



## A Bundle Theorist Holds On to His Collection of Sticks

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It is essential for scholars in any academic field to reexamine established paradigms and suggest different ways of thinking. For some time law teachers, law students, and many philosophers have thought of property chiefly as a bundle of rights or, colloquially, as a bundle of sticks. Although a right in this context is, broadly, an individual advantage secured by law, most bundle theories separate different normative modalities, and not all of these modalities are rights even in this broad sense. The most influential classification along these lines is Hohfeld's set of "fundamental legal conceptions," which he regards as the "lowest common denominators of the law" (Hohfeld 1978, 64). Table 1 gives a representation of Hohfeld's scheme. The items in the elements and correlatives columns are the fundamental legal conceptions. Hohfeld thinks of correlatives in terms of two-way entailment and of opposites as involving external rather than internal negation (Munzer 1990, 18-19).

TABLE 1. *Hohfeld's Fundamental Legal Conceptions*

Elements	Correlatives	Opposites
Claim-Right	Duty	No-Right
Privilege (Liberty)	No-Right	Duty
Power	Liability	Disability (No-Power)
Immunity	Disability	Liability

Source: Munzer 1990 (19)

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This classificatory scheme is well short of a bundle theory of property because it contains no account as to which claim-rights, etc., are involved in property. At this point some scholars have taken a page from an essay on ownership by Honoré (1961). The following list captures some of the main normative modalities, or metaphorical sticks, in a bundle theory of property: claim-rights to possess, use, exclude, control, manage, and receive income; powers to exclude, sell, devise, bequeath, pledge, waive, and abandon; liberties to consume or destroy; immunity from expropriation without compensation; the duty not to use harmfully; and liability for execution to satisfy a court judgment. By “liability” Hohfeld understands a susceptibility to have one’s legal position altered by one’s own actions or the actions of others rather than an exposure to imprisonment for a crime or to an action in tort. These normative modalities do not involve a direct relation between persons and things but rather legal relations between persons with respect to things. Often these things, such as land or animals or tools, are physical objects. Sometimes, as with patents, copyrights, and corporations, they are not. This brief sketch is not a substitute for a more thorough account developed elsewhere, yet it gives the main lines of my particular bundle theory, which I incorporate by reference (Munzer 1990, 15-31).

By the mid 1990s, a few legal scholars began to articulate reservations not just about particular bundle theories of property but all such theories (Harris 1996; Penner 1996; Penner 1997). Penner’s views have some traction with, and perhaps influence on, American academic property lawyers, especially those who approach property from a law and economics perspective. A prime example of this traction is Merrill and Smith (2007), whose casebook promises to have an impact on a rising generation of law students (Claeys 2009). Because Penner (1996) made me something of a poster boy for a bundle-of-rights theory, I have long had an interest in this nascent shift within the legal academy. As yet, this shift does not seem to have affected many philosophers who write about property.

The purpose of this essay is to examine a few of these developments as evenhandedly as I can. I confine my attention to Merrill and Smith’s casebook and, glancingly, Merrill (2000), and leave the contributions of Harris and Penner for another occasion. I assess some of Merrill and Smith’s criticisms of the bundle picture and evaluate what is being suggested in its stead. I argue that they paint too simple a picture of property and that property law is a less unified subject than they claim.

The preface to Merrill and Smith (2007, v) makes several connected statements. “The most basic principle is that property at its core entails the right to exclude others from some discrete thing. This right gives rise to a general duty on the part of others to abstain from interfering with the thing.” They continue: “The materials [in our casebook] are designed to challenge each student to decide for

him or herself whether property is defined by common principles such as the right to exclude others, or whether any such principle is so riddled with qualifications that property can only be regarded as an ad hoc ‘bundle of rights’” (ibid.). If these statements are correct, that would support their view “that property law is a unified subject” (ibid.). These passages raise a number of questions.

1. What, exactly, is a right to exclude? Merrill and Smith say that “property...entails the right to exclude” and that this right “gives rise to” a duty. Hohfeld’s vocabulary is more precise in making a duty the correlative of a right/claim-right expressible as two-way entailment. The statement that A has a right to exclude B from Blackacre entails, and is entailed by, the statement that B has a duty not to interfere with Blackacre and its ownership and possession by A in specific ways. Two-way entailment is a logical relation which is more exact than saying that a right to exclude “gives rise to” a duty, for the latter expression suggests that some temporal process is occurring.

One can, moreover, improve on the protection and contextual impact of a right to exclude by bringing in legal powers. As a well-known article by H.L.A. Hart points out, Hohfeld’s understanding of a legal power, whose correlative is a liability, was a signal achievement. It was, however, anticipated by a much deeper account of powers proposed by Jeremy Bentham but not published till long after Hohfeld’s death (Bentham 1970; Hart 1972, 800-801).

Bentham divides legal powers into two main kinds: powers of “handling” and powers of “imperation” and “deimperation.” Powers of handling, which he more often calls powers of “contrectation,” are legally recognized powers to interfere physically with things and sometimes with the bodies of other persons. Examples include an owner’s power to drive a car he owns, or a landlord’s power to make needed repairs, upon reasonable notice to the tenant, to an apartment he owns, or the power of a police officer to make an arrest. Some powers of this kind are exclusive (the landlord case) and others are inclusive (the powers of cotenants to occupy the premises) (Hart 1972, 801-805). Protecting a right to exclude involves legal powers of self-help by owners of real and personal property, though the limits on permissible self-help continue to tighten.

Powers of imperation and deimperation are powers, whether general or singular, over the active faculties of persons. A law that sets the conditions for making a will is a general power of imperation exercised by the legislature over an entire class of persons—roughly, those of sound mind who have attained the age of majority. Under this law an individual member of the class can exercise her singular power of imperation to make a will that, upon her death, transfers ownership of land and chattels to persons named or described in the will. The beneficiaries now have various powers of imperation and deimperation as well as handling over these assets (ibid., 805-810). To protect the right to exclude, the law

confers general powers of imperation on owners, and in turn owners can exercise their singular powers of imperation to bring a civil lawsuit to guard against or remedy interference with their real property (e.g., trespass and nuisance) and their personal property (e.g., conversion, replevin, and trespass to chattels). Bentham thinks of powers of deimperation as granting permissions. He believes that a person's title gives her a permission that is not available to anyone else—namely, a liberty (privilege) as well as the power to walk over her land and build a house on it. When she sells the land to someone else, it is as if she appoints the buyer to the “office” of owner. The new owner is no longer subject to a general duty to forbear interfering with the land and has powers of handling, imperation, and deimperation with respect to it. The former owner is now subject to a duty not to interfere with that property. Of course, the new owner can exercise his power of deimperation to exempt the former owner, or one of his neighbors, from a duty not to walk or drive on a broad path on his land (*ibid.*, 810-813).

Merrill and Smith (2007, 393-439, 884-936) know better than I the legal details pertaining to protecting the right to exclude, recording titles, and transferring ownership. The point of the preceding paragraphs is to underscore that one gains a much richer understanding of the right to exclude by identifying the logical relations between right and duty and by appreciating the wide range of powers of handling, imperation, and deimperation over items of property. This point applies to me, too. My exposition of the bundle theory more than twenty years ago would have been stronger had it paid more attention to Bentham and Hart and not relied so much on Hohfeld's comparatively impoverished understanding of powers. In particular, I should have paid more attention to Bentham's treatment of deimperation and the alienation of property. Selling one's land to someone else involves a complicated thicket of liberties and powers as well as rights and duties. A well-crafted bundle theory makes it easier to grasp the logical relations and complicated normative modalities involved in exclusion, title, and transfer.

2. What is a “discrete thing” according to Merrill and Smith? It would be too narrow to say that it must be a countable physical object, such as one automobile or two vases. The word “discrete” emphasizes individuality and lack of connection, but we also have to allow for physical stuffs, such as water or whale oil. Because a given quantity of water or whale oil can be divided in half and still remain water or whale oil, neither is discrete in the way that automobiles and vases are discrete.

Merrill and Smith allow for physical stuffs and intangible property by parsing discrete things as “discrete assets,” which are “valued resources” held in a legally recognized property form that are created, exchanged, or enforced by economic actors (Merrill 2000, 974). I have two reservations about this move. First, intangible property is better articulated as clusters of normative modalities as unpacked by some bundle theories of property rather than solely a right to exclude. Second,

their account encompasses only valued resources that a given legal system and a given community of economic actors already recognize. If so, then it is unclear how Merrill and Smith can accommodate any natural property rights, or any moral property rights not yet recognized by law and economic actors. Though they could respond that no such rights exist, I do not think that they are entitled to exclude them at the stroke of a definition. Neither are they entitled to import into the definition of valued resources the idea that all property rights must be recognized by a community of economic actors. Economic value need not be the only sort of value protected by property law.

3. What exactly does it mean to say that a bundle theory of property is, as Merrill and Smith put it, *ad hoc*? (a) It might mean that the theory on offer is intended for a particular purpose rather than some wider array of purposes. I intended my version of the bundle theory in this way. My purpose in doing so was to provide 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. The bundle theory I proposed can be used by many different sorts of property scholars, whatever their moral or political views. In contrast, their account of valued resources maintains that all property be recognized by a community of economic actors. Although my book advances arguments for certain moral and political positions, whether one considers those arguments good, bad, or indifferent, they are not smuggled into the analytical scheme.

(b) Perhaps they mean that a bundle theory differs from the “traditional everyday view” that property is a “right to a thing good against the world” (Merrill and Smith 2007, 1). The distinction they have in mind might seem identical with my distinction between the “legal conception” of property as relations among “persons or other entities with respect to things” and the “popular conception” of property “as *things*” (Munzer 1990, 16-17). Their view, though perhaps traditional among some lawyers, is not an “everyday” view because most people are unaware that “good against the world” rests on the notion of property as *in rem* rather than *in personam*, or “multital” and “paucital” respectively in Hohfeld’s vocabulary. To explain what it means for property to be good against the world, the bundle theory is highly useful. To my mind, the difference they point to is somewhat ill expressed, and it is unpersuasive to claim that it paints an accurate picture of how bundle theories differ from their competitors.

(c) Later they draw a distinction between two conceptions of property in another way. There are “essentialists,” such as Blackstone, Penner, and, more complicatedly, Honoré, who hold “that there is one correct meaning of property” (Merrill and Smith 2007, 15-16). And there are “skeptics,” such as John Lewis,

Benjamin Cardozo, Thomas Grey, the authors of the First Restatement of Property, and the legal realists generally, who hold that “‘property’ is just a word that means nothing until we spell out—using different words—exactly what we are talking about in any given context” (ibid., 16). Moreover, they say, the “skeptical view is reflected” in talk about a “bundle of rights” or a “bundle of sticks” (ibid.).

This distinction, I think, is muddled. Bundle theorists, such as Becker (1977, 18-21), often make use of Honoré, which suggests that they don’t view him as an essentialist. Anyway, the proper contrast with essentialism would seem to be nominalism rather than skepticism. However, I am aware of few bundle theorists who consider themselves either nominalists or skeptics. The American legal realists are a diverse group. Often they are seen, not as adherents of astringently depoliticized versions of the bundle theory, but as forerunners of the critical legal studies position that property is a set of social relations (Munzer 2001). It is hard to believe that Cardozo and Grey are skeptics in the same sense. If Grey is a skeptic, I certainly am not. At the end of my chapter expounding a bundle theory of property, I criticize Grey’s views on the disintegration of property (Munzer 1990, 31-36).

Be their distinction muddled or clear, they make a further point in the paragraph explaining it. The bundle of rights/sticks “metaphor implies that one can add to or subtract from the bundle more or less without limit, and still talk about the bundle as property” (Merrill and Smith 2007, 16). As metaphor, even if you could keep adding to the bundle, you cannot keep subtracting from it because no one would call a collection of items a bundle if it had zero or one or even two items. There are null sets but no null bundles. In any case, it is vital to separate the bundle *metaphor* from the different bundle *theories* proposed by philosophers and legal scholars. As for bundle theorists, I can think of no one who has either allowed the number of normative modalities to metastasize into the hundreds or thousands, or reduced the number to two or three.

(d) As I try to understand Merrill and Smith’s claim that bundle theories are ad hoc, there is another possibility that might capture what they mean. Given their emphasis on the right to exclude, perhaps they object to throwing in other rights, powers, liberties, and immunities on the ground that these are so trivial as to muck up the bracing clarity and force of the right to exclude.

This possible objection seems to me more powerful than some of the criticisms they voice explicitly, but Merrill and Smith over-emphasize the right to exclude. Over the years, I have received papers from students arguing for the centrality of either the right to use or the power to transfer, or both. None of these papers has wholly persuaded me but they have some merit. The right to use one’s property as one wishes might be seen as the opposite side of the coin from the right to exclude others, with both of these rights being highly important to the functioning of a system of property. Indeed, Claeys (2009, 631) puts the two

together by defining property as “a right to determine exclusively how a thing may be used.” Further, law teachers are well versed in the power to transfer as it bears on wills, trusts, and real estate transactions. Yet because many of them do not also teach contract law on a regular basis, it is easy to lose sight of the importance of sales of goods in a market economy and thereby to underweight the power to transfer chattels.

(e) Perhaps Merrill and Smith (2007, 16) mean that bundle theories have so much “plasticity” as to render the limits of property poorly defined. That property is indeterminate at the margin shows only that it is an imprecise concept, like baldness, not that it is ill-defined. The ability to describe someone’s legal position in detail rarely requires a highly precise concept of property (Munzer 1990, 24).

4. What does it mean to say that property is a “unified subject”? Merrill and Smith seem to mean that some concept (e.g., a right to exclude), or some principle (e.g., that property at its core entails the right to exclude others from some discrete thing), explains why property law has a coherent structure. However, the right to exclude does not explain why property law is coherent. Consider the right to use a public park. If state law regards this right as property, the takings and property due process clauses may come into play. But the right to exclude does not explain this right, for the right-holder does not own the park and cannot exclude others. Merrill (2000, 893-894) avoids this result only by imposing a monetary-value condition on property, which makes property simpler than it is.

Merrill’s discussion of so-called constitutional property criticizes the *Roth* case (1972) on the ground that it appears “to require the [Supreme] Court to go along with any and all contractions or expansions on the domain of property dictated by nonconstitutional law” (Merrill 2000, 923). Yet some cases do not adhere to this reading of *Roth*. *Webb’s Fabulous Pharmacies* refused to follow a Florida law that would have transmuted, “*ipse dixit*, . . . private property into public property without compensation” (1980, 164). Later, the *Craft* case quite appropriately used bundle-theory language in maintaining that state law is not dispositive of what qualifies as property and that a husband’s interest in entireties property had more than enough sticks from the bundle to qualify (2002, 278-279, 283-285). The broader points here are that there is no constitutional property as such, only constitutional protections for property, and that what counts as constitutionally protected property is a more complicated matter than an anti-“positivist” critique allows (Merrill 2000, 917-954).

5. Merrill and Smith (2007) seeks to impose more unity on property than any other casebook in its field. It does so by putting the right to exclude front and center and by leading students through diverse areas of property law to search for the maximization of exclusion-efficiency. In these respects it is the most intellectually challenging property casebook on the market.



This unity and search for efficiency rest, however, on far too simple a picture of property. Unless one attends to other normative modalities in a bundle of rights theory of property, and in particular the right to use and the power to transfer, one does not supply students and law teachers with the richer view of property that they need and deserve. Moreover, Merrill and Smith's unduly narrow theoretical understanding of property has consequences for the normative analysis they carry out in terms of economic value and efficiency. By my lights they do not give due weight either to underlying problems at the foundations of game theory and welfare economics or to bounded rationality and behavioral economics. A more complicated picture of property would insert at least a right to use and a power to transfer in addition to a right to exclude. But inserting only them would still leave out the ways in which many other powers, liberties (privileges), and immunities against government expropriation without compensation figure in property. Property law is not, I think, as unified a subject as Merrill and Smith claim.

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