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## Potentiality, Actuality, and “Stick”-Theory

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There is nothing wrong with introducing students to the topic of property law by emphasising that property is facilitative. The right to property (in particular in the case of land, where the “numerus” in the *numerus clausus* is greatest) indeed comprises an array or set of liberties and powers, principally the liberty to use the property in any way one fancies within the strictures of the general law, including using it by transforming it or destroying it, and the powers to transfer it and create lesser property/proprietary rights like licences, leases, security interests, profits, restrictive covenants, and easements. So far so banal. Much the same could be said about one’s right to contract or to enter contracts. The right to contract is a set of liberties and powers to enter into consensual arrangements of various kinds, sales, contracts for services, contracts of employment, loans, security arrangements, agency agreements, and so on. Again, so far so banal. But the “bundle of rights” picture of property is intended to present more than this mundane observation. It is supposed somehow to illuminate some special feature of the legal nature of property. On one view of this illumination the word “bundle” is particularly significant, suggesting as I think it does the bundling together of things that are in principle independent, as opposed to “array” or “set”, which I think do not. The idea here is that the standard “full-blown liberal” right of ownership, the sort we normally have over land or chattels at common law, is not any kind of natural “default” position as regards the norms that could in principle shape the rights of access that individuals have in respect of things. Rather, all the various powers and liberties which make up the standard rights of an owner are just a conventional assembly of various normative elements which might well have been assembled otherwise, added to or diminished. I think this is fanciful. In past work I have examined how the concepts of exclusion and separability together make sense of the standard incidents of ownership in a way which shows how they naturally

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belong together. But I shall not on this occasion rehearse that criticism of the way the “bundle of rights” picture of property is supposed to bring light. The other main way in which it is intended to do so is through a contrast with the “layman’s picture of property,” that is, that property is a “right to a thing”.

My view is that the layman is essentially right. The layman is not so deficient in brain cells as to think that a right to property is a right “against” a thing, as if he could take Blackacre to court if it disobeyed him; that is obviously a fatuous construal of anything any layman might possibly think. Rather, the layman quite properly thinks that the nature of his right is *mediated* by the existence of a thing. The layman understands that he is wronged when someone interferes not with him, with his person, but when someone interferes with his property—trespasses on Blackacre, for instance. The layman understands that he benefits from the practice of self-exclusion, which the law institutes to make the right to property the norm that it is. The layman understands that everyone, himself included, has a duty not to interfere with property that is not his own and that everyone benefits from the observation of this duty. (Even the propertyless benefit from it, since when someone addresses their need and hands them the money or the bowl of soup, they are only legally secured in their receipt of it by the self-same duty upon all others not to immediately snatch it away from them again.) The questions that are raised by the “bundle of rights” picture of property, which as I say is meant to be opposed to the layman’s view, are (a) what is wrong with the layman’s view? and (b) what does the “bundle of rights” picture do to correct it? In my view, the answers are (a) nothing, and (b) (therefore) nothing as well.

If that were all that needed to be said, I could stop there. But the “bundle of rights” picture is not simply spinning its wheels to no good effect, not simply an otiose bit of intellectual flotsam; in my view it is positively pernicious. It purports to provide an *alternative* analysis of the liberties and powers that go with the ownership of property. We see this amongst those who favour a “bundle of sticks” metaphor for the nature of ownership. On this view, when an owner grants a lease to Blackacre, the correct *analysis* of this transaction is not that he exercised a power to create an interest in Blackacre that did not exist before—that again would be the layman’s understanding—but rather that he transferred some pre-existing lease-stick in his bundle to the lessee. I must say I am at a loss to understand quite how this bit of nonsense has had the traction that it has, but never mind; its popularity—amongst theorists, as no lay understanding of property has, as far as I know, ever suggested anything like it, although the metaphor “selling one’s labour,” which does have some lay resonance, commits an error in the same conceptual ballpark—demands that we address it in some detail.

If we really wanted to conceive the grant of licenses, leases, easements, mortgages, and so on, as transfers of previously existing rights which the owner

himself already had, then we would have to hold that the owner has an infinite number of rights. After all, an owner has the legal power to grant anyone the right to do anything that can be done with his property; that is what a power to license someone to come onto Blackacre empowers. Furthermore, the law recognises other sorts of interests, such as security interests and interests under trusts, which multiplies further the scope of what a person having title to Blackacre can do. The “bundle of sticks” view says that an owner has one stick corresponding to each right in his bundle, which together form a bundle of sticks comprising rights to do every possible thing with his property, each of which can be transferred to others.

Now, this way of looking at things might make some sense of a grant of a lease. The idea goes something like this: A transfers five years’ time in Blackacre, which he would otherwise have kept for himself, in granting a five-year lease to B. So the idea is that he transfers the right to five years’ occupation of Blackacre to B. Since A already had the right to the next five years’ worth of occupation, that right already existed, and so it can be the subject of a transfer. This analysis, of course, is perfectly correct in the case of A’s fee simple in Blackacre, in the case where he transfers his fee simple to B.

But, really, in the case of a right like a lease, the analogy to the fee simple is a cheat. I shall return to the lease in a moment, but an easy way to see the nature of the problem is first to consider an easement. A grants B an easement over Blackacre for five years—a right of way, let us say. The important feature of the easement for our purposes here is that B, the easement holder, has a right to exclude A in the sense that henceforward A owes B a duty not to use his land in any way that interferes with B’s right of way. Now let us account for this stick in A’s bundle before he transferred it to B. Not only does A have the full right of exclusive use in virtue of his fee simple, but surprisingly he also has the duty to exclude himself from interfering with B’s right of way. On the “bundle of sticks” picture, *if we take it seriously*, A’s bundle of rights (sticks) includes both a right to the full exclusive use of Blackacre, but also the duty to exclude himself from B’s right of way over it because he has that particular “easement-stick” in his bundle as well; though he hasn’t *transferred* it to B yet, on the bundle of sticks view it is still there in the bundle, and if a right (or duty) actually exists it means it guides the behaviour of those subject to it. But of course it doesn’t actually exist, and A does not have any pre-existing duty to exclude himself from B’s right of way.

This is not an artefact about easements or any other particular right someone might have in Blackacre. This problem generalises to all the rights the stick-theorist postulates. Consider again the five-year lease. Above we assumed that there could be such a thing as an abstract right such as a “right to five years in Blackacre”. But whilst a legal system could provide a “divisible” fee simple, such that (for example) one’s fee simple ownership was conceived of as a battery of rights to time in the

land, say one right for each day, and so the grant of a lease for a year would amount to the transfer of 365 such rights, that is not the way a lease is actually conceived in the law. Given the formula of the fee simple common law grant “to A and his heirs” which basically measured time in terms of lifetimes, this analysis might work more or less for the grant of the freehold life estate, but leaseholds were never conceived along these lines. In the case of a lease, just as with the easement, its creation is conceived of as the grant of a particular right to the lessee which burdens the fee simple of the lessor. It is for this reason that there necessarily exists a relationship between the lessee and lessor, which, for example, supports the web of covenants typical of leases, that distinguishes this case from that of the life estate.

Right/duty relationships of this kind are special and *in personam*; they have their specific right-holders and duty-owners *essentially*, a distinction between rights that are *conferred* and rights that are *transferred* which we will return to in a moment. Thus from the “bundle of sticks” perspective, A must have a five-year lease-stick in his bundle for every individual alive (as well, of course, as a stick for every other length of lease for each individual, one for every possible easement for each individual, and so on and so (infinitely) on); and since all of these rights cannot genuinely co-exist (the genuine existence of any of these five-year leases excludes the existence of all the others; they are, as an economist might put it, *rivalrous*) it would seem that just in so far as they were actual they could not comprise part of A’s bundle of rights in Blackacre. So these rights are really only “potential” rights, rights which A might create by the exercise of his powers. So they do not exist before A creates them, so they are not there for him in his bundle of sticks, and so he cannot *transfer* them, for there is nothing to transfer. Any normative system whose purpose is actually to guide people’s behaviour, including how they should think about what they are doing, must founder on the kind of profound confusion of potentiality with actuality that the “bundle of sticks” version of the “bundle of rights” picture entails.

What is even more profoundly misleading in this picture, however, is the way it draws our attention away from a genuine puzzle regarding property rights, which I dramatically call the “mystery of transfer”. The “bundle of sticks” presumes that the idea of the transfer of a *right* is somehow conceptually simple. But it is not, really, really not. The transfer of possession of a tangible is not conceptually puzzling. My handing you a stick (an actual piece of a tree with actual bark and so on) with the intention that I will not take it away from you again, your realising my intention, is a perfectly obvious and untroubling example. But what does it mean to say that I transfer my *right* to the stick to you? I am not entirely sure what the right answer to this is (it is one of the things I am trying to think hard about), but here is a (popular) non-answer: your right to the stick arises by operation of law whenever I put you in possession of it with the intention no longer to vindicate my prior

right to it (a sort of directional abandonment followed by your “appropriation” of the stick). People who think this (for example those unjust enrichment theorists in the UK who think that property rights are a “response” to legal “events” such as contracts of sale or mistaken payments) cannot make sense of the notion of title. The whole notion of title turns on the idea that my right can come to be your right (the very *same* right), not just that the object of my right can come to be the object of yours. This is the sense in which transferable property rights do not have their right-holders and duty-owers essentially, for the people occupying those normative positions change upon transfer without the identity of the right coming undone; the right now just *belongs* to someone else. To avoid any misimpression that might flow from using that stick as an example, it is well to point out that this is not just a matter concerning tangibles. The same issue arises when we are faced with the question whether the “assignment” of a chose in action is to be conceived of as a true transfer of a right or whether it amounts to a novation, the creation of a right *de novo* in favour of the assignee with the same content as that held by the assignor.

So another reason for rejecting the “bundle of sticks” metaphor for ownership is that it presents as simple one feature of property which is actually quite conceptually difficult, and it tacitly treats something that is much more conceptually straightforward—the exercise of powers to create rights, duties, and other powers—as beyond the grasp of property theorists (though not apparently beyond the grasp of contract theorists, trusts theorists, and public law theorists). Very odd.

## About the Author



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