describe a system of publicly important values and offer a set of rules under which the resources are distributed between them. This is exactly what distributive justice does.

If we reject the idea that the public owns all resources, the distribution would no longer be an issue as there would be nothing for the public to distribute. But it should not mean that publicly important values we want to pursue can no longer be pursued. They can be – by private individuals, instead of public institutions.

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[59] Aforementioned Nili claims in the very paper under discussion that Deep Public Ownership does not extend to human bodies (2019, 362–363).

Let me give an example. If, say, we believe in some form of Prioritarianism, it would mean that the well-being of no member of society should be allowed to drop below a certain level. Taxation and redistribution, supported by the ideas of distributive justice and the Deep Public Ownership, is one way to achieve that. But in the absence of public ownership the same can be done by decentralized process private charity. One might argue that private charity is necessarily imperfect – but state redistribution is also no guarantee of perfection. Another objection is that in the case of the Deep Public Ownership the poor would receive welfare as their right while in the case of the Deep Private Ownership they would receive it as a handout. It is true but what is relevant is that they would still receive welfare and the purpose that initially motivated distributive justice would be satisfied.

Deep Private Ownership can achieve all the same effects that Deep Public Ownership achieves – just by different means. In the Deep Private regime humanitarian values are realized through private initiative, not through state laws. The real difference between the approaches is whom you would need to convince if you want resources to be spent on humanitarian causes you deem important. Under the Deep Private model that would be philanthropists while under the Deep Public model – state bureaucrats (or democratic crowds if you will).

In this way the appeal to the values behind the distributive justice cannot serve as an argument for Deep Public Ownership. Let me turn to one final attempt to justify this approach in the next section.

3.6. Deep Public Ownership as the transformation of the original right of use (The Kantian Argument)

In Section 2.2.1. I introduced the concept of the original right of use. It is a Hohfeldian liberty to interact with unowned objects which initially belongs to all individuals. As I argued in that section, the concept of the Deep Private Ownership appears to be critically dependent on that right as without it nothing can be appropriated. I also said back then that there is an alternative way to understand that right: not as the grounding for appropriation but as the grounding for Deep Public Ownership. Now is the time to explore this possibility in more detail.

The original right of use, as I have already argued, is of limited practical use. As long as resources are used solely on the basis of this right, long-term projects cannot be undertaken, as the resource that you have earmarked for a particular future use can be employed by another individual for a different purpose and made unavailable to you. The Deep Private approach offers one solution to this problem: the power to appropriate objects and make them the private property of the user. Appropriation, however, would diminish the freedom of others as it would take away their original right of use without their consent. In that context the Deep Public alternative becomes attractive.

The alternative in question is giving up the original right of use to the state and thus placing in its hands the power to decide who and under what conditions

would have the right to use the respective objects. Or in other words: to establish a public procedure that would regulate the way the members of a particular community use their resources in a mutually non-intrusive way that takes the interests of all into account. The result of such a decision would be the emergence of Deep Public Ownership.

Now, one would think that the institution of Deep Public Ownership in this way would require universal consent with all related difficulties. But even this can be bypassed as we can argue that giving up one's original right of use to the state is not just one permissible option among many but a *duty*. It is a duty because it is the only way one can realize her freedom so that it is compatible with the freedom of others. Otherwise, the only way to exercise the original right of use would be to trample upon the rights of your neighbors. So here is the critical difference between this approach and private appropriation lies: one cannot complain that it unjustly takes away the original right of use because it takes it away in the context where there is a duty to give it up.

I believe that this is the best reading of the Kantian view on the origin and justification of private property (Kant 1991). He formulates it in a different way and puts emphasis on the imposition of duties on others, not on the displacement of their rights. Under Kantian view, it is the need to impose a duty on others that makes property rights in the state of nature only "provisional"; to become proper rights, they need to be authorized by omnilateral will, embodied in public authority. But as I argued in 2.2., imposition of a duty is only wrongful when it coincides with taking away a pre-existing right, so Kantian approach works best if reformulated in terms of original right of use.[60]

Let me, as usual, put the argument in a formal way.

P1 Other things equal we need to choose the ownership regime that shows the best respect for the original right of use.

P2 Deep Public Ownership shows the best respect for the original right of use and all other considerations are equal.

C We need to choose the Deep Public Ownership regime.[61]

P1 is hardly possible to attack once you accept that the original right of use exists. Simply in virtue of being a right the original right of use has moral weight behind

[60] Kantian position is taken up, in different forms, by many contemporary thinkers. See e. g. (Brudner 2013; Ripstein 2009; Weinrib 2003). In their works, I believe, the arguments for Deep Public Ownership is developed in the most explicit and sophisticated way. I see their arguments as versions of the one presented in this section. Aside from Kantians, a somewhat similar argument is developed, in the context of global justice, in the works of Mathias Risse (2012, 11, 89, 93).

[61] Modern Kantians, like Ripstein and Weinrib, frame the argument somewhat differently. They put a lot of emphasis on inherent "indeterminacy" of property rights and the necessity of "assurance" that others would have their rights preserved as the result of appropriation. But, as it was convincingly argued by Penner and Sage (Penner 2020, 183–193; Sage 2018), such considerations by themselves are not sufficient to argue for anything like Deep Public Ownership. All persuasive force they get comes from the largely implicit concept of the original right of use, this is why I am putting it to the forefront.

it that you need to respect and "other things equal" clause eliminates any considerations that potentially can outbalance this weight.

Let me turn to P2. The most natural way to probe it would be to show that other things are not equal but this is not easy to do. As I argued in 2.2.1., the Deep Public Ownership regime can be combined with such rules of distribution that would emulate all beneficial effects of the Deep Private Ownership regime, so we cannot appeal here to any positive consequences of the former. The only difference on which we can rely is the intrinsic deontic quality of two regimes and in that respect Deep Public Ownership clearly wins out.

One way to attack P2 is, perhaps, to say that the original right of use does not necessarily entail the power to transfer it. The problem we have here is quite similar to the problem the Deep Private Ownership has with transfers. Hohfeldian liberties, claim-rights and powers are analytically distinct and can exist independently of each other. The original right of use is a Hohfeldian liberty. If we say that individuals have it, it does not follow that they also have a power to transfer it to someone else, including the state.

There is a good response to this objection. As I pointed out above, the original right of use by itself gives little practical benefit, as it does not allow to employ resources in long-term projects. The supporters of Deep Private Ownership concede this point and, in fact, use it to argue that the original right of use is the means by which individuals exercise their power of appropriation (see Section 2.2. above). In this way, both views believe that there should be some kind of power going along with the original right of use to make this right practical. The Deep Private approach believes that the power in question is the power to take away the original right of use from others. The Deep Public approach offers instead the power to transfer your own original right of use to the state. In other words, both approaches believe that individuals should be able to curtail the original right of use in some way and transform it into the right of ownership to make the orderly use of resources possible. The difference is that one approach wants to empower individuals to dispose of their own right and the other approach wants to empower them to take away the rights of others. Between these two views the former appears as much more plausible.

For that reason, the complaint that individuals do not have the power to cede their original right of use to the government is not available to the supporters of the Deep Private model, as they also want to tie up the original right of use with a normative power but the power they propose is of more dubious character.

It follows from the above, I believe, that, as both P1 and P2 cannot be easily rejected, grounding the Deep Public Ownership in the original right of use puts us on a promising path. And what makes this argument particularly strong is that, it seems, the Deep Private approach cannot reject its basic premise: that individuals have the original right of use. This is because, as discussed in the previous chapter, this premise also seems to be necessary to justify appropriation. And if this premise is accepted, Deep Public Ownership can be inferred through a series of very natural steps.

The Kantian Argument, therefore, represents the best hope the supporters of Deep Public Ownership have to justify their view.

3.7. Conclusion

In this chapter I have surveyed a number of arguments that can justify the Deep Public Ownership model. The results are mixed.

On the one hand, we do not see as severe problems, as we see with the Deep Private Ownership. One of the arguments explored is promising and cannot be easily refuted – at least, within the limits of this work. In that light it is no accident that the Deep Public Ownership approach is more popular of the two among contemporary political thinkers. This attitude seems justified.

On the other hand, the advantage of the Deep Public approach is not as strong as, I think, most of its supporters believe. Many arguments in favor of it fail under a close examination. The only argument that withstood my scrutiny is the Kantian Argument and it is rather peculiar. It shares many similarities with entitlements theories, in particular, in its reliance on the original right of use.

In this light, the critical importance of the original right of use becomes salient. This right is the thread on which the entire advantage of the Deep Public Ownership is hanging. It is, at the same time, the source of major problems for the Deep Private Ownership and the critical assumption, necessary to justify the Deep Public Ownership. A version of the Deep Private Ownership that would not depend on the original right of use would be in a great position to both respond to the common criticisms against entitlements theories and to refute the Kantian Argument, thus leaving the Deep Public Ownership without a good foundation to rely on.

Entrepreneurial Theory of Ownership (ETO) is exactly such a theory and I will present it to the readers in the remainder of my work. I will start with explaining the main categories of ETO and familiarizing the readers with the peculiar way in which ETO sees the world.

Chapter IV. The Main Categories of the Entrepreneurial Theory of Ownership

4.1. Introduction

Imagine Jane walking through a forest. She stops at a small glade and decides to have a quick lunch. She spots a large and unusually flat boulder at the center of the glade and a stump near it. "Good," she thinks. "This boulder would make an excellent table and the stump could be my chair". After that, she takes a watermelon out of her backpack, puts it on the boulder, and has her meal while sitting on the stump.

ETO maintains that through this process Jane has become an owner of the boulder and the stump. The event that generated the right of ownership ensued when she judged them to be suitable substitutes for, respectively, a table and a chair and acted on this judgement. At that moment she stopped seeing them as mere natural objects and started seeing them as tools. Before the judgment the boulder and the stump were indistinguishable from other boulders and stumps in this forest. After the judgment they stand out among them. In a relevant sense, they now have more in common with tables and chairs than with stumps and boulders.

This case can be generalized. Before you start using any object, you must first judge this object to be useful. In the boulder and stump case, it is especially obvious because such a judgment is all that you have to do before you can start using them. But if you decided to make an actual table from the wood found in the forest around the glade, you would still need to first judge that these particular pieces of wood are suitable as materials for a table. And the moment you make this judgment, the chosen pieces of wood will become, from your perspective, distinct from all other pieces of wood around. They will no longer be mere natural objects, they will be means to your end.

These considerations allow me to introduce four categories that lie at the foundation of ETO. Two of these categories are *brute objects* and *resources*. *Brute objects* are simply all the objects that are around us. *Resources* are the very same objects once seen as useful. Or, more formally, resources are brute objects that stand to at least one agent in the relationship of being perceived as useful. Brute objects can be converted into resources by a mental act which puts a brute object on the one hand and a human end on the other hand into a certain relationship: the object can be means to that end. This act will be called a *use-judgment* – the third category under consideration. A use-judgment puts an object on the one hand and a human end on the other hand into a certain relationship: the object can be means to that end. This relationship is called *the value* of the object – my fourth category.

ETO sees the world as consisting, by default, of brute objects that get transformed into resources when individuals make use-judgements on them. Brute

objects are unusable because, by definition, they are not seen by anyone as useful.[62] For that reason they cannot be an object of any sort of right to use them – including, importantly, the original right of use.

Resources can be an object of such a right. But in contrast to brute objects, it cannot be said about them that they relate equally to every individual in the world. For each resource there is an individual who made a use-judgement about it and the relationship between the resource and this individual is distinct. ETO argues that under certain conditions such relationship can ground the right of ownership.

In this way, ETO leaves no room for anything like the original right of use. If something can be used at all, it can be used by a specific individual or individuals. It is these individual or individuals have a right to use this respective resource which under certain circumstances can be expanded into the right of ownership. But there is no universal right of use which belongs to everyone by default: any right of use needs to be acquired. This is the central insight of ETO which distinguishes it from other approaches to the question of ownership and allows it to both solve most of the traditional problems of entitlements theories and undercut the foundations of the Deep Public Ownership model.

In the next chapter I will explain and motivate these normative claims. In this chapter, however, I will focus on the concepts in which these claims are expressed. I will familiarize the reader with the basic categories with which ETO operates.

The next three sections will be dedicated, respectively, to the categories of value, resources and brute objects, and use-judgements. Notice that all of those are technical terms within ETO. Some of these concepts – value especially – are also used by other philosophers outside of the context of ETO. It is not my intention to engage in debate with their views. If some other understanding of a particular concept is incompatible with mine, I would simply regard it as a semantic difference: we just refer to different ideas using the same word. Still, it might be sometimes useful to contrast my approach to the concepts under consideration with some others. The purpose of this contrast is not to refute these other approaches but rather to underscore the difference and avoid confusions.

The fifth section of the chapter will be devoted to ETO's approach to production. The idea that we get to own what we produce is at the core of many other entitlements theories (most notably, the Lockean one) and holds much intuitive appeal. For that reason I find it important to show what is the place of production in ETO's worldview and why it is not emphasized in its basic concepts.

The final section will give a summary of the chapter. It will give a brief overview of the kind of picture of the world ETO's basic concepts generate and explain what the motivation behind it is.

There is one further issue that needs to be addressed before I can proceed to the next section. One of the traditional problems facing entitlements theories is

[62] Of course, brute objects can be potentially useful – after someone makes a use-judgement on them and turn them into resources. But as I am concerned about differentiating them from resources, it is actual usability what is the focus here.

the so-called boundary problem: the question of where the borders of appropriated objects are and how they can be objectively defined. I imagine the reader would expect me to address the boundary problem in this chapter as it seems to be the appropriate place for this, given that I am defining "brute objects" and "resources" here and would be surprised to find this problem unmentioned.

There is a reason for that. What the proper boundaries between different objects are, what counts as object and what does not is one of the most complex problems of metaphysics. I cannot attempt to give it a proper treatment here. Fortunately, I do not need to. I need to answer a different and much easier question: what are the boundaries of objects *in the context of property acquisition*? The response to this question is something that can be properly expected from any entitlements theory, but it is inseparable from a normative question of how property acquisition is justified. For this reason, this issue will be explored in Chapter VII.

4.2. Value

Under the Entrepreneurial Theory of Ownership value is a relationship between a thing and an agent such as the thing is means for an agent's ends. Value, as follows from this definition, is agent-relative: the same thing can have different value for different agents due to the difference between their ends.

"Means" in this definition is understood in the broadest possible way. If a thing can be used in any activity which eventually would result in me achieving my ends, it will count as means and will have value. For example, if I can obtain from others goods and services that I need by giving them a particular thing, this thing would be means what my end, even if otherwise it is useless for me. In that sense "means" should be understood not only in a physical but also in a social sense; it is not just things that can facilitate my physical activity but also things that help me to employ other people in my projects.

ETO is only concerned with value understood instrumentally. It focuses on the property of things as means to ends; the nature of ends, the question of where they come from, whether they are objective or subjective, etc. are beyond its scope. In this respect, ETO departs from the way value is usually discussed in philosophy, as philosophers are typically more concerned with the problems of ultimate, not instrumental values.[63]

On the other hand, ETO needs to be distinguished from the idea that value is purely subjective in the sense that it is fixed by the choice of an agent and by nothing more than that: whatever the agent believes to be valuable *is* valuable. This idea is influential within the Austrian school of economics of which Kirzner, whose work is an inspiration for ETO, was a member.[64] ETO is not committed to this sort of value subjectivism. Value is a particular relationship between the thing

[63] There are exceptions, of course, see e. g. (Bradley 1998).
[64] See e. g. (Mises 1963).

and the agent but this relationship can both be seen as objective, existing independently of agent's opinion about it, and subjective, being, in some respect, a matter of the agent's free choice. ETO is equally compatible with both these two views.

The idea of agent-relative value is well-known in contemporary philosophy.[65] ETO, however, takes it a step further. It is not just the case that the same thing can have different value for different agents. The same thing can also have different value for the same agent under different circumstances. This is because agent's ends are understood not abstractly, as any ends this particular agent can pursue under any circumstances, but concretely, as ends that are pursued by the agent right now in her current circumstances. Once a particular end is achieved and the agent stops pursuing it, she no longer requires using the respective means and those things that earlier stood in the relationship of value to her because they were means to achieve this particular end stop being valuable. In this way an agent's roster of values is in a constant flux; it changes dynamically when certain ends are achieved and the means for them are no longer relevant, while new ends that require new means come in their place.

For example, if Jane is hungry, it is her end to acquire and consume food. A watermelon is food, it can serve as means to that end and for that reason would be valued by Jane. But once she has eaten a watermelon and sated her hunger, eating ceases to be her end and she no longer requires a means to achieve it.

It seems to follow that a second watermelon would not be a value for Jane as she no longer needs it. But such a conclusion might strike the reader as surprising. People value food, they seek it out and store it, even when they are not hungry and not going to eat this food on the spot. So, something seems to be amiss here.

The answer to this puzzle is that agents might be able to anticipate their future ends and predict that they might have difficulties in achieving them when these ends become relevant. This prediction would create a *current* end to make oneself better prepared to meet the anticipated *future* end. If Jane is not hungry at the current moment but expects herself to get hungry at night when all stores are closed, it might make sense for her to buy a watermelon *now*, in preparation for this future need. In this way, a second watermelon *might* be a value for Jane even when she is not hungry. But it is important to note that from ETO's perspective it is a different kind of value than the value of the first watermelon that was immediately consumed because this value serves a different end: not the end "to eat food now" but the end "to prepare to be able to meet the end of eating the food that will appear in the future". Let us call the first type of ends "immediate ends" and the second type of ends "anticipated ends".

One might see this distinction as pedantic, but a number of critical conclusions follow from it. The most obvious one being that we can never predict our future ends with absolute certainty, so our expectations of the future ends always have a probabilistic character. Jane predicts she would become hungry at night, goes to the grocery, buys herself a watermelon – and gets hit by a car on her way back.

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[65] See e. g. (McNaughton & Rawling 1991; Nagel 1970).

She dies and has no more need for a watermelon. Her end to prepare to meet her future needs was acted upon but ceased to be relevant.

Whenever our goal is to prepare in anticipation of our future ends, we always need to keep in mind that there might be some unexpected developments and our predictions might turn out to be false. Hence the means for anticipated ends are, other things being equal, intrinsically less valuable than means for the symmetrical immediate ends as for the former you have an additional factor of uncertainty about whether you would actually need them at all. And typically, the more remote the anticipated end is, the larger the respective uncertainty and the lesser the value of things that could be a means to achieve it are. In this way, the second watermelon which Jane wants to store for the future, will always be less valuable than the first one she wants to eat immediately.

The considerations above bring to light that value in ETO is a property of tokens, not types. No two watermelons are interchangeable because, at the very least, they are at different distances from the agent spatially speaking and this difference matters because it makes one of them a more suitable means to a concrete end that the agent wants to achieve in her particular circumstances. In our example, the closest watermelon would be the most valuable because it would be immediately eaten; the second closest watermelon would be stored for the future and, therefore, less valuable.

In this way, value in ETO is not just agent-relative but, more broadly*, context-relative*. The relationship of value exists not just between the agent and the thing but between the thing and the agent's particular end that only exists in a particular time, in a particular place, and under particular circumstances. If any of these elements changes, it would be a different end for which the thing in question would be more or less suitable as means and, therefore, more or less valuable.

Let me introduce two more distinctions before I conclude the section. ETO distinguishes between the *actual* value and the *perceived* value. The former reflects the actual capacity of a thing to serve as means to particular end. The latter reflects the same capacity as perceived by the agent. It can be the same as the actual capacity if the perception is accurate (in that case the actual value and the perceived value fully coincide) or different if it is flawed.

When agents act, they use the perceived value as guidance in their actions, but it is the actual value they want. ETO assumes that agents purposefully try to bring their perceived value as close as possible to the actual one and that they are able to succeed in such attempts, at least to an extent. For that reason, if an agent *perceives* something as valuable, it should be interpreted at least as defeasible evidence that this something is *in fact* valuable.

And with that observation allow me to conclude this section and briefly summarize what I have said so far. ETO sees value as a relationship that connects things with ends. The nature of this relationship is that things can be means to these ends. As the ends of agents are ever-changing, so is the value they attribute to things. In this sense value is not just agent-relative but context-relative.

ETO distinguishes between immediate and anticipated ends. The former are the ends you pursue right now, the latter – your preparations to the ends you

expect to pursue in the future. Things that are means to immediate ends are, other things equal, more valuable than things that are means to anticipated ends.

Finally, ETO distinguishes between the actual value and the perceived value. The former is the value as it actually is, the latter is the value as perceived by the agents. The presence of the perceived value is seen as defeasible evidence for the presence of the actual value.

4.3. Brute objects and resources

To grasp the motivation behind the contrast between brute objects and resources it is helpful to ask: what is meant under "resources" in the sentence "resources are scarce"? We cannot mean "all that exists" as this is not scarce in any practical sense: there is more matter and energy in the universe than we can plausibly consume. To speak coherently of the scarcity of resources, we require a narrower conception of resources than "all that exists". ETO proposes such a conception: *"resources" are objects with which agents can purposefully engage*.

To purposefully engage with an object means to *consciously* rely on its *perceived* properties in your plan to achieve a particular end. To *rely on the properties* of an object in your plan means that your plan is such that if the properties of the object were different, your plan would be impossible to execute. The qualifier "perceived" denotes the fact that our plans depend not on the actual properties of objects (that may be unknown) but on those properties as we see them. The qualifier "consciously" means that you are aware of these properties and count on them in your plan.

For example, we do not "purposefully engage" with the air we breathe, even though were the air unfit to breathe, it would render most of our plans impossible to execute as we would die in minutes. But breathing is an instinctive process that does not require any conscious awareness of the properties of the air. For this reason it normally does not count as a resource for the purposes of ETO. It would, however, count as a resource in the context of a space station because the existence on the space station critically depends on conscious awareness of the existence of air and its properties. If people with no understanding of the nature of air and its importance for human life try to build a space station, it is a given that their project will fail.

"Resources" are a *relational* concept in ETO. An object is always a resource *for* someone, not intrinsically. What separates brute objects from resources is not the objects themselves having a particular quality but agents having a particular mental state directed at the object. Objects for which at least one agent has this mental state would be resources *for this agent*. It follows, of course, that resources are agent-relative: what counts as a resource for one agent does not necessarily counts as a resource for other agents.

To better understand the implications of this conception of resources, consider the following rival conception which, perhaps, would appear more intuitive for many readers: resources are objects that certain agents *could* see as useful for

their ends. This conception picks out a broader set of objects than the one employed in ETO as it also includes objects that have a potential to be seen as means, not just objects that are actually seen by someone as such. But it is also a narrower set than "all that exist": if one fixes on a determinate range of agents with determinate ends, then only some objects and not others are "usable" in this sense.

ETO, however, rejects this approach because of epistemic difficulties it generates. To evaluate, whether something is a resource or not under this view, we need to know what ends exist, what agents exist and the extent of their capacity of using things. ETO, instead, simply assumes that anything could be a resource under right circumstances but this assumption makes this hypothetical rival view unhelpful. This is the reason ETO adopts a narrower conception of resources.

Let us now take a closer look at the mental state in virtue of which an object counts as a resource. It consists of two components:

a) The agent *perceives* the object as valuable (The Subjective Condition);
b) The agent *knows* how to reach this object (The Objective Condition).

Recall that resources are objects with which agents can purposefully engage. These two conditions unpack what exactly the word "can" means in this definition. The Subjective Condition provides the *motivation* to engage while the Objective Condition provides the *opportunity* to engage. An engagement is not possible without both motivation and opportunity, so those are the *necessary conditions* any resource should satisfy.

Under ETO resources do not need to actually have value. They are defined formally, not substantively: it is anything with which we can purposefully engage irrespective of the success of such engagement. This should not be seen as any kind of flaw in the theory. ETO assumes that the value of things is not automatically known. As the reader will see later, the process of discovery of their value plays a critical role in the justification of ownership which means that we cannot abstract it away. Therefore, our description of this process cannot rely on the actual value of resources being already known. For this reason, the Subjective Condition only requires objects to have a perceived value, not an actual value.

The Subjective Condition relies on the assumption that any reason we can possibly have to engage with objects can be represented in terms of value, as us seeing these things as means to some sort of end. When there is no end for which we can use a particular object, there is no reason for us to interact with it, thus making the interaction impossible. This fact makes the Subjective Condition a necessary one.

The Objective Condition reflects the fact that you cannot engage with something that is outside of your reach. An object counts as outside of your reach if you cannot rely on its properties in your plans. The reach is contextual and depends on the nature of your plan. When we use stars to find the way in the sea, we engage with them and they are within our reach for the purposes of that particular plan. But they would be outside of our reach for the purposes of mining hydrogen from them.

The Objective Condition requires *knowledge* of how to reach the object. Note the important asymmetry with the Subjective Condition for which a *belief* that an

object has value would suffice. This is because you cannot engage with an object if it is unreachable, even if you mistakenly believe it is within your reach. By contrast, a false belief that something can help you achieve your ends, still allows you to perceive it as valuable (though mistakenly), thus making the engagement possible.

Imagine, for example, I believe that the ice on Titan is magical and can cure cancer and that I can fly to Titan by means of flapping hands. If the latter of these beliefs is false, I simply would not be able to reach Titan and the ice would remain undisturbed. There will be no engagement between me and the ice. But imagine, on the other hand that the latter belief is true while the former is still false. In that case I would be able to get to Titan, take the ice there and do with it whatever I believe needs to be done to cure cancer. In that case the engagement would happen and the ice would count as my resource for the purposes of ETO. Of course, the plan to cure cancer that relies on this ice would fail but for the object to count as a resource it is not a requirement that the respective plan should succeed.

On the other hand, notice that it is not sufficient for the object to simply be reachable; at least one agent should have the knowledge of it. Imagine that teleportation is physically possible and from the resources available here on Earth we can easily build a teleportation device that would transport us to Titan. The only thing stopping us is that we do not know how to do it. If this is in fact the case, it makes Titan reachable ontologically speaking, but the objects there still would not be resources for us because we do not *know* how to reach them.

This qualifier, that the requirement is not just reachability, but agent's awareness of reachability is important for ETO because ETO assumes that all objects in the universe are ontologically reachable, and the only limiting factor is our knowledge of how to reach them. But if we were omniscient, we would be able to reach *anything* and every brute object would satisfy the Objective Condition for becoming a resource.

There is one last important point that I need to make before I move to the next section. A reader might see parallels between the concept of "resources" as presented here and the way mereological idealism views composite objects. The core idea of mereological idealism is that composite objects are constituted by our ideas and do not exist independently of them (Pearce 2017). One might wonder whether this is what I mean when I speak of "resources" and whether brute objects are just undefined mereological sums of atoms that are not yet "made" into an object by an observer. This is not the case. "Resource" in ETO is a relational concept. It picks out objects that stand in a certain relationship to an observer, namely, in the relationship of being perceived as valuable. But there is no claim that objects are *constituted* by this relationship. It is perfectly possible for the very same objects to exist outside of this relationship. In that case they would be brute objects. ETO is not committed to any form of mereological idealism but also is not committed to the rejection of it. It is still possible that we "make" brute objects by means of certain mental acts and that brute objects are constituted by some kind of relationship between them and agents. But those

would be not the acts and the relationships with which ETO is concerned. ETO does not say anything about what counts as "object" ontologically speaking. The relationships on which it is focused appear *on top* of any ontological structure.

At that point I anticipate the objection that the distinction between brute objects and resources becomes blurred. It is often (and maybe always) the case that our understanding of how a particular object can be used is "embedded" into the very conception of it. For example, chairs are by definition used for sitting on them and if I recognize an object as a chair, I would immediately and automatically realize that I can sit on it – otherwise I would not understand that it is a chair. There is no distinction between an act of recognizing something as a chair and understanding how it can be used. And that, in turn, means that there is no distinction between identifying a chair as a brute object and identifying it as a resource.

This objection misunderstands ETO's conception of resources. A resource is a brute object that is perceived by someone as valuable and to perceive something as valuable means to perceive something as a means to an end. The end in question is a *token*, not a *type*. Recall that the motivation behind the concept of resources is to pick out a class of objects with which it is possible to purposefully engage. To purposefully engage with a chair, it is not enough to abstractly know that chairs, in principle, can be used for sitting. It should be your current end to find a place to sit or you should anticipate that you would have such an end in the future and there should be no better alternatives than this particular chair already available. Only under these conditions you would acquire a reason to use the chair.

In this way it is possible to see chairs and understand that they can be used for sitting without turning them into resources. In that case you would understand that chairs can serve a particular *type* of end but you would not see them as serving any *specific* end that is pursued by you *right now*.

These considerations conclude the discussion of brute objects and resources. In the next section I will explore the act that converts one into another: use-judgements.

4.4. Values discovery and use-judgements

Resources are characterized by agents having a certain mental state which is *about* these resources: they are brute objects that are perceived by agents as having value. This mental state is not something present in the agent's mind by default; it needs to be *acquired*.

An agent acquires this mental state when she discovers the value of a particular resource. The concept of discovery is central for Kirzner's work and is analyzed by him in detail (Kirzner 1989: 20–44). ETO instead works with a slightly different concept: a use-judgment.

Use-judgments are the mental form that the act of discovery takes. To discover the value of an object is to make a use-judgment on it. "Discovery" focuses on the consequences of the act, on the fact that some value has been discovered.

"Use-judgment" brings the focus to the act itself. Observe also that there is a possibility to make a *mistaken* use-judgement that would fail to discover any value. For reasons that will become clear by the end of next chapter, ETO does not distinguish for normative reasons between accurate and mistaken use-judgments which additionally motivate its preference for the concept of use-judgment over the concept of value-discovery. In most contexts, however, "discovery of value" and "making a use-judgment" can be treated as synonymous.

Use-judgements have the following structure: "*I might achieve X by doing Y to Z in my current circumstances*". This structure follows from their function: to provide us with a reason to purposefully engage with an object.

Let me now explain each element in this structure. "I" draws attention to the first-person character of use-judgements. Just as resources exist *for* a particular agent, a use-judgement is made by the agent *for herself*. It is not intended to be applicable to anyone else.

"Might" emphasizes the probabilistic character of use-judgements: it relies on our perception of value which may or may not reflect the actual value. Even this factor of uncertainty taken into account, the mere possibility of success can be a sufficient motive to perform the action. (To be clear, it does not mean that the judgment is necessarily perceived as probabilistic by its author; "might" also covers cases when the perceived probability of success is one).

X is the end pursued. For reasons explained in 4.2., it should be an end actively pursued by the agent at the moment when the use-judgement is made (keep in mind that *preparation* for certain future activity could be the end by itself). Otherwise, the use-judgement would not supply the agent with a motive to act. Also, it should be an end belonging the author of the use-judgement as a third party's end, once again, would not serve as a motivator. Of course, a third party's end can become the agent's end under certain circumstances. For example, if Bill expects Jane to help him if he helps her, helping Jane might become his end. Or, alternatively, if Jane is in love with Bill, she would want Bill to prosper and flourish and she might make helping Bill her end for that reason.

Y is the action through which the end is achieved. Y needs to be performable by the agent otherwise the resource created by the use-judgement would not satisfy the Objective Condition. Observe that the agent does not need to understand *why* Y achieves X to be motivated to act. Suppose Bill told Jane that it would greatly help him if she eats a watermelon at midnight sharp while being outside under a moonlight. He did not explain to Jane what kind of benefit he expects to receive from it and to Jane the request seems as odd as it seems to you. Still, if she has enough trust in Bill, she might be motivated to actually do it.

Z is the object with which the action needs to be performed. Z is always a *token* and never a *type*. In 4.2., I explained that value is related to a *particular* end, not to a class of ends. The same is true for the other member of the respective relationship: the object that serves the end has to be a particular. "Blueberries are edible" is not a use-judgement. "I can sate my hunger by eating *this* blueberry" is. Observe that the first judgement does not *by itself* motivate you to act. It is of no use for you if you do not see any blueberries around and once you see them,

you need to identify them as such (and you, of course, need to identify that you are, in fact, hungry).

Even though the judgements on types of objects are not use-judgements, they are an important preparatory step to use-judgements. It might be argued that most of the work is done at that step. Once you know that blueberries are edible in general, all you need to discover the value of a particular blueberry is to identify it as a blueberry. In most cases this is easy to do. ETO acknowledges this fact. It does not embarrass the theory as the difficulty of making use-judgments is irrelevant for ETO's justification of the right of ownership, as you will see in the next chapter.

Judgments on types of objects and their normative implications can become a foundation of a sister-theory to ETO that will deal with intellectual property. These considerations, however, are beyond the scope of this work.

Finally, the qualifier "in my current circumstances" emphasizes the uniqueness of use-judgements. Recall the contextual character of value, the way it constantly fluctuates as agents achieve their goals and put new ones to themselves. In parallel, use-judgements are made not just for particular agents but also for particular circumstances in which the agents find themselves. This is because in different circumstances the character of value they see around themselves might change and a use-judgement that was made for the other set of circumstances would no longer be relevant. In that sense use-judgements are unique and their usefulness is always fleeting. It is not the case that you can make a use-judgement once and then rely on it indefinitely; it is rather you constantly need to make use-judgements anew, each time adjusting for ever-changing context.

That is not to say that new use-judgements are unconnected to the earlier ones. To the contrary, just as use-judgements heavily rely on the cognitive work made in judgements on types of objects, they also rely on the cognitive work made in earlier use-judgements on the same object or for the same end, or even for a *similar* end pursued by a different agent. In this way, even though each use-judgement is unique, it also might be *reliant* on a different use-judgement, made previously by the same agent or, very importantly, *by other agents,* creating with them a complex web of epistemic dependencies.

(Observe that judgements on types of objects invariably start with a use-judgement made about a particular token of a type. It is not a mistake, therefore, to simply say that use-judgement rely on the previous use-judgements, abstracting away the intermediate judgement about a type. I will mostly use this simplified analysis in the remainder of the text.)

Allow me now to introduce several other concepts that are related to the category of use-judgements.

Use-judgement is considered *productive* when X can in fact be achieved by the author of the use-judgement by doing Y to Z in the current circumstances of the author. If X cannot be achieved by this means and in that context, a use-judgement will be *unproductive*. Observe that an unproductive use-judgements can still be a motive for action. In this way, even a mistaken use-judgement can

fulfil its function of enabling purposeful interactions (though, notably, it would not discover any value).

By contrast, if doing Y to Z is *impossible*, a use-judgement will not be able to fulfill its function. Therefore, the "doing Y" component of the use-judgement implies that the agent has a workable step-by-step understanding of what acts it includes and how to perform them. The lack of such understanding would mean that the Objective Condition for an object being a resource is not fulfilled. Use-judgements which do not have such understanding I will label as *failed* as they fail in their attempt to turn a brute object into a resource.[66]

Performing Y is called the *enactment* of the use-judgement. For the purposes of enactment, performance needs to be understood in the broadest sense possible. It includes, for example, *planning* the action. The intention of the concept of the enactment is to include any acts, including mental acts, that can be said to be *caused* by the use-judgement. As long, as agent's behavior is such that it can be seen as *reliant* on the use-judgement, the use-judgement is enacted.

To understand how enactment is a broader concept than use as it is understood in everyday language, consider the following example. Imagine that you have one thousand dollars stashed away in a safe. You view this as your emergency fund and resolve to use it only under the direst of circumstances. The emergency, however, never comes, and the money remains lying idle. In this case the very awareness that you have it affects your behavior. You may make riskier choices and spend your other money more freely. In this way, the emergency money still generates value for you by simply being in your possession. The use-judgement you made on them is still being enacted despite you not using them in the narrow sense of this word and they remain a resource for you.

Recall that resources are characterized by specific mental states agents have about them: agents perceive them as valuable. The enactment of use-judgement is the *form* of this mental state: it cannot be said to exist if the respective use-judgement is not enacted. This is because perceiving a resource as valuable should be understood in a very concrete sense: it is something useful for the end you pursue *right now*. If you do not proceed immediately with using the resource or preparing to use it or laying down plans to use it, then you either do not really pursue the respective end or do not really see the respective resource as means to this end.[67]

For that reason, a resource can only exist if someone enacts a use-judgement made on it. If no enactment takes place, it means it is not a resource for anyone

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[66] There are multiple ways in which a use-judgment can fail. For example, an agent can have a reasonable idea of what it needs to do to achieve X but her idea turns out to be wrong. Like, I believe that I can walk to my office using the First Street but the First Street turns out to be blocked. Contrast it with the case of a child who think she know she can sate her hunger by "cooking pasts" but in fact has no conception of how to even approach the task of cooking. These finer distinctions between different types of failed use-judgments do not play a role in ETO, this is why I will ignore them.

[67] This formulation is meant to include cases when you have a reason that counts against using this particular means for this particular end.

in particular and that, in turn, means it is not a resource at all. Such a resource reverts back to the state of a brute object. In this way resources are *created* by making use-judgements and *maintained as such* by their enactment.

To summarize, use-judgements, resources and enactment relate to each other as follows. Resources are objects with respect to which at least one agent has the following mental state: she perceives them as valuable. Use-judgements are mental events that produce this mental state which is afterwards maintained in the form of the enactment of the respective use-judgement. If the use-judgement stops being enacted, the resource becomes a brute object again as the respective mental state no longer exists.

One question a reader might have with respect to the concept of use-judgement is what exactly use-judgements are. I invite you to come back to the boulder case from the first section to illustrate the problem. Imagine how Bill comes across a boulder on the glade. He says out loud: "I can use it as a table and put my watermelon on it" and then proceeds to do so. Next day Jane comes to the same glade. She does not say anything and does not even think about the boulder in any explicit terms: her mind is on the problems of philosophy, probably she is thinking about ETO. She absent-mindedly takes her watermelon out of her backpack and puts it on the boulder.

So, here is the question. Bill obviously made a use-judgement in this scenario but what about Jane? It seems no mental event that is in any way similar to Bill's has happened in her case. It would be odd to say, however, that the boulder was a resource for Bill but was not a resource for Jane as they did exactly the same thing with it.

Use-judgement is a mental event, but it is not some particular kind of mental event. It is any mental event that fulfils the function of use-judgement – to produce the kind of mental attitude that turns a brute object into a resource – in a particular situation. It is called "use-judgement" because after it happens the agent behaves herself *as if* she made a judgement of particular form. But it need not necessarily be a "judgement" in a phenomenological sense, a phrase that the agent says in her mind. A use-judgement can be made unconsciously, without agent being aware of it.

Unconscious use-judgements need to be distinguished from instinctive behavior. Humans often engage in very complex behavior without being aware of it: I demonstrate this fact by example right now by blind-typing on a keyboard. Conscious awareness is unnecessary for such behavior because it got automated from constant repetition of the same pattern: we do not need to think about it because we have done all necessary thinking in the past. Contrast it with activities like breathing, or even the work of our internal organs and immune system. These behaviors do not require thinking at any point, in any manner or form. Unconscious use-judgements are of the former kind but not the latter.

These considerations conclude the section on use-judgements. Now all the basic building blocks of ETO are introduced: value, brute objects, resources, use-judgements. In the next section I will take the very first look at the way these

blocks interact by explaining in their terms the concept of production that is very often at the center of more traditional entitlements theories.

4.5. ETO's conception of production

Production, understood as creation of value in some form, is probably the most popular justification of appropriation. It appeals to an intuitive idea that one has the right to control whatever she produces. The main weakness of this idea is also well-known: when we talk about production, we usually mean the process in which raw materials get transformed into some valuable end product by human labor. Yet even before this process starts one needs to find and appropriate raw materials and this activity cannot be plausibly described as production. Therefore, production cannot be the ultimate source of the right of ownership.[68]

ETO interprets production in such a way that *finding* a thing and *producing* a thing appear importantly similar thus creating a groundwork for the justification of appropriation. I will present this conception of production in this section.

Imagine, once again, Jane walking through the forest. She sees a stump and wants to sit on it but does not find it comfortable. So, she decides to cut a proper chair out of it. She has all necessary skills, knowledge and tools to do it, so she starts with the work and in a couple of hours it is complete.[69]

We would say here that Jane has produced a chair from the stump. But consider this: if we focus in this story on the part where Jane transforms the stump into a chair, we would find that the result of the productive process can be fully explained in terms of its inputs and its inputs, in return, can be presented as depersonalized factors of production. We can say that the energy of Jane's body, her skills in carpentry and her tools were applied to the stump and the chair emerged as the result of this interaction. Notably, it is not at all important that it was Jane who was doing the work. It could be any other person with the same skills or even a robot with appropriate software. As long as the maker of the chair has capabilities identical to those of Jane, the result would be the same. There is no place for Jane's *person* in this process.

Jane's person manifests, however, in her decision to make a chair. And at the core of this decision is a use-judgement: she set making a chair as her goal and she saw that the stump can be used as a material for this. This decision was the point where an actual *choice* to make a chair was made and the entire production process afterwards can be seen as deterministically following from this choice. On the other hand, there is no guarantee that a different person with the same skills and knowledge as Jane would make the same choice in the same situation

[68] For a more detailed explanation of this argument see (Simmons 1998).

[69] In terms of ETO: she first make a use-judgment that a stump can be used as a chair but then realizes that it is not productive enough and modifies it to a use-judgment "a stump can be used as a material to make a chair" which she promptly enacts.

and, of course, a robot would not be able to make a choice at all as a robot would not have ends of its own.

In this way ETO breaks production into two components: *creative* and *mechanical*. The creative component consists in deciding what and why we should make, and the mechanical component consists in physically going through with this decision.

Now, *if* we believe that production generates any sort of rights at all, it is most natural to believe that this normative work is done by the creative component: as I argued, this is the only place where the personality of the producer manifests and where we can find a reason why the respective rights should be assigned to this particular person and not to a different one. The mechanical component, however, needs to be seen as normatively barren as it does not involve any choices: when we are doing mechanical work, we are no different from tools.

For a better understanding of this idea consider the case of factory workers. Marxists see them as "true" producers. They argue that their labor is the ultimate source of the value of their products and that capitalists exploit them by appropriating this value. From ETO's perspective nothing is further from truth. ETO observes that workers are only engaged in the mechanical component of production.[70] They do not decide what to produce and why, they do not make any use-judgements on the resources with which they operate. They only follow the use-judgements made by others.[71]

Where the workers do make use-judgements is the stage where they get employed, where they decide that the best thing to do with their labor is to make it means for the end of the factory owner in exchange for money. And for that reason they do not end up being entitled to any share of factory's income but they are entitled to monetary compensation for the value of labor they provided.

One important implication here is that if the factory owner fails to sell her product with profit, it does not change her duties towards the workers in the

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[70] This, of course, assumes a somewhat idealized scenario where workers literally do nothing but mechanically following a certain rigid algorithm. Few industries nowadays operate in such a way.

[71] Contrast this with the conception of productivity expressed in (Scanlon 2017, 129): "Suppose that a productive process involves a number of workers who, while they are working, cannot always see what others are doing. It may be that these workers would work more efficiently (would accomplish more with a given amount of total labor) if someone helped to coordinate their efforts by standing at a place where she can see and be seen by all of the workers, and signaling to them what most needs to be done at a given time. The marginal product of this coordinator would be the value of the increased production resulting from a unit of time of her "direction." That is to say, the difference in value between what the workers would produce in that time if they are directed and what they would produce in that time without direction. Perhaps the marginal product of the person in this directing role is greater than that of the ordinary workers. But the extra quantity of goods produced as a result of this direction is not something "produced by" the person who provides the direction. Rather, it is produced by the other workers with her help".

In Scanlon's example both the workers and their coordinator are engaged in mechanical component of production. The creative component is completely absent from this picture.

slightest. This is because her failure to sell the product represents the failure of her use-judgement for which her workers have no responsibility. Of course, it is equally true that workers have no entitlement to be rewarded for the unexpected success of the use-judgement of the factory owner. If she was able to sell the product for a much higher price than she anticipated, it does not mean that her workers should expect to receive a pay raise.

Observe now that the creative component is shared between both producing and finding. Let us go back to the stump case from which I started this section. Jane makes a use-judgment both when she decides to use the stump as it is and when she decides to remake it into a chair. What the second scenario adds is the mechanical component which is absent in the first one. I have argued, however, that the mechanical component should not be seen as having normative implications. Therefore, production can only be as normatively significant, as finding is.

It should now become clear why the category of production plays no special role in ETO. Nor does finding play a special role – in this aspect ETO does not follow Kirzner who justified appropriation by a finders-keepers rule.[72] Instead of these concepts ETO works with the concept of use-judgement as it represents the normatively significant creative component which is present in both production and finding, and thus underscores the unity between these two concepts. It is use-judgements and their enactment what serves as grounding for property acquisition under ETO.

One possible confusion here is to see the enactment of the use-judgement as the same thing as the mechanical component of production. This is not the case, even though they are often co-extensive. The enactment is primarily a mental attitude that only contingently manifests in physical actions. It is more an extension of the respective use-judgement in time than something distinct from the use-judgement. The mechanical component of production, by contrast, is purely physical. You cannot enact a use-judgement made by someone else because you would not have the necessary mental state. But you can do mechanical work for the end defined by a use-judgement of a third party.

To understand this difference, think about factory workers once again. They – in an idealized conditions – do not need to understand the meaning and the goal of their work. In fact, they can do their job perfectly fine even if they do not know what kind of product emerges at the end of the conveyor. This is the reason I would say that they *work for* the factory owner but they do not *enact* her use-judgement. The purpose of their actions has nothing to do with the owner's purpose to make profit and everything to do with their own purpose to get paid their wage. They are enacting their own use-judgement here which is "If I will be pressing these particular buttons in the right order for eight hours every workday, I will get money at the end of the month". Observe how this latter use-judgement does not need to contain any reference to the end-result of their button-pressing

[72] "…an unowned object becomes a justly owned private property of the first person who, discovering its availability and its potential value, takes possession of it" (Kirzner 1989, 98).

activity. This is the way in which it is possible to perform the mechanical component of production without enacting the respective use-judgement.

With the place of production within ETO's framework clarified, let me move to the conclusion of this chapter.

4.6. Conclusion

The analytical distinction between brute objects and resources is the central feature of ETO. This distinction is based on the fact that no object is automatically available for our use. Such availability only comes after preliminary mental work. The fact that such mental work is necessary underlies the phenomenon of *scarcity*. Brute objects as such are not meaningfully scarce; there is an entire universe full of them that extends further than we can see. What is scarce is our ability to "prepare" brute objects for use.

The mental work that transforms brute objects into resources is conceptualized within ETO as use-judgements. Use-judgements are typically very easy to make and, in most cases, we make them automatically, without any conscious mental focus. This fact makes use-judgements "invisible" for reflection and creates an illusion that the phenomenon of scarcity is the property of external world, not a limitation of our internal ability.

The main purpose behind ETO's concepts of brute objects, resources and use-judgements is to dispel this illusion. Kirzner argues that in a certain sense we create resources by discovering them (1989, 40–44, 152). This claim might seem puzzling as discovery is a purely mental event that cannot directly affect objective reality. But ETO shows that scarcity exists not in the objective reality but in our minds and it is by changing our minds we overcome it.

In the next chapter I will show what normative conclusions will follow if we look at the world through this lens.[73]

[73] Individual resources can be scarce in a different sense – when there are several competing use-judgments made on the same unit of resources. I will explore these cases in the next chapter. The concept of scarcity presented here concerns a more abstract case where a particular type of resources or even resources in general are seen as scarce. This concept will receive some further elaboration in Section 7.5.

Chapter V. Property Acquisition and the Justification of the Right of Private Ownership [74]

5.1. Introduction

In this chapter I will present ETO's justification for the right of private ownership as natural right. The very first thing I need to do in this respect is to define what the right of ownership is.

I have already laid down some groundwork for this task in Section 1.2. I distinguished there between the ways the philosophy of law and political philosophy approach this problem. The philosophy of law seeks to formulate an abstract schema which would concisely summarize the rules of existing positive law related to ownership. Political philosophy, on the other hand, seeks to uncover moral reasons that serve as grounding for positive law.

Back then I presented the right of ownership as the answer to the question who should set goals for a particular resource. The choice is between two options:

1) The goals for each resource are unilaterally assigned by a specific individual – its owner.
2) The goals for each resource are assigned through a procedure that involves decisions made by more than one individual.

The former of these answers leads to Deep Private Ownership while the latter leads to Deep Public Ownership.

The right of ownership, therefore, can be defined as the right to decide what should be done with a particular resource.[75] For the purposes of this chapter, however, such definition is too vague. To argue that individuals, in fact, have such a right I need to specify its content and make clear what exactly the "right to decide" includes in the context of ownership.

In this respect the Hohfeldian system of jural relationships, introduced earlier in Section 2.2., can be a useful tool. It allows breaking down the right of ownership into distinct components to each of which a specific justification can be provided.

Hohfeld (1917, 746–747) helpfully provided his own analysis of ownership in terms of his system. What follows below is my own adaptation of his ideas.

The right of ownership will be conceptualized as consisting of the following components:

1) *Owner's Liberty*. This is a Hohfeldian liberty to use a particular resource.
2) *Owner's Claim-Right*. This is a Hohfeldian claim-right to demand that others not use the resource. In literature it is also known as the right to exclude others from using the resource or simply the right to exclude. This latter term I will also sometimes use throughout this work.

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[74] For a compressed version of the arguments of this chapter see (Sazonov forthcoming).

[75] This is how Nozick defines the right of ownership (Nozick 1974, 171). This definition of ownership is also accepted by Waldron (1988, 39) and, more recently, Nili (2019, 354).

3) *Owner's Power*. This is a Hohfeldian a power to transfer the aforementioned rights to others, also known as the power of transfer or the right to transfer. I will use the latter terms interchangeably with Owner's Power.
4) *Owner's Immunity*. This is a Hohfeldian immunity that protects the owner against others (including government officials) from taking the aforementioned rights away.

In legal literature you can more often encounter a different and much more detailed breakdown of the components of ownership that goes back to Honore (1961, 113–126) and includes eleven "incidents" of ownership. Most of these incidents can be easily mapped on the four components above, with two notable exceptions.

Firstly, Honore's list of incidents includes the right to manage property (1961, 116) and the right to receive income from property (1961, 117) and it is not immediately obvious how to describe them in terms of my four components, so I would like to clarify here my position with respect to these rights.

The right to manage is essentially the right to grant others a partial access to property. James Penner in his recent book (2020) reconceptualized this right as a part of a broader category – the power to license to others such activities that would otherwise be a trespass. This power is distinct from the power of transfer as it does not transfer the right of ownership as a whole but only gives others the right to perform certain actions that would normally be only allowed to an owner without making them owners in turn (we use this power to lease away our property, for example).

Penner believes that this power is one of the essential components of the right of ownership (2020, 13), but I would argue otherwise. What we do when we allow others to use our property is giving them an enforceable promise not to use our right to exclude if certain conditions are met. This power, therefore, is not a part of the right of ownership but a part of a more general power to give enforceable promises which is not related to ownership by itself and should be studied within the law of contracts. The only ownership-relevant component here is our right to exclude on which this power relies.

The right to income was already somewhat explored in 2.4.2. Back then I pointed out that the right to income is nothing more that the power of transfer exercised by another party of a transaction. A landlord who receives money from her tenant owns it because the tenant used her Owner's Power to transfer the ownership of money to the landlord. No separate right of income is necessary to explain this transaction. For this reason, I will not include a separate discussion of the right to income in this chapter. This is not to ignore broader social and political concerns associated with the right of income which will be discussed in Chapter VIII.

Secondly, Honore's list of incidents includes not just rights associated with ownership but also liabilities and limitations. There are three incidents that belong to this category:

1) The duty to prevent harm (1961, 123).
2) The liability to execution (1961, 123).
3) The incident of residuarity (1961, 126).

The first is the duty not to use property in ways that are harmful to others. I see it as an aspect of a more general duty not to harm others without a reason and do not see it necessary to devote any special attention to this duty in a work focused on the right of ownership. The second incident indicates that property, under certain circumstances, can be expropriated to cover one's debts. This is just a specific legal mechanism through which the duty to pay one's debts is enforced and also does not need to be covered here. The third incident regulates the cases where property rights get expired or abandoned. These issues are relevant to the topic of this study and will be explored in Chapter VII.

In this chapter I will explain how the first three components of the right of ownership I listed here – Owner's Liberty, Claim-Right and Power – are acquired by individuals making and enacting use-judgements. As I will argue, these three components mutually support each other and merge into a unified whole which is the right of private ownership. The fourth aspect – Owner's Immunity – is an odd one because it is not a component of the right of ownership but rather a particular quality which the other three components have. To put it in other words, to show that the first three components are acquired is sufficient to justify the right of ownership as a defeasible right, but it still can be a very weak right that can be easy overridden by any number of other morally relevant considerations. Justifying Owner's Immunity, however, means to show that the right of ownership trumps any or at least most competing moral principles.

This is the line along which I will construe the division of labor between this chapter and the next one. The task of this chapter is to show that the right of ownership is a well-grounded moral fact. The task of the next chapter, which will be dedicated to Owner's Immunity, is to explore how exactly significant this fact is when weighed against other moral facts.

The grounding of Owner's Liberty, Claim-Right and Power will be presented in Sections 5.2. – 5.4. respectively. In Section 5.5. I will show how the conditions necessary for the emergence of all three come together in what I call ETO's rule of property acquisition. Finally, Section 5.6. will provide a connection between the material of this chapter and the two subsequent ones.

With that said, let me move on to the argument for Owner's Liberty.

5.2. Owner's Liberty

Appropriation under ETO takes place over two stages. The first one is where a use-judgement is made. As a result, the respective brute object becomes a resource *for the author* of the use-judgement, and she acquires Owner's Liberty. The second one happens when the author enacts her use-judgement. At this stage she acquires Owner's Claim-Right. I will explore the former stage in this section and will focus on the latter stage in the next one.

Owner's Liberty finds its foundation in what I call natural liberty. Natural liberty is a principle according to which a person is free to do anything she wants unless there is a normative reason against her doing it. In other words, individuals

are fully free *by default* and what needs to be justified is any limitations on their freedom, but not the freedom itself. This is a highly intuitive principle, and I will assume throughout the rest of the text that no reader finds it controversial.

Consider now, in the light of the principle of natural liberty, the normative situation of the author of the very first use-judgement made on a brute object – let's say it is Jane making a use-judgement on a stump in the forest. From that point on it becomes possible for her to use it, which means she acquires a default liberty to do it as an aspect of her natural liberty.

Observe now that as Jane was the very first person to make a use-judgement on this object, no one else, by definition, even knows that this object is a resource. Corollary: no one else has a way to use it and, therefore, can claim any *right* to use it. Jane's default liberty to use this object is, therefore, unrivaled, which makes it not just a *defeasible*, but *absolute* right – Owner's Liberty.

One may regard this conclusion as hasty. Perhaps, the lack of ability to carry out an action does not equate to the absence of a right to attempt it. If people other than Jane cannot use the stump it does not need to mean that they have no right to do it. For example, it is impossible to teleport to Mars, but would we say that individuals have no right to teleport to Mars?[76]

I do not think this objection holds. There is a reason to distinguish between this case and the alleged right (of others) to use brute objects. The right to use brute objects is a logical, not physical, impossibility: it is a right to use something that is by definition unusable. It is similar not to the right to teleport to Mars but to the right to draw a square circle. There is no such right as the expression "to draw a square circle" does not describe any action and, therefore, has no meaning. By contrast, the meaning of the right to teleport to Mars is transparent.

Owner's Liberty in ETO is structurally identical to the original right of use in other entitlements theories and serves the same function. It is a precondition for any subsequent actions performed with its object. The difference is that the original right of use is something that everyone has while in ETO it is limited to a single individual – the author of the respective use-judgement. With this established, let me move on to the next component of the right of ownership.

5.3. Owner's Claim-Right

In the previous section I explored the normative consequences of a single agent making a use-judgement on a resource. As I established, in that scenario the agent acquires Owner's Liberty because the resource does not exist as such for others. In this section I will present an argument that intends to show how the *enactment* of the use-judgement in question establishes Owner's Claim-Right.

The argument here is more complex than the argument for the Owner's Liberty and invites more powerful objections, so I will have to split off several subsections to deal with them adequately. Ultimately, as you will see, the case for

[76] A somewhat similar argument is made in (Spafford 2020).

Owner's Claim-Right cannot be made without also arguing for Owner's Power which means the argument will have to extend to the next two sections.

The section will have the following structure. In the 5.3.1. I will present the core argument for Owner's Claim-Right. Subsections 5.3.2. through 5.3.4. will deal with several objections that can be advanced against the argument, progressing from the easier to the more difficult ones. To answer the very last of these objections I will need to rely on ETO's conception of transfer, so the issues raised in the last subsection will not be answered there. They will have to wait until 5.5. where I will present a unified conception of property acquisition.

5.3.1. The case for Owner's Claim-Right

Let me return to the situation from the previous section where Jane makes a use-judgement on a stump and acquires Owner's Liberty with respect to it. I will now introduce another agent – Bill.

Let us say Bill makes his own use-judgment on the stump which Jane is already using. I will assume, for the remainder of the chapter, that Bill's use-judgement is exclusive which means it cannot be enacted simultaneously with Jane's use-judgement (I will deal with non-exclusive use-judgements in Chapter VII). For example, he and Jane both want to use the stump for sitting but there is space only for one of them.

Observe now that there is a fundamental asymmetry between Jane's use-judgement, that was made earlier, and Bill's. When Jane made her use-judgement Bill, as argued in the previous section, did not have any rights with respect to the stump as he was not yet aware that it is a resource. This is why when Jane enacted her use-judgement, it did not make Bill's situation in any way worse. On the other hand, if Bill would now enact his use-judgment, it would reduce the amount of substantive opportunities Jane possesses as she no longer can exercise her liberty to sit on the stump. In this way, Jane's natural liberty, of which her Owner's Liberty, described in the previous section, is an aspect, will be devalued. In order to prevent this from happening, Jane now needs an additional tool alongside with her liberty to use the stump: a claim-right to demand that others, Bill included, do not use it. Owner's Claim-Right.

Billy Christmas argued beautifully how the right to exclude others should be seen as a mere extension of the right to use:

> There are many uses of external objects that, however, in order to remain uninterfered with, require extensive abstention from third parties. When one engages in such an activity, the right to non-interference one naturally has becomes functionally identical to the extensive right to exclude that characterises private ownership. A right of exclusion that resembles that of private ownership can therefore be borne of a right to exclude that is strictly protective of the particular use one makes of an object. Uses of things that are near-exclusive – leaving little or no action space for others to make use of them – require that others almost totally exclude themselves from the resource. A use-based account of property can

> therefore yield an account of property that turns out to be functionally equivalent to ownership of things.
> <…>
> The fact that we use external objects as direct consumables and as production goods grounds the potential for far more expansive rights of exclusion than might be initially thought. Take the use of clothes made from animal hides, silk, wool, or cotton. The subsumption of these objects into the activities of their users does not cease when they are hung up at night and one goes to sleep, nor when one changes out of one set and into another.
> <…>
> Our lives are not punctuated lists of book-ended actions: one being necessarily over for another to begin. Rather, they are expanding nexuses of overlapping actions of various degrees of spatiotemporal extension. Some actions continue as long as we live, others are long-term but not indefinite, others are short-term, and some are near instantaneously completed. Many of these actions subsume the others, so that interference in one more spatio-temporally discrete action also constitutes an interference in a more expansive one. (Christmas 2021, 69–70)

Owner's Claim-Right, therefore, appears as an extension of individual's natural liberty: it is a mechanism which protects her from others interfering with the enactment of her use-judgments. Observe, however, that for Owner's Claim-Right to appear the enactment should have taken place, otherwise, it has nothing to protect and, therefore, no normative grounding. Jane should already be sitting on the stump, or, at the very least, in the process of moving towards the stump to take a sit, if she wants her Owner's Claim-Right to be recognized. This condition creates certain epistemic difficulties which I will explore in the next subsection.

5.3.2. Ignorance of enactment

Bill's normative situation is straightforward as long, as he is aware that Jane's use-judgment is being enacted: he has no right to enact his own use-judgment as it would violate Jane's natural liberty. Such would be the case if he, for example, sees Jane sitting on the stump.

But let us explore a different scenario. Suppose Jane got up from her stump and went away to pick blueberries and that was the moment when Bill wandered into the glade and, unaware that the stump is already occupied by Jane, took a sit on it.

Observe that in this scenario Jane would still be enacting her use-judgement. Even though she went away from the stump, she plans to eventually return to it and sit on it for some more time. So, it is still a resource for her.[77] The question is, would she have a right to shoo away Bill from it given that he was not aware that the stump is "hers"?

[77] Readers who are wondering what would happen if Jane abandoned the stump for good will get their answer in Chapter VII.

ETO's answer to this question is negative. Recall how the core assumption of ETO is that resources are not known automatically but have to be discovered. It follows that the shape of property rights is also not known automatically: if agents do not know what resources exist in the world, they cannot be expected to know who owns which resources. Therefore, when the author of the first use-judgement discovers a resource, she cannot expect others to respect her right to it as they do not know that the right even exists. It means it is the author's duty to communicate this knowledge to the wider society. It is not enough to privately see a brute object as a resource. For your Owner's Claim-Right to exist you also need to tell others that a particular object is a resource for you.

To put the point in a different way, as long as Jane's use-judgement is private, the resource exists only for her and is not known to the society at large. She is alone responsible for maintaining her control over the resource and cannot expect anyone else to support her in this project. But when others learn about the resource from her, this knowledge can be utilized on the social level. Jane's neighbors can now make their own use-judgements, building on Jane's initial discovery. The resource now belongs not to Jane, a private person, but to Jane, a member of community. This fact creates an obligation for all other members of the same community to respect her control over the resource.

In a normal case the enactment would manifest itself in some physical action which will by itself communicate all necessary information to others (for example, Jane sitting on the stump). But as enactment is primarily a mental phenomenon, it is not necessarily the case: the related action or actions can take place without any directly observable connection with the respective resource. For this reason ETO distinguishes conceptually between enactment and *proof of enactment*. In most cases they would be co-extensive but when enactment is by itself unobservable, its proof is something that appropriators need to additionally provide in order to impose on others an obligation to recognize their Owner's Claim-Right.[78]

Observe how this requirement makes the right of ownership distinct from other natural rights. We do not need to prove to anyone that we have a right to life. On the contrary, it is a duty of the wider society to identify the agents who have such a right and recognize this right for them. But in case of ownership placing such a requirement on society is unreasonable because the right of ownership is an acquired right and the moment of acquisition is obscured from everyone except the bearer of the right: it depends on her internal mental processes. It means that to have this right recognized by others, one has to do an additional work of communicating to them the very fact that the right exists.

It is, therefore, possible for a *relationship* of ownership to remain unrecognized and thus fail to generate the respective *right* of ownership – if its holder did not bother to discharge her duty to provide the proof of enactment. Which means

[78] It is common for entitlements theories to require that appropriation is fixed in some socially observable way, so ETO is not original in that respect. See (Christmas 2021, 138–141; Mack 2010, 73–74; Ripstein 2009, 105; Van der Vossen 2009, 363).

that even a perfectly functioning system of property rights might sometimes fail in its function of protecting the liberty to enact use-judgments. As I explained, this peculiar property of the right of ownership emerges from the obscurity of the moment of its acquisition. We can see it as a manifestation of transaction costs which are inevitably imposed on any instance of human interaction.

Let me now apply this reasoning to the scenario with which I started this subsection. Jane cannot reclaim her stump because it is unreasonable for her to expect Bill to know that she counts it as her resource. Therefore, she has no Owner's Claim-Right and no right of ownership. To establish her right of ownership she would need to leave some sort of marking on the stump that would communicate to Bill that this stump is already someone's resource.

If Jane did not produce a proof of enactment, it means her use-judgment remained private and, essentially, non-existent as far as others concerned. It will not have any normative consequences and Jane cannot rely on it if she wants to take the stump back from Bill's possession. If Bill found the stump unoccupied and unmarked and took a sit on it, he has the right to remain sitting.

It is only possible to supply the proof of enactment when a particular standard of proof exists. To a large extent, the requirements for such a standard are objective. On one hand, there should be some sort of causal connection between the enactment of a use-judgement and whatever evidence appropriators are required to provide so that it would not be possible (or, at least, would be difficult) to prove one's enactment without actually going through with it. On the other hand, the requirements towards appropriators should not be excessively onerous: proving the enactment should be as easy as possible. In our scenario it is reasonable to ask Jane to leave a simple marking on a stump but unreasonable to ask her to carve out a lengthy treatise on it, specifying the content of her use-judgement in the most detailed way possible. Another requirement is that the proof of enactment should be connected with the enactment temporarily and spatially. The mark needs to be on the stump itself, not on the nearby tree, and it probably should carry some reference to the time period during which a use-judgement is expected to be enacted. A year-old mark on a stump deep in a desolate forest is not particularly informative by itself about whether any use-judgement is being enacted right now.

However, once these conditions are satisfied, there is a lot of room for requirements that have purely conventional character. Most obviously, the meaning of the marking should be intelligible to Bill which means it should follow some sort of linguistic convention accepted in this area. This conventional aspect of the standard of proof cannot be avoided and, in fact, it follows directly from the assumptions of ETO. As I already explained, the shape of ownership rights is by default unknown and needs to be communicated to the society at large before the rights in question are recognized. But it means that the procedure for such recognition must be influenced by the manner in which a particular society accumulates, stores and communicates information. This, in turn, means that different societies would recognize different sets of property rights in similar situations without any of them being in error.

A possible worry here is that these considerations introduce a degree of relativism into ETO and compromise the natural character of property rights. For example, Ripstein (2009, 168–176) pointed out that property rights are undetermined until the government sanctions them and concluded that it is impossible for them to exist without the government. Varden (2012) develops a similar argument. It seems like the critical role the proof of enactment plays in the formation of property rights in ETO makes it vulnerable to the criticism explored in 3.2., according to which there is a logical dependence between property rights and the institution of government which makes all ownership necessarily public.

Back in 3.2. I relied on the distinction between the right itself being conventional and the manner in which it gets socially recognized being dependent on social conventions to respond to this criticism. Here I want to make one additional point. Even though the standard of proof is conventional, it is not the case that the government is necessary to articulate and sanction this convention. Government is by essence a coercive institution and plays a necessary role in enforcement of any rights, including property rights. But there is no logical necessity for a standard of proof of enactment to be supported by coercion. We can easily imagine a society where all people voluntarily comply with the regime of property rights. They would still need to prove their enactments to each other to know the shape of their rights and they would need a commonly accepted standard of proof. But standards can certainly emerge without government: language is the most obvious example here. We do not need government in order to *have* a standard of proof. As long as people respect property rights out of their own will, a regime of private ownership can exist without government.[79]

The idea that government is necessary to determine property rights originates from the confusion between creating regulatory norms and enforcing them. It is only a contingent feature of modern society that reliable obedience to many types of norms (property rights are certainly no exception here) is only possible under a threat of violence. But it is not the essential feature of norms themselves and tells us nothing of their nature. For illustration, imagine a small society that only consists of a husband and wife and their children. It is hardly inconceivable to imagine that they would be able to develop a system of property rights to regulate their relationships and to follow it without coercion ever being on the table.

On the other hand, it does follow from this discussion that ownership can only be acquired after certain interpersonal conventions – primarily, linguistic ones – are established. The conflict Jane and Bill have about the stump can only be rightfully resolved when they can properly communicate with each other. The point here is not that property rights can exist in a social vacuum but that coercive force of the government is not among their necessary background conditions.

With this last problem resolved, let me summarize the subsection. The enactment of a use-judgement creates Owner's Claim-Right but it only has this effect if the fact of enactment was properly communicated to others. It means that

[79] See (Hafer 2006) for an interesting game-theoretical model of how property rights can arise in a stateless society.

appropriators need to provide a proof of enactment if they want their right to be socially recognized. The standard of such proof is partially defined by the manner in which public communication is organized in a particular society. In this sense this standard is conventional. It does not, however, make the right of ownership itself conventional.

5.3.3. ETO and use-based theories of property acquisition

The ideas presented in this section so far invite, I believe, the following worry. Despite all the talk about the importance of use-judgements, they are not, by themselves, sufficient for appropriation: you also need to enact them. And, as we just learnt, the enactment is also insufficient: you need to prove that it has taken place by physically doing something with the object you appropriated. It appears, therefore, that what actually fixes appropriation is this last act. So, a reader might wonder, why all this talk about use-judgements and enactment? Why cannot we throw all this away and simply focus on appropriators physically interacting with resources as it would supply the enactment with conclusive proof?

In this way, it seems, ETO collapses into use-based theories of appropriation best represented by the recent work of Billy Christmas (2021). The central claim of these theories is that we appropriate resources when we use them. In a sense, ETO follows the same idea: it claims that appropriation is complete when a use-judgement is enacted and the proof of enactment is presented to the public. As it becomes obvious from my citations from Christmas in 5.3.1., the concept of enactment is very similar to the way he understands "use" – as not just immediate physical engagement with objects but continuous reliance on them over time.

There is, however, a way in which ETO is different from these theories and, as I will argue, superior to them. The problem with use-based theories is that they are vulnerable to the Right Displacement Problem (RDO) discussed in Section 2.2. above. Agents need to use resources in order to appropriate them which means that some sort of use-right exists *before* the appropriation. For this reason, use-based theories need to assume that there is at least some sort of universal liberty to use unowned objects (the original right of use as I labeled it in 2.2.). But once we assume such a liberty, we need to concede that this liberty gets displaced at the moment of appropriation as it is incompatible with the right of ownership. Therefore, use-based theories need to admit that appropriators diminish the freedom of others and face a difficult task of justifying their power to do so. Arguably, they have very little to offer against the claim that the only way to respect the original right of use is to institute the right of public ownership on its basis (see Sections 2.3.2.3 and 3.6. above).

ETO avoids this difficulty by breaking down the act of appropriation into two logically distinct steps. At the first step the appropriator makes a use-judgement and acquires Owner's Liberty, and at the second step she enacts the use-judgement and acquires Owner's Claim-Right. As ETO does not start with the assumption that there is a universal liberty to use resources but instead explains how such

liberty emerges for a particular individual, it does not need to deal with RDO: there is no prior right of use which appropriators displace. This circumstance allows ETO to completely flip the script in the debate around property rights.

Owner's Liberty, as a structural analogue of the original right of use, creates all the same difficulties for the *opponents* of the idea of unilateral appropriation which the original right of use created for its *proponents*. Under ETO it is not appropriators who are challenged to justify the fact that they displace the rights of others, but rather the others who are challenged to justify their right to interfere with the liberty of the owner. Traditional ETs need to claim that some particular action, performed by appropriators, has so much normative weight that it outbalances the original right of use.[80] ETO eliminates the original right of use and claims that without this powerful competitor even very weak claims of appropriators would be sufficient to establish ownership.

There is, therefore, no significant difference between the normative recommendations of ETO and use-based theories, but ETO offers a more convincing justification of these recommendations. It breaks the concept of "use" into three analytically distinct components: making a use-judgement, enacting a use-judgement and providing the proof of enactment, and assigns distinct normative effects to each of them, thus making it clearer why specifically use results in appropriation.

5.3.4. The displacement of the normative power to appropriate

So far, the argument for the Owner's Claim-Right, presented in this section, amounts to the following. When the appropriator makes a use-judgement on a brute object, enacts this use-judgement and communicates it to others, the enactment of any subsequent use-judgement on this object would be a violation of appropriator's natural liberty and is, therefore impermissible. Which means that the appropriator has a right to exclude others from interfering with her enactment.

The assumption is that when the appropriator makes the initial use-judgement and claims the respective resource as her own, she does not interfere with anyone's rights. To support this assumption, I argued that there is no universal liberty to use objects because the objects on which no use-judgement was made cannot be used. But the original right of use is not the only normative opportunity that can be displaced. As my argument concedes, once an object is appropriated it becomes normatively impossible to enact a use-judgement on it. But this means that it becomes impossible to make a use-judgement that would grant its author Owner's Liberty over the resource. And this fact constitutes a problem for ETO: it avoids RDO by eliminating a universal *liberty to use* unowned objects, but it is a logical necessity for any theory of appropriation that there be, at the very least,

[80] Cf (Locke 1980 II, 40).

a universal *power to appropriate* unowned objects. In ETO this power is manifested in the ability of agents to make *normatively consequential use-judgements* about objects.[81] This is the ability which appropriators deny to others under ETO.

To illustrate: imagine, once again, how Bill finds a stump in the forest only to discover that Jane has already marked it as hers. Now, if there was no mark, it would have been possible for him to come up with his own use-judgement on this stump. In that case he would become its owner but, thanks to Jane's marking, this opportunity is forever closed for him.

This problem is potentially fatal for the theory. The argument for Owner's Claim-Right is that there is no symmetry between the author of the initial use-judgement and the authors of subsequent ones: the former does not diminish the freedom of others when she enacts her use-judgment, while the latter would diminish the freedom of the former if allowed to enact their use-judgement. But now it appears that appropriators deny others the power to appropriate and, in this way, diminish their freedom after all. If this is the case, then ETO has no advantage over other entitlements theories of property rights and is vulnerable to the same core objection.

The solution to this problem cannot be found within the conception of appropriation but will become apparent once we explore ETO's conception of transfer. This is what I will proceed to do in the next section.

5.4. Owner's Power (the Right to Transfer)

Any use-judgment on a brute object, even a poor one, increases its value as the value of a brute object is non-existent. An inefficient use would still be better than no use at all.

Use-judgements on resources, however, present a more complicated case as they compete with an earlier use-judgment. Even though they are often reliant on previous use-judgements, it is not given that they are less productive than the latter. Even productive use-judgements are not equal between each other as they can provide for more or less efficient uses of a particular resource. The argument presented above seems to claim that an earlier use-judgement should take priority even if it is less productive than the later ones which is hardly agreeable.

This problem is solved in ETO's conception of transfer which will be the subject of this section. I will start with a quick sketch of the argument for Owner's Power (Subsection 5.4.1.) and then proceed to respond to possible objections while at the same time explicating and defending the underlying assumptions of the argument (Subsections 5.4.2. – 5.4.4).

[81] It also covers all the use-judgments which would generate liberty but not claim-right and, therefore, would not result in appropriation (I will expand on such use-judgments in Chapter VII). The subsequent discussion should fully apply to such use-judgements as well.

5.4.1. The argument for Owner's Power

If we want to resolve the conflict between two competing use-judgements, it would be helpful to have a way to compare their quality. To do this we need to make a comparison between the amount of value they respectively discover, but this leads to the following difficulty. Value, as defined in 4.2., is a relationship between a particular human end and a particular object in which the object is means to this end. It is not immediately obvious how any sort of quantity can be assigned to such a relationship.

The solution to this problem starts with the following observation. Other things equal, individuals prioritize the satisfaction of more important ends over the satisfaction of less important ones. This fact gives us a way to rank the importance of ends by comparing their urgency: those that are satisfied earlier are, other things equal, more important. And once we rank the ends in this way, we can also rank means: those that serve to attain more urgent ends are more important than those that serve to attain less urgent ends. It follows that resources which are seen as means for the former kind of ends are more valuable than resources which are seen as means for the latter kind of ends. In this way the value of resources can be quantified.

These observations allow us to make a comparison between the quality of various use-judgements: those use-judgements that discover more valuable resources are of higher quality. I will henceforth refer to use-judgements of different quality as more or less productive.

With this in mind, let me now return to the question with which I started this section: what do we do if a use-judgment is made on a resource with pre-established ownership? There are two possibilities: the new use-judgement can be more or less productive than the previous one.[82]

Suppose that the new use-judgement is less productive. Such use-judgment would not succeed in discovering any additional value: the respective resource is already engaged in a project that satisfies a more urgent need, so knowledge that there is also a less urgent need it can satisfy is unhelpful. But discovering value is a *telos* of use-judgments: it is the only reason why individuals make them in the first place. An unproductive use-judgment fails to succeed in its purpose; there is no difference between the world where it was made and the world where it was not made, so it could as well not exist. As this use-judgment is fundamentally inconsequential on the factual level, it stands to reason that it should be inconsequential on the normative level. Therefore, it cannot generate any rights for its author.

Suppose now that the new use-judgement is more productive. Such use-judgment would discover additional value: we now know that this resource can be employed for a more urgent need than the one it currently serves. There is,

[82] I do not believe two use-judgments can be *equally* productive as we measure the value they discover by looking at individuals' choices and equality can never manifest in choice.

therefore, no reason why it should not have the same normative consequences as the previous one.

Therefore, the normative situation of the author of a more productive use-judgment is in certain sense similar to the one of initial appropriator: they both made a productive use-judgment which generated, at least, a liberty to use a resource. There are, however, two differences.

Firstly, the fact that the resource is already owned by another person is an issue. The old use-judgment, under which the current owner employs the resource, cannot be considered fruitless in the same way the new use-judgment was in the previous scenario. This is because when it was made it did add value and, in this sense, did not fail its *telos*. The world, where it was made, is different from the world where it was not made. There is no reason, therefore, to deny this use-judgment its normative force.

Recall how the justification of appropriation is based upon the idea that the appropriator does not deny others any more opportunities than she created. This argument is unavailable here as the current owner would lose the opportunity to use the resource if the ownership is reassigned. Even though the new use-judgement is more productive, there is one person who would be worse off if it is enacted.

The second difference pertains to a lack of epistemic clarity. Where there is only one use-judgement, as it is the case in the situation of appropriation, we need not draw a comparison with its rivals. But in this circumstance, we must make a comparison between the amount of value both judgements discover before we determine which of them have more normative weight.

Therefore, if the author of the new use-judgment wants to claim ownership over the contested resource, she carries additional justificatory burdens. Firstly, she needs to justify her rights to the current owner (special justification). Secondly, she needs to provide evidence that her use-judgement was more productive than the previous one in the first place (general justification).

This justificatory task can be completed if we further stipulate the following condition for the transfer of ownership to the author of the new use-judgment: *the prospective owner owes a compensation to the current one in the amount agreed upon by both parties*. This stipulation, firstly, will fulfil the requirement of special justification, as the current owner now only loses her ownership if she agrees to it. Secondly, the very facts that the current owner agreed to part with the resource in exchange for the compensation, and that the prospective owner agreed to appropriate the resource despite the requirement of the compensation, serve as evidence that the current owner assigns less value to the resource than the prospective one. In this way, current and prospective owner signal that they both believe that the new use-judgement is more productive than the old one.

Now, there are no other persons in society who are in a better epistemic position to judge the quality of the pair of rival use-judgements than these two individuals. They both have incentive to make an accurate assessment of them and they both have direct knowledge of what kind of value the respective resource can

provide. If they both are in agreement that the new use-judgement is superior, it should serve as conclusive evidence that it, in fact, is.

One can try to argue here that there can be better ways to compare the quality of the two use-judgements than the one offered here. But what could they be? Value is a relationship between agent's ends and material objects, and the former part of it is private and cannot be directly observed by anyone except the agent in question. Therefore, to compare the quality of the two use-judgements we need to rely on the behavior of agents who made them and infer the comparison indirectly from such behavior. Moreover, we need some way to quantify their behavior in such a way that their choices are made commensurable with each other. Finally, we need to account for agent's capacity to lie about the comparative importance of their ends or make inaccurate judgments, so our method of comparison should include certain form of responsibility for giving inaccurate signals

Transferring ownership over a contested resource in exchange for mutually agreed compensation satisfies all the requirements above. Firstly, it involves both parties making a choice – so it is casually connected with their behavior. Secondly, as explained above, the nature of their choices is such that it allows to place their ranking of respective use-judgements on the same scale which makes them commensurable with each other. Finally, both parties stand to lose something if their choices do not reflect the way they internally rank their use-judgements (or if they ranked them inaccurately). The current owner would lose the compensation which is more valuable for her than the resource and the prospective owner would forgo the control over the resource which is more valuable for her than the compensation she was asked to provide.

I do not know of any other method of comparison that would satisfy all the criteria I outlined. This is not to say that the procedure I described is perfect. Both the current and the prospective owner are fallible, as all humans, and can misjudge the quality of their use-judgements, even if they try their best to be accurate. Or a productive transfer might fail to come through due too high transaction costs. There is no doubt that because of these and other reasons there would be cases when a more productive use-judgment would not result in a transfer of ownership rights. The proposed method of value-discovery is not foolproof but ETO does not need to claim that it is. It only needs to claim – and claims – that this procedure is superior to any possible alternative. Most importantly, any method of comparison that would give the power to adjudicate between conflicting use-judgements to a third party (for example, a government agency) will be inherently inferior. Such a party would be in inferior epistemic position as it would not have a direct access to respective use-judgements.[83]

There are two concerns I expect the reader to have with this reasoning. Let me discuss them immediately below.

The first of those concern is that when I talk about "productive" and "unproductive" use-judgments I take a social, not individual perspective on value. It means that I want to rank the value, discovered by use-judgments, across the

[83] This point is argued in more detail in (Hayek 1945; Kirzner 1973; Kirzner 1989, 72–96).

needs of all members of society as if they were a single individual. Jane's use-judgment is considered unproductive if the respective resource is used by Bill in a more productive way. But one might argue that Jane's use-judgment is still productive from her *personal* perspective because she is not using this resource at all. So, if she is allowed to enact her use-judgment, she would gain value from the exploitation of a previously unavailable resource. So, one might ask, why should we so entirely dismiss this personal perspective and treat Jane's use-judgment as completely inconsequential?

The answer to this is that ETO aspires to justify the right of ownership within a community of individuals, engaged in a *cooperative* enterprise of discovery and exploitation of resources. One of the aspects of this cooperation is pooling together their knowledge and trying to find the most efficient use for resource from communal, not individual perspective. This is why use-judgments are only considered productive if they increase available value not from individual but from social perspective.

For Jane to attempt to ignore the fact that the respective resource is already used in a more productive way by another member of the community and to privilege her personal hierarchy of values over a broader communal one would mean to refuse to participate in the cooperative venture of value discovery and to strike on her own instead, becoming, essentially, a separate community of one person. And I even grant that in some circumstances it might be a valid ethical choice – if, for example, your abilities exceed those of others by so much that they are of no use for you, or if the barrier of language, culture and overall epistemic context is so high that transaction costs make any cooperation unfruitful. In these cases, I admit, there is no reason for Jane and others to mutually respect each other's ownership rights. But in most normal circumstances to participate in social cooperation is so profitable that it is very stupid to leave this scheme for whatever frivolous reason.

Observe how in this way ETO transcends the apparent tension between individualistic and social aspects of private ownership. Private ownership under ETO is a natural individual right – but this right answers to the aspect of human nature which is essentially social, namely, to the human ability to cooperate between each other in a joint enterprise of exploration and exploitation of the world of resources. Any "social" views of private ownership, Deep Public Ownership in particular, seem to oppress individuality because they always try to create a specific, privileged agent who "speaks for" society – for example, the state, and to grant to this agent an exclusive control over "social" resources. ETO sees social cooperation as nothing more than a sum of private decisions and private choices. Under ETO to be a member of society means to be an agent of this society when it comes to decisions concerning production, consumption and distribution of resources which were discovered by you and which matter to you. In this way the social appears as an aspect of the individual, not as something external to it and alienated from it.

Let me now move to the second concern. One might be wondering how exactly the duty of the prospective owner to provide the compensation is justified,

given that the appropriator does not seem to have a similar duty, so their position with this respect is asymmetrical.

Indeed, the author of the initial use-judgement does not have a duty to provide evidence that her use-judgement is more productive than the previous one because, by stipulation, there is no previous use-judgement. But she does have a somewhat parallel duty: she needs to provide the proof of enactment. In this way, authors of all use-judgements have some sort of epistemic duty related to the seriousness of their intent with respect to the use of resources they want to claim.

A possible objection here is that there is still no symmetry between the two duties. The duty to provide compensation to the previous owner involves material losses, sometimes quite substantial, which could not necessarily be said for the duty to provide the proof of enactment. As I emphasized above, this duty is often satisfied by a simple act of using the resource.

Two considerations could be brought forth in response to this objection. Firstly, the system close to what I am here proposing is in fact practiced in our actual world and we can observe that in great many cases agents choose to pay the compensation, even though it is possible for them to appropriate a similar resource. Lots of people buy wild berries and mushrooms at a market instead of manually collecting them in the wilds, even though there is usually no prohibition on that. This fact suggests that even though making initial use-judgements can seem easy in a vacuum, it often involves costly preparations while making subsequent use-judgements is often a simple matter of going to a nearby grocery store.

To appreciate the type of effort behind the initial use-judgements we need to understand that they entail exploring the natural world of brute objects, which is not by itself organized around human needs. It is quite a different task from identifying a resource after it was placed in a social context that makes its usefulness apparent. It is harder to find a mushroom in a forest than in a supermarket (and finding a mushroom that would not poison you is harder still). In Chapter IV I pointed out that a use-judgement made on a resource is reliant on use-judgements made on it previously. This is not just a logical dependency. It is also a manifestation of an empirical fact that after the initial use-judgement is made and enacted it is normally much easier to make and enact the subsequent ones.

Secondly, recall that when I argue that ownership should be transferred to the authors of more productive use-judgements, I rely on the fact that their use-judgements discover more value than the use-judgment under which the resource is currently employed. But we need to keep in mind that even though the new use-judgement is more productive than the old one, the old one still discovered some amount of value and this value will not be available after the resource is transferred to the new owner. Therefore, the actual impact of the new use-judgment equals to the *net* value added by it, not the gross amount of value discovered. It is therefore appropriate that if the new owner wants to acquire the *full* control over the resource, she has to make up for the share of its value which exceed the amount of value she added. This is how the duty to compensate the old owner for her lost opportunities emerges.

I admit, however, that there are still fringe cases where the duty to provide compensation to appropriators leads to results many readers would see as unfair. Such are cases where the first use-judgment was very easy to make and enact but the respective resource carries a lot of value.

Imagine how a pile of gold falls from the sky right in front of Bill and Jane standing together. They both rush towards it but Jane grabs it a split second faster. ETO claims that by doing so Jane appropriated the gold. Making a use-judgment is very easy here and they both made it simultaneously or almost simultaneously. But it was Jane who was the first to enact it, and now, under the rules of ETO, Bill needs to buy gold from Jane if he wants to get it while Jane has it for free. A skeptical reader would say that in this scenario ETO assigned ownership essentially at random.

The response ETO has to such scenarios is that it is tailored to real life, not to fantasy thought experiments. In real life humans need to actively look for resources in order to acquire them. Observe how it was precisely the feature of real-life gold rushes that finding the gold was never guaranteed. Even if you knew abstractly that a certain area has abundant gold deposits (the fact which, once again, had to be discovered by someone), you would still need to explore around before you find an unoccupied goldfield from which the gold can be extracted – and your search could very conceivably fail.

The gold rush case as presented here is the exact opposite of that: Bill and Jane did not need to find the gold, instead, the gold found them. This goes against ETO's assumptions about how the world operates, so it should be unsurprising that ETO comes up with unintuitive recommendations. And observe – if we try to make this scenario more realistic, if we attribute to Bill and Jane any sort of explorative activity, the recommendations of ETO would immediately become more intuitive as they would depend on what Bill and Jane do and how much success they have in their actions.

Let me now summarize what happens if the new use-judgment outcompetes the old one. The author of the latter loses her ownership as it is transferred to the author of the former. However, the prospective owner would have a duty to compensate the current owner for the value she lost. The exact amount of the compensation is determined by the agreement between parties.

Observe that when a transfer takes place the rights of the new owner are justified by her enacting a use-judgement of a particular quality. This justification is unrelated to the idea that the previous owner holds a moral power to transfer her rights to someone else. For that reason, the power of transfer as a specific *moral* power is unnecessary under ETO. Owner's Power appears as a purely legal phenomenon. It is a mere by-product of the fact that the authors of use-judgements on resources that are already in use are required to provide a proof of the quality of their use-judgements. Owner's Power is grounded in epistemic considerations, but not moral ones.

The normative idea behind the justification of Owner's Power is that ownership needs to be continuously redistributed towards individuals who promise the most productive use of the respective resources. Once this condition is met, it

would not really be a problem, if the very first use-judgement on a resource would only be marginally productive, or not productive at all. If the initial owner sees that she does not get much value out of her resource, she would easily agree to part with it for a modest compensation. In this way poor use-judgements get gradually replaced by better ones. Owner's Power appears as a conduit that facilitates this process.

The justification of Owner's Power I presented here depends on the assumption that the value of resources is discovered in a series of freely agreed exchanges between their owners. This discovery procedure is commonly known as *market process*. This reliance on market process might seem like a liability for ETO, as critics allege that markets have numerous normative defects. I will address some of this criticism in the remainder of this section, but it will be impossible to respond to the entire body of it within the bounds of this work. For this reason, I want to make one additional point before I proceed. ETO only needs markets to be a viable tool for value discovery *as a general case*. It is quite resistant to various exceptions from this rule and edge cases – I will cover this in more detail in Chapter VII. It does not need markets to be a perfect solution to the value discovery problem. It only needs them to be a workable solution which is superior to competing approaches. Given that currently almost all humanity lives in market economies, even though regulated to some extent, I think many of my readers would find this assumption agreeable.

With that said, let me now address what I believe to be the most salient lines of criticism, while clearing up in this process potential misconceptions and confusions and further refining the argument I made so far. There are, I believe, three charges that can be made against the procedure I offered. The market process can be seen as inefficient, unfair and cruel. I will respond to each of these charges in the three following subsections.

5.4.2. Inefficiency

My argument seems to assume, tacitly, that the compensation agreed upon by the authors of both the old and the new use-judgements is equivalent to the value discovered by the old use-judgement. Assume that Jane owns a watermelon and sees its value as equal to fifty coins while Bill has a superior use-judgement under which he assigns to it hundred coins of value. In that case, it is apparently assumed, Bill would be able to buy the watermelon from Jane for fifty-one coins: it would make no sense for Jane to hold on to her watermelon when she is able to exchange it for more value than she gets from it.

But it is not that simple. Just like Jane has a reason to sell the watermelon for fifty-one coins, Bill has a reason to buy it for up to ninety-nine coins: the transaction would be beneficial for him even in this last case. Bill and Jane, therefore, can agree to exchange the watermelon for any sum of money between fifty and one hundred coins; but if the function of the compensation is to make up for Jane

the worth of her old use-judgement, then it is unclear where exactly her right to receive anything above fifty coins from Bill comes from.

Now, if watermelons are traded under the conditions of perfect competition and Bill has an infinity of other sellers to go to, the price would naturally drop to as close to fifty coins as possible: if Jane would not sell the watermelon for this price, Bill would just go to a different seller and Jane would get no profit at all. Also, importantly, if watermelons are naturally abundant, Bill always has an option to bypass any sellers altogether and just find himself an unappropriated watermelon. This is another factor that can force Jane to keep the price down.

But the conditions are not always such. If Jane happened to appropriate the only watermelon in the world, Bill would have no choice but to pay her ninety-nine coins: she is the only source of watermelons available. This, of course, is an extreme case but a similar logic would operate in any situation when the resource Jane controls is rare and not easily available otherwise. This factor would drive the price up.

It appears, therefore, that the system ETO proposes allow for massive inefficiencies: the compensation owed to the current owner of a resource can significantly exceed the value discovered by her use-judgement.[84]

I explained this problem here using the specific terminology of ETO but the situation I described is also well-known under such terms as speculation and price gouging. And the objection with which I need to deal here is the classic complaint that speculators can earn giant profits just through accumulating control over rare resources and selling them later at premium price. In this process they do not appear to discover any value that would contribute to the well-being of the community at large. Their entire use-judgement amounts to simply seeing an opportunity to resell the respective resource in the future for a higher price.

To understand the moral rationale behind speculation, think about what would happen to rare resources if transfers were not allowed but unilateral appropriation were. In that case the distribution of these resources would be chaotic. They would be exploited by individuals who happen to be the first to grab them without any regard to the value behind the use-judgements they enact in the process. If, on the other hand, transfers are allowed and the resource is controlled by a speculator who captured it before the exploitation started, it will ensure that the resource goes to the highest bidder – the person with the most valuable use-judgement.

Another alternative to this would be to ban unilateral appropriation and let the public (through the government) control the distribution of the resource. But in that case the problems I brought up in the previous section would apply: the government would not have a direct access to use-judgements made about the resource and suffer no negative consequences from making inaccurate decisions. In fact, it would not be even possible to determine whether its decisions were inaccurate as unrealized use-judgements would forever remain concealed and their authors would never have an opportunity to put them to the ultimate test of

[84] This argument is advanced in (Dekker 2010).

the market system. In this way, the system I propose is more efficient than any conceivable alternatives: speculators essentially do the same work as government bureaucrats under the public ownership system, but they do it much better.

With these considerations in mind, I can now offer a more developed understanding of the nature of the compensation owed to the previous owner in the situation of transfer. It consists, in fact, of two components: the compensation for the value discovered by the old use-judgement *and* the additional payment for the contribution of the previous owner to the process of public cognition which quantifies the value discovered by different use-judgements and ensures that only the most productive use-judgement is enacted. This work is unimportant when the resource is abundant and easy to obtain; in this case we do not particularly care whether it is used efficiently or not. It explains why the closer the market situation approaches to perfect competition, the smaller the gap becomes between market prices and the costs of production. But when it comes to resources that are truly rare, the efficiency of their use becomes paramount, hence the premium payment for putting them to the most important uses goes up.

5.4.3. Unfairness

The next charge against the proposed principle of transfer is its unfairness. The system allows for different individuals to control different amounts of value which means, in turn, that they all have different capacity to pay out compensations. In this way, individuals have unequal power to affect the process of collective decision-making with respect to relative importance of different use-judgements.

This inequality is hardly unfair, however, if we keep in mind that the overall purpose of this system of rules is to resolve conflicts between use-judgements in favor of the most productive ones. Under the proposed system individuals who have the best ability to identify productive use-judgements would regularly end up with the highest amount of surplus value as they would consistently claim ownership over objects that are more valuable than the compensation they pay. This, in turn, would enhance their capacity to give out compensations and to influence which use-judgements are enacted, thus creating a virtuous circle: the people who are best at identifying productive use-judgements are also the people with the most say on the matter. In this way, the inequality is essential for the very purpose for which the system was instituted.

This response invites two further objections. The first one would be that identifying productive use-judgements is not the only way in which bargaining power can be accumulated under the proposed system. Even though the purpose of the power of transfer is to make the comparisons between different use-judgements possible, this is not the only way in which it can be used. Bill can transfer a watermelon to Jane not because Jane offered Bill a nice compensation but simply because Bill wants Jane to prosper. Or, to describe the situation in the

language of ETO, Bill wants Jane's use-judgements to be enacted not because Jane proved their high quality but simply because their author is Jane.

This scenario happens regularly in real life and is known as *inheritance*. It looks like a convincing counterexample to the claim that ETO's system of ownership transfer facilitates the selection of the most productive use-judgements. The fact that Jane acquires her bargaining power and is able to put a high priority on her use-judgements seems both inefficient and unfair: inefficient because she did not demonstrate any particular ability at identifying productive use-judgements, and unfair because her use-judgements get enacted ahead of those of others without a good reason.

But the impression of unfairness and inefficiency evaporates once we realize that the productivity of Jane's use-judgements should be regarded from Bill's viewpoint. It is Bill's ultimate end that Jane has a freedom to enact her use-judgements, so it can never be an inefficient use of resources whenever they are used to enable her to do so. It can also never be unfair because, from Bill's perspective, the simple fact that the use-judgements are Jane's is a good enough reason to have them enacted.

Observe that transfers of this kind are not the case of abandonment of ownership title on Bill's behalf as it happens under Christmas' view (Christmas 2021, 77–81). The resource is still employed in Bill's project of advancement of Jane's interest. Nor it is the case that Bill exercises some sort of power of transfer as his use-judgment by itself is not sufficient to transfer ownership to Jane. It is rather Bill gives Jane a blank check to claim his resource at any point and in any manner she sees fit, and then the moment she makes any use-judgment on them, they get transferred to her.

Jane's situation only seems unfair if we approach the situation with the assumption of Deep Public Ownership in mind. If we believe that individuals other than Jane have some sort of claim on these resources that is equal to hers, we might want a special justification for putting a priority on Jane's needs when it comes to exploiting these resources. But, as I extensively argued throughout the text, there is no reason to believe that others have any sort of claim. The only person with a claim to these resources is Bill, who presumably discovered them. If Bill wants these resources to be used for the enactment of Jane's use-judgements, there is simply no normative reason that could possibly outweigh this decision.

A different way to put the same point is to say that there is no "absolute" vantage point from which we can judge whether Jane's use-judgements are productive or not. The very point of the power of transfer is to cope with our ignorance in that respect, so it is pointless to criticize it while assuming this ignorance away. We do not have any authoritative knowledge about the value of Jane's use-judgements. All we know here is that Bill and Jane found them valuable and as I argued above, there are no other individuals who are in a better epistemic position to pass a judgement on that.

This discussion reveals an important point about ETO's approach to ownership. The argument does not try to justify the right of ownership by the fact that

private owners are some sort of efficient slaves who do a good job managing resources while serving society's ends.[85] This is a well-known argument indeed, but it belongs to Deep Public thinking. When I say that the public needs to rely on owner's perception of value in order to determine which use-judgement is the most productive, it includes owner's perception of *ultimate* value, not just *instrumental* one. The point of the system ETO proposes is to entrust the decisions with respect to exploitation of resources to those who stand closest to the discovery of the value of those resources – and to entrust them *fully*.

Market system is not seen just as a system that facilitates *economic* calculation of how to achieve public ends. It is primarily a system of *moral* calculation of what ends are worthy of being achieved. This is not to say that the mere fact that Bill is good at value discovery means that his ends are good. This is not the point. The point is that it was Bill who made it possible to use the respective resources to achieve any ends at all and without his contribution they would not be available in the first place.

Let me now move to a different way in which the fairness of ETO's conception of transfer might be attacked. Newcomers into the system would have no property and, therefore, no means to pay out compensations but whatever they can produce by their labor. Their bargaining power would be low. This fact, however, cannot serve as evidence for their low ability to identify productive use-judgements as they simply did not yet have an opportunity to demonstrate one. It might seem, therefore, that there is no good reason to penalize their use-judgements by giving low priority to their enactment.

One obvious response is that this problem can be easily fixed by the presence of developed capital market. A newcomer who made a worthwhile use-judgement but lacks funds to pay the compensation to the current owner of the respective resource can always simply borrow the funds and then pay her loan back from the proceeds from her lucrative use-judgement. The problem here is that she still would need to pay interest which would highly likely be above zero. In this way, she would be in a worse position than a person who would make the same use-judgement but would also have the ability to pay the compensation out of her equity.[86]

There is, indeed, inequality in this situation but this inequality reflects objective facts about the epistemic situations of different agents. Under ETO all individuals are under equal duty to prove the worth of their use-judgements, but it is natural that this duty is easier to fulfill for those who have been participating in the system of transfers for a long time. They have already generated lots of information about their abilities which is reflected in their bargaining power. The premium which newcomers would have to pay in the form of interest is, therefore, hardly unfair; it is simply a natural effect of the fact that the extent of their ability is objectively indeterminate.

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[85] I take (Cruft 2019) or (Miller 1989) as examples of such approach.

[86] This argument is developed in (Burczac 2002).

5.4.4. Cruelty

There is one more potential problem with ETO's approach to transfer that I see as distinct from the charges of inefficiency and unfairness. Suppose that Bill is hungry and made a use-judgement on a watermelon to the effect that he can eat it and sate his hunger. The watermelon, however, is owned by Jane and Bill does not have any assets under his control to pay the compensation in the amount Jane asks. He is not able to discover any resource, owned or unowned, that can be a substitute to the watermelon. Finally, no one agrees to extend credit to him, presumably, because he objectively has no ability to repay it.

It appears that the only thing Bill can do here is to starve to death. And even if we accept that it is both efficient and fair (as argued in the previous subsections), we still have to recognize that Bill's fate is cruel. The fact that ETO allows this cruelty many would see as a serious argument against the theory.[87]

Observe, however, that ETO provides ample options for Bill even in this situation. All he needs is to find a single individual who would see intrinsic value in Bill's life and would make Bill's survival the end for her use-judgement. ETO does not prohibit charity. The only scenario in which Bill in fact starves is if no one in his community cares whether he is alive or dead. In this circumstance yes, Bill's fate would be grim, but would it really be a problem for ETO? If we, for example, have a system of public property, why should we expect the very same people who refused Bill the most trivial charity to allow Bill access to public food reserves? ETO allows Bill's cruel fate, true, but Deep Public Ownership allows it all the same.

ETO's bottom line response to the cruelty objection is, therefore, the follows: any system of property rights would become cruel as long as the people who employ this system are cruel. And if the people are not cruel, then ETO supplies them with plenty of means to express their generosity.

5.5. ETO's rule of property acquisition

Let us take stock of what we have learnt so far. I started with the justification of Owner's Liberty. It is a simple extension of the principle of natural liberty: once an individual discovered a resource, she can do whatever she wants with it, as for others it just does not exist.

Owner's Claim-Right appears when more than one individual knows of a resource. This circumstance creates the need to resolve a potential conflict between their use-judgements. I explored a principle under which the author of the very first use-judgement gets a claim-right against all others to demand that they refrain from using the resource. This principle was justified by an apparent asymmetry between their normative situations: the author of the first use-judgment would not make anyone's situation worse by making use of the resource but

[87] For a similar criticism see (Elegido 1995).

the authors of subsequent use-judgments would deny the author of the first one the opportunities, opened up by her use-judgment and in this way diminish the value of her natural liberty.

And yet, this argument ultimately fails because there still would be a way in which appropriator would worsen the normative situation of others. She would deny her neighbors an opportunity to appropriate the same resource or, in other words, to make a normatively consequential use-judgement on it.

This issue finds its solution within the conception of transfer: it gives non-owners tools to acquire resources which were earlier appropriated by someone else. ETO, therefore, claims that there can be no satisfactory rule of just appropriation taken separately from the possibility of transfer but there can be *a rule of property acquisition* that unites rules of both appropriation and transfer into inseparable whole.

This rule can be expressed by the following formula: *the ownership of a resource is assigned to an individual, who improved upon the use-judgment under which it was previously used, on the condition that the previous owner is compensated for her loss of ownership.* Transfer is the *paradigm* case covered by this rule and appropriation is a *special* case where there is no previous owner and thus no need to provide the compensation.[88]

Under ETO there is no essential difference between appropriating a resource and *buying* a resource. These are two different manifestations of the same principle and buyers are not in any worse normative position than appropriators. Buyers need to pay for their purchase – but it is the same thing as to say that they only have a claim over the amount of value *added* by their use-judgement on top of the value discovered by the previous one. Appropriators are in the exact same normative position. Their claim does not extend further than the value they added, so when they acquire property, they receive no more than buyers receive after their payment is subtracted. It is simply a contingent fact about the situation of appropriators that there was no previous use-judgement and thus the entire value they discovered is added value.

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[88] There is a parallel between these considerations and the analysis of property rights offered by Alan Brudner. Consider: "The upshot is that our final properties are not in the physical things we possess in isolation but in their metaphysical values realized in exchange. What I own without qualification is not the thing I unilaterally possessed, but only the equivalent value allotted to me by the market when I relinquish my possession – a value reflecting everyone else's frustration in letting me have it". (Brudner 2013, 226). Brudner, however, does not consider that unilateral appropriation is simply a special case of the acquisition through transfer in this context and concludes, erroneously, in my opinion, that unilateral appropriation produces the right of inferior strength than the one generated by a market transaction. In Brudner's view transfers play ontological role in a sense that they complete the creation of property rights. Later in his work he uses this idea to argue for a version of Deep Public Ownership (Brudner 2013, 252–268). ETO, however, recognizes that both appropriation and transfer are just different normative manifestation of the same underlying phenomenon: use-judgments. In transfer we see two use-judgments interacting and in appropriation there is only one but it does not make transfers qualitatively different from appropriation.

Buyers need the consent of the previous owner, but such a consent only serves as proof that their use-judgements are, in fact, an improvement over the previous ones. If the previous owner denies her consent, it means, by definition, that the new use-judgement did not add any value and the potential buyer never had a right to the resource in the first place. Therefore, non-consent on behalf of the previous owner can never be seen as an exercise of an arbitrary power on her behalf.

A possible objection here is that the duty-imposition problem is still present here in the following sense. If we claim that the consent of the previous owner does not represent any sort of discretionary power on her behalf and serve merely as an epistemic tool, then it can be claimed that the previous owner has a duty to consent to a transfer in cases when the new use-judgment is superior to the old one. If so, it appears that the prospective owner imposes this duty to give consent on the current owner by making her use-judgment.

I believe that duty-imposition does happen here but the duty to consent can never be onerous because it is up to the current owner to decide whether this duty is in fact present. Therefore, such duty imposition cannot be ethically objectionable as it does not make the situation of its bearer substantively worse in any way.

Now, armed with these considerations, we can respond to the objection I voiced in 5.3.4. The worry was that appropriators deny others the normative power to appropriate the same object. But once the power of transfer is recognized, the appropriators, while denying others the opportunity to appropriate, simultaneously create for them a symmetrical opportunity to purchase the same resource. And per the discussion above, opportunities to appropriate a resource and to purchase it are nothing more than different facets of the same fundamental normative phenomenon: *the opportunity to obtain exclusive control over the value added by one's use-judgement*.

In this way, it is still true that appropriation does not take any opportunities away from others, the considerations of 5.3.4. notwithstanding. It simply substitutes one opportunity for another which is its full equivalent. In this way, as long as the power of transfer is recognized, the normative asymmetry between appropriators and other members of society holds – and with it ETO's justification for Owner's Claim-Right.

Before I wrap up this section, let me consider one final problem: the rule of property acquisition seems to go astray in cases where owners destroy resources while enacting their use-judgements. In these cases others would not have an opportunity to improve upon the earlier use-judgment because the respective object does not exist anymore.

There are two possibilities here. The use-judgment that resulted in the destruction of the resource was either more or less productive than other potential use-judgments that could have been made on this resource. If it was more productive, then we have no issue as there never was an opportunity to improve upon it in the first place, so the appropriator did not diminish anyone's freedom. But if it was less productive, then the appropriator would have been better off if she held on to the resource instead of destroying it and sold it to the authors of subsequent, more

productive use-judgments. By destroying the resource the appropriator took away profitable opportunities not just from others but also from herself. So, in this scenario ETO does allow appropriators to diminish the freedom of others but it rectifies the resulting injustice by a built-in punishment for such (normally unintentional) abuse of power. In such cases ETO would simply say that a mistake has been made: the mechanism of public cognition charged with the discovery of best possible uses for resources delegated this task to a wrong person. But the mere presence of such cases is no embarrassment to ETO because no mechanism of cognition can be infallible. What ETO has to say for itself here is that it facilitates the best possible incentive for individuals to look for productive use-judgements and channels resources into the hands of those who are most capable of it. The point of ownership under ETO is not to guarantee that everyone discovers and exploits resources successfully but to give everyone the freedom to make an attempt and take up responsibility for its success – and failure.

5.6. Conclusion

The core component of ETO which is the rule of property acquisition is now presented in full, together with its justification and responses to possible objections. There are, however, two group of questions which still need to be answered in order to make the theory complete.

The first group concerns the fourth component of the right of ownership that has not been touched upon in this chapter – Owner's Immunity. Yet it is critical to both provide the justification for this component and outline its limits. Everything what has been said so far in favor of the right of private ownership is of little practical relevance if it turns out to be a very weak right that can be often overridden by other considerations, like public interest. I will explore this issue in the next chapter.

The second group concerns the scope of private ownership in the material world. So far, we investigated the nature of the right itself and its justification, but the nature of the *objects* to which this right applies is still mostly a mystery. In Chapter VII I will take a closer look at this issue and outline spatial and temporal boundaries of those objects. In the same chapter I will also briefly discuss the possibility of common ownership that can arise from non-exclusive use-judgements. Finally, I will touch upon a principle that is widely believed to serve as a necessary limit for property rights but is not employed as such in ETO: the Lockean proviso.

Chapter VI. Owner's Immunity: Why the Right of Ownership is Absolute

6.1. Introduction

In the previous chapter I showed how the authors of use-judgments may acquire the right of ownership over the object on which their use-judgment is made. In this chapter I will explore the question of how strong this right is. After all, everything I said above would be of little importance if it turned out that the right of ownership can be overridden by multiple other moral considerations. In that case its social effects would become buried under the weight of more important factors.

I will argue here that the right of ownership is in fact extremely strong – so strong that it outcompetes all its possible rivals and only gives way when it becomes necessary to sacrifice it for the sake of its own background conditions. In order to present my argument, I will break down all moral reasons that come in conflict with the right of ownership into two types of claims.

The first type is what I call individual claims. Those are claims on resources made for the individual benefit of non-owners that can only be satisfied at the expense of owners. I will discuss them in Section 6.2. and will argue that all such claims, if given normative weight, would constitute wrongful private duty imposition made upon the owners. It means, as I will argue, that they violate the principle of moral equality between all persons which is the foundation upon the entire fabric of our society depends.

The second type is what I call communal claims. Those are claims on resources made not for the benefit of any specific individual but rather for the benefit of the community taken as a whole. There can be no problem here with the private duty imposition, as those claims are by definition not private, but there is a different problem: communal claims can only be articulated and acted upon by individuals, so the question we have here is whom we need to acknowledge as proper caretakers acting on behalf of the community. And I will argue in Section 6.3. that none fits this position better than private owners, so all communal claims would collapse back into the right of private ownership.

In Section 6.4. I will take a look at the cases where private ownership does in fact get overridden. I will argue that it only happens when we need to sacrifice property rights or put limits on them in order to safeguard the social order that makes private ownership possible. In other words, the right of private ownership is absolute as a moral right but when it manifests in social reality as a collection of private property rights, these rights need to make room for the needs of the social infrastructure that supports them.

In Section 6.5. I will summarize the findings of this chapter.

6.2. Individual claims[89]

The task of this section is to show that the right of private ownership, as it is defined in ETO, is immune against all possible individual claims that other individuals can make on owned resources. That is, that there is no possible moral reason an individual might have under which she can use a resource against the will of its owner.

The challenge here is that there is an incredible variety of moral considerations which falls under this category. Analyzing each of them individually would be an insurmountable task. Fortunately, there is a way around this problem: focus on the kind of conclusion towards which these considerations have to lead in order to override the right of ownership. If I am able to show that this conclusion violates a certain overriding moral principle, I would be able to justify Owner's Immunity against individual claims as a general principle, without the need to respond to each specific challenge.

The first step in this process is to place the right of ownership into a framework where it can be compared with its rivals. The problem here is that many such rivals would reject the concept of ownership altogether in a sense that for each resource there should be a specific individual who has a full right to control it and can transfer said right to others at will. Other philosophers proposed institutional designs under which private ownership is defined much narrower and does not include a full right to transfer (Christman 1994); or under which the means of production are owned directly by the public and are leased to the workers who use them (Albert 2003, 2017; Schweickart 2011).

To complicate matters further, theories of distributive justice seldom deal with ownership of specific things directly. Typically, they distribute among the individuals some abstract "currency", to borrow Cohen's (1989) term: "capabilities" (Sen 1980), "opportunity for welfare" (Arnerson 1989, 2000), "opportunity for advantage" (Cohen 1989), "resources" abstractly understood (Dworkin 1981) and others. The distribution of said currency can be motivated by a variety of justificatory strategies: egalitarianism, utilitarianism, prioritarianism, sufficientarianism, some form of desertism, etc. On a concrete level the abstract currency should somehow get converted to rights of access to specific material objects, but this stage is typically beyond the focus of distributive justice theorists.

Furthermore, some theories focus not on the distribution of a particular currency but on the way in which various institutions treat individuals.[90] Such approaches, however, also can potentially generate moral reasons that would clash with private ownership. Relational egalitarianism is an instructive example here (Anderson 1999; Scheffler 2010). Relational egalitarians distance themselves from materialistic concerns of traditional egalitarian theories and shift the focus from the equality of human well-being to the equality of human status. Still, even

[89] This section is loosely based on (Sazonov 2022).

[90] See (Schemmel 2011) for an illuminating discussion of the way these two approaches interact.

they have something to say about property rights as they would prohibit extreme disparity of wealth in a society: as they argue, large disparities in material conditions inevitably lead to inequality in status (Anderson 1999, 315; Scheffler 2010, 192–193).

To unite all this variety under a single conceptual umbrella I propose the concept of *rules of access to resources*. The idea behind this concept is that any challenge to the right of ownership, irrespective of how it is grounded, should, at some point, come down to a claim of the form "Y can access X against the will of Z" where Y is some individual, X is a resource and Z is the owner of this resource. This claim, in turn, should instantiate a certain maxim M which should contain an abstract rule regulating which individuals can access resources under which circumstances. It is this kind of maxims I call "rules of access to resources" and in this section I will work with them directly, abstracting away all the variety of theoretical frameworks within which they can be situated.

I will argue here that any rule of access to resources that is in conflict with ETO runs into the Private Duty Imposition Objection (PDIO). I will proceed to do it in the following way. In Subsection 6.2.1. I will argue that any intervention with the right of ownership implies wrongful private duty imposition. In subsections 6.2.2. – 6.2.3. I will take a closer look at two objections which can be made against the argument of 6.2.1.: that luck egalitarianism offers a way to avoid private duty imposition and that the issue will disappear altogether ones we see the government as a subject of distributive justice. Finally, in subsection 6.2.4. I will argue that wrongful duty imposition is important enough to summarily dismiss all claims which entail it.

6.2.1. Individual claims and the Private Duty Imposition Objection

Let me start with a quick reminder of what we learnt about PDIO back in 2.2.3. PDIO argues that if private appropriation is allowed, it enables private individuals to unilaterally force duties on others: when the future owner appropriates a resource, she binds others with the duty to respect her property rights without their consent. We have established back then that there is at least one set of circumstances under which there is nothing problematic private duty imposition: when the very same act that imposes a prohibition on others also makes it possible to do what has become prohibited. In such situations the agent would both extend the freedom of others by opening up an opportunity to perform an action and diminish said freedom by making this action prohibited. These two effects would cancel each other out. One example of such situation is Van der Vossen's scenario where the agent grows hair on her head thus both making it possible to touch it and imposing a prohibition on touching it without her consent.

I will hereinafter label the cases where private duty imposition leads to a net decrease in the opportunities available to others as cases of *wrongful private duty imposition* to distinguish them from a harmless variant demonstrated by the hair

case. At the beginning of Chapter II it seemed apparent that private appropriation under entitlements theories is a paradigmatic example of wrongful private duty imposition, contrary to what Van der Vossen asserts: it takes away the opportunity to use a particular resource that existed irrespective of the actions of the appropriator. But the distinction between brute objects and resources, introduced in Chapter IV, makes it clear that the situation with appropriation is more complicated. There is no opportunity to use a brute object, so one cannot argue that this is what appropriators deny to others. On the other hand, the opportunity to use resources is dependent on the use-judgement made by the appropriator which makes the situation fully analogous to the hair-growing case. There is also no argument that appropriators deny others the freedom to make normatively consequential use-judgements. As argued in the previous chapter, the normative opportunity in question is the opportunity to obtain control over the net value added by a use-judgement – and this opportunity is preserved after the appropriation in the form of the right to receive transfers from others.

Appropriation under ETO is, therefore, not a case of wrongful private duty imposition. However, as I will argue in this section, any plausible set of rules of access to resources would lead to wrongful private duty imposition as long as it is dissimilar to ETO.

The starting point of my argument is that any rule of access to resources can be represented as a function that takes a set of morally relevant facts as an input and produces individual claims to access to resources as an output (access claims).[91] To show that the only plausible rule of such form that avoids wrongful private duty imposition is the one offered by ETO I will demonstrate the truth of the following two statements:

1) For all rules of access to resources it is the case that access claims can be changed by unilateral actions of private individuals.[92]
2) For all plausible rivals of ETO such change constitutes wrongful private duty imposition at least in some circumstances.

Let me start with arguing for (1). Let us ask what are the conditions under which (1) is false. To make (1) false, we need to come up with a principle that does not include individual actions and their outcomes among the facts, which are relevant for generation of access claims. Under such principle there would be no connection at all between what you do and what you get. Such approach can at minimum be criticized as impractical in current social circumstances as it leaves

[91] "Access claims" should be understood as claims to actions which individuals are both physically able to perform and normatively allowed to perform, in the same way as freedom is understood in my discussion of Van der Vossen's response to Private Duty Imposition Objection in 2.2.3.

[92] Let me present this claim a bit more formally here. Let us say that x is a state of agent X and y is a state of all other agents Y. A principle of justice needs to include a function $f(x,y)$ which mandates a certain distribution of resources among all agents X, Y. The claim is that in all plausible cases x or y should be defined in such a way that some of them could be changed by a unilateral action of X, which, in turn, means that X can unilaterally change the output of the function f(x,y).

individuals with no incentive to contribute anything to social production. Still, I imagine one can hold on to this principle at least as a basis for an attractive social ideal and argue that in an ideal society individuals would be incentivized purely by altruistic sentiments (Cohen 2009).

Unfortunately, biting this bullet would not be sufficient to avoiding (1). Even if we abandon any explicit reference to individual actions in the generation of access claims, as long as resources are consumed and produced as a result of individual choices, there still would be an indirect connection. As resources are added to and subtracted from their total available mass, access claims have to be recalculated and the situation of some individuals would change as a result of the actions of others. Imagine a society consisting of Bill and Jane where they both consume an equal share of social product but only Jane contributes to production. If Jane stops working, this society would quickly run out of resources and Bill would lose his access claims because of Jane's actions. Hypothetically, this problem can be avoided in a society where persons do not participate in production (for example, everything is done by machines). In this way, there still seem to be a possibility for a situation for which (1) is false – but observe that to create such a possibility we were forced to reach into science fiction territory.

However, even this explicitly fictional scenario cannot deal with the fact that humans reproduce. Each time a new person appears she needs to be supplied with an appropriate bundle of claims and, unless your production somehow perfectly matches with population growth, the only way to generate these claims is to reduce the amount of resources claimed by others. Childbirth, however, is a product of individual actions; this means that through childbirth individuals can indirectly influence access claims of others without their knowledge or consent.[93]

Now, one can, of course, invent further fictional scenarios where even this problem would be solved but this, I believe, is a pointless exercise. A society where none of the issues I described above would arise is simply too different from ours to serve as a useful case study. There is, therefore, no plausible rule of access to resources for which (1) would be false – and this, of course, is also true for the rules of access described by ETO.

Allow me now to present my argument for (2): for all plausible rivals of ETO such change constitutes wrongful private duty imposition at least in some circumstances. There are, in principle, three ways in which individuals can acquire access claims:

a) by claiming resources that were previously unclaimed;
b) by claiming resources that were claimed by others with their consent;
c) by claiming resources that were claimed by others without their consent.

Of these three cases only (c) would constitute a wrongful duty imposition. In (a) there is no net reduction of freedom of others as others never had access claims to the resources in question. In (b) the duty imposition is not unilateral: individuals who previously had access claim to respective resources provide their consent. It is only in (c) we observe a net reduction in freedom imposed, without

[93] This childbirth scenario was inspired by (Breakey 2009, 623)

consent, by one private party on another: those, who had access to resources before would lose it as a result of your claim.

As I argued in previous chapters, there are, strictly speaking, no unclaimed resources existing by themselves. Each resource is only a resource as long as it serves the end of a specific individual and in virtue of this property it is claimed by said individual. The only way to acquire a new resource that is not yet claimed by anyone else is to pass a use-judgement on a brute object – which is exactly the mechanism ETO uses for appropriation. Therefore, ETO allows all cases of access claims generation covered by (a). Furthermore, under ETO the consent of the previous owner is a sufficient condition to generate an access claim to a resource previously claimed by another person. It means that all cases covered by (b) are also allowed in ETO. On the other hand, under normal circumstances ETO does not allow access to resources without the consent of their owners and, in this way, prohibits the generation of all access claims that fall in group (c). In this way, ETO allows the generation of all access claims that do not constitute wrongful private duty imposition and prohibits the generation of all access claims that do. Therefore, any access claim that cannot be generated under the rules of ETO, constitutes a case of wrongful private duty imposition. It follows that if a different system of rules of access to resources allows the generation of access claims that are such that they could not be generated under ETO, it necessarily means that the rules of such system allow wrongful private duty imposition.[94]

Allow me to illustrate this idea by several examples. Imagine Jane living alone on a small island. She runs an efficient household which employs all the resources that exist there. At some point, however, Bill arrives. Now, does Jane have a duty to transfer any part of the resources to him? If the answer is "no" then the operating principle of justice simply gives the same recommendation as ETO. But if the answer is "yes", it would mean that Bill, by coming to the island, imposed a duty on Jane in such a way that it diminished the freedom Jane previously enjoyed.

Let me consider another example. Suppose that Bill fell down, broke his spine and got his legs paralyzed. Cohen suggests that any egalitarian would want to give Bill a wheelchair (Cohen 1989, 917). Hence, after his fall Bill would acquire a right to get a wheelchair – a right which he did not have previously. This, in turn, means that someone who has a wheelchair – let us say it is Bill's neighbor Jane – now has a duty to give it to Bill.[95] Once again, the duty was imposed on Jane by Bill unilaterally and wrongfully: unilaterally because Jane did not have a

[94] There is a theoretical possibility of a system of rules that prohibits some of the claims that ETO allows but does not allow generation of any additional claims. For example, a hypothetical system which only difference from ETO is that it prohibits certain types of trade would be such. This system would not allow wrongful private duty imposition and yet it would be different from ETO. Observe, however, that such a system cannot be justified by any interest of individualistic character, as one hardly can have an interest that purely consist in denying others their access claims without getting anything in return. The justification for such a system should be public in nature and as such will be dealt with in the next section.

[95] Or it could be that Jane now has a duty to make a wheelchair for Bill – the difference between these two scenarios is immaterial.

say in it and wrongfully because Jane's space of opportunities got diminished: she could do whatever she wanted with her wheelchair before but now she has to part with it.

Finally, to demonstrate the persistence of this phenomenon, let me give you one more example, this time using a very different moral framework – utilitarianism. Suppose that Bill has discovered a way to derive great utility from eating a certain exotic mushroom. This mushroom is currently in Jane's possession who derives a much smaller utility just by smelling it. Utilitarianism (act utilitarianism, at least) would demand, all else being equal, that we take the mushroom from Jane and give it to Bill. Or, in other words, Jane would acquire a duty to transfer the possession of the mushroom to Bill – the duty Bill created by doing something without Jane's consent or even knowledge.

6.2.2. Luck egalitarianism

Luck egalitarianism, it seems, has an immediate response to my argument. The central tenet of this view is the idea that we only need to equalize the effects of brute luck on people's lives (Arnerson 1989, 88–89; Cohen 1989, 908; Roemer 1998, 5–12) and that circumstances, for which individuals are themselves responsible, should not generate moral claims on others. So, what they can claim is that their recommendations only deviate from those of ETO in cases where the change in access claims would happen not as a result of any actions on someone's behalf but as a result of happenstances beyond any individual's control. Sometimes, they would say, we acquire access claims not as a result of something we do but as a result of something that happens to us. And when in such circumstances we acquire access claims at the expense of someone else, it would not constitute a private duty imposition because the duty would not be imposed by our action but rather would be generated as a response to events beyond anyone's control.

To better understand the power of this argument, let us look at how luck egalitarians would deal with my examples. In the case of Bill arriving to Jane's island they would ask whether he arrived voluntarily or by some unhappy accident (say, his ship was wrecked upon the island by a storm). If he arrived voluntarily, they would argue, Jane owes him nothing and Bill can hardly complain, given that going to this inhospitable place was his choice. But if it was an accident, Jane does acquire a duty to give Bill some of her possessions and in that case, we cannot really say that the duty was imposed on her by Bill's action. The accident, they would say, happened to Bill but it could have happened to Jane just as well and Jane's duty to share her wealth with Bill is simply a way to equalize this inherently unfair effect of bad luck.

The same reasoning applies to the wheelchair situation: we need to ask how exactly Bill broke his spine. If he has done it deliberately to get a wheelchair (a very unlikely scenario), then we do not need to reward this behavior by giving him anything. But if it happened by accident, then the duty was not imposed by his action.

There are several problems with this position. The first one is that luck egalitarianism is rarely pushed to its extreme logical conclusion: most philosophers would find the cost of doing that too high. The scenario where Bill deliberately falls to get a wheelchair is of course ridiculous, but we can easily imagine him falling due to his own carelessness. In that case what happened to him is hardly an effect of brute luck, as a different, more careful person would be able to avoid falling. Do we deny Bill a wheelchair in this scenario? For many people this is too cruel to accept (Fleurbaey 1995; Shiffrin 2000). And what do we make of people who put themselves into a disadvantaged position by pursuing some laudable goal? A woman who does not have a job because she needs to spend all day taking care of her infirm mother does not get any compensation under luck egalitarianism because preferring her mother to employment was her free choice (Anderson 1999, 297). A typical response by luck egalitarians to these and other similar lines of criticism would be to relax their own doctrine and allow, in some cases, compensation even in the case of consciously chosen burdens (Cohen 2004; Knight 2009, 122–155). But this concession makes them vulnerable to the private duty imposition problem.

The second problem is that even under its strictest interpretation luck egalitarianism would not be able to exclude wrongful private duty imposition in situations where the duty gets imposed not by its beneficiary but by a third party. Let us return to the wheelchair example once again. Imagine that Bill fell after he was pushed by Tom. The immediate suggestion would be to resolve the situation by forcing Tom to buy Bill a wheelchair: Tom would not be able to complain as he imposed this duty on himself by violating Bill's rights. But Tom is broke – he cannot get Bill a wheelchair because he has no money. If we insist that Bill has a right to a wheelchair irrespective of Tom's financial situation, then someone else will need to buy it – and let us say this someone will once again be Jane. Observe how the reason why Jane now has this duty is what Tom did. In this way, we end up in a rather absurd scenario where the power to impose duties on others gets vested in Tom – a person who broke the spine of another and is unable to make up for the wrong he did.

But the ultimate case of a duty imposed by a third party is childbirth. Let us return to the island once more. Bill comes and demands half of the island. Jane rejects his demand on the basis of luck egalitarianism and, out of pure charity, gives him only the barest minimum necessary for his survival. But then Bill brings in his wife and they start having children whom they cannot sustain. Each time a new child is born, Bill asks Jane for the share of her wealth necessary to feed the child, arguing that the child cannot be held responsible for Bill's and his wife dubious decision making. By the very rules of luck egalitarianism, to which Jane initially appealed, she cannot refuse Bill, as there is no response to his argument. (And, once again, observe that Bill gets rewarded with the power to impose duties for his lack of social responsibility).

None of these, however, touches the core problem of luck egalitarianism: the very concept of brute luck. Luck egalitarians claim that there are events that no human can foresee and avoid or counteract. Brute luck is something that can

happen to anyone with equal probability – and this is the reason it is unfair that only the people to whom such events actually happened need to suffer from their consequences. The effects of brute luck need to be equalized.

But this reasoning assumes that there is a way to know which events could and could not be foreseen. The claim here is that there is an epistemic position that an actual, living agent can occupy from which it is known for certain whether a particular set of circumstances could have been discovered: only from such a position we can judge whether a particular misfortune should be attributed to bad luck or to inaction that manifested in the lack of foresight.

To assume that this position exists means to lack understanding that dealing with the unknown and unknowable is a fundamental part of human condition and the way to deal with it is to constantly discover new resources, causal laws, patterns and to make preparations for the unforeseen. It is a responsibility of each human being to always seek understanding of what once was inscrutable and to try to predict what once was unpredictable. It is only in this way human understanding of nature can progress and the impact of "bad luck" can be diminished.

Bill claims he was just unlucky when he got shipwrecked at Jane's island. But what then we make of Tom who carefully studied weather patterns and reef maps and avoided the island because he decided that sailing near it would be too dangerous? Should we take Tom's money to compensate Bill? Why Tom should be punished for Bill's complacency?

Now, the case does not need to be as easy as that. Perhaps, there was no obvious danger coming from reefs and weather: Bill studied all that and came to a well-justified conclusion that sailing is safe. And yet, the shipwreck was caused by *something*, there was a factor beyond what was generally known and could be accounted for. Should we expect Bill to find this factor and hold him responsible for failing to do it? Or should we be satisfied that Bill *went through the motions* of checking reefs and weather and did not bother to think beyond the precautions that are generally expected from him?

If we assess Bill the same way we assess a bureaucrat, if we absolve him of any responsibility beyond going through a checklist, then we need to decide – who takes up this responsibility? Do we need to have a cohort of special people in society whose duty is to look beyond the known and obvious? If we do not expect Bill to discover what can cause the shipwreck if not the weather or the reefs, then whom we expect to discover this?

These questions are the reason why there is no such thing as bad luck in ETO. There is only a failure of one specific individual to make a productive use-judgment. It could be that it was beyond human capacity to make a use-judgement in her situation – but we cannot know it. To say that no other person would be able to make a needed discovery if put in the same position is to turn a failure of one human into a failure of humanity in general and to give an unneeded, unjustified insult to all others, who now need to share the burden of alleged "bad luck" without ever being given a chance to show that this particular mistake could be avoided. One cannot know whether others could deal with her challenges better or not – and thus can never claim she has done everything what could be done

and should not bear any further responsibility. ETO holds each individual responsible both for making use-judgements and failing to make them, and does not accept any excuses. As I argued here, this approach represents a better understanding of human condition than what luck egalitarianism offers.

6.2.3. The Rawlsian Objection

So far, my assumption was that actions of private individuals directly generate access claims for other private individuals: Bills comes to an island and Jane has to share with him; Bills breaks his spine and Jane has to buy him a wheelchair. But the rules of access to resources do not need to operate in this way. In fact, the most famous theory of distributive justice – the Rawlsian one – is very explicit in stating that this is not how justice works. Under the Rawlsian approach, the primary subject of distributive justice is not any individual but instead the basic structure of society, its main institutions (Rawls 1978; 1999, 6–10). Duties of specific individuals are defined not by any normative distribution of access claims, which others can affect by their actions, but by procedural justice, the rules of which are, in turn, specified by the basic structure: "The intuitive idea is to design the social system so that the outcome is just whatever it happens to be, at least so long as it is within a certain range" (Rawls 1999, 74). In this way, the basic structure serves as a middleman between the rights of one individual and the duties of another. New access claims are created not by individual actions but by changes in the basic structure.

For example, suppose that justice requires that everyone is provided with a basic income. This would not mean that I can come up to a random person on the street and demand money from her. It would mean only that I can address this kind of demand to the state (a part of basic structure, according to Rawls) and the state would have a duty to satisfy it. The only duty which strangers on streets have is to support just institutions which, in that particular case, means to pay taxes. This duty, however, was not imposed by my actions. It was imposed by a *public* decision and, therefore, cannot be a case of a wrongful *private* duty imposition by definition.[96]

The view that we can limit the subject of distributive justice to basic structure was criticized by Cohen (1997, 17–23). Cohen argues that Rawls faces a dilemma: his basic structure either includes non-coercive institutions (like the family) or not. If it does not include them then the scope of the concept is arbitrarily limited. Rawls says that basic structure is characterized by the fact that its effects are "profound and present from the start" (Rawls 1999, 7). There is no reason to believe that only coercive institutions satisfy these criteria. But if the basic structure does include non-coercive institutions, then Rawls has to deal with the fact

[96] The Rawlsian system is not the only one which can give this kind of response. Goodin argued, in a similar fashion, that utilitarianism can be viewed as a public philosophy focused solely upon the rights and duties of the state (Goodin 1995, 4–11 and passim) and Feldman framed distributive justice as "the virtue of the states" (Feldman 2016, 7–11).

that these institutions are, by definition, shaped by freely chosen actions of individuals. As the basic structure is regulated by the rules of distributive justice, it would mean that private individuals have to take these rules into account as long as they make choices affecting the basic structure. But if that so, then the considerations of distributive justice do influence the duties of individuals directly after all.[97]

But even if we prefer Rawls over Cohen in this dispute, we need to ask, whether inserting a middleman changes the essentials of the situation. If we believe that the state is morally bound by the requirements of distributive justice and is under the obligation to provide individuals with access claims whenever the rules of justice demand it, then it cannot be held responsible for the generation of such claims as it does not really have a choice whether to generate them or not.[98] The choice in question is made by private individuals who altered their situation in such a way that new access claims now need to be created for them – and it is those individuals who should bear the full moral responsibility for the consequences of their actions.

Let us get back to the wheelchair example. Yes, it may be true that the duty to provide the wheelchair should be discharged by the state, not by private citizens. But the state is financed by taxes and paying taxes is the duty of individuals. If more people would need wheelchairs, the state would need to raise taxes to pay for them. In such a situation, it would be disingenuous to say that this new duty to pay additional taxes was created by the state, because it was not a product of its whim. Introducing additional taxation is something the state is morally forced to do once the demand for wheelchairs rises, because it would not be able to discharge its duties otherwise. It was the state who decided that Jane should be the one to pay for Bill's wheelchair, but this only happened after Bill made it so that *someone* needs to pay for his wheelchair.[99] The ultimate responsibility for the new wheelchair taxes should lie on Bill, not on the state.[100]

Dworkin, unwittingly, provides me with a nice illustration when he gives his argument for universal healthcare (Dworkin 2002, 114). He argues that mandatory healthcare insurance is justified because some people would not provide for their own healthcare out of negligence. But firstly, the insurance would also be mandatory for people who are not negligent and, secondly, the negligence of

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[97] See, however, (Schouten 2013) for a response to this.

[98] As Rawls put it "laws and institutions, no matter how efficient and well-arranged must be reformed or abolished if they are unjust" (1999, 3).

[99] In a similar way, if we assumed that unilateral appropriation wrongfully imposes duties on others, we would need to notice that it is never the case that the owner has some specific person in mind she wants to bind with the duty. She just wants her possessions protected and is rather indifferent whether it means that Mary, or Tom or Bob would need to suffer the resulting inconvenience. Bill demonstrates the same indifference in the wheelchair case: he does not know who would pay for it but he makes it certain that *someone* must.

[100] Breakey (2011, 202) gives a somewhat similar argument to show that the imposition of duties motivated by the desire to achieve a particular patterned distribution constitutes a case of other-ownership.

others is the only reason why this duty is forced upon them: in a world where all people are responsible and farsighted there would be no need for mandatory health insurance. In this way we see how introducing the state as a middleman does nothing to change the moral essentials of the situation: the duties of one group of people only come into being because of the way another group of people behaves.

One can respond here that I shifted the discourse to the talk of "groups of people" instead of single individuals. And it is indeed a fact that a single person can hardly create so big an imposition on the state budget that it would require raising new taxes. But I do not see how this fact is morally relevant. The problem with private duty imposition was never that it is one person imposing his will on the others without their consent, it was the fact that such imposition happens at all and puts *some* private individuals into a superior moral position with respect to others. It does not really matter for how large a set "some" stands for. We can have one person imposing her will on a million or a million imposing their will on one – both situations would be equally reprehensible.

6.2.4. The force of the Private Duty Imposition Objection

It should now become clear that the right of ownership is inextricably linked with the prohibition on the wrongful private duty imposition: it is about as strong, as seriously we take said prohibition. And the last remarks of the previous section open up a good opportunity to talk about why exactly private duty imposition is so important.

Back in 2.2.3. I argued that the core problem of the private duty imposition is the fact that it violates the principle of moral equality under which no private person should be allowed to unilaterally impose her will on other private persons. In this subsection I would like to advance some additional considerations to argue for the importance of the principle of moral equality understood in this way.

One way to appreciate the connection between the principle of moral equality and the right of private ownership would be to understand that the right of ownership is a manifestation of Kantian principle of humanity: one should never treat a fellow human being just as means but also as an end in herself. In ETO, in contrast to many other views, resources do not appear automatically, presenting themselves to humans. Each resource was discovered by a particular individual in the pursuit of her ends which are just as important for her as your ends for you. To snatch the resource without the consent of this person means to disregard the intrinsic value of her ends while affirming the intrinsic value of your own. It means reducing another person to a mere machine that conveniently supplies you with resources without showing proper respect to the engine behind this machine – her humanity.

This can be put in a slightly different way. To disregard the right of ownership means to endorse two contradictory maxims. On the one hand, the very fact that you show interest in taking the resource is evidence that you see value in it and, by extension, see value in the use-judgement under which the resource was discovered. And to see value in the use-judgment of another means to recognize her

capacity to set ends for herself as this capacity was what made the use-judgment possible. On the other hand, when you take the resource without owner's consent you say, by this action, that her ends do not matter which means to deny her capacity to set ends the proper recognition. In other words, you both value and do not value the humanity of another.

Finally, and perhaps, most importantly, consider this. In all the examples we explored above, Jane, all else being equal, would be better off if Bill *did not exist*. If Bill never existed, he would not be able to come to her island and demand a part of it or break his spine and demand a wheelchair. And this, indeed, is a constant feature of all resource claims which are incompatible with those of ETO. The fact that they allow wrongful private duty imposition means that they create a group of population whose very existence is a burden to others, creating burdens for them without providing anything in return (otherwise imposing duties would not be necessary: the value could be obtained in a fair market exchange).[101] In this way, any approach to justice that is in conflict with ETO is fundamentally antisocial: it creates circumstances where it is less beneficial for individuals to be in society with each other than to be alone.

These considerations should make it clearer why the right of ownership, as established by ETO, should supersede the usual considerations of distributive justice. The central question of distributive justice is how to appropriately distribute benefits and burdens of social cooperation (Rawls 1999, 4). But here we face a question which is even more fundamental: with whom do we share membership in society itself? To disrespect the right of ownership of another means to see her not as a person but as a tool and one cannot be in a society with tools. It means to see her not as a partner but as a threat or a victim. Mutual recognition of ownership rights is what *constitutes* a society and as long, as it is not established, there is no social *cooperation*, only masters giving orders to their slaves.

6.3. Communal claims

In the previous section I explored the possibility that the right of ownership can be overridden by moral claims of specific individuals. I established that any such claim would involve wrongful private duty imposition and is, therefore, impermissible. There is, however, another possibility: that the right of ownership can be overridden by the claims made on behalf of the community and out of considerations of the common good. Such claims are immune to the charge of private duty imposition as they are, by definition, not private. Therefore, if the right of ownership is to be immune to them, we need to look for a different argument.

[101] One could suggest a scenario where those who need to take up the burden get compensated for it by some third party. But the problem would then just reappear on the next level, as the compensation, once again, need to come from *somewhere* – and under ETO it means it need to come from *someone*.

The central problem with the conception of common good is its epistemic obscurity. It is clear how to approach a concept of individual good: it is reasonable to assume that each individual cares about her own good and has a deep and intimate understanding of her personal circumstances upon which the content of such good depends. Therefore, if someone believes X is her individual good, it counts as a strong (even though defeasible) evidence that X is in fact her individual good. But we cannot replicate the same process for the community as a whole. The community does not have its own individual mind, it cannot form beliefs about its own good and it cannot manifest those beliefs in actions. A community can only act through its individual members and whenever it happens, we face an intractable problem of how to separate the actions performed by those individuals as individuals from the actions they perform on the behalf of the community. Therefore, anyone who claims that she acts on the basis of considerations of common good and, furthermore, claims that these considerations are more important than the right of ownership, is challenged to explain how exactly she knows that her actions in fact constitute the common good.[102]

I alluded to one possible explanation in Chapter V. When two parties exchange a resource for a compensation, their mutual agreement for such an exchange constitutes the strongest possible evidence that the use-judgement of the new owner of the resource is an improvement upon the use-judgement of the previous owner. In that sense the exchange serves the common good of both parties – they both are better off as a result of this exchange and the community consisting of those two is better off overall as the resource is now more efficiently employed. There is no obvious reason why this basic logic of a singular exchange cannot be scaled up. A market society is a group of individuals who interact with each other through an intricate system of such exchanges and in this way they all both serve the common good and improve their individual situation. Of course, one might believe that a system of economic regulations needs to be instituted to compensate for externalities and to ensure that all transactions are efficient and fair – but, as I argued earlier, such regulations are allowed and, in fact, made necessary by the requirements of ETO.

Now, can there be any common good beside the one generated in the market process? Even if there is, I doubt its content can be established with the certainty necessary to justify the usage of political force. The information of the specific value discovered by a particular use-judgement is private.[103] Only the author of the use-judgement has a full understanding of what kind of end is assigned to a

[102] I here distinguish the notion of "common good" from the notion of "overall good" that is often employed in consequentialist ethics. "Overall good" might mean a simple sum of individual goods while it is constitutive for the notion of common good here that it is not reducible to such sum.

[103] It does not conflict with my earlier claim that use-judgments need to be publicly communicated to establish the right of ownership. Public communication only establishes that there is *some* value to the resource and, furthermore, this value can be put in comparison with the value discovered by a different use-judgments. None of it is sufficient to make public the full content of a particular use-judgment.

resource she owns and how valuable this end is to her. This is why only when she gives up the resource voluntarily can we have some confidence that the use-judgement under which the resource will be employed in the future is in fact more productive than the one under which it was employed previously. But suppose now that a resource was taken from the previous owner against her will (for example, as a tax). In this case, it cannot ever be known whether the new use-judgement is more productive than the old one, because the information about the productivity of the old use-judgement remains concealed. The old owner never had a chance to agree to part with her resource or to reject it and, therefore, never had a chance to make her knowledge about the true value of her use-judgement public. Note, that the mere fact that she, say, received a compensation in the form of access to public goods paid for from her taxes, changes nothing about this fundamental truth, as we would not ever know whether these public goods were in fact valuable enough for her to justify taking away her property.

And this would be the problem for any system of rules that allows involuntary taking of private property on the basis of considerations of common good. The very rules of such system would preclude collection and utilization of critical information that is necessary to determine whether the use-judgements, under which it wants to employ resources, constitute an improvement over the use-judgements under which resources were employed previously. It can never be known whether the workings of such a system are in fact directed at the net good or not, therefore, it can never rely on the concept of common good as its justification.

Now, at this point I foresee an objection. One can respond that there is, in fact, a system that determines the content of common good which has all the virtues of the market system: democratic governance. Under democratic governance all public decisions, including the decisions about which use-judgments to prioritize, are made by the representatives of the people, who are, in turn, elected in free and fair elections in which all members of the community can participate. In this way, everyone has an equal opportunity to contribute to public decisions and the democratic system accumulates and utilizes the private knowledge possessed by the citizenry, much in the same way as the market system does.

It is quite common to defend democracy on epistemic grounds by, among other considerations, drawing this analogy with markets (e.g. Estlund 2008, 177). But the analogy is flawed because under democracy citizens are not *individually* responsible for their decisions. Under a market system, all mistakes lead to personal losses while all successes lead to personal gains. If you bought ten watermelons for 100 Euros, expecting to resell them for 120, but only managed to resell them for 70, this 30 Euros loss comes directly out of your pocket. This fact creates for you a strong incentive to be vigilant, alert and cautious in your deals.

With democracy it does not work in the same way. You can vote for a disastrous policy, but as long as you are outvoted by more numerous and reasonable compatriots, you would never feel the consequences of your vote. On the flipside, if you are the only sane person in an insane country and others always vote for stupid decisions you do not support, you cannot expect any reward for your rationality: bad policies would be forced upon you, even if you fight against them.

Furthermore, it is also possible to vote for decisions which are bad overall but benefit you personally (for example, a large tax cut for the group you are a part of at the expense of a painful hole in the state budget). In such cases bad decisions get not punished but rewarded on the personal level. Under a democratic system, voters act individually but receive their punishments and rewards collectively. There is no incentive to improve the quality of one's political choice. And given that politics is complex and making correct political choices is hard and often takes a lifetime of learning, it is simply irrational to expect voters to put in the necessary effort.[104]

The problem goes even deeper than that. The beauty of market economy is that everyone can choose a cognitive burden commensurable with one's abilities and interests. Under normal circumstances you do not *have to* immerse yourself into the dangerous and fluid world of watermelon speculations. You can instead get yourself employed as a humble watermelon gardener and receive a fixed compensation from your employer the amount of which would not depend on the volatile price of your product. There is no similar choice in democratic politics. John Stuart Mill expected universal suffrage to be a tool of education and enlightenment, hoping that political participation will provide an incentive for people to learn more about politics (Mill 2001, 103–105). Above I already expressed my doubts that suffrage can fulfill this educational function, but is it even reasonable to want this function to be fulfilled? I am deeply uncertain it is desirable to live in a society where every citizen is expected to develop a deep expertise in statecraft irrespective of whether she wants it or not.

To conclude this line of argument, democratic decision-making is not an appropriate substitute for the market. It does not provide for the same kind of feedback loop we see in the market where good decisions get rewarded and bad decisions get punished. It also does not allow individuals to regulate their degree of involvement in collective decision-making and only take up as much cognitive burden as they could handle. Under democratic system everyone has the same degree of power irrespective of her abilities and inclinations and no systemic reason to use this power in a reasonable way. There is no mechanism that provides for filtering signal from noise in the democratic system. It cannot take up the function of accumulation and utilization of social knowledge which the market fulfills.[105]

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[104] For more on how democracy makes it rational for voters to be irrational see (Caplan 2007). See also (Buchanan and Tullock 1962) on more intricate problems with democratic decision-making.

[105] To respond to this charge democratic theorists often emphasize "deliberative" features of the ideal democratic process (Cohen 1989; 1996; Habermas 1996; Rawls 1993). Democracy, they argue, is not about voters solipsistically going to their booth and privately making a decision there, but about them presenting their positions to each other, publicly discussing advantages and drawbacks of possible choices and only making their final decision on the basis of this deliberation, with their mind not just on their private interest but also on the considerations presented by others. I do not see, however, how any of this changes the essentials of the situation. If voters have no reason to take their votes seriously, why should we expect them to take the discussion surrounding the votes seriously?

Now a sceptic can respond that the argument above is still unconvincing. The automatic, thoughtless mechanism of the market system has its limits. There are worthwhile goals the achievement of which would bring immeasurable good to society – but this good is so remote and/or so dispersed that the benefit it promises would not register on the level of individual planning. Fundamental scientific research or education can be examples here but there are many other worthwhile projects for which the market simply cannot generate a strong enough incentive. On top of that, there are values which are essentially communal and are invisible from the egocentric standpoint the market forces you to take. In some cases, common good can only be achievable if someone would explicitly take up a social, not individual perspective, and would make decisions with social, not individual good in mind (Anderson 1993, 143–146; Estlund 2008, 177; Kallhoff 2011, 2014).

I do not disagree with any of that. I concede that some laudable goals only become visible if you transcend the egocentric standpoint and look at what the society as a whole needs to develop and prosper. My question is, why believe that individuals who occupy political offices can be expected to hold such transcended perspective. In modern democratic countries political decision-making is done by a cooperative effort of the following three groups:

a) *voters* who express their preferences during elections;
b) *elected politicians* who make strategic level decisions broadly in accordance with the preferences expressed by the voters;
c) *bureaucrats*, appointed by the elected politicians, who prepare, develop and execute their decisions.

As I argued above, there is no special incentive for the voters to think much about the common good – in fact, due to the lack of individual-level consequences, they have an incentive to give it as little thought as possible. This means, in turn, that neither politicians, nor bureaucrats have any systemic incentive to care about the common good either – they only have incentive to respond to the most immediate, most shallow impulses of the voters. The situation is even worse if we employ the discoveries of public choice economics which show that the actual incentive of politicians and bureaucrats is to maximize their narrow self-interest *under the pretext* of caring about common good (Krueger 1974; Niskanen 1994; Tullock 1989).

To be clear, this cynical view has its limits. It is not uncommon to see people acting *against* their self-interest on the political level and there are a number of political phenomena that cannot be explained if we assume that political actors are nothing more than rational egoists (Pressman 2004). Human beings are not mindless automatons who respond only to the most simple and straightforward stimuli. All participants to the political process can (and often do) act against their incentives on the basis of higher order values they internalized. But this is just as true for private persons. If we argue that politicians can act against their incentives and upon their values, we cannot, in the same argument, cast owners as unthinking slaves to the market process. My point here is not that all politicians care about is their self-interest, but that there is no special privilege for political actors

in this respect. There is no magic in politics that suddenly makes all who engaged in it more likely to act for the common good.[106]

If we forbid the state to meddle with property rights on the basis of the considerations of common good, it does not mean that such considerations have no force at all in the given community as they would still matter for private owners. The essence of private ownership is that the owner has full control over her resources and there is no law that requires her to just mechanically respond to market incentives. Private owners have all cognitive and moral ability necessary to pursue the common good, both individually and in cooperation with each other – they have no less such ability than state officials. It can be argued, in fact, that they have more. Wealthy individuals, who do not have to worry about their personal well-being, are more likely to give more consideration to the general well-being of the community in which they live.[107]

The practical effect of their efforts in this direction should not be overestimated – the problem is not so much the lack of goodwill but the lack of cognitive ability. As I pointed out in the beginning of this section, in contrast to the individual good, the common good is in principle obscured as you cannot just interview "the community" and ask what it thinks is good for itself. The actual content of the common good should be determined by complex and often indirect inferences and there is no immediate feedback mechanism that would help to identify and correct mistakes. But, once again, governments struggle with this problem just as much as private persons and it is incredibly naive, I think, to believe that by putting "care of common good" into an official's job description we get any closer to solving it. What can be said for the wealthy (assuming they exist in the context of well-protected property rights and fair and efficient market system) is that they are better than average at making use-judgments – or, at least, that they were raised in the families of those who were. If they are good at making use-judgements for themselves, it is at least weak evidence that they would be good at it when they act on the behalf of the community. There is no analogous argument for the holders of political offices.[108]

This concludes the argument of this section. To summarize, I do agree that there are considerations of common good that are invisible to market mechanisms and that sometimes resources could be directed to ends that are at odds with those

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[106] A possible response here is that political decision-making in mature democracies involve building consensus between a large number of interest groups which, allegedly, improve the overall ability of political system to track common good. I would say that this property of democratic politics indeed makes it less radical in a sense that it is more burdened by the inertia of status quo. Observe, however, that it does not obviously follow that such system is better able to track common good.

[107] This is validated empirically – you can hardly find today a billionaire who would not be engaged in some form of charitable activity.

[108] The analysis offered by John Finnis in (2011, 184–188) is relevant here. He points out that there is no reason why we should cast the state as the custodian of distributive justice: distributive duties apply to any agent who holds the common stock, and there is no reason why the state should be such an agent.

suggested by the market. But this is not a reason against Owner's Immunity because common good is best realized through the system of private ownership. The very traits that make an individual good at property acquisition also make her (relatively) good at identifying what would serve common good best.

There is no special feature of political process that can give the state and its officials a cognitive or moral advantage in that respect. Rather, the opposite is true: wealthy private owners have such an advantage, albeit a weak one. They do not need to worry about their personal well-being and hence are less likely to be distracted by petty egoism; and the very fact that they were able to acquire their wealth shows that they possess a certain amount of prudence.

6.4. The limits to Owner's Immunity

As we established in the previous section, the right of ownership is resistant to both moral claims made by specific individuals and moral claims made on the behalf of the community. But still, there are circumstances in which the right of ownership needs to give way and they will be the subject of this section.

Rights do not have any automatic force. Individuals can only enjoy their rights if others respect them, and such respect requires certain social conditions to be fulfilled. For example, no respect for rights is possible if the members of a given community do not know their content or do not see themselves bound by them. Fulfilling these and other conditions places certain duties on individuals, and this is the kind of duties to which individual rights should give way. Rights cannot be more important than maintaining the social system which makes the respect for rights possible.

This principle applies to the right of ownership as well. Recall how I discussed in 1.1. that the right of ownership is more complex than other natural rights: while other rights are typically acquired at birth and persist until death more or less unchanged, property rights are constantly acquired and lost throughout the life of an individual in many different ways. It should be no surprise that such complex right can only manifest through the reliance on a complex social infrastructure and maintaining this infrastructure would place a significant burden on the members of the respective community. This burden, in part, must consist in giving up certain aspects of the right of ownership itself. At the very least, the resources spent on the aforementioned maintenance need to come from somewhere. As every single resource has, according to ETO, its own private owner, the only way in which the necessary supply of resources can be guaranteed is through taking them from some of the owners, if necessary, against their will.

ETO identifies three conditions under which the system of private ownership can manifest: secured individual rights, fair and efficient markets, and a justice-bound political system. Let me take a closer look at each of these conditions and explore what kind of limits they might place on the right of ownership.

The condition of secured individual rights means that the society needs to be in such a state that the awareness, recognition and respect for individual rights is

ubiquitous. Individual rights for current purposes include the right of ownership, for obvious reasons, but also the rights to life and liberty as without those persons cannot freely engage in appropriation and transfer, as these are specified by ETO, and, therefore, their ability to acquire ownership will be sabotaged.

The most straightforward way to secure individual rights is to assign penalties for their violation and to institute a security apparatus that would track and identify the violations and impose penalties on the transgressors. This, however, is not the only method available. If, for example, we believe that one of the reasons people turn to crime is extreme need, it could be possible to dissuade the potential transgressors from violating rights by establishing a system of welfare payments, so that they are less desperate and less inclined to prey on others. Finally, a system of education and propaganda which explains the value and importance of individual rights can also contribute to making them more secure.

ETO is neutral with respect to what combination of these (or other) tools is employed. It should be decided on the basis of their efficiency and their efficiency, in turn, is an empirical issue which would be decided differently in different societies. But what is common across all these methods of securing rights is that they all require expanding resources to maintain the respective institutions. And as I pointed out earlier, the only possible source of such resources are private owners. Therefore, it might be justified to forcibly take the resources from them and direct them to aforementioned ends, provided that necessary expenses cannot be covered by voluntary donations.

Let me now move to the second condition – fair and efficient markets. Under ETO, the right of private ownership is inseparable from the possibility of market exchange. This is because it can only be justified if all others retain the opportunity to make productive use-judgements on owned resources and take control over the net value discovered by such use-judgements. As I argued in Chapter V, this opportunity is realized through market transactions. But such transactions need to adequately reflect the value added by respective use-judgements, in other words, they need to be conducted in the context of a fair and efficient marketplace.

ETO does not specify the background conditions which enable a fair and efficient marketplace – it only maintains that those need to be established before any property rights can be justified. Their content is once again an empirical question which needs to be answered by economic science and the answer to which might vary from one society to another. But it is very much a possibility that maintaining fair and efficient marketplace would require additional expenditure. If this expenditure cannot be covered by voluntary donations, financing it by forcibly taking resources from private owners should be acceptable. On top of that, maintaining a fair and efficient marketplace might only be possible by placing various limitations on the transactions owners might perform or on the kind of uses for which they can employ their resources. All such limitations are justified as without a fair and efficient market there can be no right of ownership at all.

Finally, in order for all the institutions specified above to work, we need a political system within which they would be formed and legitimized. This system

should be organized in such a way that it would treat the security of individual rights as its overarching goal and would never place any other considerations above it – a *justice-bound political system*, as I call it. Otherwise, all the institutions created to protect individual rights would get corrupted and use the power granted to them to become chief violators of the very norms they were set to protect.

In the context of the right of ownership, the particular danger is that the system would be overtaken by the coalition of owners who enjoy a momentary control over a large amount of resources and then changed in such a way that this coalition would receive protection from the pressure of market forces or even would be allowed to forcibly take resources from others at will. If it happens, this would destroy the conditions specified above and make maintaining the system of ownership impossible.

Protecting the political system from this and other dangers is, therefore, also a goal that trumps the sanctity of the right of ownership. It could be necessary to place limits on the ways in which private resources can be used in political struggle or even to introduce laws that preclude the very possibility of the emergence of large private estates. These and other measures can be justified if it can be demonstrated that without them a justice-bound political system cannot survive.

In this way, ETO can allow for a wide variety of interventions in private property rights, including interventions which are not typically associated with Deep Private Ownership views, such as taxing owners for the sake of welfare spending or out of concern for excessive concentration of capital. Observe also that ETO is flexible in this regard: it does not prescribe the same regime of property rights for all possible societies. The amount of necessary intervention would greatly depend on the culture and overall level of moral and technological development of a particular community. In some cases, the community would be so naturally friendly towards property rights that only a very minimal political structure would be required to keep them safe, while in other cases the system of private ownership would only be able to survive with property rights severely circumscribed. ETO, of course, does claim that the former situation is preferable to the latter one but even the latter one is justified.

On the other hand, the amount of flexibility ETO provides is not infinite. The need to maintain social conditions necessary for the system of private property to exist should not be taken as a blank excuse for any sort of restriction of the right of ownership. ETO only allows to impose such limits on the right of ownership that are *necessary* to sustain it. This means that in each specific case one needs to demonstrate such necessity, to show that the goal of maintaining the system of ownership cannot be achieved, in the particular circumstances of a given society, by any less intrusive means. It is not enough, for example, to just say that taxes are justified because they cover the expenses on the protection of property rights. It has to be demonstrated that this same result cannot be achieved by a system of

voluntary donations. There is nothing obvious about that, because basic government functions, like courts and police, are very cheap relative to other government spending.[109]

The same reasoning applies to all other potential restrictions on the right of private ownership discussed in this section. In each case they should be justified by concrete empirical data related to the community in which we expect to apply them. Intuitively, I doubt that many currently existing taxes and regulations would survive such a stringent test. In this way, ETO does not necessarily demand modern governments to shrink to the size of a libertarian minimal state, but it almost certainly demands a massive reduction of their powers and a massive expansion of the collective wealth and power of private owners.

6.5. Conclusion

In this chapter I explored how strong the right of private ownership under ETO is and how much immunity it gives to owners. I considered two possible types of moral claims that can challenge this right: various claims made by other individuals on resources controlled by owners, and claims made on behalf of the community as a whole.

I have shown that neither of these can possibly be a reason to interfere with the right of private ownership. In the case of individual claims this is because as long as they are in conflict with the right of ownership, they would constitute wrongful private duty imposition, which, in turn, violates the fundamental principle of moral equality between persons which lies at the very foundation of our society. And in the case of communal claims, the problem is that a community, in contrast to individuals, cannot act or think or express its desires and needs. Specific individuals need to act on its behalf and, as I argued, there is no better option than to entrust this function to private owners. In this way, if we refer to communal claims, they would just lead us back to the right of private ownership.

Still, there are cases where the right of private ownership can be sacrificed. This is when it is required to maintain the social infrastructure on which it depends: the right of private ownership cannot demand the destruction of its own practical foundations. The specific list of cases in which this sacrifice happens would be different depending on the properties of the community in question, its culture, developmental level, prevailing ideology and behavioral patterns, etc. ETO concedes that in some cases private ownership can survive as an actual social institution only if severe limitations are placed upon it. Still, it insists that those, who propose such limitations, bear the burden of proving their necessity.

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[109] In 2017 justice system expenditures by federal, state, and local governments of USA were 305 billion USD – a bit less than two percent of GDP (Buehler 2021). To put this figure in perspective, in 2016 the total amount of charitable donations in USA was 390.05 billion USD (Giving USA 2017). In the light of this data, it is not implausible to suggest that the protection of law and order can be at least in some cases financed entirely by voluntary donations.

Chapter VII. The Boundaries of Ownership

7.1. Introduction

In the previous two chapters I focused my discussion on the right of ownership itself: how it is structured, how its various components are justified and how it is related to other types of moral claims. In this chapter I will take a look at how far exactly this right extends and will try to demarcate its boundaries.

There are generally two senses in which the concept of the boundaries of ownership could be understood. Firstly, and more obviously, it is the boundaries of objects of ownership: the question of where the resource upon which the owner has a rightful claim ends and the unowned world begins. Such boundaries can be both spatial and temporal in the sense that the right of ownership only extends for a certain period of time. These issues will be explored in the second section of this chapter.

There is, however, another way in which the concept of boundaries can be understood: the range of actions that are protected by the right of ownership. In the previous discussion the assumption was that the right of ownership always implies an absolute control over a respective resource, that is, that the owner is authorized to prohibit any actions that touch the resource in any way. Taken literally, however, this assumption would quickly lead to absurdities. We live in a world where all material objects are interconnected. Any action we take will have a ripple effect that will extend to a large number of surrounding objects and if it were within owner's right to guard their resource from even the most trivial outside influence, it would be hard to do anything at all without violating someone's right.[110]

In the third section of this chapter I will take a look at how far owner's control extends in this sense. I will show how use-judgments under ETO can have weaker normative consequences than the right of ownership in the absolute sense, leaving space for others to interact with owned objects in certain limited ways. Also I will explore cases where such weaker claims made by multiple individuals on the same resource can interact with ownership rights and each other leading to such phenomena as common ownership and easements.

The boundaries described in the second and third sections create a very complex normative picture which is nigh impossible to implement in any actual, real-life context. In the fourth section I will describe how ETO bridges this gap between ideal and practical. I will argue that any normative system with an ambition to be a source of guidance for the positive law should accommodate for objective limitations imposed by the properties of law-making and law-enforcing institutions and demonstrate how such considerations are integrated into ETO.

In the fifth section I will explore the relationship between ETO and the Lockean Proviso: a moral principle according to which one can only appropriate as

[110] (Sobel 2012) relies on this consideration for building a general case against entitlements theories.

long as "enough and as good is left for others". It is widely believed that this principle serves as an important limit on private appropriation and some readers might expect that this should be yet another boundary imposed on private ownership. I will argue that there is no need or even conceptual space for such a rule within ETO's framework.

In the final section I will provide a summary of the chapter.

7.2. Spatial and temporal boundaries of the objects of the right of ownership

This section will be split into further two subsections. First I will deal with spatial boundaries (7.2.1.), then with the temporal ones (7.2.2.).

7.2.1. Spatial boundaries

Jane is a sea-explorer, a captain of a ship who ventures into unknown waters. During one of her voyages she discovered a beautiful island, with nice climate, lush vegetation, fresh water and completely uninhabited. She decided that this island will be her retirement home: she will live there after she gets tired of roaming high seas. That was her use-judgment and her retirement plans were its enactment. She provided the proof of this enactment in accordance with the rules of the community to which she belongs. The island is now hers… or is it?

The problem we need to solve here – and, indeed, in any other case of property acquisition – is what exactly Jane appropriated. The whole island? But why? Does she need the whole island for her retirement? That could be true if the island is small but what if it is of the size of Australia? Where exactly does the boundary of the object Jane appropriated lie?

The problem I outlined is known in literature as "the boundary problem" and it is a long-known problem for entitlements theories.[111] The material world which we inhabit is fundamentally a contiguous whole. Each particle is a part of the same network of causal connections and where one object ends and another starts is not an obvious matter. This is especially salient in the case of land plots where borders are arbitrary to a very large extent, but the problem might arise in relation to any other object. Before any system of property rights is put in practice, we need to work out some way to determine the shape of the objects acquired by appropriators.

ETO offers two principles which are supposed to do this work. Firstly, the shape of the object acquired by the owner is defined by the content of the respective use-judgment. Every use-judgment concerns a specific end and cannot be a ground for appropriating more resources than are required to achieve this end. Jane in my example wants a retirement home. It means she can claim enough

[111] On the boundary problem see (Mautner 1982, 261; Nozick 1974, 174; Varden 2012, 420–422).

land to build a comfortable home for herself and her closest family; she can take some additional land if she wants to do gardening or any other similar work. There is, however, no reason for her to be entitled to anything more than that. She cannot get any land that is not a part of any project of hers, as this land would just get wasted.[112]

But in many cases this principle alone is not sufficient. Suppose that instead of building a retirement home Jane wants to sell the land on this island to others. The only natural limit for such use-judgment is the size of Jane's market – which can be very large. If we apply the principle above without qualifications, it can easily give way to appropriation of entire continents.

The problem with Jane's use-judgment in this last example is that it can only be enacted if Jane owns the island. However, she is not yet the owner when she makes it, as making a use-judgment is, in fact, a pre-condition for the right of ownership to emerge. Any use-judgment that involves selling things you don't own yet is impossible to enact. Back in Chapter III I labeled such use-judgments as failed use-judgments and pointed out that they fail to turn a brute object into a resource. And as brute objects cannot be owned, it means we cannot come to own something just by intending to sell it.

Billy Christmas (2021, 107–109) cites similar considerations arguing that appropriation of resources is possible only for personal use. He discusses a case of land speculation where a plot of land is appropriated not with the purpose to use it in any way but just with the purpose of reselling it later for a higher price, and concludes that no right of ownership emerges in this case. This approach neatly puts a tight ceiling on how much one person can appropriate but it comes in tension with Christmas's own theory of transfer (2021, 77–81). He argues that transfers are nothing more than a combination of one person abandoning her right of ownership and another person appropriating the abandoned object anew. However, this would mean that the recipients of transfers are under the same restrictions as appropriators. If we cannot appropriate a resource purely with the purpose of reselling it, we also cannot buy a resource having such end in mind – a conclusion Christmas would hardly find acceptable. Moreover, it is unclear whether Christmas would apply this principle to cases beyond land appropriation. If Jane picks up mushrooms in the forest with the purpose of selling them on the farmer's market – does it mean she does not acquire ownership over them? If it does not, how exactly this situation is different from the case of land speculator?

ETO, it seems, would also struggle with a similar problem. Its conception of transfer is different from what Christmas offers but also relies on the idea that the recipient of a transfer is engaged in the same kind of activity as the appropriator. Just as it is the case with appropriation, a use-judgment is necessary for the transfer to happen, and if a use-judgment cannot ground appropriation, neither can it ground transfer. ETO, however, has a way out of this conundrum. In order to

[112] This use-centric solution is similar in spirit to the ones offered in (Christmas 2021, 72–73; Rothbard 1997, 153–157). Also it runs in parallel with Locke's spoliation proviso (Locke 1980, II:31).

understand it we need to take a closer look at the use-judgment Jane makes in the island example and figure out what specifically is wrong with it.

Back in Chapter IV I described the structure of use-judgments as "I might achieve X by doing Y to Z in my current circumstances". Jane's use-judgment in the last case would be "I might acquire money if I appropriate the island and then resell it" where "acquire money" would stand for X, "appropriate and resell" would stand for Y and "island" would stand for Z. The problem here is that appropriation is something we perform by passing and enacting use-judgments, and that makes this entire sentence a self-referential tautology with no actual content: the action to which the use-judgment refers is the act of passing of this very judgment. It fails as a use-judgment because Jane does not describe any actual activity she intends to do *with the island*. The island is not really a means to her end as she is not really doing anything with it, and, therefore, not a resource for her.

The problem, therefore, is that Jane does not intend any sort of constructive activity which is related to the island. But this is not the way land speculation is properly described, at least, not necessarily. Recall my discussion of speculation in 5.4.2. I argued back then that speculators perform an important social function. They ensure that rare resources would go to people with the best use-judgments and in this way they prevent those resources from being wasted. In this way, if Jane would appropriate the island and auction it away, it would actually serve social good.

Let us try to modify the use-judgment Jane makes in such a way that it would reflect her contribution to value-generation. The action Jane here performs is turning the island into a marketable good. After the island becomes owned, it becomes possible to rationally assess the quality of use-judgments made on it by means of the price mechanism as described in 5.4. Therefore, Jane's use-judgment can be modified like this: "I might acquire money by *bringing the island to the market*".[113] This now is a proper use-judgment as it describes an actual activity related to the island. The flipside is that in order to enact this use-judgment Jane needs to do some actual work. It is now her responsibility to make it possible for others to learn about the island, to assess the resources it offers, and to buy it from her. The means by which she fulfills these duties depend on what kind of market infrastructure her community possesses.

I will call use-judgments aimed at profiteering by selling resources to others *market-oriented use-judgments*. They stand in contrast with *person-oriented use-judgments* where the resource is intended to be used directly for the satisfaction of personal needs of the author of the respective use-judgment. Market-oriented use-judgments generate ownership just as well as person-oriented use-judgments. There is, however, an important difference between them. The enactment of person-oriented use-judgments does not depend on the assistance on behalf of the

[113] Christmas in his argument points out that all what a speculator does is the removal of resources from the market (2021, 108). This, I believe, is a misunderstanding of the social function of speculation. To the contrary, it is only after resources are appropriated that they can then be marketed.

community. Even if everyone else dies, Jane can still retire to the island and live there as a hermit. By contrast, market-oriented use-judgments are impossible to enact if there is no market: in order to sell something, you need buyers. In this way, market-oriented use-judgments rely on the opportunities provided by others in the community. The implication of this is that the enactment of such use-judgments necessarily involves active interaction with market infrastructure: you rely on opportunities created by others, and it means you need to provide opportunities to them in return. Jane's duty is to make the island visible for other market participants as an economic good. Her ownership will only be respected as long as she facilitates others by making them aware of the island and the resources it holds and being open to their market offers. It is also her responsibility to preserve the value which the island holds. The concrete activity that could be demanded from Jane here could include physically demarcating the borders of her land plot by putting a fence around it, exploring and cataloguing the resources available on the land plot, making the information about the land plot and her contacts as its owner available in a publicly maintained register, performing custodian duties such as putting out forest fires, etc.[114]

In practice these demands would put a soft cap on the share of the island Jane would be able to appropriate, as she would need to constantly spend her personal resources to maintain her ownership. Note, however, that if her resources are extensive, she would still be able to appropriate vast amounts of land. The only limit here, besides her resources, are considerations of political stability discussed in 6.4.

This discussion allows us to finally formulate the two principles that govern spatial boundaries of the objects of ownership under ETO. If the object gets acquired by a person-oriented use-judgment, the respective boundaries are determined by the content of this use-judgment. They cannot be wider than it is necessary for the use-judgment to be enacted. In case of acquisition by a market-oriented use-judgment, the boundaries are determined by the owner's willingness to maintain the market availability of the resource.

7.2.2. Temporal boundaries

Let us get back to the scene from the beginning of Chapter IV. Back then Jane stumbled upon a stump and a boulder while walking through the forest. She used them as furniture substitute while having her dinner. After that she packed her stuff and left, never to return to the glade again.

In Chapter V I explained how Jane acquired the right of ownership when she made and enacted her use-judgment on the stump and the boulder. But in an unqualified form this claim would lead to an absurd conclusion. Imagine Bill wandering onto the same glade a year later. He certainly cannot have a duty to

[114] Similar things should be said about the case of picking mushrooms in a forest in order to sell them on the market.

ask Jane's permission to use the stump and the boulder – she probably has forgotten about their existence by this point.

Recall, however, that being a resource is a relational property – a property of being seen by someone as means to her end. Jane, in the stump and boulder case, stops seeing them as means the moment she finishes her lunch and leaves the glade. It means that the stump and the boulder stop being resources for her and revert to the state of brute objects. Brute objects, however, by their very definition cannot be used and, as I argued in 5.2., there can be no Owner's Liberty with respect to them. And without Owner's Liberty there can be no ownership as all other aspects of ownership are derivative from it. It follows that ownership has bounds not just in space but in time: it only exists for as long as the respective use-judgment is enacted.

To better understand this idea consider the following extreme example. Imagine Jane walking through the forest along an untrodden path. With each step she makes and enacts a use-judgment on a piece of land immediately before her: she uses it as a prop for her locomotion. In this way she appropriates this piece of land, makes it her resource. At the same time, with each step she abandons the land on which she was standing a second ago: she no longer needs it as she walked through. In this way, Jane here constantly appropriates new land for herself – only to immediately abandon it. The temporal boundary of her ownership right is so tight that this right is practically inconsequential.

In this way, ownership under ETO is not perpetual. The moment the respective use-judgment stops being enacted, the resource is deemed abandoned by its owner and can be appropriated anew by someone else.

There is, once again, a difference here between person-oriented and market-oriented use-judgments. Person-oriented use-judgments typically assign finite uses to resources. Once the end with respect to which a use-judgment was made was achieved, a resource is no longer of use to the author, unless she makes a different use-judgment on it. This is exactly what happens in the example I discussed above: after Jane eats her dinner, she no longer has any need for the boulder and the stump. Market-oriented use-judgments are different because keeping resources on a market is a project that does not have any natural time limit. It only ends when the owner transfers away her resources or when she decides that she no longer wants to bear costs of maintaining the ownership (see 7.2.1.). In this way, in contrast to person-oriented use-judgments, there is no natural point when the right of ownership terminates.

Therefore, temporal boundaries of objects of ownership are defined by the same two principles which define their spatial boundaries. In case of person-oriented use-judgments it is primarily the nature of the respective use-judgment which limits them, but in case of market-oriented use-judgments it is more the willingness of the owner to bear the costs, associated with ownership.

7.3. The activities protected by the Owner's Claim-Right, common ownership and easements[115]

Let me start this section with the introduction of several new concepts. If a use-judgment is such that any interaction between its object and a third party would disrupt its enactment, this use-judgment will be called *exclusive*. If only some interactions would disrupt the enactment, the use-judgment will be called *partially exclusive*. And if no interaction would be disruptive, the use-judgment would be called *non-exclusive*.

Since early in Chapter V my arguments assumed that all use-judgments are exclusive. It is either Jane sits on the stump or Bill: they cannot sit on it together. This assumption was of course a simplification: my intention was to focus on the paradigm case of ownership. In this section I will explore what will be the consequences of partially exclusive and non-exclusive use-judgments.

Recall that, per discussion in 5.3., the purpose of Owner's Claim-Right is to safeguard the holder of Owner's Liberty from the interference by others. It follows that Owner's Claim-Right can only be as strong as it is necessary for this purpose. In this way its extent is determined by the scope of Owner's Liberty, which, in turn, is determined by the content of respective use-judgment, as discussed in the previous section. If a use-judgment is non-exclusive, its enactment cannot be interfered with, which means that there is no need for Owner's Claim-Right. Therefore, non-exclusive use-judgments do not generate Owner's Claim-Right.

The overwhelming majority of use-judgments are partially exclusive. There are some which are fully exclusive. For example, the very point of having a private bedroom is that no stranger can come in for whatever reason. I do not think there are use-judgments which are genuinely non-exclusive – for any kind of activity it is possible to think up a way to sabotage it. Observe, however, that partially exclusive use-judgments lie on the spectrum between exclusivity and non-exclusivity. They have the properties of exclusive use-judgments with respect to activities that can disrupt their enactment and the properties of the non-exclusive ones with respect to activities that cannot; more specifically, they would generate Owner's Claim-Right but only with respect to the kind of actions that would obstruct their enactment. For this reason, in the remainder of this section I will only speak of exclusive and non-exclusive use-judgments as analytical ideal types and the reader needs to keep in mind that all I say applies to partially exclusive use-judgments, depending on what kind of properties they display in a particular context.

[115] The arguments of this section is substantively similar to those presented in (Christmas 2021, 87–102) and I refer the reader to this text for a more extensive treatment of the issue. My contribution is mostly limited to reformulation of Christmas's argument so that it fits ETO's conceptual framework. There are, however, a couple of places where my conclusions are different from those of Christmas which will be noted in the text.

Now, non-exclusive use-judgments do not generate Owner's Claim-Right and do not prevent others from using the same resource. They also do not stop others from appropriating the same resource.[116] This is because the authors of exclusive use-judgments on the same resource still need to receive protection from interference by third parties. However, such appropriation does not have normative power to displace Owner's Liberty of the authors of older non-exclusive use-judgments and for this reason appropriators would have no right to exclude previous users from their property. In this way, previous users will be entitled to an *easement* with respect to appropriated resources, under which they would still have a right to use them in the way in which they did it before, even though the resource itself will now be private property. This easement, of course, can be transferred away to the owner or to a third party in the same way the right of ownership can be transferred away as argued in 5.4.

Another complication with respect to non-exclusive use-judgments is that the property of non-exclusivity depends heavily on the number of other users. While you are a sole driver on an empty highway, another driver would not obstruct your movement. But add a million drivers and movement along the highway would become impossible. Even if a resource can, in principle, be used in a non-exclusive way, there is always a capacity limit after which new users would interfere with the previous ones.

When the capacity of the resource reaches its limit the use-judgments of all current users become exclusive in relation to use-judgments made by any newcomer. It follows that all current users acquire Owner's Claim-Right with respect to any possible new users.

The immediate practical consequence of this new normative situation is that those who make new use-judgments with respect to the resource would need to obtain consent from every single of its current users in order to obtain access to the resource. If the number of current users is high, it might be an exceptionally onerous requirement simply due to transaction cost. As it is also in the interest of current users to be able to market their rights, it might be beneficial for them to create a governing body that would act as an owner of their common resource on their behalf. This is how *common ownership* comes into being.

Observe that under ETO common ownership is not something distinct from private ownership: it is simply a situation when there are multiple owners of the same resource. Also, ETO does not recognize that any resources are genuinely *public* in a sense that everyone has a right to use them.[117] This is because under ETO you cannot have a right to use a resource before you make a use-judgment on it and there is always a limited number of people who made use-judgments on a particular resource. ETO does recognize public resources in a sense that access

[116] In this claim I deviate from Christmas. Within his system a resource that is used in a non-exclusive way falls into what he calls "public property" and cannot be appropriated (2021, 93).

[117] For this conception of public ownership see (Christmas 2021, 94–95). Note that this view on public ownership is very different from the idea of Deep Public Ownership.

to them is open for all but it simply means that there are no restrictions on making and enacting use-judgments on such resources. On the fundamental level ETO does not have a category of "common" resources as distinct from "private" ones.

Christmas (2021, 97) argues that co-owners cannot be forced to surrender their right of managing their property to such governing body. If at least one person decides not to participate in it, her consent to any actions related to the resource would need to be obtained separately, transaction costs notwithstanding. As Christmas notes, "that is the cost of dealing with individuals who have rights" (2021, 97).

ETO here dissents. The difference between ETO and Christmas's approach is that Christmas is satisfied with the idea that resources belong to first-comers: if you were the first to use a particular resource, no more argument is needed to justify your right to do it (see 3.3.2.3. above). For that reason, users of common resources receive full protection of owners simply because they started to use these resources earlier than others.

But for ETO it is irrelevant who started to use a resource first. ETO assigns ownership to the author of the most productive use-judgment and the relative productivity of use-judgments is determined by the market process. Simply grabbing and holding a resource is not enough for the owner to justify her right; she also needs to put it on a fair and efficient market, so that her use-judgment could be constantly compared with alternatives. And if the transaction costs of obtaining consent from each individual user are so high that it makes the resource effectively non-marketable, it would render the rights of co-owners unjustified. In such a situation co-owners might be forced to submit to a common governing body that would manage the resource on their behalf and with their participation. That would count as the type of market regulations that would be justified under ETO as described in 6.4.

These considerations conclude my analysis of normative consequences of non-exclusive use-judgments. As we saw, they do not generate the right of ownership but might create easements in favor of their authors after the resource is properly appropriated and, under some circumstances, can result in the creation of common ownership.

7.4. Practical issues with the implementation of the boundaries of ownership

The discussion in two previous sections invites the following worry. The rules I have offered so far present impossible epistemic challenges to any authority that would try to implement them. It appears that to learn over what kind of actions and with respect to what kind of objects the right of ownership extends its protection one would need to undertake a detailed investigation of each particular use-judgment. It would involve precise knowledge of the end, objects and actions involved.

There are two difficulties with this undertaking. Firstly, use-judgments are by their very nature private and accessible directly only to their authors – and the authors very often would have an incentive to confuse others about the content of their use-judgments in order to extend their control over more resources than they in fact require. Secondly, there is no "standard" shape of the right of ownership which can be automatically assigned in each case. Every use-judgment is somewhat unique both in terms of an object to which it extends and in terms of actions which it enables. It means that to properly protect the right of ownership we would need to give each use-judgment individual attention.

ETO accounts for this problem in the following way. It distinguishes between ownership as moral right and property rights as its legal manifestation. Even though property rights are based on the underlying moral right, it is not necessary for them to have exactly the same content. This is because the content of legal rights is defined not just by the moral reality they aim to reflect, but also by the objective limitations of the legal and political structure that implements and enforces them. If the respective moral reality is too complex and obscure to be properly tracked, legal rights should aim to approximate it, not to mimic it.

A helpful illustration here is age of consent laws. Their intention is to protect those individuals who are not yet mature enough to understand the full meaning and nature of sexual intercourse. One might think that in order to achieve this goal we need to first "measure" sexual maturity so that we can determine whether the individual in question needs protection. But such an attempt would face difficulties very similar to those I described above. Sexual maturity is a deeply personal matter which is hardly observable outside and which develops with a different pace in each individual case.

So, lawmakers all over the world adopted a different strategy. Instead of measuring the maturity of each individual, they established a semi-arbitrary age mark which intends to reflect what a *typical* result of such measurement would be: depending on the country, it typically varies from fourteen to eighteen years. Everyone below this line is considered immature, while everyone above – mature.

In a sense, age of consent is unfair in each individual case: hardly there is a person out there who reaches psychological sexual maturity exactly at their eighteenth birthday (or whatever is the age of consent in the country in question). It means that for each person there is a period in her life when her legal status is at odds with her actual psychological condition. And yet hardly there is any doubt that age of consent laws are not some arbitrary caprice of politicians. They serve to safeguard an important moral right and they do so by the only method feasible given the capacity of law enforcement. The logic here is similar to the one I offered in 6.4.: it is worthwhile to sacrifice a small aspect of individuals' sexual freedom if it is necessary to maintain a system that allows such freedom to exist at all.

ETO proposes a similar solution to the situation with the protection of the right of ownership. Each particular use-judgment is just as intractable as sexual maturity of a specific individual and we cannot expect law enforcement authorities to determine their content on a case by case basis. Instead, legal rules should be

crafted on the basis of accumulated knowledge of what kind of use-judgments are typical in a particular community and in what kind of situations, and what are the most common exceptions from these practices. These rules would indeed produce unfair results in certain deviant cases, but this is the necessary price for the capacity to uphold justice in the vast majority of cases. Law should take into account the objective cognitive limits of whatever power is tasked with its implementation and offer a set of simple rules regulating a complex world.[118]

In practical terms it would mean that, for example, even though most use-judgments are only partially exclusive, the law would in most cases assume either full exclusivity or full non-exclusivity, depending on towards which of these two poles a particular type of use-judgment typically gravitates. But there is still conceptual space for some sort of mixed regime between these two extremes if the circumstances of a particular community would require it.

This approach once again demonstrates the inherent flexibility of ETO. In 6.4. I argued that in individual cases the rights of owners might need to be sacrificed in order to preserve the stability of the overall system of property rights, and the extent of such necessary sacrifice would vary depending on the relevant social context. Here we see once again that the content of property rights would depend not just on moral reality, which is the same across all societies and cultures, but on the way the practice of property acquisition typically operates in the community in question. Different cultures, technological and political structures would generate varying property regimes all of which still can be justified under the umbrella of ETO.[119]

7.5. ETO and the Lockean Proviso

The Lockean Proviso is a principle according to which no one can appropriate more than her "fair share" (Locke 1980, II:27). It means that appropriation is only allowed as long as there is "enough and as good left for others". You cannot appropriate if appropriation would render a particular kind of resource unavailable for your neighbors.

Even among the supporters of Deep Private Ownership view many believe that any moral theory grounding property rights should accommodate for the Lockean Proviso in some form. Notably, Robert Nozick believed that appropriation should not make others worse off (1974, 174–182), while John Simmons saw Lockean Proviso as an argument against high levels of wealth inequality (1994,

[118] For a comprehensive argument for this idea see (Epstein 1995). This argument runs in parallel with the argument for rule utilitarianism against act utilitarianism developed in (Singer 1961). But observe that in this context ETO offers a standard of legality as distinct from the standard of morality and is immune to the charge that it sacrifices its own moral principles for the sake of blindly following rules which is sometimes made against rule utilitarianism (Smart 1956).

[119] This is similar with the way I argued for a flexible approach to the standard of proof of enactment in 5.3.2.

305–306). And, of course, the idea that we should take the Proviso very seriously lies at the very heart of left-libertarianism (Otsuka 2003; 2018; Sreenivasan 1995; Steiner 1994; Vallentyne 2000; Vallentyne 2003).

ETO dissents from these views as it allows no conceptual space for the Proviso and denies that it should serve as a limit on appropriation. In this section I will explore the reason behind this difference in approaches and offer an argument in support of ETO's position. In order to do this, I will first need to take a closer look at the concept of scarcity which takes a very peculiar form in ETO.

Resources are scarce while brute objects are not. But the property that distinguishes resources from brute objects is us holding particular beliefs about them. Scarcity of resources, therefore, is not a feature of the external world, but a by-product of our ignorance.

In this way the most distinct feature of ETO's worldview becomes apparent: scarcity exists not on the ontic but on the epistemic level. It appears as an attribute not of the world but of our mind.

Let me illustrate this idea by a simple example. Imagine a tribe of primitive hunter-gatherers who exterminated all their usual game and cleaned up all the plants they used to eat. Unable to find any more food, the tribe slowly goes extinct.

The reason for their extinction is the lack of resources, but let us think what that exactly means. The tribe lived in a fertile land that would later support a much larger number of farmers. The problem was not that the land was of poor quality in any objective sense. The problem was that the people in this tribe did not know agriculture.

This is the point which ETO makes. It assumes that today we are in a position similar to these tribesmen – we just do not know it. The opportunities our universe has on offer are objectively limitless, the only limit that exists is internal – we lack the knowledge necessary to exploit these opportunities. Symmetrically, the way to overcome this limit is also fundamentally internal. The problem of scarcity of resources is resolved through better understanding of the workings of the world around us. The form of such understanding is use-judgements.

Kirzner argued that in a certain sense we create resources by discovering them (1989, 40–44, 152). This claim might seem puzzling as discovery is a purely mental event that cannot directly affect objective reality. Within ETO, however, the entire difference between brute objects and resources is a difference of mental perspective. And as brute objects are not meaningfully scarce the effect of transforming a brute object into a resource is indistinguishable from the creation of a resource *ex nihilo*.[120]

[120] The implication of this conclusion would be that creation is an appropriate metaphor to describe the activities of appropriators – the idea towards which even the supporters of Deep Private Ownership are often skeptical (Simmons 1998). This fact puts Deep Private Ownership on a firmer footing – even such arch-critic of entitlements theories as Cohen acknowledged that they would be very difficult to argue against if owners created their resources instead of taking them (1995, 170).

The significance of these conclusions can be best understood if we contrast ETO's position with the one exposed in (Steiner 1981), which came to dominate left-libertarian literature. Steiner offers a scenario where resources are limited on the ontic level and after they all are appropriated, the opportunity to appropriate more is forever closed. He concludes that it is an important task of any theory of property to avoid this possibility and ensure that everyone gets their fair share of this fixed stock.

ETO does not see this picture of the world as plausible. To say that resources are limited on the ontic level is to say that there will be some point in the future where no new productive use-judgements can be made, because we have run out of the opportunities to make them. I believe this idea stands at odds with what the entire history of humanity suggests. A stone-age caveman or even an ancient Greek philosopher could not fathom most of the technological opportunities we take today for granted. We now see as resources a much larger portion of the world than they did and we know of much more sophisticated and effective ways to exploit these resources. There is no reason to believe that the future would be in any way different, and our current worldview is not as narrow in comparison to the one of our descendants as the worldview of our ancestors was narrow compared to ours.

Consider the fact that we certainly have an abundance of brute objects for which we have not yet figured out the way to turn them into resources. Our planet is a giant ball of matter and we are currently able to exploit only a miniscule portion of it, scrapping the very top layer of the crust. And this ball of matter we are not yet able to exploit is tiny compared to what we have in our star system. The sun emits many magnitudes more energy than humanity produces and we capture almost none of it. Simply converting our solar system into resources would take many millennia.

But consider also this: our ancestors were aware of much less amount of brute objects than we are. They did not know that other planets and stars were celestial bodies of a size comparable with that of the Earth. In fact, they severely underestimated the size of the Earth itself. Their world was much smaller and limited than the one that we know.

And once again – why think that this trend is not to continue? It is not just that our awareness of available resources has been expanding throughout history; our awareness of brute objects that could be potentially turned into resources has been expanding even faster. Despite the fact that we greatly expanded our resource consumption in industrial era, we now know of more brute objects than in a pre-industrial age, not less. If we see brute objects as fundamentally scarce, that would be a weird paradox.[121]

ETO, therefore, rejects the concept of sustainability as it is typically understood nowadays. The last thing we should do is try to balance our consumption

[121] For a more detailed exposition of this view supported by empirical evidence see (Simon 1981; Simon 1996).

of resources against their remaining stock. Instead, we should think about sustainability in a dynamic sense. Scarce resource should be not saved up but invested into opening up new opportunities that would allow to transcend their scarcity.[122] Humanity should see itself as *locust* – not (both literally and metaphorically) an entity sitting in one place and trying to balance its appetites with the capacity of its home but an entity that exploits everything around it to the bone in order to use up the appropriated value to move to a different place where the process would begin anew.

For many readers ETO's view that there is no scarcity of opportunities to create new resources would appear implausible. The discussion above, I believe, shows that it is the other way around. If this assumption was not true, we would find ourselves in a really weird world much unlike the one we observe around us.

The lack of objective scarcity implies that the situation where the Lockean Proviso might be applicable can never happen. There will also be ample opportunities to make productive use-judgments and, therefore, there will also be an opportunity to acquire property. Moreover, the world for which Lockean Proviso is relevant – the Steiner's world – is the world where property acquisition as it is understood in ETO cannot happen at all. In this world we have a readily available stock of resources which, on one hand, is already known to us and, on the other hand, cannot be expanded. In this world there is no place for productive use-judgments as all possible use-judgments are already made. It means, in turn, that no property rights can be acquired. In this way, there is no conflict between ETO and left-libertarianism when it comes to normative reasoning: if left-libertarians are right in their ontological assumptions, then indeed, unilateral appropriation is not possible. The real difference between the two approaches is the way they see the world.

7.6. Conclusion

In this chapter I explored the boundaries of ownership. There are two kinds of those. The first type concerns the way we demarcate the boundaries of objects of property rights when they are acquired. I argued that there two types of those boundaries – the temporal and the spatial ones – and they both are defined by the nature of respective use-judgments and by the extent of the effort the owner is willing to invest into maintaining her right. The second type concerns the range of actions which are protected by the right of ownership. Once again, it is defined by the content of the respective use-judgment. When use-judgment is such that it can be enacted alongside with other use-judgments made on the same resource, it does not generate the right of private ownership, as it only creates Owner's Liberty but not Owner's Claim-Right. However, under certain circumstances such use-judgments can result in the creation of common ownership.

[122] For example, instead of limiting our consumption of carbon fuels, we should use them up to build infrastructure that would allow to permanently move away from them and rely on nuclear power and renewables.

The boundaries of ownership are, therefore, primarily defined by the content of the respective use-judgments. Individually tracking and implementing each and every individual use-judgment would be an impossible task for any law enforcement system, but ETO does not require that. Instead, it tasks the legal system to come up with the best possible approximation of the most typical use-judgments made in a given society. In this way, it accounts for objective cognitive limitations of political institutions upon which the implementation of property rights depends.

I closed the chapter with an analysis of the relationship between the Lockean Proviso – as an often cited limitation of appropriation – and ETO. My conclusion was that under ETO's ontology the Lockean Proviso is not applicable.

Chapter VIII. Summary: Theoretical Impact of ETO

8.1. Introduction

All elements of ETO are now presented to the reader. I introduced the main concepts of ETO (Chapter IV), demonstrated how these concepts can be applied to explain the nature of the right of ownership and justify all its main components (Chapter V and Chapter VI) and outlined the boundaries of the right of ownership (Chapter VII). In this last chapter I will assess the impact ETO has on the central debate surrounding the nature of property rights, namely, the conflict between the Deep Public and the Deep Private positions.

For this reason I will need to return to the material of Chapters II and III. I will once again go through the challenges encountered by these approaches and take a look at what ETO has to say about them and how it changes the state of the discussion.

Most of what I will say here was already touched upon in the earlier chapters: there will be little new. The point of the chapter is not to introduce new material but to provide a new perspective on it. Earlier I was primarily concerned with the internal logic of ETO and the way it responds to challenges posed by the reality it seeks to explain. Here I will use my earlier conclusions as ammunition in a debate against other views.

The next three sections will be dedicated to various attacks on the idea of Deep Private Ownership and the ways in which ETO can parry them. In 8.2. I will reiterate the answer ETO gives to the Right Displacement Objection, the challenge that private appropriation presupposes a pre-existing universal use-right which will be displaced as the result of appropriation. In 8.3. I will show how ETO can offer a satisfactory justification of the right of ownership that is immune to objections that are typically raised against it. And in 8.4. I will argue that ETO's unique approach to transfers sidesteps most of the problems in this area with which other approaches typically struggle.

In section 8.5. I will take a look at the way ETO impacts the justification of Deep Public Ownership. Back in 3.6. I argued that the only satisfactory way to justify Deep Public Ownership is to ground it in the original right of use. Luckily for the supporters of the Deep Public view, their opponents would also typically need to assume the existence of the original right of use to get their own theories off the ground. ETO, however, does not need the original right of use and provides a powerful argument against it, which puts the entire case for Deep Public Ownership into a very difficult position.

Section 8.6. will summarize the conclusions of this chapter and of this work in general.

8.2. ETO and the logic of appropriation

Back in 2.2. I introduced the Right Displacement Objection (RDO) to entitlements theories of ownership. This objection argues that there is an internal tension

in any view that allows unilateral appropriation. To perform appropriation one needs to perform some action with the respective resource, but this action should itself be permitted. Such permission means that there is a universal liberty to act on resources before any ownership rights on them are established – the original right of use, as I labeled it back then. This universal liberty will be displaced by unilateral appropriation without the consent of its holders.

This fact places on theories of appropriation the burden of justifying such a displacement, and this puts them in an inferior position with respect to alternatives that can achieve the same result without the need to bear this burden. In 3.6. I argued that Deep Public Ownership aspires to be such an alternative. If we conceptualize Deep Public Ownership as the manifestation of the original right of use in the conditions of civil society, we can move from the right of use to the right of ownership in a rights-respecting manner. And after we have Deep Public Ownership, the government can be authorized to create private property rights in such a manner that they would have the same practical benefits as the rights that could be generated by unilateral appropriation. In this way we can preserve all the practical benefits of the Deep Private approach but avoid the moral defect represented by the phenomenon of rights displacement.

Therefore, RDO appears to be a knockout argument against unilateral appropriation and, by extension, the entire Deep Private approach. It allegedly shows that the Deep Private view is self-defeating: once we trace down the implications of its assumptions, we would be forced to conclude that the Deep Public approach is superior.

ETO avoids this problem because it offers a concept of appropriation that does not require the original right of use. While other approaches need to start with the assumption that the world is commonly owned, at least in the sense that everyone has a liberty to use any resource she finds, ETO starts with the assumption that the world is unowned even in this weak sense. It argues that there can be no liberty to use resources before they are discovered as an undiscovered resource cannot be used.

Once this starting assumption is established, ETO breaks the process of appropriation into two analytical stages. At the first one the appropriator makes a use-judgment which creates a *liberty* to use the respective resource. This liberty has exactly the same properties as the original right of use, except that it belongs not to everyone but only to the author of the use-judgment. At the second stage the appropriator enacts her use-judgment and makes the proof of such enactment public. At this stage ETO does not differ much from what other entitlements theories offer, with one important exception: other views need to rely on the original right of use to make appropriation possible while ETO instead relies on the liberty that was established during the first stage. And as said liberty is not shared by the entire community, ETO does not require that appropriators displace anyone's rights and is, therefore, immune to RDO.

In contemporary literature RDO is typically stated in the form of the Private Duty Imposition Objection – PDIO. In this form the emphasis is not on the displacement of the right but on the imposition of the corresponding duty. In this

context ETO points out that the imposition of a duty is only objectionable when it diminishes the opportunities available to an individual. There are cases, however, when imposition of a duty goes hand in hand with the creation of opportunities to which this duty is related.

For example, if I grow hair on my head, it would impose on everyone else a duty not to touch this hair. But observe that there was no opportunity to touch my hair before I grew it – the respective opportunity did not exist. The same act that imposed the prohibition made the prohibited opportunity possible. The two effects cancelled each other out and the normative situation of others remained unchanged.

ETO argues that something similar happens in the case of appropriation. Appropriators do not diminish the opportunities of others: they simply replace one opportunity with another, an essentially identical one.

This effect happens in two forms. Firstly, as I argued above, there is no opportunity to use undiscovered resources: it only appears when appropriators discover resources and communicate their discovery to others in the form of the proof of enactment. In this way, they did not take away any pre-existing opportunities, but simply impose a prohibition on using the opportunities they created. These two normative effects balance each other out.

Now, one might say that what is in question here is not a *physical opportunity to use resources* but a *normative opportunity (Hohfeldian power) to appropriate them*. Once a resource is appropriated, one might argue, all subsequent use-judgments on it will be normatively inconsequential as one cannot appropriate it for the second time. In other words, it could be that what appropriators take away from others is not their liberty to use resources but their power to appropriate them.

In response ETO argues that the power to appropriate is only a special case of a more general power: the power to obtain exclusive control over the value added by one's use-judgement. In case of appropriation the starting value of a resource is zero, so the entire value discovered by appropriators is added value. This is the reason why appropriators acquire ownership without any further conditions. But when the resource is already being used, added value equals to the difference between its current value and the value discovered by the new use-judgment of another potential owner. This is the reason why property acquisition in this case requires a special procedure: the author of the new use-judgment acquires full control over the resource but needs to provide compensation to the previous owner that covers the current value of the resource. Still, whether one receives resources through appropriation or transfers, those are just different facets of the same power according to ETO. And this power is always present with respect to all resources, irrespective of whether they are owned, or not.

In this way, ETO shows that appropriators do not deny others any opportunities that existed before their activities. This argument puts PDIO to rest together with RDO. The most critical argument against deep private ownership is thusly defused.

8.3. ETO and the justification of appropriation

In 2.3. I reviewed various justifications that have been offered for unilateral appropriation. My conclusion was that all of them are in some way defective, so the question is how ETO can improve upon them.

At first glance, ETO does not offer much new here. Its justification of appropriation is similar to the one offered in (Christmas 2021). Just as Christmas, it sees the right of ownership as an extension of natural liberty. Of course, in contrast to this view, ETO does not fall to RDO, as I argued above.

Notice, however, that the reason why the justification of appropriation is so important for entitlements theories is the fact that appropriation displaces the original right of use. We need a very good reason to permit such violation of individual rights by a private person, and it is against such strict standard these theories need to be evaluated.

For ETO the standard needs to be different. As argued above, it shows that the right of ownership emerges not at the expense of a different right, but in a normative vacuum. As there is no competing right it needs to outweigh, even a weak reason supporting the right of ownership would suffice. And ETO provides such a reason: natural liberty, the default right to do whatever one pleases without an outside interference.

An important objection against rights-based justifications of unilateral appropriation is offered by Rowan Cruft (2006; 2019). He argues that if we believe there is an individual interest that warrants protection by means of private property rights, such interest also necessarily warrants protection by means of assistance rights. Let us say, for example, we believe private property is necessary to protect one's interest in self-preservation. But if we assume that self-preservation is important enough to deserve such protection, why don't we take one step further and conclude that individuals have a right to be *assisted* in their quest to preserve themselves? It therefore appears that the right of ownership implies that people who lack property to take care of their vital needs have to be *given* property. And that, in turn, implies that redistribution, at least in some circumstances, might be justified. Cruft argues that this argument can be generalized: you can substitute "self-preservation" here with any other interest, but you would reach the same conclusion.

ETO is not vulnerable to this objection. The interest it wants to protect is the interest in exercising one's natural liberty unobstructed. Such interest cannot generate any assistance rights, because this is not the kind of activity that can be assisted. Exercising natural liberty is something one can only do by herself. The best others can do to help is not interfere – and according to ETO this is the extent of their duties.

8.4. ETO and the power of transfer

As detailed in 2.4., the power of transfer represents a serious difficulty for all entitlements theories. These theories claim that property rights are initially

acquired by appropriation when prospective owners establish a sort of moral connection between themselves and resources. This connection gives them the right to decide how the respective resource should be used. But this kind of right does not imply by itself that its holders also have the power to transfer said right to others. If you have a moral connection with an object, it does not follow that you can transfer this connection to someone else. Such power requires an additional justification, separate from the justification of appropriation, and entitlements theories typically struggle to come up with one.

In ETO transfers are justified by the same argument as appropriation; in fact, without the possibility of transfer, appropriation does not work as it would become a violation of the right of others to acquire resources as property (see 8.2. above). Both appropriation and transfers are seen as different manifestation of the same power to obtain exclusive control over the value added by one's use-judgement. You can either acquire control over an unowned resource, as it is the case in appropriation, or you can acquire control over the resource owned by someone else, as it is the case in transfer.

Transfers are seen not primarily as an exercise of a specific power of the current owner but as an exercise of a power on behalf of the prospective owner – a power which is of the same species as the power to appropriate. The power of transfer of the current owner only serves a supplementary role. As argued in 5.4., the prospective owner has a duty to demonstrate that her use-judgement is in fact more productive than the use-judgment under which the resource is currently used, and also the duty to compensate the current owner for the loss of her resource. The power of transfer gives the current owner means to ensure that these duties are fulfilled.

Here one might see it as ETO's defect that it seems to be focused on the case where the prospective owner plays an active role in a transfer: the case where she seeks out resources, makes use-judgments on them, and only then, in case resources are already owned by someone else, activates the transfer procedure. One might wonder how ETO deals with transfers that do not fit into this model, namely, inheritances and gifts. In such transfers it is the current owner who plays the active role. It is very often the case (like in inheritances) that the prospective owner would first find herself in the possession of transferred resources and only then would make a use-judgment on them.

And indeed, ETO treats such transfers somewhat differently. The power of transfer exercised by the owner here is grounded – as all other aspects of ownership – in the content of the use-judgment made on a respective resource. In this particular case the owner wants to assist another individual in her goals and grants said individual control over one of her resources as means. Observe that by itself such use-judgment cannot yet transfer ownership; in ETO the only way to acquire ownership is to make and enact a productive use-judgment on a resource and until the prospective owner does that on her side, the resource does not really change hands. The normative effect of the owner's decision to give away her resource is that she, firstly, carves out an exception in her Owner's Claim-Right, waiving it with respect to a specific person; and secondly, she waives away her right to

demand compensation when this person takes up the ownership of the resource. To explain it using ETO's categories, the current owner makes a use-judgement of the form "I might achieve my goal of advancing the interests of X by allowing her to freely acquire this resource that belongs to me".[123]

Now, as we are clear on how ETO solves the most fundamental issue with transfers that entitlements theories typically have, let us take a look at ETO's stance on other transfer-related problems explored in Chapter II.

8.4.1. ETO and the right to income

The first of those problems is the so-called right to income. A popular objection against strong property rights is that they give owners control not just over resources proper but also over any income they generate. As I discussed in 2.4.2., it might seem a bit confusing at first why the right to income represents a specific problem, because it is simply an aspect of transfers: once the right to transfer is justified, the right of income is also justified. But the charitable way to understand this objection is to see it shifting focus to the social effect of the transfer. The income generated by a resource is a product not just of owner's efforts but also of a social context that exists independently of the owner. Or, to put it in a different way, the value of the resource is not its intrinsic property but a relational property: it only becomes valuable in a particular social situation. Even if we believe that there is a relationship between the owner and the resource in virtue of which the owner has the right to control the resource, it does not necessarily follow that the owner is entitled to reap the benefits of such control which are the result of the fact that the resource is situated in a specific social environment.

Barbara Fried (1995, 235–236) explores a case of a land speculator who bought a parcel of land in a rural neighborhood and had the value of her land increased tenfold in twenty years due to the fact that people started to move in the area. She points out that the speculator made no contribution to this rapid increase of her wealth; it was entirely an effect of the actions of the people around her. By what right, she asks, the speculator can claim ownership over this windfall income?

This argument assumes that the value of land is something that is very easy to know: all you need to do is check the land prices. But this is only easy because we have a market system, and the market system is only possible because we have property rights. Imagine the same scenario Fried suggests, but where buying and selling land got banned soon after the speculator bought her land. Suddenly,

[123] One might wonder how this applies to inheritances where the owner is dead and cannot retain ownership until the heir makes her use-judgment. One way to interpret this situation is that by making a will the owner creates a legal person with strictly limited powers that would temporarily take up the ownership mantle between the moment of owner's death and the moment when the heir accepts her inheritance. This legal person is typically represented by the custodian of the estate, appointed in the will.

it becomes not a trivial matter at all to determine whether the value of her land increased or not and if it did then by how much.

In 5.4.2. I explored the social function of speculation. I argued that the contribution speculators make is to ensure that rare resources would be put to the most efficient use by selling them to the highest bidder. This is exactly what we see in Fried's example. Assume for a moment that we do not have a land market. As land has become very rare in her example, we would need to ration it and to determine, somehow, which of the potential uses for the land are the most urgent. In the absence of market prices the only way to come to such decision is by reliance on a staff of bureaucrats. So, the choice is not whether we want to allow a speculator to keep her "unearned" wealth or not, but whether we want to pay speculators or bureaucrats. It could be that speculators are more expensive than bureaucrats. However, they operate under a much better incentive structure and can rely in their decisions on the price mechanism, which does a much better job at collecting and organizing local information than anything with which central planners can come up.[124]

In this way, ETO explains where the right to income comes from: it is a reward for the participation in the procedure of value-discovery. Owners perform crucial social work simply by keeping their resources on the market and making it possible to evaluate use-judgments made on them through the price mechanism. It is true that the value of resources is relational, not intrinsic, but it is not the case that this relationship emerges automatically. It is, in fact, created by owners.

8.4.2. ETO and the problem of political equality

A popular argument against the right to transfer property is that it would eventually lead to accumulation of property in the hands of a few individuals and that, in turn, would undermine the political stability of a particular society as they would be able to convert their wealth into political power. I presented this argument back in 2.4.3. and now it is time to see what ETO has to say about it.

First of all, I need to point out that it is not given that this is a relevant problem for modern society. Political structures we currently observe do not at all look like something we would expect in a society where political power is concentrated in the hands of wealthy elites. Consider, for example, the following. Several hundred years ago taxes were mostly paid by lower classes, and the right not to pay taxes was the sign of power and status. Today the situation is the opposite: those with low income enjoy a variety of tax breaks, and tax burden is mostly taken up by those who have high income. Even though we accept at face value the claims of those who dispute the progressivity of modern tax systems (e. g. Saez and Zucman 2019), it is still undeniable that at least in *absolute* terms the expenses of modern governments are mostly paid by the rich. If we compare modern societies with the pre-industrial ones, the conclusion would rather be that since then the political power shifted away from the hands of the rich.

[124] For more on that see (Hayek 1945; Mises 1975).

Shifted where? One possible answer to this question is to follow the money. The main story of the last century is not the concentration of wealth in the hands of capitalists as some argued (Piketty 2014), but an explosive growth of government expenses and of the share of national income controlled by the bureaucratic apparatus. In the nineteenth century governments spent, typically, between one and ten percent of GDP; today this figure is closer to fifty percent (Our World in Data 2023). Curiously, those who are concerned about the concentration of economic power do not seem to worry about this process at all, handwaving the situation away by pointing out that these Behemoth bureaucracies are democratically controlled.[125] It requires a peculiar intellectual perversion to look at the situation where there is a single entity controlling one half of the economy and lament about the unchecked economic power of a billionaire who controls less than one percent of it.

We do not, however, need to have this discussion here because empirical claims about the distribution of economic power in modern societies are not a part of ETO. Instead of entering this debate, ETO simply says that if the concentration of wealth in private hands represents any danger for political stability, then either the wealth can be taxed away or its use regulated. This is because, as I argued in 6.4., the requirements of the overall system of ownership take priority over any specific right of ownership. If we believe that the system of ownership is in danger and the only way to avoid it is to violate the rights of a particular owner, then ETO gives us a license to do just that.

In this way, the concentration of wealth in private hands is not a theoretical challenge to ETO, irrespective of whether it is a real problem, or not.

8.4.3. ETO and the Irrelevance Objection

What I call the Irrelevance Objection is the claim that entitlements theories, even if correct, are completely unrelated to the modern social situation (e. g. Kymlicka 1990, 158–159; Mautner 1982). Most of resources nowadays are already owned and if we try to trace the history of their ownership down the chain of transfers, we most likely would eventually reach the point where the property rights were acquired in an unjust manner. It follows that historical entitlements cannot do the job of justifying property rights as they currently exist.

The assumption behind this argument is that transfers are normatively barren. The right gets created at the moment of appropriation and then transfers just shift this right around without adding anything to it. If there was any point in the history of the right where it was acquired in an unjust manner, then it is forever defective and nothing can be done to repair it.

[125] I shared my skepticism about this argument in 6.3. Observe also that none of those worried about the excessive wealth in the hands of private individuals would be satisfied by the response that they are kept in check by market discipline, even though it is a much more potent mechanism of accountability than democratic control.

But ETO sees transfers as the same species of action as appropriation. In both cases a productive use-judgment is made on a resource and in both cases we see similar normative consequences. Transfers do not just swap one holder of a right for another but create the right of ownership in the same manner as appropriation does. And it follows that even if there was any kind of defect introduced during appropriation or transfer, it can be gradually ameliorated in the subsequent chain of transfers. In fact, the mere availability of the resource for market transactions can do this job, because as long as the owner keeps it on the market, the use-judgment, under which it is used, is continuously tested against the rival use-judgments.[126]

In this way, ETO is completely immune to the Irrelevance Objection. It does not need to go deep into the history of every resource to justify the rights of its current owner – it only needs to go just deep enough to establish that the resource is currently used under the most productive use-judgment available.

8.5. ETO and Deep Public Ownership

Back in Chapter III I discussed possible ways to justify Deep Public Ownership. I concluded that there is only one compelling path to do that: to present Deep Public Ownership as a manifestation of the original right of use. This path, however, offered a lot of promise because, as discussed in 2.2., the original right of use seemed to be an integral part of any entitlements theory. In this way, Deep Public Ownership could build itself upon a foundation which its opponents cannot coherently criticize.

ETO denies Deep Public Ownership this advantage. In 8.2. above I already discussed how it does not require the original right of use to function. But it goes one step further as it demonstrates that the original right of use cannot possibly exist.

The original right of use needs to be applied either to brute objects or to resources. It cannot be applied to brute objects, because brute objects by definition cannot be used. The right to use them would be similar to the right to draw a square circle, a logical impossibility (see 5.2. for more on that).

But the original right of use also cannot be applied to resources. The concept of resources designates a relative property, not an intrinsic one: it is not what the object is but how it is seen by an agent. The right to use resources can, therefore, only belong to those who stand in the respective relationship to them. To enter such a relationship one needs to perform a specific mental act: the use-judgment.

The right to use resources, therefore, cannot be a universal right that belongs to all from birth. This is always an *acquired* right which an individual has with

[126] These consideration, in conjunction with the idea that ownership has temporal bounds (see 7.2.2.), allow ETO to make sense of legal doctrines of prescription and adverse possession which would otherwise be poorly compatible with justifying ownership by reference to historical entitlements.

respect to a specific set of resources on which she made a use-judgment but not with respect to all that exists. The original right of use, however, is conceived exactly as a universal right which individuals have by default. Therefore, the original right of use cannot be applied to resources.

This leaves the original right of use empty of content: as it does not cover the use of brute objects and does not cover the use of resources, it cannot exist at all. And this, in turn, means that the only promising justification of Deep Public Ownership does not hold ground. In this way, ETO leaves Deep Public Ownership with no foundations.

8.6. Conclusion

In Chapter II and Chapter III I reviewed the current situation in the debate between Deep Private Ownership and Deep Public Ownership. My conclusion back then was that Deep Public Ownership had an upper hand. While the Deep Private position struggles with numerous seemingly overwhelming challenges, Deep Public Ownership does offer a promising argument that capitalizes nicely on the problems which its rival has.

The key insight ETO brings to this debate is the conceptual distinction between brute objects and resources. All other approaches, both on Deep Private and Deep Public side, blend these two categories into one, which leads them to a confusion. On the one hand, they see that by default all individuals stand in an equal position to unappropriated physical objects. On the other hand, they see that those objects are scarce. The latter makes them conclude that appropriation of these objects would harm others, while the former leads to a conclusion that such harm would be unjustified. This conclusion weakens the Deep Private position while strengthening the Deep Public one. But ETO demonstrates that this reasoning is fallacious, because the equality part of it applies to brute objects, but the scarcity part applies to resources. There is no harm to others in laying a claim over a brute object because those are not scarce; and there is no equality when it comes to resources, as for each resource there is an individual who discovered it and this individual stands in a different normative position with respect to this resource than everyone else.

Recall how in the very first chapter I discussed the case of Bill and Jane stumbling upon a watermelon. I pointed out back then that if we ask how they should divide it, the most intuitive answer would be to use some procedure that would take the interests of both of them into account. People typically imagine scenarios of this sort when they think about the origin of property rights and this is what makes the approach of Deep Public Ownership so appealing.[127] ETO allows us now to see clearly what the problem with this scenario is: it presents the watermelon as a resource for both Jane and Bill from the very start, thus skipping the essential part of search and discovery. A scenario more grounded in

[127] See (Ackerman 1980) for a prominent example of such reasoning.

reality would be something like Bill and Jane looking for wild berries and mushrooms. Here our protagonists start in the middle of a sea of brute objects and need to make an effort to discover resources among those. Observe that when we engage in this kind of activity in real life (something that actually happens in contrast to randomly finding a watermelon in the forest), the natural rule is that everyone keeps whatever she finds – just as ETO offers.

In this way, ETO has a potential to dramatically shift the balance of the debate between Deep Private and Deep Public Ownership. As I argued in this chapter, once we trace down the implications of the conceptual distinction between brute objects and resources, we can, on the one hand, ameliorate all the alleged defects of the Deep Private position and, on the other hand, offer a powerful criticism of the Deep Public position. This gives the Deep Private position an upper hand in the debate overall.

Finally, observe that the defeat of Deep Public Ownership would have some very far-reaching implications, because, as I argued in Chapter I, the entire field of distributive justice depends on the truth of this approach. The question of how we should distribute social resources has any relevance only if we first assume that society owns any resources it can distribute. ETO disputes this assumption and offers a different one: resources are owned by individuals from the get-go as every resource is ultimately the product of a use-judgment made in the privacy of an individual mind. Once this alternative assumption is accepted, there is little space left for the considerations of distributive justice. The success of my work, therefore, would greatly diminish the practical significance of this field: it would mostly bear relevance for the decisions made by private individuals, not public institutions.

To what extent my work was successful I will leave for the readers to decide.

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SUMMARY IN ESTONIAN

Ettevõtluslik omanditeooria

Käesolev väitekiri tutvustab ja kaitseb ettevõtluslikku omanditeooriat (EOT), mis käsitleb õigust eraomandile tugeva loomuõigusena. EOT kuulub laiemasse ajaloolise õiguse põhiste omanditeooriate perekonda, mille visandas Robert Nozick oma klassikalises raamatus *Anarhia, riik ja utoopia* (1974, e.k 2018). Need teooriad väidavad, et õigus mingit konkreetset asja omada põhineb teatud ajaloolistel sündmustel – õiglase omandamise ja õiglase üleandmise aktidel.

EOT põhineb Israel Kirzneri ideedel. Kirzner väitis, et loodusvarasid ei tohiks distributiivse õigluse teooriates antuna võtta – tegelikult on nii, et loodusvarad tuleb avastada, enne kui neid kasutada saab. EOT lähtub sellest tähelepanekust ning ehitab sellele üles argumendi loomulike omandiõiguste kaitseks. Selle käigus lõimib see ühtlasi mitmeid ideid Billy Christmasilt, kes arendas välja eraomandiõiguse kasutusepõhise teooria. Nõnda võib EOT-d näha kahe väljapaistava eraomandit õigustava lähenemise sünteesina.

1. peatükis tegelen oma argumendile pinna ettevalmistamisega. Käsitlen seal kaasaegse omandiõiguste filosoofia peamist debatti kui lahingut kahe erineva lähenemise vahel, mida ma nimetan *süvaühisomandiks* ja *süvaeraomandiks*. Süvaühisomandi kaitsjad eeldavad, et kõik ressursid on põhimiselt ühised ja mistahes eraomandiõigusi saab õigustada üksnes nii, et näidatakse nende pärinemist selle algse ühisõiguse teostamisest mõne avaliku võimu poolt. Teisisõnu, kõik ressursid kuuluvad vaikimisi üldsusele, kuid üldsus võib otsustada anda mõned neist eraisikute eksklusiivse kontrolli alla. Süvaeraomandi kaitsjad eeldavad seevastu, et igasugune omand saab alguse eraomandina ning võib ühiseks saada alles siis, kui üksikisikutest omanikud vastavalt otsustavad. Nende kahe lähenemise vahel valib EOT süvaeraomandi poole.

2. peatükis uurin ma süvaeraomandi lähenemise ees seisvaid väljakutseid ning väidan, et hetkel olemasolevad teooriad ei suuda nendega rahuldaval viisil toime tulla. Tolles peatükis käsitletud arvukate probleemide hulgast kerkivad kaks tükki iseäranis esile.

Esimest neist nimetan ma *õiguste väljavahetamise vastuväiteks* (ÕVV). Mistahes süvaeraomandit kaitsev vaade peab võimaldama ühepoolset omandamist, kuna omandiõigus saab pärineda üksnes eraviisilisest tegevusest. ÕVV väidab, et see viib teatud seesmise pingeni. Selleks, et midagi omandada, tuleb vastava ressursiga sooritada mõni tegu, kuid too tegu ise peab olema lubatav. Selline lubatavus tähendab, et meil on üleüldine voli ressurssidega toimetada veel enne, kui nende suhtes mistahes omandiõigus kehtima hakkab – teisisõnu esialgne kasutusõigus. Ühepoolne omandamine vahetab selle esialgse kasutusõiguse välja, ilma et selle õiguse valdajad selleks nõusoleku oleks andnud. See asetab ühepoolset omandamist lubavate teooriate õlule kohustuse sedalaadi väljavahetamist õigustada, mis paneb nad alternatiivide ees kehvemasse seisu, kuivõrd viimastel on võimalik jõuda sama tulemuseni sellist kohustust kandmata.

Teine tõsine probleem seisneb selles, et enim, mida süvaeraomandi vaated õigustada näivad suutvat, on eksklusiivse kasutamise õigus. Kuid üleandmise voli, mis on samuti omandiõiguse lahutamatu osa, poleks eksklusiivse kasutamise õigusega loogiliselt kuidagi seotud ja süvaeraomandi vaated seda ei õigusta.

3. peatükis võtan tähelepanu alla süvaühisomandi vaate. Ma väidan, et ehkki enamik levinud strateegiaid selle kaitsmiseks luhtuvad, on siiski üks, mis tundub vägagi lootustandev – argument, mille järgi süvaühisomand tuleneb esialgse kasutusõiguse teisenemisest kodanikuühiskonna tingimustes. Kõnealune argument ütleb, et kuna ressursse poleks võimalik tõhusalt kasutada, kui kõik oma esialgset kasutusõigust piiranguteta teostama hakkaks, on üksikisikutel kohustus loovutada oma esialgne kasutusõigus avalikule võimule, mis võtab vastutuse reeglite ja eeskirjade kehtestamise eest, mille alusel ressursse kasutatakse. Selline avaliku võimu voli tähendab sisuliselt õigust süvaühisomandile.

Sellele argumendile pole süvaeraomandi kaitsjatel head vastust, sest nad ei saa lükata tagasi selle põhilist eeldust – nagu juba öeldud, näib esialgne kasutusõigus olevat omandamise tarvilik eeltingimus ja seetõttu ei saa süvaeraomandi teoreetikud väita, et sellist õigust ei eksisteeri.

2. ja 3. peatüki ühine järeldus on, et süvaeraomandi ja süvaühisomandi kaitsjate vahelise vaidluse lahendamine sõltub esialgse kasutusõiguse olemasolust – seni, kuni viimast tunnistada, on süvaühisomandi kaitsjad eelispositsioonis. Selles kontekstis saabki ilmseks EOT relevantsus – mitte üksnes pole EOT esialgsest kasutusõigusest sõltumatu, vaid väidab lausa, et sellise õiguse olemasolu on võimatu. Arendan seda argumenti edasi järgmistes peatükkides.

4. peatükk tutvustab EOT peamisi kontseptuaalseid kategooriaid. Kõige olulisemad neist on *pelgad objektid*, *ressursid* ja *kasutusotsustus*. Pelgad objektid on kõik füüsilised objektid, mis universumis olemas on. Ressursid on objektid, mida vähemalt üks üksisik peab kasulikuks. Viimaks, kasutusotsustus on vaimne toiming, mis asetab pelga objekti suhtesse teatud inimliku eesmärgiga, ilmutades nõnda selle kasulikkust ning muutes selle ressursiks.

Eristus pelkade objektide ja kasutusotsustuste vahel loob mõistelise ruumi Kirzneri tähelepanekule, et ükski objekt pole vaikimisi kasutatav. Mistahes objekti kasutamiseks tuleb enne teha ettevalmistavat tööd – *avastada*, kuidas see objekt võiks olla väärtuslik mingite eesmärkide saavutamiseks. Asju, mille suhtes sellist avastust pole tehtud, nimetatakse pelkadeks objektideks, samas kui asju, mille väärtus on avastatud, nimetatakse ressurssideks. Avastamise akt ise esineb EOT-s kasutusotsustuste kujul.

5. peatükis rakendan ma 4. peatükis välja töötatud aparatuuri, et esitada normatiivne argument EOT kaitseks. Meenutagem, kuidas süvaeraomandi teooriate üks peamisi probleeme seisnes tõsiasjas, et ühepoolse omandamise lubamiseks tuleb neil esialgsele kasutusõigusele toetuda, ent samal ajal tunnistada, et sellise omandamise tulemusel see õigus mitte-omandajate nõusolekuta välja vahetatakse. EOT näitab, et sellist asja nagu vaikimisi kasutusõigus ei saa olla, kuna pelkasid objekte ei saa kasutada. Kasutusõigus tuleb *saada* läbi selle, et pelk objekt muudetakse läbi kasutusotsustuse ressursiks. Nõnda asendab EOT kõigile kuuluva ja kõigile maailma objektidele laieneva *üldise* kasutusõiguse paljude

kasutamise *eriõigustega*, mille on saanud konkreetsed üksikisikud konkreetsete ressursside suhtes. See edasiarendus pöörab omandiõiguste õigustamist puudutava vaidluse tervenisti pea peale. Enam pole nii, et omandajatel tuleb teiste ees õigustada seda, et nad nende õiguse välja vahetavad. Otse vastupidi – kõigil teistel tuleks õigustada hoopis tolle kasutusõiguse, mille omandajad endale said, väljavahetamist. Nõnda lahendab EOT õiguste väljavahetamise probleemi.

Siinkohal võidakse vastata, et ehkki omandajaid ei ähvarda enam süüdistus, et nad võtavad teistelt kasutusõiguse ära, võib sellegipoolest öelda, et nad võtavad teistelt ära õiguse neidsamu ressursse omandada. EOT vastab sellele nii, et mõistab omandamise voli üldisema, kasutustotsustustega avastatud netoväärtuse enda valdusesse saamise voli erijuhuna. Seejärel väidab EOT, et sama voli teostatakse ka ressursside ühelt üksikisikult teisele *üleandmisel*. Isegi kui mõnda konkreetset ressurssi ei saa enam (kitsamas tähenduses) omandada, võib selle siiski endale saada üleandmise läbi. Kuivõrd mõlemad juhtumid kätkevad sedasama normatiivset jõudu, tõrjub EOT taaskord süüdistuse, nagu lubaks ta omandajatel teiste normatiivset positsiooni mingil viisil ühepoolselt muuta. Tagatipuks võimaldab kõnealune argument EOT-l omandamist ja üleandmist kokku lõimida, näidates neid üheainsa normatiivse nähtuse eri tahkudena. Nõnda tuleb EOT toime ka teise väljakutsega, mis traditsiooniliselt süvaeraomandi kaitsjaid kimbutanud on.

Töö sellesse punkti jõudes olen ma näidanud, et omandiõigus on moraalne õigus. Samas pole ma veel välistanud, et tegu võib olla väga nõrga õigusega, mille teised moraalsed kaalutlused tühistada võivad. 6. peatükis väidan aga, et omandiõigus on tegelikult kõigi teiste moraaliväidete suhtes ülimuslik. See on ülimuslik üksikisikute nõuete suhtes, sest vastasel juhul lubaksime osadel eraisikutel ühepoolselt teistele koormavaid panna. Ja samuti on see ülimuslik kogukonna nõuete ees, kuivõrd kogukonna eesmärke on parim mõista individuaalsete omanike eesmärkide teatud aspektina.

Ehkki omandiõigus on tugev, on sellel siiski piirid ja 7. peatükis arutan ma nende piiridega seonduvaid peensusi. Esiteks on omandis olevatel objektidel ruumilised ja ajalised piirid, mille piiresse jääb see osa materiaalsest maailmast, mida omanik valdab. Teiseks kaitseb omandiõigus üksnes teatud omanikupoolseid tegevusi – nimelt neid, mis tarvitsevad teiste välistamist. Ma väidan, et ühisomandi võimalikkus on üks nendest kaalutlustest tulenevaid järeldusi.

8. peatükis teen EOT-st kokkuvõtte ja hindan selle teoreetilist mõju. Naasen seal 2. ja 3. peatükis esitatud materjali juurde ja näitan, kuidas EOT vastab kõigile süvaeraomandi vaatele esitatud väljakutsetele. Lisaks väidan, et esialgse kasutusõiguse kõrvalejätmisega valmistab EOT süvaühisomandi ideele tõsiseid probleeme.

CURRICULUM VITAE

Name: Sergei Sazonov
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1. Summary

A philosopher with legal background. I am a fellow at Classical Liberal Institute at New York University School of Law and also a graduate student in philosophy specializing in political philosophy and philosophy of law pursuing PhD at the University of Tartu (Estonia).

2. Areas of specialization and competence

AOS: Philosophical foundations of property rights, philosophy of taxation, distributive justice.
AOC: Normative ethics, political philosophy, philosophy of law, democratic theory.

3. Education

Moscow State University: 2001–2006, specialist in law program, concentration in civil law, graduated magna cum laude ("red diploma").
University of Tartu: 2016–2018, MA in philosophy, graduated magna cum laude.
The topic of MA thesis: "On the Separation of State from Taxes"
Supervisors: Mats Volberg, Helen Eenmaa-Dmitrieva
University of Tartu: 2018 – current, PhD in Philosophy.
The topic of PhD Dissertation: "The Entrepreneurial Theory of Ownership"
Supervisors: Francesco Orsi, Mats Volberg, Helen Eenmaa-Dmitrieva
Expect to defend the dissertation in September 2024.

4. Publications

Published:
Sazonov, Sergei (2022). Private Duty Creation in Theories of Distributive Justice. *Social Theory and Practice* 48 (2):379–401 DOI 10.5840/soctheorpract202231160
Sazonov, S. (forthcoming). The Entrepreneurial Theory of Ownership. *Economics and Philosophy*: 1–19. DOI 10.1017/s0266267124000087

5. Teaching experience

2019/2020 (autumn semester), University of Tartu: Main topics in ethics (co-teaching under the supervision of Francesco Orsi).

2020/2021 (spring semester), University of Tartu: Reading group on Estlund's "Democratic Authority: a Philosophical Framework" (only teacher).
2021/2022 (spring semester), University of Tartu: Main topics in ethics (co-teaching under the supervision of Francesco Orsi).

6. Academic Work Experience

01.10.2023 – current: fellow at the Classical Liberal Institute at New York University School of Law
01.09.2021 – 31.08.2022: junior research assistant at the University of Tartu (Department of Philosophy and Semiotics).

7. Presentations on conferences

– *New Orleans Graduate Conference in Philosophy, 05–06.04 2019* held at Tulane University, New Orleans
– Topic of the presentation: "Duty Creation in Distributive Justice".
– *MANCEPT workshop on Alternate Forms of Government, 09–11.09 2020* organized by the University of Manchester (held in on-line format)
– Topic of the presentation: "Polyarchy revisited: dividing power in liberal democracy".
– *John Locke Conference, 09–11.06 2021* organized by John Locke Society (held in online format).
– Topic of the presentation: "Appropriation through Labor: Entrepreneurial Interpretation".
– *Estonian Annual Philosophy Conference, 23–24.09 2021* held at the University of Tartu
– Topic of the presentation: "Entrepreneurial Theory of Property Rights".
– *III Geneva Graduate Conference in Political Philosophy, 17–18.02 2022* organized by the Department of Political Science & International Relations of the University of Geneva (held in online format)
– Topic of the presentation: "The Entrepreneurial Theory of Ownership".
– *Bucharest Conference in Analytical Political Theory, 09–10.06 2022* organized by Bucharest Center for Political Theory, University of Bucharest.
– Topic of the presentation: "Minimal voting age and the principle of universal suffrage".
– *MANCEPT workshop on Forced Displacement, Refugeehood, and Injustice 07–08.2022* organized by the University of Manchester
– Topic of the presentation: "Hostages or Collaborators? Reflections on the Moral Status of Russian Refugees".

8. Grants, scholarships and awards

2018 – 2022: doctoral allowance, granted by Estonian government (renewed on the yearly basis conditional on satisfactory academic record)
2018 – 2022: doctoral performance stipend, granted by the University of Tartu (renewed on the yearly basis conditional on excellent academic record)

9. Outreach
Spring 2018 – a lecturer in *"Philosophy as the Art of Argumentation"*, a series of introductory classes at the University of Tartu designed for high-school students.

10. Non-academic publications
Sergei Sazonov: "The West should ignore Putin's nuclear blackmail and put an end to the war in Ukraine", Kyiv Independent, 14.03.2022
https://kyivindependent.com/opinion/sergei-sazonov-the-west-should-ignore-putins-nuclear-blackmail-and-put-an-end-to-the-war-in-ukraine/

11. Non-academic work experience
Since 2004 to 2016 I worked as a lawyer on a variety of positions, as an associate in Russian consulting firms and as an in-house lawyer in large Russian corporation. My primary area of specialization was corporate law. The positions I held during this period are listed below.

2004–2005	Law firm "Na Trechprudnom" (consulting firm), paralegal
2006–2013	NP Consult (consulting firm), associate, senior associate
2014–2015	Westside Advisors (consulting firm), associate
2015–2016	Consultant Plus (IT Company, in-house lawyer), senior legal analyst.

Language skills
Russian: native
English: fluent

ELULOOKIRJELDUS

Nimi: Sergei Sazonov
Sünniaeg: 11. juuli 1984
Kodakondsus: Venemaa
Elukoht: USA
Kontakt: ss18648@nyu.edu

1. Kokkuvõte

Õigusteaduse taustaga filosoof. Ma olen teadur New Yorgi ülikooli õigusteaduskonna klassikalise liberalismi instituudis ning poliitika- ja õigusfilosoofiale spetsialiseerunud filosoofiadoktorant Tartu ülikoolis.

2. Uurimisvaldkonnad

Spetsialiseerumisvaldkonnad: Omandiõiguste filosoofilised alused, maksustamise filosoofia, distributiivne õiglus.

Pädevusvaldkonnad: Normatiivne eetika, politiikafilosoofia, õigusfilosoofia, demokraatia teooria.

3. Haridustee

Moskva riiklik ülikool: 2001–2006, õigusteaduse õppekava, rõhuasetusega tsiviilõigusel, *magna cum laude* (“punane diplom”).

Tartu ülikool: 2016–2018, humanitaarteaduse magister filosoofias, *magna cum laude*.

Magistritöö teema: “On the Separation of State from Taxes” („Riigi ja maksude lahutamisest“)

Juhendajad: Mats Volberg, Helen Eenmaa-Dmitrieva

Tartu ülikool: 2018–…, filosoofia doktorantuur

Doktoritöö teema: “The Entrepreneurial Theory of Ownership” („Ettevõtluslik omanditeooria“)

Juhendajad: Francesco Orsi, Mats Volberg, Helen Eenmaa-Dmitrieva

Eeldatav kaitsmine 2024. aasta septembris.

4. Publikatsioonid

Sazonov, Sergei (2022). Private Duty Creation in Theories of Distributive Justice. *Social Theory and Practice* 48 (2):379–401
DOI 10.5840/soctheorpract202231160

Sazonov, S. (ilmumas). The Entrepreneurial Theory of Ownership. *Economics and Philosophy*: 1–19. DOI 10.1017/s0266267124000087

5. Õpetamiskogemus

2019/2020 (sügissemester), Tartu ülikool: Eetika peateemad (koos Francesco Orsiga).

2020/2021 (kevadsemester), Tartu ülikool: David Estlundi raamatu "Democratic Authority: a Philosophical Framework" lugemisgrupp (ainsa juhendajana).
2021/2022 (kevadsemester), Tartu ülikool: Eetika peateemad (koos Francesco Orsiga).

6. Akadeemiline töökogemus

01.10.2023–…: teadur New Yorgi ülikooli õigusteaduskonna klassikalise liberalismi instituudis.
01.09.2021–31.08.2022: nooremteadur Tartu ülikooli filosoofia ja semiootika instituudis.

7. Ettekanded konverentsidel

– *New Orleansi filosoofia kraadiõppurite konverents, 05–06.04.2019,* Tulane'i ülikool, New Orleans
– Ettekande teema: "Duty Creation in Distributive Justice" („Kohustuste loomine distributiivses õigluses").
– *MANCEPT töötuba alternatiivsetest valitsemisvormidest, 09–11.09.2020,* korraldajaks Manchesteri ülikool (veebifromaadis)
– Ettekande teema: "Polyarchy Revisited: Dividing Power in Liberal Democracy" („Veelkord polüarhiast: võimu jagamine liberaalses demokraatias").
– *John Locke'i konverents, 09–11.06.2021,* korraldajaks John Locke'i selts (veebiformaadis).
– Ettekande teema: "Appropriation Through Labor: Entrepreneurial Interpretation" („Omandamine läbi töö: ettevõtluslik tõlgendus").
– *Eesti filosoofia aastakonverents, 23–24.09.2021,* Tartu ülikool
– Ettekande teema: "Entrepreneurial Theory of Property Rights" („Omandiõiguste ettevõtluslik teooria").
– *III Genfi poliitikafilosoofia kraadiõppurite konverents, 17–18.02.2022,* korraldajaks Genfi ülikooli politoloogia ja rahvusvaheliste suhete osakond (veebiformaadis)
– Ettekande teema: "The Entrepreneurial Theory of Ownership" („Ettevõtluslik omanditeooria").
– *Bukaresti analüütilise poliitikateooria konverents, 09–10.06.2022,* korraldajaks Bukaresti poliitikateooria keskus, Bukaresti ülikool.
– Ettekande teema: "Minimal Voting Age and the Principle of Universal Suffrage" („Valimisea alampiir ja üldise valimisõiguse põhimõte").
– *MANCEPT töötuba sunniviisilisest ümberasustamisest, pagulasseisundist ja ebaõiglusest, 07–08.2022,* korraldajaks Manchesteri ülikool
– Ettekande teema: "Hostages or Collaborators? Reflections on the Moral Status of Russian Refugees" („Pantvangid või kollaborandid? Mõtisklusi Vene pagulaste moraalse staatuse üle").

8. Grandid, stipendiumid ja preemiad

2018–2022: doktorandistipendium Eesti Vabariigilt (pikendatakse igal aastal tingimusel, et õppeedukus on rahuldav)

2018–2022: doktorandi tulemusstipendium Tartu ülikoolilt (pikendatakse igal aastal tingimusel, et õppeedukus on suurepärane)

9. Populariseerimistegevus

2018. a. kevadel pidasin Tartu ülikoolis keskkooliõpilastele mõeldud loengusarja „Filosoofia kui argumenteerimiskunst".

10. Mitteakadeemilised publikatsioonid

Sergei Sazonov: "The West should ignore Putin's nuclear blackmail and put an end to the war in Ukraine", Kyiv Independent, 14.03.2022
https://kyivindependent.com/opinion/sergei-sazonov-the-west-should-ignore-putins-nuclear-blackmail-and-put-an-end-to-the-war-in-ukraine/

11. Mitteakadeemiline töökogemus

Aastatel 2004–2016 töötasin ma juristina mitmesugustel ametikohtadel, assistendina Vene konsultatsioonifirmades ja sisejuristina suures Vene korporatsioonis. Spetsialiseerusin peamiselt äriühinguõigusele. Järgnevalt on loetletud mu toonased ametikohad.

2004–2005 Õigusbüroo "Na Trechprudnom" (konsultatsioonifirma), õigusabi
2006–2013 NP Consult (konsultatsioonifirma), assistent, vanemassistent
2014–2015 Westside Advisors (konsultatsioonifirma), assistent
2015–2016 Consultant Plus (infotehnoloogia ettevõte, sisejurist), vanemanalüütik

Keelteoskus

Vene keel: emakeel
Inglise keel: vaba keelekasutus

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