

Backing Away from Libertarian Self-Ownership*

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Libertarian self-ownership views have traditionally maintained that we enjoy very powerful deontological protections against any infringement upon our property. This stringency yields very counterintuitive results when we consider trivial infringements such as very mildly toxic pollution or trivial risks such as having planes fly overhead. Maintaining that other people's rights against all infringements are very powerful threatens to undermine our liberty, as Nozick saw. In this essay I consider the most sophisticated attempts to rectify this problem within a libertarian self-ownership framework. I argue that all of these responses are significantly flawed.

Since an enormous number of actions do increase risk to others, a society which prohibited such uncovered actions would ill fit a picture of a free society as one embodying a presumption in favor of liberty.¹

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1. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 78. All otherwise unattributed page references in the text are to this work.

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If we take seriously the fact that we find ourselves situated in, and connected through, an environment, we are soon impressed with the inaptness of a conception of morality that pictures individuals as set apart by propertylike boundaries, . . . free to act as they please within their boundaries, although absolutely constrained by them.²

I want to explore the prospects of a moral view that claims that our most basic and powerful deontological rights, or at least our most basic and powerful enforceable rights, stem from our self-ownership.³ Call this the Self-Ownership Thesis. Intuitively it does seem that we have something like property rights over our bodies and that these rights are strong enough to make it impermissible for others to take our organs and give them to others even if more good would be created if they did so. Self-ownership is attractive because it appears to offer a satisfyingly direct and not very hostage to empirical fortune justification for such protections. That something is mine—that I own it—provides an obvious and much relied upon rationale for my authority over what may happen to a thing even when others can create more good with it. Friends of the Self-Ownership Thesis have traditionally maintained that we can well explain these and other powerful moral intuitions with the general claim that it is never, or only in extraordinary circumstances, permissible to infringe upon one person's self-ownership rights even for the sake of a significant gain for others. The Self-Ownership Thesis is associated with the most influential strand of both left- and right-libertarian thought.⁴

Because property rights in this tradition have been understood to create such powerful moral side constraints on permissible action, such libertarians have been able to offer a very simple, intuitive, principled, and not very hostage to empirical fortune rationale for the central conclusions we associate with libertarianism. Why may the state not forcibly take some of my money or blood and give it to others who need it more badly than I do? Because to do so would be to violate my morally very powerful property rights. Why may the state not act paternalistically toward its ci-

2. Peter Railton, "Locke, Stock, and Peril: Natural Property Rights, Pollution, and Risk," in his *Facts, Values, and Norms* (Cambridge: Cambridge University Press, 2003), 187–225, 219.

3. One might have a right that others not do X, but no right to enforce their not doing it.

4. See, among others, John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), 19. Locke writes, "every man has a property in his own person: this no body has any right to but himself." See also Nozick, *Anarchy, State, and Utopia*, 57, 171–72, 281–83, and 286; Murray Rothbard (*The Ethics of Liberty* [New York: New York University Press, 2002], 113) goes farther and claims that the only human rights are property rights; John Hospers ("The Libertarian Manifesto," in *Morality in Practice*, ed. James Sterba [Belmont, CA: Wadsworth, 1997], 21–29, at 21) writes, in his defense of libertarianism, that "libertarianism . . . is the doctrine that every person is the owner of his own life, and that no one is the owner of anyone else's life"; Eric Mack ("Self-Ownership, Marxism, and Egalitarianism," pt. 1, *Politics, Philosophy, and Economics* 1 [2002]: 75–108, and "Self-Ownership, Marxism, and Egalitarianism," pt. 2,

tizens? Again, because doing so would wrongly suppose that you rather than I may decide what will happen to things I own. Why may the state not regulate what kind of sex I may have with consenting competent adults or what I may smoke in ways that infringe on no one else's rights? Ditto. Self-ownership thus appears to justify an attractive set of Millian liberties more securely than consequentialist views. The view rules out almost all interference when we are engaged in self-regarding actions or consensual actions with other self-owners that threaten no one else's rights.

Crucially, it has not been thought necessary to make a case that such property infringements involved significant costs to the person whose rights would be infringed in order to uphold the strength of her rights against such infringements.⁵ On this conception, property rights, whether they protect something important or not, provide powerful protection against infringing upon what I own.⁶ This feature of the view is what allows the above simple and powerful argument against a range of activity without requiring an investigation into the significance of the infringement. After all, it was assessing the costs and benefits of each infringement and treating less seriously infringements that are not very costly that rendered consequentialist justifications of our Millian liberties insecure.

Politics, Philosophy, and Economics 1 [2002]: 237–76) explicitly embraces the Self-Ownership Thesis in these and other works; left-libertarian writings that champion the Self-Ownership Thesis include, among others, Peter Vallentyne, Hillel Steiner, and Michael Otsuka, “Why Left-Libertarianism Isn’t Incoherent, Indeterminate, or Irrelevant: A Reply to Fried,” *Philosophy and Public Affairs* 33 (2005): 201–15; Michael Otsuka, *Libertarianism without Inequality* (Oxford: Oxford University Press, 2003); Peter Vallentyne, “Left-Libertarianism and Liberty,” in *Contemporary Debates in Political Philosophy*, ed. Tom Christiano and John Christman (Oxford: Blackwell, 2009), 137–51; Hillel Steiner, “Original Rights and Just Redistribution,” in *Left-Libertarianism and Its Critics*, ed. Peter Vallentyne and Hillel Steiner (New York: Palgrave, 2000), 74–121. See also Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 2000); Thomson concludes that “people own their own bodies”; and see Michael Huemer, “America’s Unjust Drug War,” in *The Ethical Life*, 2nd ed., ed. Russ Shafer-Landau (Oxford: Oxford University Press, 2012), 421–35.

5. I here speak of “property rights” rather than “property rights in oneself” because the former is less cumbersome and more general. I mean to be talking about property rights that are purported to have the moral force that the Self-Ownership Thesis attributes to our rights over our own bodies. It is, of course, an interesting question (and one that divides left- and right-libertarians) how widely beyond the self we have property rights so conceived. As Peter Vallentyne writes (“Left-Libertarianism as Liberal Egalitarianism,” *Philosophical Exchange* [2009]: 56–71), right-libertarian positions maintain “agents have a robust moral power to acquire full private property in natural resources (e.g., space, land, minerals, air, and water) without the consent of, or any significant payment to, other members of society. Left-libertarianism, by contrast, holds that the value of natural resources belongs to everyone in some egalitarian manner and thus appropriation is subject to some stronger constraints.”

6. Nozick, in his wondrously inventive development of some of the worries stressed here, writes that the natural rights tradition he is writing in “holds that stealing a penny or a pin or anything from someone violates his rights. That tradition does not select a threshold measure of harm as a lower limit, in the case of harms certain to occur” (*Anarchy, State, and Utopia*, 75).

I argue, first, that our libertarian cannot rely on this simple path from self-ownership to the above sort of traditional libertarian conclusions.⁷ The ubiquity of difficult to avoid, minor infringements on other people's bodies makes the simple argument unattractive. Strong moral constraints against all such infringements would make too many things impermissible.⁸ The thought that, quite generally, my self-ownership creates very powerful moral constraints on any and all involuntary infringements on my body would unacceptably interfere with your liberty, as Nozick saw.

Several examples demonstrate the point, including cases of involuntary minor risk imposition as when I fly a plane over your head.⁹ Here I will focus, as Nozick, Railton, Hospers, Rothbard, and others have, on the case of pollution to highlight the problem. Suppose there is a pollutant that is produced by a wide range of human activity, such as driving a car, flying a plane, running the lawnmower, making toasters, and so on. Suppose this pollutant's only effect is to produce itchiness once a year in proportion to the amount it lands on one's skin.¹⁰ Even at maximal itchiness, however, it is not debilitating but only annoying. Presumably putting this pollutant into the air such that it lands on me and I am affected by it is an infringement of my powerful property right to my skin.¹¹ So, if you cause this stuff

7. Acceptance of the Self-Ownership Thesis is not a necessary condition for counting as a libertarian. A good number of contemporary self-described libertarians reject the thesis. It is more plausibly a sufficient condition. When I speak of "our libertarian" I mean one who accepts the Self-Ownership Thesis. A number of contemporary libertarians argue empirically that compliance with traditional libertarian conclusions is morally recommended because it has good consequences. I do not argue against such claims here. It may be, for all I say here, that many actions that violate traditional libertarian conclusions are impermissible for reasons other than that they infringe our property rights.

8. Railton's excellent "Locke, Stock, and Peril" very much helped blaze the trail I explore here.

9. Or consider soft-paternalism cases such as pushing someone out of the way of a bus. See the excellent discussion of problems self-ownership views have with soft-paternalism in Steven Wall, "Self-Ownership and Paternalism," *Journal of Political Philosophy* 17 (2009): 399–417. An interference is a case of soft-paternalism if the person interfered with would have consented to the interference had they been more informed.

10. The case of breathing in pollutants at least arguably changes the case from an outright border crossing to a case covered by the Lockean Proviso. Thus I think the case I consider avoids unneeded distractions, even if it is less common of a case. Shooting me is straightforwardly a border crossing without introducing Proviso-type complications despite the fact that the bullet must travel through the air to reach me. I assume we should say the same thing for pollutants that fall on me.

11. One might reply, on behalf of the Self-Ownership Thesis, that we clearly do have a going conception of property rights such that minor pollution does not count as an infringement of it. However, the friend of Self-Ownership must be reluctant to accept our cultural practices as settling their notion of property rights given that she will end up arguing that such practices significantly fail to adequately protect people's property rights as our libertarian understands them. After all, our going cultural conception of property is also such that some redistributive taxation is broadly seen to not infringe on property rights.

to end up on my skin without my permission, you infringe my rights.¹² My property right to my skin includes a prohibition against damaging or irritating it without my permission.¹³

But if the size of the harm done to the rights holder by an infringement is irrelevant to the stringency of the prohibition against such actions, then it should take the same amount of social good to outweigh each infringement caused by pollution as it takes to outweigh taking my spare kidney.¹⁴ But in that case, since there will be a great many such rights infringements as a result of the pollution, surely such pollution would be impermissible. But this would shut down much of the economy of the world and it would radically restrict people's liberties. It would, for example, seemingly make a wide range of industry and transportation impermissible, perhaps even most uses of fire. Nozick, recoiling from such a picture said that this "would ill fit a picture of a free society as one embodying a presumption in favor of liberty" (78).

12. Exactly what rights I have in virtue of owning a thing is, of course, a complicated issue. One can say two things directly relevant to the assessing the case before us. First, the influential champions of self-ownership that have explicitly discussed the case of pollution do clearly treat it as a border crossing. See Nozick, *Anarchy, State, and Utopia*, 79–81; Hospers, "Libertarian Manifesto"; and Murray Rothbard, "The Great Ecology Issue," *Individualist 2* (1970), cited in Hospers, "Libertarian Manifesto," 27; Rothbard writes, "The remedy is simply to enjoin anyone from injecting pollutants into the air, and thereby invading the rights of persons and property. Period" (5). Second, the most influential understanding of what the rights of self-ownership are, as developed by G. A. Cohen and seconded (with amendments) by Michael Otsuka, Hillel Steiner, and Peter Vallentyne, certainly would classify pollution as a border crossing; see G. A. Cohen, "Self-Ownership: Delineating the Concept," in his *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995), 195–208, 213; Vallentyne, Steiner, and Otsuka, "Why Left-Libertarianism Isn't Incoherent," 204–5; Steiner ("Original Rights and Just Redistribution" 76) endorses Cohen's way of explicating the position; and Otsuka (*Libertarianism without Inequality*, 12) also endorses Cohen's general framework.

13. There are reasons to doubt that self-ownership points us toward an acceptably determinate conception of rights. This issue will get some attention below but I will mainly be assuming for the sake of argument that there is a sufficiently determinate shape to such rights in order to pursue other issues. For worries about determinacy see Barbara Fried, "Left-Libertarianism: A Review Essay," *Philosophy and Public Affairs* 32 (2004): 66–92, and "Does Nozick Have a Theory of Property Rights?" in *The Cambridge Companion to Nozick's Anarchy, State, and Utopia*, ed. Ralf Bader and John Meadowcroft (Cambridge: Cambridge University Press, 2012), 230–54.

14. I consider, and eventually recommend to the champion of the Self-Ownership Thesis, what I take to be the most plausible way to relax this assumption within the spirit of the framework toward the end of Sec. II and, in more detail, in my "Self-Ownership and the Conflation Problem." I argue that the more plausible versions of such views will allow, contrary to what is traditionally maintained, that the significance of an infringement is relevant to the amount of social good that can make that infringement justified. This change would cost the view its traditionally embraced stringency.

But this reveals a tension in our libertarian's picture. On the one hand, liberty is just defined negatively as the freedoms one is entitled to so long as one does not violate another person's rights. So understood, there would be no infringement of liberty here. But Nozick's reaction reveals that there is another image of liberty, one that involves our having a wide range of attractive options and permission to move about freely. Usually our libertarian assumes that these two pictures will go together—that is, that respecting other people's property rights will leave us lots of free space and make permissible a wide range of attractive options. Usually we assume that respecting people's negative rights is undemanding, and it is only views with strong positive rights that are likely to be too demanding and restrictive.¹⁵ But given the wide array of actions that in minor ways infringe on other people's property rights, such as polluting, this view seems threatened. Could the philosophical theory named for liberty actually turn out to be unacceptably restrictive of our freedom?

So far I think the above warrants the conclusion that the traditional simple route from self-ownership to a vindication of traditional libertarian conclusions is unattractive. Our libertarian needs a new, less simple argument to convince us that their view has principled grounds for protecting our Millian liberties that had previously seemed to unproblematically flow from self-ownership.

Some friends of self-ownership have noticed (or perhaps, in Nozick's case, discovered) the above problem with full self-ownership. Left- and right-libertarians have, to the extent that they directly confront this problem, tended to largely concede the worry and adjust their view in an attempt to mitigate the problem. One might have expected some attempt at clarifying what self-ownership comes to such that these problems would not arise. Instead, to the extent that we have been given clarification about what self-ownership comes to, the clarification deepens the above concern.¹⁶

In the rest of this article I will consider the best responses to this worry that have been offered, namely, those argued for by Nozick, Otsuka, and (writing together) Vallentyne, Steiner, and Otsuka. These authors, the most philosophically influential contemporary writers in the tradition who have highlighted the problem, are to be commended for not sweeping the issue under the rug but instead wrestling with it. Many in the tra-

15. I argue that the Demandingness Objection is not a good objection to Consequentialism in "The Impotence of the Demandingness Objection," *Philosophers' Imprint*, 2007 (<http://hdl.handle.net/2027/spo.3521354.0007.008>).

16. See the beginning of Sec. II below.

dition have ignored or missed the problem. Nonetheless, I will argue that in each case the replies are inadequate.

I. NOZICK AND CROSS AND COMPENSATE

Other people having full self-ownership would unacceptably limit our liberty.¹⁷ Nozick took this worry very seriously and came up with an ingenious response.¹⁸ His main response is to claim that our property rights do not create boundaries that it is generally impermissible to cross. Rather, others may permissibly cross our boundaries provided that they adequately compensate us for doing so (henceforth, “cross and compensate”).¹⁹ Nozick’s thought is not the relatively mundane idea that if others have already crossed our boundaries, they owe us compensation. Rather his thought is that one may permissibly prospectively plan to and succeed in crossing the

17. As likely would full ownership of just about anything.

18. Nozick is less explicit that his view is motivated by self-ownership than one would expect (yet see the references to *Anarchy, State, and Utopia* mentioned in n. 4). Nonetheless that hypothesis explains a wide range of his preoccupations and conclusions. He forcefully champions a Kantian rationale for the strong property rights he asserts (30–35). It seems to be this Kantian rationale for not sacrificing the one for the sake of the group that is the source of the problem explored here as this rationale fails to distinguish adequately between serious and trivial infringements on the one for the sake of the group. My complaints do not hinge on whether someone arrives at the deontological natural rights Nozick champions via self-ownership or via some other path. Any account that ends up with the uniformly powerful and broad deontological property-like rights will generate the puzzles I discuss here. However, self-ownership is handy for my purposes because it involves a commitment to specific property rights (i.e., over one’s body) and that makes it simpler to run the problem cases I discuss here.

19. Nozick’s thinking on such matters in *Anarchy, State, and Utopia* gets little discussion, which is surprising given how crucial Nozick clearly finds such matters. It is, to say the least, not widely acknowledged that the view I attribute to Nozick here is his view. Further, Nozick’s truly extraordinary brilliance in seeing options and identifying problems is not infrequently matched by frustrating reluctance to announce an official view and occasional significant sloppiness. Nonetheless, although it is not central to my main thesis in this article, I believe the view I describe here is the best reading of Nozick and not merely Nozick-inspired. That is, I claim, Nozick is best read as being committed to cross and compensate (albeit in a constrained way). Nozick is not best read as only invoking cross and compensate in the service of the Principle of Compensation. His commitment to it goes well beyond that. Additionally, his motivations for introducing cross and compensate go well beyond the role it might have in helping justify the state. He is rightly concerned about how to deal with trivial risk and harm cases within a natural rights framework that does not sacrifice one for the group. Cross and compensate, I claim, is a significant part of his answer to that important and overlooked issue. I believe that excessive focus on the question of whether Nozick manages to justify the state has caused people to overlook the role in Nozick of cross and compensate and focus only on the much narrower Principle of Compensation. Nozick deserves some of the blame for this as his presentation of these issues is disorganized.

boundaries of someone's legitimate property without her consent provided compensation is paid.²⁰ In legal terminology, such protections are tellingly called a liability rule rather than a property rule for protecting boundaries. Adequate compensation for such crossings is compensation that leaves us, by our own lights, no worse off than we would have been had there been no crossing and no compensation.²¹ According to cross and compensate, our property rights do not create side-constraints but rather help specify a baseline of well-being or preference satisfaction that is morally significant.²² It is especially clear that Nozick is strongly backing away from the Self-Ownership Thesis since his view actually requires that we keep track of our property boundaries, yet he maintains that there are no side constraints against crossing such borders without consent.²³

20. Confusingly, immediately after discussing cross and compensate, Nozick starts talking about the Principle of Compensation (*Anarchy, State, and Utopia*, 78–84). This latter principle, seemingly quite different from cross and compensate, addresses questions of when someone is owed compensation for being forbidden from imposing risk on others in ways that damage the interests of the person so forbidden. Although Nozick discusses these two principles back to back he little discusses their connection. (See 83 for an unconvincing suggestion about the relation between the two. See also 87 for an acknowledgment of the lack of connection between the two principles.) Cross and compensate is clearly much broader in scope. For example, the Principle of Compensation is only applicable when both a risky action has been prohibited and that prohibition would be costly to the person whose actions are prohibited. Cross and compensate is applicable even when neither is the case. Nozick's discussion of pollution (79–81) is contained within the section devoted to developing the Principle of Compensation. I think such passages are obviously relevant to the motivation for cross and compensate (which immediately precedes the section on the Principle of Compensation) and interpret them in that light. Nozick's Principle of Compensation plays a central role in his attempt to justify the state (which oddly draws the lion's share of the critical attention) and as a result few have adequately distinguished the Principle of Compensation from cross and compensate.

21. "Full compensation keeps the victim on as high an indifference curve as he would occupy if the other person hadn't crossed" (*ibid.*, 63). But see Barbara Fried's helpful essay ("Does Nozick Have a Theory of Property Rights?"), which sorts out competing conceptions of the relevant kind of compensation that Nozick mentions. Eric Mack ("Nozickian Arguments for the More-than-Minimal State," in *The Cambridge Companion to Nozick's Anarchy, State, and Utopia*, ed. Ralf Bader and John Meadowcroft [Cambridge: Cambridge University Press, 2012], 89–115, 110) develops a very interesting alternative understanding of the relevant kind of compensation. He proposes that compensation is owed in the currency of prevention of future boundary-crossings. While this proposal may, as Mack claims, help Nozick justify the minimal state, it will not adequately ensure that we can justify trivial pollution and risk. Mack does not suggest otherwise.

22. Locke earlier had also started backing away from the Self-Ownership Thesis. Locke (*Second Treatise of Government*, 9) maintained that God (also?) owns us and so we may not do with ourselves as we like.

23. Eric Mack ("Unproductivity: The Unintended Consequences," in *Reading Nozick*, ed. Jeffrey Paul [Totowa, NJ: Roman & Allanheld, 1981], 169–90, 187) also finds that on Nozick's view "a boundary specifies a level of well-being and the permissibility of others' actions depends upon the effects of those actions upon the subject's well-being." Mack notes these

Nozick worries more about arguments needed to constrain cross and compensate than he does about justifying the principle in the first place. The simple argument that we should restrict cross and compensate because it constitutes an infringement on our property rights without our permission is barely mentioned. There are only two serious candidates for Nozick's rationale for cross and compensate, neither of which Nozick states as clearly as one would like. First, one might think that I have no complaint against a transition from state A to state B if I am indifferent to or prefer B to A. Just to have a handy label, and without assuming that the only thing a person can hold relevant to whether situation B is preferred to A is the agent's own well-being, let us call this the "No Harm, No Foul" rationale for cross and compensate. One might think that if an action violated my rights, I certainly would have a complaint against that action. The No Harm, No Foul principle implies that I have no complaint against an action that crosses my borders provided compensation is paid, and thus implies that such action does not infringe my rights.²⁴ This argument highlights that cross and compensate licenses some actions that are Pareto-superior that a system of strict property rights would forbid.²⁵

implications of Nozick's cross and compensate and sadly concludes that the "deontic conception of rights is lost when even having a morally unambiguous boundary is understood as being on a certain indifference curve from which others may only move one outward, toward higher indifference curves" (187). I do not agree with this last point. Surely one still may not cross and fail to compensate one person so that five other people do not have someone else cross and fail to compensate them. The view remains deontological. Rather, the result of Nozick's addition of cross and compensate is that one's property boundaries do not themselves create the morally serious side-constraints. In other words, the result is the rejection of the Self-Ownership Thesis.

24. Confusingly, Nozick writes that, when such issues are most front and center, "The reason one sometimes would wish to allow boundary crossings with compensation . . . is presumably the great benefits of the act; it is worthwhile, ought to be done, and can pay its way. . . . The most efficient policy forgoes the fewest net beneficial acts" (*Anarchy, State, and Utopia*, 72–73). While Nozick rejects "the most efficient policy" here, when there are only "marginal benefits" involved, he does not provide a clearer statement of the rationale for his acceptance of a limited version of Cross and Compensate. The most confusing thing here is Nozick speaking of "net" beneficial acts. I think Nozick spoke incautiously here and meant to be highlighting the pareto-optimality of such acts, rather than changing his mind that his approved side constraints "reflect the fact that no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall social good. There is no justified sacrifice of some of us for others" (33). Nozick seems to clarify the above notion of an activity being able to "pay its way," in a way helpful to my interpretation. On 79 he says it amounts to the idea that "those who benefit from it would be willing to pay enough to cover the costs of compensating those ill affected by it."

25. One may wonder about the connection between the kind of preference satisfaction that Nozick focuses on and an agent's well-being. Even a subjectivist about well-being such as myself will worry that the preferences Nozick makes use of are too uninformed and unseparated from moral concerns to coincide with an agent's well-being. For my take on such issues, see David Sobel, "Full Information Accounts of Well-Being," *Ethics* 104 (1994): 784–810, "Well-Being as the Object of Moral Consideration," *Economics and Philosophy* 14 (1998): 249–81, and

Second, Nozick appears to concede that his only serious options in dealing with risk are either to make impermissible all actions that involve even very small risks to normatively unimportant borders or to accept some version of cross and compensate. The former option Nozick quickly concedes would prohibit much too much and “would ill fit a picture of a free society as one embodying a presumption in favor of liberty.”²⁶ So Nozick is in effect saying that only cross and compensate maintains libertarian principles in a manner compatible with an attractive level of liberty.²⁷

A terminological issue must briefly detain us. I will refer to potentially permissible unconsented to crossings upon another person’s property, with Nozick, as a “boundary crossing.” According to cross and compensate, a boundary crossing would result in a rights infringement only if adequate compensation is not paid.²⁸ An infringement involves doing something that someone’s rights protect her against. Nonetheless, a rights infringement could potentially be permissible, at least according to non-absolutist variants of the view, if it would, for example, avoid a catastrophe.²⁹ In such cases let us say the infringement is justified. Infringements that are not so justified are impermissible and violate a person’s rights.³⁰

“Subjectivism and Idealization,” *Ethics* 119 (2009): 336–52. But, as I argue in the middle essay above, well-being may well not be the appropriate object of moral consideration. Actions are, in one sense, Pareto-superior if the result of them would be that no one’s desires are worse satisfied and some people’s desires are better satisfied, regardless of the connection between the satisfaction of such desires and well-being.

26. Nozick, *Anarchy, State, and Utopia*, 78. On 79 Nozick writes, “Since it would exclude too much to forbid *all* polluting activities, how might a society (capitalist or socialist) decide which polluting activities to forbid and which to permit?” Nozick claims that “Only if the benefits to air passengers are greater than those costs to airport neighbors should the noisier mode of transportation service go on. A society must have some way to determine whether the benefits do outweigh the costs.” And a test for this is whether the beneficiaries of the act gain so much from the act that they would consent to the act even if they had to compensate those negatively affected. Nozick concludes, “If a polluting activity is to be allowed to continue on the ground that its benefits outweigh its costs (including its polluting costs), then those who benefit actually should compensate those upon whom the pollution costs are initially thrown” (80).

27. It is common to find Nozick’s ideological friends hostile to cross and compensate. In addition to the above noted reaction by Mack, Murray Rothbard has a very hostile discussion of it in *Ethics of Liberty*, 240–53. Randy Barnett (“Whither Anarchy? Has Nozick Justified the State?” *Journal of Libertarian Studies* 1 [1977]: 15–21, 20) broadly rejects the view. I believe this is largely because natural rights libertarians have failed to focus on the problems that Nozick highlighted that cross and compensate is needed to help solve, starting with the problems stemming from the ubiquity of the imposition of risk.

28. Further, I think we should say that on a nonabsolutist version of the view, enough social good could make it permissible to infringe a right, rather than say that in such cases the right disappears. Nozick says “Overridden rights do not disappear; they leave a trace” (*Anarchy, State, and Utopia*, 180).

29. Nozick (*ibid.*, 30), expresses agnosticism between an absolutist version of the view and one that permits rights infringements to avoid a “catastrophic moral horror.”

30. I follow Vallentyne’s helpful terminological conventions here. See Peter Vallentyne, “Enforcement Rights and Unjust Intrusions,” *Ratio* 24 (2011): 422–42.

It is important to note the impressive range of virtues cross and compensate has, especially from a libertarian point of view, beyond the considerable appeal of Pareto-optimality. It can appear that cross and compensate is just grasping at straws once the problem of pollution and risk is appreciated in its full generality, but that would be to seriously underestimate it. Cross and compensate allows Nozick to treat as less serious smaller impositions of risk or outright crossing of relatively unimportant property borders. It can treat more minor boundary crossings without consent as relatively minor matters in the sense that they are more easily made right. Nozick's thought is that it will be easy and relatively cheap to compensate people for the imposition of trivial risks. This scheme, Nozick must be thinking, would allow us to pollute without antecedently gaining universal consent so long as we contribute to some general fund that compensates each person for the imposition of the trivial risk. And if the risks of the pollution are more significant, then perhaps it should be prohibited. And it can do this without permitting one person to be involuntarily sacrificed for another, for cross and compensate rules out harmfully crossing boundaries without permission.³¹ If no one is harmed, one might well think, no one is sacrificed. Adding cross and compensate to a system of property rights need not sacrifice the strongly deontological and antipaternalistic character of the view. You may not cross my boundary without compensation, presumably, even to prevent several people from having their boundary so crossed. Cross and compensate also does not allow anyone to infringe upon my property simply because they think, perhaps even rightly, that doing so will be good for me. Only my own assessment that I am no worse off after the crossing and compensating can make this combination permissible. Further, this view can explain why soft-paternalism, such as pushing someone out of the way of a bus, will generally be permissible and not require compensation.³² The person pushed will, if it really is a case of soft-paternalism, prefer the new situation they find themselves in to the one that they would have been in without the crossing and so pushing a nonsuicidal person out of the way of a bus will be vindicated by cross and compensate as both permissible and not requiring compensation. Cross and compensate accomplishes all this within a framework that Locke seemed to embrace (the No Harm, No Foul Principle) in shaping

31. However, seemingly it could be the case that a person was less satisfied with their situation simply in virtue of being protected by cross and compensate rather than by more robust property rights. Consistency might require Nozick to say that such a person enjoys more robust property rights. Thanks to an anonymous referee for this point.

32. Perhaps there are other promising ways of dealing with such soft-paternalism cases within this framework. Nonetheless, it is an advantage of cross and compensate that it provides a quite plausible method in an independently motivated way.

the Lockian Proviso³³ and that has seemed even to Nozick's sharpest critic to be a compelling story.³⁴

Limits to Cross and Compensate?

Nozick's cross and compensate backs away from The Self-Ownership Thesis. According to cross and compensate, the borders of our property do not create serious moral side constraints. But perhaps I have so far exaggerated Nozick's commitment to cross and compensate and, in doing so, exaggerated the degree to which he backs away from the moral implications of full self-ownership. After all, Nozick offers many arguments intended to rein in the permissible scope of cross and compensate. If those arguments are good, perhaps he has succeeded in preserving the attractive implications of self-ownership while shedding its unattractive ones.

Nozick did not provide good reasons to limit cross and compensate. If I am right about that, his view would be more coherent and unified if it either embraced an unrestricted version of cross and compensate or rejected it altogether. He lacks justification for his selective use of the principle, I will argue. Cross and compensate has attractive features that allow him to helpfully address problems that need addressing. Thus his overall view would look more coherent and unified if it embraced an unrestricted version of cross and compensate.

I will focus on the three arguments for limiting cross and compensate that Nozick stresses. It is important to keep in mind, when assessing cross and compensate, that if in some particular case a boundary crossing would require impossible levels of compensation that is not a limitation on the general applicability of cross and compensate but rather a case where someone cannot afford the compensation that cross and compensate says would be required. In such cases it is the conclusion of the principle that such crossings must not take place. That is not a limitation on the principle but rather an implication of the principle.

First, Nozick claims that providing only just enough compensation so that the person whose boundary is crossed is, by her lights, no worse off for the crossing divides up the benefits of the crossing in "an unfair and arbitrary

33. Locke (*Second Treatise of Government*, 21), in explaining why one has no complaint against others drinking water from a stream, when they leave as much and as good for others, writes, "No body could think himself injured by the drinking of another man, though he took a good draught, who has a whole river of the same water left him to quench his thirst: and the case of land and water where there is enough of both, is perfectly the same."

34. Cohen ("Self-Ownership, World-Ownership, and Equality," in *Self-Ownership, Freedom, and Equality*, 75) writes that if an action's "impact on others is (at worst) harmless, as satisfaction of Locke's proviso would seem to ensure, then it will be difficult to criticize it, regardless of how it was effected."

trary manner” because it sells the right to do so at the lowest point that the seller of the boundary would be willing to sell. This allows the buyer of the permission to cross to always gain all the benefits of the exchange.³⁵ It is as if each person who would sell milk must truthfully announce the very lowest price they would accept for it, thereby ensuring the buyer all the benefits of the exchange. This complaint against cross and compensate is reasonable but also easily cured. Clearly we just need to add a fair method of dividing the benefits of the exchange. And that will merely involve the crosser providing a somewhat larger amount of compensation. There is no argument here that would help restore the sanctity of our property boundaries.

Second, Nozick’s most extensive and complicated argument for a constraint to cross and compensate concerns the fear that crossing and compensating could create. The worry is that some such crossings and compensatings will create fear in those whose boundaries are not themselves crossed and (1) “there is a legitimate public interest in eliminating these border-crossing acts, especially because their commission raises everyone’s fear of its happening to them” (67); and (2) it is not clear who is to provide compensation for such fear.³⁶

There is the interesting question of whether such fear is rational, given that by one’s own lights one is assured of thinking the entire experience of the crossing and compensation was not worse than neither happening.³⁷ Nozick argues that such fear is to be expected, as fear does not

35. Nozick, *Anarchy, State, and Utopia*, 63–65.

36. In a very wide range of cases there will be significant epistemic issues and transaction costs in determining and providing the appropriate compensation. This becomes clear, for example, when we start worrying that people might misrepresent their preferences or have idiosyncratic preferences. These issues will exist in cases where Nozick relies on cross and compensate (as in the pollution case) as well as in cases where he wants to forbid it. Nozick employs the simplifying device of supposing that it is easy to extract compensation from those who have it, once we know who owes whom what, and that the parties are tolerably well motivated to respect people’s rights and are able to determine what those rights are (see *Anarchy, State, and Utopia*, 5, 59, 119, and 141). Perhaps such simplifications are partially explained by the hypothesis that what we are debating here is a truth-maker for what constitutes a rights infringement and not an implementable decision procedure suitable for the real world.

37. Nozick at one point (*Anarchy, State, and Utopia*, 72) treats the question of whether we may use cross and compensate as settled by the size of the transaction costs (which are presumably far short of a catastrophe). I think at these moments he loses sight of the question of what is and is not an infringement. If cross and compensate without consent is an infringement, then it should not be permissible even when transaction costs are high (but well short of a catastrophe). If it is not an infringement, then why is it impermissible when transaction costs are low? He seems to stop seeing the question in terms of what it takes to infringe a right and start treating the matter via something closer to a consequentialist cost/benefit analysis. I see this as a lapse from his more considered view. Such moments lend support to Fried’s claim in “Does Nozick Have a Theory of Property Rights?” that “when the going gets tough, rights theorists tend to turn utilitarian.”

respond to a global assessment of one's situation. He does not directly speak to the question of whether such fear is rational.³⁸

Nozick worries about cases where one is rationally fearful simply because of the broad permissibility of cross and compensate. After all, you are unprotected in such a system from others sneaking up and breaking your arm, provided they pay compensation. It is not clear such fear should be thought to deserve compensation. If cross and compensate does not violate a person's rights prior to the fear, then I do not think our libertarian can maintain that such fear should be thought to change that situation. After all, suppose others are within their rights to not aid me should I fall down a well. Would they owe me compensation for the fear I might have that I will die unaided that results from such a system? As Nozick says, "Not every act that produces lower utility for others generally may be forbidden; it must cross the boundary of others' rights for the question of its prohibition to even arise" (67). If rational fear generated by a system of rights can, by itself, establish that a boundary has been crossed, then a system of rights that generates rational fear of being unaided should also require compensation. Clearly our libertarian cannot accept that this means we can therefore enforceably forbid not aiding or enforceably require compensation for failing to aid. Thus it seems they must accept that rational fear cannot, on its own, rationalize forbidding what otherwise infringes no rights.³⁹ Libertarians should maintain that if my action is otherwise permissible, your rational fear caused by my action does not merit compensation and cannot, by itself, change the status of an action from a noninfringement to an infringement.⁴⁰ However, even if, contrary to what I argue above, such rational fear did merit compensation, it is still not clear to me that Nozick's argument provides a rationale to limit cross and compensate as opposed to deriving a consequence from that principle that actions that generate widespread fear must not be performed as they will require too much and too complicated compensation.

Third, Nozick claims that "a system permitting boundary crossing, provided compensation is paid, embodies the use of persons as means: knowing that they are so used, and that their plans and expectations are

38. Nozick, *Anarchy, State, and Utopia*, 69–70; I am assuming it is much more reasonable to ask others to compensate one for one's rational fears that they help cause than one's irrational fears.

39. See Railton's discussion of such matters ("Locke, Stock, and Peril," 204–7), which seem to tend toward the opposite conclusion. I do not dispute Railton's claims, but merely am pointing out above that that commitment would take libertarians in directions that are directly hostile to core aspects of their doctrine.

40. If one prohibits forcing people to aid then people will rationally fear being unaided. But if one does not prohibit forcing people to aid others, then people will rationally fear being forced to aid. Thus perhaps only the system of rights that creates avoidable levels of rational fear should be thought to be problematic.

liable to be thwarted arbitrarily, is a cost to people” (71). In response I would say, first, that if we think of using me as a means merely as something that is a cost to me, then cross and compensate is seemingly well situated to account for that cost and explain what could make it permissible. Second, Nozick nowhere explains why he thinks cross and compensate uses others as a means. It does permit us to take someone’s property without her consent so as to benefit another. But it does not permit us to harmfully take someone’s property and give it to another. When Nozick speaks passionately against the permissibility of using someone as a means, he has in mind cases where we sacrifice one for the sake of others. Cross and compensate is compatible with the thought that we must not use people as a means, at least if we add the assumption that so using someone requires making her less content with her situation.⁴¹

Problems for Cross and Compensate

I have so far been singing the praises of cross and compensate, pointing out that it strongly backs away from the Self-Ownership Thesis, and explaining why Nozick did not provide a good rationale for limiting its scope. However, I do not think cross and compensate ultimately successful in handling the sorts of problems that have concerned us above.⁴²

Start with two internal problems with Nozick’s commitment to cross and compensate. First, Nozick tells us that “the central core of the notion of a property right in X, relative to which other parts of the notion are to be explained, is the right to determine what shall be done with X; the right to choose which of the constrained set of options concerning X shall be realized or attempted” (171). Given this understanding of property rights, cross and compensate seems to make other people part owners of our bodies, as others may permissibly decide what will happen to them without our consent. Recall that a central complaint against patterned principles of distributive justice that Nozick offers is that they, but not his entitlement theory, “involve a shift from the classical liberal notion of self-ownership to a notion of (partial) property rights in other people” (172).

41. Nozick, *Anarchy, State, and Utopia*, 32–34; Nozick’s own attitude toward this complaint against cross and compensate seems to be that this may well be a price we have to pay. In any case, he does not use this complaint against cross and compensate to justify any particular way of limiting it. Perhaps it is just meant to dampen enthusiasm for the principle generally, rather than shape the principle so as to avoid the cases where it permits using people as a means. I think it fair to say that Nozick only mentions this complaint against the principle; he does not deploy it so as to show us how to limit the principle. Nozick relies on cross and compensate at least in pollution cases and he clearly intends a broader role for it.

42. Here I stress problems for cross and compensate that the Nozickian will be least able to shrug off. I here ignore other concerns one might have about it such as that raping a desperately poor person will more frequently be permissible and require less compensation than raping a rich person.

Nozick must either abandon this complaint against patterned principles, make more complicated his core conception of what it is to have a property right in something, or admit that the complaint applies against his own view as well.

Second, Nozick conjectures that side constraints are appropriate for creatures like us, but perhaps not for other animals, because we can autonomously pursue our conception of the good; we are creatures that can make and carry out plans guided by what seems to us worth doing (50). A problem with cross and compensate for Nozick's purposes is that it seems to sell that value for subjective desire satisfaction overly readily. Cross and compensate broadly permits interruptions of my autonomous plans for other goods. Permitting me to sell my autonomous planfulness at my initiative is one thing, but entitling others to force me to sell it is another. Whatever else can be said for cross and compensate, it does not seem well designed to respect our autonomously chosen plans. There is a tension between the thought that autonomy is the key fact about us that makes it morally appropriate to take us into account by respecting deontological side constraints and the thought that we may undermine this aspect of people freely so long as we compensate them in the coin of subjective desire satisfaction.

Now let's move on to noninternal problems with cross and compensate. So far we have mainly considered cases where I merely fail to consent to a boundary crossing but cross and compensate permits it. This can happen in cases where the issue of your crossing my property never occurred to me prior to the crossing event. But suppose instead that I explicitly prohibit your crossing my boundary for any compensation. Yet after the crossing I find that, by my lights, there is compensation that returns me to an all-in unharmed state. Either we must limit cross and compensate or we must limit a person's power to make crossing her border a rights infringement by explicitly forbidding such a crossing. Unlimited cross and compensate seems to conflict with a version of antipaternalism that the libertarian is likely to be attracted to—namely, one that does not permit us to interfere with a person's property against her explicit will in cases where we can reasonably foresee that she won't in the end mind.

But most importantly, cross and compensate does not solve the key problems with full self-ownership that we saw above. It does not make sufficient room for vital economic activity and it cannot adequately distinguish serious from trivial property rights infringements. Consider the case of someone like the late Howard Hughes. Our Hughes is very rich, not concerned about enjoying the miracles of industry, and very fussy about contaminants that might threaten his health. He will not accept any level of compensation (or only extravagant levels of compensation) for polluting the air that he will breathe even if the negative impact to his health of this boundary crossing is very small. Cross and compensate

does not solve the problem we were worried about above of how to make permissible such pollutants.⁴³ Such issues might persuade one that cross and compensate would be more attractive if the compensation was understood in terms of an objective conception of welfare rather than subjective preference satisfaction. But such views look less able to secure the anti-paternalism that was central to Nozick's understanding of the view.⁴⁴ Further such a change would not help in other sorts of cases where providing compensation is exceedingly difficult or impossible yet the harm or risk is trivial and the action crucial to the leading of a decent life. Think perhaps of the use of fire prior to modern methods of transportation, where it would have been literally impossible to reach some who are trivially affected by one's actions, or of people on islands who cannot reach each other to compensate each other but whose activity does impose trivial harm or risk to each other. Additionally, if compensation should be paid not for the risk imposed but for the actual damage done, then cross and compensate will do an even less good job making permissible intuitively permissible pollution. Each of a billion people may well be compensable for having a one in a billion chance of death due to pollution imposed on them. But if the pollutant kills someone in the prime of life, likely no amount of compensation will make that person okay with that result.⁴⁵

Part of the problem is that cross and compensate still cannot adequately distinguish between more and less significant rights infringements. It can, admittedly, distinguish between more and less significant border crossings by focusing on the differing amounts of compensation needed to make such crossings right. But the view as yet has no means to distinguish between differentially significant border crossings without compensation. Such crossings remain on a par. All are presumably forbidden except perhaps to avoid a catastrophic moral horror. But the examples of minor risk and pollution show that it is implausible to treat all such infringements as of equal importance in the sense of requiring the same amount of social welfare to make permissible. Nozick's consid-

43. Railton makes essentially this point in "Locke, Stock, and Peril," 213.

44. See Nozick, *The Nature of Rationality* (Princeton, NJ: Princeton University Press, 1993), 176, where Nozick claims such a conception "opens the door to despotic requirements, externally imposed."

45. Nozick considers this worry. He offers the suggestion that perhaps the problem can be taken care of by permitting people to sell the rights to post-mortem compensation to others (*Anarchy, State, and Utopia*, 77). This would not help alleviate our case of Howard Hughes. Nozick also mentions Charles Fried's suggestion that we might each agree to allow trivial risks to be imposed by others provided that we may ourselves impose such risks (76). Railton ("Locke, Stock, and Peril," 207–8) considers this suggestion (and several others). In this case he argues that this proposal is undermined by the quite unequal risks we impose on each other. Recall that Nozick firmly rejects tacit consent (*Anarchy, State, and Utopia*, 287).

erable backing away from the moral consequences of full self-ownership has failed to fix the fundamental problem we found with such a view.

Part of the problem here stems from Nozick's unwillingness to permit, catastrophes aside, even slight all-in harms that result from border crossings to befall anyone even if they would produce much good. Further, to help ensure antipaternalism, Nozick understands the relevant harms in terms of subjective desire satisfaction. The result is that my whimsical slight preference can make impermissible an action needed to save lives and limbs. But the problem is not merely that Nozick has allied his view with a preference-based account of the relevant harm. Our examples of quite minor infringements such as our pollution and risk cases make plain how implausibly strong the requirement is to not sacrifice the one, no matter how trivially, for the sake of the group. Further, nonabsolutists who treat each sacrificing infringement as very morally significant will implausibly conflate the seriousness of important and quite trivial infringements and, ironically, allow other people's rights to unattractively limit our liberty.

II. VALLENTYNE, STEINER, AND OTSUKA

By now it may well seem that part of the problem here stems from vagueness concerning exactly what rights I have in virtue of being a self-owner. G. A. Cohen responded to the persistent worry that self-ownership is problematically indeterminate by offering a principled way of sharpening the proposal. He maintained that "the stipulation that self-ownership confers the fullest right a person (logically) can have over herself provided that each other person also has just such a right generates a procedure for determining the content of self-ownership."⁴⁶ Vallentyne, Steiner, and Otsuka (VSO) follow Cohen in insisting that their proposal is made more determinate by appealing to the notion of full self-ownership. Full self-ownership "is simply (roughly) the logically strongest set of ownership rights over a thing that a person can have compatibly with others having such rights over everything else." They claim such an un-

46. Cohen, "Self-Ownership: Delineating the Concept," 213. See also Hospers ("Libertarian Manifesto," 22), who writes, "Each human being has a right to live his life as he chooses, compatibly with the equal right of all other human beings to live their lives as they choose." Cohen's conception here looks much more motivated if we assume that a desideratum of such a conception of rights is that they reasonably be thought capable of serving as a premise in establishing our libertarian's very strong conclusions against nearly all paternalism and re-distribution. Some influential contemporary libertarians, such as David Schmidtz, appear to treat the stringency of these conclusions as much more negotiable; see his "Property and Justice," *Social Philosophy and Policy* 27 (2010): 79–100.

derstanding of “full-ownership has a relatively determinate content.”⁴⁷ They then note that this notion of full self-ownership, what they eventually call strict self-ownership, “has some rather radical implications.” These include the claim that my self-ownership is violated “if, in the process of putting out a dangerous fire, you inadvertently send a small bit of stone one hundred yards away, where it lightly flicks my hand. Most people with strong libertarian inclinations will want to reject these implications and thus reject full self-ownership in the strict sense.”⁴⁸

In response, VSO make their notion of self-ownership vaguer by having it be compatible with four possible exceptions, in any combination, from full self-ownership. I take them to be suggesting that these exceptions, in some combination, are sufficient to handle the problem cases. I will be claiming that is not so. The exceptions are actions where it is the case that (1) there is only a very small probability that it will result in an incursion against oneself, (2) if there is an incursion, the harm to oneself will be trivial, (3) the harm was not reasonably foreseeable, (4) the benefits to others of performing the action are enormous (e.g., avoidance of social catastrophe).⁴⁹

The first thing that should strike us about this list of exceptions is that there is no effort to make a case that they have any more unity than a determinate conception of self-ownership together with independent exceptions to handle counter-intuitive cases. More importantly, VSO’s exceptions do not handle the counter-intuitive cases satisfactorily, I will argue. Obviously I cannot here show this for each of the sixteen variants of VSO’s proposal. What I will hope to do here is show that the general shape of each of the exceptions they offer do not individually look to be adequate. Recall that we have already considered the prospects for non-absolutist versions of the view that permit rights infringements to avoid catastrophes (VSO’s fourth option) and found that this move on its own was unable to make permissible intuitively acceptable pollution because such pollution would infringe on so many people’s rights.

Let us now consider VSO’s third option, namely that there is no infringement if the harm was not reasonably foreseeable. The fact that X

47. Vallentyne, Steiner, and Otsuka, “Why Left-Libertarianism Isn’t Incoherent,” 204–5. (See also the essays by the left-libertarians referred to in n. 12.) As they note, this determinacy partially hinges on finding within the notion of ownership a strong priority to the rights against others crossing one’s border without one’s consent over the rights to use that which one owns, at least when these conflict (“Why Left-Libertarianism Isn’t Incoherent,” 206). David Schmidtz argues that this priority is essential to the notion of property in “Property: A History,” in *Oxford Handbook of the History of Political Thought*, ed. George Klosko (Oxford: Oxford University Press, 2011), 599–610.

48. Vallentyne, Steiner, and Otsuka, “Why Left-Libertarianism Isn’t Incoherent,” 206–7. Steiner and Vallentyne, when writing alone, do not clearly reject such an implication.

49. *Ibid.*

could not reasonably foresee that her actions would lead to my boundary being crossed would most directly affect our judgments of blame for X's actions but not whether or not X's actions infringe upon my rights of self-ownership.⁵⁰ But setting aside issues of blame, it seems that its not being foreseeable that X's actions would cross the boundary of something protected by my rights should not make us think that my rights were not infringed. It is typically claimed that my right of self-ownership gives me a right to defend my body from actions of others that would harm it. Surely if X cannot reasonably see that her action will cross the boundary of my property rights but I can, my rights to defend my property are activated. This is a sign that my rights are threatened, even if not knowingly.

Saying that a border crossing was not "reasonably foreseeable" might be taken to mean that such a crossing was very unlikely. If we take it this way, it collapses into the first VSO response that I will consider below. But instead we might take it to suggest that the focus should be on the reasonable subjective probabilities available to the actor, not on the objective chance that an action would cross a border. So understood, the distinction is of little help with our problem. The cases that are causing the problem for supposing that our property rights are uniformly very strong are cases of trivial harm or risk. This problem is just as acute in cases where the actor is aware of the small risk.

Let us now consider the first two, more significant, modifications VSO offer to full self-ownership. Consider first the idea that if the risk to a purported property right is small enough, this amounts to no infringement at all.⁵¹ First, this would mean that a state lottery in which there is a small chance that the rich have their assets redistributively taxed would not infringe the rights of the rich. Nor would a similar lottery where my organs would be used for others. Second, this would mean that we did not have a right that others not play Russian roulette with our head so long as the chance of killing us is small enough. Third, if the view is developed in the threshold manner, then there will implausibly be cases where risks just below the threshold are no problem as far as rights are concerned but just over it is a full rights violation. Such views will be forced to maintain that arbitrarily small additional impositions of risks make a very great moral difference—a greater difference than a larger amount of risk that took us near to the threshold. Fourth, uncoordinated acts each of which is below the threshold could add up to an arbitrarily high chance of a

50. Judith Jarvis Thomson seems to agree. She writes that we should reject the view that "Y infringes a claim of X's in doing alpha only if Y is at fault for doing alpha" (*Realm of Rights*, 234).

51. Eric Mack, in "Nozickian Arguments for the More-than-Minimal State" (97), also suggests that small risks of boundary crossings should not count as infringements.

harmful border crossing, yet no one infringes my rights.⁵² Fifth, some acts that bring no one's risk above a threshold could raise a lot of people's risk a little. Presumably the standards should be higher for imposing a small risk on billions of people than it should be for imposing such a risk on one person. Releasing a carcinogen that has a one in a billion chance of killing those who inhale it is very different if it is imposed on only one person than if it is imposed on a billion people. Sixth, nothing has yet been said about the value of the risk-imposing act to the person who imposes the risk. Surely if the act promises only trivial or no value for the actor, or only an infinitesimal prospect of a value, then such actions should be less permissible. For example, if the act promises an N chance of a benefit to the actor and it imposes a $2N$ chance of the loss of that same sized benefit to the person affected by the border-crossing act, then presumably the act should not be permitted even when $2N$ is still a quite small risk.

Let us now consider the view that if an act would harm someone only a small amount, below some low threshold, it would not amount to a property infringement. Against this view, note first that the last four concerns above about imposing small risks can obviously be modified to pose problems in the case of small harms. Second, what would happen to ownership rights over trivial items such as, to borrow Nozick's examples, a pen or a pin, if small harms did not count as rights infringements?⁵³ Third, we might see property rights as fundamental and presocial rights or we might see the institution of property as itself justified by considerations of social value. Allowing that our property rights are not infringed in cases in which we are harmed only slightly suggests the latter picture.⁵⁴

There is an obvious way to remedy these problems with VSO's proposal. We could let the moral badness of the rights infringement vary continuously with the size of the risk and the scope and seriousness of the

52. Such a complaint forces us to distinguish between the view that each person may permissibly impose up to N amount of risk and the view that each person may permissibly have up to N amount of risk imposed upon her. The latter view will maintain that whether an act of mine infringes your rights depends on what others have done.

53. This is Nozick's rationale for rejecting this proposal. He makes a strong case that this commitment forces one to reject the previous proposal concerning low risk (*Anarchy, State, and Utopia*, 74–75).

54. Many have championed a broadly consequentialist rationale for the institution of property. Surely it is implausible on its face that things would go better without stable expectations to enjoy and plan around the availability of certain goods and the incentive structure provided by such stable expectation. But such a rationale for property need provide no reason to think that, for example, progressive taxation rates that largely leave such attractive features of property in place should be thought to violate our legitimate expectations to our property. The arguments presented here are in no way hostile to the institution of property, but only tell against treating property rights that are independent of such considerations as uniformly morally powerful and fundamental.

harm. And we could sell different sized infringements for different amounts of social good. What seems plausible, and what VSO's modifications from the implications of full self-ownership begin to capture, is that the lower the risk of an infringement an act causes, and the less harm it threatens, the cheaper it should be in terms of social good to make permissible.⁵⁵ So perhaps the fact that an infringement causes N amount of the relevant sort of infringement-harm requires that the act produce at least $20N$ of social good to be permissible.⁵⁶ The fact that something is one's own property provides protection against others infringing on one's property in proportion to how important it is that the thing not be so infringed upon.⁵⁷ This allows the less serious infringements to be bought for less social good. It retains a deontological, rights based approach. It vindicates the thought that because something is mine I have say over what may be done with it well beyond the extent to which I can create the most good with it. It vindicates the thought that the fact that we own a penny or a pin gives us a claim that others not take such things from us. Yet it can explain in a principled way why flying normally safe planes overhead and emitting some pollution is permissible. It vindicates the intuition that you may borrow my tennis racket without my permission if you need to do so to save a life yet you may not take my kidney to save a life.⁵⁸ Such a view looks much less ad hoc than VSO's proposal, it is more

55. Richard Arneson ("Self-Ownership and World Ownership: Against Left-Libertarianism," *Social Philosophy and Policy* 27 [2010]: 168–94, 192) also finds that the most promising left-libertarianism must be modified so that "the level of bad consequences that suffices to trigger a moral permission or requirement to infringe Lockean moral rights is variable, depending on the moral importance of the rights at stake in the situation."

56. Obviously any particular number one picks here will, without supplementation, fail to capture all our intuitions. Nonetheless the view moves in the direction of Scheffler's hybrid, which was widely seen to capture our intuitions better than standard consequentialist views, but does so from a rationale that is not subject to the significant problems Scheffler's view faced. See Samuel Scheffler, *The Rejection of Consequentialism* (Oxford: Oxford University Press, 1994); and Shelly Kagan, "Does Consequentialism Demand Too Much?" *Philosophy and Public Affairs* 13 (1984): 239–54. If one remains dissatisfied with the ability of the resulting view to capture one's intuitions, one might explore requiring a higher price for intentional infringements.

57. I think of this as pursuing a line that G. A. Cohen suggested but did not pursue. He wrote that a "limited dose of forced labour is massively different, normatively, from the life-long forced labour that characterizes a slave" ("Self-Ownership: Assessing the Thesis," in *Self-Ownership, Freedom, and Equality*, 231).

58. Peter Vallentyne ("Left-Libertarianism and Liberty," 7) claims that even in cases in which slightly injuring a person would save millions of lives, the self-ownership of the one who would be injured makes it unjust to impose such an injury. Confusingly, Vallentyne writes, "It may simply be that it is reasonable to behave unjustly in such extreme circumstances." One would wish for some unpacking of the notion of "reasonable" in the above sentence. Vallentyne does not consider the case of risk, but presumably his absolutist views would have the implications mentioned above, at least concerning what is just.

determinate than their proposal, and it solves the concerns just mentioned above about their view.⁵⁹

III. OTSUKA AND INTENTIONALLY USING OTHERS AS A MEANS

So far I have stressed ways in which friends of self-ownership back away from full self-ownership in order to try to avoid the problems with pollution and differentially important property rights infringements that we considered above. I have focused so far on ways in which this backing away from full self-ownership has failed to cure those basic problems that beset the view. But we should also remember that self-ownership intuitively has a variety of attractive implications. Otsuka reminds us of many of these. He writes: “The anti-paternalistic and anti-moralistic implications of this right [of self-ownership] will be attractive to anyone who finds himself in sympathy with the conclusions which John Stuart Mill draws in *On Liberty*. When it comes to such things as freedom of expression, the legalization of euthanasia, of sexual relations of any sort between consenting adults, of the possession of cannabis and other recreational drugs, of gambling, and the like, I am completely at one with other libertarians.”⁶⁰

It is time to remind ourselves not only of these attractive apparent implications of self-ownership, but also that it is possible for the friend of self-ownership to back so far away from full self-ownership as to threaten their ability to vindicate the above attractive sort of conclusions that the left has always thought that right-libertarians got right. That is, in backing away from full self-ownership, our libertarian must take care to leave self-ownership sufficiently intact to ensure that the above sort of wanted conclusions still plausibly flow from the view. I fear that Otsuka has not done so.

Otsuka considers the threat that full self-ownership would result in implausibly strong restrictions on interference with other people. He helpfully points out that the full self-ownership view would seem implausibly to prohibit turning the trolley away from killing 5 and toward killing 1, for example. To avoid such worries, Otsuka tells us he is “not committed to a full right of self-ownership” because his view “does not prohibit all unintentional incursions upon one’s body.”⁶¹ He offers us a conception of self-ownership that gives us two rights. First, our self-ownership entails a

59. Shelly Kagan, in *The Limits of Morality* (Oxford: Oxford University Press, 1989), considers the worry against moral theories that provide deontological constraints against causing harm that “there is absolutely nothing I can do which does not carry some risk of harming others.” He suggests on behalf of such a deontologist a “threshold which diminishes with the decrease in the probability of harm” (89). See also Thomson’s discussion of risk in *The Realm of Rights* at 243–48.

60. Otsuka, *Libertarianism without Inequality*, 2.

61. *Ibid.*, 15.

“very stringent right of control over and use of one’s mind and body that bars others from intentionally using one as a means by forcing one to sacrifice life, limb, or labour.” Second, we also have a “very stringent right to all of the income that one can gain from one’s mind and body.”⁶² Otsuka tells us that these are the “two rights that together constitute a libertarian right of self-ownership.”⁶³

There are two importantly different senses philosophers may have in mind when they speak about “using someone as a means.” On the one hand, there is a Kantian notion, as embodied in his second formulation of the categorical imperative, according to which to treat someone as a mere means is to treat her in a way that is incompatible with her being an end in herself. Since Kant thought this imperative was equivalent to the Universal Law formulation, most have assumed Kant must have had a relatively broad notion of what it would be to treat someone as a mere means. For example, since it is presumably wrong to recklessly drink and drive in a way that endangers other people, the broad understanding of treating others as a mere means would seem to suggest that such action treats others as a mere means in the sense that such actions are insufficiently cautious in preserving the worth others have. It is perfectly sensible, on this broad understanding of treating others as a mere means, that we could count as treating others as a mere means even if you did not intend, but only foresaw, the high probability of harm.

On the other hand, there is another, morally narrower, notion of using someone as a means. This is closer to the notion of using a tool as a means to fix a leak. Here the thought is we make use of someone as a means if we literally use her, without her consent and in a way that crosses her borders, in the pursuit of our end. Pushing the fat man in front of the trolley to stop it, cutting up the one to save the five, or bombing innocents to discourage the military leadership are familiar examples of this form of use. This notion is bound up with the distinction between intending some harm to someone as part of one’s plan to achieve an end and foreseeing that harm will come to someone as a side-effect of one’s plan.

Otsuka clearly has the latter, narrower, sense of what it is to use someone as a means in mind. Recall that he points us to Quinn’s version of the distinction as being his most preferred.⁶⁴ Quinn held that there is a special problem with our harmful action, in that it uses others as a means, when our action exhibits “agency in which harm comes to some victims, at least in part, from the agent’s deliberately involving them in something

62. *Ibid.*

63. *Ibid.*, 30.

64. *Ibid.*, 15. Otsuka points us to his favorite interpretation of this notion in Warren Quinn’s “Action, Intentions, and Consequences: The Doctrine of Double Effect,” in his *Morality and Action* (Cambridge: Cambridge University Press, 1993), 175–93.

in order to further his purpose precisely by way of their being so involved.” Quinn defends this thought by claiming that there is a “strong moral presumption that those who can be usefully involved in the promotion of a goal only at the cost of something protected by their independent moral rights (such as their life, their bodily integrity, or their freedom) ought, *prima facie*, to serve the goal only voluntarily.”⁶⁵

Feeding this interpretation back into the rights that Otsuka champions yields surprising results. The result is that such rights say nothing about the limitations my self-ownership places on what others may do to me when not intentionally using me as a means or taking what I made using only my mind and body. Suppose, for example, you are planning to blow up your home to build a new one. The fact that doing so would, foreseeably but not intentionally, destroy some of my body surely cannot entail that you are intentionally using me as a means in Otsuka’s sense. Yet any view entitled to say that it endorses a serious sense in which we are self-owners must claim that the fact that your action would have such implications for my body without my consent, when I am not infringing any rights nor threatening to, is something to be said normatively against it. Otsuka’s view does not secure that conclusion. And of course there are a great number of morally problematic ways people can interfere with my body without intentionally treating me as a means or taking my income that I earned by only using my body and mind.⁶⁶

Given this, I think Otsuka is not yet entitled to say that his conception of self-ownership can vindicate the attractive set of liberal rights he articulated above. It is not clear that forbidding someone from engaging in homosexual sex or from expressing certain opinions would require treating her as a means in the sense that Quinn outlined above. As we saw, unjustly killing someone need not involve treating someone as a means. We have not yet been given sufficient reason to think that violating other Millian rights must do so.⁶⁷

Seemingly Otsuka will have to make the rights of self-ownership significantly broader to assure us that his view vindicates the set of Millian

65. Quinn, “Actions, Intentions, and Consequences,” 184, 191. Quinn’s own view is that it is harder to justify harms that are brought about in this way than comparably sized harms brought about in other ways. See also Francis Kamm, *Intricate Ethics* (Oxford: Oxford University Press, 2007).

66. Kasper Lippert-Rasmussen, in his excellent “Against Self-Ownership,” *Philosophy and Public Affairs* 36 (2008): 86–118, also presses concerns in this neighborhood against Otsuka and concludes with a suggestion that Otsuka “might want to omit the qualification ‘intentionally’ in his statement of the first right encompassed by self-ownership” (88 n. 6). But, as Lippert-Rasmussen seems to recognize, this change would not be sufficient to address the sorts of concerns I discuss here, as the person in my example is not used as a means even unintentionally.

67. Richard Arneson (“Self-Ownership and World Ownership,” 177) finds interesting different grounds to doubt that Otsuka has provided principled protections for such Millian rights.

liberal rights he hopes to defend. And of course, once he does that, we will have to worry that his view will again have the problems with full self-ownership that we saw above. Otsuka has not specified a happy middle position on self-ownership which can in a principled way vindicate the set of liberal rights many of us are rooting for while at the same time avoiding making the normative implications of our self-ownership implausibly strong so as to be vulnerable to the set of worries articulated above. He will have to move closer to full self-ownership to have any hope of doing so.

Many of the problematic cases for full self-ownership discussed above are cases where the infringement is foreseen and not intended or where it is a side-effect of one's action. In typical examples of the above sort of actions we would not count as using people as means in Quinn's sense. A natural way, then, to start backing away from full self-ownership so as to avoid such problem cases would be to have self-ownership provide less protection against unintended boundary crossings or boundary crossings that are side-effects of one's action. And Quinn's view would fit well here as it claims that we have a lesser claim against unintended boundary crossings than we do against such crossings that use us as a means. However, Otsuka's view simply abandons outright all nonfinancial claims of self-ownership against unintended or side-effect boundary crossings. But this must be a significant overreaction.

It is an interesting question whether a plausible intermediate view could be formulated. Such a view would have to lessen the stringency of our rights against merely foreseen boundary crossings or side-effect crossings but not abandon all rights against such. It would have to persuade us that it has plausible upshot in pollution and very small risk cases as well as providing adequate protection against neighbors looking to blow things up. And it would have to do all this while still persuading us that self-ownership is playing a serious role in guiding the set of rights we end up with, rather than just finding in self-ownership whatever rights we are independently attracted to.⁶⁸ Otsuka attempts none of these tasks.

Otsuka claims that previous libertarian champions of self-ownership, explicitly including Nozick, have been primarily motivated by the thought that one has a right that one's property "not be used as a means by being forced . . . to sacrifice life, limb, or labour" rather than by the thought that one's property gives one a "right against harmful incursions upon one's body *simpliciter*."⁶⁹ As Otsuka points out, Nozick does at one point forcefully appeal to the Kantian notion of not using a person as a means (30–31). Otsuka is trying to persuade us that the two key rights of self-ownership he offered us above are sufficient to capture the notion of self-ownership No-

68. Barbara Fried helpfully pressed this concern against the Self-Ownership Thesis in her excellent "Left-Libertarianism."

69. Otsuka, *Libertarianism without Inequality*, 14.

zick and other right-libertarians were working with. He writes: “Libertarians such as Nozick have sought to build their political philosophy on high moral ground—that of a stringent libertarian right of self-ownership that is supposed to reflect our elevated status as inviolable persons. The purpose of this chapter has been to show that egalitarians can build there too. The Lockean egalitarianism I have sketched is, indeed, far more deferential to the preservation of a *robust*-libertarian right of self-ownership than Nozick’s libertarianism.”⁷⁰

However, it is clear that Nozick maintained, as seemingly any tempting view must, that our rights to our person protect us from many sorts of actions that are not intentionally using us as means in Otsuka’s sense. See, for example, Nozick’s discussion of pollution.⁷¹ Typical cases of polluting that Nozick and other libertarians took to be a boundary crossing do not use others as a means.⁷² In sum, I think Otsuka has not made a convincing case that his two principles sufficiently capture Nozick’s or the generic right-libertarian views about the rights that flow directly from our self-ownership, setting aside differences in world-ownership. A view that suggests that our self-ownership provides no moral protection against others foreseeably or as a side effect destroying what we so own is not capturing what Nozick or other right-libertarian champions of self-ownership had in mind.

Otsuka might have claimed that he offers us an uncompromised set of self-ownership rights because owning something generally does not give one any claims against others damaging it unless in doing so they intentionally use it as a means. If Otsuka had said that he would have an implausible conception of what the rights of ownership are, but he would have offered a clear explanation of the connection between self-ownership and the rights that he claims we have. Instead Otsuka seems to allow that severely counterintuitive cases force him away from accepting the view that his own favored Cohen-inspired conception of the rights of self-ownership would suggest. It is unclear what connection Otsuka sees between self-ownership, which he does champion, and the central right he thinks we have to not be intentionally used as a means.

70. *Ibid.*; “robust” is for Otsuka a technical term which, given his meaning of it, he is entitled to in this passage. I am claiming that while what he is offering is, in his sense robust, it is not a robust instance of libertarian rights of self-ownership as Nozick or other right-libertarians would have conceived of them.

71. Nozick, *Anarchy, State, and Utopia*, 78–84.

72. Recall that Hospers, Rothbard, as well as Nozick all saw unconsented to pollution as a rights infringement despite it obviously not using others as a means in Otsuka’s sense. Hospers (“Libertarian Manifesto,” 26), in explicating how the government should protect our rights, includes protections against unintended harmings such as those caused by the negligent leaving of a bicycle on a sidewalk.

Otsuka's view backs away from full self-ownership in ways that help overcome some of the worries we saw at the beginning of the essay. In the most obviously morally acceptable pollution and minor risk cases we are not intentionally using anyone as a means, and so Otsuka's view may be able to explain why such things are permissible. But his resulting view backs so far away that it does not maintain obvious contact with the initial idea that we are self-owners. It fails to vindicate a variety of protections that we intuitively think people have against infringements upon their own person—intuitions that should be paradigmatically captured by and centrally motivate the Self-Ownership Thesis. Additionally, Otsuka's view does not secure the attractive set of Millian rights we might have hoped a self-ownership view would vindicate. His view has backed away so far from the Self-Ownership Thesis that it can no longer capture the central intuitions that motivated such views.

IV. CONCLUSION

The Self-Ownership Thesis as traditionally conceived provides us very powerful moral protections even against trivial infringements. Such rights generate severely counterintuitive results in cases of trivial infringements such as our pollution and minor risk cases. Attempting to secure our liberty or autonomy ever more tightly by ratcheting up the force of our property rights has proven counterproductive. On such a view we would have something too close to veto power over a surprising range of other people's activities.⁷³ The power of other people's rights has started to unacceptably close off a wide range of my actions. The influential friends of the Self-Ownership Thesis that we have focused on here have not disputed these claims but instead try to back away from self-ownership enough to avoid the problem cases but not so much as to make self-ownership morally irrelevant. I have argued that these maneuvers have failed to find a principled view in the neighborhood of self-ownership that solves our central puzzle and retains the central attractive features the Self-Ownership Thesis seemed to offer. Elsewhere I go on to develop what I take to be the most charitable version of the view which, I argue, scores significantly better in these goals than the views we have considered. However, I argue, a self-ownership view that can accomplish this must abandon

73. Mack ("Nozickian Arguments for the More-than-Minimal State," 112–13) offers an "anti-paralysis postulate" intended to ensure the rights of self-owners do not paralyze each other. He suggests that such a postulate might provide a rationale for limiting our protections against trivial risks. Obviously the key to this postulate will be determining what counts as the relevant sort of paralysis and what the conception of our rights is such that we are protected against such paralysis.

its uniform stringency against infringements and much more broadly permit things such as redistributive taxation.⁷⁴

It seems obvious that some property infringements are morally serious and others are unimportant. Accepting this thought would help explain why trivial infringements such as our pollution and risk cases are broadly permissible, but doing so threatens the traditional stringency of our libertarian's prohibition against redistribution and paternalism. In this case, seemingly a wide range of actions that involve taking from those who will little feel the loss and giving to those seriously and nonculpably in need would be permissible for the same reason some pollution and trivial risk is permissible—namely because the infringement harms are trivial and the social benefits great. Denying the apparently obvious thought would help make clear how our libertarian proposes to vindicate the stringent conclusions, but at the cost of making it unclear why pollution and risk are permissible. Since the conclusions about pollution and risk seem nonnegotiable, it appears that the stringency of the traditional conclusions must give way.⁷⁵

74. Sobel, "Self-Ownership and the Conflation Problem."

75. I go on, in "Self-Ownership and the Conflation Problem," to develop the positive proposal mentioned at the end of Sec. II which would sell differentially important infringements for different amounts of social value. I argue that a key problem with previous versions of the Self-Ownership Thesis is that they implausibly conflate the significance of important and trivial property infringements by requiring one-size fits all amount of social good to justify any infringement.