



Property Is Not Just a Bundle of Rights

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Is property a bundle of rights? Yes and no. Is a diamond a collection of carbon atoms? Again, yes and no: A diamond does consist of carbon atoms, but there is a lot more to a diamond. The relations between the atoms help distinguish it from graphite. Properties like a diamond's hardness and light dispersion are emergent properties from the overall structure. There is a lot more to a diamond than counting carbon atoms.

The bundle-of-rights picture of property treats property in atom-counting fashion. It sees property as a bundle of sticks but misses the trees, not to mention the forest. In this Essay I will compare the bundle view with a more "architectural" approach to property and show how the latter opens up whole areas of inquiry that the bundle picture obscures, if not forecloses altogether. At the end I will turn to the question why the bundle picture has retained such an enduring appeal and why the bundle picture and its alternatives matter to fundamental issues in private law.

Where Does the Bundle Come From?

The bundle picture as conventional wisdom is a legacy of Legal Realism. The roots of the bundle picture lie in the late nineteenth century and in early twentieth century analytical jurisprudence (Alexander 1997, 319-329; Merrill and Smith 2001b, 364-365). The most famous precursor of the bundle picture is Wesley Hohfeld's theory of jural relations (Hohfeld 1913). Hohfeld sought to break down what people loosely called rights into clear and unambiguous pieces. Thus a right might be a right proper, or claim right—a legal right to insist that someone else do or refrain from some action with a corresponding duty in that person. Or it could

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be a privilege (also called liberty)—a freedom to do or refrain from an action with a corresponding lack of a right in another to legally compel it. Somewhat similarly, Hohfeld (1917) analyzed *in rem* rights (rights availing against people generally) into a collection of *in personam* rights. As in the later bundle theory that builds on Hohfeld, the emphasis is on how rights (and other jural relations) hold between people, rather than seeing property as a “right to a thing.” Thus “property” could be broken down into more basic legal relations. Ownership of Blackacre includes the right to exclude B, C, D, etc., as well as privileges to use Blackacre for growing crops, for building a house, and for walking around on, such privileges availing against B, C, D, etc., who have corresponding “no-rights.” But a firefighter would have a privilege (or maybe even a right) to enter to fight a fire. An easement might give E a right to cross A’s land, and A would have a duty not to interfere (as would B, C, and so forth). Rights and other relations hold between persons, which is true, but the “thing” of property loses much of its importance.

Legal Realism took the step of adding nominalism to Hohfeld’s scheme (Radin 1938). Hohfeld was interested in clarifying concepts, but the Realists were against concepts, at least to the extent that they were not justified in terms of social policy. Thus the Realists found the bundle picture congenial because they thought they could replace notions like property and ownership that carried historical and moral baggage (to their minds) and replace them with a more scientific vocabulary that would not obscure the real design issues involved in making property serve society’s needs (Cohen 1935). Hohfeld’s tendency to make fine distinctions was embraced and extended because the social planner or judge could tinker with the bundle, and given the Progressive and New Deal agenda of the Realists, this would allow sticks to be transferred from owners to others with the result still being “property” (Grey 1980; Merrill and Smith 2001b). This picture carried into the American Law Institute’s *Restatement of the Law of Property of 1938* (§ 7, § 10), which defines “real property” as one of a number of present possessory estates and an “owner” as the person who has one or more interests. Objections on the grounds that policy-driven innovations violated property rights could simply be defined away as naïve and superstitious formalism and conceptualism in the service of an anti-Progress agenda masquerading as objective reality.

Realism has many children, and they have stuck close to the bundle picture despite their having gone off on their own. Mainstream policy-oriented legal studies still employ the bundle, and this is one reason why one constantly hears that “we are all realists now.” The bundle is self-evident wisdom to all but the unsophisticated who might employ the everyday notion of property as a right to a thing good against the world (Ackerman 1977, 26-29; Rubin 1984, 1086; Williams 1998, 297). But other strands of Post-Realism are equally committed to the bundle (Merrill and Smith 2001b). Critical Legal Studies and its offshoots like the bundle

for its nominalism because the agenda is to dethrone property further and to make bigger changes to the institution. Somewhat surprisingly, law and economics and the New Institutional Economics are equally committed to the bundle picture because of the analytical convenience that it offers (Coase 1960; Merrill and Smith 2001b and forthcoming). A thin notion of entitlement—a right to derive value from a resource—accords with what would seem to be economists’ concerns, because they are primarily concerned with expectations. Legal detail or structure does not immediately appear to correspond to expectations of deriving value, but the supposed sticks in the bundle—rights to exclude, liberties to use and so on—very clearly do. The traditional approach to property as an *in rem* right to a thing did not seem to be doing much work at all for any of these theorists.

What Is the Alternative to the Bundle?

The alternative to the bundle is not a return to pre-Realism or to pure doctrinalism. Unreflective conceptualism or formalism is a nonstarter. But it is worth noticing that the bundle picture has always had its detractors. It has been criticized by natural rights theorists, feminists, and some legal philosophers (Mossoff 2003; Schroeder 1994; Penner 1996). Among the objectors there is a general sense that property might have some essence or at least some content that is not fully captured by the analytical and nominal approach of the bundle theorists. Here I will present as an alternative to the bundle what I will call an *architectural* or *modular* theory of property that responds to information costs.

At the base of the architectural approach is a distinction that the bundle theory—along with other theories—tends to obscure. The interests we have in using things and the devices the law uses to protect those interests are related but distinct. Causes of action like trespass implement a right to exclude, but the right to exclude is not *why* we have property (Penner 1997; Newman, forthcoming; Smith 2007, 1751-53; Smith 2009, 964-65). Rather, the right to exclude is part of *how* property works. Rights to exclude are a means to an end, and the ends in property relate to our true interests served by property: interests in using things.

Property serves purposes related to use by employing a variety of delineation strategies. Because delineation costs are not zero, which strategy we use when will be dictated in part by the costs of delineation, not just by the benefits which correspond to the use-based purposes of property. Because it makes sense in modern property systems to delegate to owners a choice of a range of uses and because protection allows for stability, appropriability, facilitation of planning and investment, liberty, and autonomy, we start with an *exclusion* strategy, and that goes not just for private property but for common and public property as well. “Use”

can include nonconsumptive uses relating to conservation. The exclusion strategy defines a chunk of the world—a thing—under the owner’s control, and much of the information about the uses, their interactions, and the user are irrelevant to the outside world. Duty bearers know not to enter Blackacre or take a car without permission, and they know this without needing to know who the owner is, what the owner is using the land or vehicle for, who else might have rights and other interests, and so on. But dividing the world into chunks is not enough: spillovers and scale problems call for more specific rules to deal with problems like odors and lateral support and to facilitate coordination (covenants, common interest communities, trusts). These *governance* strategies focus more closely on narrower classes of use and sometimes make more specific reference to their purposes, and so they are more contextual (Smith 2002; Smith 2004).

In a zero transaction cost world we could use all governance all the time, whether supplied by government or through super fine-grained contracting among all the concerned parties. That is not our world, and the main point of exclusion as a delineation strategy is that it is a *shortcut* over this more “complete” set of legal relations (Merrill and Smith, forthcoming). Analytically it might be interesting to think of property as a list of use rights availing pairwise between all people in society, but this would be intractable in our world.

The architecture of property emerges from solving the problem of serving use-interests in a roughly cost-effective way. In modern societies this usually involves a first cut with a more use-neutral exclusion strategy and refinement through governance in the form of contracts, regulations, common law doctrine, and norms. At the core of this architecture is exclusion because it is a default, a convenient starting point. This does not mean that exclusion is the most important or “core” value; even entertaining this idea usually reflects the confusion of means and ends in property law. Exclusion is not a value at all: it is a rough first cut—and only that—at serving the purposes of property. It is true that exclusion piggybacks on everyday morality of “thou shalt not steal” and that governance reflects a more refined Golden Rule “do unto others” type of morality in more personal contexts (Merrill and Smith 2007). It is probably the case that our morality itself is shaped to a certain extent by the ease with which it can be communicated and enforced in more impersonal settings, but I leave that question for another day. The point here is that the exclusion-governance architecture is compatible with a wide range of purposes for property. Some societies will move from exclusion to governance—that is, some systems of laws and norms will focus more on individuated uses of resources—more readily than others and will do so for different reasons.

The bundle picture obscures the distinction between means and ends in property. Each stick can be (too) easily identified with a purpose. This confusion is furthered though the use of the word “interest.” I have noted that we have interests

in the use of things (but not an interest in exclusion), but “interest” can refer to legal interest, as in fee simple, life estate, and so forth, or even more finely to the sticks in the bundle. Again, the tendency is to analyze property into pieces that are transparent to purposes. On the architectural view, by contrast, nontransparency to purposes is directly related to the transaction cost savings from (sometimes) using the exclusion strategy.

In the service of transparent purposes, the bundle picture usually assumes a very unconstrained use of context. If trespass and conversion send a simple message of “keep off” and “don’t take” (without permission), other aspects of property like nuisance (which not coincidentally tend to involve neighbors rather than the world at large) involve more information about the value of uses, their harm, and the nature of the surrounding area. If delineation cost is left out of the picture, it becomes deceptively attractive to move in the direction of more governance-style contextualized inquiry into such matters. Suggesting the importation of copyright’s notoriously fuzzy and mysterious fair use doctrine into the law of trespass in order to capture all and sundry societal interests in potential boundary crossings is but an extreme example (Depoorter 2011). Promoting the promiscuous employment of contextual information in property is in keeping with ignoring the cost of delineation in the process of serving the purposes of property. Legal Realists and their successors object to delineation strategies that are not fully congruent with purposes for being too formalistic or conceptualistic. The implication is that right-thinking people would want to serve the purpose in question—say a right of access for hikers—and any reluctance to define this stick is mere apology for the owner class. Furthermore in designing a right to roam, one could take all sorts of context into account like the relative needs of the parties and so on (Anderson 2007; Lovett 2010). The right to roam as implemented in Scotland winds up being a complex, interests-balancing governance regime that fits uncomfortably in the existing “bundle” (Cooper 2011). The post-Realist reply would be that the law has to be contextual, and more generally, a classic Realist-style leap of logic has it that because the law sometimes uses context it should be available always (Smith 2003, 1180-1181). The burden is shifted to anyone who wants to deny the relevance of context, and when using context can be shown to be congruent with a virtuous purpose, then objections are labeled as formalistic or worse.

But context versus formalism, like exclusion itself, is not all or nothing or always or never (Smith 2003). Formalism is relative invariance to context (Heylighen 1999, 49-53), and in our world context is costly to incorporate into a legal rule or standard. In particular, when rights and other legal relations avail against people generally we can presume less in the way of background knowledge (Merrill and Smith 2000; Smith 2003). As a result, it is no accident that the more

in rem a legal institution or an aspect of a legal institution is, the more formal (relatively) it will be. Intermediate cases like bailments, landlord tenant, trusts, and security interests are standardized (including a degree of formality) somewhere in between (Merrill and Smith 2001a). In these situations, those aspects of the institution that implicate third parties are more formal and standardized than those that are confined in their impact to smaller and more definite groups of people.

Why Is the Bundle Picture Incomplete?

Because the bundle picture conflates use interests with legal interests, ignores delineation costs, and promiscuously invokes context, the bundle picture is incomplete and so winds up being wrong in practice. It is inadequate also because it is too unstructured, too fissiparous, and too internally homogeneous.

The Bundle Picture Is Too Unstructured

The bundle picture treats property as a collection—of rights or, metaphorically, of sticks. As mentioned at the outset of this essay, property rather is like a diamond in that it has a lot of very important internal structure. The exclusion-governance architecture leads to a characteristic structure of property. The use of boundaries, the sweeping of uses behind them, and the use of on/off proxies for violation all stem from the transaction cost savings of employing shortcuts over the complete or full set of maximally articulated rights—all governance all the time, as it were. That sticks come in standardized clumps—fee simple, defeasible fee, life estate, future interests, easements, and so on—looks more like happenstance on the bundle view.

But there's more to the lack of structure in the bundle than simply missing the benefits of shortcuts. Delineating property rights using a mix of exclusion and governance strategies causes some features of property to follow automatically from the basic setup (Chang and Smith 2011). Start with the right to exclude. Now is not the time to get into how important it is to the notion of property (see, e.g., Claeys 2009; Harris 1996; Katz 2008; Merrill 1998; Merrill and Smith 2001b; Penner 1997), and again I do not see exclusion or the right to exclude as an interest or value *per se* in property. But I *am* arguing for a special “first cut” role for exclusionary strategies in the delineation of property, and the style of delineation has implications for the right to exclude. By defining a right to a thing and employing use-neutral proxies for violations of the right to the thing, a right to exclude emerges. It is not a “stick” or a free-standing interest that can be added or

subtracted without changing the rest of the setup. It is an integral product of the delineation process.

This does not make the right to exclude absolute. Exclusion is combined with governance, and the latter is often implemented by overriding or making exceptions to the “right to exclude.” But no modern system builds up a fee simple by enumerating use rights, even those systems that qualify the right to exclude in substantial and diverse ways.

Other aspects of property also fall into place. The residual claim could be thought of as a collection of use rights, but that’s not how it is delineated. As its name suggests, it is the result of defining property rights to an asset (or a pool of assets), spelling out specific claims (often *in personam*) that subtract from the whole, and calling the rest the “residual claim.” Delineation costs are saved by using the outer contours of the asset and the specific claims, rather than going through a lot of internal delineation. The point of a residual claim is that it can be treated holistically by the system, and its owner can be left to manage its internal structure and try to increase its value.

Likewise, running to successors is both characteristic of property and largely follows automatically from the exclusion-governance architecture. To the extent that exclusion is more formal in the sense of being invariant to context—it makes less reference to use and users than governance strategies—then it is easier to substitute one owner for another. The successor can step into the shoes of the predecessor more easily if the shoe is one-size-fits-all than if it is tailored. Property rights that are difficult to delineate in terms of exclusion, especially fluid resources like water, are correspondingly more difficult to make fully alienable (Smith 2008). The centrality to property of running to successors and the reliance of this feature on decontextualization are not well captured on the bundle theory.

Some features of property are implicit and not separately delineated. Thus, as we saw earlier, the right to exclude that emerges from the exclusion strategy protects a wide range of privileges of use without the need to separately delineate them. If the owner can control access to Blackacre, his interests in using Blackacre for growing crops and so forth are implicitly protected. The protection may be over- and under-inclusive—not everyone with unauthorized access would be doing harm, and harm from the shadow cast by a high wall would not be ameliorated—but the law need not delineate the liberty to use Blackacre for growing crops, for residing, etc. When a use conflict becomes a large issue—think solar access for solar panels—then the law may have to delineate a use separately and create rights and duties with respect to specific uses (Bronin 2009; Rule 2010). But many uses are taken care of implicitly—that’s the point of the exclusion shortcut in the first place.

The Bundle Is Wrongly Made Up of Separable Sticks

Not all features of property are automatic consequences of the exclusion-governance architecture. The internal features—sticks, if you will—interact with each other. Part of the point of placing property boundaries where they are is that complementary attributes—those whose uses impact each other a lot—will be inside, and the boundary will to the extent possible not involve intense interaction between attributes inside and those outside the boundary (Smith 2007). This is what a modular structure means in a system that is nearly decomposable: intense interactions on the inside of components that are mostly hidden from other components that are (relatively) weakly interacting (Baldwin and Clark 2000; Langlois 2002; Sanchez and Mahoney 1996; Simon 1981). Thus, in the case of Blackacre, soil nutrients and moisture are highly complementary, and the top and bottom of the side of a hill for grape growing are complementary.

The flip side is that adding or subtracting a stick to the bundle affects the rest of the sticks. In principle the bundle theory could take this into account, but it typically does not. Instead, the metaphor of the bundle of sticks is used to imply precisely the opposite. In a bundle of sticks the sticks do not interact; you can add or subtract them at will, and still you will have a bundle with roughly the same properties. Not so with property: giving the right-to-roam stick to a neighbor or to the public affects the value of the remaining property, including “sticks” like the ability to grow plants, to eat dinner in peace, etc.

The Bundle Picture Obscures the Emergent Properties of Property

The emergent properties of property highlight another difficulty with the bundle theory. By making the pieces of the bundle transparent to purposes and obscuring the means-end relation between property law and the purposes it serves, the bundle theory leads to a fallacy of division. Just as water molecules don't have to be wet for water to be wet, so each stick in the bundle or doctrine of property need not have the desirable features we want the system to have. Wetness is an emergent property of water. So with property. Allowing owners to exclude others in particular seems nasty and selfish, but whether it is efficient, fair, just, or virtue-promoting is sometimes only assessable in the context of the system as a whole. Properties like efficiency, fairness, justness, and virtue-promotion are emergent properties of the property system. It is certainly relatively easy to ask whether isolated individual rules like the doctrine of necessity, antidiscrimination law, and exemption of high-altitude airplane overflights from trespass serve a given purpose. And sometimes that makes some sense, but it makes more sense if we realize

that our decision in any such situation is not a freestanding one but impacts the rest of the owner's rights and the working of the system. Requiring that each piece of the system and each stick in the bundle transparently reflect or promote our purposes is not necessary.

Nor is it wise. Again, some features of the system are emergent properties. Take stability. A Realist might want to treat this as yet another detachable feature or lever to be dialed up or down (Dagan 2011). But things don't work that way; stability is a feature that can only be evaluated as an aspect of the system. Neither is stability a factor to be balanced whenever we are deciding on the supposedly separable sticks in the bundle. The idea that doctrines are part of an issue-by-issue balancing of values like community, autonomy, efficiency, personhood, labor, and distributive justice is to commit the fallacy of division. These are all important values for the system to serve, but the bundle picture creates the expectation that the pieces of the system will serve these values individually and separably as well as collectively. Little attention is directed toward the possible specialization of the parts in achieving the goals of the whole. Thus, trespass may contribute relatively more to owner security and autonomy, and the implied warranty of habitability to fairness and protection of tenant expectations, but if so, they do so in tandem (and with other rules). There is little reason to expect trespass law itself, for example, to be as fair or nuanced as property law as a whole. The alternative is to invoke a plethora of general principles to be balanced as specific situations present themselves. One can declare by fiat that such a system is not an ad hoc, unstructured bundle (Dagan 2011, 43), but ad hocery itself is not a feature that can easily be dialed down! Such an approach is indeed Realist but not realistic.

Why Is the Bundle Picture So Appealing?

By now, the attractions of the bundle theory should be apparent. It combines the convenient simplification of an analytical approach (in the spirit of Hohfeld) with an avoidance of the need to consider the cost of implementing all the good things that we in our wisdom as the experts and designers can come up with. It is designed to reduce humility and promote experimentation. It is ideal for "debunking" traditional notions of property that draw on lay intuitions, including those about morality, and for replacing them with a rule of experts. The alternative architectural view, far from being (as Dagan (2011, 41) contends) "condescending" about the lay view, takes lay views seriously. In our everyday lives, even we legal experts benefit when navigating through the social world by conserving our need to know for where it is truly needed. The architectural approach also raises the issue of whether major changes in the system are for legislatures or courts, and it points

to a general preference for the former. By contrast, the bundle view is an invitation for the heroic judge to innovate at will—and Realism and its successors have always tended to be court-centric.

The bundle is well suited for problems that are focused and detachable, and some difficult problems have this nature. Thus, tweaking the law of organizational forms or intellectual property licenses bears relatively little direct relation to the regime of trespass to land. But we should not kid ourselves that problems that might bulk large in the lives of lawyers and economists exhaust what property does. Property as a system is marvelously multipurpose, and as long as it is so, it needs the basic exclusion-governance architecture.

Like the very related nexus-of-contracts view of corporation, the bundle-of-rights picture of property is useful if understood more modestly. Breaking property down into a theoretical set of rights, privileges, duties, and so on can be illuminating. But to identify property with this “bundle” and to focus on these components to the exclusion of property’s automatic but not absolute features—property’s structure, the interaction of its parts, and the emergent properties of the property system—leaves out of the picture much of what is important about property and how it actually works. When the bundle-of-rights approach oversimplifies property and downplays the cost of innovation, it can be quite harmful.

What Is at Stake?

Whether to subscribe to—or go no further than—the bundle picture raises larger issues of baselines in private law. Turning the issue of how to delineate property in terms of some mix of exclusion and governance into a referendum on the morality of “giving” the right to exclude “stick” to owners distorts private law beyond recognition. Perhaps that is the point. Policy engineers need not overcome existing baselines if the whole notion of baselines can be wished away. The question of baselines pervades private law, and not just property, and it is also involved in the controversies—stemming again from Realism and its legacy—of whether there is a public/private distinction and a domain of private law at all. Analysis and even a degree of policy-oriented nominalism are appropriate to an institution that serves human purposes and carries with it a capacity for (bounded) change, but they can be used to obscure and even dissolve the architecture of property and private law. This is the unfortunate legacy of the bundle-of-rights picture of property and the Realism that inspired it.

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