The Point of Self-Ownership[[1]](#footnote-1)

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June 4, 2015

The Self-Ownership Tradition that I mean to address here is committed to powerful rights of the individual against the (enforceable) claims of group benefit and views with great suspicion involuntary impositions on individuals except in self-defense. This tradition maintains that such rights are not merely indirectly justified from their general usefulness at promoting aggregate benefit but rather is seen as offering a sharp contract to any variant of consequentialism by championing the inviolability of the individual. This tradition draws inspiration from Locke, who maintained that “every man has a property in his own person: this no body has any right to but himself” (Locke, 1980) and received its most searching exploration in Nozick’s *Anarchy, State, and Utopia* (Nozick, 1974).

It maintains that one initially owns, and thus has property rights over, one’s body and may use it to acquire property rights in previously unowned natural resources. More recently there has been very interesting work on “left-libertarianism” that keeps many aspects of this tradition in place but attempts to secure a more egalitarian distribution of world-ownership than is ensured by the older versions of the view. Such differences between these variants of the tradition will not concern us here. Rather we will be concerned with some quite broad brush problems for all views in this neighborhood and broad brush attempts at solutions.

The picture in which people have forceful property-like claims over their person that may not be infringed merely for the sake of others nicely captures an important strand in our moral thought. You may not take my “spare” kidney simply because you need it more than me. I own it and so have say over what may happen to it that your greater desire or need rarely, if ever, can outweigh. You may not stop me from engaging in consensual sexual relations with competent adults who also own themselves because in doing so you would be treating as your own something that does not belong to you. Further, the Self-Ownership tradition’s relentlessly championing voluntary ways of people living together over involuntary ones has obvious moral attractions. Finally, consider how seemingly morally unproblematically I make a host of daily decisions that involve what will happen to my body including decisions about what to wear, which beer to drink, and whether to go for a run or not. This broad range of apparent moral powers I have to legitimately make such decisions needs explanation. The Self-Ownership Tradition seems to provide the most straightforward and intuitive explanation. That I own something intuitively provides me a wide range of rights over a thing even when others could benefit more if they had it or controlled it. And this shows that the Self-Ownership Tradition fits well with some powerful aspects of our thinking about morality.

But, like other moral theories, the self-ownership tradition fits uneasily with other strands of our ethical thinking and runs into cases that it handles much less convincingly. Here we will be investigating a few ways in which it does not fit our ethical thinking as well as might be hoped and exploring ways the view might evolve to improve this fit.

The Problem

The self-ownership explanation for why you may not bar me from selling my own kidney, tax me to pay for health care for orphans, or prohibit me from engaging in homosexual relations with competent adults is that such actions infringe upon my very powerful property rights to my body or my extra-personal possessions. But this explanation, on its own, feels quite inadequate to the varied moral landscape we face. I own lots of things, including this scrap piece of paper I have been meaning to throw away. Why is it so much more serious if you damage my body than if you damage that piece of paper? I own both things. In both cases you are messing with something I own without my permission. Any moral theory that cannot adequately distinguish the moral seriousness of these different sorts of actions and that cannot vindicate the thought that messing with the latter is much easier to justify than the former will be gravely flawed. Similar thoughts might be pressed about the vast moral difference between taking my kidney and taking a strand of hair or about putting a tiny amount of not very toxic pollution in the air and poisoning my only water supply.

Self-ownership would seem to need to be supplemented with some story about the various significances of things that can be owned and this story will have to be over and above an account of ownership. A picture in which any messing with anything I legitimately own is equally morally impermissible with any other possible such messing will radically conflate the seriousness of quite morally different types of action. Commonsense does not approve of the view that you may not take a single strand of my hair if doing so will prevent a murder nor that flying a plane over my head is impermissible because you involuntarily inflict upon my body minor noise and trivial risk.[[2]](#footnote-2)

We have so far considered what I called elsewhere Self-Ownership’s “Conflation Problem”—the conflating of the moral significance of very different types of infringements upon a person’s property (Sobel 2013). When we combine the Conflation Problem with the traditional stringency of property rights insisted upon by the Self-Ownership Tradition, we get the “Problem of Trivial Infringements”. That is, the problem that the view seems forced to treat trivial infringements, such as nearly harmless pollution that lands on me, as a morally very significant infringement such that just about any pollution, kicking up dust, etc. would seem impermissible on the view.

One Solution and its Cost

So how might the Self-Ownership Tradition respond to this so as to make the view less counter-intuitive? I had offered one way of doing so. My proposal was a bit off-hand but perhaps it suggests directions worth exploring. It does show how we might capture some otherwise difficult to capture intuitions within a recognizably Self-Ownership Libertarian framework. I recommended that the Self-Ownership Libertarian find a way to acknowledge the distinction between more and less morally serious infringements by treating as morally relevant the size of the costs and benefits of different infringing acts. Noticing the Problem with Trivial Infringements seemed a good opportunity to add to the traditional framework by trying to solve the more general Conflation Problem. I proposed treating harmful infringements as harder to justify than trivial infringements. For example, one might say that an infringement that causes N amount of the relevant kind of cost is only permissible if it was required to produce at least 25 N of compensating benefit for society. The view is compatible with the relevant benefits and costs being utility, freedom, autonomy, or what have you. The view would make permissible the intuitively permissible, socially useful small infringements such as are produced by not very toxic pollution that results from industry that is crucial to a great number of people living a good life. This structure solved that problem, remained deontological, vindicated 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, kept in place the thought that my owning small and trivial things still gives me some small claim over them (even against accidental damage), avoiding suggesting that there is a magic cutoff of infringing cost below which matters not at all and above which is as bad as any infringement can be, and justified the common sense view that, for example, I may borrow your tennis racket without your permission if I need it to ward off a deadly attacker, but I cannot take it without permission just because I am interested in trying it out. The view could also justify some soft paternalism such as pushing someone out of the way of a bus without his or her consent (Wall, 2009). So, on this picture, The Conflation Problem and the Problem of Trivial Infringements are overcome and the heart of the intuitive attractions of the view seems to me maintained.[[3]](#footnote-3)

But some characteristic aspects of the traditional view, such as the idea that agents are in some important sense inviolable, were lost. The view I outline straightforwardly permits some infringements on the one simply because they produced enough of the relevant sort of value for others and inviolability as I understand it rules out such trade-offs or permits them only in quite extreme cases. While it is true that Nozick contemplated tolerating some infringements to avoid “catastrophic moral horrors”, the view I am outlining does so at such a low price (relative to what the tradition has tolerated) that it is best to be honest and accept that my view cannot capture the sort of moral inviolability of the individual for the sake of group benefits that the view has traditionally championed.

Mack’s Solution: The Point of Self-Ownership

Another way for the Tradition to respond to the general Problem of Trivial Infringements would be to offer a compelling story about the point of self-ownership, or of rights generally, which would allow us to shape the underlying property rights so as to serve that point. Such a picture might explain why an understanding of rights according to which trivial border crossings count as infringements does not well serve the underlying point of rights and so should be amended so that such border crossings do not count as infringements at all. Such a story would seem an independently desirable feature for the tradition to offer. It could help us see the deeper moral attractions of the view that animate its sometimes counter-intuitive particular conclusions. A persistent worry about the view is that we are simply finding in self-ownership whatever rights we are independently attracted to and lack a principled way of explicating what the rights of self-ownership are when we get past the simplest cases (Fried, 2012). Articulating an underlying rationale for self-ownership could provide a powerful response to such concerns.

Further, some have wondered if the attractions of self-ownership hinge on contingent features of owning oneself that apply locally but not across all the cases that we want to morally assess (Lippert-Rassumsen, 2008). Self-ownership, the suggestion here is, might provide morally desirable outcomes in worlds like this one but does not do so in imaginable cases that it is appropriate to test for full moral adequacy. Again, articulating the underlying point of self-ownership rights might allow a convincing response. It might be conceded that such property rights only secure the underlying point of such rights in some possible worlds and not others and so different rights might apply in wildly different empirical circumstances.

What it might well seem we need, then, is an understanding of the point of such rights which will help us see why very minor border crossings or small risks of such are permitted by the theory, yet the traditional stringency and inviolability of the view would be kept otherwise intact.

And such a story is exactly what Eric Mack thinks is needed and tries to provide (Mack, 2015).[[4]](#footnote-4) Mack tries to deal with the Problem of Trivial Infringements by championing an

‘[E]lbow room for rights’ explanation for the permissibility of minor intrusions. The key idea is that, when one thinks about how to articulate or delineate the character or the boundaries of the rights one ascribes to persons, one crucial guide is the moral elbow room postulate. According to this postulate, a reasonable delineation of basic moral rights must be such that the claim-rights that are ascribed to individuals do not systematically preclude people from exercising the liberty-rights that the claim-rights are supposed to protect… The elbow room postulate tell us that, since the impermissibility of minor intrusions would be hog-tying, a reasonable delineation of rights does not construe minor intrusions as boundary crossings… The permissibility of minor intrusions is explained on the basis of a refinement in the location of boundaries rather than a general attenuation of rights. [6]

And the elbow room postulate is itself derived from a better understanding of the general “underlying rationale for ascribing moral rights to individuals.” [7] Mack claims that

The rationale for the deployment of the postulate in the delineation of people’s basic rights emerges from the rationale for ascribing people rights in the first place… As I view it, the most basic organizing principle for Self-Ownership Libertarian rights theory is the moral principle that each individual is to be allowed to live his own life in his own chosen way. Each abstract moral right provides individuals with moral protection against one of the diverse ways in which they can be prevented (by others) from living their own lives in their own chosen ways. For example, people can be prevented from living their own lives in their own chosen ways by being deprived of discretionary control over their own bodies and faculties. For this reason, the abstract right of self-ownership is a crucial and salient dimension of the proper codification of the primordial libertarian principle.” [7]

Mack’s picture of the point of property rights in a Self-Ownership Libertarian system does not appear idiosyncratic. Recall that Nozick offered a somewhat similar picture of the foundation of the rights he championed. He claimed the basis of those moral constraints was largely “the moral importance of this additional ability to form a picture of one’s whole life (or at least of significant chunk of it) and to act in terms of some overall conception of the life one wishes to lead?” Nozick adds that “A person’s shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for meaningful life.” [Nozick, 1974, p. 50]. And when Nozick explains why we should opt for a strongly deontological conception of our moral claims he argues first that we should not sacrifice one person for the sake of others because “there are distinct individuals each with his own life to lead.” [Nozick, 1974, p. 33] Finally, when Nozick explains why paternalist interference is unjustified he stresses the fact that “there are distinct individuals, each with his own life *to lead*.” (Nozick, 1974, p. 34). Strong deontological constraints, Nozick claims, respects the individual’s unique life and allows that person to live her own life in a way which makes possible her life having meaning. The point of such rights, or the thing about us such that we have such rights, Nozick seems to be saying, is that such rights recognize and respond to the morally crucial claim individuals have to live their own lives by their own lights.[[5]](#footnote-5)

Locke too thought we needed to ensure that there is a “Liberty to dispose, and order as he lists, his Person, Actions, Possessions, and his whole Property…” “For who could be free, when every other Man’s humour might domineer over him?”(Locke, 1980, paragraph 57).

One needed qualification before we move on. As Mack would seem to need to interpret his claim about the point of rights, they must be providing protection not only from other people forcibly preventing me from living my life by my lights, but also from a system of rights that would morally prohibit me from doing so. After all, Mack uses this thought as if it told against a system of strict property rights. His thought seemed to be that a system of rights that morally precluded one from being able to kick up a bit of dust violates one’s claim to not be precluded from living my own life as I see fit. So I will interpret Mack as needing to say that the point of rights is to enhance our ability to live our own lives by our own lights unprevented by others *or by the moral force of other people’s rights*. This addition is significant since now my moral right to control my body looks as though it threatens to impede your ability to live your own life by your own lights.

Two Cases

So to assess Mack’s attempt to make small or trivial border crossings count as no infringement at all due to a more careful understanding of the point of rights we will need to think hard about what it means for a person “to be allowed to live his own life in his own chosen way. Each abstract moral right provides individuals with moral protection against one of the diverse ways in which they can be prevented (by others) from living their own lives in their own chosen ways.” How should we understand this idea? The idea as presented so far is somewhat skeletal and we do not get a more fleshed out theoretical presentation of the view. But we do learn more about it in action, so to speak, when Mack is generating some abstract rights from the proposal.

I want to draw attention to two different moments in Mack’s deployment of this idea in deriving rights. To anticipate, I will suggest that these two moments suggest two different models for developing Mack’s, or the generic, proposal that we can finesse the problem of trivial border crossings for self-ownership views by explicating more carefully the point of rights in such a way that such intuitively trivial border crossings can be seen to be no infringement at all but that the traditional severity of the property rights and inviolability are nonetheless retained. I will go on to disambiguate these two different ways of pursuing the Mackian strategy and discuss issues involved in trying to explicate either more fully.

So, let us turn now to our two case studies of ways Mack invokes the underlying point of rights to help him specify the content of rights in way that fit our intuitions better. The first case involves, for my money, the most beautiful result of Mack’s proposal. This argument is designed to thread a very narrow needle and show us why some intentional minor border crossings are impermissible while otherwise similar unintended but foreseen border crossings remain permissible. There is a general issue, noted by Peter Railton, in understanding the greater impermissibility of an agent’s intending to 0, rather than merely foreseeing that 0, in the difference in degree of intentionality (Railton, 2003). For it would seem that before intending to 0 can be awful or impermissible there must independently be something awful or impermissible about 0. If there were nothing wrong with 0-ing, what would be bad about doing so intentionally? And so a difficulty in a Self-Ownership theorist’s claim that we have rights against others intentionally 0-ing in ways that cross our borders but not against their foreseeably doing so, is that this seems to make intending what is not an infringement into an infringement. Yet it would seem that the Self-Ownership Libertarian must rely on the distinction between intending and not intending since surely they want to justify some very minor involuntary intrusions, such as minor pollution cases, yet they also want to retain the idea that “stealing a penny or a pin” from me is something my property rights give me some claim against (Nozick, 1974). And surely the Self-Ownership Libertarian must also grant us some protections against more serious unintended but foreseen harms. You cannot blow up a building next to me, foreseeing the harm that will come to me, and claim that because the harm was no part of your plan, I have no moral protection against it. So seemingly the Self-Ownership Libertarian must distinguish between intentional and unintentional border crossings, permit trivial unintentional one’s, forbid intentional one’s, and forbid more seriously harmful border crossings whether intended or merely foreseen, all without claiming that intending something that itself is no infringement is the source of the claim against being permitted to do it.

Mack offers an elegant solution. The rationale for distinguishing between intentionally crossing a border and foreseeably doing so is not to be found in the greater viciousness or greater impact upon the victims of the former infringement but rather in the fact that we only need to permit foreseeable very minor infringements in order to un hog-tie rights holders.[[6]](#footnote-6) The person who is forbidden from intentionally crossing borders in trivial ways is not precluded from living a life of her choosing whereas the person forbidden from foreseeably crossing borders in trivial ways is. We have tons of options we may permissibly choose without intentionally crossing other people’s borders but we have almost no options for how to live that would fail to unintentionally cross borders. For us to be able to live a life of our choosing, we need to be permitted to unintentionally cross borders. The central difference between intentional minor border crossings and foreseen one’s is not to be found in the stronger claim we have against the former being perpetrated against us but in our greater need to perpetrate the latter if we are to avoid being hog-tied. Here, according to Mack, we see the appropriate structure for rights to take by seeing what structure would best enable people to live lives of their own choosing. There is no need here to prioritize some sorts of potentially chosen lives over others or to antecedently distinguish the morally acceptable potentially chosen lives from the others. The case for restricting intentional trivial border crossings, but not unintentional one’s, hangs on such former restriction being sufficient to create moral free space in which agents can shape their own lives in a wide variety of attractive ways. We would have very few options if we could not unintentionally cross anyone else’s borders. Indeed, that is the point of the Problem of Trivial Infringements.[[7]](#footnote-7)

Let us now turn to our second case study of Mack’s proposal in action. Mack asks if “an individual who needs a kidney [is] disallowed from living her own life in her own chosen way by another individual declining to supply her with his spare kidney or by his evading her attempts to extract that needed kidney?”[[8]](#footnote-8) [8] As mentioned above, I think we need to add here to the list of potentially limiting conditions on a person living her own life in her own way, on Mack’s behalf, the moral force of other people having rights to their stuff.

His answer to the kidney case is that

The organizing principle for Self-Ownership Libertarian rights answers these questions in the negative. Agents who are not enabled to live as they choose because another party declines to supply one of his kidneys or declines to participate in desired sexual interactions are not thereby made unable—or precluded from—living their own lives in their own chosen way… Absent this understanding, ordinary exercises of rights by one party will regularly also count as ordinary violations of the other parties’ rights and the moral claims of individuals to live their own lives in their own chosen ways will systematically conflict. Any resolution of that conflict would require the demotion of rights into moral commodities that are to be traded off against one another. [8]

Moralized and Non-Moralized Conceptions of the Point of Rights

I now want to explicate a bit these two different moments in explicating the implications of Mack’s understanding of the point of rights and argue that they are best understood as providing two fundamentally different models for how to understand how the proposal is supposed to work.

But first I want to briefly mark a distinction that will be relevant and that I’ll be asking us to keep our eye on as we think about Mack’s two different ways of deploying his understanding of the point of rights. The distinction is between moralized and non-moralized conceptions of the point of rights. For Mack’s conception to be moralized in my sense would be for the point of rights to be to keep people unprevented from living lives of their own choosing so long as those lives pass some moral test. He would be using a non-moralized conception if he maintained that the point of rights was to keep people unprevented from living lives of their own choosing whether or not those lives pass some moral test. I will be claiming neither a moralized nor a non-moralized understanding the point of rights vindicates Mack’s proposal.

Let us return to the two cases discussed above. In the kidney case it seems clear what is animating Mack. He wants to say that the person who needs another person’s kidney to live has no claim at all on that kidney, not even a claim that is outweighed by the stronger claim of the person whose kidney it is. Mack surprisingly suggests that if we allow that the person who needs a kidney counts as prevented from living a life of his own choosing if she were not permitted to take it, that we thereby would have to say that the rights of the person who needs the kidney were infringed and thus rights must be demoted to commodities. This seems not to be the case. We can say that a specification of rights according to which one has no claim to another person’s kidney does to some degree (morally) prevent that person from living the life of her choosing without saying that thereby her rights are infringed. After all, rights are what emerge from this story when we see what system would best expand people’s ability to so live their lives as they choose. Rather we might say the person who needs the kidney has a pro-tanto right-making claim to be unprevented from taking another person’s kidney but that that claim is outweighed by the greater overall ability people would have to live their own lives if that type of claim were denied. But this picture does involve, as Mack sees, systematic conflicts between people’s pro-tanto rights-making claims. Rights need not be turned into mere commodities on such a view, for rights are what emerge only after the pro-tanto right-making claims have been weighed against each other. But the pro tanto rights making claim to live one’s own life unprevented from others has been turned into a commodity that must be traded off against other people’s ability to do so.

Inviolability of our “rights” would seem less impressive if we regularly diminished one person’s holdings with respect to the point of rights so as to increase other people’s ability to live her life by her own lights. But any non-moralized conception of the point of rights seems sure to have to adjudicate and tolerate such trade-offs. This, I think, is what is driving Mack towards a moralized conception of what it is to live a life of one’s own choosing unprevented from others. Intuitively, the person who needs a kidney and would like to take the one in my body but is thwarted from doing so by the existence of rights I have against her doing so or by others defending themselves against my actions has been prevented from living a life of her own choosing. For that to not be the case, Mack must mean that we have a pro tanto right-making claim to live our life as we choose, unprevented by others or moral requirements that we not do so, provided that chosen life does not violate people’s rights or is in other ways morally unacceptable. This is what it would be to moralize the point of rights. And it seems to be something we might be driven to if we want to avoid allowing that there are persistent trade-offs between a scheme that does not prevent X from living a life of her own choosing and a scheme that does not prevent Y and X from doing so. For if there are such persistent trade-offs, then the fear is that the only good sense to be made of a system that well serves the point of rights that Mack imagines would have to be a system that served that point aggregatively. And if that is the case, then it is hard to see that anything like inviolability remains. This is the danger that I think is leading Mack towards a moralized conception of the point of rights. Non-moralized conceptions of what it is for a person to be unprevented from living a life of her own choosing look like they have to give up inviolability and serve this point aggregatively.

Let us consider two of the more obvious ways this threat to non-moralized conceptions might be overcome; two ways, that is, that someone might resist the claim that the only good sense to be made of a system that well serves the non-moralized point of rights Mack champions is aggregative. The first hope would be if there was a Pareto-optimal way to promote the underlying point of rights. Pareto-optimal solutions have a strong claim to not sacrificing the one for the sake of the group. The problem is that pareto-optimality only provides guidance against a baseline or against a well-defined comparison class and it is not clear what either would be supposed to be in this case.

This problem would be greatly alleviated if there were a default rationale for starting from strict property rights and allowing only Pareto-optimal changes from that baseline. Then, since generally allowing non-intentional minor border-crossings plausibly provides a Pareto improvement, but allowing more major (or more intentional) one’s may not, we might get to where Mack wants to end up. But I don’t see that the framework he offers fits well with the idea that strict property rights provide a privileged baseline (at least on the non-moralized conception of the point of rights that we are currently exploring). If the point of rights is to keep people from being prevented (by agents or other people’s rights) from living a life of their own choosing, then strict property rights are just a poor first stab at providing such protections. That baseline privileges, without explanation, our claims against some ways in which we are prevented from living a life of our choosing and downgrades other claims of that same type. And without a privileged baseline, Pareto-optimality is much less likely to provide much guidance. If Mack is deprived of strict property rights as a Pareto baseline, then seemingly he must argue only for rights specifications that provide a Pareto-optimal distribution of claims against being prevented from living one’s life by one’s own lights when compared to any other possible distribution of rights. And that is not plausible.

Second, perhaps a case could be made that the package of rights Mack ends up with (permission to perpetrate minor unintentional border crossings, lack of permission to perpetrate minor intentional border crossings, etc.) provide each and every person a maximally large space in which to live their own lives unprevented by others or morality. Or at least that this is so if we assume that everyone must get the same set of rights. Again, if this were so, we need not trade of the point of rights for the one for the sake of the greater point of rights for the many. This is the second hope we will explore here for Mack being able to do so.

To make such a case we would need to understand what would make a package of rights provide a larger or smaller space free to live as one likes unprevented by others or morality. A first point to make here is that, if we are dealing with a non-moralized conception, the largeness of such a set will not be one that dominates other sets—that is it will not be one that includes all the other freedoms that other sets provide and more still. This is because, on a non-moralized conception, some possible sets will increase our ability to live as we like by greatly harming others. If such a set is smaller than Mack’s set it is not because Mack’s set offers all the freedoms such a set offers and then some.

So what should we think makes one set of freedoms to live as we like larger in the relevant sense here. We might try to simply count the ways one can act without being prevented from doing so with one set of rights in place and compare that to the number we get when we imagine another set of right in place. Or we might think that the ability to grate off the skin on one’s forearm less of a significant option than being able to worship one’s God and so weigh more heavily sets of rights that give us the latter option rather than the former. And we might think this either because people in fact have no interest in such an option or we might think it because they ought not have interest in such an option. More generally, we might think that the relevant weighty options might be agent-relative and depend on what sort of lives a particular person cares about or might care about. On this picture, if there were someone who only cared about living lives in which they intentionally cross other people’s borders harmfully, and found that having permission to do so was worth paying the price of others doing the same to her, then Mack could not offer such a person a conception of their rights that gave that person at least as large a set of cared for options as any other possible set (where everyone gets the same set). Or we might think that some types of lives are good for people, or worth choosing, regardless of their opinion on the matter and weigh more heavily those options. But the more we filter in this way the set of relevant sorts of lives of the sort that being unprevented from choosing, the less it seems like we are clearly promoting the agent’s autonomy by doing so.

However we sort out these tricky issues about what makes a set of options that one is unprevented from living larger in the relevant way, it seems certain that some people will want to choose lives that are ruled out by the set of rights Mack ends up with. After all, on any sane conception of what the moral rules are, some people surely choose to break those rules. Mack presumably must argue, if he is to follow the argumentative path we are exploring, that even though that is so, still literally no agents regardless of what their aims and what their lights suggest about how they ought to live, will find that any other set of rights (universally applied) would protect their ability to be unprevented from others or morality as well, from living their life by their own lights. The most likely thought here would be that even though these people would want to infringe on rights as Mack has them, they would in fact do less well in being unprevented in a world in which all were given the right to cross borders as they propose to do. The structure of the argument under consideration is perhaps a bit reminiscent of Kant’s first formulation of the categorical imperative in which we imagine a world in which all have the rights that we propose for ourselves and we learn to our surprise that in such a world we are unable to well advance the goals we had that motivated us to advance the claim that we had those rights. Yet while Kant aspired to show that his argument generated the results he sought regardless of what sort of agent we imagined, this seems (even more) unlikely in Mack’s case.

Mack’s picture of how to determine what set of rights we have is to see what is needed to allow people to live their own lives without being prevented from doing so by others (or by the rights themselves). Different sorts of rational agents, or agents with unusual goals, might need different sets of rights to accomplish this. Creatures like us need to be able to kick up a bit of dust to have any chance at autonomous lives. We can imagine rational agents capable of autonomous action that were different from us in this respect. These other creatures are incapable of movement or breathing, are nourished by the sun, and are mainly interested in trying out chess openings in their heads. For such creatures, gaining the permission to kick up a bit of dust would not enhance their ability to live their own life according to their choosing. Yet they are slightly negatively affected by trivial border crossings such as pollution. In such a case, I presume, Mack would allow that for such creatures there is no rationale to diminish the strictness of their property rights in order to create elbow room. On Mack’s view, broad empirical features of a creature that are relevant to what it would take to fail to prevent it from living a life of its choosing are highly relevant to the proper specification of such a creature’s rights.[[9]](#footnote-9)

Now suppose that we share a planet with such creatures and that they are negatively affected in minor ways by our kicking up some dust. The point of positing such creatures is that we can no longer make a case that their tolerating some dust being kicked up is more than compensated for by their increased ability to not be prevented from living as they want. In a system of rights where we get to kick up dust, they suffer the minor harms the rest of us do but do not get freedom compensating benefits. In a system of rights where we do not get to kick up dust, we are hog-tied. Is there a privileged starting point, perhaps strict property rights, such that only freedom Pareto-improvements are permissible from it? It is hard to see why that should be on Mack’s picture. But if that were the case, then we would be hog-tied in worlds that we have to share with Those that Need Only Non-Interference to be Unprevented from Living as They Like. If not, then in cases like this, where curtailing A’s strict property rights is needed to un hog-tie B but will trivially cost A some and will not benefit A any, then Pareto-optimality will be of little help. As usual Paretian criteria need a privileged starting point to provide much guidance.

One thing Mack’s own view tries to preserve from the traditional Self-Ownership Libertarian views is “inviolability”. I am confident he would claim that the view I outline does not preserve that thought and that seems true to me. I want to briefly make a case that a view like Mack’s, at least on its non-moralized interpretation, cannot both preserve inviolability and ensure that we are not hog-tied.

What inviolability amounts to, on Mack’s view, is to not have one’s claim on others (or a system of rights) to not prevent me from living my life as I see fit compromised for the sake of others. Inviolability amounts to it being wrong to sacrifice the one in the relevant way for the sake of the group. But, as the above example shows, this aspect of the view may not be sustainable. A moral view like Mack’s must admit that when quite different sorts of rational agents are living together, his view must either diminish the property rights of some without compensating gains for them in terms of the point of property rights or it must not diminish the unusual creatures property rights in which case we will be hog-tied. Mack has not shown us how a moral theory can, with full generality, uphold inviolability and avoid agents being hog-tied.

Some might think it sufficient if we can show that in relevant or local scenarios we can combine inviolability with avoiding anyone being hog-tied. I do not. If we think that it is a fundamental moral truth that agent’s are inviolable, we must explain how that would work in merely possible scenarios. It seems that there are possible scenarios in which either the point of property rights as Mack understands them must radically give way, such that many are severely prevented from living autonomously, or we must allow that inviolability is not a fundamental requirement of morality. If this is correct, it would make more plausible that my proposal, in giving up on the traditional Self-Ownership Libertarian notion of inviolability, is not giving up on an aspect of the Self-Ownership Libertarian picture that can be sustained.

Or, more realistically, suppose that for different people different trade-offs between strict property rights and elbow room are better for allowing them to not be prohibited from living their life as they see fit. It is possible that all actual humans gain in freedom in the switch away from strict rights and towards some elbow room attenuation of the strictness of such rights.[[10]](#footnote-10) But the fact that all would see a Pareto improvement in freedom in such a transition does not imply that we could get to any particular attenuation without going beyond the freedom-Pareto criterion. Each different possible attenuation of rights away from strict property rights will, to different degrees, prohibit each agent from living according to her own lights. The asthmatic and the industrialist might both agree that they need some elbow room but quite disagree about what look like attractive ways of attenuating strict property rights so as to attain that elbow room. Perhaps there is a particular contaminant that some asthmatics are especially vulnerable to but which also are difficult to avoid without quite costly pollution scrubbing. It seems insufficient to say to whoever loses such cases that they are nonetheless better off freedom wise than they would have been with no attenuation. It is possible that being involuntarily enslaved in an attenuated property regime would still be freedom superior to life in a strict property regime. We will have to move beyond the freedom Pareto criterion in settling on a particular favored trade-off between attenuating our property rights and providing elbow room. In settling on a particular trade-off we are seemingly forced to accept a situation that is freedom-worse for some on the grounds that it is freedom-better for many. And Mack’s sensible claim that these trade-offs need not be determined by the philosopher but can be determined culturally by a judicial system seems to me irrelevant to the broader point that the system we are envisaging will sacrifice the freedom of some for the greater freedom of others. Again, as I understand it, this is to leave inviolability behind.[[11]](#footnote-11)

The Moralized Conception of the Point of Rights

How must we understand a moralized conception of the point of rights it so that it might explicate the point of rights assignments? Seemingly we must not understand it to be tacitly assumed that the point of rights is to be unprevented from doing that which we have a right to do. For this will throw us back onto the project of understand what those presupposed rights are and not help explicate what their point is or to understand why they are not infringed when others in trivial ways cross our borders. The point of rights could not be to protect our rights. There must be some priority to the point for it to count as potentially an informative and helpful account of the point of rights.

So we must understand the notion of being unprevented by others from living a life of one’s choosing as not already restricting the range of lives one might choose to those that are permissible by some background assumed assignment of rights.[[12]](#footnote-12) Specifically we presumably must not presuppose what people, if others do not prevent them, are entitled to do. So we would have to understand the things that we must be unprevented from doing and the things we are to be free to choose for ourselves as not respecting other people’s antecedent rights or presupposing a demarcation of mine and thine since protecting such a sphere is meant to provide the point for demarcations of mine and thine. Such a starting point might appear clearly hopeless as a normatively attractive point of rights assignments but G.A. Cohen provides a model for how such a picture might work without presupposing that the background freedoms which provide the point of rights are themselves shaped by antecedently understood property rights.

Perhaps the hope for the Moralized Conception, at least when it comes to explicating the point of rights, would be to contrast the type of normative facts we are presupposing in shaping the sort of lives that we must be unprevented from choosing from the sort of normative facts we aspire to vindicate. Scanlon, for example, offers a non-reductionist, fully normativized conception of an agent’s reasons and hopes to build some moral facts out of those. There seems nothing problematic in principle with starting with some moral facts and using them explicates the (non-instrumental) point of rights. But these moral facts would have to be more specific than just that it is morally good when we are unprevented by others from living lives of our choosing. The moral facts here would have to tell us which sort of lives it is morally good that we are unprevented by others from choosing. And there will have to be sufficient distance between those moral facts and the rights we hope to vindicate such that the former might explicate the point of the latter rather than just be a restatement of them.

Consider, as a possible model, a consequentialist view that moralizes welfare. Such a view would claim that the sort of welfare we want to maximize is welfare that passes a moral test. Most obviously, apparent benefits that flow from enjoying another person’s undeserved misery might be judged not to pass this test. Much will hinge on exactly how this test is understood. But the point for the moment is that this moralizing test for welfare need not render the resulting consequentialist proposal entirely vacuous. It would still be contentious, and interesting if true, if the point of morality was to further morally permissible happiness, rather than serving up deontological constraints against sacrificing one person’s morally permissible happiness for the sake of the morally permissible happiness of the many.

So it does not immediately follow that if Mack moralizes the relevant kind of cases in which we have a claim that others not prevent us from living a life of our own choosing, that the resulting picture could not capture illuminatingly the point of rights. But to do so Mack would have to more clearly back away from the suggestion that the way he is moralizing the relevant kind of cases is with a background conception according to which we are entitled to privileged say over how some items may be used because they are ours. Such a conception looks too close to the resulting picture of rights to be vindicated to stand behind them and serve as an illumination of such rights point. If Mack offers a moralized conception of the point of rights, he will have to explicate more clearly what moralized conception he is working with and persuade us that there is enough distance between that conception and the notion of rights he aspires to vindicate for the former to illuminate the point of the latter. Until we have this background normative picture in place, his story will not genuinely illuminate the point of rights.

Conclusion

If Mack opts for a non-moralized conception of the point of rights he is not entitled to what he says about the kidney case. For his handling of that case supposes that what does and does not count as preventing a person from living a life of her choosing already involves an understanding what she is and is not entitled to—she is not entitled to other people’s bodies, for example, and that is why her being denied access to other people’s bodies does not count as being denied the ability to live her own life by her own lights. Further, the non-moralized conception seems inevitably to have to live with the thought that we must persistently trade off your ability to live your life as you see fit against other people’s ability to live their lives as they see fit. And such trade offs make it difficult to see how to recapture a normatively serious sense in which agents are inviolable in the way that the self-ownership tradition has maintained they are.

But if he offers a moralized conception then he must allow his understanding of the point of rights is to protect our antecedent moral status—a moral status which the story he has so far given us about the point of rights does not help explicate but rather simply needs to presuppose. Only by understanding and vindicating that background normative status could we vindicate a particular picture of what does and does not count as preventing people from living lives of their choosing in the moralized sense. And Mack’s story does not help with that task.

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1. This paper continues a thread of argumentation from two earlier papers of mine, Sobel 2012 and Sobel 2013. In trying to minimize overlap with these earlier papers I do not repeat some of the setup and motivation for the problems with the problems with the self-ownership tradition that I explore here. The discussion here is meant to be motivated and intelligible independently of those discussions, but in some cases additional arguments relevant to a full assessment of the view are offered in those other papers. Thanks for help with this paper is gratefully given to David Schmidtz, Steve Wall, the audience at the Tucson Freedom Center Conference for this volume, the audience at NOISE 2013, and helpful referees for this volume. [↑](#footnote-ref-1)
2. As I read Nozick, he took such worries very seriously and significantly adjusted his view to deal with such cases. I discuss Nozick on these matters at length in my previously referenced papers. Railton, 2003 searchingly explores such worries. [↑](#footnote-ref-2)
3. I myself do not think such a view correct and am more attracted to some forms of Consequentialism. Rather, I offer such a view in the spirit of attempting to solving the problems here under discussion in the most attractive way while remaining, at least arguably, within the Self-Ownership framework. [↑](#footnote-ref-3)
4. Mack, 2015 is not yet in print at the time this paper went to press. Thus the page numbers in the text refer to manuscript page numbers. [↑](#footnote-ref-4)
5. I want to mention and then ignore what I take to be two large unresolved issues for views in this general neck of the woods. The first is why morality should be thought to focus on failing to prevent people from being autonomous, rather than people being autonomous. The second is why, even with that focus, morality should take a deontological rather than consequentialist structure? We might think that if it is so important that people not be prevented from living lives of their own choosing, then perhaps we ought to prevent one person from living such a live if in doing so we could prevent 5 others from being prevented from living a life of their own choosing. [↑](#footnote-ref-5)
6. But consider Mack’s use of “wanton”. [↑](#footnote-ref-6)
7. A natural way to interpret Mack’s view, at least roughly, is that any act that unintentionally (et al) produces below a certain threshold of harm or expected harm is permissible. But likely this will not do as this would put a lot of pressure on act individuation and permit quite harmful sequences simply because they can be broken up into a series of small acts. If I restart the generator each half-hour can I put out the same amount of pollution that would have been impermissible had it been the result of a single act? Better, likely, would be to have a yearly amount of (unintended) harm one may impose. We might be tempted to require that this yearly amount can only be spent in very small increments, so that no border-crossing act that produces above a low threshold of harm will be permissible. But this will have the same problem we just saw. Further, we might be tempted to somehow require that the harms of an individual’s actions and of the group’s actions not fall too disproportionately on a narrow range of people [↑](#footnote-ref-7)
8. Mack is here responding to a case I brought forward when I commented on Mack’s paper at NOISE 2013, as a potential problem for his view. [↑](#footnote-ref-8)
9. Recall that not only did Nozick clearly think such wild counter-factuals relevant to assessing a moral theory, as in his Utility Monster example, but he took seriously the possibility that our inviolability might only obtain when we are dealing with creatures such as ourselves and might not make sense were we to interact with quite different (in his case he consider our interacting with higher, better) sorts of beings. [↑](#footnote-ref-9)
10. This must be thought to justify the claim not only that therefore all would be rational to approve such a transition, but also that we may attenuate people’s strict rights without their permission. For the former thought alone will not, for our Self-Ownership Libertarian, justify treating people in ways that they would have been rational to agree to but do not in fact agree to. [↑](#footnote-ref-10)
11. Perhaps maxi-min for freedom might be appropriate in such cases. That is, we could compare the different attenuating trade-offs for which leaves the person in that system worst off in terms of freedom and choose that attenuation in which the freedom worst off person is least badly off in terms of freedom. Perhaps that returns a notion of inviolability that is sustainable in cases where inevitably each particular trade off is freedom-better for some than others. Maxi-min perhaps allows us to say that no one must accept less freedom simply so that others may have more. At least we can then say that we are not preventably allowing some to have less freedom simply so that others may have more. However, this rationale may have the feel of a thought that is too much from behind the Veil for Mack’s purposes. [↑](#footnote-ref-11)
12. Perhaps we could understand the point of X type of rights as being in terms of Y type of rights? Even if so, Mack’s story would then not tell us much useful about the more fundamental sort of rights. [↑](#footnote-ref-12)