

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)¹

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.

¹ 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.²

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.³

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.

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

³ 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.⁴

⁴ 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.”⁵ 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 triologue 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.

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).

⁵ 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.⁶ 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

⁶ 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.⁷

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

⁷ 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.”⁸ 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

⁸ 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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