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CAN A RIGHT OF SELF-OWNERSHIP BE ROBUST?

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ABSTRACT. According to a renowned left-libertarian, Michael Otsuka, a libertarian right of self-ownership can be so robust that one need not sacrifice the use of one's mind and body to help others. In this article, I demonstrate that Otsuka's way of reconciling this robust conception of self-ownership with equality is not appealing and, at best, would provide limited guidance in the face of real-life uncertainty.

I. INTRODUCTION

Over the last few decades, left-libertarianism has attracted our attention as one of the most powerful and intelligent strands of political philosophy. Left-libertarianism holds, roughly, that while people are full owners of their mental capacities and physical traits, unowned worldly resources should be distributed in an egalitarian manner.¹ No doubt the attractiveness of this position resides in its appeal to our intuitions of self-ownership and equality. Among left libertarians Michael Otsuka attempts to ground the two intuitions in a provocative way. In his recent book entitled *Libertarianism without Inequality*,² Otsuka tries to prove not only that a libertarian right of self-ownership, including a stringent right to all of the fruits that one can gain through the exercise of one's mind and body, is defensible. He also argues that the libertarian right of self-ownership can be so robust that one need not aid in the subsistence of others by sacrificing the free use of one's mind and body. His argument thus purports to show why left-libertarianism is a strand of libertarianism, which argues against any

¹ See, e.g. Vallentyne and Steiner 2000; Vallentyne et al. 2005.

² Otsuka 2003.

forced work for the sake of others.³ Were this argument successful Otsuka would have demonstrated not only the attractiveness of left-libertarianism but also its distinctness as libertarianism, which can be contrasted with liberal egalitarianism.⁴

In this article, I argue that, admirably ambitious as his attempt is, Otsuka fails to combine self-ownership defined as robust with equality in a successful way. The structure of my article is as follows: In the first place, I introduce Otsuka's project to reconcile between a robust right of self-ownership and equality. Next, I show that his project is not appealing, or of limited success at most, in virtue of real-life uncertainty. Finally, I consider three possible objections to my argument and respond to them.

II. OTSUKA'S RECONCILIATION PROJECT

Before scrutinising his discussion of how robust a right of self-ownership can be, we should first and foremost note that Otsuka suggests the replacement of a *full* right of self-ownership with a *libertarian* right of self-ownership. While the former is indecomposable, the latter can be decomposed into two parts as follows:

- (1) A very stringent right of control over and use of one's mind and body that bars others from intentionally using one as a means by forcing one to sacrifice life, limb, or labour, where such force operates by means of incursions or threats of incursions upon one's mind and body (including assault and battery and forcible arrest, detention, and imprisonment).
- (2) A very stringent 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.⁵

³ It goes without saying that the libertarian doctrine against any forced labour for the subsistence of others stems from Robert Nozick's well-known argument that "[t]axation of earnings from labor is on a par with forced labor" (Nozick 1974, p. 169). See also Otsuka 2003, pp.16–20.

⁴ In chapter 6 of his book (Otsuka 2003, pp. 114–131), Otsuka actually compares his libertarian account of political legitimacy with the approach to political legitimacy that liberal egalitarians such as John Rawls employ.

⁵ Otsuka 2003, p. 15.

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By this, Otsuka exposes a difference between Nozick's right-libertarian line of argument and his left-libertarian line of argument. As is well known, Nozick argues that Right (2) can gain full warrant from Right (1) combined with a minimal principle of just appropriation that no one actually rejects, which is the so-called Lockean proviso that ensures "the situation of others is not worsened."⁶ Otsuka calls this into question, since it is doubtful that Right (2) can follow from Right (1) *only* with such a minimal principle in a morally acceptable manner.⁷

Otsuka's reasoning is as follows: The original Lockean proviso as adapted by Nozick may neglect the extent to which people differ in their bargaining powers, since the Lockean proviso requires merely that one's appropriation worsen nobody else. To see the problem clearly, imagine a case in which people are washed up on a desert island, which is under conditions of scarcity. Suppose that they can be divided into two kinds of people, 'the incompetent', endowed only with poor skills to acquire worldly resources, and 'the competent', gifted with great abilities to appropriate resources effectively. For simplicity, assume that people differ in skills to acquire worldly goods through no fault of their own (e.g. the difference is due to their native talents). The problem is obviously that even if the competent appropriated lots more than the incompetent, the amount of which leaves the incompetent barely sufficient to live off, the Lockean proviso might obtain. This may be the case as long as the competent offer the incompetent compensation that would lead them to be no worse off than if nothing had been appropriated. Note that this problem also occurs even in cases in which there is no difference of such talents between people: the first appropriators may legitimately take over land or

⁶ Nozick 1974, p. 175.

⁷ Nozick, however, acknowledges that there are exceptional cases in which the full right of self-ownership cannot be guaranteed under the Lockean proviso. For instance, in unfortunate situations where there is only one water hole in a desert or where all the water holes in the desert dry up except someone's, (her) property rights of the water hole may well be restricted for the avoidance of catastrophe (Nozick 1974, p. 180).

worldly resources by offering the others certain benefit that, for instance, makes their position slightly better than if nothing had been appropriated. Nozick's Lockean proviso thus seems too weak to prevent people being exploited unfairly by those who have more leverage in the bargaining process after their initial acquisition.⁸

From the fact that Nozick's Lockean proviso is not sufficient to be a just principle of original appropriation, however, it does not follow that the libertarian right of self-ownership can in no way be defensible. For, according to Otsuka, the following revision can correct the above-mentioned defects with the original Lockean proviso:

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.⁹

Here it is important to note that the egalitarian proviso assures not just a right to 'equal share' but rather an entitlement to 'equally *advantageous* share'. The egalitarian proviso thus is not subject to the aforementioned defects in such a way as to disallow the competent (or the first appropriators) to place the incompetent (or the rest of the people) at any disadvantageous share of worldly resources by exercising their bargaining leverage. Evaluating whether each share is equally advantageous, Otsuka is committed to Arneson's equal opportunity as his welfare metric, which noticeably recommends an *ex ante* type of equalisation.¹⁰ For the present purposes, however, details of the metric he employs do not matter much.¹¹

What is distinctive about Otsuka's argument is that it does not stop at this *prima facie* happy combination of a libertarian right of self-ownership and equality. His further claim is that we can admit even that one has a *robust* right of self-ownership, defined as a right not to be forced to aid in the subsistence of others.¹² To demonstrate this, Otsuka introduces an artificial

⁸ Otsuka 2003, pp. 23–24. See also Cohen (1995), pp. 79–83.

⁹ Otsuka 2003, p. 24.

¹⁰ Otsuka 2003, pp. 25–29.

¹¹ See also note 15.

¹² Otsuka 2003, pp. 32–35.

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illustration. Imagine only two kinds of people, a handful of the physically disabled and a large number of the able-bodied, on a desert island. Suppose that only the following worldly resources are scarce and regarded as valuable: seafront and arable land. The egalitarian proviso enjoins the islanders to apportion those resources in such a way that the disabled appropriate the seafront property while the able-bodied divide the arable land equally. For the former who cannot engage in any productive activities can enjoy an equally advantageous share of resources in permitting the latter's access to the beach in exchange for the food products the latter produce, without gaining any assistance from the latter. It is reasonable to think that divisions of this kind are much easier in actual circumstances in which there is a variety of natural resources and disabilities. This is why, Otsuka believes, all people can respect a libertarian right of self-ownership in the very robust sense.¹³

III. WHY OTSUKA'S PROJECT FAILS

In virtue of the illuminating demonstration of how a robust-libertarian right of self-ownership can be guaranteed under the egalitarian proviso, Otsuka's project might seem to be successful. However, there is a strong reason for thinking this success dubious. The reason is that the egalitarian proviso may leave uncorrected many real-life inequalities involving *uncertainty*.

¹³ Note, for the sake of this argument, it must be assumed that the able-bodied have a preference for more goods than just necessary for their subsistence (Otsuka 2003, p. 33). Although Otsuka thinks it to be a paradigmatic preference, I suspect that few of the able-bodied would form such a preference in the above-mentioned circumstances under the egalitarian proviso. For the egalitarian proviso may have a significantly disincentive effect on the able-bodied workers in such circumstances. Furthermore, with no argument in favour of this assumption it may beg the question, since we are now scrutinising whether the able-bodied need really be *forced* to assist the disabled or not. This, I take it, is a serious problem with Otsuka's argument.

Consider the desert island story again. In allocating unowned worldly resources in accord to the egalitarian proviso, the islanders (or, if available, a third person with authorised powers) must be fully informed of the extent to which the physical disability influences individual capacities to engage in certain valuable activities. In the case under discussion, there is a need to know how arduous the disabled find engaging in farming that is of great value in the island market. Now suppose that information in question is given, no matter how controversial it may be. Still, there remains a task of evaluating the potential value of farming in the island market. Obviously enough, this is extremely demanding, since such value cannot easily be known even to the best kind of economists (if any). It might be suggested that by using a supercomputer, the islanders (or the third party) can assess the value of farming through the process of hypothetical auction given existing pertinent information. But this does not change that: first, to collect relevant information required for the hypothetical auction is of tremendous difficulty, or possible but at unreasonably high cost; and second, even if the information can be collected in some way or other, the auction process is so complex that the value of auctioned goods cannot be computed during the time of economic exchanges, even by using a brilliant supercomputer.

Now assume that information of this kind is obtainable at reasonable cost and the computation is possible in a reasonable time. We still would encounter a much deeper problem with uncertainty, more precisely, uncertainty in a sense of objective probabilities.¹⁴ The following implication of the egalitarian proviso troubles the islanders in the initial allocation of resources: the initial division of those resources should be such that the egalitarian proviso obtains *whatever may happen* later

¹⁴ It might be claimed that there are no objective probabilities as such. But even if there are no such things we still can rank the status of probabilities in such a way that the higher credence to belief, the higher the status of probability, other things being equal. Uncertainty then could be taken to be a derivative concept of the higher-status probability. On this point, see, e.g. Broome 1991, p. 129.

on. This requirement turns out to be extremely demanding if we consider two cases. The first case is:

Volcanic Eruption: A few years after the allocation of land, there was a volcanic eruption in the farmland that had never occurred before in living memory or recorded history.¹⁵

The result of this eruption makes the farmers non-culpably worse off, whereas the disabled with steady incomes are not (or less) badly off. In this case, the egalitarian proviso does not obtain, since, contrary to their legitimate expectations formed with available information of a relevant sort, the able-bodied farmers may never consume the same degree of resources as the disabled enjoy.

Consider next:

Seashell Boom: In the seafront which the physically disabled own, there are seashells that were regarded as valueless (when they appropriated the seafront); so the disabled were allowed to acquire them freely. But unforeseeably, some islanders come to think them valuable and then the seashells become popular. The disabled start to exchange those seashells for farm products with the able-bodied. In the end, the disabled are much better off.

This is a tricky case, since while the disabled amass the windfall profit as sheer good luck, no one is made (at least distinctly) worse off. But note that no one initially had any prospects of receiving 'manna from heaven', even given pertinent information. Hence, it may well be said that the egalitarian proviso is not satisfied in the initial allocation of resources. For the disabled heap an extremely advantageous share of resources that comes about through sheer good fortune.

What do those cases show? The answer is this: Only when people (or a third person with no private interests) have *perfect*

¹⁵ A similar example is used by Lippert-Rasmussen (1999, pp. 482–484), in order to show why Arneson's equality of opportunity for welfare cannot be a sufficient condition for an outcome permissible with respect to inequality: even if people enjoy initial equality of opportunity for welfare in terms of expected value, some might have disastrous outcomes of their own choice that they could not have reasonably foreseen. It thus seems natural that Otsuka's egalitarian proviso, which is spelled out by reference to the Arnesonian metric that is strongly favourable to any sort of ex ante views, faces counterexamples of the same sort.

information about the outcomes of their initial acquisitions of resources is it the case that no one can legitimately complain about their resulting positions. In other words, under the egalitarian proviso, a robust-libertarian right of self-ownership is enhanced only when there are no threats of uncertainty. This would mean that the claim that a libertarian right of self-ownership is robust is rarely respected true; the egalitarian proviso cannot be satisfied in the presence of uncertainty, which is unavoidable in most actual circumstances. We thus may be compelled either to weaken the egalitarian proviso in the manner that permits unfortunate resulting inequalities, or to get rid of the robust sense from the libertarian right of self-ownership. Either way, however, is unattractive for Otsuka's line of left-libertarianism: the former pushes us to revise the Lockean proviso in some inegalitarian direction; the latter can cause left-libertarianism to lose its identity as libertarianism. We thus should conclude that there is no plausible reconciliation between robust self-ownership and equality in real life.

IV. THREE POSSIBLE OBJECTIONS

Now let me examine three possible objections to my argument.

First, it might be objected that the two cases raised above are exceptional, in that they involve extraordinary luck that cannot be foreseen in any reasonable way. In more ordinary or standard sorts of cases, it is argued, we can say that most agents normally enjoy a right of self-ownership in such a robust sense as to be unforced to come to the assistance of others under the egalitarian proviso.

However, the two cases above are representative of the things that frequently happen in actual circumstances. It goes without saying that people in the actual world encounter unforeseeably disastrous events, such as earthquakes, lightning strikes, and bushfires, which often affect the value of worldly goods of various kinds. There seems no difficulty to see the volcanic eruption case as such. The same thing is also true of the case of seashell boom where there is the unanticipatable boom of the seashells that were of no marketable value in the initial division of land resources. In the market society, it can easily be found that people unpredict-

ably change their tastes. In other words, the seashell case can also be seen as among typical cases (to say the least, not exceptional) that frequently come about in an economic system driven by the popularity of preferences.¹⁶

Another objection is put in the following way: To cope with the aforesaid problem with uncertainty, what we should do is engage in ex post adjustments to people's share of worldly resources after unforeseeable events occur.¹⁷

For a libertarian right of self-ownership could be interpreted as a claim to full income that one can gain from one's mind and body on terms that this right is exercised within the confines of owning worldly resources, which are determined in a way which is strictly consistent with the egalitarian proviso. For instance, in the volcanic eruption case, we should redistribute the appropriated worldly resources in such a way that all islanders would have enjoyed an equally advantageous share of the remaining resources after the volcano erupted. Similarly, the unpredictable boom of seashells would require us to apply the egalitarian proviso to the seashells as certain valuable resources (given that they are moderately scarce). In other words, the egalitarian rule of allocation need not be applied just once, but over and over again; the rule is applied whenever the value of resources is changed.

This revised proposal that allows for ex post redistributions as such might seemingly make Otsuka's argument more reasonable than the strongly ex ante type of argument that I

¹⁶ For related discussions of this point, see Gibbard (2000, p. 29); Attas (2003, pp. 368–370).

¹⁷ As a matter of fact, Otsuka briefly states that ex post adjustments would practically need to be implemented for achieving equality as follows:

It would be a mistake to regard ... interventions as objectionable on the grounds that they constitute violations or infringements of the property rights of individuals, since they are instead a necessary means of realizing a just distribution of worldly resources in accordance with the principle of justice in acquisition. Such an adjustment would be no more a violation or even an infringement of somebody's property rights than the taking someone's holdings in order to rectify the fact that these holdings were unjustly passed down to him. (Otsuka 2003, p. 40).

take as Otsuka's original one. It would not get Otsuka's argument off the hook of the problem uncertainty poses, however. To see this, suppose that uncertainty is prevalent. It would render ex post adjustments an indispensable means to realise the equal allocation of worldly resources over time, in the scheme based on the revised proposal. Then a question immediately arises: what kind of role can the libertarian right of self-ownership play in this scheme? The answer seems this: no real role may very likely be given to the right of self-ownership defined as robust. In other words, this revised proposal must allow that in the circumstances in which uncertainty is inescapable, the notion of self-ownership be vacuous, or, to say the least, much thinner than that which Otsuka's reconciliation project purports to delineate. This is because in the alleged scheme, the ex post transfers are apparently prioritised over the initial acquisitions of unappropriated resources based on the robust-libertarian right of self-ownership, in order to achieve what the egalitarian proviso enjoins whenever the value of goods is altered. This turns out to be seriously problematic in view of the reconciliation project, provided that we take seriously the common trait of the actual market, that is, uncertainty. We thus should conclude that this revised proposal is also vulnerable to the problem with radical uncertainty.

The third objection is this: To be sure, there is irremovable uncertainty in real life, but we can imagine a possible world in which the egalitarian proviso would obtain without obliging people to assist others in their subsistence under perfect information.¹⁸ Given that Otsuka's reconciliation is justified theoretically, our task is to trace the gap between what actually occurs influenced by such uncertainty and what would happen in the possible world the theory exemplifies, and then, correct the former in accordance with the latter.

This suggestion might seem plausible in that it accepts the fact that we cannot avoid the effects of uncertainty in most actual circumstances. Setting aside any epistemic difficulty in

¹⁸ It seems that this objection properly reflects Otsuka's intention which is to show no "putative conflict between self-ownership and equality *at the level of ideal theory*." (Otsuka 2003, p. 40; emphasis added).

specifying possible worlds of this sort, we might think this proposal quite persuasive in the volcanic eruption case. For this would require that, among other things, the able-bodied who are non-culpably worse off through sheer bad luck be indemnified, as far as is possible, to a proportional degree to which they would have earned had they not encountered the volcanic eruption.¹⁹ In this case, narrowing the gap between the actual world and the possible world in question appears to meet the egalitarian intuition.

Nevertheless, the gap-narrowing argument is not so convincing in the case of seashell boom, where the disabled are luckily better off in virtue of the value change of the seashells they can own. For, if the gap-narrowing policy were carried out, all of the benefit the disabled receive through voluntary exchanges of the seashells would very likely be utterly confiscated.²⁰ This policy could be implemented more easily than the compensation policy in the volcanic eruption case, since what the authority should do in the seashell case is simply impound the windfall benefit from the disabled. It seems counterintuitive to enforce such a strictly levelling-down policy—the policy to take the benefit away from the disabled and then do nothing else.²¹

¹⁹ For such indemnity, it is likely that the benefit the disabled can enjoy is reduced by a proportion to the resources destroyed by the volcanic eruption. This implies that the disabled can only have an advantage of their share curtailed by that proportion. It then might seem that this result is contrary to what the egalitarian proviso ought to require. But if really so, it simply means that the proposed counterargument fails.

²⁰ It might seem that rights to transfer, which are a part of the libertarian right of self-ownership, are infringed by such confiscation. On this proposal, however, this must be legitimate because the amount of fruits people can claim is that which can be obtained in the possible world described above.

²¹ Some might think that in the case of seashell boom, there are other, more acceptable, ways of making the actual world closer to the possible world. True, to confiscate the manna from heaven from the disabled is not the only way. But this is admittedly the easiest way. And more important, if one claims that we should employ the other way which, in one's judgment, would give rise to a better result, it then seems that one appeals to moral considerations of a different sort that is not derived from the gap-narrowing argument. See the next paragraph above.

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Of course, it could be suggested that the benefit forfeited be shared equally among all islanders. But this plausible suggestion is not relevant to the evaluation of the gap-narrowing argument, since it must be based on moral considerations of a different sort, not on requirements of any sort directly derived from the egalitarian proviso per se. In other words, ex post redistributions of this sort are not guaranteed by Otsuka's argument if, as suggested by the proposal under discussion, it is taken to be at the purely theoretical level: some further argument is required in order to endorse the redistributive policy in question. The gap-narrowing argument thus would not be promising enough to rescue Otsuka's defence of a robust-libertarian right of self-ownership in a way which is compatible with egalitarianism.

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REFERENCES

- Attas, D., 'The Negative Principle of Just Appropriation', *Canadian Journal of Philosophy* 33: (2003), 343–372.
- Broome, J., *Weighing Goods: Equality, Uncertainty and Time* (Oxford: Blackwell, 1991).
- Cohen, G. A., *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995).
- Gibbard, A., 'Natural Property Rights', in Vallentyne and Steiner (2000).
- Lippert-Rasmussen, K., 'Arneson on Equality of Opportunity for Welfare', *Journal of Political Philosophy* 7: (1999), 478–487.
- Nozick, R., *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974).
- Otsuka, M., *Libertarianism without Inequality* (New York: Clarendon Press, 2003).

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Vallentyne, P. and Steiner, H. (eds.), *Left-Libertarianism and Its Critics: The Contemporary Debate* (New York: Palgrave, 2000).

Vallentyne P., Steiner H., and Otsuka M. 'Why Left-Libertarianism is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried', *Philosophy and Public Affairs* 33: (2005), 201–215.

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