

Ownership, guardianship & stewardship or, Ownership, duty free

Here's a puzzle:

Locke writes: "...every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."¹

Kant writes: "...someone can be his own master but cannot be the owner of himself (cannot dispose of himself as he pleases)--still less can he dispose of others as he pleases--since he is accountable to the humanity in his own person."²

What's puzzling about these two positions is that both Kant and Locke appear to accept identical duties and obligations that we have with respect to ourselves. We cannot commit suicide but must preserve ourselves and cannot sell ourselves into slavery;³⁴ and we have an obligation to improve our talents.

Locke thought these duties were perfectly consistent with the concept of ownership, so he didn't think there was anything the matter in insisting that we had a property in ourselves; that we were self-owners. Locke thought that we can own what we cannot smash, sell, or spoil.

Not so for Kant. Kant thought that duties like these ruled ownership out conceptually. We cannot be self-owners because we cannot have duties like these with respect to owned objects. For Kant, you cannot own what you can't smash, sell, or spoil.

To be clear, Kant thought that ownership, specifically, was inapplicable. It would be all right to say that P is a *master* over, or had *authority* to determine what was to be done with, this-or-that or so-and-so. It would be all right, maybe, to say that someone had a property in x, whatever x is, even if it would be wrong, on Kant's view, to say that someone *owned* x.

The distinction between "having a property in x" and "owning x" stems from A.M.

John Locke, *Two Treatises of Government* (1698), II. ii. § 27

Immanuel Kant, *Metaphysics of Morals*, p. 56.

For Locke on self-preservation and slavery, see II, iv, § 22: "This freedom from absolute, arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together. For a man, not having the power of his own life, cannot by compact or his own consent enslave himself to any one, nor put himself under the absolute, arbitrary power of another to take away his life when he pleases." For Kant, one could not sell oneself into slavery not because it violates a duty or obligation, but because it is irrational in the sense of *incoherent*. See Kant, *Metaphysics of Morals*, p.

Honore's account of legal property relations.⁵ On Honore's account, property is a "bundle of rights" with more particular "sticks" or "incidents." There are 12 of them:

- *Rights* to: 1. possess, 2. use, 3. manage, 4. and receive income
- *Power* to: 5. transfer, 6. waive, 7. exclude and 8. abandon
- 9. *Liberty* to consume or destroy
- 10. immunity from expropriation
- 11. the duty not to use property harmfully
- 12. liability for execution to satisfy a court ordered judgment⁶

Each stick in the bundle is property. If you have the power to exclude someone from use of this pen, then you have a property in this pen, even if you don't have any of the other sticks in the bundle. You "own" the pen only if you have a "sufficient" number of sticks in the bundle of rights.⁷

Importantly, none of the sticks are considered by Honore essential for ownership. At least the power to transfer and the liberty to destroy, however, appear to be essential for Kant's normative conception of ownership. This is partly why he rejected self-ownership. Restricting the power to transfer and the liberty to destroy is inconsistent with the moral freedom to "dispose of [owned objects] as [one] pleases."

We can call this the no-new-reasons conception of ownership; for anyone to count as an owner, it must be the case that ownership (the position of privileged authority to be the final arbiter with respect to an object) does not generate any new reasons *for the owner*. To be clear, ownership generates reasons -- if I own this pen, then everyone else has to ask my leave to use it -- but those reasons are reasons *for non-owners*.

These sticks are clearly not essential for Locke, since he thought that a condition on the private ownership of external objects was, amongst others, the waste and spoilage proviso -- the proviso that we only take so much as we can use without waste or spoilage. So Honore's account of ownership is consistent with Locke's conception of

A.M. Honore (1961), "Ownership," in A.G. Guest, ed., *Oxford Essays in Jurisprudence*, (Oxford: Clarendon Press).

This is taken from John C. Becker and Timothy W. Kelsey, "Property Rights: Interests and Perspectives – 2. Philosophical and Political Foundations of Property Rights," Penn State University (<http://extension.aers.psu.edu/pubs/PropertyRights2.pdf>) accessed Jan. 27, 2010, at p. 8, ff. 17. It appears in Honore (1961) at p. 113 ff.

Jeremy Waldron makes this idea clearer: "Ownership... expresses the very abstract idea of an object being correlated with the name of some individual, in relation to a rule which says that society will uphold that individual's decision as final when there is any dispute about what is to be done with the object. The owner of an object is the person who has been put in that privileged position." Waldron, Jeremy (1985), "What is Private Property?", *Oxford Journal of Legal Studies*, 5: 3, p. 333.

ownership.

In this talk, I want to make the case that Locke is wrong, and Kant is right. I have two major strategies for defending the no-new-reasons conception of ownership. The first is to demonstrate that plausible duties are not really duties *of ownership*, but general background duties. While the second is to introduce guardianship and stewardship as rival concepts that can, and probably should, be used in place of ownership to describe certain authority relations. The point is not that ownership cannot be used to describe these authority relations, but that we should prefer these other concepts since they are less provocative, and more illuminating.

DUTIES & OBLIGATIONS

For the first strategy, we have a template to follow. Consider Jeremy Waldron's objection to the 11th incident in Honore's analysis -- the duty not to use property harmfully. Waldron claims that this is merely an extension of a general duty not to harm; it has nothing to do with property or ownership *per se*.⁸ Whether or not this is *my* knife has no bearing on whether or not I can shove it, willy-nilly, between your shoulder-blades. We can't shove knives between people's shoulder-blades. And that's as true of red-headed knife-wielders as it is of owners of knives. Spelling out this duty is redundant.

The 11th incident is not, then, a new reason, but merely a general background reason applicable to moral agents generally. A more difficult case is a duty that Honore did not specify, but one that many accept as part of the best normative conception of ownership. Namely, owners can be held liable for harms brought about by their property, because they have a duty of care, the "duty to inspect and make safe."⁹

This liability, as a legal claim, is gaining ground in, especially, urban jurisdictions. Owners are often held liable when one of their tree's branches, for example, fall on a neighbour's car (or foot) causing damages. The contours of this duty, and the specific legally-required methods of discharging the duty (whether it is sufficient to post a sign, for example, warning people of possible dangers), do not matter for our purposes. All that matters is that it is plausible that owners have a duty to inspect and make safe their property, and they have this duty just because they own it.

Here's a thought experiment: Walking along a canyon road, Patricia sees two large boulders teetering high above, one on either side. A man is walking along ahead of her,

Waldron calls this a "general background constraint," and insists that it has nothing to do with an analysis of property in Waldron, Jeremy (1988), "The Right to Private Property," Oxford University Press at p. 33.

For a discussion of this duty, see Benditt, Theodore M. (1982), "Liability for failing to rescue," *Law and Philosophy*, 1: 3.

unaware of the danger. The land just east of the canyon is Patricia's land and so, too, is the boulder on that side. The land to the west is public and so, too, is the boulder on that side. Suppose further that yelling out to the man is insufficient. Does Patricia have any *weightier* reason to prevent, assuming she could, the eastern boulder from tumbling down onto the man?

If we rewind the example to the day before, we might ask if Patricia has any reason to inspect and make safe either one or both of the boulders, in anticipation of someone's walking along the canyon's road. Maybe she has a reason to inspect and make safe *both* eastern and western boulder, but does she have any *weightier* reason to inspect *her* eastern boulder?

If you answer "yes" to both questions, then it looks like you believe that ownership generates new reasons -- that you have a reason to inspect and make safe and/or prevent *your* boulder from harming people just because it is *your* boulder.

Still, we can deny that this duty is a duty *of ownership*. That denial is based on the following argument:

1. If a permissible activity imposes a risk on others, the risk-imposer
 - a) has a duty to minimize the risk (analogous to a duty to inspect and make safe) &
 - b) can be held liable for damages as a result of the risk-imposition¹⁰
 2. Taking ownership is a permissible activity
 3. Taking ownership increases risk to others
- Therefore,
4. Owner's have duty to inspect and make safe & can be held liable for damages

1. is, I hope, sufficiently uncontroversial. 2., meanwhile, is part of our set of initial assumptions. It is 3., I think, that is controversial, and requires something to be said in its defense.

How does ownership increase risk to others? It might be helpful to conceive of ownership as a moral force-field that prevents non-owners from interacting with an owned object. Non-owners cannot waltz into your house to make certain that your water heater won't blow up when you're not at home. And even when you are at home, you still have the option of saying "get off my lawn." It is like placing objects on ledges so that we can't see them (at least not without a ladder that only the owner can provide). And so, from the non-owners perspective, the world presents itself as somewhat more risky.

Strictly speaking, it is *uncertainty* that ownership increases, and whether or not

For a discussion of this argument, see Schroeder, Christopher H. (1989), "Corrective Justice and Liability for Increasing Risk," *UCLA Law Review*, 37: 439.

an increase in uncertainty is an increase in risk will depend on your theory of risk. Alternatively, increases in uncertainty may be sufficient, without a further view about uncertainty's relation to risk, to ground a duty to inspect and make safe.

The claim amounts to saying that a duty to inspect and make safe is *entailed* by ownership, but is not part of the concept of ownership. Ownership increases risk or uncertainty, but it is the increase in risk or uncertainty, and not ownership *per se*, that generates the duty to inspect and make safe. Put differently, someone is under a duty to inspect and make safe in virtue of imposing risk or uncertainty, and not in virtue of being an owner.

I want to be able to say something stronger than this. The claim that I want to defend is not merely that any plausible new reasons that are supposed to befall owners in virtue of ownership are actually just background reasons, but the stronger claim that ownership gives the owner moral permission to do what she pleases with the owned object within the constraints set by general background reasons. That ownership talk should be reserved for that authority relation which includes moral permission to transfer or alienate, including by sale on a market, and to destroy the owned object. This is, after all, what I've taken Kant to mean when he objected to self-ownership.

To get this stronger claim off the ground will require our moving on to the second strategy -- the introduction of two concepts, that of guardianship and stewardship.

The strategy below is indirect. I will try to show that cases where we have duties to or with respect to certain objects that we have ownership-like authority over are cases better handled by concepts other than ownership. Namely, guardianship or stewardship (or some other -ship).

GUARDIANSHIP

On the Locke/Honore conception of ownership, we can describe parents as owners of their children. Some contemporary Lockeans do say something close to this.¹¹ And there's really nothing the matter with saying this on the Locke/Honore conception of ownership. Since the conception is malleable, we can simply remove certain sticks from the bundle, add a couple of duties or caveats and, provided we're left with a sufficient number of sticks from the bundle, count as owners.

I hope that you share my feeling of unease at this. To describe the parent-child relation as an ownership relation is disturbing. There are a few possible candidates for why we

See, for example, Archard, David (1996), "Do Parents own their Children?" *The International Journal of Children's Rights*, 1: 293-301. See also Narveson, Jan (2001), *The Libertarian Idea*, Broadview Press, p. 272-274. Narveson argues that parents have property rights in children, but that these are severely constrained.

might feel disturbed by the suggestion that parents own their children. I will refer to them as “sticks” for a reason that will soon become clear.

Stick A is the power to transfer by way of sale. We probably believe that children are market-inalienable¹², that they cannot be bartered for, bought or sold, even if we think that there is nothing wrong with adoptions. Put more modestly, we might think we have reason not to buy and sell children, even if, in certain unfortunate or tragic situations, a market in babies might be all-in better than the realistic and available alternatives. This objection is more commonly put in terms of “commodification.” Like, for example, the claim that children are not “commodities”.¹³

Stick B is the liberty to destroy. To be clear, a Hohfeldian “liberty,” which is what Honore had in mind, has a technical meaning.¹⁴ The jural opposite of “liberty” is “no-duty.” To say that P has the liberty to destroy x means that P has no duty not to destroy x, and no Q has a right to prevent P from destroying x. And none of us should think that we are at liberty to destroy children, not willy-nilly anyways. (Please notice that this claim does not entail the view that it is always impermissible to destroy one’s child, just that we are never at liberty to do so. It might be permissible only if certain conditions are met).

Stick C is the thought that what matters principally or primarily is how an owned object affects the owner -- that owners matter more than the objects that they own. Eric Mack writes that a property right is a right “...in the disposition of ... acquired objects as one sees fit in the service of one’s ends.”¹⁵ This is (probably) false in the case of parents and their children. This is not to say that children matter more than their parents (they might matter equally, after all), but it is to say that children matter non-instrumentally.

Stick D, and related to stick C, is the thought that authority over things like children comes with specific duties. In particular, the duty to promote or preserve the well-being of the child. This duty is discharged when it is done *for the child’s sake*, and not because it makes the parent happy (although it might), or for the sake of getting a reputation as a good mom or dad, or to ensure, to the extent possible, that the child grows up and provides the parent with a retirement income.

Candidate E is some combination of sticks A through D, or all of them together.

This term is taken from Margaret Jane Radin. See Radin, Margaret Jane (1987), “Market-Inalienability,” *Harvard Law Review*, 100: 8, pp. 1849-1937.

See, for example, J. Robert S. Prichard (1984), “A Market for Babies?”, *The University of Toronto Law Journal*, 34: 3, pp. 341 - 357.

For the Hohfeldian distinctions, see Hohfeld, Wesley Newcomb, “Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *The Yale Law Journal*, 26: 8, pp. 710-780.

Mack, Eric (2010), “The Natural Right of Property,” *Social Philosophy and Policy*, 27: 1, p. 53.

Candidate F is the claim that Honore's conception is technical, so parents *technically* do own their children. What disturbs us is our non-technical conception of ownership. After all, on this conception, we can specify that we mean to exclude market-alienability and the liberty to destroy, add the duty to mind the well-being of the owned object for the object's sake, and point to all of the sticks in the bundle still left.

The right candidate might very well be candidate F, although I don't think so. But whether or not it is does not really matter, since sticks A through D, inclusively, describe a perfectly good alternative concept for this particular authority relation -- the authority a parent has over a child, or the authority a person (or persons) has over an object that a) has a sake (a well-being or welfare) that b) matters independently and non-instrumentally. That concept is guardianship, and sticks A through D, inclusively, gives us one particular conception of guardianship, the one that I'm partial to.

To put this conception formally:

P is a guardian over Q just in case:

1. P has final decision-making authority over Q, and
2. Well-being of Q is morally paramount for decisions regarding the ward &
3. P has a duty to preserve/promote well-being/interests of ward, for the ward's sake

I believe that a prohibition or a reason counting against both market-alienability and the liberty to destroy is implied by 2. and 3. If that's controversial, you can just add those two to the list of criteria for the parent-child relation.

Guardianship is a rival concept to ownership. The concepts operate at the same level of analysis. A further and stronger claim is this: to describe the parent-child relation as an ownership relation is a category error. If you accept this further and stronger claim, then you can see why candidate F does not really matter.

Meanwhile, an object is fit for a guardianship relation just in case it has a sake or well-being which matters independently and non-instrumentally. This is a necessary condition for guardianship, but it may not, alone, be sufficient. We may, for example, believe that certain non-human animals meet this criteria without thinking that they are fit only for a guardianship relation, and not an ownership one.

The right story might be analagous to Honore's story about property and ownership: To be fit for a guardianship relation is to necessarily have stick D, and at least two of sticks A through C, inclusively.

Why "at least two"?

We may believe that a dog's well-being matters independently. This would mean that we do not have the liberty to destroy this dog willy-nilly, and would be under a duty to

at least preserve its well-being if we were masters over this dog. But the well-being of a dog probably does not matter as much as ours, and it may be true that we are permitted to treat the dog, within constraints, in ways that please us.

Like dyeing it to look like a tiger, as I understand is becoming trendy in China. And it probably does not offend or disturb us that dogs are bought and sold, are market-alienable.

It's not my intention to offer a comprehensive theory about which objects are fit for only the guardianship relation, merely to point to the duties that follow given an objects fittingness for guardianship. These duties are, in the case of children, not merely general background duties. It's true that we all have reason to heed the well-being of children, but those who have final decision-making authority over children have distinct duties in virtue of their authority. These are duties *of guardianship*. Duties are constitutive of the guardianship relation.

This does leave the Lockean/Honoreian the option of saying "I mean ownership in the sense of guardianship," but, in the case of children, I see no particular reason to do this, and I see good reason not to -- it's unnecessary and less illuminating.

CULTURAL ARTEFACTS

Guardianship is intended to capture those objects over which someone might have authority but towards which we have duties, for their sake. But there may be classes of objects that do not have a sake or well-being but, nevertheless, are classes of objects *about which* we have certain duties in virtue of our position of authority over them.

As with the claim about guardianship, here the claim will be that stewardship, rather than ownership, is a better, in the sense of being clearer and more illuminating, concept to use.

Suppose Quincy is in possession of the original U.S. Constitution. Quincy thinks it would be great fun to throw darts at this Constitution. Playing darts with this Constitution would ruin it, it would be left in pieces. If we think of Quincy as an owner of this Constitution, perhaps the best criticism we could level at him is that he was mean or insufficiently sensitive to those of us who think that Constitutions matter a great deal. Quincy would fail at performing what would be a supererogatory action, that of preserving the Constitution. We might think that this criticism is too weak. We might believe that Quincy's throwing darts at an original Constituion would be immoral, that he has an *obligation* to, minimally, preserve this Constitution. And to preserve it for the sake of those of us who think this Constitution matters a great deal.

There's reason to believe that there are objects like this, objects over which someone

can have authority that come, in virtue of the authority, with duties to preserve the object for the benefit of relevant third parties. Maybe that includes significant works of art or other objects of cultural significance, or things like “the environment” or an “ecosystem,” or religious icons, and so on.

We can put this conception of stewardship formally as follows:

P is a steward over x just in case:

1. P has final decision-making authority over x, and
2. P has a duty to, minimally, preserve x, for the benefit of a relevant third party, Q

The clause “for the benefit of a relevant third party, Q” is ambiguous. So let’s pick this apart.

First, what is meant by “relevant” in “relevant third parties”?

In the case of the environment, we preserve it for the sake of current other persons who may benefit from it, or future generations. In the case of significant cultural artifacts, including religious icons, we preserve it for the sake of the cultural community in whose history the object played a part.

Second, what duties are entailed by the “for the benefit of” clause?

In the case of the environment, benefits might include getting a chance to be “at one” with nature, or learning something from it, or gaining health benefits from it . Depending on which is the benefit with the most weight, we may have a duty to make certain areas publicly accessible, consistent with preservation, or to limit accessibility, and to prevent certain actions that would undermine the benefit.

In the case of significant cultural artifacts, the benefits might include learning something from it, or getting spiritual sustenance from it. If these are the relevant benefits, then making the objects publicly available, at least to the relevant cultural community, seems to be a way of discharging the duty.

A comprehensive theory of stewardship will answer three questions:

- 1) What objects are fit for stewardship?
- 2) Who ought to be the steward?
- 3) Whose sake is normative on the steward (or: who is the relevant third party)?

The first question will set out criteria for what gets to count as an object fit for stewardship, rather than ownership or guardianship. It is possible that the answer will not depend on facts or features of an object independent of the target of the normative obligations. It may very well depend on permissible attitudes or sentiments held by

some individual or group that makes an object fit for stewardship.

The second question will seek to answer what criteria someone or some institution will have to meet in order to be justified in having authority over an object answering to the first question. Here, the theory will seek to answer a question analogous to the question of original appropriation -- who or what gets to have authority over an object of this sort and for what reason?

The third question seeks to discover the stakes that are most relevant to determine what is to be done with an object answering the first question. The answer to this question will provide moral guidance to the person or institution answering to the second question. An answer to this question will presumably also be an answer to the question of what ought to be done with an object of this sort, or how ought we to treat or interact with an object of this sort.

CONCLUSION

To summarize the three strategies to preserve what I've been calling the Kantian conception of ownership:

I have tried to show that the 11th incident, the duty not to use property harmfully, as well as the most plausible candidate for a new reason (the duty to inspect and make safe) are not really duties of ownership, but are general background duties entailed by ownership, but not constitutive of it.

I have also offered two conceptions of two concepts -- guardianship and stewardship - - that are much more illuminating than ownership to capture those cases where we are agreed we, those of us with final decision-making authority, have duties either towards (directly), or with respect to (indirectly) some object.

As a final note, let me return to the puzzle that initially attracted my attention to this topic -- the disagreement between Kant and Locke on whether or not we are self-owners. On this analysis it turns out that the best description of the kind of mastery or authority Kant thought an individual has over herself is captured by guardianship. For Kant, we are not self-owners but, rather, self-guardians, since we have duties towards ourselves in virtue of our dignity or humanity.

Maybe more interestingly, on this analysis, a more felicitous or illuminating rendering of the kind of authority an individual has over herself on Locke's view is captured by stewardship. So we're not really self-owners, but self-stewards, since we have duties with respect to ourselves in virtue of God's dominion over the whole of the Earth, including each of us.