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The Property Prism

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The “bundle of rights” metaphor has played a large role in framing the way we think about a number of critical issues regarding property. It has been invoked in controversies about the scope of constitutional protection for property; it has defined the terms of debate about the meaning of the concept of property; and it has underscored the complexity of property as an institution for the organization of resources. The bundle metaphor, however, has been more successful in framing questions than in answering them. The metaphor suggests that property is complicated and that it changes, but it does not tell us when, why, or how. Designed to emphasize the malleability of property, the metaphor itself is too malleable to offer clear guidance in resolving any important questions.

I suggest that a better metaphor is that of a prism. A prism takes on a different color from different angles, and so does property. I will suggest four angles from which property may be viewed, each corresponding to an “audience” of property rules. From the “stranger” angle, property is a very simple “keep out” rule. From other angles, it is a complex of rules decipherable by legal specialists but not by laymen. From still other angles, it partakes of rules and norms that vary from case to case and which are of interest only to insiders. The property prism, unlike the bundle, does not suggest that the constituent features of property are infinitely variable without regard to who is viewing it. The property prism also pushes us further down the path toward understanding the institution of property, by suggesting we start by asking who is looking at it and why.

The “bundle of rights” metaphor apparently entered into property discourse from constitutional law. The first documented use of the metaphor appears in a nineteenth century treatise about eminent domain (Lewis 1888, 43). It was later

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embraced by the Legal Realists in the 1920s and 1930s as a rhetorical device for attacking the notion that property is a natural right that cannot be significantly modified by the state without paying just compensation (Hale 1922). If property is just a bundle of rights, the argument went, then adding or subtracting sticks from the bundle is an expected feature of social life and no particular configuration of rights should be privileged against inevitable change.

The bundle metaphor, however, has proved to be a two-edged sword in the battle between property owners and the activist state. The Realists and their modern heirs embraced the bundle because the idea of moving sticks in and out of bundles suggests the futility of giving significant constitutional protection to property. Contemporary property rights advocates, however, have turned the metaphor around, arguing that the bundle metaphor merely confirms that the attributes of property protected against change are many and various. Richard Epstein, most prominently, has argued that precisely because property is a bundle of rights, eliminating any one of the sticks from the bundle requires the payment of compensation, because this is a “taking” of “property” (Epstein 1985, 57-62). Thus, the Takings Clause applies not only to government expropriations but also to all sorts of taxes and regulations of the use of property.

Stepping back from this battle of the bundles, we can see that the metaphor is capable of framing the way we think about the constitutional issue but does not provide answers. One question is whether we attach the label “property” to the whole bundle or to each of the sticks (Wenar 1997). The bundle metaphor does not answer this question and provides no assistance about how to answer it. The Supreme Court has said that chopping through every stick in the bundle is a taking (*Loretto v. Teleprompter Manhattan* 1982, 435), but the significance of this cannot be determined without knowing the dimensions of the bundle or how to distinguish between a horizontal stick and a lateral chop. Again, the metaphor cannot tell us how to answer these questions.

A second controversy, which is essentially philosophical, concerns the meaning of the concept of property. Here too the bundle of rights metaphor has played a significant role in framing the debate. The issue is typically posed as whether the concept of property has any defining feature. One group, call them the “essentialists,” say there is such a feature. The feature most commonly identified is the right to exclude. To call something property is always to say that some designated person (the owner) has the right to exclude all non-owners from the thing (Penner 1997, Merrill 1998). Another group, call them the “nominalists,” say there is no such defining element. The identification of something as property is purely a matter of social convention (Grey 1980).

There is an obvious affinity between the nominalist view and the “bundle of rights” metaphor. But there is no reason why an essentialist must reject the bun-

dle metaphor. The essentialist view merely claims that the right to exclude is a necessary condition of identifying something as property. It does not claim that exclusion is all there is or that there are no other rights or attributes of significance associated with ownership of property. Nor can the essentialist claim that the right to exclude, by itself, logically entails other attributes like the rights to inherit or to pledge property as security for a loan.

So the essentialist thesis can be re-described as the claim that there must always be one stick in the bundle—e.g., the right to exclude. It does not tell us what other sticks are in the bundle, and indeed it is fully compatible with the notion that other sticks can be added or subtracted as social conditions dictate without the bundle losing its identification as property. The distance between the essentialist and the nominalist views with respect to the bundle metaphor therefore reduces to one stick. Again, the bundle metaphor does not answer the question whether at least one stick is essential or all sticks are optional. Unless one caricatures the essentialist thesis as being that property consists of exclusion and nothing more, the metaphor cannot resolve the debate.

What then about a third inquiry: seeking an accurate understanding of how property functions as an institution? Property is not merely a constitutional right or a concept; it is a social institution. More precisely, it is an institution for organizing the management of resources, an institution that exists to one degree or another in every known human society. Does the “bundle of rights” metaphor help us in understanding the way property functions as a social institution?

To a very limited extent, it does. The bundle metaphor helps us perceive that property is a heterogeneous institution. In some contexts, where the law of trespass and conversion hold sway, property is simple and draconian. “Don’t enter!” and “Don’t take!” are the operative rules. In other contexts, where the different forms of ownership like the fee simple, the tenancy in common, the term of years, the trust, and the condominium come into play, property appears to entail rule-like but fairly arcane doctrine. Here, navigation is possible only with the aid of a lawyer. In still other contexts, such as the relationships between bailor and bailee, landlord and tenant, or trustee and beneficiary, property appears to function like a specialized version of the law of contracts. Relations among neighbors and those between the government and the owners of property present yet further variations. The bundle reminds us of this heterogeneity.

The bundle metaphor provides no assistance, however, in helping us discern patterns or explanations for the different dimensions of property that generate this heterogeneity. The bundle is formless. It highlights the complexity of the institution without offering any views about its nature or content. Like much Realist-inspired writing, it reflects hostility to property, which too often translates

into indifference about understanding how the institution actually functions and why.

If we want to start to understand property as an institution, a better metaphor is a prism. The institution of property is like a prism that takes on a different coloration when viewed from different angles. The point has been suggested by those who have stressed the importance of identifying the “audiences” of property (Rose 1985, Smith 2003, Chang and Smith 2011). Different audiences have different needs in interacting with property, and the nature of their interaction requires different information and can tolerate different degrees of complexity and information loads.

Simplifying a bit, the prism of property can be seen as having four sides, each corresponding to a different audience. I will call them “strangers,” “potential transactors,” “persons inside the zone of privity,” and “neighbors.”

For the audience of strangers, the property prism broadcasts a bright red light that corresponds to exclusion. Strangers know that they are to keep off and cannot take without permission—period. The simplicity and rigidity of the rules is made necessary by the information costs of communicating between the owner and all strangers that may interact with the property, which includes potentially “all the world.” All the world includes many people who are not very sophisticated and even more who remain rationally ignorant about the preferences of different owners (Merrill and Smith 2007, 1853-1854). A simple set of rules easily and universally comprehended at low cost is necessary in order to preserve a strategy of resource management that concentrates authority over particular resources in designated persons.

As for potential transactors, here I include persons who are on the lookout for particular types of property to purchase or rent, as well as persons who are willing to lend to owners in return for a security interest in property. For present purposes, I also include the government, insofar as it seeks to acquire resources, by purchase or eminent domain, or to satisfy a tax lien, collect a fine, or recover a forfeiture.

For potential transactors, the prism of property transmits light of a different hue, a kind of amber perhaps. Here, property presents itself in a finite number of standard forms: the fee simple, the lease, the condominium, the trust, the easement, the security interest, and so forth. The forms are sufficiently numerous that resources can be deployed in different ways to achieve different objectives. But the number of forms existing at any time is closed, and the rights and privileges associated with each form are sufficiently standardized that they can be explained to potential transactors by the proverbial country solicitor. The explanation for this *numerus clausus* of property forms, as Henry Smith and I have argued, is information costs (Merrill and Smith 2000). Given the small number of potential transactors

relative to strangers, and the much higher stakes involved for potential transactors relative to strangers, a significantly higher information cost burden can be imposed on potential transactors than on strangers: high enough to permit a menu of different forms of property to be established, but not so high as to dissuade potential transactors from seeking out new resources.

The third audience of property I call, somewhat awkwardly, “persons inside the zone of privity.” By this I mean persons who share an interest in some piece of property defined by contract, express or implied. Bailors and bailees, landlords and tenants, and trustees and beneficiaries would be familiar examples (Merrill and Smith 2001). Also included in this category would be co-tenants in a tenancy in common or a joint tenancy. And I would further include the partners and employees of a partnership and the directors, officers, and employees of corporations. In each case, control over an asset or a complex of assets is divided between two or more persons, and this division of authority is defined contractually, either by explicit contracts like leases or trusts or corporate bylaws, or by implicit contracts as in an oral bailment or mutual understandings among co-tenants.

For persons in the zone of privity, the prism of property reveals a steady green light. For those in the zone, a tremendous diversity of rules and practices is possible. The relationship among the actors in the zone is a personal one, and the division of responsibilities they establish over the use of the resource will largely be of concern only to themselves. There will be, ordinarily, few external effects on third parties outside the zone. The explanation for letting a thousand different contracts bloom is, again, information costs. Idiosyncratic rules and practices may be of high utility in particular situations involving the ongoing management of particular assets, making free customizability of rules and practices welfare-enhancing. At the same time, the costs of learning about these idiosyncratic rules and practices are lower for persons inside the zone, who typically interact on a regular basis and hence can learn the rules and practices without difficulty.

Finally, we reach the audience of neighbors, which can perhaps be generalized to include anyone who experiences significant external effects from the way the property is managed. Neighbors have a distinctive type of relationship to property. Neighbors are not strangers, since a neighbor typically has some knowledge about the identity of the owner and the nature of the activity the owner engages in on the property. Neighbors are also typically not potential transactors. Contractual agreements are in theory a solution to neighborhood conflicts (Coase 1960), but these agreements are in fact rare and are not standardized in a way designed to reduce the costs of searching for potential transactors. In some situations, such as condominium associations and subdivision associations, neighbors may be within a zone of privity with each other, in which case the analysis of persons within the

zone of privity would apply. But again, neighbors typically do not interact with each other under a pre-existing governance regime established by contract.

For neighbors, the prism of property reflects a kind of white light, composed of multiple of colors on the spectrum. Where external effects are concerned, context is everything. The severity of the spillover, the nature of the affected property, the predominant use of property in the locality, cultural expectations—all are relevant. The law regulates external effects through a combination of *ex ante* rules—zoning and building permit requirements, subdivision covenants, and easements—and *ex post* liability in nuisance. The multifarious nature of legal protection for neighbors obviously presents relatively high information costs—much higher than we find with respect to strangers and higher even than those associated with potential transactors. The higher information cost burden is tolerable here because legal intervention to protect neighbors tends to be episodic. Most of the time, external effects are ignored under the maxim “live and let live” (Epstein 1979, 82-87). Legal machinery tends to be invoked only when some significant change has occurred or is imminent—a new factory is proposed, a dam is being built, a residential structure is being converted to commercial use. Since significant changes are episodic, the affected parties need to inform themselves about the relevant options only when a conflict arises and only when it is sufficiently serious to justify incurring the costs.

The “property prism” metaphor accomplishes some of the same things as the “bundle of rights” metaphor. It underscores that property law is heterogeneous and cannot be reduced to simple maxims about owner sovereignty. But unlike the bundle metaphor, the prism does not suggest that the constituent features of property are a random collection of rights or that the identity of the rights is completely plastic. It also helpfully points us toward asking who the relevant audience is when we consider the nature of property. Property casts a different light on different audiences, and the complexity of the rules that govern this institution vary tremendously depending on the relevant audience. The prism tells us that property is not a formless collection of random rights but has an inherent structural integrity whose shape can be explained by ideas like information costs.

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. By using a prism, Newton discovered that light consists of different colors arrayed by wave length. It is time to see that property consists of different rules arrayed by type of audience. Abandoning the bundle for the prism would be a step toward enlightenment.

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