

Sharing Mother Nature's Gifts: A Reply to Quong and Miller

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Note to participants in the *Territory and Justice* conference, Dublin 2010:

This paper is part of a symposium that will shortly be published in the *Journal of Political Philosophy*. It is Part II of this paper – my reply to David Miller – that is relevant to the concerns of our conference and that should be comprehensible even in the absence of David's paper. Of course, I'd very much welcome any comments you might have on *any* part of the paper. Please send them to me at hillel.steiner@manchester.ac.uk . Thanks.

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For nearly forty years now, philosophers working on conceptions of distributive justice have been arguing about whether – and if so, how – responsibility-sensitivity can be an integral feature of their accounts. Some, primarily right libertarians, have contended that it can be if, and only if, the sole foundational right ascribed to individuals is one of self-ownership.¹ Others, primarily strict egalitarians, have tended to agree with them and have consequently rejected both responsibility-sensitivity and self-ownership on the grounds that the unequal distributions which those features underwrite are patently unjust.

Luck egalitarian theories reject both of these positions, though their reasons for doing so vary somewhat from one such theory to another. Left libertarianism is a luck egalitarian theory or, more precisely, a family of luck egalitarian theories. Among their several reasons for rejecting right libertarianism is the fact that it *fails* the responsibility-sensitivity test. The underlying source of this failure is its assignment of greater Hohfeldian powers and privileges to members of temporally prior generations than to their immediate successors. More specifically, right libertarianism licenses those earlier persons to acquire more unencumbered property rights in natural resources than would, in Locke's familiar phrase, 'leave enough and as good' for

¹ A right is *foundational* – non-derivative – if (a) it is one that can be exercised to create other rights, and (b) it is not one that has been created by the exercise of another right; cf. Hillel Steiner, 'Moral Rights', in *Oxford Handbook of Ethical Theory*, ed. D. Copp, (Oxford: Oxford University Press, 2006), pp. 472-3, and 'Are There *Still* Any Natural Rights?', in *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy*, eds. M. Kramer, C. Grant, B. Colburn & A. Hatzistavrou, (Oxford: Oxford University Press, 2008), p. 240.

those others. Since no one is responsible for (the starting-point of) his or her own temporal location, and since being vested with such extensive control of natural resources endows those who have it with (at least) superior bargaining power, such unequal distributions as result from exercises of those unequal bargaining powers are far from being describable as responsibility-sensitive.²

Left libertarians, and luck egalitarians generally, reject strict egalitarianism on a number of grounds, primarily ones bearing on moral implausibility. Strict egalitarianism underwrites levelling down, exploitation, the ‘slavery of the talented’, and the indiscriminate subsidization of expensive tastes.³ Since, although not strictly sources of incoherence, at least some of these morally undesirable features are commonly held to be unjust, strict egalitarianism looks to be ineligible as an account of the demands of distributive justice. Accordingly, the account of distributively just rights sought by left libertarians is one that compossibly vests *all* moral agents with the right of self-ownership, that accurately tracks responsibility-sensitivity, and that precludes levelling down, exploitation, the ‘slavery of the talented’, and the indiscriminate subsidization of expensive tastes. As a set of just rights, it constitutes a standard for the moral assessment of sets of legal rights, and is thus determined independently of them. And that independence implies that those rights are global in scope: their correlatively entailed duties are ones owed by each self-owner to all others, and not merely to fellow inhabitants of the same legal jurisdiction.

For some left libertarians, myself included, these parameters have been taken to imply that every moral agent is justly vested with two foundational rights: a right of self-

² Elsewhere, I’ve further argued that right libertarianism is strictly incoherent since, by thus permitting a subset of self-owning persons unilaterally to acquire unencumbered ownership of *all* natural resources (including land, space, etc.), it implies that, in the absence of those owners’ waivers, later arrivals are encumbered with *unperformable duties of non-trespass*, the enforcement of which violates those later arrivals’ self-ownership: that is, the property rights of those resource owners are *impossible* with the later arrivals’ self-ownership rights; cf. ‘Responses’, in *Hillel Steiner and the Anatomy of Justice: Themes and Challenges*, eds. S. de Wijze, M. Kramer & I. Carter (London & New York: Routledge, 2009), p. 241.

³ One version of a *discriminating* subsidization of expensive tastes takes the form of compensation owed solely to those persons who are not responsible for their own expensive tastes. With whom this compensation liability rests – taxpayers generally, or specific others – is less than clear in some luck egalitarian theories; cf. Hillel Steiner, ‘How Equality Matters’, *Social Philosophy & Policy*, 19 (2002), 342-56, pp. 353-4.

ownership and a right to an equal share of the value of global natural resources.⁴ And since natural resources encompass geographical sites, the global extension of those rights has been taken to be the sole constitutive basis for determining the just scope and content of states' territorial rights. However, the preceding essays by Jonathan Quong and David Miller respectively mount serious challenges to these inferences, and it is to these challenges that I now turn.

I. QUONG ON INDIVIDUAL RIGHTS

Quong's well-crafted challenge is directed at left libertarianism's self understanding as a form of luck egalitarianism. Endorsing many aspects of left libertarian theory, he contends that it would be more securely grounded if its self-ownership right were conjoined with the Rawlsian conception of distributive equality, rather than the luck egalitarian requirement that distributive inequalities due to brute luck be eliminated. His reason for this contention is that the kinds of equality advanced by left libertarianism's luck-neutralising rights are either insufficiently egalitarian or inconsistent with universal self-ownership.

As Quong's essay indicates, different left libertarian theories conceive of those luck-neutralising rights differently: some construe them as rights to equal opportunity sets while others, including my own, construe them as rights to equal resources. Both construals are subjected, by Quong, to probing criticism. In replying to him, I'll confine myself to his arguments against the equal resources construal.

In that regard, he aptly distinguishes between two resourcist accounts of left libertarian egalitarianism: *strict* resourcism and *expansive* resourcism. On the strict resourcist view,

each person has a claim to an equally valuable share of worldly resources,
where those resources include only the raw (that is, unimproved)

⁴ It would be more accurate to say, at least in my own case, that these two rights (i) are not entirely independent of one another, for the reason given in fn. 2 above, and (ii) are *near-foundational* ones, insofar as they're both immediately and uniquely implied by a foundational right to equal (negative) freedom; cf. Hillel Steiner, *An Essay on Rights* (Oxford & Cambridge, Mass.: Blackwell, 1994), pp. 208-36.

resources of the external world. Specifically excluded from this metric are what Ronald Dworkin calls personal resources, that is, an individual's natural talents or abilities. Thus, provided each person is allocated an equally valuable amount of external worldly resources at the outset of their adult life (or over the course of their life), and provided this allocation is done without infringing anyone's self-ownership rights, the theory achieves a reconciliation of self-ownership and equality.

The problem with strict resourcism, as Quong notes, is that it's insufficiently egalitarian. In the two-person world of Able and Infirm, the latter's genetically-driven disabilities entail that even an equal division of external resources would still lead to their respectively enjoying vastly unequal standards of living.

It is this consideration - along with the aim of resolving what I've called the 'paradox of universal self-ownership'⁵ - that has motivated the expansive resourcist conception of left libertarian egalitarianism. Quong's characterisation of this conception is as follows:

Instead of limiting worldly resources to the raw materials of the external world only, this approach includes two new elements in the resourcist metric: (a) germ-line genetic information which determines individuals' natural talents and abilities, and (b) brute luck whose source is entirely natural (that is, events for which no person can be held responsible), and for which insurance was not available. By adding these two new features into the basket of natural resources, the theory aims to ensure that people like Infirm ... need not be disadvantaged by their disability. Instead of simply giving Able and Infirm equally valuable shares of external worldly resources, the theory declares that Able's greater natural talents mean that he is in possession of more than an equal share of natural resources – in this case he possesses a more valuable share of germ-line genetic information than Infirm, and thus the distribution of worldly resources must be adjusted to accommodate for this fact, perhaps by giving Infirm a much larger share of external resources.

⁵ Cf. Steiner, *An Essay on Rights*, pp. 237-49, and 'Universal Self-ownership and the Fruits of One's Labour: A Reply to Curchin', *Journal of Political Philosophy*, 16 (2008), 350–5.

This characterisation errs in two respects: one of them minor, but the other being of some significance. I'll explore that second error presently.

The minor one is due to the fact that element (b) is already included in the strict resourcist metric, and for a reason which Quong himself previously advances.

Suppose that Infirm is disabled as a result of a natural disaster on his half of the world that was wholly unpredictable (and the kind of disaster for which insurance was unavailable). In this [brute luck] context it seems very plausible to say that Able has been given more than an equal share of the world's resources since Able benefitted from living in a more valuable area where the disaster did not occur. It seems inconsistent with strict resourcism, even on its own terms, to allow the resulting inequality between Able and Infirm to persist since the cause of the inequality is an unequal division of nature's bounty, in this case, the bounty of living in an area not struck by disaster.

That is, the strict resourcist's equal division of natural resources straightforwardly implies that the comparative extent of each person's share of them reflects, *inter alia*, their comparative vulnerability to natural disasters.⁶ So the *only* factor making for the expansiveness of the expansive resourcist conception is its inclusion of germ-line genetic information in the basket of natural resources.

In Quong's view, this inclusion, while neutralising the source of strict resourcism's morally implausible equality-deficit, replaces that shortcoming with one that is, from a philosophical standpoint, even more serious: namely, inconsistency. For, he claims, it is possible to envisage circumstances in which, as with right libertarianism, one person's natural resource entitlement – in this case, *equal* entitlement – is impossible with another's self-ownership: that is, there can be cases where 'we have a conflict between the two pillars of left-libertarianism'.

⁶ More generally, left libertarianism construes the distributive impact of a person's brute luck as being reducible without remainder to what we might call Mother Nature's blessings and adversities, and it insistently distinguishes these from the respective distributive impacts of both (a) that person's own choices, and (b) the choices of other persons; cf. Steiner, *An Essay on Rights*, pp. 277-9, and 'Choice and Circumstance', *Ratio*, X (1997), 296-312, *passim*, and 'How Equality Matters', pp. 348-53. In 'Responses', 249-50, I further suggest that, if the *reasonably unforeseeable* consequences of a chosen action count as instances of brute luck, they should be causally attributed to Mother Nature's doings, and both their costs and benefits should accrue to Mother Nature's owners.

Suppose we again have our two characters: Able and Infirm. Infirm is severely disabled in a way that means he cannot personally make use of raw natural resources – they are only valuable to him as a means of trading with others. To fully compensate for Able’s much more valuable possession of germ-line genetic information, we would have to give the whole external world to Infirm. Even though, under this solution, it is *rational* for Able and Infirm to reach some agreement of services in exchange for resources, it nevertheless remains the case that we have a conflict between the two pillars of left-libertarianism. An egalitarian distribution of the world’s resources requires giving the whole external world to Infirm, but this conflicts with Able’s self-ownership since Able cannot, under these conditions, effectively own himself without Infirm’s consent. After all, Infirm owns the whole external world, and thus Able will not be permitted to move, or even exist (since existence requires the use of physical space) anywhere without Infirm’s consent. The upshot is that the egalitarian requirement of left-libertarianism (giving the whole external world to Infirm) effectively strips Able of his self-ownership since his mere existence makes him a necessary trespasser: someone who cannot avoid violating other people’s landed property rights.

Quong is certainly correct to suggest that, *if* Able has no entitlement to external resources, his self-ownership is invalid. Is it true that he has no such entitlement?

I think not. What has probably led Quong to believe otherwise is his re-deployment of the two-person-world model in a case where it *ex hypothesi* cannot apply, and his consequently mistaken inclusion of *germ-line* genetic information in the natural resource bundles respectively possessed by Able and Infirm. For the source of their differential natural talents is not *their own* germ-line genetic information. Indeed, it’s entirely possible that they may each possess no germ-line genetic information whatsoever.⁷

What *is* true, and what is of the essence for the expansive resourcist conception, is that their differential natural talents – Infirm’s disabilities and Able’s abilities – are the

⁷ That is, they may each be sterile or barren.

manufactured *products* of germ-line genetic information. More precisely, their differential natural talents are the products of production processes undertaken by their respective procreators whose chosen acts of procreation amounted to *appropriations* of germ-line genetic information.⁸ And hence, like the appropriators of any other kinds of scarce natural resource, left libertarianism requires them to pay compensation for their appropriation and in proportion to the value of what they appropriate. Accordingly, and as Quong himself acknowledges, in a two-*family* world, Able's procreators will be net compensators of Infirm's procreators.

[T]o be exact, in Steiner's theory it is Able's *parents* who must pay into a 'global fund' which compensates Infirm's parents, since it is the parents who appropriated the relevant germ-line genetic information when they conceived Able and Infirm.

Presumably, the amount of that payment, in reflecting the value of that appropriated germ-line genetic information, will be (as with any other factor of production) a function of the value of its product – Able's natural talents – and, thus, of what people would pay to acquire (the non-natural equivalents of) such talents: it will reflect the cost of enabling Infirm to acquire those equivalent talents.⁹

Since it is Able's parents – and not Able – who owe that compensation, Able's entitlement to an equal share of external natural resources remains entirely intact. And hence there is nothing in this expansive resourcist account that brings his or anyone else's self-ownership rights into conflict with egalitarian natural resource rights: expansive resourcism fully sustains their compossibility.

It is, of course, possible that Able's natural talents are so valuable that no amount of resources available to his parents is sufficient to cover the compensation they owe for appropriating those talents' valuable production factors. But this kind of eventuality –

⁸ Cf. *An Essay on Rights*, pp. 246-9, where I also discuss how this germ-line genetic information, despite being located within the precincts of a self-owned body, can be construed as an unowned (until appropriated) natural resource.

⁹ An important, and difficult, question is whether – and if so, how – Infirm's parents can be understood to bear a duty to apply that compensatory payment to offsetting his disabilities. I address this, too briefly, in *An Essay on Rights*, pp. 248, 275, and at somewhat greater length in 'Silver Spoons and Golden Genes: Talent Differentials and Distributive Justice,' in *The Genetic Revolution and Human Rights: The 1998 Oxford Amnesty Lectures*, ed. J. Burley (Oxford: Oxford University Press, 1999), *passim*, where I also explore the inferable distribution of compensatory rights and duties consequent upon the emerging prospect of germ-line genetic information becoming artefactual rather than being a natural resource.

debtors' insufficient funds – is a contingency that besets *any* theory (and, indeed, practice) of just compensation, and is not one that exposes any inconsistency between those two left libertarian rights. More generally, the fact that some rights violations – especially horrendous ones - cannot be fully redressed by their perpetrators is not normally taken to impair the coherence of the principles generating those rights

In short, strict resourcism – like right libertarianism - suffers, not only from its equality-deficit, but also from its failing the responsibility-sensitivity test, by neglecting to take account of the fact that persons are *not responsible* for their own genetic endowments nor, therefore, for their own natural talents nor, therefore, for the distributive consequences that flow from them. Expansive resourcism corrects for both this omission and that equality-deficit by recognising that those endowments and talents are the products of nature-appropriating acts for which other persons are responsible.

II. MILLER ON TERRITORIAL RIGHTS

Since individuals' just entitlements to natural resources straightforwardly encompass property rights in geographical sites, we might reasonably suppose that the justness of states' territorial rights is entirely predicated on their being consistently derivative from those property rights. For, in the absence of a state, the various kinds of conduct that others owe, as a matter of correlative duty, to the just owner of a geographical site, seem entirely to correspond to the conduct which David Miller correctly describes as that which states claim powers to regulate, as a matter of their territorial rights.

Indeed, in a famous passage describing the generic powers that a right-holder has with respect to the conduct required by *any* particular correlative duty, H.L.A. Hart observes:

In the area of conduct covered by that duty the individual who has the right is a *small-scale sovereign* to whom the duty is owed. The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or

threatened breach of duty he may leave it 'unenforced' or may 'enforce' it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise.¹⁰

The powers that pertain to the duties controlled by such landowners seem to have *identical counterparts* in what Miller lists as the three main elements of states' territorial rights: (1) the right to regulate the conduct of persons present within their domains and to penalise breaches of those regulations; (2) the right to control and use resources present in those domains; and (3) the right to regulate the movement of goods and people across the boundaries of those domains.

It's plain, I take it, that no coherent set of rights can be such as to vest control over one and the same duty in more than one individual or agency. Otherwise, the possibility of their respectively delivering mutually opposed decisions on whether omission of the duty-act is permissible or impermissible – their respectively waiving and demanding its performance – would signify the presence of a contradiction in that set. So, if landowners' just property rights are to be compossible, and not in conflict, with states' just territorial rights, it must be the case that either (a) some ceded elements of landowners' rights are what constitute states' territorial rights, or (b) some ceded elements of states' territorial rights are what constitute individual landowners' rights.¹¹

Miller's central contention is that it's a philosophically open question as to whether (a) or (b) is the case. He asks

[H]ow are property and territory related conceptually? Or to put the question in a more pointed way, are territorial rights simply collective property rights – property rights that have been pooled for certain

¹⁰ H.L.A. Hart, *Essays on Bentham*, (Oxford: Oxford University Press, 1982), pp. 183-4, (emphasis added).

¹¹ In this regard, Miller aptly cites A.M. Honoré's canonical essay on ownership which perspicuously displays its composite nature and the consequent interpersonal separability of the several incidents comprising it. The various claims, powers, immunities and liberties that pertain to any piece of land can be interpersonally dispersed and need not all be vested in one and the same person or agency: there need not be what Honoré calls *full liberal ownership* of that land.

purposes, as Steiner's analysis would suggest? I do not think that either concept can be reduced to the other: owning and governing are simply different activities. It is not difficult to conceive of property without territory and territory without property, whatever we think about the feasibility or desirability of these possibilities. The first would be exemplified by an area of land populated by individual owners who settled any disputes between them by bilateral negotiation, without any commonly enforced body of rules. The second would be exemplified by a group of people – a tribe or clan – living in a territory under the auspices of a common set of rules, but without any individual rights of ownership, in either land or possessions. So if we are going to show that one of these notions is primary and the other derivative, this has to be done by normative rather than conceptual argument: we would have to show that territorial rights can only be *justified* via property rights, or vice versa.

Is it true that conceptual argument can have no bearing on the issue of whether states' territorial rights are primary or derivative, and that this can only be determined normatively?

I think not. What's certainly true, as Miller correctly reports, is that Locke – and, for that matter, libertarians generally - hold the view that it is states' territorial rights that are the derivative ones here. And it's equally true that they deploy normative arguments in support of that view. But there is also a conceptual argument underpinning those normative ones – an argument of sufficient complexity that it needs to be taken in steps.

Miller claims that the conceptual possibility of those territorial rights being primary and non-derivative ones is exemplified 'by a group of people – a tribe or clan – living in *a territory* under the auspices of a common set of rules, but without any individual rights of ownership, in either land or possessions' (emphasis added). What is it, we need to ask, that *identifies that territory and demarcates its boundary*, the bounded jurisdiction of those rules? For unless 'that territory' refers to the entire globe, unless that tribe or clan encompasses the entire human species, the set of geographical sites comprising that territory can be only a subset of all the geographical sites there are.

To whom do those other sites – particularly the adjacent ones¹² – belong? It may be, of course, that they similarly belong to tribes or clans each ‘living under the auspices of common sets of rules, and without any individual rights of ownership, in either land or possessions’. Or it may not: some or all of them may be fully owned by individuals, or entirely unowned. Regardless of which of these is the case, it seems clear that the tribe living on one side of that boundary must regard the sites on its other side either as unowned or as belonging to others. Whether those others are groups or individuals, whether those domains are large or small, doesn’t appear to have much bearing on the nature of the powers and rights vested in their respective owners. A Martian lawyer (!), observing this situation with the aid of his long-range telescope, would be hard put to spot any difference between these respective domain owners’ entitlements: he would not see any difference of content between the tribal territorial rights on one side of that boundary and the individual property rights on the other.

Nor is there any very strong historical pedigree for a conceptual distinction between territorial rights and property rights. Thus G.W. Paton, in his authoritative text on jurisprudence, conjectures that the principal reason for distinguishing between public and private law – between the domain of state authority and that of individual ownership and contract - is to accord due recognition to the ‘importance of the peculiar character of the State’. But he then immediately proceeds to comment that

[n]evertheless, this distinction has not always been clearly marked. Until the State itself has developed, public law is a mere embryo. Even in the days of feudalism there is much confusion; for no clear line can be drawn between the public and private capacities of the king. Jurisdiction, office and even kingship are looked upon as property - indeed public law might almost be regarded as ‘a mere appendix’ to the law of *real property* so far as the feudal ideal is realized.¹³

¹² What counts as ‘adjacent’ is itself an issue of some complexity, since there’s nothing inconceivable about non-tribe/clan members inhabiting sites that are *spatially interspersed* amongst those inhabited by tribal members; cf. Hillel Steiner, ‘May Lockean Doughnuts Have Holes? The Geometry of Territorial Jurisdiction’, *Political Studies*, 56 (2008), 949-56.

¹³ G.W. Paton, *A Text-book of Jurisprudence* (Oxford: Oxford University Press, 1972), p. 328 (emphasis added). Paton’s point appears to be acknowledged by Miller in his reference to *absolute monarchy* which, however, he describes as a ‘special case’. But it’s fairly clear that, whatever it is that makes a case ‘special’ in this regard, it can’t be historical rarity.

Nor, it should be added, is it clear how changes in the *form* of a state's government – from, say, feudal monarchy to constitutional monarchy or republic and to parliamentary democracy – can, in themselves, entail any changes in the nature of that state's rights: changing the right-holders is not normally regarded as entailing a change in the content of the rights they hold. So, again, the distinction between territorial rights and property rights appears to be something less than a deeply conceptual one.

How does this conceptual argument bear on the issue of whether states' territorial rights are derivative from individuals' property rights? What it shows us, I think, is that this issue turns, not on whether there are essential differences between those two types of right – in the absence of any interpersonal dispersion of their Honoré incidents, there aren't – but rather on whether *any* rights ascribed to groups must be derivative from rights ascribed to individual members of those groups and, if not, under what conditions those two sets of rights can be subsets of one and the same set of compossible rights. Not unrelatedly, a further question of some significance here asks for the conditions under which various groups' respective territorial rights form a globally compossible set. All of these, it should be noted, are conceptual – not normative – questions. And answers to the first two are best found by addressing the third.

What is necessary to ensure the compossibility of different groups' territorial rights? What ensures that one group's claims, to the forbearance of others from farming in valley X or hunting in forest Y, are not identical to the claims of another group? In asking about 'territorial rights' here, we are evidently not referring to *legal* territorial rights – those which are actually enforced – but rather moral ones. If the rights under consideration here were merely legal ones, the answer to those questions would be reasonably clear: what would ensure that group G₁'s legal claim is not identical with group G₂'s legal claim is simply the *fact* of one group's occupation of X and Y and the superior force that it exerts to exclude the other's would-be occupants. But, as Miller says,

we .. need some criterion of rightful occupation, since plainly simple *de facto* occupation is not enough – no group could get rights in land merely by pushing off the existing occupants and replacing them with its own members...

If, then, it's with *rightful* territorial rights that we're concerned, what's evidently required to ensure their aforesaid global compossibility is some global distributive rule: ideally, some formula that, for any potential instance of rivalrous (i.e. identical) group claims, yields a determinate answer as to which one of them is rightfully valid.¹⁴

There are, in principle, many conceivable candidates for such a rule. One fairly obvious rule would favour the claim of the group in effective possession of that site at some (arbitrarily?) stipulated date. Another would favour the claimant group who are that site's historically earliest occupants. A third might favour the claim of the group with the least other territorial claims. And still another might favour the claim of the group with the greatest prospect of using that site productively. And so forth. The possibilities, if not infinite, are evidently numerous.

Three things seem clear. One is that any argument as to which inter-group distributive rule is valid must, as Miller would presumably agree, be a normative argument: it must be an argument invoking some conception of *justice between groups*. A second is that the groups in question must each have the attributes of *agency*: since a significant proportion of the several incidents constituting states' territorial rights are Hohfeldian powers, the holders of those powers must be conceived to be capable of exercising them. And third, it looks to be very difficult to form a conception of justice between groups that is not one derived from some conception of *justice between individuals*. But as this third contention might be thought to be controversial, it needs some defence.

Its primary line of defence, I think, is again a conceptual argument rather than a normative one. And it begins with the observation that a conception of group agency as being entirely non-dependent on individual agency is not easy to imagine. Much of the philosophical action here, of course, revolves around the interpretation of 'non-dependent'. But at least this much seems to be uncontroversially true: that a group -say, of kindergarten children - *none* of whose members possesses the attributes of agency, is itself an implausible subject of their possession. That being so, no decision

¹⁴ This is not to deny the possibility of piecemeal settlements of particular disputes, e.g. by negotiation between rival claimants. But even such negotiations must operate under the auspices of a global formula that distinguishes eligible from non-eligible parties to those negotiations.

emanating from that group could count as an exercise of a power, a granting or withholding of consent to the non-performance of a correlative duty. So at least one member of any power-holding group must count as an agent, and the question thereby becomes ‘Given that her decisions *can* count as ones exercising powers, how can they be construed as ones exercising the powers of the *group*, rather than solely of her own?’. What is it that grounds her powers in a group right and not, as with an absolute monarch, in her own personal right?

To this, there are two very different standard responses. One of them presupposes that other members of the group are also capable of agency, ascribes powers to them, and postulates their having exercised those powers to authorize her: that is, they have transferred, to her, powers which severally belonged to each of them and which, aggregated, are constitutive of the group powers which she exercises. The second response does not presuppose agency on the part of the group’s other members and, instead, grounds her powers directly in their interests. Now, as different as these two responses are from one another, what is common to both of them is that the group powers involved are conceived as derivative from individual members’ entitlements. In the first response, that entitlement is each individual’s authority personally to control the (deontic status of the) duty-acts owed to him or her by others. And in the second response, it is individuals’ claims to have their interests served by those others’ duty-acts.

Where normative argument about states’ rights finds its proper role, then, is *not* in answering the question of whether those rights are primary or derivative: they’re pretty clearly derivative. Its proper role lies, rather, in determining the content of those individual entitlements in order to derive, from that content, what is to count as justice between groups. That group rights, including states’ territorial rights, are derivative from their members’ rights is *not* itself a deliverance of normative argument.

Limitations of time and space evidently preclude any extensive review, here, of the reasons supporting the left libertarian account of the content of individuals’ just entitlements.¹⁵ Instead, I’ll focus attention on the challenging objections that Miller

¹⁵ Perhaps one very general point worth making is that interpreting them in terms of *interests* looks to be an unpromising exercise inasmuch as, whatever is held to constitute such interests, there is no reason why duties to serve those interests – and the individual and group rights which they correlatively entail

levels at what I take to be the core elements of that account's understanding of natural resource owners' property rights. Those objections pertain to the issues of (i) whether that account has some provenance in its Lockean and Kantian counterparts, and (ii) whether its metric, for the valuation of those resource rights, is coherent. The unifying burden of Miller's objections is his contention that I 'fail to show that there can be well-defined property rights, equally distributed, prior to the existence of political authority'.

As he notes, Locke's, Kant's, and my own definition of justice converge in a rule vesting each person with a right to equal freedom. From this foundational right flow each person's rights to self-ownership and to an equal share of natural resources. That the right to equal freedom generates those two rights is, perhaps, more familiarly discerned in the accounts of Locke and left libertarianism than in that of Kant. Nevertheless, and notwithstanding his strictures against the ownability of persons, self-ownership looks to be the plausible interpretation of what Kant advances as the immediate implication of each person's 'innate right' to freedom, namely

innate *equality*, that is, independence from being bound by others to more than one can in turn bind them; hence a man's quality of being *his own master*.¹⁶

More obscurely, and as Miller reports, 'Kant concedes that each person has an equal original right to the surface of the earth'.¹⁷ This right is inferable from his concept of an 'original community of land (*communio fundi originaria*)' which he presents as an *a priori* idea of practical reason and one which is presupposed by personal (and thence national) titles to particular portions of land – titles which are somehow the products of ahistorical contractual undertakings given by something denoted as humanity's General Will.¹⁸

– need be compossible. Since the only apparent formula for resolving such conflicts – namely, one rejecting those conflicting rights that represent less than the greatest attainable level of interest-service in any given circumstance – collapses sets of such rights into some form of utilitarianism, interpreting rights in terms of interests lends support to Bentham's famous charge that moral rights are conceptually and normatively redundant.

¹⁶ Immanuel Kant, *The Metaphysics of Morals*, (ed. and transl.) Mary Gregor, (Cambridge: Cambridge University Press, 1991), p. 63.

¹⁷ The reasons why this might be thought to be a *concession* on Kant's part will emerge presently.

¹⁸ Kant, *The Metaphysics of Morals*, pp. 71-4.

In view of these strong foundational affinities, how do Locke, Kant, and left libertarians manage to draw such different conclusions about the relation of individual property rights to states' territorial rights? Thus Miller asks:

[W]here should we locate Steiner's position on the map which has Locke at one pole and Kant at the other?

The answer, I believe, is best found by redrawing that map, placing Locke *near* one pole and *Hobbes* at the other, with Kant located somewhere between them. For this redrawn map takes more precise account of the fact that the comparative location of these writers' theories is a function of two factors, not one. We might label these two factors, respectively, as the *Identification Question* and the *Compliance Question*.

The Identification Question asks whether there can be a rationally derived, independent moral standard for identifying each individual's rightful possessions – a standard independent of positive law, and one with reference to which the justness of both *legal* property rights and, more generally, the actions of political authorities can be assessed. Locke and Kant – unlike Hobbes – both return an affirmative answer to this question. Without claiming that this standard will invariably yield a determinate answer in every case of disputed rights, they nonetheless hold that there is no necessary identity between what is just and what is legal, and that the powers justly ascribable to political authorities are limited accordingly.

The Compliance Question asks whether, in the absence of an established legal system and political authority, individuals are rationally capable of complying with the demands that respect for others' rights imposes on them. Kant and Hobbes – unlike Locke – both return a negative answer to this question. In Hobbes' case, this response follows directly from both his account of human motivation and his aforesaid denial that there can be any such identifiable rights to respect. And while Kant does not share that denial,¹⁹ he does appear to accept something very like Hobbes' account of motivation. For, in the absence of political authority,

No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by

¹⁹ Since, for him, as Miller notes, 'In the state of nature a person can recognize another as the rightful possessor of external things '.

bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, *when he can quite well perceive within himself the inclination of men to lord it over others as their master* (not to respect the superiority of the rights of others when they feel superior to them in strength or cunning)?²⁰

Whether Kant can, consistently, endorse such a motivational account seems, at the very least, unclear and, in any case, need not detain us here. Nor is it clear, as Locke and libertarians might observe, how he can suppose that the assurance-deficit which is said to infest the state of nature could be made good by similarly motivated political authorities. What *is* clear is that the consequences of that endorsement and supposition are, as Miller reports, (i) that Kant regards any instance of rightful possession as merely 'provisional' until it receives legal authorization, and (ii) that he vests individuals with powers to conscript one another into political society.

So the affinities between the Lockean, Kantian, and left libertarian accounts of justice lie in (1) their common foundational right to equal freedom, (2) their endorsement of each person's basic rights to self-ownership and to some kind of equal share of natural resources, and (3) their view that persons' just property entitlements are broadly identifiable independently of any legal authorization. But there are also significant differences. For, in addition to that conscription power, which is nowhere to be found in Locke and left libertarianism, Kant embraces the right libertarian position on natural resource appropriation – namely, an unencumbered *right of first possession* – which, as Miller says, is not derived from his foundational right to equal freedom. Nor is it easy to see how it could be: that is, how each person, being vested with an 'equal original right to the surface of the earth', could rationally consent to a right of first possession or, at least, to any unencumbered right of first possession.²¹ And Miller is again correct in finding Kant's somewhat tortuous account, of the rights created by bequest, to be one which presupposes the existence of a legal system.²² (Locke's views on property rights acquired by posthumous succession are equally confused, at

²⁰ Kant, *The Metaphysics of Morals*, p. 122 (emphasis added).

²¹ Since, as we saw previously with right libertarianism, an unencumbered right of first possession permits a subset of self-owners to appropriate the entire world and, thereby, to impose upon other (later) self-owners a duty of non-trespass which is both unfulfillable and enforceable.

²² And which, therefore, is precluded from generating just rights; cf. Steiner, *An Essay on Rights*, pp. 249-61, where the institution of bequest is shown to be logically dependent upon a *legal fiction*.

once embracing *both* an unencumbered right of bequest *and* an independent right of inheritance.)²³

Hence, the issue of whether left libertarianism's just property rights enjoy some provenance in their Lockean and Kantian counterparts must turn on a judgement as to (a) whether their foundational affinities outweigh those differences, *and* (b) whether those counterparts' differences are consistent with Locke's and Kant's foundational principles. In my view, the answer to (b) is clearly 'no'.

Since those property rights, and thence states' territorial rights, are held by left libertarians to be derived from exercises of the basic individual right to equal natural resources, it's crucially important to ascertain whether their account of that right is coherent. Miller contends that it's not, arguing that it suffers from radical indeterminacy which is remediable only by postulating the prior existence of political authority. This indeterminacy is said to be due to that account's failure to take sufficient notice of the Honoré-separability of the components of property rights and its failure to supply a clear metric for assessing the value of heterogeneous natural resources.

Let's consider the metrication problem first. Here Miller rightly notes that *An Essay on Rights* reports a change of view from my earlier papers, which had rejected the use of market prices as the standard for determining resource values. The grounds offered for that earlier rejection were that the impartiality of market prices, as a metric for that valuation, is tainted inasmuch as the size of later arrivals' initial shares would thereby be determined by reference to the set of prices already formed by (the set of exchanges based upon) their predecessors' preferences. However, it has since become unclear to me why (I ever believed that) the use of that set of prices adversely affects later arrivals' shares. Why?

In order to keep things simple, we'll consider a world with only two kinds of natural resource: arable fields and coastal beaches, in equal numbers of acres. To this world we bring two successive generations: an earlier one which is predominantly

²³ Cf. A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), pp. 204-12.

industrious (EI), and the later one, their offspring, who are predominantly lazy (LL). So it's reasonable to assume that, before the arrival of LL, the value of a field acre was greater than that of a beach acre. Let's suppose that their exchange ratio (market price) was $1_f:4_b$: that is, one field acre exchanged for four beach acres. Had LL, with its stronger preference for leisure, arrived earlier than EI, the market price that would have been formed by exchanges among its members is, say, $3_f:4_b$. But since LL did *not* arrive earlier than EI, its members' initial natural resource shares are calculated on the basis of the prevailing (EI-formed) $1_f:4_b$ price. What this means is that their equal shares each contain more beach acres and less field acres than if they had been calculated on the basis of the $3_f:4_b$ price. That is, *LL members' shares contain more of what they value more and less of what they value less*. Hence it's difficult to see how the use of EI prices – market prices - adversely affects later arrivals' initial shares and is consequently tainted by partiality.

What are the components of these shares? Miller astutely points out that, inasmuch as they're rights to natural resources, it makes a great deal of difference whether, for any resource, R, what we're talking about is the full set of Honoré incidents – *full liberal ownership* of R – or various separable subsets of them that might each belong to different persons. For, as he says,

[W]hat would it mean for the initial distribution of resources among individuals to be an equal distribution [?] We cannot know what price a given resource would command, even in a hypothetical condition of equality, until we know which set of property rights (and corresponding obligations) the holders of that resource will enjoy. Recall here that Steiner is officially agnostic about how the various rights over objects that together make up property in the full liberal sense are to be combined or separated But it has to be resolved before we can determine the market price of any particular resource, since the value of that resource to any individual – the amount they are willing to pay to have it – must depend on what they are able to do with it once they own it, how far they are protected against intrusive acts by others, and so forth.

This is entirely correct and, hence, that 'official agnosticism' was mistaken. Quite clearly, the amount that one would be willing to pay for only the claim-right to the income derived from resource R is bound to be less than what would be paid for that

claim-right *plus*, say, the power to sell R *plus* any of the other Honoré incidents pertaining to R.

But Miller draws a mistaken inference from this correct point in arguing that ‘the right to equal freedom does not by itself answer [the above] question’, and that

there must be some authoritative specification of property rights *before* we are in a position to use a measure such as (hypothetical) market prices to determine what an equal share of natural resources amounts to.

For it seems clearly consonant with the right to equal freedom that - in the imagined auction needed to initiate just resource distribution and the system of property rights/market prices consequent upon it²⁴ - every resource’s Honoré incidents would each be *separately* purchasable. Otherwise, there would indeed have to be Miller’s ‘authoritative specification’: that is, a set of decisions stipulating which subsets of R’s incidents are to be packaged together for that auction. And the problem with that proposal is precisely that the persons making those decisions would be readily describable as enjoying *more freedom* than others: they would be unilaterally imposing their conditions on those others, with regard to the purchasability of those resources.²⁵ Separate purchasability entails no such imposition nor, therefore, any need for a political authority to supply it.

In short, then, state territorial rights are either identical with individual property rights (in the case of absolute monarchies) or are derivative from group rights which are themselves derivative from the rights of individual members of the group. Locke, Kant, and left libertarians share a common view of individuals’ foundational *just* rights. What left libertarianism does is to extend these into a coherent account of the individual property rights consistently deriveable from those foundations. And this leads us, unsurprisingly, to the centuries-old liberal conclusion that, insofar as states assume and exercise powers not ceded to them by the holders of those rights, they act as if they were absolute monarchs and are *ipso facto* unjust.

²⁴ Such as the Dworkinian auction, mentioned by Miller.

²⁵ Cf. Steiner, ‘Responses’, pp. 251-2, for a more general explanation of why unilateral imposition violates rights to equal freedom.

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It's unquestionably true that Mother Nature is reasonably generous in the gifts she bestows upon us. But, in her generosity, she is rather less attentive to how those gifts are distributed - both genetically and geographically - among persons and nations. Left libertarians see this as a problem and aim to give her a helping hand with overcoming it, by identifying the distribution that she herself would secure, if she were not only benevolent but also just.²⁶

²⁶ I'm indebted to Mike Otsuka and Ian Steedman for helpful comments on some of the arguments advanced here.