

WHO OWNS THE CHILDREN? LIBERTARIANISM, FEMINISM, AND PROPERTY

Susan Moller Okin's
Justice, Gender, and the Family
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Susan Moller Okin's *Justice, Gender, and the Family*¹ attempts to explicate a theory of justice that applies equally to both men and women. She argues, often persuasively, that other more commonly held theories, such as those that appeal to tradition, shared community values, or justice as fairness, implicitly assume that the only people to whom they need apply are men—frequently heads of households with wives providing household services for them. A theory of justice that applies to only fifty percent of the population, she argues, cannot be a general theory of justice.

Classical liberals and libertarians (whom she characterizes as “extreme” classical liberals [Okin, 74]) would wholeheartedly agree. Indeed, by developing a political theory of individuals as opposed to groups or families, libertarians might well believe they have already accomplished Okin's task. Yet, Okin argues that libertarian thought suffers from the same gender biases, and hence selective blindness to true justice, that mar other theories of justice. And while she sees some hope for a feminist reinterpretation of Rawlsian arguments for justice as fairness (Okin, 108-9), she sees no hope at all for the individualist philosophy of libertarianism.

Okin's charge of gender insensitivity in libertarian theory raises interesting questions about the problems of dependency in a libertarian world of rights, property, and contract. By calling attention to the presence of children in the real world, she calls attention to an under-explored area of

libertarian philosophy where individuals who own property and engage in contracts are presumed to be rational or at least competent and responsible adults. But the presence of children suggests that some inhabitants of this world are not fully rational and therefore not fully competent to assert their own rights as human beings. Further, because adults bring children into the world, libertarians cannot ignore questions about the rights and responsibilities of parents and children.

Unfortunately, while Okin's critique of libertarian theories causes one to think about these questions, it does not direct one toward a way of finding answers. Rather than leading us to see the real problems that childhood dependency creates for an individualist philosophy and a theory of the minimal state, she tries to demolish libertarian thought through a *reductio ad absurdum* which amuses but does not instruct, and which is certainly not nearly as devastating as she seems to believe.

1. Entitlements and Property in Children

As her representative libertarian, Okin chooses Robert Nozick and his entitlement theory of property as found in *Anarchy, State, and Utopia*.² There, as part of his critique of redistributionist theories of justice, Nozick defines justice in property holdings in terms of rules rather than patterns of outcomes: "Whoever makes something, having bought or contracted for all other held resources used in the process . . . is entitled to it. . . . Things come into the world already attached to people having entitlements over them" (Nozick, 160). Okin argues, however, that Nozick fails to consider that people (babies) are among the "things" that most assuredly come into the world already attached to other people (their mothers) (Okin, 83). If children are the product of their mother's labor, why don't libertarians view them as their mothers' property? In fact, Okin argues, the production of children seems to be an archetypical case of legitimately created property:

Once she is freely given a sperm (as usually happens) or buys one (as is becoming no longer very unusual)—in either case amounting to a legitimate transfer—a fertile woman can make a baby with no other resources than her own body and its nourishment. . . . [I]t is the complex capacities of the female reproductive system and its labor that achieve the transformation of two cells into an infant. . . . Since he [Nozick] so firmly upholds in all other cases the principle that persons are fully entitled to whatever results from their natural talents and capacities, he would seem to have no way of avoiding the conclusion that only women own the children they produce. (Okin, 83)

And since in Nozick's theory, people are entitled to do with their property

as they see fit, a woman presumably would be entitled to use her child in any way she wishes: "to keep it in a cage to amuse her, perhaps, as some people keep birds, or even to kill it and eat it, if she were so inclined" (Okin, 84). Okin's conclusion, then, is that the entitlement theory of property is absurd since it leads to this absurd conclusion. It is not a candidate for a general theory of justice.

How might a libertarian respond to this argument? A staunch advocate of property rights might respond that children *are* in fact owned by their mothers—or parents³—until such time as they achieve adulthood. This advocate might also hold that, as property, children may be treated by their parents as they see fit. However, this does not necessarily mean that parents would routinely eat their babies or keep them in cages; inherent parental feelings and the expectations of the community would place limits on acceptable parental behavior. Of course, relying on cultural norms and parental affection may not be sufficient to prevent all cases of exploitation, but after all, the world is imperfect in any case. The property-rights advocate might point to the experience of Roman law, where the paterfamilias had the right of life and death over his children but, at least as far as we know, rarely exercised it, and indeed, paid enough attention to the welfare of his family to face death rather than see them suffer financial loss.

However, this response does not avoid the larger problem of establishing human autonomy when humans are the product of other human's efforts. To say that children are property until they reach adulthood only postpones explaining how persons achieve autonomy and also requires one to come up with a definition of adulthood.

A more compelling reason for rejecting the children-are-property argument, however, is an empirical one. There are places in the world today where children are regarded more or less as property, and the results are not pretty. In some places parents do sell children, and especially daughters, into slavery, or otherwise exploit them for the parents' advantage. Unless we are prepared to regard children as less than human, no libertarian could deny that children's rights preclude such activities. If children are human beings, libertarians must hold that they have the right not to be used for other's purposes regardless of how they come into being. Libertarians might argue over the proper remedies for outrages against children, and debate the degree to which the state could legitimately (or efficiently) respond to parental aggression, but the aggression could not be ignored on the grounds that the children "belonged" to their parents.

Rather than proving that libertarians cannot escape from the conclusion that mothers own their children, Okin seems to be revealing a conflict between two fundamental libertarian principles: the rights people have to determine their own actions—to own themselves, as Locke would say—and the rights people have to acquire property through the exercise of their own talents and efforts. In the case in question, most libertarians would

argue that the first principle takes precedence over the second: you can own things but not people. But how do they come to this conclusion? How are these conflicting principles reconciled to avoid the conclusion that children are property?

In the context of a critique of Locke's theory of property, Nozick offers several kinds of arguments that could be constructed to avoid this conclusion:

(1) [S]omething intrinsic to persons bars those who make them from owning them . . . (2) some condition within the theory of how property rights arise in productive processes excludes the process whereby parents make their children as yielding ownership, or (3) something about parents bars them from standing in the, or a particular, ownership relation, or (4) parents do not, really, make their children. (Nozick, 289)

While Nozick believes (1) and (2) offer the most promising route out of the dilemma, he offers no explicit argument in favor of either. Further, Okin argues that Nozick's own theory precludes his constructing an argument along the lines of (1) since he asserts people's rights to sell themselves into slavery, thereby denying that there is something inherent in people that precludes their being owned.⁴

Okin seems to believe that to avoid the conclusion that an entitlement theory of property implies that parents own their children, it is necessary to partition off human beings from the rest of the world's resources. While Okin may not see how it is done, and while Nozick may not have offered explicit arguments for such a partitioning, it seems that it should not be a very difficult task.

2. Locke, Self-Ownership, and the Workmanship of God

Okin argues that the necessary assumption for Nozick's entitlement theory is the Lockean concept of self-ownership. While Nozick does not himself argue for this proposition, he presupposes it to get the result that people own parts of their bodies and have the right to control their bodies (Okin, 79). Perhaps by studying how Locke reasoned about self-ownership and property, we can find our way toward solutions to the puzzle Okin sets us in the relationship between autonomy and property.

Locke's discussion of self-ownership and property is presented within the context of a carefully developed theory of government. The *Two Treatises*⁵ were written to argue against a theory of hereditary monarchy and for a theory of limited constitutional government based on the consent of the people. Consent is the linchpin of Locke's theory and is a prerequisite for

all just interpersonal relationships: between magistrate and citizen, husband and wife (*ST*, par. 78), employer and employee (*ST*, par. 85).

The *First Treatise* is a refutation of Sir Robert Filmer's divine right of kings doctrine, which traces the king's right to rule back to God's grant of dominion over the earth to Adam. Among the arguments Locke summons to refute Filmer is his strong claim that fatherhood does not convey power over the lives of the children (*FT*, par. 52-54), that even if heredity counted for sovereignty, both parents would have to be sovereign, since both are equal in their relationship to their children (*FT*, par. 55).⁶ Further, he argued explicitly against the view that parents could regard their children as property (*FT*, par. 88-89).

Locke's argument about the origin of property in the *Second Treatise* (ch. 5) is designed to address a very particular problem: how is property legitimately established in a world God has given to people in common for their use? Locke's theory of property proposed to show how the right of self-ownership, coupled with the act of appropriation for use, led to the establishment of property rights in previously unowned resources. He addressed this problem by invoking a powerful metaphor: man mixes his labor with unowned resources to create something new that is his property. However, it would have been inconceivable to Locke to apply his theory to the production of children.⁷ Children are not produced by appropriating free resources from the common pool; more importantly, they cannot be owned by their parents because they are inherently selves that are not subject to ownership.

Self-ownership, in Locke's view, refers to one's status vis-à-vis other human beings. We own ourselves because no one else owns us. Self-ownership does not refer, however, to man's relationship to God. Man is God's handiwork, and is in some sense owned by Him just as all the earth is owned by Him (*ST*, par. 56). God grants us life and enjoins us not to take our own lives. Thus, we may not sell ourselves into slavery; we would be disposing of that which we do not own, our power over our own lives (*ST*, par. 24). Nozick criticizes this position by claiming that if we cannot own other people because God owns them, this could apply to "plants, non-human animals; and perhaps it applies to everything" (Nozick, 288). Nozick's interpretation is correct but incomplete: Locke would agree that God does own everything, but He has explicitly granted us the right to use the earth's nonhuman resources for our own benefit; He has not granted us the right to use other people.

Locke had no problem distinguishing human beings from everything else, because he had no difficulty in distinguishing humans from God. His theory of self-ownership, property rights, and consent was expounded within a larger context of his religious/moral beliefs which he referred to as natural law.⁸ In this system of belief, people were subservient to God's will, but equal to each other in the sight of God. One could and should own

pieces of the world and the products flowing from one's activities there, but one could never own another person, since a person was more than a piece of the world: a person was a creature of God possessing a soul (*ST*, par. 6).

Locke avoided the conclusion that children were the property of their parents by invoking man's relationship with God and relying on a long moral tradition that placed limits on legitimate human behavior and clearly distinguished between men and beasts. Within this tradition, children were entrusted to parents to be cared for and nurtured; they imposed responsibilities on their parents rather than ownership (*ST*, par. 66). To pluck Locke's ideas about property out of their religious context is to misread and manipulate Locke.

In developing his theory of property, Nozick attempts to move beyond Locke. Not only does he drop Locke's labor-mixing formula because of its logical difficulties (Nozick, 178), he ostensibly drops the religious context as well (though one might argue that Nozick implicitly accepts the background assumptions that allow Locke to treat people as creatures with a soul). But if Nozick does not want to rely explicitly on the moral/religious assumptions that give humans a special status in nature, should he not offer explicit arguments about why people are different from the rest of the world and hence not legitimate property of their human creators? Certainly, Okin would have us believe that Nozick's theory—indeed, all of libertarian philosophy—collapses into a hopeless contradiction without such arguments.

But why should Nozick, or libertarians in general, have to provide arguments in political philosophy about the special status of human beings to anyone (except perhaps the extreme animal rights people, who see no such difference on their own)? If there seems to be a conflict in the theory of property between people's rights to autonomy and self-ownership, and their rights to own the products of their labor, why is it not sufficient to stipulate that people aren't things and hence their autonomy precludes their involuntarily being owned by others?

Even if libertarians reject the Judeo-Christian moral heritage that gives human beings a special status, they still may stipulate the categorical distinction that allows them to apply rules of justice to humans and not everything else. Indeed, such a stipulation is a move that would command widespread assent, including the assent of liberals such as Okin. The question isn't "Why are people different from trees?" so much as "Given that people are different from trees, what does this imply about how we treat them?" An entitlement theory of property is an important component of an answer to that second question. Moreover, an entitlement theory is not invulnerable to sensible criticism from the left. If Okin had foregone the temptation to be clever and had instead offered a serious challenge to libertarian theories of property rights and justice in general, an important examination of the implications of libertarian doctrine for women and chil-

dren might have been encouraged to begin.

3. Libertarianism, Feminism, and the Problem of Dependency

Despite Okin's insinuations to the contrary, one would expect libertarian thought to be congenial to feminists who regard themselves as fully equal to men, since libertarian principles of individualism and individual rights apply equally to men and to women. Claiming common cause with many of the early feminist writers,⁹ libertarians oppose laws that discriminate against women in overt ways, and in general oppose paternalistic arguments that regard women as inferior. Marriage, if it is thought of at all, is regarded in the Lockean fashion as a contract between equals. Libertarian thought has no presumption that women should always do home work and men market work; the division of labor within a household is considered a negotiable part of the marriage contract. Indeed, libertarian philosophy, more than most others, is content to let people, men and women, live their lives as they choose.

In contrast, Okin believes women in contemporary culture really can't be thought of as having the kinds of choices libertarians routinely assume are open to adults. She argues that while equality is the ideal, real equality does not exist for women in modern society. If libertarians really took women seriously, they would see that women need special protection until such time as culture is rearranged. Okin argues that the gender difference that underlies modern beliefs about male and female is itself unjust (Okin, 4). Our notions of gender presume that women will not only bear children, but take primary responsibility for rearing them, and this is the crux of the problem. This traditional household division of labor limits women's ability to maximize their income in market work, leaving them dependent upon their husbands and financially vulnerable in the case of divorce (Okin, 160-62). As long as this is the case, she argues, women will not achieve full equality. The answer is to eliminate all gender-related divisions of labor within the household by eliminating gender itself (Okin, 17).

According to Okin, gender is a social construction that is not based in nature (Okin, 6-7). Social constructions are inherently arbitrary. Hence, if we judge some social constructions to be unjust, we can and should "reconstruct" them, which in this case means eliminate them entirely.

There is much to unpack here, and this is not the place to do all the unpacking. Suffice it to say that Okin has made a number of bold assumptions that she backs up in only the sketchiest manner. We are to take for granted that the "traditional division of labor," for example, has no roots in nature. Women have no special attachment to their children or expertise in child rearing that sets them apart from men (Okin, 5), nor any special concern with households that is not a product of cultural conditioning. This

strikes me as an iffy proposition at best, and certainly no more than a hypothesis that requires further investigation—a hypothesis too uncertain to justify sweeping policy decisions. Further, she assumes that institutionalized child care is as good or better than home-provided child care and the attentions of a present mother. Again this is at best conjecture. Additionally, she takes it for granted that market work is always more fulfilling and desirable than home work. As one who has done both, I am certainly not prepared to argue that case.

Perhaps the most disturbing assumption is that socially constructed ideas of gender can be rationally reconstructed according to her (or anyone's) theory of justice (Okin, 15). It might well be true that gender is a social construction without it also being true that (a) we can do anything about it except at the margins, or (b) even if we could, that we *should* do anything about it. It might be a "bad" social construction by some standards, but it also might be better than the untried alternative. Friedrich Hayek¹⁰ has shown persuasively why attempts at sweeping social reconstruction in the economic area are doomed to ignominious failure as unintended consequences heap upon unintended consequences. Such an outcome is no less likely in an attempt at sweeping cultural reconstruction. While libertarians are often as reluctant as liberals to acknowledge limits to humans' ability to create their ideal social orders, both would do well to heed Hayek's warning.

While I am skeptical of many of Okin's claims for the arbitrariness of gender constructs and while I also believe libertarian philosophy is compatible with full feminine equality at one level, there is another level at which Okin has a point. Women have babies, and babies come into the world dependent and incomplete. They require years of parental nurturing, a huge investment of resources, and what they offer in return is not generally thought of as consideration in a legal contract. If we are not to regard babies as property of either mothers or parents, what theories do we have to tell us how they are to be regarded and how they are to be treated in political society?

To those who would argue that child rearing is not the concern of the state, I would partly side with Okin; we cannot avoid having the state concerned with child rearing at least on one level (Okin, 111). Even the minimal state is supposed to protect its citizens against force and fraud. But the protection of the state requires that there be competent individuals to assert their rights; people sue each other or bring charges against aggressors. What if, however, the perpetrators of force and fraud are parents, and the victims, children? Certainly, no one could claim that unaided children are competent to protect their rights vis-à-vis their parents. But libertarians are understandably unenthusiastic about the idea of bureaucratic child-welfare services vigilantly inspecting homes for violations against children. Yet short of some such process, who or what will protect children from violent

or fraudulent parents?

This raises an even more interesting question. How would a libertarian define force or fraud against a child? To raise children means to protect them from harm and to socialize them so that they can live in the world peacefully with others. But this means teaching, and sometimes punishing children. When is a punishment justified and when is it excessive force? Rearing a child also means providing for his or her well-being. What is the extent and what are the limits of the child's claim on the parents' assets? Should a child be allowed to sue his parents for failure of specific performance? Should children be allowed to divorce their parents if they are dissatisfied customers? Should parents be allowed to sue their children for failure to perform their duties to their parents? When is parental authority invoked for the good of the child and when is it a destructive ego trip?

These questions may seem absurd to some; certainly there are conventional standards of child rearing that most parents subscribe to, and the problem faced in affluent societies is often parents' doting on children and giving them too much rather than too little, but that is beside the point. The point is that a libertarian society that had laws against force and fraud would also in justice have to apply those laws or some variant to children as well.

While it might be possible to incorporate laws against excessive force against children into a libertarian minimal protective state, it is not clear that an even more difficult issue could be handled by libertarian philosophy. That is the question of community externalities. Libertarians generally subscribe to the view that personal behavior that does not involve force and fraud should not be the concern of the state. Most would argue that sexual behavior, reading material, eccentricity, and people's values in general are their own business as long as they are not harming others. Libertarians also presumably believe people have the right to raise their children to share their values. But is this a viable position when we acknowledge that children must learn values before they can act in accordance with them? That is, does not the right parents have to raise their children according to their own values conflict with the individual's right to live any way he pleases?

Values are not learned in a cultural vacuum; they can only be passed on in the context of a valuing community. This is a fact that conservatives recognize, that troubles Okin (hence her desire to use schools as indoctrination centers for the new utopia [Okin, 177]), and that libertarians have not fully come to grips with. It might be that, for example, raising children to be responsible, self-sufficient, and hard-working adults, all characteristics of people who can respect property rights and refrain from force and fraud, is incompatible with a freewheeling attitude toward drug use, promiscuous sex, and pornography. Certainly many people, some feminists among them,

claim that to be the case. Short of denying that there are value externalities in human behavior, and of ignoring the process by which children learn from their environment, I do not see how an “anything goes” attitude toward personal behavior is consistent with the right of families to live unmolested according to their own values.¹¹ But if communities have the right to enforce certain behavioral standards, how far can they go without trampling on the rights of the eccentric?

In short, once we recognize the fact that children are born dependent and have to be raised to be fully competent and moral human beings, the unproblematic definition of the minimal state becomes difficult to sustain.¹² This does not mean that libertarians must embrace rampant political liberalism. There are still good reasons for being wary of an extensive state and for developing a theory of property rights based predominately on processes rather than end states. But taking human reproduction seriously means taking uncontracted-for dependency seriously as well. If we are to be wary of the state’s intrusion into private life—as I am and as Okin would be if the state were, for example, a fundamentalist Islamic one—then we must consider well the state’s position with regard to dependent children.

4. Conclusion

Let us conclude by asking why Okin is so hostile toward private property and the limited state that she chooses to ridicule libertarianism rather than to argue seriously against it. So many of the personal behaviors she advocates are clearly compatible with libertarian philosophy. Further, given the history of how the apparatus of the state has repeatedly been used to oppress women, one wonders why she would not find libertarian hostility toward the state and reliance on voluntary contract at least somewhat appealing. One can only speculate that she cannot afford to give up the coercive powers of the redistributive state because her plan for bringing about the ideal order she recommends requires it.

Not content to try to convince others of the truth by the power of her argument, as libertarianism recommends, she wants to use taxes, subsidies, and regulations to make the public an offer it can’t refuse. She needs taxes to subsidize day care so that even where a household division of labor would be more efficient to the creation of wealth than market work, we will get market work (Okin, 175). She needs a public school system to teach children that their misguided mothers who prefer to stay at home—even part time—are victims of their fathers’ injustice (Okin, 177). She needs a powerful government bureaucracy to mandate hiring practices and internal management issues of businesses to bring about the “major changes in the work place” she sees as necessary for parental equality (Okin, 176).¹³

While much of what Okin says about justice and women is congenial to libertarians, her wholly trusting attitude toward government creates an unbridgeable gulf between her "liberal" view of justice and the libertarian one. The crux of libertarian thought is a deep and abiding suspicion of government and its monopoly of force. The government that can mandate family-leave policy or affirmative action enforced by quotas when in the hands of liberals, could also mandate excluding women from employment or preferential hiring for men when in other hands. As amusing as it might be, no argument about how a woman's labor in childbirth is or is not equivalent to a farmer's labor in producing crops can touch this core of libertarian thought.

1. Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); page references will be given parenthetically in the text.
2. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); page references will be given parenthetically in the text.
3. The conclusion that only mothers own their children has to be one of the most misleading slights of hand in Okin's critique. Men do not in all cases simply "freely give" their sperm to the female without any regard to consequences. At least within marriage, and perhaps in other long-term cooperative living arrangements, there is an explicit contractual agreement concerning the mutual responsibilities both parents have toward their children. Even if we were to assume children are "owned" like property in such cases, they would have to be jointly owned. Of course, this does not apply in cases of rape, or casual sex with no long-term commitment, but these are situations that neither libertarians nor feminists would presumably recommend as normative.
4. Actually, Nozick offers the opinion in passing that a free society should permit adults to sell themselves into slavery, since they are presumed competent to judge whether such a contract would be in their best interests. Nozick admits the position is debatable, and he explicitly denies the right of anyone to sell someone else into slavery. Okin regards this as a quibble, but in fact it is an assertion of the primacy of autonomy and self-determination over property rights (Nozick, 331).
5. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988); references to the *First Treatise* (FT) and the *Second Treatise* (ST) will be given parenthetically in the text.
6. Whatever Okin may claim about other theorists ignoring women and children, she cannot in justice include Locke in that indictment. Locke was very much aware of the implications of two sexes and human procreation in his work. He regarded women as fully politically equal to men, regarded marriage as a negotiable contract, and considered women biologically more responsible for the production of children than men, although not morally more responsible for their upbringing (FT, par. 55). While it is also true that Locke assumed women were physically weaker and therefore would be the subordinate power in a marriage, husbands had the obligation of caring for and loving their wives. While modern feminists may cringe at this last assumption, Locke was probably one of the most liberal of philosophers in his day on the subject of women.
7. Locke's discussion of why parents do not own their children is found in two places. In FT, par. 52-56, in conjunction with his argument about the absence of natural sovereignty, he argues that children are a gift of God and are not the products of their parents. Despite

Nozick's criticism of that argument, it is more serious than he realizes. Locke makes a similar argument in *ST*, ch. 6, where he describes in detail the responsibilities parents have to their children until they reach adulthood.

8. Since natural law was given by God, Locke saw no conflict between God-given law and the law of nature. In fact, he used reason and revelation interchangeably as sources of natural law (*ST*, par. 25).

9. See, for example, Wendy McElroy, ed., *Freedom, Feminism, and the State* (Washington: CATO Institute, 1982).

10. Friedrich Hayek, *Law, Legislation, and Liberty*, vol. I (Chicago: University of Chicago Press, 1973).

11. The standard libertarian response to worries about the influence of corrupting culture is to advise individuals to shut it out. In the case of television, for example, parents are literally advised to pull the plug. These suggestions can only come from people who either (a) have no children or (b) are raising their children on a farm miles away from the nearest neighbor. Otherwise, they would realize that pulling the plug in one house does not constitute pulling the plug at every house one's child visits. And one has only marginally more control over the activities of one's child at his playmate's house than one has over the weather.

12. Nozick recognizes the problem of externalities and tries to overcome it by envisioning the coexistence of differing communities where social experiments can be carried out. These communities avoid the charge of coercion by permitting free exit. However, he devotes no more than three sentences to the problem children present to his utopia (Nozick, 330).

13. The one part of Okin's program for reform that I can subscribe to wholeheartedly is her proposed reformulation of divorce laws (Okin, 163-65). Women are disadvantaged under current "no-fault" divorce, and given current patterns of female employment decisions, a woman who specializes in home work is often devastated by the kinds of financial settlements meted out in divorce courts. Interestingly, the current divorce laws were originally supported by feminists who viewed alimony as demeaning to women and thought it important to give women an incentive to go into the workplace.