

PRIORITY OF INDIVIDUAL SOVEREIGNTY

A Libertarian Approach

By
Kin-wai LEUNG

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Supervisor: Professor Andres Moles

Abstract

This project develops a novel account of self-ownership overcoming two interrelated problems that contemporary libertarians have yet solved—the problem of imprisonment and the denial of assigning a greater moral weight to an individual body than to extrabodily materials. The thesis that an individual has natural ownership of his body appears to well account for the wrongness of non-consensual use of an individual’s body. The problem of imprisonment challenges this appearance. Since right libertarians place weak or no limits on appropriation, they could not rationally condemn unilateral occupation of the natural environment that amounts to imprisonment of an innocent individual so long as the appropriator has worked on the environment. This project examines various right-libertarian attempts to solve this problem after mapping a new conceptual terrain of libertarianism. Besides the common division into libertarian theories that place limits on appropriation and libertarian theories that do not, this project proposes another division focusing on whether the thesis and rules of distribution are inferred from the same set of more fundamental principles and nonmoral premises. As these two divisions cut across each other, right-libertarian theories are classifiable into four types. This project demonstrates that, in solving the problem of imprisonment, right-libertarians generally in turn deny greater moral importance of our bodies relative to extrabodily

materials. Falling into none of those types, this project develops an original idea about what our bodies are distinct from extrabodily objects concerning our living. Our agency extends beyond our bodies to extrabodily materials because we make an impact on the world by means of exercising materials' causal capacities to make changes. Since we are identical to our bodies, our bodies play an extra role that extrabodily materials lack—changes that our bodies undergo are changes that we undergo. Control over changes to our bodies that we are, if disrespectful, is a tie-breaking consideration giving priority to respect self-ownership over ownership of extrabodily materials. The last part of this project provides a physiological conception of human body as organism by drawing recent literature of biology and philosophy of biology. The project reveals that several counterexamples to the normative priority of the body over extrabodily objects rest on dubious presuppositions stemming from the folk understanding of organism.

Declaration

I, the undersigned **Kin-wai Leung**, candidate for the degree of Doctor of Philosophy at Central European University Doctoral School of Political Science, Public Policy and International Relations, declare herewith that the present thesis is exclusively my own work, based on my research and only such external information as properly credited in notes and bibliography. I declare that no unidentified and illegitimate use was made of work of others, and no part the thesis infringes on any person's or institution's copyright. I also declare that no part the thesis has been submitted in this form to any other institution of higher education for an academic degree.

Hong Kong, January 31, 2022

A handwritten signature in cursive script, appearing to read 'Kin-wai Leung', is written above a horizontal line.

Signature

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Introduction

Libertarianism is a tradition of political thought in which different views share a significant family resemblance.¹ One of the central aspects these views resemble in is that respect for individuals' negative liberties of certain sorts, including economic liberties, is a good index of how just a society is.² Many libertarians embrace the thesis of self-ownership, though its relation to the requirement of respect for negative liberties is open to debate. According to this thesis, an individual originally owns himself in the same way that a master owns his slave. 'Ownership' is a technical term; for now, we may focus on a central claim entailed by it: permissible use of an individual, done by himself or by others, is at his normative discretion.

It is easy to demonstrate the practical import of this thesis if we assume that an individual's normative discretion over himself covers his body as well. The thesis offers a straightforward justifying explanation for the wrongness of forcible prevention of an individual's use of his own body such as banning abortion and prohibiting consensual killing (Thomson, 1971; Vallentyne, 2003); it also explains the wrongness of non-consensual use of an individual's body such as rape, forced labour, and '(unchosen) eyeball redistribution'

¹ This definition of libertarianism is becoming popular among libertarians (Brennan et al., 2018; Mack & Gaus, 2004; van der Vossen, 2019).

² See Mack & Gaus, 2004, pp. 116–117.

(Mack, 2002, p. 260). According to the thesis, all these are wrong because how an individual's body is used is not decided by him.

However, the picture that the thesis of self-ownership well accounts for pre-reflective judgments about use of a human body has been continually challenged. Counterexamples have been given by critics to show that enforcement of self-ownership implausibly bans any paternalistic treatment and minor nuisances (Sobel, 2012; Wall, 2009). The mere fact about a human body grounds no reason for judgment and action (Cohen, 1995; Lippert-Rasmussen, 2008). Disgust causally explains our moral beliefs about cases supporting the thesis, and yet production of disgust is a psychological mechanism unreliable for tracking moral truths (Freiman & Lerner, 2015).

Among those challenges, one targets somewhat specifically at right-libertarianism. Right-libertarianism is a branch of right-wing libertarianism having three assumptions. First, 'raw external nature' is originally unowned (Cunliffe, 2000, p. 2). Second, through and only through working on previously unowned objects or voluntary agreement in compliance with some normative limits, if any, individuals acquire enforceable rights in the objects. Third, normative limits mentioned in the previous assumption are weak or none. In view of these three assumptions, both its advocates and critics notice a worry (Cohen, 1995, p. 98; Mack, 2010, pp. 69–71; Russell, 2010, p. 164). Suppose an appropriator works on unowned land

surrounding a forest in compliance with all normative limits on acquisition. The second assumption arguably implies that the appropriator becomes the sole owner of the land. He is legitimate in imprisoning indigenous people living in the forest since their leaving the forest is literally trespass and imprisonment is just enforcement of the appropriator's acquired right in the land. In short, right-libertarianism legitimises acquisition amounting to imprisonment and diverges from the ordinary viewpoint on what rights are expressed by the rhetorically forceful slogan 'It is my body!' since imprisonment deprives us of bodily movement. This is the problem of imprisonment.

Some might find the problem of imprisonment spurious as they think that the point of having self-ownership explains why imprisoning acquisition is wrong. Suppose that point is that an individual is left free to interact with the environment. Given this supposed point of having self-ownership, an individual has the right over his body and the opportunity or chance to access part of the environment as material resources (ordinarily understood), for he would be unfree to interact with the environment if he was excluded from accessing these two kinds of things. Since acquisition that imprisons an individual deprives him of the opportunity, such acquisition is unjustifiable.

Yet, if any reason for an individual's discretion over his body is similar to some reason that there might be for ownership of material resources, there is nothing special about the

body with respect to justice. Moral symmetry between the body and extrabodily resources threatens the thesis of comparative asymmetry stated as follows: respect for an individual's discretion over his body outweighs, absolutely or relatively, other interests of the same or another individual. This is another core thesis of libertarianism since it underlies the libertarian explanation of the wrongness of forcible use of an individual's body parts for other (potential) benefits to others or that individual (Lippert-Rasmussen, 2008). This thesis supports that forcible transplantation of organs is at least generally worse than redistribution of wealth. Yet, if these two measures infringe negative liberty to the same degree, neither of them is preferable to the other. If the state must choose between them for other considerations such as equality of welfare, forcible transplantation of organs is not a worse option.

In short, right-libertarians are caught in a *prima facie* dilemma: either the point of having ownership of our own body is also the point of having ownership of extrabodily objects, or they are not. If they are, the thesis of comparative asymmetry is doubtful; if they are not, people suffering the imprisonment in question cannot complain in the name of self-ownership or the point of having it.

In this dissertation, two research questions will be addressed:

1. Is there any solution to the problem of imprisonment that does not undermine the thesis of comparative asymmetry and is acceptable to libertarians?

2. What justifies the thesis of comparative asymmetry? More specifically, if the thesis can be defended on the ground of some intrinsic difference between our bodies and extrabodily resources, what is the difference?

In addressing the first question, a solution to the problem of imprisonment will be given, though it does not fall too right on the spectrum of opinions ranging from complete state control of production to complete free market. In addressing the second question, the unique intimacy of our capacity to undergo (or suffer) changes with our bodies will be explored; that only our bodies are both loci where our capacities to impact the world and to be impacted is an intrinsic moral difference between our bodies and extrabodily resources.

In Chapters 1 and 2, I investigate the problem of imprisonment from a right-libertarian perspective by mapping a partial conceptual terrain of libertarianism. This terrain will be presented in more detail at the beginning of Chapter 1. At this point, I briefly introduce another divide between libertarian theories which maintain the two theses: the pluralist view and the monist view. According to the pluralist view, the thesis and distributive rules, including the rule affirming the unilateral mora power of acquisition, are derived from different sets of more fundamental principles. According to the monist view, they are derived from the same set of the principles and nonmoral premises.

The flow of Chapters 1 and 2 is this. A plausible monist theory cannot avoid undermining the thesis of comparative asymmetry and is not a viable option for SO libertarians. Although pluralism can avoid the undermining effect by consistently and reasonably embracing the comparative asymmetry as a priority rule to settle conflict between self-ownership and other considerations, right-libertarian pluralists have their own drawbacks.

Some right-libertarian pluralists might give a rejoinder to the problem of imprisonment by proposing their own Lockean proviso. Lockean provisos are provisos requiring that acquisition or use does not make others worse than they are or would (otherwise) be, in a certain respect, under a certain circumstance. These right-libertarians would question the possibility of legitimate acquisition that imprisons others. The second assumption of right-libertarianism entails that acquisition is illegitimate if it breaches a normative limit. Since a Lockean proviso proposed is such a normative limit, and since imprisoning acquisition breaches the proviso proposed, imprisoning acquisition is illegitimate. Whether this rejoinder succeeds depends on the respect and the circumstance incorporated in the proviso proposed. Right-libertarians should worry that, if the proviso proposed is weak, then it can be met by imprisoning acquisition; if it is robust, then it does not qualify as right-libertarian. Moreover, what is the rationale for selecting a certain circumstance as the baseline for comparison? Failure to give the rationale will be accused of concealing conflict of individuals' claims to demand improvement or not being worsened.

In addition, the thesis of self-ownership is either axiomatic or not. If the thesis is taken as axiomatic, no point of having self-ownership can be taken for reference to compare evaluatively which self-ownership infringement is severer. On the other hand, a plausible theory in which the thesis's place is non-axiomatic may imply distributive rules governing a considerable area of the society's economic domain. The implication may be a solution to the problem of imprisonment, yet the relation between the thesis and the distributive rules implied as such is not pluralist.

Some right-libertarians feel not troubled by the problem of imprisonment since they think that having inviolable rights over things constituting a prison is simply the upshot of exercise of the moral power to acquire previously unowned things unilaterally. This position is not as deeply counterintuitive as it looks. Who owns, morally, a farmland if not the person or the group who changed it from being bare to being fertile? Besides original self-ownership and the formal requirement of respecting rights acquired, these right-libertarians place no other normative limits on acquisition.

But do mothers who worked on their children have inviolable rights over their children? If they do, the thesis of self-ownership seems to be false. If they do not, do they lose their non-waivable rights over their children involuntarily at some moment of their children's growth? Hillel Steiner calls this 'Paradox of Universal Self-ownership' (Steiner, 1994, p.

242). In Chapter 2, I argue that, from these right-libertarians' perspective, the best strategy to solve this paradox is to insist that an individual's body is exceptionally outside the scope of the moral power of unilateral acquisition, and yet this limitation of the scope is an ad hoc assumption within the framework of monism.

Some right-libertarian monists refuse to acknowledge imprisoning appropriation for the reason that imprisonment violates the 'natural right of property', which they take as a normative limit on acquisition (Mack, 2010, p. 54). Respecting this right requires not precluding the right-holder from participating in a self-ownership-compatible convention of acquiring property. As imprisonment precludes participation, the acquisition fails to be legitimate.

There are two problems with these monists' theories. First, a convention respecting self-ownership could be a competition that confers upon firstcomers inviolable rights over things together surrounding some latecomers. Such a convention legitimates imprisoning acquisition. Innocent latecomers are not prisoners but losers in such a competition. Second, these monists beg the question as to which convention can confer upon ownership in things. If a convention favouring firstcomers can, what is the difference between these monists and those right-libertarians who place no limits on appropriation? Being similar to those right-libertarians, these monists also encounter Paradox of Universal Self-ownership.

In scrutinising the monist view, I argue that a plausible principle of non-interference entails conflict of individuals' rights against interference. Assumed the precept that similar cases be treated similarly, conflicting violable rights be satisfied equally. If equality is at the pareto front, then it is preferable. Even if it is not, equal satisfaction of the violable rights is a reason in support of distributive rules restricting imprisoning appropriation since such appropriation is inequality-generating. In short, appropriate treatment among parties involved in the conflict is more left than right and the treatment is a solution to the problem of imprisonment.

That said, Chapter 2 ends with a challenge to any monist, be it left or right. If both self-ownership and extrabodily ownership matter merely because of the point of self-ownership described in the more fundamental principle, there is nothing special about our body parts in consideration of justice. It is questionable that all our body parts are more important, morally, than extrabodily objects even if they are under comparison that is fair (in a certain sense stipulated in Chapter 2).

In Chapter 3, I explore an intrinsic difference between our bodies and extrabodily resources. To discern the intrinsic difference between body parts and extrabodily objects, I suggest to first recognise that all body parts, including those (e.g., organs) not directly involved in our basic actions, are resources. Our agency extends to all resources because

effects brought about by resources controlled by us are our actions after all. But a symmetrical analysis of our patiency, i.e., our being capable to be changed, is false. Our agency extends beyond the body, our patiency never does. Changes related to body parts are changes related to us per se, changes related to extrabodily resources are not. Only our body parts are loci where our agency and patiency exercise. This account is coined the 'Agency-Patiency account'.

But the mere fact that only our body parts are the loci does not explain why and what treatment is to be done. The principle of independence fills the gap between Agency-Patiency account and statements about ownership. This principle states that individuals have the violable natural right against subjection to the will of others. Such a right is explicated by the violable right against others' disrespectful control over our lives. Since a function of ownership as a bundle of enforceable rights is decreasing others' control over things owned, the principle of independence entails that we each have violable ownership of things necessary and sufficient for the absence of others' disrespectful control over how we live. Given the nonmoral facts that we live qua agent and patient, from the principle of independence two requirements are derived: the requirements of not controlling how our agency and patiency exercise. By violating ownership of extrabodily objects per se, others control exercise of our agency. By violating ownership of our own body parts, others control both exercise of our agency and patiency. Avoiding disrespectful control over exercise of our

patency is a tie-breaking consideration in favour of self-ownership when self-ownership is balanced with ownership of extrabodily materials.

Explication of the principle of independence requires an analysis of control and an account of control being disrespectful. An individual is under another's control to do (or refrain from doing) something when two conditions prevail. First, another has a power to secure that he does it. Second, another is disposed to exercise or consolidate the power. Dispositions do not correspond to conditional probabilities. A bomb is by nature explosive, i.e., disposed to explode in a considerable variety of circumstances, though it is unlikely to explode assumed or given that it is stored inside the Moon.

Viewed as a conception of negative liberty, the analysis of control is distinct from the prominent liberal and republican conceptions. The former is too subjective, linking unfreedom to how probable an interferer would prefer to interfere if controlee endeavoured to do otherwise. The latter is too objective, linking unfreedom to the (modal) possibility of an interferer's power with impunity. The analysis of control stands in the middle. An authoritarian regime is more disposed to but is unlikelier to interfere in affairs of some city within its territory than a democratic regime, assumed that the city is a global financial hub, for the regime's interference in the hub would destroy its 'peaceful rise' international branding. Something's disposition to exercise its power is not its power but the general

tendency to exercise the power. A sainted giant is powerful, but he or she is less disposed to exercise it relative to an equally powerful tyrant.

Control, however, is not necessarily bad and may be constructive. To accuse parents, surgeons, and rescuers, of having disrespectful control over their children, patients (in the ordinary sense), and victims, respectively are highly contentious and perhaps arouse fair indignation. One of the factors in judgment about the degree of the disrespectfulness is the controller's disposition to manage his power by seeking voluntary permission from the contree when communication is possible. What a controller would do in (hypothetical) cases where communication is impossible is not evidence for his denying the contree's status of being a 'self-originating' source of valid claims about his own life (Rawls, 1999, p. 330). This account of disrespectful control leaves room for soft paternalistic intervention in cases where communication is impossible, yet it goes beyond soft paternalism by requiring the intervening body not to control disrespectfully. This requirement remains valid in situations in which people are genuinely neutral towards or favour being intervened or controlled.

Despite the intimate connection between patiency and our bodies, some critics of the normative priority of self-ownership might reply that the two theses in question give implausible practical guidance. Why, for example, is non-consensual removal of a malignant tumour worse than forcible removal of a pacemaker from the same or another individual per

se? These cases show the divergence between self-ownership's implications and pre-reflective judgments about some cases our sovereignty over our bodies. In Chapter 4, I critically examine presuppositions making those cases become counterexamples to the thesis of self-ownership and the thesis of comparative asymmetry respectively. The former are dubious presuppositions about constituents of organisms, some of which imply, *inter alia*, that a tumour is a body part. The latter are dubious presuppositions about comparing disrespectful control over use of bodies involved in different options, some of which imply, *inter alia*, that damaging a tiny piece of body tissue is always worse than removing a pacemaker with respect to individual discretion over his body.