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Nonhuman animals as property holders: An exploration of the Lockean labour-mixing account

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Abstract: Recent proposals in political philosophy concerning nonhuman animals as property-holders – from John Hadley and Steve Cooke – have focussed on the interests that nonhuman animals have in access to and use of their territories. The possibility that such rights might be grounded on the basis of a Lockean (that is, labour-mixing) account of property has been rejected. In this paper, I explore four criticisms of Lockean property rights for nonhuman animals – concerning self-ownership, initiative, exertion and the sufficiency of protection offered – concluding that Lockean property rights could be extended to nonhuman animals. I then suggest that Lockean property rights actually offer advantages over interest-based accounts: they more clearly ground property, they are potentially broader, and they are considerably stronger.

Keywords: Animal ethics; Animal rights; Property; Labour; John Locke.

In recent years, there has been a 'political turn' in animal ethics, with the emergence of a large amount of high-quality literature on human obligations concerning nonhuman animals (NHAs) utilising the language of political philosophy and political theory, in contrast to the traditional focus on moral theory and axiology. Paradigmatic of the new approach are works by Sue Donaldson and Will Kymlicka (2011), Martha Nussbaum (2006), Robert Garner (2013), Alasdair Cochrane (2012), Kimberly Smith (2012) and Siobhan O'Sullivan (2011). The emerging literature has also seen edited collections (Wissenburg and Schlosberg, 2015; Garner and O'Sullivan, 2016) and even a dedicated journal: the open-access Politics and Animals. This literature is both marked out and unified by the way that authors focus upon (and conceive of) questions about justice; the works that belong as part of the turn, write three of its central figures, 'imagine how political institutions, structures and processes might be transformed so as to secure justice for both human and nonhuman animals. Put simply, the essential feature of the political turn is this constructive focus on justice' (Cochrane, Garner and O'Sullivan, 2016: 4, emphasis in the original). Much of this literature has offered reassessments of the tools and intellectual resources of liberal political theory so that they might be deployed to protect the interests of NHAs.

The political turn has offered a valuable opportunity to revisit ideas mostly taken for granted in traditional animal rights philosophy. One such notion is that we should simply let free-living ('wild') NHAs be (Regan, 2004: 357), an idea referred to by Clare Palmer (2011: 2) as the laissez-faire intuition. While thinkers in the political turn do tend to endorse a mostly-hands-off approach to free-living NHAs, the idea is given new grounding. For example, Donaldson and Kymlicka justify it with a detailed exploration of sovereignty, concluding that free-living NHAs can and should be considered sovereign over their own spaces (2011: chap. 6). Nussbaum, alternatively, posits that justice requires the recognition of NHAs' capability for 'control over [their] environment' (2006: 400). She stops short,

however, of offering NHAs property rights: 'On the material side, the human form of the capability includes certain sorts of protection for property rights and employment rights ... For nonhuman animals, the analogue to property rights is respect for the territorial integrity of their habitat, whether domestic or "in the wild"' (2006: 400). This stopping-short may not be surprising; it perhaps sounds odd, depending on the account – if any – of property we endorse, to suggest that NHAs might seriously be considered property holders. Typically, the pertinent debate about NHAs and property would concern whether NHAs should be considered property themselves, and, relatedly, the extent to which this is good/bad for them. However, the idea that NHAs can be property holders has received some scholarly defence. The most significant, though perhaps not only (see, e.g., Sapontzis, 1987: 104; Squadrito, 1981: 22), advocates of this view are Steve Cooke (forthcoming) and especially John Hadley (2005, 2015, forthcoming). Cooke and Hadley's explorations can usefully be contextualised within questions about NHAs' interests in their habitats/territories in the political turn.[1] Both use property rights as a theoretical tool (alongside, in Cooke's case, sovereignty rights) to protect NHAs' interest in free use of their territory; as such, both authors – though their accounts are not identical – offer an interest-based account of NHA property rights (cf. Cochrane, 2012).

In this paper, I will explore and defend an alternative grounding for the possibility of NHAs as property-holders; namely, the labour-mixing account associated with John Locke (hereafter, 'Lockeanism' or 'Lockean [property] rights'). This account has retained a persistent presence in the academic literature on property, and has a number of contemporary advocates. As such, and while I shall neither reject nor endorse the account itself, I argue that

[1] Hadley frames his work as the natural conclusion of the traditional face of animal ethics (Hadley, 2015: 76, 117), but it can be meaningfully understood as part of the political turn (Cochrane, Garner and O'Sullivan, 2016; Milburn, forthcoming-a).

its potential application to NHAs should be of interest to animal ethicists and property theorists, as well as environmental ethicists[2] and liberal/libertarian political theorists. If Lockeanism for NHAs can be defended, I will have demonstrated a new way to ground a particular kind of moral right for NHAs. This moral right, however – in keeping with my concern for a political account of animal ethics, and mirroring both Cooke and Hadley – could ultimately be the foundation of a legal right. The precise workings of this legal right will not be explored in the present work, but, if I am able to demonstrate that Lockeanism can ground NHA property rights (and, importantly, that it may be a good way to ground NHA property rights), I will have opened the door to future work in applied normative theory that places Lockean property rights for NHAs within broader accounts of animal ethics and that can explore the way that such rights could be appropriately institutionalised.

This paper will progress as follows. I will begin by presenting a prima facie case for the plausibility of NHAs claiming Lockean property rights. I will then explore four objections to the possibility, suggesting that they are not fatal. Insofar as my prima facie case and responses to objections are successful, I will have shown that there is no conceptual incoherence in attributing Lockean property rights to NHAs. However, I wish to argue further that a Lockean account may have certain advantages over interest-based accounts of NHA property. As such, I will set out Hadley and Cooke's respective arguments for NHA property rights and then contrast them with Lockean rights, outlining three possible advantages of Lockeanism. Namely, I will suggest that Lockeanism clearly offers a property right, that it can offer a broader set of rights, and that the rights it offers are stronger. I will thus conclude

[2] Hadley (2005; 2015: chap. 5) is keen to stress that 'animal property rights theory' offers potential for a much-sought-after rapprochement between animal and environmental ethicists (cf. Wissenburg and Schlosberg, 2014). These groups often find themselves with apparently irreconcilable differences.

that not only could we apply Lockean rights to NHAs, but, at least insofar as we have reason to want to see NHAs well-protected, we may think that we should apply them.

Extending Lockean property rights to nonhuman animals

Locke, who would not himself be sympathetic to extending property rights to NHAs (Squadrito, 1981; Waldron, 1990: 143-4), presents the following argument:

> Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it that excludes the common right of other men. (2003: §2.27)

The argument is generally taken to be that individuals come to own previously unowned objects by placing into them something that they own (their labour, as an extension of the authority they have over themselves).[3] To be clear, I am not so much interested in explicating Locke's philosophy as I am interested in exploring the potential applicability of a part of it, but it is worth noting that Locke's account (that property is appropriated by labour) can be

[3] This is the reading of, e.g., Robert Nozick (1974: 174-5) and Jeremy Waldron (1990: chap. 6).

separated from Locke's argument (concerning labourers owning their labour). Thus, one can be a Lockean in the sense that I am using the term without having to endorse Locke's own case for Lockeanism.

One of Locke's illustrations of his labour theory concerns gathering acorns in woodland:

> He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask then, when did they begin to be his? when he digested? or when he ate? or when he boiled? or when he brought them home? or when he picked them up? and it is plain, if the first gathering made them not his, nothing else could. (2003: §2.28)

That Locke's example seemingly works as well for NHAs as for humans has not been overlooked. James Rachels has observed that, assuming a Lockean account of property, 'it follows that animals such as squirrels also have a right to property; for squirrels labor to gather nuts for their own nourishment in exactly the way Locke pictures the man laboring' (1989: 125). As Kathy Squadrito (1981) has argued, however, Rachels would be wrong to say that Locke himself would endorse this conclusion; Locke's own claims must be understood in the context of his theologically-motivated anthropocentrism. That said, Lockeanism has a life beyond Locke, and so nothing need rest, for Rachels or I, upon what Locke himself held.

We need not limit the prima facie case to Rachels's squirrels. A standard example of putative NHA labour is the found in the actions of beavers (Clark, 2014: 150; Hadley, 2015:

41). These animals labour in a wide variety of ways, including by selecting and felling trees; dragging the resulting logs; creating canals; and building and repairing dams made out of stones, the (modified) logs and compacted earth. This example is standard because it so striking, but many more come to mind: NHAs select or craft tools for various purposes (e.g., otters use rocks, octopuses gather coconut shells, chimps shape sticks); they build shelters, burrows, scrapes and so forth (e.g., rabbits dig warrens, bowerbirds construct bowers, swallows build nests); and they collect trinkets (e.g., corvids).

Indeed, one need not look to the complex behaviours of the kinds listed above to find (something resembling) labouring. A great many NHAs, even what might be described as unremarkable invertebrates, will gather and store foodstuffs, or eat non-food items; lay eggs on carefully selected and/or modified surfaces; create or seek-out shells or casings; or bury themselves temporarily in the substrate. If humans were to engage in these activities – assuming Lockeanism and that the items/spaces utilised were unowned – they would be able to claim a property right.

I take it, then, that there is a compelling prima facie case for the applicability of Lockean property rights to NHAs and the items/spaces upon which they labour. I will now explore four possible challenges to this account; it is my claim that if these challenges are unsuccessful, then, given this prima facie case, the extension of Lockean property rights to NHAs is plausible.

First objection: Self-ownership

Hadley raises a number of worries about Lockeanism based upon the fact that it has been devised against the backdrop of a 'person-centric approach to philosophy' (2015: 41). Before

I discuss these explicitly, it is worth noting that Hadley's three worries could – as he himself acknowledges – be partially overcome by leaning on the possibility of human non-persons being property owners (Hadley, 2015: 43-4). This is effectively a new application of the argument from species overlap[4] relying upon the fact that some jurisdictions and theorists are already open to the idea of human non-persons as property holders. Given, the argument would go, that we already accept that humans lacking traits associated with personhood (such as moral agency) can be property holders, we know that lacking said traits is not a barrier to property ownership. As such, NHAs, even when they lack these certain given capacities, can be property-owners. In a sense, this does not answer Hadley's objections, as the critic could simply claim that these jurisdictions/theorists are wrong to allow human non-persons to be property holders. Indeed, Locke himself would likely respond in this way (Squadrito, 1981). I do not think it is necessary to lean on the argument from species overlap to respond to Hadley's worries, and I note that a heavy reliance on the argument – a problematically blunt tool – has come to be seen as undesirable (Milligan, 2015; Garner, 2013: chap. 9). As such, I will say no more about this means of responding to Hadley's critique.

Hadley's first explicit worry is with the assumption of (something resembling) self-ownership in Lockeanism. Locke's argument for his labour theory depends upon self-ownership, meaning that labour becomes 'the mechanism by which the authority that one enjoys over one's self can be extended to parts of the world that are not owned' (Hadley, 2015: 41). Consequently, Lockean accounts of NHA property rights, if they are to follow Locke's argument, must presuppose that NHAs have this kind of authority over themselves. Consider the following: if, hypothetically, one owns another human, then one would also own

[4] This has also been called the 'argument from marginal cases', but this name is problematic (Horta, 2014; cf. Dombrowski, 1997).

that human's labour.[5] If Smith owns Jones, Jones's labour cannot ground a property right for Jones (even if we allow that property owning property is conceptually possible), and would instead ground a property right for Smith. As such, it seems that a labour-mixing account of NHA property must lean upon something resembling an account of NHA self-ownership.

Hadley holds that this is problematic. He does not explicitly deny that NHAs are/can be self-owners (Hadley, 2015: 41), but such a claim is surely not widely accepted in the contemporary world; if Hadley's animal property rights theory relies upon this, it is a step further from being instituted. More will be said about this shortly, but it is first worth observing that it is not clear that (something like) NHA self-ownership should be seen as theoretically problematic, especially if we are considering the possibility that Lockeanism could be a tool adopted by existing accounts of animal ethics. Indeed, it does not, as might be first thought, unduly limit its applicability to strongly-libertarian-influenced accounts of animal ethics.[6] Any account that rejects the idea of NHAs as property could likely support something sufficiently resembling self-ownership for the labour-mixing account to be plausible. This includes a variety of positions in contemporary animal ethics, such as Donaldson and Kymlicka's proposal for a zoopolis, a mixed human/NHA state. Donaldson and Kymlicka base their proposal upon a claim of universal and inviolable basic rights for NHAs, which entail recognising that

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[5] Nozick (1974: 331) allows that humans may sell themselves into slavery, for example. Locke notes that a man's own labour, the labour of his horse and the labour of his servant all ground rights for the man himself (2003: §2.28).

[6] The significance of libertarianism, in this context, is the weight that libertarians place upon a claim of one's ownership over one's self/body. The possibility of a libertarian-inspired animal ethics might sound surprising, but see Ebert and Machan, 2012 and Milburn, 2016, forthcoming-c.

> [NHAs] are not means to our ends. They were not put on earth to serve us, or feed us, or comfort us. Rather, they have their own subjective existence, and hence their own equal and inviolable rights to life and liberty, which prohibits harming them, killing them, confining them, owning them, and enslaving them. (Donaldson and Kymlicka, 2011: 40)

This position does not entail self-ownership for NHAs in the strict libertarian sense. Nonetheless, it grounds a kind of authority-over-self sufficient to suggest that Hadley's concern is not fatal for Lockeanism. (It is true that not all positions in contemporary animal ethics would make this kind of allowance; Cochrane, for instance, rejects the idea that NHAs have a right against being owned, claiming that owning a NHA does not necessarily set back any interests possessed by the owned being (Cochrane, 2009).)

Hadley is concerned with offering a pragmatic solution to a real-world problem for NHAs; his proposal is hampered if it rests upon the achievement of some other political/legal/moral development for NHAs. In this context, his worries about self-ownership make sense; however, I suggest that Hadley is overly optimistic about the possibility of instituting NHA property rights without first making other developments. In particular, there is a problem with instituting interest-based property rights for NHAs without first introducing a right against being killed. This is because humans who wish to make use of NHAs' territory without making concessions to the NHAs could simply kill said NHAs; dead NHAs do not possess an interest-based right in use of their territory, and so the humans left with an elegant solution that makes a mockery of animal rights (Milburn, forthcoming-a; Milburn, forthcoming-b). I conclude, then, that Lockeanism's putative reliance on something

resembling self-ownership is not as problematic as Hadley assumes, and that, even if it does push NHA property rights further from real-world achievement, Hadley has overestimated the extent to which his own proposal currently has real-world viability.

Second objection: Individual initiative

A second worry about the person-centred nature of Lockeanism raised by Hadley concerns the fact that some NHAs do not display individual initiative in their labour. That is, they do not choose to mix their labour with external objects but merely act upon instinct – or, to put it another way, they could not choose not to labour (Hadley, 2015: 41-2). Squadrito raises the same kind of worry; her arguments are strongly grounded in Locke's own words, and she seems less willing to detach Lockeanism from Locke than I, but she observes that (for Locke) some level of rationality is necessary for property possession (Squadrito, 1981: 21), and that Locke would likely not consider the actions of NHAs to be labour in the significant sense (Squaditro, 1981: 21-2).

I am prepared to concede that this kind of criticism works for some NHAs. Ants, for example, could probably only be described as labouring or engaging in industrious activity by analogy, and likely lack the capacities to engage in personal choice in any meaningful way – or, to draw upon Hadley's words (2015: 41-2), they could not choose not to act as they do. When Hadley applies his criticism to the (putative) labour of beavers, however, I fear he runs close to reducing these NHAs to mere automata. We know, however, that they are not, but are thinking, feeling beings with a capacity for preferences and choice. Jonathan L. Clark (2014), who defends the claim that NHAs might be considered labourers in a Marxian sense, draws upon the words of prominent ethologists (Gould and Gould, 2007; Griffin, 2001) to rebut the

arguments of those who claim that beavers lack the mental sophistication necessary for their labour-like-activity to be considered labour.

> Describing how beavers excavate their burrows, [James L.] Gould and [Carol Grant] Gould (2007: 257) observe that "[i]magination, an ability to plan, and a ready willingness to learn from experience seem the most realistic combination of cognitive faculties to generate this aspect of the beaver's life". "And this is just the burrow", they add. Offering a story about a group of beavers that repaired a dam that human vandals had damaged, [Donald] Griffin (2001: 111) suggests that beavers are able to develop novel solutions to unexpected and unprecedented problems (see also Gould and Gould 2007: 266–268). "[W]hen an animal can repair unlikely damage to something it has built", Gould and Gould (2007: 278–279) explain, "the simplest interpretation is that it has some kind of picture of the goal or the structure of the finished product". (Clarke, 2014: 150)

Beavers, then, display behaviour indicating initiative, purpose, rationality and choice behind their labouring. Importantly, these are precisely the kinds of things that NHA labour might be thought to lack, and that might be used to ground a claim that NHA 'labour' should not be considered of normative significance. It is true that beavers are driven by unchosen instincts and urges, but so are humans – we do not choose to feel hunger, fear, sexual attraction, pain. And while beavers are somewhat predictable, so are humans. It would be unusual to see a human or a beaver choosing to fight a bear, or fasting, or killing their own offspring, but afflictions or extreme circumstances may indeed lead either to these things. As such, I

conclude that – at least in some cases – the labour of NHAs can and should be considered normatively significant (for related discussions, see Cochrane, 2016; Clark, 2014).

To be clear, while some beings (human and nonhuman) do perhaps lack the possibility of the (weak, minimal) 'agency'[7]/initiative necessary for their labour to be morally significant, this cannot be used to claim that Lockeanism is inappropriate for grounding the (putative) property rights of all NHAs. This issue is complicated, of course, by the difficulty of drawing a line around those beings whose labour is morally significant. We cannot neatly split the world into those beings who choose to engage in laborious activity and those who do not; instead, many animals (human and nonhuman) exist on a spectrum from those who make (or have the capacity to make) very few choices to those who (can) make a great many. As we come to learn more about ethology and evolution, we recognise more and more that any difference between the labour of paradigmatic humans and the labour of NHAs is one of degree, not one of kind (Clark, 2014: 146-52). The important point, however, is that there are some NHAs who possess the capacities necessary for their labour to be normatively significant; some who choose to and plan to engage in labour for their own reasons, rather than being driven solely by an instinct to engage in something-resembling-labour (as, perhaps, are ants). This is all that is required to prevent this criticism from being fatal for Lockeanism, though it does mean that Lockeanism may be left unable to ground property rights for certain (nonhuman and, perhaps, human) beings.

Third objection: Exertion

[7] A recurring concern of animal ethicists has been rethinking ideas of 'agency' so that they might capture the actions of NHAs. For a critical review, see Weisberg, 2015.

A similar worry raised by Hadley concerns the plausibility of the moral significance of exertion.[8] He writes that

> Part of what seems important about exertion is that in expending their energy the individual concerned is making some kind of sacrifice, in the sense that they are putting themselves out, so to speak. … [W]hen animals expend energy in the process of laboring, are they making a sacrifice in the sense of bearing some cost to themselves? For example, have they chosen to forego an activity in order to free-up their time and energy for the express purpose of engaging in labor? Is there anything they would prefer to be doing at the time? A proponent of the labor mixing argument in support of animal property rights needs to answer these questions. (Hadley, 2015: 43)

It seems clear that NHAs are forgoing activity when they labour; while a bird builds her nest, she is forgoing feeding, breeding, bathing and other activities in which she might otherwise be partaking, and may even be putting herself at some risk – she may go to places she would not normally and may act in ways atypical, potentially exposing her to predators, parasites and other dangers.

Hadley's question, however, is whether she chooses to forgo these other activities. It is not clear to me why Hadley places the normative importance upon this that he does. It is

[8] The significance of exertion may seem unclear from the recapitulation I offered of Locke's account of property, but the reading I have offered is only one available; again, I wish to make no claims about Locke, and 'Lockeanism' extends beyond Locke himself.

easy to imagine craftspeople and artists who are so absorbed by their activity that they neither actively choose to forgo other activity, nor would they rather be doing anything but crafting. Imagine a whittler so keen to finish her flute that she does not even notice her hunger or the cold. It would be odd to use her absorption in her labouring as an argument against the finished flute being her property. If anything, we would do the opposite; we would be inclined to think that she had truly earned her flute. Imagine, too, that the whittler would not prefer to be doing anything else; again, there is no clear reason that this would mean that she must renounce her property right in the flute.

The putative fact that NHAs might be more driven by unreflective urges or the necessity of survival than most whittlers should not worry us. Even if – implausibly, perhaps – we imagine that a drey-building squirrel is driven only by a survival instinct,[9] we can attribute property rights based on her labouring. The Lockean would not deny that *humans'* instinct for survival is often what drives them to labour: shelter, food and water are among the most basic needs of humans, and it is towards them that we frequently work. It would be odd indeed to suggest that the desperate labour of a castaway to acquire meagre supplies of food, water and shelter should be dismissed as not truly property-grounding because they were motivated by her survival instinct. The drive for survival is at the very foundation of a labour-based account of property acquisition.[10] All of this means that Hadley's worry about how NHAs may not truly 'exert' themselves is misplaced.

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[9] Distinct, it should be noted, from the hypothetical instinct to engage in something-resembling-labour that I mentioned earlier.

[10] Locke makes precisely this point. Though his claim is not strictly part of his labour-mixing account of property, he writes that natural reason 'tells us, that men, being once born, have a right to their preservation, and consequently to [food] and drink, and such other things as nature affords for their subsistence' (2003: §2.25).

Fourth objection: Insufficiency of property

I have shown how Hadley's worries about Lockean property rights for NHAs are not fatal. I will now turn to a final concern, this one raised by Donaldson and Kymlicka. The authors write that

> It is one thing to say that a bird has a property right in its nest, or that a wolf has a property right in its den – specific bits of territory used exclusively by one animal family. But the habitat that animals need to survive extends far beyond such specific and exclusive bits of territory – animals often need to fly or roam over vast territories shared by many other animals. Protecting a bird's nest is of little help if the nearby watering holes are polluted, or if tall buildings block its flight path. It's not clear how ideas of property rights can help here. (Donaldson and Kymlicka, 2011: 160)

They explicitly present this as a challenge to Hadley, but, given his focus on property rights over territories, it is perhaps not as well-targeted as it could be. Nonetheless, it does seem to be an apt challenge to a Lockean account of NHA property. The authors argue that property rights are not enough to protect NHAs' interests in their space, and that NHAs should instead be considered sovereign over their territory (2011, chap. 6).[11] They draw an apt comparison to the approach of European imperialists, who paid lip-service to the idea that indigenous

[11] The argument is definitely an interest-based one, of a similar structure to Hadley and Cooke's – which will be expanded upon shortly – though the authors are perhaps not as clear about this as they could be (cf. Donaldson and Kymlicka, 2013a; Milburn, forthcoming-b).

peoples possessed property rights, but who nonetheless denied that the peoples were sovereign, resulting in oppression (2011: 178).[12]

It is true that Lockean accounts alone are unable to offer many NHAs a property right over their whole territory. Rabbits' warrens and birds' nests are protected as property, while the rabbits' foraging ground and the birds' cliff-face remain part of the commons. Distinctions may even seem, on interest grounds, arbitrary. For instance, constantly-travelling NHAs, like whales, seem to have significantly less protection than NHAs – moles, say – who spend the majority of their life in areas that they have created. These apparently-arbitrary elements are features, rather than bugs, of Lockeanism. The same 'problems' arise in the human case: the work of a stonemason more clearly creates property than the work of a gymnast, while farmers who work the land are entitled to more property than foragers who take from it. It is unsurprising that a labour-mixing account of property does not clearly map to an interest-based account of property for the simple reason that the former is not – typically – particularly concerned with interests.

Of course, there is no reason – and this is my motivation for exploring it – that this account could not be incorporated into a broader picture as one part of a wider political animal ethics. If Donaldson and Kymlicka are right that NHAs possess interests in their territory that are not properly protected by a (Lockean) account of property (and they surely are), then other tools – perhaps including sovereignty or an interest-based territorial right – could be used to complement it. Thus, importantly, the various accounts offered by Donaldson and Kymlicka, Cooke, Hadley and myself need not be in competition. Indeed, to

[12] There is potentially a parallel to be drawn with Locke, here, as Locke has been read as concerned, in developing his account of property, precisely with denying that Native Americans had a right of control over their space (Arneil, 1996: chap. 6).

the extent that they respond to different kinds of problems (or different facets of the same problem), they may be perfectly harmonious; future political theories of human/NHA relations may be able to fruitfully draw upon several of the offered tools simultaneously.

Property and interests

Given the preceding discussion of the criticisms of the application of Lockean property rights to NHAs, it might seem that, even if Lockeanism could be applied in certain instances, it is not a particularly promising account for the protection of NHAs. However, I will shortly explore some positive defences of the application of Lockeanism. Before I can do this, however, it is worthwhile setting out the existing interest-based cases for NHA property as a point of comparison. Both Hadley and Cooke, who have offered the most detailed arguments for animal property rights, take property as a tool that exists in real-world political practice that might be applied to protect NHAs,[13] aiming to produce rich proposals ripe for implementation, the details of which differ in significant ways. Cooke's case can be summarised as follows:

CP1: Some NHAs depend upon their territory for continued survival.

CP2: Some NHAs have an interest in continued life strong enough to ground a duty not to kill.

[13] Hadley is explicitly pragmatist in his commitments (Hadley, 2015: chap. 6), endorsing a functional account of property as a tool that serves a particular allocative purpose (private correspondence; see also Hadley, 2015: 118), while Cooke, along with other thinkers in the political turn, has a strong focus on achievable change (Milligan, 2015, but compare Cochrane, Garner and O'Sullivan, 2016).

CP3: The groups referred to in **CP1** and **CP2** (at least partially) overlap.

CP4: An interest in life strong enough to ground a duty not to kill also grounds a duty not to deprive of the conditions necessary for life.

CC1: Given **CP1-4**, some NHAs have an interest in their territory strong enough to ground a right to said territory.

CP5: Some NHAs do not depend on their territory for continued survival, but do depend on it for wellbeing.

CP6: Some NHAs have an interest in wellbeing strong enough that they have a right not to be deprived of the conditions necessary for wellbeing.

CP7: The groups referred to in **CP5** and **CP6** (at least partially) overlap.

CC2: Given **CC1** and **CP5-7**, there are at least two groups of NHAs who possess a right to their territory.[14]

CP8: The right referred to in **CC2** can and should be protected with a property right.[15]

CC3: At least some NHAs should have a property right in their territory.

Cooke, then, offers two ways that NHAs have a strong interest in their territory, and these interests – assuming an interest-based account of animal rights (Cochrane, 2012) – can

[14] **CP1**-**CC2** is adapted from Cooke, forthcoming: 3-5.

[15] **CP8** is adapted from Cooke, forthcoming: 6-8. If property rights are unsuccessful in protecting these interests, Cooke argues, territorial or successional rights, leading ultimately to sovereignty rights, are appropriate remedies (Cooke, forthcoming: 8-23).

ground rights. Cooke's argument shares a number of similarities with Hadley's (2015: chap. 4; cf. Hadley, 2005; Hadley, forthcoming). Hadley's basic approach (2015: 54) seems to utilise two separate arguments for NHA property rights. The first is based on a comparison to humans' interests in property:

H1P1: The interests and lives of NHAs count for something.

H1P2: NHAs have an interest in the use of natural goods to meet their basic needs (and those of their offspring).

H1P3: Some weak human interests are held to be sufficient to give rise to a property right.

H1P4: The interests referred to in **H1P2** are at least as important as the interests referred to in **H1P3**.

H1C1: NHAs have interests important enough to ground property rights.

H1C2: NHAs have property rights.

Before outlining the second strand of Hadley's argument, it is worth noting that important (as used in **H1P4**) is not strong. Hadley is making a moral claim about the comparative importance of interests, not a descriptive claim about their comparative strength. As such, this argument, upon which he leans quite strongly in some places (e.g., Hadley, forthcoming), has a certain axiological element not present in Cooke's argument.

Hadley's second argument, like Cooke's, leans explicitly on an interest-based account of (animal) rights:

H2P1: NHAs have an interest in the use of natural goods in their territories to meet their basic needs (and those of their offspring).

H2P2: A sufficiently strong interest in x, ceteris paribus,[16] grounds a right to x.

H2P3: The interests referred to in **H2P1** are sufficiently strong in the way referred to in **H2P2**.

H2C1: NHAs have a right to use the natural goods in their territories.

H2P4: If NHAs 'have a right to use natural goods this means that, logically, they have property right in the good concerned' (Hadley, 2015: 54, emphasis Hadley's).

H2C2: NHAs have a property right in [the natural goods contained in] their territories.

I outline all three of these arguments to show that there are a number of ways that interests could ground a property right for NHAs. It is not my goal to either criticise or defend the basic arguments of Hadley and Cooke here; instead, this introduction – without, admittedly, any discussion of the practical recommendations offered – is sufficient for present purposes, allowing a point of comparison to the alternative Lockean framework I have proposed. That Lockeanism offers an alternative account to interest-based accounts (either as conceived by Hadley/Cooke or more generally) should be clear; not only is the theoretical basis of property

[16] Allowing, e.g., that there are no strong countervailing interests. Hadley seems to take the usual ceteris paribus stipulations for granted.

different, but each account potentially offers property rights over resources excluded by the other. For instance, there are many items that particular NHAs have a strong interest in using but with which said NHAs have not mixed their labour. An obvious example is found in the resources of which the NHAs will make use in the future. These are typically protected as part of the NHAs' territory by Hadley and Cooke, but are completely unowned on a (pure) Lockean account. On the other hand, there may be items upon which NHAs have laboured but in which they have very little interest – I will later use the example of the trinkets collected by crows – and that may not even be protected under the broad territory-level protections offered by interest-based rights. For example, particular NHAs may actively leave their territory in order to acquire items, or else items may be removed from the NHAs' territories (by wind, say).

This established, I will, for the remainder of this paper, explore whether Lockeanism might fruitfully be included in political theories of animal rights. Specifically, I will offer three advantages (to activists and/or NHAs) that Lockean property rights have over interest-based property rights. The first concerns property, the second concerns the breadth of the right, and the third concerns the strength of the right. To be clear, my purpose in offering this defence is not to say that all talk of interest-based NHA property rights should be replaced with Lockean rights. I do not believe this. Instead, I aim to illustrate that Lockeanism should not simply be dismissed.

First advantage: Genuine property

The first advantage is that the Lockean account seems to more clearly ground a property right than does the interest-based account. Cooke deploys property rights as a tool towards the protection of the actual right that is possessed by NHAs, which is a habitat right. He is

explicitly unconcerned with some aspects of ownership,[17] stressing simply the putative right NHAs have to use their 'property' (Cooke, forthcoming: 2, 7). Similar seems to be true in Hadley (AUTHOR1), though he is, admittedly, more ambiguous about whether the 'property' rights are more than usufructuary. In the subtitle of his book, we see that 'property rights' become 'habitat rights', perhaps because he posits a surprisingly close relationship between the two; as already mentioned, Hadley holds that if a NHA has 'a right to use natural goods [then] this means that, logically, they have a property right in the good concerned' (Hadley, 2015: 54, emphasis Hadley's). This is something that many property theorists will deny. Take, for instance, a legal right-of-way. I have a right to use footpaths over the property of others, but I certainly do not have any claim to owning the land upon which I walk.[18] Thus, for Hadley – as for Cooke – property seems to be a tool for the protection of NHAs' interest in their use of their territories, rather than something affirmed in its own right. To be clear, this is not a mere terminological dispute; to claim that something is the property of someone has certain rhetorical force, and posits the existence of a particular kind of legal right (or collection of legal rights).

Lockeanism is also able to avoid certain surprising implications of NHA property as already theorised. Odd conclusions are not necessarily wrong, and may well be the correct outcome of a rigorously-applied interest-based account, but they could lead to the account being dismissed. In particular, Hadley is of the view that it would be arbitrary to deny NHAs property rights in human-made structures, using the example of black kites who nest upon

[17] A property right over x is often considered a bundle of rights over x; a right to use x is only one right within this bundle. Other rights might include a right to exclude others from x, a right to destroy x and a right to relinquish one's claim on x.

[18] Or, to put this another way, that I possess an important usufructury right concerning the land is not sufficient – in technical or everyday dialogue – for me to own the land.

communication towers versus those who nest in trees (private correspondence). Just as birds nesting in trees would have a property right over the tree, he suggests, birds nesting on communication towers would have a property right over said towers. However, the thought that a NHA could claim property rights in a human-made, human-owned and human-used structure will be worrying for many theorists and practitioners.[19] If we were to say that genuine NHA property was limited to Lockean property, we would be able to deny that the birds have a property right in the tower. The Lockean account could say that the birds have property rights in their nests, but not in the structures upon which they are built. However, this would not be a toothless claim, as a bird's right to her nest might ground limitations on what the human owners of the tower might do (even without any property right being given to the birds).

This, though, may be too hasty;[20] if one uses the property of someone else in the construction of something new, a property right is likely not gained at all. Lockeanism is not a labour theory, but a first labour theory (Waldron, 1990: 176). As such, the birds seem to have no property right over their nests or the towers under the Lockean account; this, though, may be a more plausible solution than saying that they have property rights over both. We could still posit a kind of interest-based usufructury right – which is, I think, ultimately what Hadley's 'property' right is – without making the dubious claim that NHAs have a property

[19] The Lockean account could nonetheless allow NHAs property in human-made items when a human has (perhaps through abandoning it) relinquished property rights. A coot who builds a nest using litter could not be denied a right to her nest on the grounds that the litter once belonged to humans.

[20] I thank [redacted] for this point.

right over human-owned-and-used structures. In this sense, Lockean property rights will, ceteris paribus, be more significant for free-living NHAs than they are for liminal[21] NHAs.

Second advantage: Breadth

A Lockean property right seems to be broader than an interest-based property right as conceived by Hadley and Cooke in two significant ways. First, Lockeanism moves beyond territory. NHAs labour on particular items, and these items can be protected on Lockean grounds, whether or not they fall within NHAs' particular territories. This includes not just carefully selected tools – the otter's rock, the chimp's stick, the octopus's coconut shell – but also cached foodstuffs, semi-movable structures or other trinkets that NHAs have gathered or produced for whatever reason. Particularly important for many NHAs may be the products that their body has produced: their eggs, their fur or feathers used to line dens or nests, or even their faeces, if they are not immediately abandoned.[22] Lockean accounts can clearly account for the fact that these items belong to particular NHAs in a way that interest-based rights (as conceived by Hadley and Cooke) cannot.

Second, Lockean rights, as indicated above, can include more than merely a right-to-use. Under interest-based 'property' rights in territory (as they have so far been conceived), NHAs have a right to use their 'property', but only a limited right against human use of their 'property'. A Lockean right can overcome this; not only does a squirrel have a right to use her

[21] 'Liminal' NHAs are those who inhabit the conceptual space between 'domestication' and 'wildness' (Donaldson and Kymlicka, 2011: chap. 7).

[22] NHAs' territory is partially delineated by the presence of these items, but they may be found outside of the territory.

buried nuts, but she has a right against humans using them. Not only does a sparrow have a right to use her nest, but she has a right against humans using it. The advantages of this account are clear. On a territorial account of property rights, it could be that particular items upon which NHAs have laboured are not protected, even though their wider territory is. Of course, that they could, by exercising their right to use natural resources in their territory, search for other nuts or make another nest is little consolation for a starving squirrel or a bird who has missed her breeding window.

One could plausibly give this kind of breadth to an interest-based account of NHA property, but, to my knowledge, no one has done this. One could argue, first, that NHAs have an interest in certain items – including, but perhaps not limited to, (some) items on which they labour – strong enough to ground a property right in these items. For example, perhaps a squirrel does have an interest in certain nuts such that she has a property right in them independent of any property right she may have in the territory around them. Second, it could be claimed that NHAs' interests in some parts of their territory are such that they ground both a usufructuary right and an exclusionary one. For example, it may be that badgers' interests in their sets are such that, not only would humans violate the badgers' rights by preventing them from using their sets, but they would also violate the badgers' rights by entering the sets. As such, I do not claim that this breadth advantage is unique to Lockeanism, but it is an advantage offered in contrast to interest-based property rights as they have been conceived so far.

Third advantage: Strength

Lockean property, when applicable, is considerably stronger than interest-based property. An interest-based ownership claim is in constant jeopardy of being overridden by competing

interests, or else of being challenged on the grounds of the limited interest the owner has in the property.[23] Take a corvid's interest in the trinkets – rocks, litter, leaves – she has gathered. Assume, as is typical, that these are mostly worthless. It could easily be argued that the corvid does not have any particularly strong interest in keeping the trinkets. The bird's fascination with a particular item is likely ephemeral, and, even in that time, the item may not be particularly important to the crow.[24] Let us also imagine that certain ornithologists are fascinated by crows' habits, meaning that they would treasure a collection of crows' trinkets. They would take pleasure from looking at and thinking about the collection, it would serve as a conversation-starter, and so forth. Under an interest-based account (even assuming that an interest-based account can move beyond habitat), it seems that humans would be able to legitimately take these trinkets from the crows, if they could do so without violating other interests the crows might possess (say, by unobtrusively taking them from any caches or nests in which the crows store them).[25]

The Lockean account does not need to make this kind of concession – extreme scenarios aside, the items belong to the crow until she freely chooses to discard them or give them away. The significance of this point does not need to be limited to this case. For example, depending on the strength of birds' interests in having young, it might be argued that humans' taking of birds' eggs and nests could be legitimate, even for trivial purposes. Indeed, the strength of the right is not merely advantageous because it offers greater

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[23] Depending on the precise account of interest rights utilised.

[24] There is an ambiguity in the word 'interest'. By something being 'important to the crow', I mean from the crow's point of view. In the case of trinkets, the crow only has an interest in the item, if at all, because she is interested in the item.

[25] This example draws upon the case of Gabi Mann, who treasures a collection of trinkets that she has been freely given by crows (Sewall, 2015).

protection for NHAs (in certain cases), but also because it prevents us having to work out interests anew each time a human has some desire to make use of something that is ostensibly the property of a NHA. Instead, we can simply draw a line under those things that NHAs create and use – extreme scenarios aside, these items belong to the NHAs, not to us, no matter how much we think NHAs do not really need them or how much we think it would be good for us to have them.

Concluding remarks

I have defended the Lockean account of NHA property against criticisms and suggested that it may hold certain advantages over the main competing account. As such, I conclude that, while Lockean property rights are surely not the golden bullet that NHAs need in order to be saved from the many and various harms that they face at human hands, the account is one that should not be dismissed out-of-hand as inapplicable to NHAs. In addition, we may (insofar as we should be concerned with protecting NHAs) have reasons to actually seek the real-world institution of such a system. As a caveat, I repeat that I have neither defended nor criticised (nor, indeed, endorsed or rejected) the Lockean account of property simpliciter. Instead, I have explored its application to a particular kind of case.

In closing, it is worth saying that this paper should not be read as a criticism of those authors with whom I have engaged. Instead, I have explored an overlooked conceptual tool, or else explored a particular problem from an alternative direction. Like Cooke, Donaldson, Kymlicka and Hadley, I hope for a world in which NHAs, including free-living NHAs, are offered considerable institutional protection from the arbitrary and harmful interferences of humans. One of the most exciting and important aspects of the political turn is the chance to explore new and alternative approaches to animal ethics (Donaldson and Kymlicka, 2013b).

The present work has shown that Lockean property rights are one tool that could and, perhaps, should be used as a part of these approaches.

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