Articles

Entitlements to Personal and Extra-Personal Assets

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1. Introduction

My article in honor of Fred Miller and his philosophical accomplishments focuses on an early and underappreciated work of his: "The Natural Right to Private Property."[1] In more recent years, I have often had its most central contention in mind, as it has formed part of the background for my own writings on property rights in extra-personal objects.[2] I refer to this contention as Miller's Theorem, which holds that "[e]ntitlements to natural assets and entitlements to nonhuman resources should be determined by the same sorts of normative principle."[3]

I return to Miller's "The Natural Right to Private Property" to consider the meaning of the Theorem and how to refine it, to describe how Miller himself makes use of the Theorem in upholding a libertarian view about entitlements, and to indicate how two other political philosophers have adopted a version of the Theorem in their accounts of entitlements. Neither of those philosophers—Loren Lomasky and me—has previously given credit to Miller for his earlier articulation of the Theorem.

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[1] That article grew out of a conference sponsored by the American Association for the Philosophic Study of Society (in Ann Arbor, MI, likely during the summer of 1980) and was later published as Fred Miller, "The Natural Right to Private Property," in *The Libertarian Reader*, ed. Tibor R. Machan (Totowa, NJ: Rowman and Littlefield, 1982), pp. 275–85.

[2] See Eric Mack, "The Natural Right of Property," *Social Philosophy and Policy* 27, no.1 (2010), pp. 53–79.

[3] Miller, "The Natural Right to Private Property," p. 276.

Reason Papers 43, no. 1 (Spring 2023): 97–118.

Miller's article focuses extensively on criticizing John Rawls's redistributionist liberalism as presented in *A Theory of Justice*[4] and Robert Nozick's libertarian doctrine as presented in *Anarchy, State, and Utopia*.[5] Miller's criticisms are noteworthy and related to his Theorem in interesting ways, so I devote Section 2 to Miller's examination of Rawls and Section 3 to Miller's examination of Nozick. While I endorse and press further Miller's critique of Rawls, I dispute his critique of Nozick. My response to Miller on Nozick turns on my articulation of the Self-Ownership Proviso (SOP), which I argue is a better Lockean proviso than the one Nozick offers.[6] Building on some of my discussion of Miller's Theorem, in Section 4 I turn to a more direct discussion of it and its subsequent employment by Lomasky and me.

2. Miller on Rawls

The key distinctive element in Rawls's conception of justice is the "difference principle." This principle asserts that the state, which Rawls coyly calls "the basic structure," should manage the resources morally available to society in order to maximize the income of the members of society's lowest income group. It is important to recognize how demanding the difference principle is because Rawls himself often writes as though economic justice only requires that everyone—including the worst off—gain relative to some egalitarian baseline.[7]

However, the stance that economic justice merely requires that everyone gain simply amounts to what Rawls calls "the principle of efficiency" according to which a distribution is just "when there is no way to change this distribution so as to raise the prospects of some without lowering the prospects of others,[8] and Rawls explicitly *rejects* this principle of efficiency as a standard for economic justice. This is because Rawls recognizes that in any ordinary social situation there

[4] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

[5] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

[6] Eric Mack, "The Self-Ownership Proviso: A New and Improved Lockean Proviso," *Social Philosophy and Policy* 12, no. 1 (Winter 1995), pp. 186–218.

[7] Rawls, *A Theory of Justice*, pp. 62, 101, 102, and 107.

[8] Ibid., p. 70.

will be many different available distributions of income each of which would be efficient, and Rawls believes that a principle of justice must determine which of these efficient outcomes is the just one. The role of the difference principle is to remove "the indeterminateness of the principle of efficiency by singling out a particular position from which the social and economic inequalities of the basic structure are to be judged."[9] In particular, the difference principle singles out the lowest income position within society as the position within which income is to be maximized. As Rawls puts it:

> In order to make the principle regulating inequalities determinate, one looks at the system from the standpoint of the least advantaged representative man. Inequalities are permissible when [and only when] they maximize, or at least all contribute to, the long-term expectations of the least fortunate group.[10]

Note that Rawls's insertion of "or at least all contribute to" is a bit of hedging which, if taken seriously, would reintroduce the problem of indeterminateness.

For the impact of the difference principle to be as extensive as Rawls wants, all or almost all productive resources must be morally available to society. Thus, Rawls is eager to debunk any claim that prevents productive resources—such as people's physical possessions, personal capacities, or talents—from being morally available to society for redistribution.[11] For this reason, Rawls attacks the premise that some individuals *deserve* at least some of their capacities and talents, and so those assets are morally unavailable for Rawlsian redistribution. Against this premise Rawls contends:

> The notion of desert seems not to apply to these cases. Thus the more advantaged representative man cannot say that he

[9] Ibid., p. 75.

[10] Ibid., p. 151.

[11] The Rawlsian arguments discussed in this article operate *outside* of the Original Position. Neither this article nor Miller's addresses Rawls's claim that negotiation *within* the Original Position would yield the principles of justice that Rawls endorses.

> deserves and therefore has a right to a scheme of cooperation in which he is permitted to acquire benefits in ways that do not contribute to the welfare of others. There is no basis for his making this claim. From the standpoint of common sense, then, the difference principle appears to be acceptable both to the more advantaged and to the less advantaged individual.[12]

Miller rightly points to the "loose and informal manner"[13] in which Rawls's argument is expressed. I pause here to examine some loose reasoning that Miller generously omits mentioning.

Rawls depicts the "more advantaged" man as claiming "a right to a scheme of cooperation in which he is permitted to acquire benefits in ways that do not contribute to the welfare of others." This more advantaged individual holds that, if he has an opportunity to enhance his welfare yet his doing so will not also advance the welfare of others, he ought nevertheless to be allowed to increase his welfare. Even though this may seem entirely reasonable, let us grant for the sake of argument that Rawls is correct in holding that the more advantaged has "no basis for his making this claim." However, all that follows from this is that others must gain *to some degree* if gains to the more advantaged are to be acceptable. It does not follow that—as the difference principle decrees—the gains to the more advantaged are acceptable only if the less advantaged gain as much as possible.

Against the argument that the more advantaged individual *deserves* those capacities or talents, Rawls responds that every person's possession of productive capacities and talents is entirely (or almost entirely) due to the arbitrary luck of natural and social lotteries. Hence, no one can *deserve* any of his or her capacities or talents.

Echoing Nozick, Miller first objects that the more advantaged man need not argue that he *deserves* his productive capacities or talents. He may simply claim to be *entitled* to those capacities and talents,[14] and because he is entitled to them, those capacities and talents are not morally available to society. Just as one's entitlement to one's eyeball or kidney would be violated by society treating them as

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[12] Miller, "The Natural Right to Private Property," p. 278, citing Rawls, *A Theory of Justice*, p. 104.

[13] Ibid., p. 278.

[14] Ibid., p, 278, citing Nozick, p. 225.

resources to be utilized for society's ends, so too would one's entitlement to one's productive capacities and talents be violated by such treatment. One does not have to *deserve* one's eyeballs, kidneys, capacities, or talents to be wronged by their being treated as society's assets.

Miller's second objection points to a *non-sequitur* in Rawls's argument. Suppose we accept Rawls's brute luck argument against desert, and we go along with the implicit (and false) premise that, if no one *deserves* his or her capacities or talents, no one is *entitled* to his or her capacities or talents. Then, we could conclude that no individual is *entitled* to his or her productive capacities or talents. Miller points out that Rawls leaps from this conclusion to "Everyone has [joint] title to the individuals' natural assets."[15] As Miller puts it:

> Even if there is no moral reason to assign me exclusive title to my left kidney, would it follow that it is a common asset, i.e., that "everyone had a collective title to it?" . . . [E]ven if Rawls were right that "there is no basis" for the entitlement claims of individuals, this would not provide any basis for collective entitlement claims.[16]

Miller explains that, in one form or another, the invalid "*Not I, so Everyone*"[17] argument pervades egalitarian-leaning political philosophy.[18]

A third major objection against Rawls could be ascribed to Miller. Ironically, this objection draws upon Rawls's *affirmation* of Miller's Theorem. Near the beginning of his article, Miller ascribes to Locke the view that

> nonhuman assets [or, more precisely, *raw* nonhuman assets] might be distributed or redistributed so as to maximize utility,

[15] Ibid., p. 278.

[16] Ibid., pp. 278–79.

[17] Ibid., p. 278.

[18] See ibid., pp. 278–80, for Miller's discussion of the reasoning offered by Alan Goldman, "The Entitlement Theory of Distributive Justice," *Journal of Philosophy* 73, no. 21 (1976), pp. 823–35.

> but it would not be permissible to enslave individuals, i.e., to coerce them to use their natural assets to maximize utility.[19]

Locke, according to Miller, applies different normative principles to personal assets and to nonhuman assets. Miller then introduces Rawls as a theorist who, *in contrast to Locke*, holds that "these two sorts of assets cannot be distinguished in this way."[20] For Rawls, "There is no significant, morally relevant difference between facts involving an individual's natural assets and facts involving that individual's nonhuman possessions."[21] Miller then says that "Rawls' reasoning seems to contain a grain of truth" and that it "suggests the following principle of parity,"[22] which leads right into Miller's statement of his Theorem. These are understatements. Rawls clearly and fully endorses this principle of parity, that is, Miller's Theorem.

Miller's third objection could thus hardly be that Rawls diverges from Miller's Theorem. Rather, the third objection is the unacceptability of the normative principle—namely, the difference principle—that Rawls *consistently* applies to both personal human assets and nonhuman assets. From Miller's perspective, it is bad enough that Rawls takes raw natural material and nonhuman products of human action to be common assets. It is worse yet for "the distribution of natural talents" (and of personal capacities such as alertness, willingness to make an effort, far-sightedness, and so on) to be construed as a "common asset" or a "collective asset."[23] Miller notes:

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[19] Miller, "The Natural Right to Private Property," p. 276. I believe that Miller misreads Locke's statement that the earth originally is "common to all men."

[20] Ibid., p. 276.

[21] Ibid.

[22] Ibid.

[23] Ibid., p. 277, citing Rawls, pp. 101 and 179. Why does Rawls say that the *distribution* of natural talents is a common asset rather than that natural talents as such are common assets? Surely, the fundamental Rawlsian proposal is to treat the natural talents, *not their distribution*, as morally available to society for advancing society's (alleged) purposes. What would it mean to treat *the distribution* of natural talents as a common asset?

> It is difficult to avoid the implication, which Rawls does not explicitly draw, that human beings themselves are simply collections of natural resources. Presumably, in *normal* circumstances, this would not justify treating people as collections of spare parts such as corneas and kidneys who could be "cannibalized" against their wills for the benefit of the less advantaged, namely, of people who are blind or without kidneys and cannot find voluntary donors.[24]

Still, Miller adds, "on Rawls' account, it clearly does justify pooling all benefits, including material goods and social advantages, resulting from the employment of these natural assets, together and allocating these benefits according to principles of distributive justice."[25] Miller is careful to point out that the validity of his first two objections against Rawls's case that natural talents are common assets does not establish that "each individual properly is entitled to his or her own natural assets."[26] Establishing that conclusion requires a separate and independent line of argument.

To this end, Miller offers an account of Ayn Rand's theory of natural rights (the details of which I will not investigate here). Rand concludes that all individuals possess a natural right to life and this right is to be understood as a "right to engage in self-sustaining and self-generated action—which means: the freedom to take all the actions required by the nature of a rational being for the support, the furtherance, the fulfillment and the enjoyment of his own life."[27] From

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[24] Ibid., p. 277. Miller notes that Rawls's principle of equal liberty is supposed to have strict priority over the difference principle. According to this lexical priority, further gains to the least advantaged do not justify infringements upon anyone's equal liberty; see ibid., p. 286 n. 12. Yet many questions can be raised about what rights are to be protected under the rubric of equal liberty. The standard examples are rights to expression, religious freedom, freedom of association, and freedom of life-style choices. It is far from clear that a Rawlsian principle of equal liberty that focuses on such rights would preclude the forced donation of eyeballs or kidneys, except insofar as those forced donations would inhibit the exercise of these rights of self-definition.

[25] Ibid., p. 277.

[26] Ibid., p. 280.

[27] Ibid., p. 281, citing Ayn Rand, "Man's Rights" in Ayn Rand, *The Virtue of Selfishness* (New York: New American Library, 1964), pp. 93–94. In personal

the affirmation of this right Miller infers that "[e]ach individual has an unconditional title to a particular set of natural [personal] assets."[28]

Yet, surprisingly, Miller does not go on to provide a parallel line of reasoning *from the right to life* to "the corresponding thesis about private property," namely, that "[e]ach individual has an unconditional title to a particular set of nonhuman resources."[29] He does not proceed to show how the normative principle that underwrites rights to natural talents *also* underwrites rights to property in extra-personal resources. Instead, Miller infers "the corresponding thesis" that there are unconditional entitlements to nonhuman resources from the conjunction of unconditional entitlements to personal assets and the Theorem.

This raises questions about the status of Miller's Theorem. One understanding of the Theorem is that it starts as the hypothesis that one fundamental principle underwrites entitlements to natural personal capacities and talents and entitlements to extra-personal resources. This hypothesis would be confirmed, if each set of entitlements is shown to be supported by the same fundamental norm. Alternatively, the Theorem may be taken as an *already established* truth that can be invoked to support an inference from entitlements to personal assets to entitlements to nonhuman resources (or from nonhuman resources to personal assets). In this latter case, we need some independent argument for the Theorem, but I do not think that Miller offers one.

3. Miller on Nozick's Lockean Proviso

We have already seen that Miller takes Locke to offend against the Theorem because, as Miller sees it, Locke affirms "that individuals have exclusive title to their own natural [personal] assets, and *nevertheless,* reject[s] the corresponding thesis about private property

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correspondence on May 3, 2022, Miller indicates that he now would offer a somewhat different account of natural rights, one based upon a better understanding of Rand's view.

[28] Miller, "The Natural Right to Private Property," p. 282.

[29] Ibid. I doubt that Miller wants to draw this conclusion as he formulates it. For Miller would not want to hold that every person does in fact have entitlements to at least some nonhuman resources.

[in nonhuman resources]."[30] According to Miller, Locke rejects the second thesis because Locke believes in mankind's natural joint ownership of the earth.[31] Miller does not ascribe this belief to Nozick, but he thinks that Nozick's neo-Lockean doctrine still offends against the Theorem. For Nozick adopts a version of Locke's "enough, and as good" proviso,[32] which "qualifies his theory of entitlements to nonhuman holdings." Due to this qualifying proviso, Nozick fails to affirm that "[e]ach individual has an *unconditional* title to a particular set of nonhuman resources," even though he affirms that "[e]ach individual has an *unconditional* title to a particular set of natural [i.e., personal] assets."[33]

There are many difficulties with Nozick's Lockean proviso, some of which are well noted by Miller. However, I will not focus on Nozick's specific proviso and its specific problems. Rather, I want to challenge a more general thesis that Miller seems to endorse. This is that any combination of strong (Miller says, "unconditional") natural rights to personal assets and a Lockean proviso that "qualifies" rights to nonhuman assets runs afoul of the Theorem. I challenge this general thesis by (i) pointing to a sense in which robust rights need to be conditional and (ii) sketching a better Lockean proviso than that offered by Nozick. I will do both with the Self-Ownership Proviso (SOP), which takes entitlements to extra-personal assets as conditional in precisely the way they should be conditional.

Moral entitlements properly so-called will always be *conditional* in the sense that the party who is entitled to some resource may not use it in any way that transgresses the moral entitlements of others. My liberty rights to use my thumb as I choose and my liberty right to use my knife as I choose are each limited (i.e., conditioned) by your claim right to your eye. I may not thrust either of my rightfully held resources into your eye. This general conditioning of my liberty rights does not nullify or dilute those rights. Rather, it fortifies them. For it is in virtue of this general conditioning that all others are bound to allow me to exercise my liberties as long as I do not violate the

[30] Ibid., emphasis added.

[31] Ibid.

[32] Nozick, *Anarchy, State, and Utopia*, pp. 174–82.

[33] Miller, "The Natural Right to Private Property," p. 282, emphasis added.

claim rights that protect others' liberties. If liberty rights were not at least usually accompanied by claim rights against interference with the exercise those rights, we would have a world of Hobbesian blameless liberties and not a world with moral fences that enable us to live at peace and to mutual advantage with one another.

My case for the SOP turns on expanding the range of actions that should be recognized as transgressions of self-ownership and, hence, as uses of one's personal or extra-personal assets that are morally precluded. The key to this expansion is the recognition that certain actions block individuals from exercising their self-owned world-interactive powers, *even though those actions do not physically impinge or intrude upon those individuals or their extra-personal assets (or even threaten such physical impingement or intrusion)*. Hence, those blocking actions also are transgressions of self-ownership.

As the examples I employ and the discussion that follows indicate, based on self-ownership, there is a broad anti-blockage *provision* against actions that preclude individuals from exercising their self-owned world-interactive powers. This provision forbids blocking actions that are carried out when an agent uses his own body or some (owned or unowned) extra-personal objects as a barrier that precludes another individual from applying her world-interactive powers to some otherwise available extra-personal resource. The narrower SOP forbids a subset of the actions that are forbidden by the broad anti-blocking provision. These are certain instances of individuals being blocked from exercising their world-interactive powers by others invoking their own entitlements to extra-personal assets. Before explaining why most instances of an agent invoking his entitlement to some object to preclude other individuals from using *that object* are *not* censured by the SOP, I first present and analyze examples that support a general provision against non-impinging blockage that self-ownership advocates should affirm.

Imagine that you wander into an unowned field, lie down on the lush grass, and fall asleep. When you awake, you find that five people have formed a circle around you and have tightly linked their arms to create a human wall that surrounds you. You indicate your desire to continue your perambulations. However, the spokesman for the five says:

> Go ahead if you can without physically aggressing against any of us, i.e., without physically intruding upon any of us. Of

> course, since we are all self-owners, you will be acting impermissibly if you initiate any such physical contact. We demand that you keep your filthy hands off our bodies. On the other hand, we'd be happy to unlink our arms so that you can continue your ramble in exchange for a payment of $5,000.

Consider a slightly different case of non-impinging blockage. Here too you fall asleep in that unowned field. However, in this case a single other person arrives with his lightweight, ten-foot high, plastic fence which he places around you and seals shut. You wake up and demand that the blockage be removed. However, the fence owner responds:

> All I have done is to deploy my own property as I desire. I haven't misused my property since I have not in any way touched you with it. In fact, my plastic fence is not that strong. With some determined battering you can probably create a hole in it large enough for you to pass through. However, any such battering will violate my property rights over the plastic. I demand that you keep your filthy hands off my property.

I think the philosophical friend of self-ownership and of entitlements to nonhuman resources will hold that the five's use of their bodies and the plastic-fence owner's use of his plastic are both illicit. In neither case has the encircled party been subjected to physical intrusion—as she would be, were someone smashing her legs. Yet, in both cases she would have a valid complaint *based upon her self-ownership*. That party's valid complaint is based on self-ownership because each person's self-ownership encompasses her own world-interactive powers, that is, her own powers to interact with the world that is beyond the outer surface of her skin. Each of these encirclements is forbidden by the subject's self-ownership because each substantially nullifies a person's capacity to bring her world-interactive powers to bear on the world. Unprovoked imprisonment violates self-ownership whether the victim is brought to the prison through physically impinging action or the prison is brought to the victim through physically non-impinging action.

It is worth noting a somewhat different sort of case of physically non-intruding encirclement. Suppose that a speaker's capacity to address her intended audience is nullified when a crowd of

protesters makes so much noise that the audience cannot hear the speaker. Even if this noise does not physically impinge upon the speaker in a way that violates her self-ownership—suppose she is zooming in from another location—I submit that this blockage of her capacity to address that audience wrongfully contravenes her self-ownership. A duly broad right of free expression arises from a right of self-ownership if and only if such non-impinging blockage of expression counts as a transgression of self-ownership.

In the two encirclement examples, part of the nullification of the encircled agent's world-interactive powers consists in the nullification of her capacity for locomotion. However, the valid complaint that the encircled party would have against arm-linkers and plastic-fence owners is not limited to their nullification of that party's capacity to move around in the world. To see this, consider another plastic-fence example that does not involve blocking locomotion. In this example, the plastic-fence owner encases in his fence every object on which our beleaguered agent would otherwise apply her world-interactive powers. This systematic encasement substantially undermines the agent's capacity to act in the world in pursuit of her ends.

It is natural to take the examples I have offered to involve an agent being blocked from applying her world-interactive powers to *unowned* objects. However, the examples work equally well if we assume that the objects that the agent is blocked from interacting with are owned by one or more other parties. The plastic-fence encaser who blocks this agent from bringing her powers to bear on extra-personal objects owned by others who are willing to have her interact with those objects, transgresses self-ownership in the same way he does when the objects to which he blocks access are unowned.

I recall once reading that early European traders with inhabitants along the coast of West Africa would sometimes preclude those inhabitants from rowing out to trade with competing European traders by firing their cannons across the bows of the inhabitants' canoes. The anti-blockage provision is not needed to explain the wrong of threatening those inhabitants with physical harm. However, that provision is needed to explain why firing across the bows of the canoes also infringes upon the self-ownership of the traders who were thereby prevented from intercourse with those inhabitants. The cannons fired across the bows of the canoes were devices to drive prospective trading partners away from the competitors of the cannon-firers. If you think the competing traders had a complaint in justice against those who

frightened off the canoers, you have reason to affirm the anti-blockage provision.

In contrast to the broad anti-blockage provision, the SOP focuses on individuals being blocked from bringing their powers to bear on extra-personal objects by the owners of those objects not consenting to those individuals using their objects. Suppose someone owns the field on a portion of which our beleaguered agent has fallen asleep. Now, when she awakes, what blocks her movement through and interaction with extra-personal objects is the owner's demand that she not trespass further on his field. Mustn't this physically non-impinging blockage also count as an infringement on the awakened party's self-ownership? However, if it does count as such an infringement, this seems to *strengthen* Miller's claim that advocating the Lockean Proviso deeply compromises entitlements to extra-personal assets.

An individual's entitlement to any extra-personal object is essentially the right to say "no" to the appropriation, use, transformation, or consumption of that object by any other party. Since the SOP objects to individuals saying "no" to others' uses of the owners' extra-personal assets, isn't Miller correct to hold that such provisos systematically undermine entitlements to extra-personal objects? A negative answer to this question turns on recognizing systematic positive effects of the right to say "no." While each (enforceable) entitlement underwrites a "no" to others' non-consensual appropriation, use, transformation, or consumption of the object of that entitlement, the system of "no"s as a whole engenders an almost unimaginable increase of useful objects that are produced and brought to market. The owners of this cornucopia are eager to say "yes" to others' appropriation, use, transformation, or consumption of those objects, typically in exchange for those others saying "yes" to those owners' appropriation, use, transformation, or consumption of the objects created by and brought to market by those other agents.

Smith produces goods and brings them to market because she has confidence that she can say "no" to anyone else who would take control of those goods without her consent, and she has confidence that others have a like confidence that their entitlements to what they produce and bring to market will be respected. Legal regimes that protect peaceful gains from production and trade generate a tide of increasing economic opportunity for all individuals who are willing to swim with that tide. Being willing to swim with the tide involves being willing to respond to the ebb and flow of its currents, that is, being

willing to adjust one's efforts and plans to moving out of the ebbs (the "no"s that the tide needs to rise) and into the flows (the "yes"s that are offered by the rising tide).[34] The SOP forbids precluding (or severely inhibiting) willing people from swimming with the tide.

The dynamism of private property and open market regimes often involves the destruction of some existing opportunities in the course of the creation of new ones. It is crucial to recognize that one cannot sustain the processes that generate increasing new opportunities—often whole new arenas of productive human activity—without allowing some existing opportunities to wither away. Friedrich Hayek makes the point that it is often people who have benefited greatly from the past creation of new opportunities that eliminated yet older opportunities who now seek to suppress the dynamic processes that will open up new opportunities for others (and for themselves): "To ask for protection against being displaced from a position one has long enjoyed, by others who are now favoured by new circumstances, means to deny to them the chances to which one's present position is due."[35] The disappearance of opportunities—such as the opportunity to make wooden wheels for horse carts—is not an indication that private property and open market regimes transgress the SOP.

An individual's legitimate acquisition of the use or ownership of some resource that has been owned by another will almost always involve *some* cost to that individual. Yet costs almost always will have had to be borne in a pre-property state of nature to gain the use or possession of extra-personal resources. Think of any extra-personal resource—say, a reliably sharp cutting tool or a coat that will keep one warm through the winter—that would be available at some cost to individuals within a pre-property state of nature and within a developed private property and open market economy. Almost certainly the cost of acquisition of that good—measured, say, in hours of labor—will be vastly greater in the former setting than in the latter. The reality that individuals have to bear some cost in order to take advantage of economic opportunities generated by widespread, secure,

[34] Regimes that mix public and private ownership may satisfy the SOP. Satisfying the SOP is necessary but not sufficient for the justice of a legal and economic order.

[35] Friedrich A. Hayek, *Law, Legislation, and Liberty*, Vol. 2 (Chicago, IL: University of Chicago Press, 1976), p. 95. I thank Hans Eicholz for helping me find this passage again.

transferable, private ownership is not an indication that they have just complaints under the SOP.[36]

This is not to say that violations of the SOP will never occur within property rights and open market economic regimes. Blockages that are akin to the examples I have used in advancing the plausibility of the anti-blockage provision are certainly possible. Within such an economic order, some individual or group of coordinated individuals may own land that surrounds another agent and her small interior plot, and may invoke his or their property rights to lock in that agent or to extract an exorbitant exit fee. Or some individual may come to own a proverbial isolated waterhole and refuse access to dehydrated agents or require an enormous payment for lifesaving water. In the surrounding-land case, the SOP requires that the surrounding land be subject to some (suitable) easements. In the waterhole case, the SOP requires something like the traveler not be charged more for a drink of water than the cost would have been for her were the waterhole to have remained unowned.[37]

To provide some sense of how violations of the SOP might arise within private property and open market regimes, consider two further scenarios. First, imagine that there is a small, isolated village in which the demand for the services of a barber is just enough to sustain one barber. Unfortunately, the one barber is hated by the one rich businessman in the town, who builds a fancier barber shop in the town, hires an equally competent and more attractive barber to work in that new shop, requires that no customer ever be charged for that shop's

[36] See, e.g., Lysander Spooner, *The Law of Intellectual Property*, in *The Collected Works of Lysander Spooner*, Vol. 3, ed. Charles Shively (Weston, MA: M&S Press, 1971), p. 24: "The first man is a hungry, shivering savage, with all the wealth of nature around him. The last man reels in all the luxuries, which art, science, and nature, working in concert, can furnish him."

[37] However, note that had the waterhole remained unowned, it would probably have been vastly over-utilized. In that case, little or no water would now be available to our traveler, except perhaps through very costly excavation and filtration. Is the waterhole a purely natural object or has it come to be owned by being created or maintained in existence by some agent (or series of agents)? If it is the former, it is not clear how it can be owned, and hence how there can be any *owner* to say "no." I take it that our traveler will have a complaint in justice against a waterhole owner only if there is no known feasible alternative route for our agent other than to travel by the waterhole and no known feasible way to avoid needing water from it.

barbering services, and pays the new barber twice what he would receive through customer payments. The result is the collapse of the original barber's business. Moreover, wherever that barber goes and whatever adjustment she makes to deal with this ebb of business, the wicked businessman pursues her and arranges a similar scheme for luring customers away from her. I take it that this barber would have a just complaint against that businessman on the grounds of the physically non-impinging blockage that is inflicted upon her. Concern for that barber's right not to be precluded from bringing her world-interactive powers to bear in the pursuit of her own ends justifies an injunction against the businessman's endeavor.

Second, imagine that a high percentage of the members of an economically dominant racial majority issue "no"s to a high percentage of the members of an economically less well-off racial minority. Through conscious coordination or habit or group-imposed social pressure, many economic opportunities that are offered to members of the majority are withheld from many members the minority. With respect to most members of the minority group, the system of rights to say "no" does not in its usually paradoxical way deliver a rich array of "yes"s. Many members of the minority group are not allowed to enter into and swim with the tide, a tide that, in fact, would be raised higher for all (or almost all) willing swimmers were the minority members to be allowed to enter it.[38] This system of discrimination in jobs; permission to pursue occupations; finding willing trading partners; and acquisition of credit, training, and capital goods would be akin to a world in which devices that have been attached to many of the extra-personal objects remove most of those objects from the reach of members of this minority who seek to use, appropriate, transform, or consume them. By hypothesis, the normal dynamic of competitive markets is undermined by the systemic "no"s issued by a high percentage of the members of the majority.[39] In such a situation, the SOP supports a (suitably formulated) requirement that individuals desist from such forms of discrimination.

[38] Many of these "no"-sayers would be economically irrational in the same way as the barber-hating businessman would be.

[39] As an empirical matter, coercively enforced state segregation policies are at least usually crucial to the development and maintenance of such patterns of discrimination.

4. Subsequent Use of Miller's Theorem

At the end of Section 2, I pointed to two possible roles for Miller's Theorem. It can operate as a premise that justifies an inference from individuals having (or not having) entitlements of a certain stringency over their personal (human) assets to their having (or not having) entitlements of the same stringency over extra-personal assets.[40] This seems to be the role that the Theorem plays in Miller's article. Unfortunately, he does not offer any independent justification for the Theorem that warrants its use in this way. One could argue that grounding entitlements to personal assets and entitlements to extra-personal resources in fundamentally distinct normative principles will lead to conflicts between the two sets of entitlements. To guard against such conflicting entitlements, one would then need to derive all entitlements from the same fundamental norm or mode of moral reasoning. However, I am not aware of anyone who seeks to develop such an argument.

Alternatively, Miller's Theorem is a hypothesis that the same fundamental normative principle (or mode of moral reasoning) explains the entitlements that individuals have over their personal resources and over extra-personal resources. If the normative backing of those entitlements is the same, so too is their character and stringency. This hypothesis is vindicated if and only if the fundamental normative principle (or mode of moral reasoning) does indeed underwrite "corresponding" entitlements with respect to personal assets and extra-personal resources. In this section, I briefly indicate how both Loren Lomasky and I have employed the Theorem in this second role.

In *Persons, Rights, and the Moral Community*,[41] Lomasky hypothesizes that a single fundamental normative principle (or a single mode of moral justification) underwrites both entitlements to personal assets and entitlements to extra-personal resources. He offers an account of how that single mode of justification yields corresponding entitlements to personal assets and to extra-personal resources. The

[40] Or it operates as a premise to justify an inference from individuals having (or not having) entitlements of a given stringency over certain extra-personal resources to their having (or not having) entitlements of that stringency over their personal (human) resources.

[41] Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987); see esp. chaps. 3–6.

entitlements to personal assets and to extra-personal resources are comparably stringent, albeit more conditional than either Miller or I would favor.

According to Lomasky's account, basic rights are the fundamental interpersonal claims that individuals as project pursuers would rationally affirm among themselves so as to form and sustain a social order that is conducive to their respective successful pursuit of their personal projects: "[O]ne will come to see what basic rights *are* as one comes to understand what moral order persons have reason to *acknowledge* and to *value*."[42] For Lomasky, the claims on which the vast majority of individuals would rationally tend to converge are primarily liberty claims in the sense of rights to freedom from interference. These liberty claims encompass extensive rights over one's personal assets and extensive rights to acquire and exercise discretionary control over extra-personal resources.

However, according to Lomasky, a noteworthy number of project pursuers will reasonably believe that their ongoing capacity to pursue their life-defining plans will require that, on some occasions, others come to their assistance. Those individuals will condition their commitment to others' rights against interference upon the commitment of those others to such rights to assistance. In order to bring these more cautious individuals into an extended moral community, individuals who most favor a code entirely composed of rights against interference will settle for the inclusion of certain rights to assistance. Also, in order to enter into an extended moral community with those who most favor a code limited to rights against interference, those more cautious individuals will settle for modest rights of assistance: "So, for example, laws requiring that one rescue someone in peril provided that the rescue attempt will pose no danger to oneself or laws requiring one who is aware of an assault in progress to notify the police are compatible with the spirit of liberalism."[43] Within the sea of mutually affirmed rights against interference, then, there will be currents of mutually affirmed modest rights to assistance.[44]

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[42] Ibid., p. 101.

[43] Ibid., p. 128.

[44] This oversimplifies Lomasky's view. Individuals are also taken to be disposed to affirm assistance rights for others because of their evolved empathy and their perception of the impersonal value of others' flourishing.

According to Lomasky, the mode of moral justification that underwrites basic rights to personal liberty for project pursuers combined with modest rights to assistance against other project pursuers also yields the following (correct) semi-libertarian conclusion with respect to property rights:

> Security in one's possessions—what one has—is of value to everyone, and therefore, everyone has some reason to extend deference to others with respect to their holdings conditional upon the receipt of like deference. . . . The only addition to the familiar account [of basic rights] that renders this an examination of *property* rights is the insertion of the proposition that the ability to pursue projects entails the having of goods. . . . Therefore, to posit basic rights to property is neither more nor less warranted than is the positing of basic rights *simpliciter*. *If* there are basic rights, then there are basic rights to property.[45]

Key to needing property rights for project pursuit, Lomasky holds, is that "purposeful action and command over things are virtually inseparable."[46]

To complete the parallel with rights *simpliciter*, Lomasky contends that entitlements to extra-personal resources are not limited to negative rights to be left to the peaceful enjoyment of what one has justly acquired. Since there is

> no assurance that liberty will universally guarantee to each person the requisites for satisfactory prospects of project pursuit . . . those in exigent straits may demand welfare goods *as a matter of right*. . . . If a person is otherwise unable to secure that which is necessary for his ability to live as a project pursuer, then he has a rightful claim to provision by others who have a surplus beyond what they require to live as project pursuers. In that strictly limited but crucial respect, basic rights extend beyond liberty rights to welfare rights.[47]

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[45] Ibid., p. 121.

[46] Ibid., p. 120.

[47] Ibid., p. 126. Lomasky's claim that the welfare rights of some justify depriving those "who have a surplus beyond what they require to live as

My purpose here is not to affirm Lomasky's conclusions, but rather, to point out how his argument conforms to Miller's Theorem. As with Rawls's doctrine, any critic of Lomasky's doctrine would have to focus on the fundamental normative principle (or mode of justification) that Lomasky applies with consistency to both personal assets and extra-personal resources.

I also make use of the second hypothesized version of Miller's Theorem, most prominently in "The Natural Right of Property." The most fundamental normative principle I defend in that article is the "ur-claim" that all individuals are "to be allowed to pursue their own good in their own way."[48] This ur-claim involves affirming a number of basic rights, each of which provides individuals with moral protection against a basic way in which individuals can be precluded from pursuing their own ends in their own chosen way. Each person's natural right over his or her own person—the basic right of self-ownership—provides each individual with moral protection against being deprived of the possession, enjoyment, or discretionary control of her physical or mental faculties. The SOP is part of a full articulation of the right of self-ownership. Beyond self-ownership, each person's natural right of property provides each individual with moral protection against being deprived of her possession, enjoyment, or discretionary control over extra-personal resources that she has made her own.[49] The ur-claim that each individual is allowed to pursue his or her good in his or her own chosen way extends to a right to make things one's own and to exercise discretionary control over what one has made one's own because

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project pursuers" seems to imply that the more advantaged may be required to surrender *all* of that "surplus." This contravenes his insistence that basic positive rights cannot impose burdens markedly greater than those imposed by basic negative rights. That insistence leads Lomasky to conclude: "There can be no general obligation to give up that which is of considerable instrumental value to the pursuit of one's own projects on the grounds that someone else has a pressing need for those items" (p. 87).

[48] Mack, "The Natural Right of Property," p. 54.

[49] There is also a basic natural right against deceptive manipulation that provides persons with moral protection against induced misdirection.

> almost all human life, almost all human goal-pursuit, takes place in and through the purposive acquisition, transformation, and utilization of objects in the extra-personal world. We are not merely embodied beings; we are beings whose lives are mostly lived in and through the physical world that exists beyond the outer surface of our skin.[50]

To be clear, the natural right of property is not a right to any specific extra-personal objects or to any specific share of such objects. It is a right to others' compliance with a practice of private property that consists of a system of rules that define the procedures through which individuals acquire, transfer, abandon, or restore ownership and discretionary control over extra-personal resources. The natural right of property does not require others to provide one with any extra-personal resources. It merely requires others not to preclude one's acquisition, retention, or discretionary control over extra-personal objects (which are not already owned by others).

My view accords with—indeed, vindicates—Miller's Theorem because entitlements to personal assets and entitlements to extra-personal assets are both vindicated by the ur-claim that all persons be allowed to pursue their own ends in their own chosen ways. The vindication of the former set of entitlements runs from that ur-claim through the basic right of self-ownership, while the vindication of the latter set of entitlements runs from the ur-claim through the basic natural right of property.

I conclude by emphasizing the crucial similarity between Miller's view in "The Natural Right to Private Property," Lomasky's view in *Persons, Rights, and the Moral Community*, and my own view in "The Natural Right of Property." The similarity consists of three shared features. First, each of us endorses a fundamental normative principle—respectively, a right to life, a basic claim to be treated as a project pursuer, and an ur-claim to be allowed to pursue one's own good in one's own chosen way—which is open-endedly pro-liberty in its implications. Second, since life or project pursuit or action for the sake of one's ends is achieved through action in the extra-personal world, a condition of each individual's exercise of that fundamental right or claim is that the individual is not precluded from using, acquiring, transforming, exchanging, and consuming objects in the extra-personal world. Third, it follows that the fundamental right or

[50] Mack, "The Natural Right of Property," p. 62.

claim that is affirmed must encompass a right to others' compliance with a system of rules through which one can make external things one's own and exercise discretionary control over what one has made one's own.