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Natural Rights to Migration?

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INTRODUCTION

It is often claimed that states enjoy, as a consequence of their sovereign status, the right to control the passage of outsiders through their territory and that they have a discretion to admit or to refuse to admit outsiders, whether those outsiders be tourists, business travelers, would-be economic migrants, or even refugees. Or, to be more exact, such limitations on that right to control are derived from the agreement of states to treaties and conventions, agreement which they could have withheld and could yet revoke. As a statement of the legal position this is not completely uncontroversial,[1] but my aim in this paper is not to make a contribution to international law or law at all. Rather, my concern is with political philosophy and with the issue of whether

[1] See, for elaboration the discussion in Nafziger (1983).

any state, or state-like entity, could, in fact, have the moral right to exclude foreigners who wish to enter its territory.

Whilst some people think it obvious that states have such rights to control and limit movement, to others, this claim can seem utterly mysterious. Borders are not natural features of the world – though they may track such features – and the idea that some people have the right to declare an arbitrary line and the right to forbid others from crossing it, and that those others have the moral duty to comply and not to cross without permission can seem simply bizarre. I start then with the following two assertions, both of which are open to challenge: first, that persons have an original natural right to free movement, and second that a change to that position can only be brought about with the consent of the person whose rights are changed. In saying that people have an original right to free movement, indeed in saying that they have a right to do any thing that they have a right to do, I mean only that it is morally permissible for them to do that thing and morally impermissible for someone to coerce them not to do it. [2]

In the argument below, I explore a couple of strategies for getting from individual rights in a state of nature to a collective right to exclude. These strategies I call the Lockean strategy and the Kantian strategy, although I have no pretensions in this paper to contributing to the scholarship of ei-

[2]Gibbard (1976), p.77. This paper derives to a very large extent from thinking about how Gibbard's arguments with respect to property rights can be adapted to the case of state territory.

ther philosopher. Both of these strategies I find to be defective. The basic reason for this is, in both cases, the same. Nearly all broadly contractarian approaches to the justification of political power and authority conform to what Robert Goodin has called the "mutual benefit" model.[3] The basic idea here is that we should accept the coercive power of the state, accept that we should be bound by a set of rules and relations that limit, equally, the freedom of all, because those limitations are mutually beneficial. If we did not subject ourselves to them then we would be worse off, either in terms of welfare or in terms of freedom. The anarchy of private coercion is worse for us than state coercion: we have an interest in being forced to be free (to use a familiar phrase). The difficulty about applying this way of thinking in the present case is precisely that the *quid pro quo* of accepting coercion for increased welfare or freedom is lacking in the case of non-members of the political community. Their welfare, or freedom, or opportunity may be diminished by the presence of the borders of the new state, but they receive no more-than-compensatory benefit in return.

In the final part of the paper I shall argue that some kind of at-least-compensatory benefit to outsiders is needed if the state system, with its borders, is to be justified. This is because outsiders would not have consented to the establishment of a coercive state system without a guarantee that they would be about the assure their basic interests. This implies that the rights

[3]Goodin (1988).

of sovereignty of individual states cannot extend so far as to allow them to have a discretion to turn away whomsoever they choose. Rather, they have a general duty towards all persons to ensure respect for their basic human rights and perhaps certain opportunities and levels of welfare. Note that the argument does not seek to establish that the duties of political communities towards outsiders are limited to ensuring compliance with these standards (and to taking people in when this is necessary to protect their basic interests). Rather, the thought is that political communities have at least these obligations, they may have many more but justified in other ways.

LOCKEAN THEORIES OF TERRITORY

One obvious strategy for getting a right to territorial exclusion off the ground is to build on the model of property rights. The thought here is that if we can justify some very local right to exclude on the basis of property, we can then extend this right by conceiving of rights over territory as an extension of those more ordinary property rights in land. This is the individualistic Lockean model for territory, as dicussed, though not necessarily endorsed, by a number of philosophers.[4] I won't overlabour the details of this model, since most people are familiar with it. In brief outline: individual self-owners, in a state of nature, come to acquire property rights in land (and other things) by mixing their labour with what was previously owned by no-one in particu-

[4]Including, Otsuka (2003);Simmons (2001);Nine (2008).

lar. But in a state of nature, though there is common knowledge of the law of nature, there is still endless scope for disputes both about the interpretation of the law and about the facts, and hence room for dispute. Dispute that can in turn lead to violence and its escalation. So there is a need for an authority to settle disagreements: a common judge. In view of this need, holders of contiguous property come together and form themselves into a community and appoint people to legislate and adjudicate for that community. The legislators and adjudicators have, under their jurisdiction, a territory formed by the land of the original property holders, plus unowned land enclosed by that property, plus, perhaps, some other contiguous land and, again perhaps, the land of "independents" in the vicinity.

On this model the political power of the legitimate state derives from the consent of the individuals who have associated together and such powers as it has to coerce or punish are powers that have been voluntarily transferred to it by the associates. The right that the state then has to control the movement of aliens across its borders and to refuse them the right to settle on its territory is merely an extension of the right that property-holders have to exclude others from the land that they have legitimately acquired.

To say that there are a number of difficulties with this approach would be significantly to understate the case. I'm going to confine my remarks to just two of these difficulties. The first is Locke's adoption of a broadly welfarist no-worsening criterion for taking account of the interests of outsiders at both

the property acquisition and territory establishment stages. The second is a concern about generating a right of exclusion from territory on the basis of a right of exclusion from private property.

The no-worsening criterion

The "no worsening" condition is central to Locke's account of property acquisition. The famous proviso, for example, depends on the idea that those excluded from property have no basis for complaint because they have "enough and as good" left for themselves. And when Locke discusses the formation of the state, he again makes the same argumentative move: they may organise themselves into a political society, "because it injures not the freedom of the rest; they [the rest] are left as they were in the liberty of the state of nature."[5] We may, then, according to Locke, acquire rights over space in the state of nature just so long as no-one else has a reasonable complaint against us doing so. And, of course, in the original argument of the *Second Treatise*, this no worsening condition is weakened further once money has been invented so that even those with diminished opportunities to appropriate may not legitimately complain, so long as they are better off than they would have been had not process of privatization and institution-building ever taken place.

In *Anarchy, State and Utopia*, Robert Nozick deploys a version of the no-worsening argument against Fourier:

[5]Locke (1960), *Second Treatise* §95.

> Fourier held that since the process of civilization had deprived the members of society of certain liberties (to gather, pasture, engage in the chase), a socially guaranteed minimum provision for persons was justified as compensation for the loss .... But this puts the point too strongly. This compensation would be due to persons, if any, for whom the process of civilization was a *net loss*, for whom the benefits of civilization did not counterbalance being deprived of these particular liberties. [6].

Now it is indeed likely, despite Nozick's ("if any") scepticism, that an act of territorial acquisition would worsen the material circumstances of nomads and hunter-gatherers by depriving them of opportunities to gather, pasture, etc. That is, it is likely given the fact that human beings live finite lives, that at least the first generation of those so deprived would be materially worse off as the result of the deprivation unless they were suitably compensated. It is also noteworthy that, on Nozick's account of what Fourier says, the scope of those considered is limited to "members of society" who were, previous to the various acts of acquistion, hunter gatherers or nomads. But we need a wider scope than this, since it is not merely members of society but also non-members who are affected by the change. More scandalous still, though, from Nozick's own point of view, is the way in which he, in this passage, allows that individuals may come to lose a right without their consent, just

[6]Nozick (1974), p.179

so long as sufficient compensation is on offer, where that compensation is adequate so long as no net welfare loss is incurred. Nozick's argumentation in this passage would, if accepted, surely undermine the standard libertarian objections to "eminent domain" or compulsory purchase.

The fact is that Nozick's no-worsening version of the proviso is far too weak in content and far too narrow in scope. However, the weakness in content isn't merely a matter of degree, but also of kind. So, whilst we can imagine a broadly Lockean position which takes a more stringent view of the proviso than, say, Nozick does, by requiring no worsening against a more challenging baseline than whether non-appropriators are worse off than they would have been without a process of civilization, the problem is not just one of comparative levels of welfare or opportunity, but of rights. Both in the case of property acquisition and territorial establishment we have cases where persons have, at time t, a right to use or occupy a part of the works and then at $t+n$ no longer have that right. To deprive, whether permanently or temporarily, a right-holder of the right which they hold, is not normally something that can be defended simply by observing that the loss involved no forfeiture of welfare or opportunity on the part of the right holder. If you borrow my bicycle to run errands whilst I am visiting another continent, and return it unharmed to the exact location you took it from, you have deprived me of neither welfare nor opportunity, but you have still done something that you were not entitled to do without my permission. Similarly, in this

case, the person who permanently appropriates a parcel of land may deprive other persons of neither welfare nor real opportunity, but they are, restricting rights with respect to that parcel of land that the non-appropriator previously held.

It may be thought that there is a perversity about this argument. If, as Locke claims, an act of appropriate has no effect on a third-party, surely the third party has no grounds for objecting to that act? A difficulty here is the temptation seriously to underdescribe the normative situation in a way that favours the proponent of strong liberal rights to property (and subsequently to territory). This becomes clearer when we ask what, exactly the act is, that the third party supposedly has no reasonably objection to. For there is a range of possible moral acts with respect to something like a parcel of land, and it is far from clear which of these possibilities should be brought under consideration. So, for example, I can take a parcel of land and make some use of it in a way that changes the opportunities of others with respect to that parcel but diminishes neither their welfare nor their opportunities. Or, I can establish a limited right to a parcel of land that does exclude the common right of others but limits this exclusion to some time period (the growing season, say). Or I can establish a limited right that is conditional in various ways, that excludes others from the parcel for certain purposes, such as grouse hunting, but gives them access for others, such as passage from A to B.

If the Lockean argument is supposed to be that those unaffected (in terms

of welfare or opportunity for appropriation) by the act of appropriation have given their tacit consent, it can reasonably be asked what they have given their tacit consent to: to full liberal property rights including such incidents as the right of bequest, or the right to exploit mineral reserves that lie hundreds of metres below the surface? to a time-limited appropriation of the parcel? to a conditionalized appropriation? And so on.

Allan Gibbard invites us to imagine a bargaining situtation.[7] You want some exclusionary property right with respect to some object, say, a parcel of land which I currently enjoy the right to traverse, to use, etc. The land may be of no use or interest to me. I may live very far away; I may be disabled and be unable to work the land myself. I may be willing to renounce my right and to give you the right to exclude me from the parcel, but if it is a matter of my consent being needed then I will try to extract a price for my consent. You wish to use an benefit from the land, presumably there is a price that you are willing to pay and I am willing to accept for my renunciation of some right over the parcel of land. Perhaps, if I am disabled, I will permit you to exclude me from the land that I can't actually get to anyway (because of my disability) on condition of a one-off side payment, or a rent of some kind. Perhaps, if I am distant I will allow you to exclude me with nearly full liberal rights, but subject to the condition or that should I ever need the space you have privatized as a place of refuge to preserve my most vital needs

[7] Gibbard (1976), p. 80.

and interests, I should retain the right to do so. In other words, the person granting permission retains some kind of residuary interest in the parcel of land, to be activated only in certain defined circumstances.

The inference from exclusionary rights concerning property to exclusionary rights concerning territory

The second difficulty I mentioned above concerned the transition from the appropriation of parcels of land in the Lockean model to the establishment of territorial jurisdiction. Even if we were to grant, as I deny, that the Lockean appropriator of a parcel of land should have the full complement of liberal property rights with respect to that land, and that the full complement includes an unqualified right to exclude, it would not follow from this that a territorial right established by the pooling of Lockean parcels would also carry with it an unqualified right to exclude. Partly, this is because the area of land over which territorial jurisdiction is claimed is more extensive than the sum of the individual parcels, including, as it does, fully enclosed common land, perhaps some contiguous common land, and, more controversially, land occupied by "independents". It is hard to see that, just because I have the right to exclude a wandering foreigner from my front garden, I should also, by associating with my neighbour across the street, magically acquire the right to exclude the wanderer from the space between our two houses. Even if we were to find this plausible (and we shouldn't) it would

still be a massive step from here to the extensive jurisdiction claimed by states over territory.[8]

KANTIAN RIGHTS TO TERRITORY

I imagine that some readers are already impatient with this detour through the Lockean individualist theory of territory. After all, they may be thinking, it is just obvious that the Lockean theory is wrong-headed, that there is a categorial difference between property and territory,[9] and that, anyway. Lockeans have the basic order of justification the wrong way round. On the Kantian account full property ownership is not possible in a state of nature because property rights depend *conceptually* on the existence of a juridical authority. Nevertheless, persons can enjoy possession of land, though insecurely, and have an interest in forming a legal system to resolve disputes with those with whom they live unavoidably side-by-side. Again, the territory over which the new state has jurisdiction comprises the holdings of the proto-owners who have banded together to form the new society.

I am myself sceptical about many aspects of the Kantian version. As with many Kantian accounts of phenomena, what seems to be an empirical claim is being passed off as a conceptual one. After all, there does not seem to be

[8]There is some discussion of the property-territory transition in Otsuka (2003) that I would hope to incorporate into a later version of this paper.

[9]People having this thought may be having it under the influence of Brilmayer (1989). But Brilmayer's arguments look inconclusive to me, and I hope to say something about why on a future occasion.

any good *a priori* reason why stateless communities should not, as a matter of anthropological fact, evolve norms for the acquisition and transmission of property. Indeed they can and probably have. Still, there is advantage to the Kantian view: that it offers a kind of determinacy about rights that the Lockean approach lacks. If property rights really were conceptually subsequent to the establishment of sovereign jurisdiction then we would have an answer to the problem of giving property rights a definite content, a problem somewhat left in limbo by the bargaining I imagined earlier. Is the right in perpetuity, or is it time-limited? Do property rights in land come with the right of bequest, or not? Is there a right to the full value of what you produce with your labour on the land, or is there a duty to hand over some of the surplus to pay for infrastructure, to help support those unable to work, and so on? Rather than going via the rather circuitous route of imagining bargaining between individual appropriators and third parties, we can skip to the idea of a public authority regulating property rights for the common good, and striking an appropriate balance between the interests of the would-be appropriator and other members of society, and indeed society as a whole.

As soon as we make the leap, however, from thinking about property to thinking about territory, these supposed advantages of the Kantian approach look more questionable. Like the Lockean approach, the Kantian method of state formation is to start locally and expand, without considering what lies beyond. People inevitably live side-by-side with others and so reason dic-

tates that they put themselves under a common authority to resolve disputes and to fix determinate rules. This living side-by-sideness appears almost infinitely extensible, so that one might think that some kind of obligation to establish a global state is involved, but Kant and Kantians usually baulk at this objection and the picture is in fact one of little states getting bigger and then abutting other similarly generated states, all of these, eventually perhaps, establishing some kind of system of co-operation.

Whilst Kantians object to the Lockean idea of establishing rights of property in a state of nature on grounds of the indeterminacy of those rights, it is hard to see that the very same objection don't apply to the Kantian establishment of territorial jurisdiction in similar circumstances. After all, it isn't as if the business of territorial jurisdiction is naturally more determinate that that of property rights. Just as there may be room for reasonable disagreement about what counts as the acquisition or transfer of a plot of land, a reasonable disagreement that cries out for adjudication and for the establishment of common principles, there is also room for reasonable disagreement concerning the nature and extent of territorial authority. Some peoples may consist of individuals who live unavoidably side-by-side on parcels of land in a manner somewhat reminiscent of Marx's depiction of the French peasantry. But others, nomads, hunter-gatherers, pastoralists, etc. have a quite different relationship to the land.[10] Indeed different peoples, with different modes of

[10] A point central to the arguments put by Avery Kolers. See Kolers (2009)

relation to territory, may overlap, intersect, coexist over the same physical space. This coexistence has certainly caused difficulties in the past. Whereas many cessions of territory by indigenous peoples to European powers during the colonial era took place by treaty - suggesting some kind of consensus on what could be taken to be legitimate territorial authority – not all did. Perhaps most notoriously, the doctrine of *terra nullius* was widely used, especially in Australia, to deny any kind of territorial claim to native peoples.[11]

So the thought here is that Kantian arguments against Lockean property look just as applicable to the Kantian territorial rights which stand as the alleged conceptual presupposition of Kantian property rights. One response to this might be to bite the bullet and say, effectively, that in the end territorial rights simply rest upon force, history, occupation, that no further justification for them can be given, or is needed, except for the instrumental one that territorial jurisdiction offers the possibility of establishing justice on at least a swathe of the earth's territory. Such a biting of the bullet is the position of Samuel Freeman in a defence of Rawls's views on global justice. He writes:

> . . . control and jurisdiction over a territory by a people is *sui generis*: it is the condition of the possibility of the existence of a people and their exercising political jurisdiction. As such it is not a kind of property; for among other reasons, it does not have the incidences of property: it is not legally specified and enforced, nor is

[11] See the discussion in Pateman and Mills (2007) ch.2.

> it alienable or exchangeable, but is held in trust in perpetuity for the benefit of a people. But more importantly, rather than being a kind of property, a people's control of a territory provides the necessary framework for the legal institution of property and other basic social institutions. Finally, people can and have controlled territories without norms of cooperation or even recognition by other peoples at all. Indeed this has been true of many countries for most of history; they have existed in a Hobbesian state of war. [12]

There is much that is highly problematic about this passage. Since Freeman appeals to what has happened in "most of history" (though most of history predated the territorial state) it is unfortunate that he describes the alienability and exchangeability of territory as a conceptual impossibility. I wonder how he imagines Alaska and Louisiana became attached to the United States, not to mention all those bits of land that were ceded by the indigenous inhabitants in unequal treaties. More to the point here, is the simple insistence on *force majeure*. It seems that for Freeman, the right to travel over the earth's surface can simply be abrogated by a sufficiently well-organised group of human beings who may then assume full rights over the occupied territory. No compensation is due to those who have been deprived of rights or opportunities, since they are outside the scope of a conception of justice

[12] Freeman (2006) pp.247–8.

that is intrinstically institutional in relation to insiders and brutally rejectionist towards outsiders.

Still, Freeman's approach might have something to be said in its favour if it were in fact true that territorial control is a condition of the existence of a people. Depending on exactly what is meant by a "people" this seems, however, obviously false, since diaspora peoples have existed for millennia without territorial control. Even where peoples have had a determinate relationship to the land, however, it seems as if territorial control in the sense used here has not been necessary to their existence. As social anthropologists have documented, peoples vary in the manner in which the exercise control over territories. Whilst modern states go in for the control of a perimeter, indigenous peoples have often relied on their superior knowledge of the terrain and other resources to exclude outsiders.[13]

A rhetorical question is not an argument, of course. But it should surely make people uncomfortable to assert that underneath the possibility of law, justice, rights, and so forth is simply the assertion of power by those in a position to occupy territory and hang onto it. Perhaps argument has to end somewhere, but it feels unsatisfactory to say that there are not moral questions that may be reasonably asked about a state's assertion of authority with respect even to *terra nullius*.

[13]See, e.g. Cashdan (1983).

BEYOND ACTUAL CONSENT

We are starting to address questions where the actual consent of those affected looks problematic, for two reasons. First there is an unclarity about what people are being asked to give their consent to. Is it a condition on each act of appropriation that it receive the consent of each person whose normative relationship to the would-be appropriated object is changed? Presumably not. Indeed here Locke's complaint that a requirement that the permission of each commoner be sought before a part of the commons is appropriated is hopelessly impractical looks to have some bite. Second, there are persons whose relationship to the appropriated object is in question who may be in no position to give their consent, for the simple reason that they have yet to be born. It is impossible for them to give their agreement to any terms whatesoever. In the light of these difficulties we may want to relax the consent requirement on appropriation both to property and territory. The obvious revisions to make are two: first we should move away from an actual consent model towards hypothetical consent based on some notion of reasonable agreement; second we should abandon the need for consent to each token act of appropriation (whether of property or of territory) in favour of consent to a set of rules governing legitimate acquisition. The thought now is to ask, then, what general rules for appropriation would secure the consent of all those affected, were "affected" does not just refer to experience but rather (or also) to normative position. So what limitation on their freedom,

including freedom of movement, would everyone have reason to consent to?

It has to be said that this is not an easy question to address given the range of different persons who may be affected by territorial exclusion. First generation nomads and hunter gatherers may have a reasonable complaint against any process of state establishment that limits their freedom to roam, the *n*th generation poor may be massively better off than they would have been without the benefit of the economic growth that accompanies a stable legal system, yet may suffer terribly from relative disadvantage, and so on. So there are some really intractable problems of position and perspective to grapple with which make questions about whether someone would agree to particular institutional rules from a given position very difficult to assess. One thing is, though, I think fairly clear. This is that the standard sort of historical-contractarian justification for the state and a legal system is unavailable to us in its ordinary form. This is because that justification works only with respect to members of particular societies and tells us that all have reason to accept restraint on freedom that apply impartially to all because they thereby advance their interests, including their interest in freedom, relative to the state of nature. Even if this turns out to be true and gives members of particular societies reason to band together and to subject themselves to a common system of administration and law, it fails to justify with respect to the rights and interests of non-members. Their freedom is limited, they are now subject to coercion, but the threat of state violence and restriction that they must put up

with is uncompensated by any reduction in private violence. In fact the organized violence of the states that they must live adjacent to is supplementary to the everyday private insecurity they experience: it makes things worse. In addition, we can mention, perhaps more controversially, that the competitive position of outsiders may be worsened with respect to that of insiders: the insiders may benefit from all kinds of co-operation with one another that becomes possible on the basis of a legal system, but the improvement in their situation is not only relative to brute nature, but also to those who remain dissociated.[14]

Are matters then completely hopeless? Perhaps not, though we are unlikely to find a kind of knockdown argument that everyone will find acceptable. What we need, I think, is some kind of argument that limits territorial sovereignty in ways that protect the basic interests of the excluded. On the conventional view of states and their relationship to outsiders, states are mutual-benefit societies,[15] who may impose harms and sacrifices on one another so that all or each may do better, but whose primary duty towards outsiders is to leave them alone. But what I have argued is that, contrary to the standard model, where people get together with those with whom they live unavoidably side-by-side and ignore outsiders, those establishing a territorial jurisdiction do impose what look like uncompensated harms on

[14] In this respect, there may be an objection that is in some respects analogous to Samuel Scheffler's "distributive objection" to associative duties. See Samuel Scheffler's "Families, Nations and Strangers" in Scheffler (2001).

[15] Goodin (1988)

outsiders by the very establishment of their jurisdiction. Some of these harms may be welfarist in nature, but, more significant is the putative change in the normative situation of the outsider whose earlier freedom to roam is limited by boundaries of the new legal system. Even if states, and the state system of which they form a part, bring great benefits, the benefits are unevenly distributed among humankind. Unrestricted migration would be one way in which to distribute the benefits more evenly, but, arguably, it would also have the effect of reducing the incentives for growth and hence for the production of those very unevenly distributed benefits.

In conclusion, then, and very much as a point for discussion, I should like to suggest the following: that we understand national territorial boundaries to be justly established, always with a qualification in mind. Individuals in a state of nature might well give up their right of access to a part of the earth's surface in return for also getting the right to establish a community practising territorial exclusion, if they were convinced that territorially bounded communities bring with them certain definite benefits. We are all familiar with the arguments for the benefits of such states: they enable us to establish a stable institutional order and thereby to provide peace, security, economic growth and sundry public goods. But as we are all also aware, the state system carries risks as well as benefits. It is as bad, or worse, to be a member of a failed state or a predatory or genocidal state as it is to be a member of no state at all. The same goes, perhaps, for a state that, for whatever reason

is unable to develop stable economic institutions and where individuals are condemned to a permanent state of acute poverty. Hypothetical individuals agreeing to a system of rules governing territorial appropriation would therefore want to build in safeguards assuring their access to the territory of other groups in the case where they might find themselves stuck on the wrong side of the fence. But they would want not want to be too lax about the criteria for being on the wrong side, because they would also want a chance to benefit from the stable institutions that territorial control permits.

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