

Back to Bundles: Deflating Property Rights, Again

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World is crazier and more of it than we think,

Incorrigibly plural...

The drunkenness of things being various.

-Louis MacNeice, 'Snow'

1. Introduction

My aim in this paper may, at first glance, strike the reader as somewhat odd. It is a defense of a theory of property rights which, after all, has been prevalent among legal theorists for most of the last century, and which is taught as a matter of routine in most undergraduate property-law courses in order “to disabuse entering law students of their primitive lay notions regarding ownership.”²

Yet those “primitive lay notions” have been reinforced in recent years by several decidedly sophisticated legal theories. Among contemporary theorists, the previous orthodoxy is under siege, with a substantial faction now holding that the so-called “bundle-theory” of property rights is no longer tenable, and that a robust relation of ownership of things can and should be re-established.³ The bundle theory may serve the purposes of “the

¹ Early versions of this paper were presented to M.L.S. and LL.M. students at the National University of Ireland, Maynooth, and to the Irish Jurisprudence Society. I am grateful to those audiences, as well as to Sibó Banda, Garrett Barden, Brendan Curran, Brian Flanagan, John Glackin, Gerald Lang, Garret Ledwith, Tanya Sheridan, and Robbie Williams, for their helpful discussion of this material. I am also indebted to the anonymous reviewers for *Legal Theory*, whose suggestions greatly improved the finished article.

² Bruce Ackerman, *Private Property and the Constitution* 26 (Yale U.P. 1977).

³ Hugh Breakey, *Two Concepts of Property: Ownership of Things and Property in Activities*, 42 Phil. F. 239 (2011), at 240-2. The new consensus is also evident in a recent symposium on the subject; see

dimmest law student”,⁴ according to this new consensus, but it will not serve an adequate account of judicial and lay reasoning about property-rights. Accordingly, the burden of proof rests once again upon those of us who advance a “deflationary” analysis of such rights.

What I intend is, indeed, to “deflate” the somewhat mystical force that is seemingly taken by layman and neo-property theorist alike both to unify the various legal relations which we recognise as falling under the rubrics of *property* or *ownership*, and to imbue them with a distinctive moral status. The apparent unity of those concepts,⁵ I shall argue, is illusory, and largely the result of historical accident. Whatever normative force we associate with the concepts, moreover, is properly attributed to their component parts; no moral or legal conclusion can or should be drawn from the declaration that some thing is property, or that some person is its owner.

I will begin the paper by sketching briefly the outlines of the – or at any rate, a – “bundle theory” of property-rights. I will not go into any great detail in expounding a particular version of it; there are, of course, as many different bundle theories as there are theorists, so what I will aim to present here is a way to understand the common conceptual core of such theories. In subsequent sections, I will consider and reject two of the most influential objections and alternatives to the bundle theory, advanced by James Penner and

Daniel Klein & John Robinson, *Property: A Bundle of Rights? Prologue to the Property Symposium*, 8 *Econ. J. Watch* 193 (2011).

⁴ Ackerman, *Private Property* (1977), 26.

⁵ Some of the philosophical literature on property has been concerned with the nature of “concepts”, and with the distinction, if any, between these and “ideas”; for an excellent discussion and overview of these issues, see Stephen R. Munzer, “Property and Disagreement,” in eds. J. Penner & H.E. Smith, *Philosophical Foundations of Property Law* Ch. 13 (Oxford U.P. 2013). While I have a view on this question, I don’t believe that anything in the present argument hangs on it; and it seems methodologically sound to me, as far as is possible, to try and keep these two rather dissimilar sets of philosophical issues separate from each other. I am grateful to an anonymous referee for bringing this apparent lacuna to my attention.

J.W. Harris. My grounds for doing so will, I hope, give some further indication of what I think the contours of a defensible bundle theory to be.

I will not discuss the wider arguments made by these writers about economic and distributive justice. Though sympathetic to many of their concerns, I doubt that successful redistributive arguments will be dependent on the particular content of any distinctive and robust account of property or ownership. Indeed, I suspect that stipulating such accounts of property and ownership may amount in some cases to trying to acquire redistributive justice on the conceptual cheap, avoiding the hard work of detailed moral and political argument. But those concerns lie well beyond the scope of this paper. My own belief is that demystifying the notion of property and ownership would allow more rational public discourse about resource allocation, environmental protection, social justice, *etc.*; but while that is a motivation for the theory I develop here, it cannot be an argument in favour of its truth.⁶

2. Hohfeld and the Bundle Theory

The bundle theory, in its modern form, is primarily the result of work by two figures; Wesley Hohfeld⁷ and A.M. (Tony) Honoré⁸. Hohfeld made pioneering, and perhaps

⁶ In the words of a fellow enthusiast; the bundle theory is “an analytical scheme applicable to many legal systems and the property arrangements within them. A virtue of such a scheme is that it makes few if any moral or political commitments. The analysis of property law is one thing and proposals for its reform are quite another.” Stephen R. Munzer, *A Bundle Theorist holds onto his Collection of Sticks* 8 *Econ. J. Watch* 265 (2011), at 269.

⁷ Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning: And Other Essays* (Yale U.P. 1923). Since the only commercially available editions of Hohfeld’s work at this time are facsimile reprints of at best intermittent legibility, the reader is invited to contest the veracity of all passages quoted from Hohfeld’s work in this paper.

⁸ A.M. Honoré, “Ownership,” in *Making Laws Bind* 161 (Clarendon Press 1987). Opinions differ as to whether Honoré, who sought to outline the “liberal concept of full individual ownership” (*Id.*), can

unprecedented, efforts to impose a measure of logical rigour on legal concepts in general, whose influence has proved especially lasting in rights-theory; Honoré's writings on the concept of property are among his most significant contributions to an extensive range of topics in legal philosophy and general jurisprudence. I will discuss the relevance of both to my argument after briefly outlining what I take to be the bundle theory's key features.

Although now inextricably linked with Hohfeld and Honoré, the notion of property rights as comprising a "bundle of sticks" predates their work.⁹ The bundle theory holds, at its most basic, that the "right" of a property-owner is separable into a series of component right-parts; my "ownership" of some chattel may comprise, *inter alia*, a right of exclusion, a right of use, a right of possession, and a right of alienation, none of which is conceptually dependent on any of the others.¹⁰ The doctrine of estates in real property introduces further, more exotic interests; I may acquire the right of occupation in an apartment from you, perhaps supplemented by various easements and rights of access, though my right to alienate it may be restricted by the terms of the license. You may in turn have only a life interest in that apartment, with a reversion vesting in a relative upon your death. These arrangements are subject to revision over time in response to economic and social circumstances, and can thus vary substantially from jurisdiction to jurisdiction, with many local peculiarities developing. The common law envisages, for instance, such collective

properly be grouped with the bundle theorists; at any rate, the bundle theorists who followed made extensive use of his schema.

⁹ The first known use of the term in this context is John Lewis, *A Treatise on the Law of Eminent Domain in the United States* 43 (Callaghan & Co. 1888); "The dullest individual among the people knows and understands that his *property* in anything is a bundle of rights." The first metaphorical reference to a bundle of sticks, however, is Benjamin N. Cardozo, *The Paradoxes of Legal Science* 129 (Columbia U. P., 1928); "The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time."

¹⁰ See *e.g.* Mosk J's dissent, at 509-10, in *Moore v. Regents of the University of California* 793 P.2d Cal. 479 (1990).

provisions as those of the Israeli *kibbutznik* and the American Hutterite;¹¹ if the property is Irish and the owner indebted, the High Court may encumber it with a “judgment mortgage”.¹²

The bundle theory regards these individual and separable rights, or “sticks”, as having no substantive, essential connection to each other. To the extent that any two or more of them tend to accompany each other, their conjunction is contingent rather than intrinsic; from a logical point of view, we might as easily have tied any other combination of the possible interests in the chattel or property together in the bundle. In our ordinary commercial transactions, we can and do take these bundles apart, redistributing the sticks among others’ bundles, and replacing them with new ones.¹³

Who, then, is “the owner” of some particular piece of property? The question, for a bundle theorist, involves something like what Gilbert Ryle would have termed a “category error”.¹⁴ Since the number and kind of such interests in the property, all vested in different individuals, may be almost unlimited depending on the legal jurisdiction, it makes little intuitive sense to pick out any one interest-bearer as “the” owner. No particular interest or

¹¹ See *e.g.* Robert C. Ellickson, *Property in Land* 102 Yale L.J.1315 (1993), at 1346-8.

¹² See J.C.W. Wylie, *Irish Land Law*, 4th ed. 867-884 (Bloomsbury Professional, 2010).

¹³ In practice, the number and form of such fragmentations and redistributions permitted is limited by the so-called *numerus clausus* principle, principally as a result of the *in rem* nature of property rights that will play a large part in this discussion; see T.W. Merrill & H.E. Smith, *Optimal Standardisation in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1 (2000), and Joseph Singer, *Democratic Estates: Property Law in a Free and Democratic Society* 94 Cornell L. Rev. 1009 (2009), at 1021-9. For a beguiling account of the complexities of property-right arrangements, however (and of the degree to which the lay public’s understanding of their subtleties often outstrips that of legal specialists), *cf.* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan. L. Rev. 623 (1986). As detailed below, there are also relations of *logical* entailment between *e.g.* duties and their correlative rights; we may regard these, however, as instances of the *same* stick viewed from different perspectives.

¹⁴ See Gilbert Ryle, *The Concept of Mind* 16ff. (Hutchinson 1949).

right, and moreover no particular *combination* of those interests and rights, is either necessary or sufficient to establish ownership.¹⁵ “The lawyer, ...” as Jeremy Waldron notes, “will not be interested in finding out which of [the various parties] really counts as an owner. His only concern is with the detailed contents of the various different bundles of legal relations.”¹⁶

Any *unitary* notion of “ownership”, then, denoting a single canonical relation between person and property, seems to drop out of the legal picture altogether, surviving as a mere “folk-legal” concept in the discourse of laymen. Among the cognoscenti, even Ackerman’s “dimmest law student” recognises that the term is at best an imprecise place-holder for what really matters – which individual bears the particular stick or sticks relevant to the legal dispute in question.

That, at any rate, is the essence of the bundle theory of property rights. “Property” and “ownership” are therefore amorphous or “shapeless” concepts,¹⁷ failing to consistently pick out any determinate legal relation or set of legal relations. Rather, their extension changes from one occasion to the next; while everyday talk ascribes an essence or “core” content to the concepts of property and ownership, no such entity in fact exists. For the bundle theorist, then, the terms represent a sort of primitive hangover from outdated theories which legal science has now dispelled, in much the way that character-traits like courage and romance are still widely credited to the heart.

¹⁵ A fee simple interest with possession in land is widely considered to be the closest analogue to “absolute” ownership; nevertheless, even such an interest is subject to potential statutory restrictions on bequest, or to compulsory purchase by the state. See *e.g.* both the majority opinion by Brennan J and the dissent of Rehnquist J in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

¹⁶ Jeremy Waldron, *The Right to Private Property* 29 (Clarendon 1988). Cf. R.A. Posner’s discussion of the “train-sparks”; *Economic Analysis of Law* 8th ed. 63 (New York: Aspen Publishers, 2011).

¹⁷ Cf. *e.g.* Simon Kirchin, *The Shapelessness Hypothesis* 10 *Phil Imprint* (2010).

The theory has a distinguished philosophical lineage. It might not have been approved by Hume himself, but is certainly in the spirit of his injunction to “commit to the flames” as sophistry and illusion anything which was neither observable (like the sticks) nor knowable *a priori*.¹⁸ Indeed, my claim is that it represents a special case of what David Lewis termed “Humean Supervenience”, or “the doctrine that all there is to the world is a vast mosaic of local matters of particular fact, just one little thing and then another.”¹⁹ That is to say, anything true we can say about the world ultimately reduces to statements about the distribution of perfectly natural properties and relations; there are no necessary connections between the individual perfectly natural properties and relations; and those perfectly natural properties and relations are the intrinsic properties of sub-atomic particles and the spatio-temporal relations between them.

“Supervenience”, more generally, is a philosophers’ term of art for a relation between sets of properties; *A*-properties supervene on *B*-properties if and only if all differences in *A*-properties must be accompanied by differences in *B*-properties. Thus, for instance, the brittleness of objects is said to supervene on their physical micro-structure; if one windowpane is more shatter-resistant than another, then the atoms composing the two must be differently arranged. Conversely, a different arrangement of atoms does not entail a different level of brittleness, and my coffee mug may be just as prone to shattering as either windshield, while clearly being differently constituted.²⁰

¹⁸ David Hume, *An Enquiry Concerning Human Understanding* s.12, pt.3. (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford U.P. 1978).

¹⁹ David Lewis, *Philosophical Papers* vol. II ix (Oxford U.P. 1987).; cf. Helen Beebe, *The Non-Governing Conception of Laws of Nature*, 61 *Phil. Phenom. Res.* 571 (2000).

²⁰ See e.g. Jaegwon Kim, “Concepts of Supervenience,” in *Supervenience and Mind: Selected Philosophical Essays* (Cambridge U.P. 1993). Brian McLaughlin & Karen Bennett, *Supervenience*, *The Stanford Encyclopedia of Philosophy* (2011), <http://plato.stanford.edu/archives/win2011/entries/supervenience/> provides an accessible introduction to the topic.

For the sub-atomic particles discussed by Lewis, we may substitute individual “sticks” in the bundle of property-rights. The bundle theory holds, then, that anything we wish to say about what are commonly termed “property” and “ownership” can be said by reference exclusively to the properties of the sticks in question, that none of those sticks or their properties are necessarily connected with or related to any of the others,²¹ and that nothing above and beyond these sticks and their properties and relations is of relevance to “true” – that is, legally valid – judicial decision-making. Statements about “property” and “ownership”, in every case, are therefore either redundant – being reducible in full to their constituent claim-rights – or simply false, invoking mysterious entities of which we have neither evidence nor a coherent understanding.²²

²¹ This is *not* to say, *pace* Henry Smith, that the bundle theory must attribute the fact “(t)hat sticks come in standardized clumps—fee simple, defeasible fee, life estate, future interests, easements, and so on” to mere “happenstance” (H.E. Smith, *Property is not just a Bundle of Rights* 8 *Econ J Watch* 279 (2011), at 284). That the relations are not necessary or intrinsic does not mean they must be merely arbitrary. Thus, it is entirely inaccurate to charge bundle theorists with analysing a hypothetical diamond by “counting atoms” and ignoring important causal features of its physical structure (*ibid.*, at 279); what is denied is not that those causal features exist, but that they exist *necessarily*. *Cf.* Henry E. Smith, *Property as the Law of Things* 125 *Harvard L.R.* 1691 (2012), at 1709ff.

²² Perhaps the best known expression of this view is the criticism of *Local 1330, United Steel Workers v. United States Steel Corp.* 631 F.2d 1264 (1980) in Joseph Singer, *The Reliance Interest in Property*, 40 *Stan. L. Rev.* 611 (1988). The justices, Singer argues, “wrongly defined the issue as a search for the ‘owner’ of the property. They then assumed that, in the absence of specific doctrinal exceptions to the contrary, owners are allowed to do whatever they want with their property” (at 621). To search for “the owner” when many parties have compelling interests, he argues, “is fundamentally wrong. It is simply not the right question. To assume that we can know who property owners are, and to assume that once we have identified them their rights follow as a matter of course, is to assume what needs to be decided” (p. 637-8). Instead, the courts ought to “decide who wins the dispute on grounds of policy and morality, and then ... *call* that person the owner” (p. 638).

In metaphysical terms, the bundle theory is therefore like any Humean theory a naturalist, and an anti-essentialist, position. It is naturalist, insofar as it denies the existence of any further relation of “property” or “ownership” over and above the specific claim-rights; once these have been inventoried, there is nothing more the law needs to know. It is likewise anti-essentialist, because it denies that there is any particular “core” claim-right, or set of such rights, which determines how the concepts of “property” and “ownership” are to be applied. Depending on the variant, it may deny outright that any legal relation or group of such entities exists which corresponds to those concepts (an *anti-realist* bundle theory), or it may hold that *numerous* such relations or collections of them correspond to the concepts, which may be defined in any number of ways according to judicial convenience, and none of which possesses any special theoretical significance (a “promiscuous realist” bundle theory).²³ But for practical purposes, the difference between these variants is merely notational.

The greatest impetus to the bundle theory’s popularity came from the work of Wesley Hohfeld, who first demonstrated that the apparent unity of the property- and ownership-relations in fact concealed a myriad of distinct legal relations, in particular claim-rights, privileges, powers, and immunities.²⁴ Understood thus, moreover, it became clear that the property- and ownership-relations could be understood not as holding between a person and a thing, but rather – and less mysteriously – as holding between a great number of persons

²³ See e.g. John Dupré, *The Disorder of Things; Metaphysical Foundations of the Disunity of Science* (Harvard U.P. 1993).

²⁴ Hohfeld, *Fundamental Legal Conceptions* 96-7. The most important precursors to Hohfeld’s theory are Henry Terry, *Some Leading Principles of Anglo-American Law* (T & J.W. Johnson 1884), John Salmond, *Jurisprudence, Or, The Theory of the Law* (Stevens & Haynes 1902), and John Chipman Gray, *The Nature and Sources of the Law* (Columbia U. P. 1909); Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence* 6 Wis. L. Rev. 975 (1982) provides a useful summary of its historical context and development.

regarding a thing.²⁵ Accordingly, Hohfeld proposed to replace the traditional distinction between rights *in rem* and *in personam* with a new terminology;

*A paucital right, or claim (right in personam), is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights availing respectively against a few definite persons. A multital right, or claim (right in rem), is always one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.*²⁶

Thus, following and quoting with approval the position of Holmes CJ,²⁷ Hohfeld declared that the apparent distinction in kind could be reduced to a mere difference in

²⁵ For a clear recent expression of the contrary view, holding that Hohfeld and his successors have got things “exactly backward” in this regard (at 1692), see Smith, *Property as the Law of Things*. Smith’s view is that the “information costs” of keeping track of such a myriad of interpersonal relationships renders the Hohfeldian view radically impractical (see note 50, below), and that property therefore provides “a platform for the rest of private law” (at 1691) by simplifying these relationships as a much smaller and standardised number between persons and things. But the bundle theory, as Smith acknowledges (1605ff.), is an “analytical device”, which aims at revealing the fundamental nature of property-relations and quotidian property-talk; that it is usually far more efficient to abbreviate the multitude of fundamental relations into the everyday vocabulary is not something that bundle-theorists commonly deny, any more than physicists will typically eschew talk of the ordinary physical objects and properties which they nevertheless hold to be analysable without remainder into arrangements of sub-atomic particles and their properties.

²⁶ Hohfeld, *Fundamental Legal Conceptions* 72.

²⁷ “All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected.” *Tyler v Court of Registration* 175 Mass. 71 (1900), at 76. Cf. O.W. Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. R. 1 (1894).

quantity; a supposed right *in rem* was simply a great many rights *in personam* bundled together;

Suppose that A is the owner of Blackacre and X is the owner of Whiteacre. Let it be assumed, further, that, in consideration of \$100 actually paid by A to B, the latter agrees with A never to enter on X's land, Whiteacre. It is clear that A's right against B concerning Whiteacre is a right in personam, or paucital right; for A has no similar and separate rights concerning Whiteacre availing respectively against other persons in general. On the other hand, A's right against B concerning Blackacre is obviously a right in rem, or multital right; for it is but one of a very large number of fundamentally similar (though separate) rights which A has respectively against B, C, D, E, F, and a great many other persons. It must now be evident, also, that A's Blackacre right against B is, intrinsically considered, of the same general character as A's Whiteacre right against B. The Blackacre right differs, so to say, only extrinsically, that is, in having many fundamentally similar, though distinct, rights as its "companions." So, in general, we might say that a right in personam is one having few, if any, "companions"; whereas a right in rem always has many such "companions."²⁸

Note that the apparent distinction between contractual and property-rights has also vanished; Hohfeld finds such merely formal, extrinsic distinctions²⁹ spurious where the underlying substance of the right in question is invariant.

²⁸ Hohfeld, *Fundamental Legal Conceptions* 76-7.

²⁹ Cf. Mossoff's reading of *State v. Shack*, 277 A.2d N.J 369 (1971); "*Shack* is a prime example of how property rights disintegrate under the bundle conception of property ... Under such an approach, there is nothing really left to property that distinguishes it from any other *in personam* legal entitlements that the government distributes and regulates." Adam Mossoff, "The False Promise of the Right to Exclude," 8 *Econ. J. Watch* 255 (2011). For another relevant example, consider the lease/license dichotomy; see e.g. Wylie, *Irish Land Law*, at 1095 ff.

A final significant feature worth noting in Hohfeld's analysis is the so-called "Correlativity Axiom",³⁰ which joins the concepts of claim-rights, privileges, powers, and immunities with their respective correlates of duties, no-rights, liabilities, and disabilities. The axiom states that there is a symmetrical relation of strict implication between each pair; to take the most relevant and well-known example of rights and duties, my right of exclusive possession of an apartment strictly implies everybody else's corresponding duty to exclude themselves from it, and vice versa.³¹ Since the correlation is axiomatic, it is nonsensical to see the right as arising from the duty, or the duty from the right, "(j)ust as a slope's downward direction is not prior or posterior to its upward direction – either logically or temporally."³² The claim is not an empirical one; that every duty is owed to the holder of a right, and every right held against the bearer of a duty, is a purely analytical consequence of *what the terms "right" and "duty" mean*.³³

³⁰ The term is coined in Mathew H. Kramer, "Rights Without Trimmings," in *A Debate Over Rights: Philosophical Enquiries* ed. M.H. Kramer, N.E. Simmonds & Steiner Hillel 7-112, at 24. (Oxford U.P. 2000); "For Hohfeld, rights and duties ... were always correlative *by definition*. ... He posited the correlativity of rights and duties as a definitional fundament of his theory, by explicating the concepts of 'right' and 'duty' in such a way that each entails the other; each is the other from a different perspective."

³¹ Hohfeld, *Fundamental Legal Conceptions* 38 cites *Lake Shore & M.S.R. Co. v. Kurtz* 10 Ind. App. 60 (1894) ("'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated."), and cognate passages in *Howley Park Coal etc. Co. v. L. & N.W. Railway* 1 A C 11 (1913) and *Galveston etc. Railway Co. v. Harrigan* 76 S W 452 (1903).

³² Matthew H. Kramer, "Legal and Moral Obligation," in *The Blackwell Guide to the Philosophy of Law and Legal Theory* ed. Martin Golding & William Edmundson 179-90, at 188 (Blackwell 2005).

³³ Ernest Weinrib traces this insight about correlativity to Kant and Hegel: see Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L. J. 949 (1988), at 998-9; Ernest Weinrib, *Law as a Kantian Idea of Reason*, 87 Colum. L. Rev. 472 (1987), at 493, 495. The relevant passages seem to be those at G.F.W. Hegel, *Outlines of the Philosophy of Right* 56-7 (Stephen Houlgate trans., Oxford U.P. 2008) and Immanuel Kant, *The Metaphysics of Morals* §18-21 (Mary Gregor trans., Cambridge U.P. 1996). However, H.S. Maine, *Ancient Law: Its Connection with the*

The other major figure in the development of the bundle theory, as previously mentioned, was Tony Honoré, whose influential elaboration of Hohfeld's analysis distinguished eleven "standard incidents" of ownership.³⁴ While we need not consider each of these in detail, they now form the canonical list of sticks in each bundle, on which the "truth", or legal validity, of judicial determinations about property must supervene.

Yet although we may for most purposes, and for the sake of convenience, speak of these "incidents" as the sticks or judicial "atoms", the true import of Holmes and Hohfeld's analysis is rather more radical; the "ultimate" sticks of which the bundle is comprised are not these eleven, but *each of* these eleven as indexed not only to each individual right-holder and duty-bearer (your right of possession over Blackacre as held against me, and as held against my neighbour, are after all separable), but to each potentially detachable part of the things over which the rights are held (for you may partition Blackacre and sell me a right of

Early History of Society and Its Relation to Modern Ideas 269-70 (John Murray 1861) has argued further that no distinction between rights and duties existed in Roman law; see Kenneth Campbell, *Legal Rights*, The Stanford Encyclopedia of Philosophy (2011), <http://plato.stanford.edu/archives/spr2011/entries/legal-rights/>.

³⁴ Namely: the right to possess; the right to use; the right to manage; the right to the income; the right to the capital; the right to security; the incident of transmissibility; the incidence of absence of term; the duty to prevent harm; liability to execution; and residual character (Honoré, "Ownership" at 165-79). An alternative list is suggested by Dean Pound; 'a *jus possidendi* or right of possessing, a right in the strict sense; a *jus prohibendi* or right of excluding others, also a right in the strict sense; a *jus disponendi* or right of disposition, what we should now call a legal power; a *jus utendi* or right of using, what we should now call a liberty; a *jus fruendi* or right of enjoying the fruits and profits; and a *jus abutendi* or right of destroying or injuring if one like.' Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. 993 (1939), at 997. B Björkman & S O Hansson, *Bodily Rights & Property Rights*, 32 J. Med. Ethics 209 (2006) neatly compares further alternative schema due to Henry Sidgwick, Lawrence Becker, and others.

possession in the eastern, but not the western, half).³⁵ Since the sticks are so infinitesimal, it is little wonder that theorists have written of the “disintegration” of property.³⁶

3. Penner’s “Unified Concept”

So much for the bundle theory, as it has descended to us through Hohfeld and Honoré, and as I propose to defend it against the recent attacks. Why has its popularity declined so sharply in recent decades, to the point that recent theorists of property, in the course of outlining their own views, can regard it as abundantly refuted, and in no need of further discussion?³⁷ Even during its ascendancy, the contrary idea, of “an integrated notion of property existing prior to and informing the law,”³⁸ remained attractive for a variety of reasons, including its congruence with laypersons’ intuitions, and the purported ability “to explain the clear meaning and use of the term in theory and practice”³⁹, as well as to ground wider arguments about the justice of particular distributions of property. In particular, such

³⁵ Many cities, as I am grateful to an anonymous commentator for pointing out, have regulations that prohibit splitting city lots in two in this manner. There are, of course, excellent pragmatic reasons for regulations of this sort, which minimise the “information costs” imposed by excessively baroque, exotic, or fine-grained distributions of property-rights; some theorists (see note 50, below) have made these costs the basis of their opposition to the bundle theory. But according to the bundle theory, these are *contingent*, rather than *essential* connections between sticks, and there is nothing in the nature of property which determines that regulations must exist to link them in this way.

³⁶ Thomas C. Grey, “The Disintegration of Property”, in *eds.* Pennock & Chapman, *NOMOS XXII: PROPERTY* (New York U.P. 1980), at 69. For a very clear exposition and rebuttal of Grey’s somewhat extreme view by a fellow bundle-theorist, see Stephen R. Munzer, *A Theory of Property* (Cambridge U.P.1990), at 31-36.

³⁷ *e.g.* Breakey, *Two Concepts of Property*.

³⁸ *Id.*, at 241.

³⁹ *Id.*

a notion has been thought to provide a bulwark against “statist” confiscatory practices.⁴⁰ As previously stated, I don’t propose to discuss the issues of distributive justice in the course of this paper. Rather, I will focus on the ways that the concepts of ownership and property are meant and used, according to some of the more influential critiques of the bundle theory, with the aim of exposing a number of misunderstandings or misrepresentations of the theory. What these alternative theories share, which the bundle theory denies, is the focus on some supposed “standard” relationship that an owner might have to a particular physical resource, which they take to be paradigmatic of property and ownership in general.

The first such view I want to consider is that of James Penner. In a lengthy (110 pages) paper⁴¹ and a subsequent monograph⁴² he outlines both a critique of the bundle theory, and an alternative, “unified” concept of property, which rests on two main claims; the “Exclusion Thesis”, and the “Separability Thesis.” I will focus on the critical, rather than the positive, aspect of his theory; if his criticisms of the bundle theory prove unsuccessful, then the positive account loses both its motivation and many of its basic assumptions.

Penner’s critique begins inauspiciously. “Hohfeld,” he writes, “was mad for symmetry between rights and duties, and he based his notion of the correlativity of rights to duties on it.”⁴³ But as we have seen, with what Kramer termed the “Correlativity Axiom,” Hohfeld identifies a *logical* equivalence between X’s holding a right against Y, and Y’s having some correlative duty towards Y. That equivalence is not merely the expression of some irrational

⁴⁰ Klein & Robinson *Prologue*, 196-201 provide a range of quotations to this effect; but cf. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard U. P., 1985), which argues that the bundle theory itself – by making each “stick” a compensable taking – serves this protective function. This argument is reiterated in Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 *Econ. J. Watch* 223 (2011).

⁴¹ James Penner, *The ‘Bundle of Rights’ Picture of Property*, 43 *UCLA L. R.* 711 (1996).

⁴² James Penner, *The Idea of Property in Law* (Oxford U.P. 1997).

⁴³ Penner, *Idea of Property* 25.

aesthetic whim of Hohfeld's; it is, *prima facie*, a function of the very meaning of the terms.⁴⁴ So when Penner concedes that anybody believing in the correlativity of rights and duties is "pretty much bound to describe a right *in rem* as a multitude of rights *in personam*,"⁴⁵ but reassures us that "(n)o one without a commitment to Hohfeld's views regarding symmetry need define correlativity in this way,"⁴⁶ he owes us rather more than the expression of personal aesthetic preference for asymmetry, and rejection of the *in rem-in personam* reduction as implausible, that we are given. What we really need, and are nowhere given, is a wholly new account of the normal meaning of "right" and "duty", which establishes that they are independent, and unrelated, concepts.

Let us charitably suppose that some such definition of those terms is available, and acceptable. Why does Penner consider the equivalence of *in rem* and *in personam* rights to be implausible? The difference between the two which Hohfeld's analysis omits, he argues, is that for a right *in personam* – unlike a right *in rem* – it matters *which particular person* is the duty-bearer or the right-holder.

Consider the familiar Blackacre. "If A owns Blackacre," writes Penner, "then he may grant any number of rights *in personam* to specific or specifiable people to make use of it, walk across it, and so on. But it matters to A who they are, and it matters to them who A is."⁴⁷ A must know who they are in order to grant them the right, and they must know who A is and the scope of his rights in order to assess the content of their license. But in the matter of rights *in rem*, as when someone wishes to purchase Blackacre, no such personal familiarity with A is required;

⁴⁴ Cf. Walter Wheeler Cook, "Introduction," in Hohfeld, *Fundamental Legal Conceptions*; "Any given single relation necessarily involves two persons. Correlatives in Hohfeld's scheme merely describe the situation viewed first from the point of view of one person and then from that of the other."

⁴⁴ Penner, *Idea of Property* 25-6.

⁴⁵ *Id.*

⁴⁶ *Id.*, at 26.

⁴⁷ *Id.*

(t)hey may never see him, or hear about him, or even know if he has died and been replaced as owner by his younger sister. Their only relationship to him is through his property, in the sense that they can affect A only by acting on his property in some way. To them, A is only represented as his property, and what's more, he is not even represented as A. He is only represented as 'owner', i.e. his particular identity is completely obscure. This is no relation in personam between them and A. It is exactly the same relationship that everyone has to all the property that is not their own.⁴⁸

This is not an especially novel point. Indeed, it will be familiar to logicians and philosophers of language as a case of the *de dicto/de re* distinction.⁴⁹ Consider the phrase “the tallest boy in the class”; this picks out one determinate individual. But in semantic contexts such as belief- and desire- ascription or “modal” claims about possibility and necessity, termed “referentially opaque”, such a phrase may be ambiguous. In the sentence “Mary wants to kiss the tallest boy in the class,” the phrase may refer to that *specific* person, or it may function as a *general* description, which any number of others might have fulfilled in other circumstances. Suppose that Mary believes Henry to be the tallest boy; the sentence does not specify whether she wishes to kiss Henry in particular, or *whichever* boy happens to be tallest (perhaps she is mistaken, and Henry is in fact marginally shorter than Ben, who slouches). If it is Henry alone that she desires, the sentence should be interpreted *de re*, or as pertaining to the “thing” identified by the phrase; if instead she desires the tallest boy, regardless of who he may be, the sentence should be read *de dicto*, or as pertaining to the “words” of the phrase itself.

Something of this sort, I take it, is at the root of Penner’s concern. If I am granted a license *in personam* to walk Blackacre by its owner, I must have the ability to identify him, and the phrase “the owner of Blackacre” should consequently be read *de re*. But if I am not granted such a license, I have like everybody else a duty *in rem* towards “the owner of

⁴⁸ *Id.*, at 27.

⁴⁹ Introduced by W.V. Quine, *Quantifiers and Propositional Attitudes*, 53 *J. Phil.* 177 (1956).

Blackacre”, *whoever that may be (i.e., read de dicto)*. “Owing individuated, separate duties to particular property-owners would presumably require knowing what owners held what property in order to understand what those duties are,” writes Penner. “But we don’t. And that’s because our duty is not to trespass on the property of others. We are under one duty to the plurality of property holders however their property is distributed among themselves.”⁵⁰

The question here, which Penner appears to beg, is *why* I must have personal knowledge of somebody’s identity in order to hold a right of or bear a duty towards them *in personam*. We might suppose that I must have such knowledge if I am claiming a special or exceptional right; if I am asserting, for instance, that I *unlike everybody else* have been granted a license to walk Blackacre. But that would only be the case, if true, because the exceptional nature of my right, as against the “default” rights and duties of everybody else, would require it to be specifically granted.⁵¹ This in no way entails that the rights and duties we assume in default of being specifically exempted – such as the duty to avoid trespassing

⁵⁰ Penner, *Idea of Property* 27. Thomas Merrill and Henry Smith, *What Happened to Property in Law and Economics?* 111 Yale L. J. 357 (2001) use this as the basis for their influential “information-cost account” of property-as-exclusion; see also Larissa Katz, *The Regulative Function of Property Rights*, 8 Econ. J. Watch 236 (2011), at 239, Henry Smith, *On the Economy of Concepts in Property*, 160 U. Penn L. Rev. 2097 (2012), and Smith, “Emergent Property,” in eds. Penner & Smith, *Philosophical Foundations of Property Law* Ch. 14, especially §V. My own view, which coincides with Munzer’s (in his “Property and Disagreement”), is that “context and heuristics”, as in any area of human life, reduce the supposed cognitive burden of *in personam* property-rights considerably.

⁵¹ Even then, the right might be granted to me *de dicto* and without personal acquaintance as, for instance, “the individual renting the Gate Lodge of Blackacre” or “the oldest single man in the village”; *de re* reference and personal knowledge are *not* necessary for *in personam* rights. For this reason, we can dismiss Penner’s later concern that *in personam* rights “have their specific right-holders and duty-owners *essentially*” and that the title embodied in those rights cannot therefore be transferred to others (Penner, *Potentiality, Actuality, and ‘Stick’-Theory*, 8 Econ. J. Watch 274 (2011), at 277). I thank an anonymous reviewer for bringing this point to my attention.

on the property of others – are any less *in personam* than the exceptional ones we are granted specifically. When Penner “presumes” that we must know which owners (*de re*) hold what property in order to understand our *in personam* duties, he is helping himself to just what is at issue; the claim that an undifferentiated duty *in rem* cannot be reduced to a multitude of individual *in personam* duties.

Suppose that Mary, some years later, is out walking in the countryside. She happens upon Blackacre and briefly considers taking a shortcut across it. “I had better go the long way around,” she tells herself eventually, “since I have a duty to Blackacre’s owner not to trespass on the land.” Suppose further that Mary believes her old schoolgirl crush Henry to be the owner; nothing about the legal nature of the duty hangs on whether or not her belief is correct. *Whoever* the owner is, Mary bears an (otherwise) identical duty to *that person* not to trespass. The distinction between *de re* and *de dicto* meanings can be problematic, but only in contexts of “referential opacity,” when the intended reference of the sentence may fail. Since the law does not traffic in such statements,⁵² the ambiguity identified by Penner cannot be legally significant.

Against the view that property is “a structural composite”, Penner goes on to propose an alternative view of property as “a single right protecting a single, identifiable interest.”⁵³ The argument for this conclusion is “essentially a burden of proof argument, drawing on the intuition of Occam’s razor.”⁵⁴ This invocation is surprising, to say the least; William of

⁵² Actually, this is not *quite* correct. I suspect, for instance, that a case of *de re/de dicto* opacity in the context of a demonstrative reference – as discussed by David Kaplan, *On the Logic of Demonstratives*, 8 J. Phil. Logic 81 (1978) – may be the best theoretical explanation of the celebrated distinction between the common-law contract cases *Cundy v. Lindsay* 3 App. Cas. 459 (1878) and *Lewis v. Averay (No. 1)* 1 Q.B. 198 (1971). But that is another paper’s work; the claim is sufficiently accurate for our current purposes.

⁵³ Penner, *The ‘Bundle of Rights’ Picture* 739.

⁵⁴ *Id.*

Ockham's injunction that *entia non sunt multiplicanda praeter necessitatem*⁵⁵ would serve perfectly as an epigram for the bundle theory, and its insistence that the phenomenon of property can be fully explained on the basis of the individual "sticks", without any appeal to a wider, all-encompassing relation of "property-ownership".

Penner, though he elsewhere explicitly divides his alternative account into an "exclusion thesis" and a "separability thesis,"⁵⁶ states his view of property most succinctly thus;

*The right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it, and includes the right to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.*⁵⁷

This certainly captures much of the intuitive force of the folk-legal concept of "property". However, the attempt to shoe-horn various aspects of property-law into – and various other aspects of law out of – this concept of a "single, coherent right"⁵⁸ can only be described as tortuous.⁵⁹ The problem is not that Penner is unsuccessful in the two hundred or so pages

⁵⁵ "Entities are not to be multiplied beyond necessity."

⁵⁶ Penner, *Idea of Property* ch. 4-5.

⁵⁷ Penner, *The 'Bundle of Rights' Picture* 742.

⁵⁸ *Id.*, at 754.

⁵⁹ Here is the summary of just a single instance, from Penner, *Idea of Property* 131; "My submission about the proprietary character of choses in action, then, is that *to the extent* that we regard choses in action, these rights *in personam*, as property rights, we do so because of their relative 'personality poverty' in relation to other rights *in personam*. What makes these problematic property rights is the fact that while the relationship is humming along and parties are meeting their obligation, when banks are honouring their depositors; balances, dividends are paid, and debt payments are made on schedule, these rights fulfil very much the role of property that money does. When things go awry, however, when holders are apt to lose shareholder suits or actions against their debtors, the rights revert, in a sense, to their *in personam* origins."

which the endeavour takes up. The problem, reminiscent of Thomas Kuhn's famous account of the Copernican Revolution,⁶⁰ is rather that such an extensive effort is necessary at all. As Kuhn describes, the Ptolemaic astronomers who predated Copernicus believed the sun and planets to orbit the Earth in "cycles" of perfectly circular form. As more and more accurate observations began to be made, however, it became necessary to postulate further circular oscillations around the cycles themselves – "epicycles" – to preserve the theory. By the time of Johannes Kepler, who first questioned the utility of the epicycles, the *ad hoc* patches which were necessary to support the geocentric/circular orbits theory had become absurdly complex. What distinguished the Copernican theory was not that he could make better and more accurate predictions, for he could not; rather, it was the fact that his theory did not need to be supplemented by such a massively complicated auxiliary structure to bring it into line with observation. A sufficiently determined theorist, both Quine and Duhem demonstrated, can reconcile any recalcitrant data whatsoever with his theory;⁶¹ the question for Penner is not whether or not his efforts are successful, but whether or not they are worth the trouble.⁶²

There remain, in any case, theoretical problems with Penner's analysis. Penner draws a contrast between the bundle theory and his own on the basis of the individuation of particular rights; where the bundle theorist must believe such rights to be discreet and determinate, like "(m)embers of a club [which] naturally come in units called persons", Penner holds that they are in fact like "pieces of a cake which can be sliced in any way we wish;" they are "no more than momentary functional descriptions made with a particular legal concern in mind."⁶³

⁶⁰ Thomas S. Kuhn, *The Structure of Scientific Revolutions* 140, 322-4 (U. of Chicago P. 1962).

⁶¹ W.V. Quine, *Two Dogmas of Empiricism* 60 *Phil. Rev.* 20 (1951). Pierre Duhem, *The Aim and Structure of Physical Theory* 180 ff. (Princeton: Princeton U. P. 1954).

⁶² See also the criticisms of Penner's position in Adam Mossoff, *What is Property? Putting the Pieces Back Together?* 45 *Ariz. L. Rev.* 371 (2003), at 376-8.

⁶³ Penner, *The 'Bundle of Rights' Picture* 754-5.

That this is so, Penner believes, can be seen by reflecting on what happens when someone grants another a license to use their property. On the bundle view, “A, the owner, holds in his bundle of rights the millions of rights of B to do each and every thing with A's property, and the millions of rights of C, and D, ad infinitum. On the grant of a license to B, A merely extracts the particular right from his bundle with B's name on it and transfers it to B. If it is a non-exclusive license, then A can do the same in turn for C or D.”⁶⁴ The prospect, he writes, “boggles the mind.”⁶⁵

Yet this consequence, that the bundle theory entails the existence of a “mind-boggling” number of discrete rights, should be neither surprising nor troubling. In outlining the bundle theory, I compared the rights not to “sticks” in a bundle, but to “atoms” of property; the Humean supervenience thesis to which I compared the bundle theory is specifically one about how our everyday talk about the world is ultimately dependent on, and reducible to, talk about the sub-atomic particles of modern physics. The number of such particles making up the world may indeed be mind-boggling; but no physicist supposes that the physical world therefore has the structure of cake and “can be sliced in any way we wish”. No matter how many such atoms there are, they are nevertheless individually discrete; Penner would hardly suppose that the members of Barcelona Football Club fail to be individuated simply because there are 170,000 of them.

Penner re-states his argument as follows;

we can actually conceive of property in terms of a right which permits an owner to do anything or nothing with his property; the disaggregative bundle of rights thesis insists that an owner may do everything with his property. The former view accords with the fact that the law of property takes no interest in the particular use one makes of one's property (which is not to say that criminal law or the law of taxation does not); the latter holds that the essence of property

⁶⁴ *Id.*, at 758.

⁶⁵ *Id.*

*is an infinite number of rights to use a thing, in the same way that the Hohfeldian idea of a right in rem entails having millions of rights against all other people.*⁶⁶

But phrased this way, the incoherence of his position becomes clear; there is simply *no formal difference at all* between “anything” and “everything” in this context. In any imaginable calculus of rights, the two notions will be expressed by exactly the same universal quantifier; “For all rights *x*, *A* may exercise *x*, or grant it to *B*.” Once again, Penner insists on an intuitive distinction premised on the existence of some special property or entity which exists over and above the elements into which it can be formally analysed without – in the mathematical sense – remainder.

The ultimate reason for clinging to this distinction, Penner calls the “uselessness thesis”; the bundle theory involves “at least the tacit admission, that the concept of ‘property’ is vague or undefinable, and so ... degenerate or useless.”⁶⁷ If the theory is true, he reasons, the deflationary concept of “property” that it advances can add nothing to our understanding of property law or judicial decision-making. For Thomas Grey⁶⁸, this means that the entire concept, though retaining some use at the “folk-legal” level, must ultimately be confused. On a more moderate view, like Barry Hoffmaster’s, the concept is *conclusory*; “A statement of ownership is *a conclusion* drawn from comparing a particular combination of the incidents of ownership, existing together in a determinate situation, with the paradigm of ownership.”⁶⁹ In other words, judges will make a decision in any given case on the basis of the particular rights and duties of the parties, and of the particular demands of justice in the

⁶⁶ *Id.*, at 758.

⁶⁷ *Id.*, at 769.

⁶⁸ Grey, *Disintegration of Property*.

⁶⁹ Barry Hoffmaster, *Between the Sacred and the Profane: Bodies, Property, and Patents in the Moore Case*, 7 *Intell. Prop. J.* 115 (1992), at 129. Cf. Munzer, *A Theory of Property* 39; Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 *U. Toronto L. J.* 275 (2008), at 276.

circumstances, and retrospectively declare a property right to have, or not to have, obtained.⁷⁰

To show the problem with the “uselessness thesis”, Penner examines the famous cases of *International News Service v. Associated Press*⁷¹ and *Moore v. Regents of the University of California*⁷². In *International News*, Pitney J for the majority determined that the plaintiffs, by re-publishing “hot” – but non-copyrightable – news gathered by the defendants, had infringed the plaintiffs’ “quasi property.”⁷³ Like the dissents by Holmes and Brandeis JJ, this seemed perfectly to illustrate the conclusory view.

“Instead of talking about ‘quasi property’ or ‘exchangeable values’,” wonders Penner, “are we not on a better footing if we can say that what the Associated Press was claiming was the right to a market monopoly, akin to the protection generally provided by the monopolies of copyright or patent law?”⁷⁴ Such a “property right to a legally structured market position”, he argues, makes more sense than “(j)amming rights to the news or to an idea into the mold of property rights.”⁷⁵ Yet this characterisation of the conclusory view is plainly inaccurate, and still wedded to the idea of the property-concept as determinate. There is no need to “jam” such rights into a “mold”; the property-concept, according to the bundle theory, is “shapeless”, and more akin to a blanket we may simply throw loosely over whatever considerations we wish it to cover. It is hard to argue, moreover, that Penner’s “unified

⁷⁰ Cf. W.H. Hamilton & I. Till, *Property*, 12 Encyclopedia Soc. Sci. 536 (1933); “It is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection.” See e.g. the famous Australian case of *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor* 58 C.L.R. 479 (1937), as well as *Sports and General Press Agency Ltd. v. “Our Dogs” Publishing Co. Ltd* 2 K.B. 880 (1916), 2 K.B. 125 (1917).

⁷¹ *International News Service v. Associated Press* 248 U.S. 215 (1918).

⁷² *Moore v. Regents of the University of California* 793 P.2d Cal. 479 (1990).

⁷³ *International News*, at p. 235-36.

⁷⁴ Penner, *The ‘Bundle of Rights’ Picture* 816.

⁷⁵ *Id.*

concept” of property has made judicial reasoning easier to predict if the “naive but accurate”⁷⁶ intuition he appeals to finds *all three* Supreme Court opinions in a landmark case confused.

In *Moore*, where the plaintiff sought to have his property rights recognised in cells excised from his body during surgery for leukaemia, which were later the subject of several patent lines, Penner’s account is similarly at variance with actual judicial reasoning. Panelli J, writing for the majority, denied the claim in conversion, on the grounds that a relevant statute “eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to ‘property’ or ‘ownership’.”⁷⁷ Yet Penner rejects both this and the other opinions by Mosk J – who explicitly invokes the bundle theory⁷⁸ – and Broussard and Arabian JJ for failing to consider the question whether “(e)ven if one can regard the control rights we have over our body parts as somewhat akin to ‘ownership,’ is there nothing more to be said before we treat something as intimately related to the human persona as one’s body as property?”⁷⁹

The bundle-theorist’s answer, and that adopted by each of the justices in *Moore*, is simply “no”; the facts of the case, and the particular bundle of sticks involved, provide a complete basis on which to reach the decision, and no concept merely supervening upon them need be invoked to explain the outcome. Penner thinks this entails “(t)he idea that some magic occurred on [Moore’s spleen’s] removal so that the researchers could claim a property right in it as if claiming something unowned the instant it left his body.”⁸⁰ Once more, however, the criticism only works if one is wedded to a substantive concept of “property”. If “a property right” is itself nothing magical, but merely the label we attach *ex*

⁷⁶ *Id.*, at 817.

⁷⁷ *Moore*, at 492.

⁷⁸ See note 10, above.

⁷⁹ Penner, *The ‘Bundle of Rights’ Picture* 721.

⁸⁰ *Id.*, at 817.

post to any sub-bundle of the sticks sufficient to decide the case, then there is just nothing at all mysterious about that “right” transferring when certain of its constituent sticks do.

I leave the discussion of Penner with one final point, which appears to have gone unremarked in the subsequent literature. To sustain the “unified” concept of property in the admitted absence of necessary and sufficient conditions for its application, Penner overturns the entire standard field of “Classical” semantics, relying instead on an alternative view based on Jonathan Sutton’s unpublished B.Phil. thesis.⁸¹ I offer no opinion here on the merits of Prof. Sutton’s “criterial” semantics, save to note that it has not yet displaced the mainstream view. To completely revise our understanding of linguistic meaning for the sole purpose of preserving a particular theoretical view of legal rights would surely be to break a butterfly upon the proverbial wheel. That Penner does so in the name of “a burden of proof argument, drawing on the intuition of Occam’s razor”⁸² is doubly curious.

4. Harris’s “Minimal Structure”

The final anti-bundle argument I shall consider is that of Jim Harris. Harris’s main work on the subject⁸³ is careful and detailed, but it can occasionally be difficult to identify a particular structure to the overall argument. Accordingly, I will deal with the main points in approximately the order he raises them.

He begins, oddly enough, by effectively conceding one of the central claims of the bundle theory. Although “all of us (philosophers, lawyers, and ordinary folk) seem to share an intuitive idea of what property is,”⁸⁴ there is “no univocal, singular concept of

⁸¹ *Id.*, at 767ff.; J.K. Sutton, *Family Resemblance: An Externalist Approach to Metaphysics* (B. Phil. thesis, Oxford University).

⁸² Penner, *The ‘Bundle of Rights’ Picture* 739.

⁸³ J.W. Harris, *Property and Justice* (Oxford U.P. 1996).

⁸⁴ *Id.*, at 7.

ownership”⁸⁵ or property to reckon with. Indeed, on a number of occasions he refers explicitly⁸⁶ or implicitly⁸⁷ to the notion of a “bundle” of rights. On what grounds, then, does Harris reject the bundle theory? Although no single concept can do justice to property rights, he argues, we can identify a minimal core of necessary conditions, based on “the twin notions of trespassory rules and the ownership spectrum,”⁸⁸ which is then extended in a variety of directions by different legal systems, in response to different circumstances and desiderata.

The first stage of Harris’s argument is to attempt to fix our intuitions about property by the use of a series of anthropological thought experiments, termed Forest Land, Status Land, Red Land, Contract Land, Wood Land, and Pink Land, progressively advancing both in the type of resources available to residents and the local rules limiting their use.⁸⁹ Harris’s method is to demonstrate that one concept is “logically prior” to another by showing that an anthropologist from one imaginary society could only understand another’s practices in terms of his own group’s. But this seems a clear *non sequitur*; we may at best conclude from these stories that concepts like private property are *descriptively* prior to alternatives *given the limits of the hypothetical anthropologist’s conceptual resources*.

Harris’s imaginary societies might be unobjectionable, if their purpose were simply to establish the outlines of his own intuitions about property; but they are useless in investigating how those intuitions line up with reality.⁹⁰ Yet he immediately begins drawing lessons about necessary and sufficient conditions for the existence of property institutions;

⁸⁵ *Id.*, at 132; cf. J.W. Harris, “The Elusiveness of Property,” in *Perspectives on Jurisprudence: Essays in Honour of Jes Bjarup*, ed. Walgren 123-32, 129 (Stockholm Institute for Scandinavian Law 2005).

⁸⁶ Harris, *Property and Justice* 47, 51.

⁸⁷ *Id.*, at 73.

⁸⁸ *Id.*, at 5.

⁸⁹ *Id.*, at 15ff.

⁹⁰ For a stark contrast with the potential utility of *actual* empirical anthropological studies, see e.g. E. Adamson Hoebel, *Fundamental Legal Concepts as Applied in the Study of Primitive Law*, 51 Yale L.J. 951 (1942).

lessons that simply repeat the assertions made about his own intuitions in the course of describing the imaginary societies. Before long, the discussions will have “yielded the conclusion that the core idea of a property institution resides in the twinned conceptions of trespassory rules and the ownership spectrum.”⁹¹

If the elements of the “minimal structure” are of dubious provenance, the “sophisticated structures,”⁹² which Harris insists must be built upon it for the purposes of the full range of modern property-talk, are patently gerrymandered. Example after example is force-fitted in or out of the schema in the same epicyclical manner we saw in Penner, in openly vague and arbitrary fashion; “if one poses the question, who is the *owner* of this house or flat?, answers will refer only to those with leases of a substantial duration, although usage points to no particular cut-off point.”⁹³ The result, he freely admits, “is a portmanteau category,”⁹⁴ delineated only by “a stipulative boundary.”⁹⁵

In defence of this position, Harris argues that in the absence of such a unified, albeit heterogeneous, concept, “we would have to regard as baleful”⁹⁶ the everyday claims of entitlement to particular items of social wealth. This may be the aim of some more radical critics of property, but there is no obvious reason why we cannot, *per* Thomas Grey,⁹⁷ leave the folk-concept intact for everyday use, and rest the actual legal claims of entitlement on the individual “sticks” themselves.

Harris defends his jury-rigged property concept against some of those radical critics by arguing that the property-scepticism of Alf Ross and Karl Olivecrona;

⁹¹ *Harris, Property and Justice* 55.

⁹² *Id.*, at 42 & *ff.*

⁹³ *Id.*, at 72.

⁹⁴ *Id.*, at 86.

⁹⁵ *Id.*, at 62.

⁹⁶ *Id.*, at 63.

⁹⁷ See n.62 above.

*is based on a theoretical assumption about the ontological status of conceptual entities: either they directly reflect brute reality, or they are metaphysical chimera and their employment must be explained away in psychological terms. It ignores the possibility that the human mind may create abstract entities which human institutions can then usefully employ for a variety of functions, without it having to be supposed that the entities belong to some mysterious supra-sensible realm.*⁹⁸

This is perfectly true, as far as it goes; artificial, even socially-constructed, kinds (such as *money*, or *lawyers*) are no less real, objective features of the world than “natural” kinds (such as *water*, or *dogs*). But there is a further, perfectly obvious distinction between these artificial-but-real kinds and the sort described by Nelson Goodman as grue-some, exemplified by the heterogeneous property of being “grue”; green if examined before time *t*, and blue if examined thereafter.⁹⁹ Some artificial kinds, that is, do reflect the real contours of our world, but this will not license just any portmanteau category; “kosher” is a potentially useful scientific classification, whatever one’s faith,¹⁰⁰ but “kosher, or yellow, or smaller than a bread-bin” is not. Pointing out that concepts of the former sort are legitimate does not absolve charges that Harris’s “portmanteau concept” is of the latter sort. The human mind may indeed create abstract concepts, but it should not simultaneously “eschew any ‘true’ semantic or conceptual essence”¹⁰¹ of those concepts if it wishes them to be regarded as faithful to reality, carving nature at the proverbial joints.

Harris’s rival view of property and ownership, then, is unsupported by any persuasive line of argument. However, he makes direct criticisms of two aspects of the bundle theory,

⁹⁸ *Id.*, at 131.

⁹⁹ Nelson Goodman, “The New Riddle of Induction,” in *Fact, Fiction, and Forecast* ch. 3 (Harvard U.P. 1954).

¹⁰⁰ Cf. Kim Sterelny & Paul E. Griffiths, *Sex and Death: An Introduction to the Philosophy of Biology* 196 (U. Chicago P. 1999)

¹⁰¹ Harris, *Property and Justice* 142.

which its proponents will be concerned to rebut. The first of these again concerns the Correlativity Axiom, while the second decries the “conclusory view” of the role of the property concept in judicial decision-making as tautologous.

The root of Harris’s attack on the Correlativity Axiom is, once again, an apparent misunderstanding of the *in rem-in personam* reduction. The common view holds, he argues, that the layman thinks in terms of relations between persons and objects, while the lawyer knows that the relevant relations are between people, and *concerning* the objects in question. “The contrast,” he insists, “is a false one.”¹⁰²

Indeed it is, but it also seems a straw man. Nothing in Hohfeld’s or Honoré’s arguments, as Harris himself acknowledges,¹⁰³ suggests that we must cease to speak or think even loosely about legal relations between persons and objects; their aim is to analyse such talk, not to eliminate it. The point is, in other words, that we can better *understand* the nature of those legal relations if we reduce them to relations between persons. The bundle theory requires no more; it displays the underlying logical structure of such relations, but does nothing thereby to undermine them.

The reduction is possible, Harris agrees, if two conditions are met; “first, that all the relevant legal provisions are known and determinate – no open texture; and, secondly, that we are seeking to convey information about the legal situation at a particular moment in time.”¹⁰⁴ Without going into the details of Harris’s discussion of the second condition, let us agree that he has identified an important qualification to the bundle theory as previously elaborated.¹⁰⁵ At the end of section two, I identified the “sticks” composing a typical bundle as corresponding to each of Honoré’s incidents, indexed to each particular potential right-holder, duty-bearer, and detachable part of the object in question. Since I may convey an

¹⁰² *Id.*, at 119.

¹⁰³ *Id.*, at 120.

¹⁰⁴ *Id.*, at 122.

¹⁰⁵ The issue also seems to be alluded to in Penner, *Idea of Property* 25.

interest in the object to you for a limited period of time only, we should say further that the incidents are indexed to the individual *temporal parts* of the detachable portions of the object.¹⁰⁶

The first condition, whose terminology is drawn from Hart,¹⁰⁷ requires that it may not be an open question whether or not a given instance of conduct falls under the scope of the right.¹⁰⁸ A right *in rem* which is not open-textured in this way will straightforwardly reduce to a bundle of rights *in personam* whose scope is similarly known and determinate. What is the problem with open-textured rights *in rem*? According to Harris, judicial decisions regarding such rights, lacking a determinate basis in precedent, must appeal to the values of ownership generally. But in doing so, they must either be brute and tautologous in their conclusions, or they must invoke a particular relation between persons and things.

In short, Harris's objection to the Correlativity Axiom is also an objection to the "conclusory view" of property's role in judicial reasoning. In *Bradford v. Pickles*,¹⁰⁹ the plaintiffs sought to restrain the defendant from sinking a well under his land under the law of nuisance, as his sole purpose in doing so was to prevent water from percolating to their waterworks, thereby forcing them to purchase the land from him. The Lords upheld the lower court's refusal of an injunction, explicitly invoking Mr. Pickles' "rights as a landowner" to use his property in a self-interested manner, even if doing so was "churlish, selfish, and grasping."¹¹⁰ In other words, argues Harris, the court argued from Pickles' general, *in rem* rights over the land to his specific, *in personam* entitlements against the Mayor and Council

¹⁰⁶ For the standard definition of "temporal parts", see Ted Sider, *Four-Dimensionalism* 60 (Oxford U.P. 2001).

¹⁰⁷ H.L.A. Hart, *The Concept of Law* 124-36 (2d ed. Clarendon Press 1994).

¹⁰⁸ For instance, when carbon trading regimes are first instituted, a new class of economic assets is created. It then seems to be an open question who "owns" and is entitled to trade the credits newly associated with some piece of land. I thank Prof. Yvonne Scannell for suggesting this example to me.

¹⁰⁹ *Mayor and Corporation of Bradford v. Pickles* AC 587 (1895).

¹¹⁰ *Id.*, at 600-1.

to act as he did. If the *in rem* rights were simply equivalent to the *in personam* rights, as the bundle theorist claims, the judgement expresses an uninteresting tautology; “Pickles is privileged to do this and the Corporation has no right to stop him because Pickles is privileged to do this and the Corporation has no right to stop him.”¹¹¹

The obvious query to raise here is; what about this objection is specific to open-textured rights? The judgements in cases decidable on precedent, where Harris has no objection to reducing the *in personam* rights to *in rem* rights, would be no less tautologous by this reasoning. This is our first indication that the “tautology” in question may not be especially problematic.

Let us look in more detail at the nature of a judgement of this sort. According to Harris, the giving of a verdict changes the question from open- to closed-textured; “(t)he House having ruled as it did, the law as stated at any subsequent time includes a no-right/privilege relationship in such circumstances, and that will continue to be true unless the House of Lords overrules that decision or it is abolished by statute.”¹¹² That is to say, the effect of a judgement in an open-textured case is just *to recognise another stick*.

Whether we consider this new stick to be created *de novo* by the decision (“judge-made”) or to have been in force since the dawn of legal time, albeit never previously elaborated (the “pre-existence thesis”) is for current purposes irrelevant.¹¹³ The important question is why, according to Harris, we must interpret the decision as the assertion of a general principle of ownership which he admits to be subsequently decomposable into individual rights, rather than as the recognition of an additional right which contributes to our after-the-fact ownership-conclusions. Why, that is, must judicial reasoning be “top-

¹¹¹ Harris, *Property and Justice*, p. 124. Cf. also Brian Leiter’s discussion of “conceptual rule-skepticism”; Brian Leiter, “American Legal Realism,” in *The Blackwell Guide to the Philosophy of Law and Legal Theory* ed. Martin Golding & William Edmundson 50-66, at 61-3 (Blackwell 2005).

¹¹² Harris, *Property and Justice*, p. 124.

¹¹³ Donna Lyons, *Dworkin and Judicial Discretion: A Critical Analysis of the Pre-existence Thesis*, 11 *Trinity C. L. Rev.* 1 (2008) summarises the main issues with exemplary clarity.

down” from ownership to sticks, rather than “bottom-up”?¹¹⁴ Certainly, given the heterogeneous and jury-rigged nature of the “portmanteau” top-down ownership-concept Harris has outlined, he cannot commend it to us on the basis of legal certainty or theoretical elegance.

The supposed basis, then, which must apply equally in the case of closed-textured questions, is that of tautology; reasoning from a (newly-augmented) bundle of rights to a conclusion which merely restates the existence of that bundle would be both repetitious and, Harris claims, uninformative. Repetitious it might well be; but tautologies are uninformative only if we do not already possess the information they express. Since the term “water” refers to H₂O, the sentence “water is H₂O” *means* “H₂O is H₂O”; but the discovery of water’s chemical make-up was no uninteresting triviality.¹¹⁵ Similarly, even if we regard the decisions in *Bradford v. Pickles*, or *International News Service*, or *Moore*, as formally tautologous, they nevertheless express interesting, and decidedly consequential, discoveries about the extent and distribution of the proprietary interests assertible under the common law.

5. Conclusion

I have offered a defence and, I hope, a clarification of the bundle theory. I want to summarise here briefly why I think that it is the only successful, and the most theoretically attractive, account of property rights available to us.

The major innovation of my position, the feature that is most likely to come as a surprise to anyone already familiar with at least the text-book or lecture-hall accounts of the bundle theory, will be the number and minuscule scope of the individual rights which compose a typical bundle. The classic theoretical justification of the bundle theory, I have argued, applied in a thoroughgoing manner, does not merely require us to consider separately the different “incidents” of ownership identified by Honoré, separately indexed to

¹¹⁴ Cf. Munzer, “Property and Disagreement”, n.43 & ff.

¹¹⁵ Cf. Hilary Putnam, *The Meaning of ‘Meaning’*, 7 *Minnesota Stud. Phil. Sci.* 131 (1975).

– as Hohfeld pointed out – each potential right-holder and duty-bearer. That quantity of rights already strains the “bundle of sticks” metaphor to the limits; such a number of sticks would be less a bundle than a lumber-yard.

As I contend, we need to go further; each of *those* sticks is decomposable not just into all the separate spatial parts in which interests could be conveyed to others, but also into all the separate *temporal* parts indicating the limited durations for which an interest can be conveyed. The numbers are now well beyond even lumber-yard quantities; they are in a literal sense astronomical. It is just that multitudinous character that offended Penner, yet I believe it actually assists us in understanding the bundle theory by providing the new metaphor that several theorists have recently called for;¹¹⁶ the individual rights may be best thought of not as “sticks”, but as “atoms”. To that end I have drawn on an influential theory from the metaphysics of science – David Lewis’ “Humean supervenience” – to illustrate the relation the individual rights have, both to each other and to the judicial decisions and everyday property-talk for which they provide the whole and unique basis.

When we get this metaphor clear, just like the older “bundle” metaphor, we see two reasons to prefer the deflationary theory it expresses to the accounts of property which rely on the existence of some entity over and above the individual “sticks” or “atoms”. The first is that, since the individual rights can give a complete account of property-talk, invoking anything further is superfluous and inelegant; *entia non sunt multiplicanda praeter necessitatem*. The second is that, in fact, no such further entity has been observed “in the wild”, nor convincingly postulated; and it is far from clear even what *sort* of entity it would have to be. The inflationary fetish, that ascribes to “property” and “ownership” an intrinsic,

¹¹⁶ *e.g.* “The bundle of rights is a primitive metaphor, conjuring up a medieval peasant carrying a faggot of wood. It is time for a better metaphor.” (Thomas Merrill, *The Property Prism*, 8 Econ. J. Watch 247 (2011), at 252); “I therefore urge legal commentators not to abandon the bundle-of-sticks metaphor, but rather to be aware of its limitations and to invent complementary metaphors that might counter the bundle’s shortcomings.” (Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 Econ J. Watch 215 (2011), at 216).

unexamined, and thing-like status,¹¹⁷ therefore adds nothing to our abstract understanding of property rights, nor does it shed any light on the actual processes of judicial reasoning. “Commit it then to the flames: for it can contain nothing but sophistry and illusion.”

¹¹⁷ Cf. Harris, *Property and Justice*, p. 256.