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## The Problem of Self-Ownership

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# THE PROBLEM OF SELF-OWNERSHIP

BY BAS VAN DER VOSSEN AND DAVID SCHMIDTZ

## I. IT'S MY LIFE

It would be strange to hear people saying “It’s my self.” The self per se isn’t normally a contested possession. By contrast, what is normal, and so familiar that most readers can probably remember asserting such a thing themselves once upon a time, is the assertion “It’s my life.” How we live our lives can be, and often is, contested.

When we say “It’s my life,” we assert ownership. We make a claim that it is up to us how this life will be lived. What’s normally at stake when we assert our self-ownership isn’t the possession of a thing. It’s a claim about jurisdiction. We assert that with respect to some decision about how our life is to be conducted, we are the ones who have the right and the responsibility to make that decision and bear the consequences. Neither are we talking about jurisdiction over a thing (a self) so much as over a process, a life. Self-owners are in charge of how they live. Such jurisdictional claims are about relationships, not objects. Of course, to be in charge of a life is to be in charge of what lives that life. But the life and the thing living it are not the same.

For some time, academic philosophical discussions of self-ownership have proceeded as if questions about self-ownership are to be settled by analyzing more closely the concepts involved. To know what self-owners are entitled to, we need to know what ownership really means, how to square absolute possession of one’s body with the demands of social life, how to ensure that it is logically impossible for one’s rights to conflict with those of others, and so on.

Outside of philosophy, it is another story. Real ownership rights are evolving responses to evolving problems, and to real rather than hypothetical problems. Until there are real disputes over people exhaling carbon dioxide, legal systems will not be in any rush to set precedents that settle such disputes either.

Making our rights mutually consistent or compossible (as Hillel Steiner helpfully calls it, following Leibniz) is as important in the real world as it is in academic theory, but it is not the same challenge. In the real world, compossibility is an achievement and a contingency. Ownership claims, validly produced by particular legal systems can and sometimes do conflict in particular times and places. Compossibility is not built into the concept of a right. Or if it is built in, it is built in not by definition but as an aspiration for those who aspire to articulate ownership claims that resolve disputes, in a world with changing populations, changing technologies, and changing environment. It is ongoing community experience, not timeless philosophical argument, that makes the nature and limits of ownership more precise.<sup>1</sup>

Until the early nineteenth century, people living along rivers in the United States had a right that people upstream left the “natural flow” of water intact. These were rights to the undiminished and unaltered flow of water, thus precluding alterations of the river’s path, upstream damming, and so on. When forms of industry developed that relied more on using water, however, this doctrine became replaced by a “reasonable use” theory, allowing each owner use of up to about an equal portion of the stream, at least if such use conformed to normal practice and the perceived needs of the community.<sup>2</sup>

The onset of new technology can change what it takes for people to avoid intruding on other people’s claims. At one time, significantly changing the flow of a river counted as taking something that does not belong to you. At another time, communities may want to allow, even

encourage, such uses because of the other opportunities such uses represent. What is mutually advantageous depends on context.

Examples like this show that it would be missing the point of specifying ownership to aspire to specify boundaries of ownership that will never need to be redrawn or reconceived. Social life is too much of an evolving process for that. What we need from a theory of ownership is for it to help us deal with ongoing unpredictability in a principled manner. We don't need a list of necessary and sufficient conditions that make counterexamples unimaginable. We need jurisdictions that help us live together by helping us avoid and resolve disputes.

This has not been lost on the most interesting theorists of self-ownership.<sup>3</sup> The concept's functional role is to settle those jurisdictions that meaningfully need settling in real cases, and which typically bear little resemblance to toy counterexamples. From particular cases, contingent jurisdictional understandings emerge to help make it as easy as possible for people to stay out of each other's way and to know the generally accepted limits of what neighbors will count as minding one's own business. We say this in all humility as journal editors: good philosophy holds itself accountable not to journal editors but to realities of the human condition in the form in which they observably arise in real communities, not in the way in which we cleverly imagine them arising. Self-ownership rights that work represent a balancing act. They are supposed to create an expansive and liberating sphere within which people can mind their own business, as they say, but the sphere must not overreach. A mutual understanding of the boundaries of self-ownership is supposed to liberate people to live in close proximity without fear. The point is to facilitate mutual respect, and to make trust affordable, not to turn people into threats that make trusting our neighbors out of the question.

At least since Hobbes, authors have affirmed the fundamental freedom and equality of persons. Hobbes may not have been a liberal, yet even so he counts among liberalism's inventors by virtue of asking why citizens had any obligation to obey the sovereign, and for implicitly rejecting an answer that might have seemed natural in his day, namely, "The king's subjects are the king's property, so how can we even question their duty to obey?"

In Hobbes's time, this was the most significant boundary under dispute. Hobbes opened the door to thinking about how much, and in what specific respects, people ought to be *in control* of themselves. And treating them as in control comes pretty close to treating them as self-owners. Locke did see people as self-owners. We are not born to obey kings. At least initially, we have our own lives to live. Here, too, the initial point was the denial of natural authority. Self-ownership means that others cannot treat us as if we are *theirs* to dispose of. Free and equal beings are not one another's subjects.

## II. SELF-OWNERSHIP IN THEORY

Our institutions implement particular conceptions of self-ownership. Our philosophical theories of self-ownership may articulate understandings that have something, or nothing, to do with those on which our institutional frameworks implicitly depend.

Some authors *begin* their theories with self-ownership. Once we think about it, we might be tempted to say the idea is self-evident. Needless to say, however, there are few self-evident truths about how an economic and social order is to be organized. Locke's point, rather, was that we all get that whatever story we tell about economic and social arrangements, what needs to be evident to us is what we are learning to expect from each other.

Seth Lazar reminds us of a common-sense point: it would be relatively more difficult to justify redistributing parts of a person that are closer to being at the core of her identity. His example is transferring an eyeball to a blind person as compared to redistributing external resources. This common-sense point suggests something important: there's a burden of proof here. The burden is on the person who wants to take something from a current possessor. That's what rides on self-ownership as an operative cultural reality. To assert "It's my life" is to assert that it's the *taking* that needs justifying, not the *bare fact of possessing*. Lazar self-consciously leaves the door open to acknowledging that not all external possessions are equally distant from the core of our identity. Moreover, not all takings are equally distant. So, if I lost my house and most of my earthly possessions in a fire twenty years ago, and if I know that such things do happen from time to time, that relates to the core of my identity in one way. However, suppose my king took my house twenty years ago, and reserves the right to do it again, any time. I might see those two ways of being hostage to fortune as on a par, but it hardly would be shocking to learn that there are people for whom those two uncertainties feel worlds apart.

Some think that once we reach for ideas like freedom and equality, we have admitted that self-ownership as such really is not foundational. Indeed, it is not foundational in that way. People who assert that freedom and equality are foundational are asserting their primacy as moral values. People who assert that self-ownership is foundational are asserting its primacy as an operational political compromise. Self-ownership makes living in a community affordable; it isn't an idea about value, foundational or otherwise. The idea of self-ownership is the idea of jurisdiction. It is the idea of settling on jurisdictions as an alternative to thinking that we need consensus on values and thus need to dominate and subjugate those whose values may lead them to choose differently if we leave them to their own devices. Regardless of whether there is a

foundational moral value, there is a sense in which self-ownership is politically speaking more foundational than that moral value, whatever it is. Self-ownership is the political compromise that defuses the threat that we otherwise pose to each other. Self-ownership enables people with different values to be better off living together.<sup>4</sup>

Several of our authors explore what a theory of self-ownership, or the libertarian theory it supposedly buttresses, might look like once we approach matters in this way. Victor Tadros notes that the real value at stake here is related to the moral significance of the self. Chandran Kukathas develops a novel take on libertarian theory as a deeply political doctrine, something that tries to live up to the idea of non-aggression, claims of native peoples to noninterference, and more. Jessica Flanigan treats this as a *departure* from self-ownership as a moral value or ideal principle.

Of course, such approaches make the idea of self-ownership less neat. We're no longer deriving a political philosophy from a clear and concise foundational principle. Nor will there likely be an outcome to identify as *the* libertarian outcome. Kukathas offers the intriguing conjecture that not pre-selecting a particular outcome may *be* the libertarian moment.<sup>5</sup> But that still leaves us asking what people have a right to demand of others, given the questions and problems they face when living together, and that was the point all along.

### III. POLITICAL OR METAPHYSICAL?

So, where lie the boundaries of the life or self that we own? Ian Carter says self-ownership is a reflexive concept, making it coextensive with the natural body. Victor Tadros argues that self-ownership is about the moral significance of the self, of which the body is one constituent part. John Thrasher argues that the rights we have over ourselves are akin to



territorial rights, demarcating a kind of privileged or even sovereign jurisdiction. Would such views imply a similar focus on the natural body as the locus of self-ownership?

Alejandra Mancilla observes that self-ownership is as much about taking ownership of one's situation as it is about having a right to say no. Owning one's life means being empowered to take charge of one's life. The idea of self-ownership thus shows its face not only when we assert our rights against others, but also when others violate those rights. In these situations, self-owners need not regard their fate up to others. They get to take ownership of the situation.

There is of course an obvious sense in which the person owning a self comes in a natural body. But it's not obvious whether that sense of a self is the important one for moral and political questions. A life doesn't start and stop with the natural body. Taking their cue from Locke, philosophers are puzzled about how a possessed object gets assimilated to one's body in such a way as to make one the owner of said object. But however puzzling that idea may be, it is not the same thing to puzzle over how possessing objects is part of living a life. We use items, count on being able to access particular resources, and inhabit homes. In the process, we build a life. Artists may feel like they've left part of themselves in a piece they created. When our homes get burgled, we feel like it's we who got violated (it's a metaphor, but not merely a metaphor). Ian Carter supposes that people with prosthetics might feel as connected to a mechanical arm as they feel connected to a biological arm. When would we need to know whether their self-ownership includes the arm?

Ann Cudd points out that we all form nodes in a web of sociality. To her, this means self-ownership cannot just be about excluding others. We need each other to appear in our social webs. No one can live a full life, become a full person even, without others. Carter and Cudd share an interesting presupposition: we can derive an answer to the question of what's owned

from an account of who's the owner. Carter thinks the biological self is owned and owner. Cudd thinks the social self is owned and owner. Either way, Carter and Cudd seem to agree that the claims that others have on us depend on the natural or metaphysical extension of the self.

The presupposition is worth questioning. In social life, ownership doesn't require metaphysical foundations. If what we're looking for is a mechanism of dispute resolution—something enabling us to become neighbors rather than rivals—the question is whether the system actually delivers the goods. In *Armory v. Delamirie* (1722), a chimney sweep discovers a ring, pockets it, then takes it to an appraiser. The appraiser pockets the jewel that had been in the ring. The chimney sweep sues the appraiser for the jewel's return. The court rules that the question before the court is not who the ring's rightful owner is, but whether there has been a wrongful transfer from plaintiff to defendant. Whether a hypothetical plaintiff could in turn successfully sue the chimney sweep was not the question before the court. The purpose of a court of law is to undo wrongful transfers, not to make sure all possessions are in the hands of rightful owners. Partly because of such verdicts, we now say, "Possession is nine-tenths of the law."<sup>6</sup>

Daniel Russell treats self-ownership as on a par with ownership regimes more generally. And such regimes are social systems that organize social interaction. What we want, Russell argues, is a system of ownership rights that simultaneously empowers people to bring value to others, and doesn't make social interaction practically impossible or overly cumbersome. Dan Moller and Chandran Kukathas explore similar ideas. What *grounds* ownership, Moller argues, may not be what matters most. More important is that it's clear who can impinge on whom – and who, at least initially, gets to decide. Here, as elsewhere, Moller shows what it would be like to treat foundational philosophy as a discipline that starts with something other than philosophy—that is, with observable aspects of the human condition. In this case, we have such concepts of

ownership as we have partly because those concepts are responses to problems posed by the fact of our being social animals.<sup>7</sup> Whether a problem is best illuminated by arguing to or from self-ownership may depend on the details of the problem. Are our actual problems best illuminated by settling what grounds ownership *all the way down*? It seems natural for a philosopher to assume the answer must be yes. And yet, we see no harm in acknowledging that the assumption is, after all, an assumption. The ultimate question need not be about grounding all the way down—metaphysical or otherwise. It may instead be about which such rules of ownership people can expect each other, as a matter of historical observation, to take at face value and thereby serve as the glue that holds people together as a community—by helping them anticipate what to expect from each other, and thus how to accommodate each other, in that situated time and place.

#### IV. SELF-OWNERSHIP FOR SOCIAL CREATURES

Claims of ownership settle jurisdictions, as John Thrasher puts it. They tell us who gets to determine what happens to which thing. Social creatures have to contend with many such challenges. A meaningful and robust relation to our lives as *ours* to live requires a meaningful and robust relation to our bodies as *ours* to control. We know that when others violate our bodies, they're intruding upon something that is ours.

For example, suppose Blake and Kelly are happily married. Blake wants to have sex every night, Kelly does not. There is no question about who gets to decide. Kelly's no trumps Blake's yes. This hasn't always been recognized, of course. Married women had to fight to be seen as equal enough to enjoy a right to say no. They had to fight for their self-ownership, in that sense and others. (The fight isn't over.) Critics see self-ownership as antisocial. But that's clearly mistaken. Kelly isn't being antisocial. She's insisting that her relations with Blake be mutually

respectful. Sociality matters, but it cannot be imposed—at least not without oppression. Calling this antisocial sounds like a bad joke. Kelly of course isn't looking to cut all social ties. She's not even seeking a divorce. She simply wants the rudimentary respect implicit in acknowledging her right to say no. Her having a right to say no is why it means something when she says yes. (What would it mean to say Blake loves Kelly if her saying no isn't enough to stop him?)

The question of self-ownership isn't about people being social or antisocial creatures. Instead, it's a *response* to the fact that we are social beings.

Ann Cudd is right, then, to point out that we are social creatures. But what follows? What does not follow, nor does Cudd say it follows, is that we lose the right to say no. It's one thing to claim we sometimes have a duty to say yes. It's quite another to claim it doesn't matter whether we say yes or no. The latter, but not the former, makes us less than free and equal adult citizens.

The point of self-ownership is to make our sociality nontoxic. At its best, self-ownership is about being able to appreciate what goes with being a neighbor, and being able to know that we can afford to be neighbors, when we could as well be enemies. Our being valuable to others can be a promise or a threat, depending on whether others see us as having a right to say no. If we acknowledge a duty not to *impose* ourselves upon each other, then we live in a world where neighborliness, friendship, and love are live possibilities. Connections are fostered, not foisted.<sup>8</sup>

Historically, one of the most important liberal insights has been that conflicts are better resolved by figuring out who gets to decide than by figuring out what should be decided. The freedom to exit and say no constitutes progress. That, too, had to be fought for. And the fight was waged by groups who needed to affirm their separateness from the rest of society. The freedom to distance oneself from expectations that become toxic is what it means to be an equal.

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<sup>1</sup> See the essay on boundaries by Jessica Flanagan.

<sup>2</sup> Morton Horwitz, *The Transformation of American Law* (Cambridge, MA: Harvard University Press, 1979).

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<sup>3</sup> See Eric Mack “Elbow Room for Rights,” *Oxford Studies in Political Philosophy* 1 (2015) 194-221.

<sup>4</sup> Amanda Greene extends a similar point from ownership to markets.

<sup>5</sup> The definitive text on this point is Kukathas’s own *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford, 2003).

<sup>6</sup> For a tracing of the idea as far back as the century before *Armory*, see A. L. Erickson, “Possession—and the Other One-Tenth of the Law: Assessing Women’s Ownership and Economic Roles in Early Modern England,” *Women’s History Review* 16 (2007): 369-85. See Olsthoorn for a theological parallel. Consider an implication of the premise that jurisdiction is a relational property. We could be correct in asserting “It’s my life!” when talking to other people, but if we were talking to God, and asserted the same thing, we would be getting our facts wrong. That is a different kind of relationship.

<sup>7</sup> Moller separates issues of jurisdiction of self-ownership and issues of jurisdiction. Interested readers should check Moller’s just published *Governing Least* (New York: Oxford, 2019).

<sup>8</sup> See Ben Bryan’s essay on duty-sensitive self-ownership.