

Daniel Attas

## Too Much Property

A Comment on Michael Otsuka's *Libertarianism without Inequality*

Mike Otsuka's book aspires to do more than its title discloses. *Libertarianism without Inequality* (Oxford University Press, 2003) does not merely aim to reconcile liberty and equality (that is handled without remainder in the first chapter) but to draw the outlines of a complete, and distinctly Lockean, political theory. Rather than starting from first principles, Otsuka explores several specific issues only loosely connected to each other, hoping that these might add up to a complete political vision. Though the discussion is clearly tinted in Lockean colours, his conclusions are always provocative and difficult to swallow, even for modern disciples of Locke.

Thus he argues for the following theses:

- (1) Robust (rather than merely formal) self-ownership is compatible with a politically imposed egalitarian distribution of natural resources.
- (2) It is acceptable to force the criminally convicted to labour for the provision of the needs of those unable to provide for themselves.
- (3) Deterrence as a form of self-protection can justify punishment.
- (4) I am not permitted to kill someone who intentionally and resolutely aims to kill me, even when killing him is the only way to defend myself, if somehow he is not responsible for his behaviour.
- (5) The authority of the governments of political societies can be legitimized by, and only by, the actual consent of the governed. Tacit consent can be inferred from residence only under the following (I would say, highly unrealistic and unfeasible) conditions: (i) a pluralism of localized decentralized polities guaranteeing choice; (ii) the implementation of the egalitarian proviso—guaranteeing the material means to realise one's choice of polity; (iii) the possibility of forming a monity (a polity of one person).

- (6) Left-libertarianism is superior to liberal egalitarianism in so far as it can, and liberal egalitarianism cannot, legitimate by means of the free, rational, and informed consent of the governed, some extremely hierarchical and illiberal political societies.
- (7) In the absence of their legitimation by the consent of each member of the present generation, the authority of laws enacted by previous generations is as illegitimate as that of laws legislated by foreign powers.

Before I move to comment on a specific theme within the book, I would like to indicate a minor concern on the methodology Otsuka employs throughout. He bases his case entirely on argument by analogy, a frequent use of thought experiments, and an ultimate appeal to intuitions. These are all perfectly legitimate and widely used forms of argument. But when these do not come as supplementary to some more formal argument leading from general principles to concrete judgements, when the argument is presented entirely in this form, this can become somewhat problematic. This is not to say that moral theory must be foundationalist all the way down.

The problem with *appeal to intuitions* is that we don't all share the same intuitions—even after reflection and careful consideration. Thus, for example, the case against killing innocent aggressors crucially depends on comparing and finding no morally significant difference between this and killing an innocent threat and between the latter and killing an innocent bystander. But the case against killing the innocent bystander, when that is the only course available for saving my own life, is argued for by appeal to intuition.<sup>1</sup> Though I may be in the minority here, I for one do not share Otsuka's intuition on this point and so we are stuck at the point of departure. Hence an appeal to intuition as rock bottom authority dangerously verges on the subjective. Moreover, for a book that relies so heavily on intuition, Otsuka should be just a little worried about some of his highly unintuitive conclusions. The whole book might erroneously be taken as a succession of *reductio ad absurdum* arguments.

*Thought experiments* can be imaginative, entertaining, and challenging; and they often border on the bizarre, as Otsuka himself apologetically remarks

<sup>1</sup> Somewhat incongruently Otsuka seems to endorse the doctrine of double effect (13f) that would permit, in some circumstances, to kill an innocent bystander. He labels rejection of the doctrine “fanaticism.”

at one point. The difference between examples (even bizarre examples) and thought experiments is that examples do not form a part of an argument, they may be introduced to *illustrate* a principle, not to *justify* it. Thought experiments, on the other hand, are set up to squeeze out and to appeal to the reader's or the interlocutor's own intuition, as an argument in favour of one general principle or another. Yet in circumstances that diverge considerably from the familiar day-to-day circumstances, such as all bizarre cases must be, our intuitions are not very trustworthy.<sup>2</sup>

Still, the book is stimulating, thought-provoking, and definitely worthy of careful study and thought out responses.

Otsuka's particular brand of Lockean theory is leftist in so far as it exhibits an egalitarian concern for distributive justice of material resources. This sort of left libertarianism combines a strong anti-paternalistic and anti-moralistic attitude towards personal freedom together with an earnest plea for a right to an equal (in a specified sense) share of material resources. One thing in common to all libertarians is their insistence on framing their political vision in *propertarian terminology*. This is only to be expected of right-libertarians, but I find it quite inexplicable why left-libertarians would follow suit. Thus the personal freedom they invoke is phrased in terms of ownership we all have over our bodies, minds, and products; and the equal share in world resources at our disposal is phrased in terms of property rights over these resources. The trouble with this view is that it is premised on some contested ideas, and leads to all sorts of inconsistencies and highly unintuitive conclusions. Sometimes they see property where it is not; sometimes they assume too much in terms of what property implies. I think Otsuka is guilty of both these faults, revealed in at least three central themes in his book: self-ownership, the egalitarian proviso, and the legitimation of illiberal and inegalitarian political societies.

### *1. Self-ownership*

Otsuka takes our most fundamental moral status to be that of self-owners. I shall skip the detailed discussion this point deserves.<sup>3</sup> I just want here, without

<sup>2</sup> For an entertaining and instructive account and defence of the use of thought experiments in science and philosophy, with an impressive panoply of examples, see Sorensen (1992).

<sup>3</sup> See Nir Eyal's contribution to this symposium.

explanation or justification, to register my complaint which is the following. It is intuitively more apt to describe our moral status in terms of personal rights, appealing to political liberties, needs, dignity, recognition, and so on, than in terms of property rights in our selves. Moreover, the idea that we own ourselves commits us to some views that are inconsistent with whatever values might elicit our sympathies to such an idea in the first place.<sup>4</sup>

## 2. *The Egalitarian Proviso*

(a) Besides a right of self-ownership, Otsuka argues for a principle of justice in acquisition whereby individuals “can come to acquire rights of ownership over bits of the world” (22). Following a certain interpretative tradition (see Cohen 1995, 74ff), he takes this principle to be entirely negative. That is to say, the justification is not based on any positive action on the part of the appropriator, such as Locke’s idea of mixing one’s labour with an unowned resource, but rests wholly on the appropriation meeting a certain negative requirement of non-harm—a requirement that has come to be known since Nozick’s *Anarchy, State, and Utopia* as the Lockean proviso.

Such a principle depends on the supposition that the world, in terms of its initial moral status prior to any private appropriations, is unowned rather than jointly owned by all humankind. Though Locke may have had in mind joint ownership, it is nowadays almost taken for granted by libertarians—both left and right—that the initial world status is one of non-ownership. Two reasons are typically given in favour of such an interpretation: first, “in the absence of any such belief that the earth was previously owned by some being who transferred this right of ownership to humankind at the outset, it is reasonable to regard the earth as initially unowned” (22n).<sup>5</sup> Secondly, “in circumstances of joint ownership libertarian self-ownership would . . . be rendered virtually worthless, since one would be permitted to consume any bit of food or water or move, stand, or rest on any bit of land only with the collective permission of all” (30n; see also Cohen 1995, 98).

<sup>4</sup> For more on the status of self-ownership see my (2005) *Liberty, Property, and Markets: A Critique of Libertarianism*, 49–79.

<sup>5</sup> See also Thomson (1990, 323f, 333); Gaus and Lomasky (1990, 489); Sanders (1987, 385–86); Narveson (1999, 213). For a sceptical view of this approach see Wenar (1998, 804).

Both these reasons are guilty of taking property too seriously or as all too exhaustive. The idea that either someone owned the world and gave it to everyone, or it belongs to no one, is beside the point. Initial moral world status is not supposed to trace some historical or quasi-historical fact about how the world came about. Rather, it is a claim about the relation of persons to each other with respect to the world when *they* come into being. The joint ownership thesis claims that individuals as soon as they appear have an equal claim of ownership over the world in common with all others; the non-ownership thesis claims that individuals enjoy equal liberties with respect to use of the world. Choosing between them is not a matter of inspecting sacred texts but of arguing which better and more equally satisfies all individuals' interests.

Contrary to libertarian claims, joint ownership does not render self-ownership purely formal. There is no need to assume that in a jointly owned world individuals will need to seek out universal agreement for every step or move they make. We can assume that the joint owners would be a lot more reasonable and practical than that, collectively agreeing on a set of rules that would regulate movement on the land and its use, in much the same way as public parks or public libraries are regulated today.

The main point I want to make is that framing the issue as that of a choice between two options—either a world that is jointly owned or a world waiting to be owned and as such void of any moral injunction—is misleading. These are not exhaustive of all possible forms the initial moral status of the world might take. In fact there are many intermediate, more plausible, possibilities amounting to a non-appropriable world, with a more or less extensive set of moral obligations and *non-propertarian* rights, such as non-spoilage, limited use, equal access, basic needs satisfaction, free movement, and so on and so forth.

(b) Otsuka argues for a principle of acquisition that would leave everyone equally well off in terms of their opportunity for welfare. He calls this the egalitarian proviso: “You may acquire previously unowned worldly resources if and only if you leave enough so that everyone else can acquire an equally advantageous share of unowned worldly resources” (24). In effect, this guarantees that each person, on reaching majority, gets a one *n*th share of the world's resources weighted according to the objective value of the resource (that is to say, its fertility, or capacity to produce welfare) and its subjective

value (that is to say, the person's capability at converting resource to welfare). Individuals may consume their share, labour upon it and earn its fruits, invest it and make a profit, or foolishly gamble it away. What they actually do with the resources under their control is not the concern of justice. As libertarians usually do, Otsuka phrases this share of resources in terms of ownership. However, the kind of right that the egalitarian proviso provides makes all talk of ownership out of place.

The first problem, to which Otsuka himself points, is due to the intergenerational context. Even when we assume zero population growth and no overlap between generations there are certain restrictions that the egalitarian proviso imposes on what one may do with one's property. Since members of succeeding generations have the same kind of right to an equal opportunity to welfare "it is reasonable to deny the existence of complete rights to consume, destroy or bequeath those resources that one has acquired from an unowned state" (37). We must leave the next generation enough and as good as we have received so that we may not consume more, in terms of welfare producing resources, than we have produced by our labour. Moreover, since all members of the next generation must get an appropriately weighted equal share of worldly resources we cannot bequeath our property to whomever we wish. Instead, when we die our entire estate goes back to an unowned state available for acquisition. This restriction on bequest applies not only to appropriated natural resources, but also to the product of our labour.

Even more restrictive is the proposed regulation or outright prohibition of the more than merely modest "transfers or sharings that would otherwise significantly disrupt equality of opportunity for welfare" within the same generation (38). The egalitarian proviso casts its long shadow beyond the stage of original acquisition to regulate and insure an equality of opportunity for welfare at the later stages of income and transfers. This is perfectly reasonable. Now, Otsuka concedes that if one's income is not generated through any interaction with the world—that is to say, it makes no use of any resources other than one's own body and mind—such restriction would violate the rights of self-ownership. Hence, he applies the restriction only to the giving away of "one's income to whomever one pleases when this income has been generated through labour which involves the world as well as oneself" (39), which, it is plausible to assume, is the greater part of generated income. This is perhaps not a violation of self-ownership but it is difficult

to see how whatever rights are left to one's acquired possessions may still be viewed as property rights. Moreover, I can't see why the same reasoning which Otsuka presses for the regulation of *non-market* transfers such as gifts should not apply to *market exchanges*. These too could amount to fortunes that would disrupt equality of opportunity for welfare. As long as incomes exchanged were generated through interaction with the world we needn't be concerned about a possible violation of self-ownership. Consistency requires that market exchanges will be restricted too. This diminishes even further the concept of property that can be applied to rights over possessions in a left-libertarian world governed by the egalitarian proviso.

Now if we make the more realistic assumption of overlap between generations and of population growth, that is to say, for every person that dies there is normally more than one person attaining majority, the concept of property must be diluted even further. With the coming into being of more people and all worldly resources already owned, the legacies of the dead are insufficient to supply all recent arrivals with an equal share. It becomes necessary to seize from the living part of their possessions in order to provide a fair share to the newcomers. Thus, not only is the power of transfer seriously curtailed by the egalitarian proviso, so is the immunity so central to any concept of property.

Such immunity would be compromised by a strictly applied egalitarian proviso, not merely due to population growth, but also due to many kinds of events and occurrences that might unjustly harm people so that they would be entitled to a forced transfer from others: the occurrence of natural events, such as drying up of water holes, floods, or earthquakes; technological progress that changes the significance of certain natural resources, such as the significance of oil as a source of energy, or the sea or space as a medium of transportation; personal development that leads to a change of tastes and needs, e.g., maturity, family, incapacity due to accident, illness, or old age (see Munzer 1990, 247ff).

These are all harms due to events beyond the individual's control. But perhaps redistribution is justified even when the harm is due to actions for which the individual may be held responsible. For example, the disappointing result of incurred risk or even a deliberately cultivated expensive taste. I can think of two reasons to count harms for which one might be thought responsible as obligating a redistribution. First, it is plausible to assume that responsibility for past action and choices diminishes with time. In a sense I

am not the same person I was 10, 20, or 30 years ago. I am more experienced, my judgement has changed, even my values have evolved. I may find it very difficult to embrace my past choices and unequivocally accept them as my own. A rigid unity of the self over time that doesn't recognise this is arguably an unrealistic and too strict a notion. Secondly, even if such a demanding conception of responsibility is adhered to, the *options* faced, the *cost* of one's choices, and the eventual *outcome*, are all to a certain degree a matter of luck. Though one may tolerate these, they are not something that one has agreed to in advance, or something that is a given of nature, beyond human power. For what shapes the options and imposes the costs of one's choices, what makes the taste 'expensive', so to speak, might be the distribution of resources itself.

Even if this last consideration does not warrant redistribution, the egalitarian proviso nonetheless severely limits the central features of transfer and of immunity of ownership and as such makes it questionable whether such 'appropriations' really give rise to property rights at all. In this sense, one's possessions *never were one's property* since the rights to them were conditional upon certain circumstances prevailing, specifically that no one will ever be made worse off by one's exclusive possession and control. The egalitarian proviso is a plausible principle of distributive justice. But it is not a principle of initial appropriation as it pretends to be.

### 3. *The Legitimization of Illiberal and Inegalitarian Societies*

(a) One way by which an *inegalitarian* society might legitimately arise according to Otsuka is when people gamble on their status in a fantasy scenario such as the following:

An individual [who] amasses an enormous fortune by dint of effort and risky investments stakes a claim to an island . . . constructs a palace and a number of manor houses . . . and invites others to live on his island, but only on condition that they first enter a lottery which will determine who become the (non-hereditary) lords, ladies, and other noble residents of these manor houses [and who] a (non-hereditary) serf or servant for life to the lord or lady of one or other of these manors instead. (116)

A quasi-feudal political society is legitimately formed when informed individuals freely, and rationally, agree to transfer their rights to legislate and punish to the collective of the island residents in exchange for taking part in this gamble, and to entrust these powers to the owner of the island

and to appoint him sovereign for life on condition that he abide by the rules spelled out in the lottery agreement (116–17).

An *illiberal* society might be formed by the unanimous agreement of the owners of individual plots of land that together make up a sizable island. Since each owner has the power to exclude any one from his own land or to permit others under whatever conditions he chooses to impose, the collective of owners have this collective right over the whole island.

(b) Both scenarios follow from a notion that an owner of land is empowered to make rules of behaviour on his land. I think this follows from a deep and common confusion according to which ownership is the basis of sovereignty. According to this way of thinking, it is because we own the land (individually or in common) that we may legislate for anyone that resides on the land. But there is a profound difference and sometimes even conflict between ownership (exclusive control of the disposition of an object, its use, possession, and so on) and dominion or sovereignty (the power to control people, to legislate, and so forth). We usually think that the state retains powers of legislation over a territory, regardless of how ownership over land within the territory is allocated, split, merged, or transferred. Such power of the state typically extends to all privately owned premises. At least some aspects of the law apply within factories, clubs, homes, and so on. Private ownership doesn't exempt one from the reach of the law and it is certainly not the basis of the right to make law. Rights of privacy, individual autonomy, free expression, and so on and so forth, are not subject to the whim of the owner of the land upon which I reside or through which I happen to journey.

Unanimous agreement might be the basis of law, not because the people own the land, but more plausibly because they are subject to that law. That is to say, if we must choose between the two basic libertarian tenets, *self*-ownership, in so far as it is akin to self-governance, rather than *land* ownership may be the basis of collective governance. It is implausible that someone who sells whatever real estate he may have to live off the proceeds (an option Otsuka's scheme must allow) has thereby relinquished all claim to participate in legislation.<sup>6</sup>

<sup>6</sup> Such confused thinking may have been the basis of the Zionist policy of acquiring ("redeeming") land in Palestine by the Jewish National Fund prior to the establishment of the State of Israel. If sufficient land were to be owned by the Jewish people then, it was thought, in addition to any alleged historical entitlements this would give them an

(c) At least at one point Otsuka acknowledges the basis of sovereignty in the idea of self-governance rather than land ownership:

the claim that . . . illiberal and inegalitarian societies are legitimate is nothing more extreme than the claim that those who are governed on such puritanical or quasi-feudal terms have a right to govern themselves in this manner. (119)

This notion, that self-governance can legitimate illiberal or inegalitarian political societies, can only be sustained on the basis of a proprietarian understanding of self-governance. There is an important difference between, on the one hand, the liberty to behave a certain way or to restrict one's behaviour in a certain manner and, on the other hand, the power to allow others to control oneself.

If all the inhabitants of the island want to behave a certain way (puritanically/unequally) there is no need for law enforcement. Actually, there is no need for law. The need for law and its enforcement arises only when not everyone conforms or has an interest in behaving in a specified way. Are the serfs who gambled away their freedom to be coerced by law enforcement agencies to remain on the island? Are people to be denied the right to sell their property on the island to individuals who do not adhere to the puritanical laws abided by on the island?

People are permitted to live their lives as they wish. They can freely submit to the authority of another if they so wish. Such authority could be spiritual, professional, parental, or following from the structure of any kind of voluntary association. They might also choose to live with people who do the same. The point of forming political societies, however, is to enforce norms on everyone. This is where Otsuka's permissiveness becomes less compelling.

In general a permission to do X does not entail the right to do X. A right to do X does not entail the power to have X enforced on me. A power to have X enforced on me does not entail the power, in conjunction with others, to have X-behaviour collectively self-enforced.

Consider the act of killing myself. We may agree that I am permitted to kill myself. But it doesn't follow that I have a right to kill myself. To say

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undeniable claim of sovereignty over the territory. But sovereignty cannot be bought with the land, and the legitimacy of Israel's authority is based on the participation of all its citizens in the legislative process. Were a foreign investor to buy all the land in the country today, this would not even slightly compromise the right of Israeli citizens to run their own affairs.

that I do implies that I may call upon law enforcement agencies to hold back my concerned friend who is interfering with my right to jump off the 10th floor balcony. You may not share my intuition that there is no such right to kill oneself, but you should be able to agree that I can consistently hold the view that committing suicide is permitted though not a right. Even if I have a right to kill myself it doesn't follow that I can empower someone to force me to kill myself. Since if force is required to take me through the proposed course of action, I have probably gone through a change of mind between the moment I empowered someone to force me and the moment he is about to oblige. Moreover, even if each of us has the discrete power to have killing ourselves enforced on us, it doesn't follow that we have the collective power to have killing ourselves enforced on each of us. For if force is required there may very well be a gap between the decree of my individual will, and of the concatenation that makes up the collective will.

The reason why libertarians—left and right—might think that these do successively imply one another is due to their “propertarian” view of political morality, one based on *caprice* rather than on the protection of some basic (and understandable) *interests*. On a libertarian view, with self-ownership at its heart, I should be allowed to kill myself because I want to, in the same way as I am entitled to destroy my car or any other asset of mine. No justification is required beyond my capricious desire. For the same reason I should be able to allow others to force me to kill myself. On a non-propertarian view, perhaps I should be allowed to kill myself as a means to protect and preserve my dignity. But such justification may be lacking in certain cases of suicide, and arguably dignity is compromised and certainly not promoted when empowering others to force me to kill myself. Similarly, the permission to lead a puritanical life, or to live in an unequal society, does not entail the power to have such settings enforced on me, much less to have them collectively enforced. On a non-propertarian view of self-governance, collective enforcement must be grounded on some central interests of the individual—autonomy, dignity, community, welfare, need, and so on—not on just any groundless consent.

### *Conclusion*

(1) What is property? (i) A regime of rights to objects is propertarian to the extent that it employs a decentralized re-allocative mechanism based on the right-holder's power of transfer. This in effect implies an immunity against

expropriation. (ii) A property right is justified on the basis of a legitimate transfer to the owner. It is neutral with respect to the interest it serves to protect. The owner's right to control the object allows any kind of morally groundless use, abuse, and management of the object. There is no need for any further justification such as the promotion of need or dignity.

(2) Otsuka's excessively propertarian libertarianism is flawed in so far as it fails to recognise the following. (i) Personal rights (such as freedom of movement, freedom of speech, privacy, etc.) are not fully captured by the metaphor of self-ownership. (ii) Imposing a conception of egalitarian justice is incompatible with property rights. Too much reallocation will have to be centralized. (iii) Sovereignty is based neither on ownership of land, nor on ownership of self, but on a non-propertarian conception of self-governance.

Political philosophy can do better without a foundational right to property.

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Nir Eyal

## If You're an Egalitarian, How Come You're So *In*egalitarian about Your Body?

Mike: Hi, I am Mike Otsuka. I wrote *Libertarianism without Inequality*.

Righty: Hi! My name is Righty. I am a radical economic conservative.

Lefty: Hello, my name is Lefty. I am a radical egalitarian who thinks that equality of opportunity in the luck-egalitarian sense is a desirable condition. I also happen to be a rabid act-consequentialist, who believes that the state must take whatever means are necessary to promote desirable outcomes. In the case of equal opportunity, one such means is redistributive taxation: coercively transferring money from those with a lot of it to those with little. The state must therefore tax the rich to help the poor and promote equality of opportunity.

Righty: Arrghh! How ethically insensitive! Lefty, you *are* a monster, aren't you? Would you advocate a similar redistribution of a body part from those with two eyes or two kidneys to those with none, just because it would improve outcomes? Would you support the use of forced labor to maximize overall social utility? Look, I am not denying that there is something desirable, other things being equal, about equality of opportunity. But surely we have stringent reasons not to use certain means toward that otherwise noble goal. Sacrificing people—forcing them to lose life, limb, labor, *or income*—to promote other people's opportunities is unacceptable.

This little play was enacted on January 6, 2006, during a symposium on Mike Otsuka's *Libertarianism without Inequality*. I wish to thank Alon Harel and the Forum for Law and Philosophy at the Hebrew University for inviting me to speak at the symposium. Special thanks are due to those who did most of the speaking for me: David Enoch played Mike, and Yuval Eylon played Lefty. I played Righty. I also wish to thank fellow participants and Mike Otsuka for interesting comments on the paper and on the wonderful book on which the paper focuses.

Mike: Righty, why are you assuming that taking away someone's income sacrifices *her*? She is not her income. The word "she" picks out her mind, and often also her body. It does not designate her income. I share your intuitions about the forced redistribution of organs and about forced labor. Such practices sacrifice an individual. But intuitions support only the principle that individuals, including their minds and their bodies, and the products and incomes that these minds and bodies generate, must not be sacrificed — not without these people's consent. I have called that principle "libertarian self-ownership," and I fully endorse it. But libertarian self-ownership does not oppose redistributing an individual's worldly income: the income that she generates from things other than her mind and body alone. Compare, for example, selling one's own hair, or a blanket that one wove out of that hair, with selling vegetables that one produced using not only labor but also seed and farmland — components neither of one's body nor of one's mind. The egalitarian redistribution of worldly incomes like the incomes you raise from farming is fully compatible with libertarian self-ownership. Since the bulk of income is worldly, I believe that "the supposed conflict between libertarian self-ownership and equality is largely an illusion" (6).<sup>1</sup>

Righty: Gosh! Yes — that's convincing. Well done, Mike. Nozick was smart and rigorous, and yet, you've rebutted his views. Good job! I guess that means that I must reject my long-held economic conservatism? Really? Hmm . . .

Mike (turns to Lefty): I guess we've converted another one.

Lefty: Congratulations, comrade!

Righty: Hey, wait! No, I am not converting. Look, it is true, as Mike convincingly points out, that the existence of libertarian self-ownership does not entail the existence of a stringent constraint against redistributive taxation. But it remains perfectly possible that *the best justification* of libertarian self-ownership supports or even entails that a stringent constraint against redistributive taxation exists. In that indirect fashion, commitment to libertarian self-ownership may commit us to rejecting

<sup>1</sup> See also the rest of the introduction and chapter 1. Otsuka shows that egalitarian redistribution of worldly income is compatible even with "robust" libertarian self-ownership. The latter demands that "in addition to having the libertarian right itself, one also has rights over enough worldly resources to ensure that one will not be forced by necessity to come to the assistance of others in a manner involving the sacrifice of one's life, limb, or labour" (32; see also Cohen 1995, 14 and chs. 4–5).

redistributive taxation. It commits us to the best justification of libertarian self-ownership, and that justification (perhaps a principle of autonomy, or one of dignity, or the means/ends formula—whatever it takes to make sense of libertarian self-ownership) may well condemn redistributive taxation. The conflict between libertarian self-ownership and equality may therefore remain very real. Perhaps you should tell us, Mike, what, if anything, justifies being so favorable toward the redistribution of some objects, and so opposed to redistributing all others?

Lefty: Right on, Righty! Dual standards are arbitrary! Mike, if you're so egalitarian, how come you're so *inegalitarian* about your body?

Mike: My book justifies libertarian self-ownership without relying on a comprehensive ethical theory.<sup>2</sup> Strong, widespread, commonsense intuitions also support libertarian self-ownership. We all feel—I bet even consequentialist Lefty secretly does—that acts that sacrifice non-

<sup>2</sup> During the symposium, Otsuka maintained that he grounds libertarian self-ownership in an ideal of self-determination (he may have suggested that that ideal makes Frances Kamm's ethical framework especially suitable for the moral treatment of people's bodies and minds, and Tim Scanlon's framework especially suitable for the moral treatment of worldly incomes). As far as I can tell, such grounding is not fully worked out in the book. It is true that Otsuka defends one aspect of libertarian self-ownership, namely, the alienability of basic rights and freedoms, as "consistent with full respect for [people's] status as autonomous, rational choosers" (126). See my criticism below. However, libertarian self-ownership clearly involves much more than that single component. That the rights that self-ownership defends are alienable reveals virtually nothing about the determinate content of these rights. An adequate grounding of self-ownership would clarify why such determinate rights should exist. Let me also add that respect for our autonomous natures is a problematic basis for libertarian self-ownership. Admittedly, the forced sacrifice of a sum derived from hair sales affects the autonomous formation and pursuit of plans and other aspects of personal autonomy. But it affects them similarly to how the forced sacrifice of a worldly sum affects them. Moreover, I doubt that even the forced sacrifice of hair (as opposed to mere hair sales–based income) or even a monetary fine for practicing one's faith always affects the autonomous pursuit of plans and other aspects of autonomy more than the forced sacrifice of a worldly sum does. Surely the worldly origin of income does not affect its instrumental value, including its value for the pursuit of a plan or for sustaining other aspects of personal autonomy. The crude difference between all components of the mind and the body, on the one hand, and all other realms, including realms of great import, on the other, does not successfully define when an invasion is highly opposed to personal autonomy. See also Cohen 1995, 236ff.; Kocsis 1999; Fabre 2003; Eyal 2005, 197–99.

volunteers on the altar of social goals are highly problematic. Libertarian self-ownership captures that strong intuition successfully—so we should accept it.<sup>3</sup>

Lefty: Libertarian self-ownership conflicts with some core intuitions.

Mike: Like which?

Lefty: Consider the intuition that sacrificing people is nothing like sacrificing income—not even like income that these people generate exclusively from their own bodies and persons. As you construct it, libertarian self-ownership encompasses much more than the intuitively very stringent right not to be instrumentally forced to lose life, limb, or labor. Libertarian self-ownership also includes the far less intuitive “right to all of the income that one can gain from one’s mind and body (including one’s labour) either on one’s own or through unregulated and untaxed voluntary exchanges with other individuals” (15). You describe the latter right as “very stringent” as well—in exactly the same terms that you use to describe the strength of our right not to have our organs redistributed. But surely the intuition is that our rights over our non-worldly incomes are far weaker than our rights over our minds and bodies. Suppose that someone—call him *Wilt Hairberlain*—shaves his hair off for fun, and then realizes that many citizens will pay hefty sums for a strand of his beautiful and unique hair. He sells all his hair and accumulates a fortune. Everyone suffers from unequal opportunities and from their bad consequences. Intuitively, is it really nefarious to tax part of *Hairberlain*’s hair-based income in order to equalize opportunities?

Mike: Presumably we tolerate taxing his hair-based income only because the end is important enough to justify transgressing the merely finite constraint against redistributing worldly incomes (19).

Lefty: But the commonsense intuition is that any constraint against taxing income that comes from hair sales is far less stringent than the constraint against sacrificing a person, or even a person’s hair. The former constraint is roughly on a par with the fairly weak constraint against taxing worldly income. In John Christman’s (1991) terms, our “control rights” over ourselves intuitively seem far more stringent than any such “income rights”

<sup>3</sup> See, e.g., Otsuka’s emphasis on the prima facie plausibility of libertarian ownership over one’s body and his statement that “a presumption in favor of such a right of ownership over any bit of land has a good deal less prima-facie plausibility” (2003, 21, including n. 27).

over ourselves and over other things. Unfortunately, your formulation of libertarian self-ownership, which purports to reflect intuition, does not reflect that intuitive difference.

Mike: You may have overlooked my answer to Christman, on p. 16. I said there that Nozick would have rejected Christman's distinction.

Lefty: But in the following pages you refute Nozick's response, and yet, even having done so, you fail to allow Christman's cogent distinction to inform your definition. If I may suggest, perhaps you uphold libertarian self-ownership for reasons that go beyond our intuitions about forced labor and about redistributing organs.

Mike: You are right. Additional intuitions support libertarian self-ownership and the integrated right to reap the benefits of what we do using strictly our bodies and our minds. One intuition is that the theory itself is attractive. As my co-authors and I recently put the point, "there is something theoretically plausible about the thesis of self-ownership: we—and not others—are morally in charge of our bodies and our persons."<sup>4</sup>

Lefty: If we trusted *that* intuition, though, we would wind up endorsing full self-ownership, which your book rejects (13f). The book endorses only what you call "libertarian self-ownership," which condemns only determinate and harmful ways to treat people as not in charge of their bodies and persons.

Righty: Then perhaps Mike should not reject full self-ownership. After all, he does substantiate self-ownership on the basis of intuitions that would support full self-ownership far more readily than libertarian self-ownership.

Mike: What intuitions are you thinking about?

Righty: You emphasize that

The anti-paternalistic and anti-moralistic implications of [a Lockean right of self-ownership] will be attractive to anyone who finds himself in sympathy with the conclusions which John Stuart Mill draws in *On Liberty*. When it comes to such things as freedom of expression, the legalization of euthanasia, of sexual relations of any sort between consenting adults, of the possession of cannabis and other recreational drugs, of gambling, and the like, I am completely at one with other libertarians. (2–3)

<sup>4</sup> Vallentyne, Steiner, and Otsuka 2005, 207–208. Compare with Justice Cardozo's plausible-sounding statement that every adult has a "right to determine what shall be done with his own body" (*Schloendorff v. Society of NY Hospital*, 211 NY 125, 129–30, 105 N.E. 92–933 (1914)).

The rights proclaimed in such passages are very different from the determinate right that libertarian self-ownership covers. They are rights of self-control that condemn much more than being forcibly and instrumentally killed, injured, enslaved, or having non-worldly income withheld. Such passages reveal your support for a fuller version of self-ownership that rules out even benign—sometimes even beneficial—trespass into a personal sphere that should remain within one’s exclusive control. You really ought to endorse full self-ownership, and not mere libertarian self-ownership.

Mike: I cannot endorse full self-ownership. It generates the wrong conclusions in the standard *trolley* case<sup>5</sup> and in numerous other contexts. Harming someone as a foreseeable by-product of an important pursuit often seems perfectly permissible (13–14).<sup>6</sup>

Lefty: If our intuitions support full self-ownership, and they also tell against full self-ownership, why trust our intuitions so much in the first place?<sup>7</sup>

Mike: I still trust our intuitions about sacrifice. These intuitions are particularly strong. Few acts are intuitively as repulsive as the killing or the severe injury of innocents as a means to goals that these innocents do not share.<sup>8</sup>

<sup>5</sup> In *trolley*, a run-away trolley is hurtling toward five people who are tied to the tracks. The only way to save them is to push a button that automatically diverts the trolley onto a side track. Unfortunately, one person is tied to the side track. Diverting the trolley there would kill that one person. Is it permissible to push the button? Most respondents feel that it is. Saving the five with the foreseeable by-product of killing the one strikes them as fully acceptable.

<sup>6</sup> Recently, Otsuka and his co-authors proposed a different approach toward the failure of full self-ownership to generate accurate conclusions: “Full self-ownership admittedly has some counterintuitive implications. . . . This, however, is true of all principles. A full defense of a principle requires a balancing of the abstract theoretical considerations with the plausibility of the concrete implications (e.g., as in reflective equilibrium). Our claim, undefended here, is that at least loose full self-ownership is justified by such a balancing procedure” (Vallentyne, Steiner, and Otsuka 2005, 208).

<sup>7</sup> See also Daniel Attas’s contribution to this issue.

<sup>8</sup> Otsuka’s canonical statement of a libertarian right of self-ownership, on p. 15, does not specify that the relevant right bearer is innocent. But part II of the book, on punishment and self-defense, reveals the importance for Otsuka of the difference between innocent agents and blamable ones. Fully blamable criminals and fully blamable aggressors can legitimately lose their freedom of movement or even their life.

Lefty: Hey! This sounds like a version of, or a variant on, the doctrine of double effect. Mike, if you hold that self-ownership is right only insofar as it overlaps with a variant on the doctrine of double effect, perhaps you should endorse that variant directly. Why call it “self-ownership”?

Righty: Mike evidently takes the *trolley* problem very seriously, Lefty. I doubt that the doctrine of double effect deals very well with trolley when it involves a loop.<sup>9</sup>

Lefty: Please—no analysis of *trolley* today. Let's talk instead about an intuition that conflicts with Mike's view in a clearer way: the intuition that basic rights like the freedoms of speech, thought, association, movement, and physical integrity are inalienable. Endorsing either full or libertarian self-ownership unfortunately commits Mike to viewing these basic rights as alienable. In fact, Mike embraces and defends this highly counterintuitive commitment in chapter 6 of the book (122ff). There, he claims that enslavement is legitimate if the victim freely forwent her right not to be enslaved. This claim conflicts with exactly the same intuition on which Mike earlier builds his case for libertarian self-ownership, namely, the intuition that forced labor is always wrong. So Mike is in the unenviable position of having to undermine our trust in that intuition, without undermining our trust in it too much.

Mike: Don't you feel that a moral system that permits us to do anything we freely will, that permits us even to risk becoming slaves, respects us as free agents more than a system that bans that free choice? (126ff)

Lefty: In one respect, sure: having the freedom to sign such “Ulyssian contracts” that risk loss of basic rights shows high regard for our freedom (see Elster 2000). In another respect, the rights in question remain basic *freedoms*, and being allowed to lose these rights shows low regard for

<sup>9</sup> In *loop*, the side track described in note 5 above winds back behind the one person back into the main track. Therefore, a trolley diverted onto the side track would return to the main track and kill the five if the trolley did not first hit the one. However, the one is known to be so fat that hitting and killing him is bound to stop the hurtling trolley. Most people feel that, even in *loop*, it remains permissible to push the button and divert the trolley onto the side track. For philosophers like Judith Thomson and Frances Kamm, that intuition undermines the doctrine of double effect. The sacrifice of the one, who never volunteered to be hit by a trolley, seems like a means intended in order to promote an end that he need not share: saving the five.

our freedom. Appeal to respect tends to be very arbitrary. In our context, liberty, which upsets many things, can upset a person's future liberty. The value of respect for one's liberty cannot weigh for or against assigning one the liberty to lose liberty. Naturally, our intuitions on these matters are confused: far more confused than either advocates of alienable rights or advocates of inalienable rights currently take our intuitions to be.<sup>10</sup> Take another example of such confusion. Contemporary declarations of the rights of medical research subjects always demand more than simply free and informed consent. They reflect the intuition that more is owed to autonomous adults who participate in research than simply the real opportunity to refuse to serve as guinea pigs: our regulations often demand that subjects be given a chance to benefit from participation; that risk to subjects remain at the minimal level vital for a trial that is itself truly necessary; and so forth. But we also have the intuition that fully voluntary and rational choice on the part of autonomous adults — including research subjects' free and informed consent — is sufficient for legitimate interventions. I do not see how we can make sense of such apparently incompatible intuitions. The truth is that our intuitions are confused. Commonsense morality is largely the product of morally blind factors like our socio-biological makeup, or the ideologies behind recent modes of production.

Righty: Please, no Marxist rhetoric today! Why not follow Edmund Burke and take intuitions that come from our cultural heritage and innate humanity seriously? I agree that some intuitive criteria for deciding what forms of trespass are especially wrongful seem a wee bit arbitrary. For instance, we regard stealing someone's hair as a fairly despicable violation of individual rights; far more despicable, I believe, than stealing her inventions and other profitable ideas. Stealing inventions, we might explain, violates "mere" intellectual property rights. But inventions, which are the products of a person's intellect, are surely closer to constituting parts of that person than is the replaceable, dead protein that sticks out

<sup>10</sup> For attempts to ground alienable rights in respect for our dignity as free persons, see Nozick 1986, 30–33 (for Nozick, the rights to which side constraints give rise are alienable); Otsuka 2003, 126ff; Taylor 2004. For attempts to ground inalienable rights in respect for our dignity as free persons, see Attas 2000; Freeman 2001, 110ff.; Pateman 2002 (she reserves the name "property in the person" for what we have called "self-ownership" throughout); Ingram 1995, ch. 2.; Kocsis 1999, 24.

of her head. What we regard as central parts of the self is admittedly affected by rich traditions and other factors that have little “objective” importance. And yet, it would greatly impoverish our morality to disregard these factors altogether. When we protest against an occupying army’s arbitrary decision to hold a search in the bedroom of a family, against the army’s arbitrary occupation of the family’s balcony, against the army’s unwarranted destruction of the family’s olive grove, we do not first inquire whether in an ideally egalitarian world these worldly resources would indeed belong to that family. The moral constraint against such invasions into worldly resources rests in part on present legal arrangements and on our rich cultural status quo, which assigns bedrooms to their present occupiers. But if we overlook that constraint only because it lacks “objective” validity, it might be inconsistent to heed constraints against the invasion of someone’s body. They too may rest on our heritage: isn’t it ultimately arbitrary that we forbid invasion of the entire body, and not only of the mind or only of the central nervous system—arguably the more genuine seats of the self? When it comes to self-ownership, we view the entire body as part of the “self.” But body parts like hair and a single kidney are often replaceable without a change of identity or even a huge deficit.<sup>11</sup> Think about invasion of someone’s inessential kidney; invasion of her hair; invasion of her bedroom; invasion of her olive grove. The farther we are from the perceived center of the self, the weaker the relevant constraint against invasion. But the constraint does not altogether vanish once we cross the borders of the body and the mind. All the aforementioned types of invasion are to some degree problematic. In my view, invasion of a person’s bank account is only a step away. Redistributive taxation remains problematic.

Mike: So the two of you really question the existence of a *natural* right not to be sacrificed? Doesn’t it seem to you objectively wrong, for example, to order the execution of an innocent only in order to prevent a lynching?<sup>12</sup>

Lefty: You see, such rights cannot really exist. As philosophers like Harris, Kagan, Unger, and Lippert-Rasmussen have shown us, the best attempts to spell out the rationale behind such rights ultimately founder.<sup>13</sup>

<sup>11</sup> Compare Vallentyne 1998, 613 n. 2.

<sup>12</sup> Otsuka sees the right not to be coercively sacrificed as natural (2003, 3).

<sup>13</sup> Harris 1975; Kagan 1989; Unger 1996; Lippert-Rasmussen 1996, 1999.

Righty: Arrgh! Please remind me, Mike, never to talk to consequentialists again. To quote Elizabeth Anscombe (1981, 40), “if someone really thinks, in advance, that it is open to question whether such an action as procuring the judicial execution of the innocent should be quite excluded from consideration—I do not want to argue with him: he shows a corrupt mind.” Mike, let’s go!

Mike: Yeah, let’s go.

(Righty and Mike leave.)

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Alon Harel

## In Defense of an Involuntary Polity

### Comments on Otsuka's Vision of the Consensual Polity

In a bold attempt to save the legitimacy of the authority of the state, Otsuka puts forward a novel proposal: to design a political scheme which will facilitate actual choice between different societies with different legal systems and social rules. The low costs of transition from one polity to another and the great variety of alternative legal and social structures would in Otsuka's utopian vision not only legitimate the authority of a liberal polity; it would, in fact, justify the pursuit of the most inegalitarian and repressive policies (115–118).<sup>1</sup> The free marketplace of numerous different legal systems (including liberal and illiberal ones) is ultimately what provides the state with legitimate authority. Furthermore, Otsuka believes that if inegalitarian or repressive policies are founded on actual consent made under conditions of equality, and implemented in a way that guarantees adequate opportunity to make informed and free choices, the pursuit of these policies is legitimate.

After describing the mechanisms which allegedly grant legitimacy to the authority of inegalitarian or repressive states, I will argue that Otsuka buys the legitimacy of the authority of the state at too great a cost. More specifically, I shall argue that instead of defending the legitimacy of political authority, Otsuka annihilates the state's authority; that he fails to account for the distinctive features characterizing the state and distinguishing it from other private associations, and that his vision of the state is fundamentally misconceived. The Otsukan utopian state is no different in its structural features than a church, a community center, or any other private association. I shall also argue that the transformation of the state into a private association undermines the preconditions required for inculcating the capacity to choose. By transforming the state into a private association, Otsuka undermines

<sup>1</sup> All parenthetical page references are to Michael Otsuka, *Libertarianism without Inequality* (Oxford University Press, 2003).

the possibility of exercising an informed choice of the type he believes is necessary to justify the legitimacy of the state.

Otsuka asks us to imagine a case in which a privately owned plot of land is transformed into an inegalitarian political society. A successful businesswoman amasses an enormous fortune and establishes palaces and plazas. Furthermore, that person invites others to live on her island on the condition that they first enter a lottery which will determine who become (non-hereditary) lords, ladies, and other noble residents of the manor house. Unfortunately however, in exchange for the prospect of becoming a dignified lord or lady, the participants in the lottery may end up being a servant or a serf. This private island can, under Otsuka's scenario, become a political society which will bind its members to the same degree as a liberal society (116). Similarly, a highly illiberal moralistic state, which enforces strict puritanical limitations upon sexual practices, manner of dress, consumption of drugs, freedom of expression, etc., can be legitimate if it is established in a proper procedure respecting the freedom of choice of its members (117).

Otsuka's belief in the legitimacy of what can be labeled 'voluntary repressive states' is grounded in his belief that "a private individual is entitled to mark the boundaries of her estate as a line which another may cross only if that other thereby tacitly consents, by means of such crossing, to profoundly illiberal rules that govern her household and its grounds" (117). A collectivity of individuals could equally agree that a number of estates, which together cover an island, would be governed by a set of illiberal rules. It is the voluntary consent of these individuals—which does not deprive anybody of his rights—that can ultimately justify the set of illiberal rules.

Otsuka does not believe that his vision of the legitimacy of illiberal state is one that violates the duty of governments to treat whom they govern as free and equal. Instead, he believes that "this duty is fully discharged through respect for the free rational and informed choices of individuals which are made in circumstances of equality" (126). In particular, he believes that "a duty to treat the governed as free implies nothing more or less than a duty to uphold the rights of mutually consenting individuals to freedom of political association on whatever terms they choose including highly illiberal ones, so long as these choices are not disruptive of equality." Indeed, the left libertarianism which Otsuka advocates would maintain that the liberal egalitarian fails to treat the governed as free because he places restrictions upon their choice of terms of political association in a manner which is inconsistent with

full respect for their status as autonomous rational choosers (126).

Before I explore Otsuka's utopia, let me first suggest that to a larger extent than Otsuka himself realizes his vision of a free market of legal systems is already in existence. Such a market does not even compel those who prefer to live under an alternative system to leave the territory. An American corporation which operates in NYC can register in any one of the 50 states of the Union each of which has a different corporate code. By registering in one of the states it becomes subject to its laws rather than to the laws of the state in which it operates. Similarly, any partners to a contract can decide which legal system governs their contract and which courts have jurisdiction over disputes about its implementation. The special privileges which were enjoyed by Jews in Europe and by Europeans in some parts of the Ottoman Empire are also relevant examples. Adjudication of disputes among Jews (including disputes arising from what we now label criminal law) was in the hands of Jewish religious courts and, similarly, Europeans in some parts of the Ottoman Empire were subject to European law. Of course some contemporary anarchists advocate free market in legal systems without even endorsing the rule (implicitly endorsed by Otsuka) of "one territory one law." In the anarchists' vision people could join different legal systems without even exiting their territory.

Yet despite some similarities to these historical examples, Otsuka's model of legitimacy has not been tried. Furthermore, I shall argue, Otsuka's model cannot be implemented because the capacity to choose that is a prerequisite for the legitimacy of the polity cannot be sustained in the type of repressive private associations he envisions.

Let me start by describing what strikes us as particularly bizarre in the example provided by Otsuka of the lottery which divides people into lords and ladies on the one hand and serfs and servants on the other.

What is bizarre in this example is that the social stratification existing in such a society lacks an overall legitimating ideology; or, to the extent it has one, it is one that we do not normally associate with inequalitarian societies. The society Otsuka envisages does not divide people into lords, ladies, and servants on the basis of a belief concerning their hereditary rights or on the basis of what they deserve. This lottery seems to be one designed not to establish a stratified society but to prepare for a Halloween party. Although it endorses hierarchical practices, it lacks the spirit of a hierarchical society, namely, the conviction in the justifiability of hierarchy.

A real stratified society which Otsuka ought to confront is not a society in which people pretend to live the lives of lords and ladies, servants and serfs. Instead, a stratified society is one in which people live the lives of lords and ladies and servants and serfs. Violating their privileges as aristocrats is a violation of the law rather than a violation of a contractual arrangement. More specifically, it is a violation of the natural order of things, namely, the natural societal hierarchy. Similarly, a real puritanical society is not a society in which people contracted to behave properly. Instead, in such a society, a parent who is engaged in an extra-marital sexual affair is being sentenced to prison on the basis of rules which are founded on the conviction that such an affair violates the principles of morality, the word of God, or whatever. The really interesting concern is whether such a society could develop in a way which grants its practices legitimacy.

Note that I do not deny that an illiberal society of the sort envisaged by Otsuka can be established in a contractual manner. It is possible that such a society be formed on the basis of the willingness of individuals to join and respect its rules. Yet, once the society is established, it operates on the basis of rules that legitimate the hierarchy and provide it with ideological support. Its courts, its legislature, and its executive operate on the basis of the conviction that individuals are divided into lords and servants; that some of them are born to rule while others are born to serve; or that God prohibited homosexual practices, etc. The public affirmation of inequality must in the long run undermine its consensual origins.

To see why, it is important to understand a fundamental difference between states and private associations. Private associations may also be founded on the belief that homosexuality is evil and that God created inferior and superior races. But a private association inevitably operates within the limited frames established by the state and its voluntary foundations are inevitably transparent to its members. Being citizens of a state, which recognizes and protects exit from private associations and which recognizes alternative forms of life, forces its members to confront the voluntary foundations of their membership. It confronts them with the fact that beyond the horizons of their association there is a world out there which rejects their values.

Otsuka asks us to transform the state into such a voluntary association. By reducing the costs of exit, providing a variety of alternative political associations, and establishing a market for political associations, the state does not provide a framework within which private associations operate but

becomes just another private association on a par with synagogues, churches, and schools. The low costs of exit and the absence of emotional ties founded on national pride or cultural belongingness transform the state into a private association. The values embodied in its laws can therefore be as sectarian and partisan as the values embodied in the codes of a football club or the rules of a Methodist church. Should we therefore transform the state into a private association in light of Otsuka's vision?

I shall argue that this vision of the state is fundamentally flawed. To demonstrate it let me first emphasize that the authority of the Otsukan state is not political authority in the full sense of the word. Political authority as opposed to the authority of voluntary bodies is characterized by its involuntary nature and by the high costs of exit. Political obligations were often analogized to family obligations. This analogy is apt because both political and family obligations, such as the obligations of parents to their children, are involuntary.

But Otsuka could argue that there is nothing sacred about political authority as characterized above. More precisely he could argue that if one wishes to define political authority as an involuntary tie with high costs of exit then there is no legitimate political authority. Under this interpretation, Otsuka's vision calls for eliminating the existence of involuntary obligations of this sort and establishing the authority of the state in a way which will be analogous to that of private associations. He could also argue that by eliminating political authority as traditionally understood he provides firmer groundings for obligations to obey the law, irrespective of whether these obligations could be properly characterized as "political obligations."

Yet the Achilles heel of this vision is the requirement that individuals in illiberal societies will have the real capacity to make choices. Otsuka's emphasis on choice is particularly salient when he speaks of the way children ought to be raised in his illiberal utopia. Otsuka believes that all parents must ensure that the following three obligations are fulfilled. First, parents are obliged to ensure that their children have adequate opportunity to develop the capacity and acquire the knowledge to make free, rational, and informed choices regarding the sort of political society in which they would like to live upon reaching the age of majority. Second, they are obliged to ensure that their children have adequate opportunity to develop the skills, capacities, and knowledge which would enable them to flourish in a range of the political societies on offer. Third, they must not interfere with their

children's exercise, upon reaching the age of majority, of their ability to make a free, rational, and informed choice regarding the sort of political society in which they would like to live (120). Otsuka concedes that these obligations might render it unlikely that illiberal or inegalitarian political societies would perpetuate themselves via the descendants of the founders and argues that their survival might instead depend on the ability of their founders to recruit new members from the outside.

But freedom of choice is not something that can be taught in abstract in school. Rather, the capacity to choose must be inculcated via sustaining institutional mechanisms that facilitate the realization of this capacity. Periodical elections, independent judiciary which ought to treat all equally, the absence of hierarchical rituals of the type characterizing inegalitarian societies are all means by which the state inculcates this capacity. What facilitates the development of this capacity in the modern society are the institutional practices characterizing the liberal state. Furthermore, this capacity can be inculcated via these institutional practices despite the existence of inegalitarian and hierarchical private associations precisely because of the distinct status of the state as a framework which respects, reinforces, and facilitates the flourishing of this capacity. The distinctive role of the state, and the fact that it is a framework in which private associations operate, grants it a special role in preserving and sustaining the capacity to choose.

The claim I am making is of course partly psychological. It is based on conjectures concerning the ways in which people come to acquire capacities. But it is not merely a psychological one. It is also based on the belief that capacities, values, and practices are intimately interrelated.<sup>2</sup> Think of the sort of equality that forms the social basis of the sense of self-respect that an individual must have in order to exercise meaningful choice. Such equality in a liberal state can be sustained despite great disparities of wealth and life conditions. The reason these disparities do not undermine self-respect is a subtle one, and has to do with the social meanings associated with disparities of different types. To sustain equality as a potent value in social life one needs to see equality practiced by institutions. The state's institutions are the ones that provide an arena in which this value is practiced and implemented.

<sup>2</sup> See, e.g., Joseph Raz, "The Value of Practice," in Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, 2000), chap. 9.

Other institutions are sectarian and partisan and consequently are not ones that can sustain this value. Their sectarian goals dictate various types of discrimination and differentiation which conflict with equality. Consequently, it is only the state that can facilitate the equality that underpins the capacity to choose.

The flaw in Otsuka's vision is his belief that the capacity to choose can be sustained without the existence of a framework that respects, sustains, and reinforces these choices. Many people have challenged the tolerance that some multicultural societies show towards inegalitarian or illiberal communities on the grounds that it is implausible that people growing up in such communities have a meaningful exit option. To address this objection multiculturalists point out that the state still pursues policies that foster the capacity to make free, rational, and informed choices. Otsuka's utopia undermines the viability of the sole institutional framework shared by all citizens in which the values of equality and freedom of choice are embodied in institutional practices. By doing so he undermines the primary institutional mechanism in which the capacity to choose is conveyed and reinforced and thus preserved. Otsuka's vision leaves us therefore with a system in which there is an uneasy tension between institutional practices that reinforce moralistic and illiberal vision, on the one hand, and, on the other, the existence of an abstract understanding that these moralistic, illiberal institutional practices are ultimately justified on the basis of the free will of the participants. In contrast, I believe that the facilitation of choice presupposes a shared institutional framework which reinforces free choice and respects it. The state cannot, therefore, become one private association among others without undermining the viability of the preconditions Otsuka himself sets to his illiberal utopia. To sum up, Otsuka's vision — appealing as it may be — fails because it fails to understand the distinctive role that political authority serves in sustaining the capacity to choose.

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## Critical Comments Regarding Otsuka's (Version of Locke's) Political Voluntarism

### *1. The General Idea*

Suppose I rightfully own some land. It seems I am then entitled to grant some people, but not others, access to my land. And my consent to allow someone access to my land may, of course, be conditional. I may allow you access to my land, for instance, only if you allow me access to yours, or only if you pay me with sufficiently many apples. And my conditions may be more complicated. I may, for instance, allow you access to my land only if you promise to behave according to the house (that is, my) rules. Seeing that you are not entitled to gain access to my land independently of my consent, that I rightfully own it, and that you have sufficiently many sufficiently attractive options that do not involve gaining access to my land, if you, in order to gain access to my land, consent to abiding by the house rules, you are morally obligated to so doing. In a sense, the house rules have thus gained legitimate authority over you.

Nothing in this story seems to change if a group of people who individually rightfully own adjacent pieces of land decide to transfer some of their rights to some collective agency. Then it seems that the agency can allow you access to the land, and it can legitimately hold its consent until you agree to abide by its rules. And so long as the initial distribution of land is just (so long as, in other words, the Lockean Proviso, rather liberally construed, is satisfied), it seems that having agreed to such a condition you are then morally obligated to comply with the collective agency's rules. Furthermore, it seems that this agency will have legitimate authority over you, because you will be morally subject to the rules it legislates. But all of this is compatible with you being entirely free and self-owned. The only restrictions to your liberty are the result of your own freely chosen contractual commitments.

The hope of Otsuka's political voluntarism<sup>1</sup> is that the legitimacy of the state's authority over individuals can be justified in exactly this way. Free individuals in a Lockean State of Nature choose to transfer many of their rights—including the right to legislate, the right to punish, and the right to consent to others gaining access to the state's land—to the state. And assuming everyone—people who are born on the relevant territory as well as people wanting to immigrate to it—have sufficiently many sufficiently attractive options that do not involve living on that land, residing on it expresses consent to abide by the state's rules. And notice, of course, that the relevant consent—the one supposedly legitimizing state authority—is actual (though tacit), not hypothetical consent. Which is why state authority can be shown to be legitimate consistently with a rather strong and uncompromising libertarianism.

Of course, Otsuka is well aware of the difficulties facing attempts to ground the legitimacy of state authority in tacit consent. Otsuka understands Hume's famous objection as one about the unattractiveness of the alternatives undermining the normative weight of the consent, and he deals with it as indeed he should: by describing hypothetical situations (like the Archipelago scenario from chapter 6) where there are sufficiently many sufficiently attractive alternatives. It may be thought that Hume's objection should be understood (perhaps also) in another way—as challenging the state's entitlement to the relevant territory. For if it is individuals rather than the state that are entitled to the land, surely the state cannot gain legitimacy by extracting consent in order to allow people access to *their own* land. But then given a Lockean transition from a Lockean state of nature to the political situation—a transition in which the state earns its entitlement to the land—this problem too can be dealt with.

The hope, then, is to offer a defense of the legitimacy of state authority over individuals that is compatible with viewing them as completely and inviolably free. And it is without a doubt a worthy hope.

## 2. *And Now, the Real World*

What follows from Otsuka's reasoning regarding the moral status of the authority of real-world, contemporary political beings? Not much, it seems to me. For as Otsuka will surely agree, we are very far from the Archipelago

<sup>1</sup> Developed mostly in chapter 5 of his *Libertarianism without Inequality* (Oxford: Oxford University Press, 2003). All page references below are to this book.

scenario. And note that I do not here question the possibility of anything like that scenario, the soundness of such a scenario as a political ideal, or even the practicability of bringing it about.<sup>2</sup> It's just that seeing that the states we are familiar with do not share with the island-states in that scenario many of the features that play a crucial role in Otsuka's reasoning, this reasoning doesn't apply to them. Many, many people do not have sufficiently many sufficiently attractive alternatives to residing where they do in fact reside (or where they want to reside), and it is not at all clear that real-world states rather than individuals are entitled to the land. And so tacit consent can either not be attributed to them, or else it is not the kind of consent that has moral weight.

All this does not mean that real-world states do not enjoy legitimate authority. Perhaps *their* legitimate authority is justified in some other way. But we can at this point assert the following conclusion: either real-world states lack legitimate authority, or Otsuka's political voluntarism cannot be the whole story of legitimate political authority, and consent cannot be a necessary condition for legitimacy. (Which disjunct, by the way, would Otsuka go for?)

Things get a bit worse. For consider the following methodological principle:

MP<sub>1</sub> All legitimate states are legitimate for roughly the same reasons.

MP<sub>1</sub> may, of course, be false. But given two political theories which otherwise score equally high on the list of theoretical virtues, it seems clear that we should opt for the one that respects MP<sub>1</sub> rather than for the one that violates it. This is so because the explanatory power and scope of the former will defeat that of the latter. Otsuka's political voluntarism must either, then, reject real-world states as lacking legitimate authority, or else violate MP<sub>1</sub>. Either way, it seems to me, his political voluntarism loses plausibility points.

Perhaps Otsuka can claim that his political voluntarism can at least show that the state enjoys legitimate authority over those individuals who *do* have sufficiently attractive alternatives. Imagine, for instance, a fairly successful

<sup>2</sup> Though I have my worries here too. In particular, the fact that many people's lives are tied to many others' lives in ways that cannot and should not be ignored, and that there is no moment in time where such ties are not significant, may very well make the Archipelago scenario—though conceptually possible—humanly impossible. But I will not pursue such worries here.

young Israeli philosopher, who studied in the States, reads and writes mostly in English, whose small family is perfectly willing to relocate, and who is very likely to get a reasonably well-paying job at a decent American philosophy department. If this person nevertheless continues to reside in Israel, perhaps this can be understood as him tacitly consenting to the authority of the state of Israel. But consider

MP<sub>2</sub> All those legitimately bound by the authority of a state are so bound for roughly the same reasons.

Just like MP<sub>1</sub>, MP<sub>2</sub> too may be false. But again like MP<sub>1</sub>, it seems that a political theory that would have to reject MP<sub>2</sub> would be thereby losing plausibility points (though I have to confess that it seems to me it would not lose as many plausibility points as would a theory that had to reject MP<sub>1</sub>).

### 3. *Without (Attractive) Alternatives, Is the Consent Doing any Work?*

If I am in dire need of a life-saving operation, and if I consent to the conditions of the only available surgeon (say, to pay her a given sum of money), then, it seems, I am morally obligated by my consent, despite the fact that I did not have attractive alternative options (the only alternative option having been death). So, as Otsuka notes, it just isn't true that the availability of sufficiently many sufficiently attractive options is a necessary condition for the moral validity of consent. Furthermore, Otsuka is right also to note that even the availability of *some* alternative options—attractive or otherwise—may not be necessary for consent to carry moral weight. Some Frankfurt-style examples can serve to show just that. So perhaps real-world states have legitimate authority over their residents in virtue of the consent implicit in their residing in it, even if these residents do not have sufficiently many sufficiently attractive other options.

Well, not *every* consent (or “consent”) counts. If you threaten me that you're going to (unjustifiably) use force against me unless I give my consent to some agreement, and so I do, I am not then morally obligated by this consent. So what we need here is an answer to an extremely general question, Under what conditions, and to what extent, does consent count? Given a theory that gives a satisfactory reply to this question, we can then return to the consent supposedly implicit in residence, and evaluate its moral significance.

Otsuka doesn't offer a general answer to this question, and I'm afraid that I don't have an answer up my sleeve either. But even without a complete answer we can make some progress by noting some characteristics of paradigmatic cases where consent counts and where it doesn't, and then by reexamining the case of residence with the paradigmatic characteristics (on either side) in mind.

So think about the surgeon case again. It seems that there a morally relevant fact is that the surgeon is entitled—if she wishes—not to operate on me. Given something like self-ownership, she is entitled to spend her time as she wishes, and if I want her to spend the time in the operating theater, I may need to reach an agreement with her. And this is at least a part of the normative story underlying the moral weight of my consent to pay.

Does this apply to the case of residence as tacit acceptance of the authority of the state? Well, it does if—and, crucially, only if—the state is entitled that I not reside in it. Only if it is so entitled is the case analogous in the relevant way to the surgeon case. But this question—who is entitled to the land, the state or the resident—takes us back to the point made in the previous section: in the Archipelago scenario, perhaps the state is. In the real world, where the Lockean proviso is not often met, it seems clear that the state is not so entitled, even by Otsuka's (version of Locke's) standards. So the surgeon case won't help vindicate the authority of contemporary real-world states.

Let me register another possibly relevant doubt here. I am not sure that the surgeon *is* entitled not to operate given sufficiently extreme circumstances (she's the only surgeon in town, what she plans on doing if not operating is watching some sitcom reruns, and the like). Clearly, then, if Otsuka is wrong even about the surgeon case, then no analogy from it can vindicate the state. But for the rest of the argument I will assume that the surgeon is indeed entitled not to operate.

But now consider this. When discussing Frankfurt-style cases—cases where there are no alternatives, but still consent seems morally significant—Otsuka says (rightly, it seems to me) that a part of what makes consent morally significant in these cases is that the consented-to option is indeed better for the consenting individual. Similarly, when applying this lesson to the political case, Otsuka writes: “Now suppose . . . that the political society in which you reside is more than merely preferable to any alternative but also positively attractive to you in absolute terms” (107). I agree that

if this is so this makes a difference with regard to the political legitimacy of the relevant state. But, of course, it has nothing to do with consent. Yes, consent is still somewhere in the background here, but it seems at this point that what is really doing the normative work is no longer the consent, but rather objective advantages enjoyed by the individual that originate in the state. What distinguishes between a morally binding consent and one that isn't are not facts about you and your contractual commitments, but rather facts about the advantages consenting will secure for you. These give you reason to consent, and now we are flirting with the suggestion that they also play a crucial part in the story of why it is that having given your consent you are then obligated by it. It is hard not to feel, I think, that the normative role of the consent itself—as opposed to the objective reasons justifying the consent—has significantly diminished.

Ironically, the situation is here closely analogous to the situation with *hypothetical* consent theories. Against these it is often noted that what seems to be doing the normative work is not the counterfactual consent, but rather the actual reasons that make such hypothetical consent rational. So hypothetical consent can be taken out of the picture. Similarly, for Otsuka's *actual* consent theory, the question arises which consents count. And in answering this question Otsuka again falls back on the objective reasons there are to consent. So again—though perhaps not to the same degree as with hypothetical consent—consent can be taken out, and objective reasons directly relied upon. When push comes to shove, the state has legitimate authority over you not so much because of your consent, as because of the objective advantage the state's existence (and legitimate authority over its citizens) confers on you. This sounds to me like a promising route to pursue. But it would be a stretch to call such a view 'political voluntarism'.

With regard to cases where consent seems to count even without sufficiently many sufficiently attractive alternative options, then, I've made the following three points. First, I am not sure about the substantive assumption that, for instance, in the surgeon case consent obligates. Second, often asking whether such consent obligates or not will take us back to the question regarding entitlement to the land, and then we will not have here a promising way of legitimizing real-world states. And third, there is a suspicion that when we are after all able to vindicate the authority of real-world states what is doing the normative work—or most of it, anyway—is not consent, but whatever objective reasons that make such consent rational.

#### 4. The Legitimacy of Otsuka's Federal Government

Earlier I gave reasons to think that Otsuka's political voluntarism cannot be the whole story of legitimacy, that actual consent cannot be necessary for legitimacy (unless all real-world states are pronounced to lack legitimate authority). But it seems that Otsuka himself accepts this result. For when discussing the federal, trans-border government in the Archipelago scenario (e.g., 108), Otsuka himself concedes that there is no voluntarist story that will vindicate its authority. The authority of this federal government is grounded rather in the awfulness of the results of its non-existence. At least in this case, then, Otsuka himself agrees that consent is not necessary for legitimacy.

But then, what *does* Otsuka's voluntarism come to? He can argue, of course, that in the archipelago scenario the island-governments enjoy *more* legitimacy than other governments (including real-world governments) do. Perhaps he can even argue that in that scenario states enjoy legitimacy of a different, somehow better, *kind*. But no one questions these claims. *Of course* it would be nice to have the consent of the governed. *Of course* it would render state authority somehow more justified or legitimate. The controversial, interesting issue is not whether consent can make a difference, and not even whether consent is possible. The interesting question is whether consent is *necessary* for legitimacy, and libertarians—left or right—seem to be committed to answer in the positive.<sup>3</sup> But now that Otsuka has conceded

<sup>3</sup> In his oral reply to this comment, Otsuka made use of the idea of moderate deontology. He believes, as all libertarians do, in a deontological constraint against violating liberty, but he also believes that there are thresholds to deontological constraints in general, and to this one in particular. If so, all Otsuka has to do is to claim that the state case is typically below the threshold, whereas the federal case is typically above it.

But this line of thought raises two related worries. First, what reason has Otsuka to think that the consequences of the absence of a legitimate government are worse in the federal case than in the state case, and, furthermore, worse by a large enough margin to justify the claim that the threshold for the constraint against violating liberty lies somewhere in between the two?

Second, one must be careful not to be too comfortable with moderate deontology. Sure, deontological constraints can have thresholds, but if the intuitive force of deontology is to be maintained, these thresholds should be fairly high. After all, I can believe in a deontological constraint against violating liberty, then place fairly low thresholds on this constraint, then argue that all actual states violate liberty (because

that political bodies can have legitimate authority independently of the governed's consent, he has, it seems, given away *this* game. If he hasn't given away *the* game, he must be playing some other game. Which game, then, is it?

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nothing like Otsuka's line can be made to work, at least not with regard to actual states), but the consequences of the absence of legitimate authority are bad, indeed bad enough to get us over the (low) threshold. This is a legitimate move, I take it, but to call such a justification of state authority libertarian and indeed an instance of political voluntarism sounds like cheating.

Michael Otsuka

## Replies

### *Rights over the World*

1. In chapter 1, I defend the following principle of justice in acquisition:

*Egalitarian proviso:* You may acquire previously unowned worldly resources if and only if you leave enough so that everyone else can acquire an equally advantageous share of unowned worldly resources. (24)<sup>1</sup>

Daniel Attas questions my supposition that land is initially unowned rather than jointly owned. He identifies this supposition with the claim “that individuals enjoy equal liberties with respect to use of the world.” This is not what I meant by non-ownership. The supposition should not be understood as a presumption of certain initial rights such as equal liberty-rights to make use of the world. Rather, it should be understood as an initial *non*-presumption of *any* rights with respect to the world. Rather than asserting the existence of rights that, as a moral default position, we have with respect to pristine wilderness, I was making a claim that was motivated by the methodological impropriety of presuming any rights with respect to the world at the outset. Any claims of rights over the world need to be argued for rather than merely

I greatly appreciate the critical attention that Daniel Attas, David Enoch, Nir Eyal, and Alon Harel have devoted to my book. I have learnt much from their insightful and thought-provoking commentary and can only begin to address some of the challenges they present in the remarks that follow. I am also extremely grateful to Alon Harel for the considerable effort he devoted to the organization of the conference on my book at the Hebrew University of Jerusalem on January 6, 2006, where earlier versions of these four papers were presented. That was a wonderful occasion for me, and I thank all of the participants for jointly sustaining such a high calibre of vigorous but good-natured debate on the day and for the time they committed to the study and discussion of my work.

<sup>1</sup> All such references are to *Libertarianism without Inequality* (Oxford: Oxford University Press, 2003).

presumed. For that reason I would not want to assume collective property rights of joint ownership at the outset.<sup>2</sup>

2. I claim that the egalitarian proviso justifies the acquisition of property rights over worldly resources (22–23). Attas doubts that the stringent demands of this proviso are consistent with coming to have *property* rights over these resources. Some of Attas’s doubts rest on too narrow a conception of property. He claims, for example, that if one’s rights over something include neither the right to bequeath that thing nor to transfer it to others during one’s lifetime, then “it is difficult to see how whatever rights are left to one’s acquired possessions may still be viewed as property rights.” What still remain, however, are the rights to use the thing in question, even to the point of consuming or otherwise destroying it, and to exclude others from using it. What remain, therefore, are what are commonly regarded as paradigmatic instances of property rights.<sup>3</sup>

In any event, the substantive theses I defend in my book are not undermined if one grants Attas’s claim that the rights over worldly resources that the egalitarian proviso would justify are insufficiently expansive to merit the name ‘property’. None of my claims turn on the fact that I call these rights ‘property rights’. I don’t, for example, make any appeal to what follows from the concept of ownership. At one point, I note that my talk of ‘property rights’ might strike some as “an artificial and unwarranted extension of the concept of property” but maintain that “nothing will be lost if those who resist such talk simply mentally delete the words ‘property’ or ‘ownership’ throughout this book and replace them with an assertion of the relevant rights” (15, n. 14). While he denies that the egalitarian proviso could give rise to property rights, Attas maintains that the proviso is “a plausible principle of distributive justice.” If, therefore, Attas performs this mental exercise of deletion and replacement, he should be left with plausible claims about rights over things. His dispute about my claims regarding the rights over *property* that the egalitarian proviso justifies is therefore verbal rather than substantive.

<sup>2</sup> Compare Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 178.

<sup>3</sup> See, for example, John Christman, “Distributive Justice and the Complex Structure of Ownership,” *Philosophy and Public Affairs* 23 (1994): 227, and Clark Wolf, “Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations,” *Ethics* 105 (1995): 792–93.

3. In chapter 5, I claim “that private rights over land in a state of nature imply certain territorially bounded rights to legislate and punish” (95). Attas contends that claims such as this one follow from “a deep and common confusion according to which ownership is the basis of sovereignty.” This is, he says, a confusion because “the state retains powers of legislation over a territory, regardless of how ownership over land within the territory is allocated, split, merged, or transferred. . . . Private ownership doesn’t exempt one from the reach of the law and it is certainly not the basis of the right to make law.” These observations fail, however, to cast doubt on my claim, since they are not observations regarding the limits of our rights to govern our own land in a state of nature. Rather, they are observations regarding such limits in a political society. Moreover, a Lockean has a perfectly good explanation of these latter limits, which in fact presupposes rights to govern our own land in a state of nature: the state possesses its powers to govern the land we own because we must relinquish our natural rights to govern this territory to the collective as a condition of being a part of the political society in question. The fact that we have all relinquished these rights to the members of the political society as a whole explains why foreigners cannot gain sovereignty over the territory of a political society by purchasing land from private individuals within the borders of this society. The right to govern this land is no longer for sale, since it has already been given away to the collective.

#### *The Method of Moral Reasoning*

4. Both Nir Eyal and Daniel Attas draw attention to the fact that intuitive judgments about cases loom large in my book. Since Attas charges me with an “ultimate appeal to intuitions” as “rock bottom authority” that “dangerously verges on the subjective,” I should emphasize that the method of reflective equilibrium that I employ does not regard intuitions about cases as unrevisable fixed points to be accommodated by theory at all costs. Rather, it is revisionary of such intuitions that cannot be explained via an appeal to more general moral principles that are plausible in their own right and explanatory of an impressive range of other intuitions. I conclude, for example, that it is impermissible to kill an innocent threat or an innocent aggressor in self-defence, in spite of the strong intuitions that these acts are permissible.<sup>4</sup>

<sup>4</sup> My argument rests on the claim that it is impermissible to kill an innocent bystander in self-defence. Attas maintains that this claim fails to cohere with my judgment that

Attas writes that “for a book that relies so heavily on intuition, Otsuka should be just a little worried about some of his highly unintuitive conclusions,” which might “be taken as a succession of *reductio ad absurdum* arguments.” I agree that, other things being equal, the less intuitive the conclusions, the less likely they are to admit of sound justification by the method of reflective equilibrium. Nevertheless, conclusions, however counterintuitive they may strike us at a given point in time, are justified if their denial implies claims that are even more difficult to accept. Moral reasoning of a coherentist nature can and has been employed to generate powerfully progressive internal critiques of systems of moral belief, thereby yielding conclusions that were initially regarded as *reductios* but eventually accepted as both sound and intuitive. To take one example, American “Southerners had added a ban on sex discrimination to the Civil Rights Act of 1964 as a way to mock the bill, and at first it was widely treated as a joke. A Page 1 article in *The New York Times* in 1965 raised the question whether executives must let a ‘dizzy blonde’ drive a tugboat or pitch for the Mets.”<sup>5</sup> White Southerners were right to note that a commitment to non-discrimination on the basis of race implied a commitment to non-discrimination on the basis of gender. They were wrong to infer from the apparently manifest absurdity of the latter commitment the indefensibility of the former. This is because the commitment to equality that underpinned the condemnation of discrimination in both cases proved more robust and defensible than the belief in the absurdity of a ban on discrimination against women.

### *Self-Ownership*

5. Eyal’s trialogue might be read as an attempt to show that the very method of reflective equilibrium that I employ yields conclusions that in fact differ from the conclusions I defend.

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it is permissible to foreseeably kill an innocent bystander by diverting a trolley in his direction in order to prevent it from killing more. It does not follow, however, from the fact that it is permissible foreseeably to kill one innocent bystander as a byproduct of one’s saving many innocents that it is permissible to kill one innocent bystander as a byproduct of, much less a means to, one’s saving a *single* individual (even if that single person happens to be oneself).

<sup>5</sup> Anthony Lewis, “The Whirlwinds of Revolt,” *New York Times Sunday Book Review*, February 5, 2006.

For example, Eyal challenges my claim that one has a right of self-ownership to the income that one can gain from one's mind and body that is as stringent as one's right against forced sacrifice of life, limb, or labour. I concede that I should not have made so strong a claim. Among other things, my specification of the income right is not restricted to income that is derived from one's labour. His Wilt Hairberlain example nicely illustrates the separability of rights to income from rights to the fruits of one's labour, since this is an example of income from one's body that is not also the result of one's (non-trivial) labour.<sup>6</sup> By contrast, the case of my hair weaver involves the significant labour of weaving strands of hair into clothing, which is an increasing function of the quantity and quality of the clothing one produces. When the weaver's income is taxed, she must therefore *toil* on behalf of another as a condition of enjoying the fruits of her own labour. Wilt Hairberlain does not, however, need to toil on behalf of another in order to pay his income tax. For that reason, a tax on income is easier to justify in this case than in mine. I would also go so far as to acknowledge that, even in the case of income that is derived from labour, the right to such income is not as stringent as the right against forced sacrifice of life, limb, or labour. That having been said, I think it useful to have demonstrated—as I hope to have done in chapter 1—that even if one assumes a right to income that is as stringent as the right against forced sacrifice, it is possible to show that a robust form of self-ownership that encompasses such an income right is compatible with a strong form of equality. I also do not think an appropriate weakening of my commitment to income rights would jeopardize any of the main arguments of my book.

Even with an appropriate weakening of income rights, I am still left with rights of self-ownership that are appropriately far less egalitarian than rights of world-ownership in the following respects. Even though each of us has an egalitarian claim to any unappropriated worldly resources, we have very unequal claims over any particular mind and body. Although you may have

<sup>6</sup> To take another example that is akin to Wilt Hairberlain, we might suppose that certain human beings unexpectedly vomit substances that are as valuable as the “floating gold” (ambergris) that sperm whales disgorge, which is coveted as the essential ingredient of a wonderfully musky, sweet, ultra-smooth perfume. An Australian couple recently stumbled upon and took possession of one such lumpy mass that had washed ashore on a beach and which may be worth up to \$300,000. See <http://news.bbc.co.uk/1/hi/world/asia-pacific/4642722.stm>.

some claim to the income that I generate solely from my mind and body, and even some claim to forceably help yourself to parts of my body in dire circumstances, my claim to my own mind and body is far stronger than your or anybody else's claim to them. There is, no doubt, a wider perspective from which claims of self-ownership are distributed equally: each person has very strong, and equally strong, claim to precisely one mind and body—namely, her own. But insofar as human beings are unequal in their mental and physical capacities, their health and beauty, and the like, these claims will be unequal in value.

Note that I have not asserted above that unequal claims of self-ownership are in any direct conflict with egalitarian claims of world-ownership that would compensate for these inequalities. I still stand by my argument in chapter 1 that they are not. Eyal, however, raises the possibility that there may be an indirect conflict between unequal self-ownership and egalitarian world-ownership. Even if I have shown that a robust right of self-ownership does not itself directly imply inegalitarian claims to the world, Eyal notes that the best justification of such a right of self-ownership might rest on underlying principles that imply inegalitarian claims to the world. I acknowledge that this is a serious and difficult challenge, and one to which I do not yet have a ready answer.

### *Political Society as a Voluntary Association*

6. I maintain that only “free, rational, and informed” consent could legitimate illiberal or hierarchical political societies. Therefore, rather than offering an account of self-governance that is “based on *caprice*,” as Attas claims, I offer one that accords “full respect” to the status of individuals as “autonomous, rational choosers” (126). My imagined quasi-feudal society, for example, is entered into by means of a rational gamble where the odds of ending up far better than one would otherwise have been are very high and the odds of ending up very badly off quite low (116). One might compare the payoff structure to that of the gamble that people might rationally take when they choose to devote themselves to extreme sports such as rock climbing, aware that there is some chance they will end up severely and permanently disabled or dead as a result. Unlike the feudal case, these other cases do not involve consent to be coerced by others against one's future will. We are, however, familiar with cases in which consent to the latter is rational,

such as the ‘Ulyssian’ contracts to which Eyal alludes, which enable one to fulfil otherwise unobtainable ends by authorizing others to force one to do things, even when such force is against one’s will at the time. Frances Kamm has discussed another such case in which people rationally enter into an agreement to be subjected to a low chance of being seized against their will and killed as the price to be paid for the elimination of a much higher chance of being killed.<sup>7</sup>

It is important to bear in mind that the free, rational, and informed choices to alienate one’s basic liberties that I contemplate in chapter 6 are choices that are made in circumstances of equality. Eyal observes that, according to contemporary declarations of the rights of medical research subjects, a person’s free and informed consent is insufficient to justify his subjection to experimentation. I believe that such declarations must be assessed in light of the fact that present-day circumstances of inequality make it likely that such consent, even if free and informed, will constitute an agreement to forms of exploitation that are morally problematic. Similar worries are legitimately raised about even free and informed decisions to prostitute one’s body in circumstances of inequality. Worries regarding exploitation will be much less pressing in the egalitarian circumstances that form the background of the rise of illiberal and hierarchical societies that I describe in chapter 6. In the absence of such pressing worries, the case for the inalienability of the basic liberties is much weaker.

7. Alon Harel raises a different set of worries regarding the illiberal or hierarchical societies that I describe in chapter 6. He maintains that my “model cannot be implemented because the capacity to choose that is a prerequisite for the legitimacy of the polity cannot be sustained in the type of repressive private associations he envisions.” He says I ignore the “distinct status of the state as a framework which respects, reinforces, and facilitates the flourishing of this capacity. The distinctive role of the state, and the fact that it is a framework in which private associations operate, grants it a special role in preserving and sustaining the capacity to choose.”

There is, however, a respect in which my model encompasses such a framework for voluntary associations. My model is that of “a fluid

<sup>7</sup> See F. M. Kamm, *Morality, Mortality*, vol. 2 (New York: Oxford University Press, 1996), ch. 11. See also my discussion of this case in Michael Otsuka, “Kamm on the Morality of Killing,” *Ethics* 108 (1997): 205-207.

confederation of political societies” that is regulated by an “overarching government body” which is charged to oversee the drawing of the boundaries between the societies in this confederation, settle disputes between these societies, and govern the acquisition and possession of worldly resources to ensure that it is in accordance with the egalitarian proviso (108–109). The political societies of this confederation would, moreover, be on a scale of self-governing cities, towns, and regions that is small enough to foster local autonomy (105). The relation between this interpolitical governing body and the various political societies is structurally analogous to the relation between modern-day liberal-egalitarian states and the voluntary private associations within them that Harel finds unproblematic. It might be regarded as the same relation, just pushed one level up: voluntary associations are raised from the level of synagogues, churches, and schools to that of cities, towns, and small regions, and the involuntary governing framework is raised from the level of present-day states to that of a governing body that adjudicates among a confederation of political societies. Why are illiberal or hierarchical voluntary associations possible within the one framework but not the other?

Perhaps the answer to this question lies in the fact that the interpolitical governing body that I envision would be far less powerful and pervasive than the modern-day state. It would be more like a United Nations with teeth than a highly centralized state such as Britain or France or even a federal state, with lesser powers over its regions, such as Germany or the United States. Harel might maintain that my involuntary framework would need to be much more extensive—much more like these actual states—in order to sustain the capacity for individuals to choose. I think, however, that Harel exaggerates the degree to which people need to be nurtured by the institutions of a liberal egalitarian democracy in order to develop the capacity to choose. So long as they have not been brainwashed by propaganda, deprived of education, or severely traumatized, even people in illiberal or inegalitarian societies can develop, and have developed, the capacity to choose. It appears to be a consequence of Harel’s position that this capacity could not flourish before the relatively recent advent of liberal egalitarian democracies and cannot be widespread outside of these societies today. Yet that seems to underestimate the actual capacities of people outside of liberal egalitarian democracies to make rational choices involving such significant matters as marriage and employment contracts. We may regard many such choices as not genuinely

morally binding on the weaker party when they are made in circumstances of inequality. Yet the justification of the belief that these choices are non-binding need not appeal to any incapacity of the weaker party to choose properly. It is more plausible simply to appeal to the unfairness of the circumstances of choice and the exploitation to which they give rise.

Even if, however, Harel is right regarding the degree to which people need to be nurtured by the institutions of a liberal egalitarian democracy in order to develop the capacity to choose, one should bear in mind that it does not follow that the extremely illiberal or hierarchical societies that I describe in chapter 6 could not legitimately arise on my left-libertarian archipelago. They could arise so long as they are constituted by voluntary emigrants from some of the more liberal egalitarian democratic societies that would also populate the confederation.

8. I maintain that we each possess a right not to be governed by others without our own consent. This is not an absolute right, as there are circumstances in which it would be unreasonable to insist on its noninfringement. But it does not follow that consent is anything less than a very important—albeit overrideable—moral requirement. Consider the following analogy. We hold that one has a right not to have one's kidney removed without one's consent. We can, however, imagine circumstances in which forced kidney donation would be justified—e.g., that it is the only way to prevent a catastrophic plague. The fact that there are circumstances in which one may remove a person's kidney without his consent renders the consent requirement overrideable without also rendering it superfluous or insignificant.

In my book I defend the claim that actual consent is a necessary condition of the legitimacy of the governments of political societies. I deny that it is a necessary condition of the legitimacy of the interpolitical governing body. David Enoch questions whether a relevant distinction can be drawn so as to justify a nonoverridden requirement of consent in the one case but not the other. I think the following difference is relevant. Something like an interpolitical governing body must exist in order to ensure the appropriate background circumstances of equality for legitimate political associations to arise by unanimous consent and the means of settling disputes among these societies. This interpolitical governing body creates the very conditions by which the emergence and persistence of legitimate voluntary political associations becomes feasible. When such conditions are in place, there

would be no compelling justification for the overriding of our right to be governed only with our own consent, as we could no longer point to the impracticality of respecting such a right. But since, in the absence of an interpolitical governing body, we would not have the conditions in place in which the rise of legitimate unanimous consensual governance is feasible, it would be unreasonable to insist that such a governing body arise only by unanimous consent if at all.

How do these reflections bear on the question of our political obligations in the real world? Here are some preliminary thoughts. The rights of most if not all individuals in the actual world to be governed only with their consent are infringed, since (as Enoch points out) the conditions that would make residence a form of morally binding consent are almost always lacking today. The governments of actual states can and should, moreover, transform the way things are within their borders into something much closer to the egalitarian, decentralized, and open circumstances of a left-libertarian confederation and eventually reduce their own role to that of the interpolitical governing body of such a confederation. They would not, moreover, be required to obtain the consent of all to create the very conditions in which a requirement of unanimous consent is feasible. Since they can, but do not, do these things, there is no case for saying that the infringed rights of people within their borders to be governed with their consent are justifiably overridden. Therefore, few if any in the actual world have an obligation to obey their government.

9. Enoch doubts that tacit consent via residence has the normative force I claim for it in my voluntarist account of the legitimacy of the governments of political societies. I maintain that such consent might be morally binding even if one has no attractive alternative to consenting (97–98 and 105–107). In support of this claim, I appeal to Hume’s example in which a “man, dangerously wounded, who promises a competent sum to a surgeon to cure him, wou’d certainly be bound to performance.”<sup>8</sup> Enoch wonders whether the consensual agreement of a promise is actually doing any normative work in binding the patient to pay the surgeon. He acknowledges that it would do work if the surgeon were entitled, as a matter of self-ownership, not to operate on this person, as in this case he would need to reach an agreement

<sup>8</sup> Hume, *A Treatise of Human Nature*, bk. III, pt. II, sect. v.

with the surgeon. But he expresses doubt that “the surgeon is entitled not to operate given sufficiently extreme circumstances (she’s the only surgeon in town, what she plans on doing if not operating is watching some sitcom reruns, etc.)” Enoch implies that if, moreover, the surgeon has no entitlement not to operate, then consent would play no role in explaining the obligation of the patient. I believe that even in such extreme circumstances, the surgeon has the following entitlement not to operate: assuming that the patient is not destitute, the surgeon may refrain from operating for free. Nevertheless, she is duty-bound to operate for a reasonable fee. Given the plausible assumption that there will be a range of fees the surgeon could charge which would count as reasonable, consent has a role to play here. The patient must reach an agreement with the surgeon on a particular fee within that range, where such agreement serves morally to bind the patient to pay that fee and not another from within that range (98, n. 31).

I go on to claim that, if life in the society in which a person lives is positively attractive to him in absolute terms, it would be reasonable to infer that he tacitly consents via his residence in this political society even if he has no alternative whatsoever to life in this society. Moreover, such consent explains why this person is legitimately bound by the authority of the government of this society. In this case, unlike the patient–surgeon case, there is no scope for the individual to strike his own agreement with the state regarding the terms of his governance, since these terms cannot be tailored to each individual and will need to be settled collectively. Enoch maintains that what must really be doing the work in legitimizing political authority in such a scenario is the objective advantages enjoyed by the individual rather than his actual consent. In defending this claim, Enoch draws on a parallel critique of hypothetical consent, according to which it is the objective reasons that make hypothetical consent rational, rather than such counterfactual consent itself which is doing the normative work; hypothetical consent can drop out of the picture without moral loss. I think there is, however, a significant difference between hypothetical and actual consent. In the latter case, we can point to an individual’s actual willingness to live in the society in question, whereas in the former case there is no such actual state of mind to which we can point. Moreover, a person’s actual mental state—his voluntary embrace of the society in question—has an important role to play in justifying his subjection to the coercive power of the state. In explaining why the collective has a right to govern him, and not he himself, it is not enough simply to point

to the objective benefits of his being so governed by the many. We need a better explanation of how he has relinquished his natural right to govern himself to the collective.

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