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JUSTICE, FAIRNESS, AND WORLD OWNERSHIP

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ABSTRACT. It is a central tenet of most contemporary theories of justice that the badly-off have a right to some of the resources of the well-off. In this paper, I take as my starting point two principles of justice, to wit, the principle of sufficiency, whereby individuals have a right to the material resources they need in order to lead a decent life, and the principle of autonomy, whereby once everybody has such a life, individuals should be allowed to pursue their conception of the good, and to enjoy the fruits of their labour in pursuit of such conception. I also endorse the value of fairness, whereby the right person or institution makes the decision as to whether to bring about justice.

I show that justice and fairness can be satisfied only if we all enjoy a combination of private and collective rights over the world. In making that case, I shall argue that the set of ownership rights I advocate differs from readily available conceptions of restricted private ownership in two important respects. First, it is such that in some circumstances, two individuals or more can have control rights over the same property at the same time, not, as is standardly the case in legal systems, by contracting with one another (through gifts and joint purchase), but simply on grounds of justice. Second, it allows that, if necessary, property-owners be expropriated from their property without compensation.

KEY WORDS: autonomy, equality, ownership, rights, sufficiency

I. INTRODUCTION

It is a central tenet of most contemporary theories of justice that the badly-off have a right to some of the resources of the well-off. More specifically, radical egalitarians argue that, as a matter of justice, individuals should not be made worse off through no fault of their own. Other philosophers hold, less radically, that individuals should be given the resources they need in order to lead a minimally decent life. Moreover, they all argue that individuals should enjoy a considerable degree of self-ownership or autonomy. The problem, of course, is to reconcile those competing values, to wit,



the values of equality or decent life¹ on the one hand, and the values of self-ownership or autonomy on the other hand. Some of the recent literature on distributive justice seeks to do so by defending a particular allocation of ownership rights over land and natural resources (henceforth the world), from which we derive the things we need in order to have as good a life as others, or simply a decent life. That is, it offers different conceptions of who, amongst the well-off and the badly-off, has the right to decide whether, how, and by whom a given property will be used (*control rights*), as well as the right to the income derived from that property (*income rights*), and the right to confer the aforementioned rights, as well as that very same right, on someone else (*transfer rights*).²

¹ Henceforth, and unless otherwise stated, when I say “decent” I shall mean “minimally decent.”

² Here I draw in part on A. M. Honoré’s classic analysis of the various incidents of ownership in his “Ownership”, in A. M. Honoré, *Making Law Bind* (Oxford: Oxford University Press, 1987). Not all theorists of property believe that all transfer rights are central incidents of ownership. (See, e.g., J. Christman, *The Myth of Private Property: Towards An Egalitarian Theory of Ownership* (Oxford: Oxford University Press, 1994), and J. E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997).) This, however, is a rather controversial thesis, which it is beyond the scope of this paper to examine in detail. I therefore opt for the standard view, which does include those rights in the ownership bundle. Finally, note that I advert to moral ownership rights, not to the ownership rights that property-owners currently enjoy in existing legal systems.

To give a brief overview of the debate on ownership amongst theorists of justice: some libertarians maintain that unrestricted private ownership, whereby to own something means to enjoy the aforementioned rights without restrictions, can secure both equality of condition as well as self-ownership. (See, e.g. H. Steiner, “The Natural Right to the Means of Production”, *The Philosophical Quarterly* 27 (1977), pp. 43–49, and “Capitalism, Justice and Equal Starts”, *Social Philosophy and Policy* 5 (1987), pp. 49–71, and M. Otsuka, “Self-Ownership and Equality: A Lockean Reconciliation”, *Philosophy and Public Affairs* 27 (1998), pp. 65–92.) Liberal proponents of coercive resource distribution (whether egalitarian or not) from rich to poor, by contrast, advocate *restricted private ownership*, whereby to own a property means to decide whether, by whom and how the property shall be used, and yet is compatible with certain restrictions on the right to alienate the property, as well as, most importantly, on the right to enjoy income from it. They argue that private ownership thus understood secures individual autonomy and yet need not jeopardise equality of condition (See, e.g., R. Dworkin, “What is Equality? Part II: Equality of Resources”, *Philosophy and Public Affairs* 10 (1981), pp. 283–345 and “What is Equality? Part III: The Place of Liberty”, *Iowa*

In this paper, I take as my starting point two principles of justice, to wit, the principle of sufficiency, whereby individuals have a right to the material resources they need in order to lead a decent life, and the principle of autonomy, whereby once everybody has such a life, individuals should be allowed to pursue their conception of the good and to enjoy the fruits of their labour in pursuit of such conception. I argue that those two principles of justice can only be satisfied by a combination of private and collective ownership rights over the world.

The principles of justice that I have set out are principles of *substantive justice*, for they are requirements that a certain end-state of affairs obtains where the principles of sufficiency and autonomy are respected. But it is not enough that substantive justice should obtain: *procedural justice*, which, following Ronald Dworkin, I call fairness,³ must be satisfied as well, whereby the right person or institution makes the decision as to whether to bring about justice. Fairness thus ensures that it is a necessary and sufficient condition for justice to be legitimately prejudiced that those whose prospects for a decent life, or as the case may be, whose autonomy, are at stake consent to it. As I shall argue, fairness is also satisfied by a combination of private and collective ownership rights.

I proceed as follows. In section II, I articulate the principles of sufficiency and autonomy. Assuming conditions of full compliance, I then show, in sections III and IV, (A) that collective ownership secures the sufficiency principle but destroys individual autonomy, and therefore does not satisfy justice; (B) that unrestricted private ownership does not satisfy the sufficiency principle, and therefore does not satisfy justice. In the course of defending those two claims, I show that collective ownership and unrestricted private ownership

Law Review (1987), pp. 1–54; J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999 rev. edition), p. 242 and *Political Liberalism* (New York: Columbia University Press, 1993), p. 298; J. Christman, *The Myth of Private Property*, chapter 9.) Finally, some egalitarians claim that restricted private ownership does jeopardise equality of condition, but that the one ownership system which *would* secure it, to wit, collective ownership, is so inimical to individual autonomy that it should be abandoned. (See e.g., G. A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), p. 105.)

³ See R. Dworkin, *Law's Empire* (London: Fontana, 1986), p. 177. In what follows, when I use the word “justice” I shall mean “substantive justice”.

do not satisfy fairness. Finally, I argue in section V that justice and fairness can be satisfied only if we all enjoy a combination of private and collective rights over the world. In making that case, I shall argue that the set of ownership rights I advocate differs from readily available conceptions of restricted private ownership in two important respects. First, it is such that in some circumstances, two individuals or more can have control rights over the same property at the same time, not, as is standardly the case in legal systems, by contracting with one another (e.g., through gifts and joint purchase), but simply on grounds of justice and fairness. Second, it allows that, if necessary, property-owners be expropriated from their property without compensation.

II. SUFFICIENCY AND AUTONOMY

As I noted in section I, some theories of justice hold that individuals should not be worse off through no fault of their own. On that view, they should be given equal amounts of certain goods, for example, resources, opportunity for welfare or access to advantage, provided that they are not responsible for having a lesser amount of such goods than others.⁴ Now, one cannot bring about equality so understood without violating some other fundamental values. For consider: egalitarian justice mandates eradicating all inequalities for which individuals are not responsible. Consequently, and to take but one example, it disallows transfers of resources from parents to children, since such transfers produce inequalities between children whose parents are able and willing to give them resources and children whose parents are unable, or unwilling, to do so – inequalities for which the latter children cannot be held responsible. Moreover, egalitarian justice requires that the well-off give a substantial part of their resources to the worse-off if the latter are worse off through no fault of their own. In so delineating the obligations of the well-

⁴ For a defence of equality of resources, see R. Dworkin, “What is Equality? Part II: Equality of Resources”; for a defence of equality of opportunity for welfare, see R. Arneson, “Equality and Equal Opportunity for Welfare”, *Philosophical Studies* 56 (1989), pp. 77–93; for a defence of equality of access to advantage, see G. A. Cohen, “On the Currency of Egalitarian Justice”, *Ethics* 99 (1989), pp. 916–944.

off, it prevents them from giving priority to their own projects, goals and attachments. In the light of those considerations, many people, I believe, would argue that egalitarian justice is too demanding on the well-off.

The conception of justice I sketchily defend here is not vulnerable to this criticism.⁵ It assumes, uncontroversially, that all individuals have a fundamental interest in having a decent life. It also assumes, perhaps controversially, that in order to have such a life, they must be minimally autonomous, that is, they must be physically and mentally capable of, and have some opportunities for, making and implementing meaningful, identity-conferring choices as to how to live their life. Autonomy so defined demands that they enjoy various freedoms, and that they have a certain amount of material resources, such as food, decent clothing, clean water, decent shelter, some degree of health care, and so on.

Now, the view that they have rights against third parties to the enjoyment of those freedoms is widely accepted. But the view that they have rights against them to material resources is more controversial. Yet, if the reason why one is committed to conferring on individuals rights of non-interference lies in the value of autonomy, and ultimately of leading a decent life, one must be committed, on pain of arbitrariness, to conferring on them rights to the resources they need in order to lead such a life. This I call the sufficiency principle.

Note that sufficiency cannot be met unless the autonomy of some people – those who are lucky enough to earn more than they need to lead a decent life⁶ – is curtailed through distributive policies, so as to ensure that those who cannot earn enough have a decent life. However, once everybody has such a life, they should all be allowed to pursue their conception of the good and to enjoy the fruits of their labour in pursuit of such conception. They should, in other words, be allowed to maximise their autonomy, as a matter of right. This I

⁵ For a fuller defence of it, see my *Social Rights and the Constitution: Government and the Decent Life* (Oxford: Oxford Clarendon Press, 2000), Chapter One.

⁶ Depending on the context, I shall sometimes call the well-off “the lucky” or “the talented”, and the needy “the unlucky” or “the untalented.” By “unlucky”, I shall always mean individuals who have suffered from bad *brute* luck.

call the principle of autonomy. A just society, or so I assume, is one where sufficiency and autonomy are both satisfied.

At this juncture, though, three additional remarks are in order. First, I assume that when people are responsible for the fact that they have a less than decent life, they do not have a claim at the bar of justice. Second, it may turn out that there are not enough resources for everybody to have a decent life, and/or that there are not enough productive people to produce the required resources. In those cases, justice only requires that people be given as much by way of resources as possible so that they are brought as close to having a decent life as possible. Throughout the paper, and for the sake of stylistic convenience, when I say that someone's life is decent, I mean, depending on the context, that she has the resources necessary for her to have a decent life, or that she has as much by way of resources as possible even though her life may not be decent. Third, and relatedly, I assume that justice cannot require that those whose life is already decent and who can help individuals who are below the sufficiency threshold do so at the cost of their own prospects for a decent life.

Note that the conception of justice I have just outlined does not hold that people's life should be *equally* good, and that it thereby allows for huge variations above the decency threshold. In short, it is not radically egalitarian. My purpose, strategically, is precisely to offer a largely uncontroversial conception of justice and to show that although it is less demanding than its egalitarian rivals, it requires very stringent restrictions on individuals' right to control what happens to their property – indeed, more stringent than its proponents have acknowledged. To this I now turn.

III. COLLECTIVE OWNERSHIP

In section II, I defended the principles of sufficiency and autonomy as correct principles of justice. In this section and the next, I argue that neither collective ownership nor unrestricted private ownership satisfy those principles. In so doing, I pave the way for my argument, which I propound in section V, in favour of a combination of private and collective ownership rights.

Under collective ownership, a group of individuals together enjoy rights of ownership, so that no individual member can exercise any of those rights without asking permission to the other members of the group: the group unanimously decides how its property shall be used, and by whom. Now, if we together own a piece of land, we both have exactly the same rights over it, and what I produce and how it should be distributed is the outcome of a bargaining process where we both have exactly the same leverage on each other. As a result, the sufficiency principle will be satisfied since you can threaten not to give me access to the land unless I give you the resources you need, and *vice versa*. But to the extent that we cannot exercise our rights of control over the land without getting the other's permission, so much so in fact that we cannot *be* on the land unless the other agrees, we cannot in any way be regarded as autonomous.⁷ Thus, under collective ownership, the autonomy principle is not satisfied, and justice, therefore does not obtain. Nor, in fact, does fairness, since neither of us has a significant degree of control over decisions that affect us most.

IV. UNRESTRICTED PRIVATE OWNERSHIP

I noted above that some libertarians seek to reconcile the autonomy of the well-off with equality of condition, by conferring on all individuals unrestricted rights of ownership over the world. In this section, I examine two such proposals, as advanced by Hillel Steiner and Michael Otsuka, and show them to be wanting not only from the point of view of equality, but also from the point of view of sufficiency and fairness.

Hillel Steiner argues that individuals each have a right to own an equal share of natural resources and that they should not be coerced to pay taxes on what they do with that share.⁸ As G. A. Cohen has shown, private ownership *ab initio*, thus understood, is incompatible with the requirement that people not be made worse off through no fault of their own;⁹ it is, for the same reasons as those adduced by

⁷ See Cohen, *Self-Ownership, Freedom and Equality*, pp. 98–102.

⁸ Steiner, “The Natural Right to the Means of Production” and “Capitalism, Justice and Equal Starts”.

⁹ Cohen, *Self-Ownership, Freedom and Equality*, pp. 102–105.

Cohen, also incompatible with the requirement that people not get less than a decent life through no fault of their own. Indeed, Steiner's proposal disallows coerced redistribution from those who do well with their share to those who do badly. As a result, the unlucky are entirely dependent on the willingness of the lucky to help them should they need it. Suppose that at time t , the unlucky are given enough resources to lead a decent life. Suppose, moreover, that they are not talented enough to produce whatever extra resources they might need at time t_1 should their circumstances change for the worse. And yet, the lucky would act within their rights by deciding not to give them some of their own resources, since *ex hypothesi* they have full, unrestricted ownership rights over what they produce. Thus, in advocating unrestricted private ownership, Steiner ensures that individuals have, at the beginning, equal amounts of resources; but he fails to prevent inequalities which result from differential talents and abilities. By the same token, he can ensure that they have, at the beginning, enough to lead a minimally decent life; but he fails to ensure that they remain at the decency threshold should they suffer a reverse of fortune and not have the personal abilities to deal with it. Finally, Steiner's proposal fails to make appropriate space for fairness, since the unlucky do not have any control over decisions which may, potentially, jeopardise their prospects for a decent life.

In a recent article, Michael Otsuka improves on Steiner's proposal, as follows:¹⁰ in so far as people vary in their ability to convert resources into welfare, the less talented should be given enough resources, and resources of such a kind, that the talented would have incentives to trade with them, and thus to provide them with a regular and decent income. Moreover, the talented must have enough resources that they could subsist without being forced to work for the less talented (for that is a condition of their retaining full self-ownership rights) and that the less talented could get that kind of income from them. In order to illustrate his proposal, Otsuka imagines an island society where the beachfront property would be allocated to the less talented and the land-locked property to the

¹⁰ Otsuka, "Self-Ownership and Equality: A Lockean Reconciliation".

able-bodied, and where the latter would trade access to the beach in exchange for giving food to the former.

Note, first, that Otsuka's proposal could easily be said to aim at reconciling equality of access to welfare with *autonomy* rather than self-ownership. For the talented, if the proposal works, do not have to work for the untalented, and they can thus make meaningful, identity-conferring choices which require long hours of leisure. Setting that aside, though, the proposal would fail at the bar of justice even if it sought only to ensure sufficiency, and not equality itself. For consider: in such a scheme, the badly off are more vulnerable to the talented than the talented are to them, since the talented, *ex hypothesi*, have enough worldly resources to support themselves, at minimal level, and therefore do not *have* to help the badly off in order to survive. By contrast, the badly off, especially those who do not have enough productive talents to support themselves, have no choice but to trade with the able-bodied. It is not an attractive feature of a theory of justice that it allows such vulnerability.

Granted, it is not necessarily the case that the badly – off have no choice but to accept whatever terms the able-bodied will impose on them; for competition amongst the able-bodied for resources owned by the untalented will push up their price. However, such competition will obtain only if the preferences of the talented are such that all the untalented have resources in which the talented are interested. There is no guarantee, however, that this condition will always obtain – something which, like other starting-gate theories, Otsuka's proposal overlooks. Suppose that at time t , the range of preferences of the talented is sufficiently broad that all the untalented can bargain with the talented. Suppose, moreover, that the preferences of the talented change, so that at t_1 some untalented have holdings which are of very little interest to any of the talented. The only way to ensure that those untalented get the resources they need from the talented, without forcing the latter to work, is to redistribute holdings either amongst all the untalented, or amongst talented and untalented, so that all untalented have holdings which the talented would be willing to bargain for. However, *ex hypothesi*, the untalented as well as the talented have unrestricted rights in their property which, needless to say, would be violated were a policy of expropriation put in place. *Pace* Otsuka, one cannot have both unre-

stricted private ownership and justice.¹¹ Finally, under unrestricted private ownership, the unlucky do not have control over the lucky's decisions to use the world, and justice may therefore be jeopardised without their consent. And yet, fairness, you recall, makes it a necessary condition for justice to be legitimately prejudiced that those whose prospects for a decent life are at stake consent to it. Unrestricted private ownership, in short, does not satisfy fairness either.

V. DELINEATING A JUST SET OF OWNERSHIP RIGHTS

In standard accounts where private ownership is reconciled with justice via restrictions on ownership rights, it is assumed that individuals can exercise private ownership rights over the world provided that they distribute part of their income to those who cannot, by themselves, produce the resources they need in order to lead a decent life. However, as I shall now show, in some cases, justice does not demand restrictions on *income rights*: rather, it requires stringent restrictions on *control rights*. This suggests that justice and fairness are satisfied, or so I shall argue, if the lucky and the unlucky each enjoy a set of private and collective ownership rights over the world. In section V.1, I show that such a set of rights satisfies the sufficiency principle; in section V.2, I show that it satisfies the autonomy principle. In the course of doing so, I show that it satisfies fairness and that it differs from prevailing conceptions of restricted private ownership.

¹¹ It has been suggested to me that the spirit of Otsuka's proposal would be preserved if the talented had to pay a tax on their holdings as well as on the resources they derive from those holdings, so as to compensate the untalented for changes in their preferences. I do not see how Otsuka could accept that. For such a tax as imposed on the product of their labour would violate both self-ownership and unrestricted private ownership; and such a tax as imposed on their initial holdings would violate unrestricted private ownership.

V.1 *Ownership and the Principle of Sufficiency*

Accounts of restricted private ownership justify the initial allocation of property rights over land and natural resources in various ways. It is sometimes claimed, for example, that first occupancy constitutes a legitimate basis for appropriation; or it is claimed that he who labours on hitherto unclaimed natural resources acquires legitimate control rights over them. Both accounts, as is well-known, have been criticised for allowing the initial allocation of property rights to be inappropriately influenced by luck – to wit, the luck of being the first occupant or of having the skills necessary to work on natural resources. An amended version of the equal share view scores better on that account. On that view, individuals would get equally valuable shares of land and natural resources, over which they would exercise full control rights; and yet, should they lack the talents necessary to produce, out of that share, what they need to lead a decent life, they would have a right to claim some income from the talented. The amended equal share view, then, would not allow for arbitrary factors such as luck to affect who has control rights over what. And yet, it is not a satisfactory view from the standpoints of justice and fairness, because in some cases, the only way to ensure sufficiency is to restrict individuals' control rights over their share.

Consider the following two scenarios, whereby, in each case, a pair of individuals both live on the same island and both receive an equally valuable share of land and natural resources. In the first scenario, A has the personal capacities required to implement his conception of the good life, most notably productive powers which he can use to get material resources. B, by contrast, lacks such capacities (he only has the capacity to choose). The sufficiency principle requires that A produce enough to give B the material resources he needs to have prospects for a decent life. For example, assuming that A is able to walk around, whereas B, through no fault of his own, is not, justice requires that B be given a walking stick, so that he can at least explore the island and make use of some of the opportunities it offers him. If the only way for B to get a walking stick is for A to cultivate the land in certain ways, or to cultivate parts of the land which he would rather leave untouched, he must do so. He retains a control right over the land, in that he can cultivate it, but it is not a

full control right since he cannot decide how to cultivate it: the right to make that specific decision belongs to B. In short, A and B each have control rights over the land.

In the second scenario, C and D both have the capacities to produce what they need in order to lead a decent life. However, after a while, D's patch of land becomes flooded, so much so that she simply cannot live there any longer. In that scenario, restricting C's right to enjoy the products of her property by asking her to give some resources to D (e.g. in the form of wood with which to build a cabin) would not suffice to provide D with what she needs to lead a decent life. Sufficiency, here, requires that D have access to the part of the island where C lives. Accordingly, whilst C retains a control right over her initial share of the land, to wit, the right to live there, D acquires a similar right over it.

Those examples illustrate the rights structure demanded by the sufficiency principle. Initially, we should get equally valuable shares. But when you do not have sufficient resources, you have the right that I cultivate or let you use the world in required ways. Thus, I do not have the right to decide how to use the world, or rather, there are serious limitations on the kind of decisions I can make, since I *must* use it in such a way that it generates the amount and kind of resources you need in order to have a decent life. Conversely, if I need certain resources in order to have a decent life, I have a right that you let me use the world as necessary, which is to say that you cannot decide that I will not cultivate the world: you cannot decide, that is, who will use it, nor can you decide the extent to which it will be used, nor can you decide that it will not be used at all. In short, the sufficiency principle requires that neither of us singly has the rights to decide by whom, whether and how the world will be used, and to enjoy the whole of the income derived from it. We both have those rights *only* if our life is not decent under the status quo and if the other's life is better than ours, or more than decent or already decent (and would not get less than decent after the decisions are made).

Some might object that I am assuming, implausibly, that denying control rights to the current user of the property may be the only

way to promote the sufficiency principle.¹² Yet, I do not think that this is an implausible assumption. For consider: some people, in some countries, own two houses, one in which they live, and one which they only use a few weeks a year as a holiday home; others own flats or houses which they do not want to let out to people on welfare benefits. Yet, in those same countries, thousands of people are homeless through no fault of their own. To be sure, the state could raise taxes so as to build more housing for the homeless, but in the meantime, it is very plausible that the only way to house the homeless is to use existing houses which remain empty most of the year, or to disallow prospective landlords from discriminating against them. In some cases, even if taxes were raised so as to build more housing, the country might not, in any case, have enough habitable land on which to build. If that is so, justice requires that those houses be requisitioned. Less dramatically, if the only way to house the homeless is to force owners of holiday houses to let those houses out to the homeless, justice require that the homeless have the right to rent the houses, even though the owners might not consent to it.

The second case is, perhaps, less familiar. In Western European capitalist societies, the questions of expropriation, of who has the right to use land and natural resources, are not central to debates on the distribution of resources, and so to emphasise how relevant they are to justice and fairness might seem rather pedantic. But in the US, Canada, and, to an even greater extent, in Australia, New Zealand, and post-white-rule Sub-Saharan African countries, those questions are central, especially in rural areas where people's livelihood is tied to having access to arable land. In those countries, aboriginal populations are demanding that the land which white settlers took from their ancestors centuries ago be returned to them. For my purpose here, the point is not the fact that they invoke historical rights to the land, but that in many cases, considerations of justice would justify their claim anyway. For it may very well be that the only way to secure a decent livelihood to those people is to expropriate white landowners who currently own hundreds of thousands of acres of land, or to deny them the right to forbid Aboriginals to use the land.

¹² That objection, as well as the objection addressed two paragraphs below, were put to me at various seminars in London, Oxford and York.

In such cases, justice requires that white landowners not have the relevant ownership rights in the land.

At this point, some might be tempted to object that in most capitalist, welfare-state systems, which rest on the institution of restricted private ownership, the state avails itself of a power of eminent domain, whereby it can expropriate at time t_1 property-owners who had legitimately acquired ownership rights in the property at time t . Accordingly, the objection would go, the set of ownership rights I defend is not markedly different from readily available conceptions of private ownership. And yet, I believe that it is. For although advocates of restricted private ownership defend the power of eminent domain, they impose strict conditions on its exercise. Thus, on a restrictive understanding of that power, the state can expropriate property-owners only for the sake of providing its members with public goods such as a highway: it cannot, for example, expropriate the owner of a seldom used holiday home for the sake of housing a homeless individual; finally, it can only expropriate if it compensates the expropriated property-owners. On a more generous understanding, the state can expropriate property-owners for any end on which the legislature has authority to legislate, which may include promoting justice; but even in such cases it must compensate expropriated property-owners, on the grounds (amongst others) that those who are expropriated have a legitimate, *prima facie* claim to the property.¹³ Property-owners thus have the right not to be expropriated if the state cannot afford to compensate

¹³ For an example of a strict understanding of eminent domain, see, e.g., R. Epstein's classic *Takings – Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985), p. 164. See also S. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), chapter 14. For an example of a more generous understanding, see e.g., B. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977). J. E. Penner suggests that expropriation without compensation need not be an attack on private ownership rights: "if owners can insure against expropriation, then a legislature might regard expropriation without compensation as working as a general tax on land ownership, since the cost of expropriation would be spread over all landowners" (Penner, *The Idea of Property in the Law*, p. 103). Penner might well be right. If landowners decide not to insure themselves, they consent to losing their property without compensation. However, it would still remain the case that if no such insurance is available, compensation would be required lest private ownership be undermined.

them. Now, the set of ownership rights I defend differs from private ownership combined with the power of eminent domain stringently understood in that it allows for restrictions on, and expropriation from, control rights for the sake of justice; it differs from restricted private ownership combined with the power of eminent domain either stringently or generously understood in one crucial respect: given that, *ex hypothesi*, some individuals need that property in order to have a decent life, the property does not rightfully belong to the former, and the state therefore need not, on grounds of justice, compensate them for their loss.

Perhaps, though, I have misunderstood the role of compensation in expropriation? Suppose that the island is inhabited by E, F, and G. G, who is as good as E at building huts, decides to build two huts; but unfortunately, he becomes too unwell to build a hut for F, who cannot build one for himself. Now, F's need for a decent shelter can only be met by G's spare hut: for some reason, E's is unsuitable. Is it not unfair to ask G to bear that burden alone? The point of compensation, as financed by taxation, is precisely to spread the burden amongst all potential contributors. Accordingly, G should be compensated by E for losing his control rights over his spare hut to F.¹⁴

The objection rests on a crucial assumption, namely that obligations of justice should always be met by all. But it is not clear that this is so. If I am drowning, the obligation to rescue me, which, I assume, is an obligation of justice,¹⁵ must be met by whoever happens to be the strongest swimmer. Just as G's hut was suited to F's need, the swimmer's talent is suited to mine. Yet, it would seem odd on the part of the swimmer to claim compensation for the time and effort spent rescuing me, on the grounds that others on the beach, indeed in town, should bear the cost of the rescue too. If the swimmer is owed anything, surely it is in virtue of suffering a harm during the rescue, irrespective of the fact that he suffered such harm by fulfilling an obligation of justice that others were not called upon to fulfil. To be absolutely clear: there is nothing to prevent the

¹⁴ I owe this objection to J. E. Penner.

¹⁵ Not all would agree that it is: some would claim that it is a duty of charity. That I should regard it as an obligation of justice is implied by the conception of justice deployed in section II.

legislature from deciding that obligations of justice should be met by all, and that whoever is called upon to fulfil them on the grounds that he is in a better position to do so should be compensated for it by all others. In other words, I am not claiming that compensating for expropriation is illegitimate; rather, my point is that should it be impossible for the state to satisfy the sufficiency principle other than by expropriating property-owners *without* compensating them, compensation is not required.

In short, individuals do not each have full and private control rights over parts of the land. This does not imply that they *collectively own* the land. Under collective ownership, for them together to own the land means they act within their rights by refusing access to one another, whatever their reasons for doing so. Let us go back to the island. In the first scenario, if A and B owned the island collectively, it would mean that A would act within his rights by refusing to cultivate the land as required by justice, and that B would act within his rights by refusing A permission to cultivate the land at all. In the second scenario, C and D would both act within their rights if they refused the other access to the land. On my view, by contrast, individuals can withhold permission to access and use *only if their prospects for a decent life are threatened by other people's decisions*.

In short, the sufficiency principle is satisfied if individuals own the land neither privately without restrictions nor collectively, but if they have *some*, and restricted, private rights of ownership over it. So is fairness. For fairness requires that B and D be allowed to decide *whether* they want to have a decent life; it thus requires that they be given the right to decide *whether* A and C will cultivate or use the land in the ways required by the sufficiency principle and thus by justice. Now, in so far as the right to make precisely that decision is a right of ownership, it follows that fairness requires that B and D have such an ownership right over the land. Moreover, B and D cannot prevent A and C from working on the land or from having access to the land, so as to secure their own subsistence, since fairness requires that A and C themselves make that decision. Just as A, B, C and D all have some restricted rights of private ownership over a given resource at the bar of sufficiency, they have

some restricted rights of private ownership over a given resource at the bar of fairness.

The foregoing rights are rights of private ownership since they are held and exercised by A, B, C and D singly. But there are rights of ownership over the land which individuals have and exercise collectively, rights, that is, which they have together to make certain decisions concerning the land. Suppose that something can be done with the land which would violate the sufficiency principle for both A and B. For example, they decide to close off part of the land so as to ensure a safe environment for various animal species to live in. In doing so, they have just enough to function above subsistence levels, and they thus deprive themselves of the resources which they would need in order to live a decent life. In so far as such a decision would violate what justice requires that they both get, they each have a right that the other not take that decision singly. But by virtue of the requirement of fairness that they be allowed not to implement the sufficiency principle and thus not to improve their own situation, they together have a right to decide whether or not to close off part of the island. And that is a collective right of ownership.

V.2 *Ownership and the Principle of Autonomy*

I have just shown that the sufficiency principle and fairness are satisfied by a set of private and collective ownership rights. In order to show that this set satisfies justice, I now have to show that it secures the principle of autonomy, which states that people must be allowed to maximise their autonomy provided that others have enough resources to lead a minimally decent life. *Prima facie*, though, such a set might seem inimical to autonomy, since it has a strong collective element. However, it differs from collective ownership, in that individuals can work on the world and do things with it as they choose, provided that the unlucky get the amount of resources they need in order to have the opportunity for a decent life. There are two cases where individuals can use the world as they choose. First, they can do so while working so as to provide the needy with prospects for a decent life. To use a very simple example, although I live in the fertile part of the island and have productive talents, and must therefore produce a certain amount of resources such that you, who are not so lucky, have opportunities for a decent

life, I can choose to grow either flowers or tomatoes, provided I produce enough to help you. Second, individuals can use the world as they wish *once* others have enough resources to lead a decent life. Thus, to the extent that their lying on the ground and walking on it does not threaten justice, they can do so without other people's permission. To the extent that their consuming the fruits of the earth does not adversely affect others' chances for a decent life, they can do so as well. Note that fairness (and not simply justice) is satisfied in both cases: for in neither case is the requirement of justice that everybody has equal chances for a decent life compromised by the decision; and in both cases, he whose autonomy would be diminished, if he were not allowed to make the decision as to how his plot should be used, to a degree not mandated by the aforementioned requirement of justice, is allowed to make the decision.

The ownership rights at issue in the last paragraph are private rights. Yet, autonomy demands that individuals also enjoy collective ownership rights over the world. To return, once again, to the island: suppose that in closing off part of the land for the sake of animal preservation, A and B do not deny themselves opportunities for a decent life (we can imagine that the other part will yield enough resources), but rather foreclose for ever the possibility of maximising their autonomy (we can imagine, for example, that once they have left that part of the island free for various animal species to roam and breed unimpeded, A and B will never be able to reclaim it). As we have seen, fairness requires that if a given decision taken once sufficiency is satisfied would jeopardise someone's prospects for autonomy maximisation, it must be made by that person herself. Accordingly, at the bar of the autonomy principle, A and B, in that revised scenario, have the right to decide whether to close off part of the island. In so far as they *both* have that right, it is a collective right.

I claimed above that my proposed combination of private and collective rights satisfies the autonomy principle. Might it not be the case, however, that although it indeed does so, it is still so inimical to the value of autonomy (albeit less so than collective ownership) that we should reject it? In particular, someone might argue, taking her cue from Dworkin's defence of the freedom of the talented, that although it is true that people can use natural resources without

having to ask others for permission, the lucky in fact are not really autonomous, since they have to work for the unlucky. Consider the first island scenario I imagined at the outset of section 5.1: justice requires that A provide B with a walking stick if he needs one; and if the only way for him to do so is to chop wood instead of growing flowers – which he would much rather do – justice cannot be satisfied unless B has a right to forbid A to use the land in order to grow flowers. Justice, in short, is satisfied only if A does not have the right to choose what to do with the land, and thereby with his time. Now, I take people to be autonomous if they have some opportunities for making and implementing meaningful, identity-conferring choices as to how to live their life. If the lucky have to work *most*, let alone *all*, of their time for the unlucky, my Dworkinian opponent would argue, they cannot implement those identity-conferring choices of theirs which do not revolve around work, and they thus do not have a decent life. In fact, she would add, in so far as the lucky would be forced to do labour which they would rather not do, they would be enslaved: but a theory of justice which requires that some people be enslaved for the sake of others is unacceptable.¹⁶

This objection is directed not so much at the set of ownership rights I advocate, but rather at the conception of justice I posit at the outset of this paper. On that conception, it is true that indi-

¹⁶ Such worry might seem all the more pressing here as justice seems to require that B have rights not simply over A's property, but also over his labour, in and of itself. Suppose, for example, that the only way for B to move around is to be pushed in a wheelchair by A. Am I not committed to the claim not only that A should provide the wheelchair if he is the only one in a position to do so, but also that he should push B around? (I owe this example to James Penner). I am indeed committed to that claim, but just as I am not committed to the view that the needy have a right to the resources of the well-off at the cost of the latter's prospects for a decent life (see section II), I am not committed to the view that they have a right to the labour of the well-off at similar costs.

The foregoing point, it is worth noting, raises the question of suicide. That is, is A under a duty to remain alive for B's sake? I would be tempted to say "no" (which is not to say that one has a right to commit suicide at whatever cost to others. Think about the following case: a man is about to commit suicide by jumping from the top of a high church tower. There are a lot of tourists down there, admiring the church from below. If he does, he will fall so heavily on one of these tourists that he will unwittingly cause him to die. Arguably, he does not have the right to commit suicide in such circumstances).

viduals' rights over their labour are curtailed. My concern, here, is to show that, assuming that those rights are curtailed, justice (and fairness) can only be satisfied if severe restrictions are placed on individuals' control rights over their property. Nevertheless, the objection is worth addressing. To be sure, a theory of justice which would require that some people be enslaved for the sake of others would be unacceptable, if only because it would self-defeatingly require that some people, through enslavement, forego the possibility of always acting justly. But I disagree that for the lucky to do work they would rather not have to do constitutes slavery, in cases where, *ex hypothesi*, they would still enjoy a decent life, and where, quite crucially, they would enjoy a whole panoply of rights ordinarily denied to slaves. The vocabulary of slavery is rhetorically powerful but, in the present context, highly misleading.¹⁷ Notice, incidentally, that it would be as misleading (but not as rhetorically powerful) to describe the talented under my conception of ownership as indentured labourers. For indentured labourers did, and do, enjoy far fewer rights than the talented would under ownership thus understood, since, unlike the talented, they must do whatever work their employer requires them to do during the time of their contract. Moreover, indentured labourers did, or do, contract themselves into work either in order to establish themselves as independent labourers at the end of their contract (as was the case in the US in the 18th century), or in order to pay off their, or their family's, debts (as is, unfortunately, still the case in some parts of the world, most notably on the Indian sub-continent). In both instances, they contract themselves into labour out of need, which in turn makes them extremely vulnerable to their employer. Indeed, our repugnance at indentured labour stems, largely, from the exploitative nature of the relationship between labourer and "employer". Nothing I have said in this paper lends itself to the view that the relationship between the needy and the well-off under such system is analogous to the relationship between indentured labourers and their employers.

Having said that, in cases where the lucky would have to work for the sake of the unlucky and thereby would not be at liberty to

¹⁷ I am indebted here to M. Cohen Christofidis' superb discussion of Dworkin's theory of justice in her "Talent, Slavery and Envy", in J. Burley (ed.), *Dworkin and his Critics* (Blackwell, forthcoming).

use the world as they see fit, and yet where they would still enjoy a decent life (although not the kind of life they would *most* want to lead), the set of ownership rights I advocate does restrict their autonomy. But it does not do so to an unacceptable degree. The criticism that it does appears to have force only if one focuses on the situation of the lucky and overlooks the fact that if they do not work for the unlucky, the latter are not autonomous either, since they lack the material resources necessary for them to enjoy the opportunities society offers them.¹⁸ Such focus unacceptably fails to live up to what motivates justice in the first instance. Clearly the lucky will suffer a loss of autonomy, but that is an unavoidable condition of securing minimum autonomy for all.

It is true that in some cases, the lucky would have to work and do nothing but work, for example so as to provide for very costly medical treatments to the disabled – treatments, one might add, which would not be fully successful anyway. Remember, however, that justice cannot require, or so I assume, that those who are below the sufficiency threshold do so at the cost of their prospects for a decent life. I thus concede that in such cases, the lucky should not be under a duty to help the unlucky, in other words, that the needy do not have the right to decide that the lucky should use the world, and should use it in particular ways. Notice, though, that conceptions of ownership which disallow restricting the lucky's control rights over the world but allow that they should be taxed can also be very detrimental to the autonomy of the lucky if they are designed in such a way as to secure justice. For justice may very well require that the income owners derive from their property be taxed to such an extent that they would have to work, and do nothing but work, in order to meet the needs of the unlucky, which would render their life less than decent.

To sum up: the set of private and collective ownership rights I delineated ensures that the unlucky have the resources they need in order to lead a decent life; it also ensures that once they do, the lucky

¹⁸ As Cohen Christofidis rightly claims, in arguing that for the talented to have to work for the untalented amounts to slavery, Dworkin shows unjustifiable bias in favour of the former and against the latter – unjustifiable, that is, given the egalitarian concerns which underscore his theory (see Cohen Christofidis, “Talents, Slavery and Envy”).

can maximise their autonomy. Finally, it ensures that the lucky and the unlucky have the right to decide, respectively, whether to avail themselves of such resources or to maximise their autonomy, and to veto the other's decisions if they jeopardise, respectively, sufficiency and autonomy. In short, it satisfies both justice and fairness.

My proposal may sound an awkward mixture of individual and collective ownership. But the following example, which is sufficiently analogous to remove the impression of irredeemable awkwardness, clarifies what I have in mind. Suppose that we each live in a separate flat, which we each have bought, in the same two-flat apartment building. Suppose further that this building is a historical landmark protected by an institution such as the National Heritage. We each *individually* have some ownership rights over our flat, and we *collectively* have other ownership rights over the two flats and the whole building. For consider: individually, we can enjoy part of whatever income we derive from it, and decide, without the other's permission, whether we will rent it out, and whether we will live in it, whether to repaint it, and so forth. It is therefore inappropriate to say that we collectively own the entire building. It is equally inappropriate to say that we each enjoy full control rights over our flat, since we cannot undertake major renovation work in it without permission from the body politics, on whose behalf the Heritage Office acts. You and I, thus, together with others, and as citizens, have rights to ensure that the building is used and managed in the best interests of our community. Yet, we do not *collectively own* the building as citizens, since, I assume, there are decisions about these buildings that we cannot make, such as, for example, being able to ban black people from renting the flats. In short, one cannot say that we privately or collectively own the building; one can only say that we have some rights of ownership – private and collective – over it.

VI. CONCLUSION

To conclude, I defended two principles of justice: (a) everybody should be guaranteed the resources necessary for them to lead a decent life; (b) once this is the case, individuals should be allowed to maximise their autonomy even though this may create inequalities

above the threshold of what counts as a decent life. I also assumed that fairness requires that those whose prospects for a decent life are at stake have the right to decide whether to use the world at all, and how to use it; that once everybody has a decent life, those whose autonomy would be jeopardised if certain decisions were made have the right to decide whether those decisions should be made. I then articulated a conception of ownership which borrows some features from private ownership standardly understood and from collective ownership, and which, or so I argue, satisfies justice and fairness.

Such ownership system differs from prevailing conceptions of private ownership in two respects. First, it allows, and imposes, restrictions on our rights to control the world which are different from restrictions already in place in the law and/or defended by those proponents of private ownership who are committed to justice. Private property is a matter of degree: I have shown that the conception of private property which satisfies justice and fairness is constraining on individuals to a greater degree than private property as we know it “in real life” is. Second, whereas standard discussions of private ownership assume that all the right constitutive of the ownership bundle should vest in *one* person, or *one* person-like group, property relations over a given resource are more complex if they are to promote justice and fairness: some individuals, or some groups, will hold some control rights of ownership, whilst other people, or other groups, will hold other control rights, over the same property.

I should like to end by dispelling two worries one may have regarding such conception of ownership. First, one might worry that the conception of ownership I defended here could never be implemented. After all, constantly checking that the allocation of ownership rights at any given time does not fall foul of justice and fairness and modifying that allocation as necessary are likely to be very costly and difficult. Perhaps those considerations provide good reasons not to implement my proposal. However, they cannot disqualify it as that ownership system which best satisfies both justice and fairness.

Second, one might worry that it is unduly democratic.¹⁹ For consider: if we assume that it is not a necessary condition for a

¹⁹ I am grateful to Peter Nicholson for drawing my attention to that point.

regime to be democratic that it secure substantive justice and fairness, to give me a power of veto over some of your decisions and, conversely, to give you such power over some of my decisions, will yield anti-democratic outcomes when, in a n -person world where $n > 2$, the person who has that power is in the minority. In such cases, the objection would go, justice and fairness will conflict with democracy. Now, I agree that this will be the case, that, on reflection, our commitment to democracy should override our commitment to justice and fairness, and that we should therefore abandon such conception of ownership. However, my aim, in this paper, was not to take a stance on the importance of justice and fairness relative to democracy: it was simply to assess what fairness and justice require, on their own – namely, a combination of private and collective rights of ownership.

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