

PROPERTY AND EXCLUSIVITY: OWNERSHIP IN THE SCOTTISH
ENLIGHTENMENT, ADAM SMITH, AND ENGLISH LITERATURE

by

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English Literature

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Master of Arts
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DEDICATION

To Emily, who trusted without question that I would finish these chapters, even when I doubted. And to John-Paul, who – just by arriving – did more than any other individual to motivate me to finish. Your love enriches my life daily.

Also to Joe and Katie. The very best companions and interlocutors, your influence on my character and my mind is immeasurable.

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Ad maiorem Dei gloriam.

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ABSTRACT

PROPERTY AND EXCLUSIVITY: OWNERSHIP IN THE SCOTTISH
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This dissertation contributes to the recent debate over the appropriateness of the metaphor that describes property as a ‘bundle of rights,’ prevalent in legal and economic scholarship. Critics of the bundle formulation argue that a more sensible alternative description of property is to be found in our more ancient legal tradition. I argue that the bundle formulation is indeed a departure from earlier treatments of property found in the writings of Gershom Carmichael, Francis Hutcheson, Adam Smith, among others. In my final chapter, I examine a variety of folk and fairy tales that illuminate some of the criticisms of the bundle formulation. Dominion, exclusivity, and the relationship between owners and things owned, are all key components of ownership in these stories. Such attributes of property are essential not only to its operation as a social institution, but also to its ennobling properties.

GERSHOM CARMICHAEL, FRANCIS HUTCHESON, AND “IN REM” PROPERTY IN THE EARLY SCOTTISH ENLIGHTENMENT

1.1 Introduction

Modern economists and legal scholars commonly refer to property as a bundle of rights, by which they suggest that the rights we commonly call ‘property’ in fact consist of a large number of contractual rights such as the rights to use or sell. For at least the last half-century, economists seem to have generally taken for granted that the metaphor, “property is a bundle of rights” is both appropriate and illuminating. The “bundle of rights” or “bundle of sticks” description, however, is a relatively modern phenomenon.¹ And in recent decades, critics of the bundle view of property have argued that the metaphor is misleading, inappropriate, or even insidious, and have suggested a few alternative descriptions. They argue that the other descriptions have deep roots in the western philosophical tradition and specifically note the dominance of an alternative view among western scholars in the 17th and 18th centuries. In particular, they point to William Blackstone and Adam Smith as among those who espouse an “in rem” view of property that has very different properties than the bundle view. In an effort to understand more fully the depth of Adam Smith’s commitment to the in-rem view, I intend to carefully

¹ Epstein recently argued that Roman law made use of a theory of instances that operated much like our modern bundle.

² A natural right is defined by Merriam-Webster as “a right conferred upon man by natural law” and which “would hold in the absence of any government”

³ Aquinas still justified private property on practical grounds not dissimilar to the arguments found in Smith and Hume among others, that human nature, and our concern for what is our own, makes private property necessary.

⁴ Specifically, Hutcheson develops his theory of the moral sense in reaction to Locke’s attempt to ground

examine the writings of some of Smith's predecessors on the topic of property and ownership. I plan to look directly at Smith's work in a subsequent paper.

My paper proceeds as follows: In the first section, I introduce the bundle of rights view of property and describe its origin. Second, I review some of the modern criticisms of the bundle view and briefly examine the features of the in-rem view as described by some of its modern proponents. I also identify what I believe to be the three important propositions about property relevant to the debate between the bundle and in-rem views. In sections three and four, I examine the writing of Gershom Carmichael and Francis Hutcheson to determine the degree to which their descriptions of property differ from the bundle view. Finally, I conclude with a discussion of the relevance of these scholars' views to the modern debate and suggestions for additional research.

1.2 A Bundle of Rights

The sense conveyed by the metaphor, 'property is a bundle of rights,' is that the scholar or practitioner of law can better understand property when seen as a composite of a myriad of rights rather than as a unitary institution; while in casual conversation it is convenient to think of property as a generalized type of right in itself, thoughtful analysis requires that we define it instead as a collection of individual rights that have been bundled and are held together. Thus, the 'bundle of rights' view of property is frequently contrasted with the notion that property is best described as a right to a thing.

The proponents of the bundle view argue that when an individual claims a property right in a thing, he is actually making a statement about a list of rights that delineate those things he can and cannot do with respect to other individuals, which only

parenthetically involve the object or thing in question. Ronald Coase writes that, “we may speak of a person owning land and using it as a factor of production but what the land-owner in fact possesses is the right to carry out a circumscribed list of actions” (Coase 1960, p. 44). Coase’s argument is emblematic of the modern approach to property in that economists and legal scholars have pushed the object of property, the thing, to the side when working with the concepts of property and ownership. The proponents of the bundle view contrast their approach to the layman’s concept of property that emphasizes the centrality of the thing involved. The modern scholars implicitly suggest that the bundle view is more tractable: thinking of property as a bundle of rights without particular concern over the thing allows both flexibility and precision when discussing the value of giving or taking away components—sticks—of ownership. Instead of thinking about property as certain type of right with core characteristics, the bundle theorists instead propose a circumscribed list of things a person can and cannot do. Thomas Grey writes, “property ceases to be an important category in legal and political theory... specialists who design and manipulate the legal structures of the advanced capitalist economies could do without using the term ‘property’ at all” (Grey 1980, p. 73). Taken to the extreme, the bundle view denies that the label ‘property’ gives any worthwhile information about the rights in question, when it does not actively obscure the situation.

In 2001, Thomas W. Merrill and Henry E. Smith summarized the state of affairs in law and economics, writing that, “By and large, this view has become conventional wisdom among legal scholars: Property is a composite of legal relations that holds

between persons and only secondarily or incidentally involves a ‘thing.’ Someone who believes that property is a right to a thing is assumed to suffer from a childlike lack of sophistication – or worse” (Merrill and Smith 2001, 358). The same is certainly true among economists; the mainstream view is that property is best described as a bundle of legal relations, in which the thing owned is of merely secondary importance.

The metaphor of the bundle of rights seems to have first been used to describe property sometime in the late 19th century. Klein and Robinson (2011) highlight an early use of the bundle of rights metaphor in John R. Commons’s, *The Distribution of Wealth* (Commons, 1893, p. 92), wherein he writes, “Property is, therefore, not a single absolute right, but a bundle of rights.” Richard Ely also drew an early parallel between property and a bundle of sticks and writes that, “we may say that as society develops and becomes more complex with increasing density of population some sticks are taken out of this bundle of rights which we call private property” (Ely, 1899, pp. 543-544). Commons and Ely use the bundle metaphor to illustrate the notion that property has numerous instances but do not dwell on the implications of such a description. As I examine Carmichael’s and Hutcheson’s writing, I will show how they affirm the idea that property is composed of multiple rights without describing it in terms of sticks or a bundle.

Merrill and Smith aptly trace the general trend of property theory in economics from the early part of the 20th century. They argue that Wesley Hohfeld played a pivotal role in bringing about the change in how legal scholars talked about property by way of his theory of jural opposites as well as his analysis of the differences between in-rem and in-personam rights. These property rights are no different in theory than any other rights,

and even in content are only as different as their object (often land) requires. A right to property is merely a collection of numerous contractual rights between individuals to use, disposal, sale, and exclusion. None of these particular rights are special, and they are all characterized by a relationship between individuals first, and concern external things only secondarily and even incidentally. According to Merrill and Smith, Hohfeld set the stage for a conception of “in rem” rights that made them only distinct from “in personam” rights in their application to an indistinct number of people, and Coase and others took the next step and eliminated them altogether.

By the 1920s, scholars had already begun to contrast the bundle of rights view with the traditional, in rem, view. Arthur Linton Corbin, writing in *The Yale Law Journal* in 1922, argues “Our concept of property has shifted; incorporeal rights have become property. And finally, ‘property’ has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities” (Corbin, 1922, p. 429). Other scholars elaborated on the diminishment of the importance of property at the time and some even argued that property had no special meaning at all.

As the law and economics movement began in the middle of the century, economists adopted the bundle of rights language. Coase in particular relies on the metaphor when he explicitly argued that property consists of “the right to carry out a circumscribed list of actions” (Coase 1960, p. 44). Mainstream modern economists tend to work with a model of property similar to that described by Coase. Armen Alchian and Harold Demsetz argue that, “In common speech, we frequently speak of someone owning this land, that house, or these bonds... What is owned are the rights to use resources...

always circumscribed...” (Alchian and Demsetz, 1973, p. 17). Likewise Demsetz writes, “When a transaction is concluded in the marketplace, two bundles of property rights are exchanged. A bundle of rights often attaches to a physical commodity or service, but it is the value of the rights that determines the value of what is exchanged” (Demsetz, 1967, p. 347). And again, Carruthers and Ariovich succinctly write, “Property involves a bundle of rights, including the rights of usufruct, exclusivity, and alienability” (Carruthers and Ariovich, 2004, p. 24). Conversations about property rights occur within a framework influenced by the view that property is a bundle of rights that can be combined, separated and traded into practically innumerable configurations.

1.3 In-Rem Property

Since their seminal paper in 2001, Merrill and Smith have become central figures in a renewed resistance among legal scholars, philosophers, and economists to the notion that property is appropriately described as a bundle of rights. Merrill and Smith (2001) defend an “in rem” conception of property that emphasizes exclusion as property’s primary defining characteristic. In doing so, they appeal to the Scottish enlightenment, particularly Adam Smith, as one participant in a tradition that took an exclusionary perspective on property. They contrast their reading of the Scottish Enlightenment with the approach taken by the Legal Realists in the 1920s and 1930s beginning with Wesley Hohfeld. The Legal Realists, Merrill and Smith contend, misconceive the qualitative nature of “in rem” rights and, in doing so, provide the conceptual framework that is subsequently adopted by Coase, Demsetz, and others in the field of Law and Economics.

The proponents of the in-rem view of property draw out a few key propositions that they suggest differentiate the in-rem view from the modern bundle view. First, proponents of the in-rem view argue against the prevailing notion that we ought to diminish our focus on things when we think about property. An in-rem view of property highlights the centrality of things in both determining and communicating the content of property rights. James Penner suggests, “Property... isolates a particular area of human practice, dealing with things, as opposed to the practice of dealing with other people...” (Penner, 1995, p. 800). Penner argues that it is both necessary and worthwhile to have a separate terminology that enables us to discuss our unique rights with respect to things. In contrast, the proponents of the bundle view downplay or even deny the centrality of the thing in property and instead highlight the relationship between individuals. Penner argues that the layman’s understanding of property is that it entails a right to a thing and that the layman knows something is wrong when a person interferes with his things and understands that he has a duty not to interfere with property that is not his own.

Second, the proponents of the in-rem view argue that describing property as in rem encourages us to pay attention to certain rights that naturally form the core of ownership. Various, the advocates of the in-rem view suggest exclusion, exclusivity, or sovereignty as the primary attribute of property. The views all share the theme that property grants a realm within which the owner can exercise his authority. They contrast this perspective with the modern notion that property entails a specified, circumscribed, list of rights. Merrill and Smith argue that, “property rights are in rem, in that they create duties of noninterference with things marked in conventional ways as being owned,

which duties apply as a matter of law to all persons” (Merrill and Smith, 2011, p. 9). As a result, they contend that, by default, property bears in certain ways on non-owners and even communicates to non-owners some moral command not to ‘mess’ with others’ stuff.

Proponents of the in-rem view note that by recognizing a natural core of rights in property, we are more apt to recognize violations of liberty. Prominent among Merrill and Smith’s complaints about the effects of modern property theory is that:

If property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare (Merrill and Smith, 2001, p. 365).

Although they do not argue that property arises in the absence of agreement, they emphasize the naturalness of the exclusionary characteristic of property that downplays the importance of explicit consent in determining the attributes of ownership.

A third proposition that the modern proponents of the in-rem view have not emphasized, but which is a central component of older treatments of property, is that an in-rem view of property emphasizes individual action rather than consent as the foundation of ownership. The role of consent in property is important to the debate because the bundle of rights view emphasizes the alignment of property and contracts, which are by definition based on agreements. Agreement clearly plays an important role in how property operates in practical terms; non-owners in some sense consent at least in a negative sense of acquiescence to the owner’s claim. In that sense, however, the agreement is no more meaningful or useful, from a moral standpoint, than agreement with the prohibition against murder. We consent not to murder one another, but we

acknowledge that prohibition against murder has deeper roots than our agreement. The important question is what is at the root of an individual's moral claim of ownership. One possible answer is that it is merely society or the government who blesses the institution and agrees to let the owner make such a claim. The alternative is that through some independent action, an individual can establish a moral claim over some physical good that society or government merely recognizes.

While the scholars of the Scottish enlightenment were by no means homogenous in their views as to how property was acquired or how it came to be as a social institution, they unanimously wrote about property rights "in rem" rather than "in personam," and it seems the difference is more than merely linguistic. A cursory examination of the writings of Gershom Carmichael, Francis Hutcheson, Adam Smith, and William Blackstone shows that the language of exclusion was an essential part of their theory on property, and provides grounds for reasonable suspicion that they believed ownership and contracts to play separate functions in social interaction.

However, though the distinction between modern Coasean property and the property theory of the Scottish enlightenment may be real and consequential, there is still disagreement about the exact meaning of the difference and even the nature of "in rem" rights as they appear in the Enlightenment. Carmichael and Hutcheson both develop their theories of property in the context of much larger discussions on morality, natural law, and natural rights. Any analysis of the content of their "in rem" property rights is bound to be inadequate if it fails to take into account the context. A thorough examination of their theories of property rights must determine first of all the extent to which the division

between “in rem” rights and “in personam” rights by Carmichael and Hutcheson sets them apart from modern Law and Economics. If their language does indeed indicate that there is a significant difference, it will be useful to provide an accurate description of their understanding of the character and content of in-rem ownership opposed to in-personam rights.

To answer the question of whether or not property has a core characteristic, I will rely heavily on the concept of the *suum*, which Stephen Buckle argues is the tie that binds the natural law treatments of property together. Buckle talks about how the natural law theorists justified property on the basis of the moral right to extend the realm of what is proper to ones’ self into the world. The natural law theorists focused significant attention on the origins of property and they varied in the weight they gave to autonomous action in justifying the origins of property. The two general strains of thought regarding the role of agreements in the origin of private property were based in part on how each scholar described the relationship between men and the world in its original state.

I will focus on the writing of Carmichael and Hutcheson and show that they each portray property in a way that is incompatible with the bundle view. Carmichael and Hutcheson do not give identical accounts of either natural law in general, nor property specifically, but each emphasizes features of the origin and operation of property that set it apart from other rights. Their positions regarding the propositions I have discussed are codependent, and work together to make a compelling case that a bundle view of property would be foreign to their conception of the institution and its role in society.

1.4 Gershom Carmichael

Gershom Carmichael occupies an important place in the history of the theory of property in the Scottish Enlightenment. He is most known for his commentary on Samuel von Pufendorf's writings and has been called "the bond which connects the old philosophy with the new in Scotland" (McCosh, 1875, p. 36). Carmichael is central in the emergence of natural rights thinking in the universities of Scotland. Carmichael's embrace of Lockean right theory would have had an impact on Adam Smith and his contemporaries. Smith's immediate predecessor, Hutcheson, praised Carmichael's improvements and notes on Pufendorf's text, which itself was influenced in important ways by Carmichael's appreciation of Locke's work in the *Second Treatise*. Carmichael's notes and revisions of Pufendorf's *De Officio Hominis et Civis* are the most relevant text for my present inquiry. As a commentator on Pufendorf's text, many of Carmichael's ideas have roots in the thought and work of Locke, Pufendorf, or Hugo Grotius, and I will refer occasionally to their work.

In his commentary on Pufendorf's *De Officio*, Carmichael devotes a full chapter to the right of property, but that discussion is just one part of his broader investigation of the system of natural law. Following his predecessors, he first discusses man's relationship to God, the Divine Law, and duty; only then does he proceed to look at natural and adventitious rights, including the right to property. Thus Carmichael's discussion of property is embedded in a more comprehensive treatment of natural rights and natural law and I rely on other parts of his writings that do not directly address the issue of property rights.

Regarding the assertion that property is best described as an exclusive right, it is immediately clear that Carmichael uses some of the very language that Merrill, Smith, and others use when describing their alternative, in rem, view. Carmichael unambiguously refers to property as an in rem right that grants some exclusive claim over a thing. He uses terms that explicitly relate to exclusion or exclusivity in his definition of property. His use of phrases like “an *unlimited* obligation not to disturb the owners” and “barring others from random use” suggests that his view of ownership does not perfectly align with the bundle view of property. My purpose in this section is to examine the significance of his description of property in those terms in order to ascertain whether or not his characterization conflicts with the interpretation that property is merely a bundle of rights, with exclusion no more an essential characteristic right than any other. I also hope to illuminate the importance of the thing, the role of agreements, and the relationship between property and natural liberty in Carmichael’s work. To that end, I will examine Carmichael’s description of natural and adventitious rights, the parallels he draws between real rights and natural liberty, and the distinction between positive and negative community which plays an important role in how Carmichael describes the origins of property.

Following the template set by Pufendorf and earlier writers in the natural law tradition, Carmichael divides rights into two categories: natural rights which are endowed to men upon creation, and adventitious rights which arise from human action. Carmichael writes, “Nature herself has endowed each man with natural rights; adventitious rights arise from some human action or other event. Among natural rights are the right of life,

the right of physical integrity, the right of chastity, and the right of simple reputation” (Carmichael, 2002 (1724), p. 77). The key distinction between the two types of rights is that while natural rights have no prerequisites and inhere automatically in every individual, an individual obtains adventitious rights through some type of action; elsewhere, adventitious rights are called acquired rights. Carmichael does not stray far from Pufendorf, Grotius, or Locke in his initial description of natural rights. The right to life and the right to remain unmolested in one’s person are commonly listed first among man’s natural rights, as is some right respecting the maintenance of one’s simple reputation.

It is worthwhile to note that the rights to life and liberty were commonly thought to be so necessary to human existence that they are beyond the purview of any earthly authority to violate under normal circumstances.² The preeminent force of natural rights in human society is highlighted by Grotius, who writes, “It is also a fact universally recognized that the Pope has no authority to commit acts repugnant to the law of nature” (Grotius, 1916 (1608), p. 46). By comparing the authority of natural rights to the Pope, Grotius emphasizes that no institution or sovereign has the moral authority to contradict the natural law or natural rights, which come from a higher authority still. Writing of Carmichael and his use of natural rights, Samuel Gregg explains that they are, “those rights that each individual derives from their nature as human beings made by God” (Gregg, 2009, p. 93). Individuals have no part in originally obtaining their claim to natural rights, which are thought to be inherent to them, though they can forfeit them

² A natural right is defined by Merriam-Webster as “a right conferred upon man by natural law” and which “would hold in the absence of any government”

through improper action. In the natural law tradition, natural rights are innate in individuals before they enter into society, and demand recognition and protection by civil governments.

Carmichael adds three additional rights to his list of natural rights: first, “liberty” to act and choose freely within “broad limits of the common divine law,” second, to “use in common things which are by nature positively common,” and lastly, the right to acquire adventitious rights. (Carmichael, 2002 (1724), p. 78) These three additions illuminate a common strain in natural law argumentation: that certain of man’s interactions with the external world must also belong to the category of natural rights because without these rights, individuals could not sustain themselves nor fulfill certain moral obligations. Of these, the right to use what is common and the right to acquire adventitious rights are both relevant to my examination of Carmichael’s views on property because although private property is not among the list of natural rights, the right to acquire property is precisely the kind of adventitious right Carmichael speaks of here. Carmichael certifies that individuals have a natural right – given to them not by society, but by nature – to interact with the world and with others to appropriate additional rights to themselves.

Having drawn the connection between natural and adventitious rights, Carmichael turns to a much more detailed discussion of adventitious rights, which he divides into real and personal rights. “Real rights are concerned with having, possessing, using, etc., some thing (rem); personal rights, with obtaining some thing or service from another person” (Carmichael, 2002 (1724), p. 78). Carmichael immediately distinguishes rights to a thing

from rights concerned with another person. He notes that personal rights can also involve a thing, but only secondarily, in that the defining attribute of a personal right is that the obligations and rights exist between individuals. In the terms of Carmichael's explanation, the bundle view proposes that all rights are really personal rights; the modern view explains property rights as a collection of particular entitlements and obligations holding between individuals, incidentally involving a thing, which is precisely the reverse of Carmichael's description of real rights.

Carmichael clearly delineates between the two kinds of rights and proceeds to explain the essential differences between them. Carmichael proposes certain parallels between real rights and natural rights that further illustrate the importance of the notion that certain adventitious rights are acquired by way of the extension of the realm of what is proper to oneself. He explains that real rights impose obligations on others in a way that mirrors the prohibitions against violating real rights. Carmichael explains that property is the preeminent example of a real right and argues that, "To real rights, equally as to natural rights, there corresponds from the other side an unlimited obligation not to disturb the owners of these rights in the exercise of them" (Carmichael, 2002 (1724), p. 78). He first defines real rights in terms of what others – the other side – cannot do rather than in terms of what they actually permit for the bearer of the rights. Just as natural rights demarcate boundaries for others, real rights provide more information about what others cannot do than what the possessor of the real right can do.

Carmichael notes that Pufendorf makes the same comparison between real rights and natural rights. On the subject, Pufendorf writes "in the first place, that every man is

bound to allow another (not a public enemy) to enjoy his possessions in quiet, and not bring himself to injure them, make off with them, or appropriate them, by force or by fraud” (Pufendorf, 2003 (1673), p. 68). The significance of the comparison is that neither natural rights nor real rights are informed by what the possessor of those rights can do, but instead by what others cannot do to them. By drawing the parallel between natural rights and real adventitious rights, Carmichael and Pufendorf both highlight the essentially prohibitive nature of ownership. In the case of personal rights, on the other hand, there exist, “limited obligations to render to individuals those things or services which they have a right to require of us” (Carmichael, 2002 (1724), p. 78). Personal rights, Carmichael explains, are “created, transferred, and abolished in various ways... [prominently by] mutual consent on the part of the person by whom a right is transferred and on the part of the person by whom it is acquired” (Carmichael, 2002 (1724), p. 78). Personal rights are bound up in transfer of one kind or another, and Carmichael argues that their very creation depends on some type of contract or agreement between individuals that gives rise to certain limited obligations.

Regarding the particular permissions granted by natural as well as by real rights, Carmichael’s description is generally both vague and indeterminate. Scholars propose different ideas about the furthest limits of natural liberty, especially regarding the right to enter into slavery, or alternatively how to act when the right conflicts with the good of society or of others, but within those broad bounds, the natural right to life is characterized by its indefiniteness. These scholars conceive of the right to life as protecting any action that is consistent with the preserving one’s own life. In fact, these

rights more directly characterize not what the possessor of those rights can do, but what others can do to him. Carmichael explains, “the general precept of natural law, by which every man is forbidden from violating any of these rights in another” (Carmichael, 2002 (1724), p. 78). The discussion of natural rights is in some ways much more useful in terms of setting boundaries against violations from the outside than in providing clarity about what an individual is permitted to do.

Carmichael’s comparison between real rights and natural rights does more than merely illustrate the exclusionary nature of property. Individuals possess the natural right and moral sanction to extend their natural sovereignty over the self into the external world, and when they do so, much of the liberty protected in their natural sovereignty extends as well. By introducing the notion that a person has a natural right to acquire adventitious rights, Carmichael provides his justification for extending what a person can claim belongs to them beyond the self, into the external world. Stephen Buckle, in *Natural Law and the Theory of Property* discusses the concept of the *suum* as a tie that binds the natural law thinkers, from Grotius to Locke and even to Hume. Buckle writes of the *suum*, “What belongs to a person is what is one’s own – in Latin, *suum*... Essentially it includes a person’s life, limbs, and liberty... It is what naturally belongs to a person because none of these things can be taken away without injustice” (Buckle, 1991, p. 29). What belongs to a person, what is one’s own, are essentially those things we think of as our natural rights. One of Buckle’s theses regarding David Hume is that he is much more connected to the natural law tradition than often thought because he, like Grotius, Pufendorf, Locke, and Hutcheson, expresses a variant of the notion that we can extend

our *suum* into the natural world. Buckle describes how each of the natural law scholars proposes a different mechanism for how and why an individual can extend his sovereignty with respect to his own person into the external world, and argues that the varied mechanisms are actually much more similar than they at first appear. In his chapter on Grotius, Buckle writes, “Private property (as we know it) is the set of extensions to the *suum*, and for this reason private property laws become an essential part of the system of natural justice” (Buckle, 1991, p. 30). Natural justice pertains to the natural rights, and property is tied up with natural justice because of the mechanism by which we extend our *suum*. When Carmichael includes the right to make use of positively common property and the right to acquire adventitious rights among the natural rights, he implies that he also sees that our natural rights to life and liberty only make sense if we have a moral claim over some of the external things of the world. The mechanism by which Carmichael proposes we go about appropriating external things to ourselves depends on his views of original property, but if private property arises when we extend the sphere of what is proper to us, we begin to see how it is connected to natural liberty.

The process or activity by which an individual appropriates the external things of the world depends upon the state of those external things prior to their appropriation. One of the first principles of natural law theory with regard to property is that the world was originally granted to all men in common. Thus, the world in its original state is in some sense owned in communion by all. The scholars of the 16th and 17th century provide two different descriptions of the type of ownership the community holds over common property. They each argue that this communal ownership can take roughly two forms:

positive community or negative community. Positive community refers to resources that belong to more than one person without division, while negative community refers to the condition of being publicly available to anyone. Positive community requires either universal agreement, or some third party determination, to be divided into private property whereas negative community allows for any individual to take what he needs without such agreement. To clarify the distinction, Carmichael discusses water in a river, which he states is part of negative community. The central criterion for negative community is that from things owned in negative community, a man “may take from the common store” anything that he needs or could use, “provided only that in so doing he does not prevent the rest from enjoying the use of the things that they need” (Carmichael, 2002 (1724), p. 92). Water from a river is owned in negative community because it belongs to no single person in its natural state, but can be claimed by any individual when he takes from the common store for personal use. Because the water is abundant, no individual needs permission from anyone else to appropriate water for their own use from the common store. An individual establishes her right to the water she has taken simply by her own actions – by extending her *suum*, what belongs to her, through activity permitted by the natural law. Positive community, on the other hand, is manifested in something like a public park, where ownership is held in common, but no individual may appropriate any part of the property for their own without the unanimous agreement of every other owner.

The distinction between positive and negative community allows Carmichael to clarify his position on a question regarding the acquisition of property that is especially

important for Christian writers. Because Christians hold that God initially granted the world to all in common, Christian scholars historically have displayed some hesitancy in explaining how private ownership arises out of common ownership. Dougherty suggests that a concern for the common good above individual ownership made it impossible for Augustine and Aquinas to mount “a principled defense of an absolute or unqualified right to the possession of private property” (Dougherty 2003, 491).³ However, Carmichael is unsatisfied with a theory of property that requires consent at its foundation. He points out that it is absurd to think that mutual and unanimous agreement is found at the base of private appropriation of the common stock of goods initially granted to man from Nature (by God). And he points out that the only way to have reached a division of property from a state in which the world was held in positive community would be by such unanimous agreement. He thus concludes that God clearly intended that nature is held in negative community.

Perhaps because Carmichael is arguing against Pufendorf, who writes that property can only arise through agreement, Carmichael goes to an extreme in explaining his commitment to the implications of negative community. As a result of his conclusion that nature is held in negative community, Carmichael argues that property can arise purely from individual action. He writes that “even when other men do not exist, it is possible for a right to exist which would be valid against others if they did exist; hence there is no reason why one man, even if he were alone in the world, might not have

³ Aquinas still justified private property on practical grounds not dissimilar to the arguments found in Smith and Hume among others, that human nature, and our concern for what is our own, makes private property necessary.

ownership of certain things” (Carmichael, 2002 (1724), p. 93). Carmichael further separates property from personal rights and rejects the notion that the institution of property arises from consent; he even proposes that ownership remains a sensible concept in a world with only one person.

Carmichael’s particular explanation of how an individual extends the realm of the *sum* is similar, though not identical, to Locke’s theory of property. First of all, Locke also forcefully affirms the original disposition of the world in negative community. Locke writes, “if such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him” (Locke iv.28). A world held in negative community allows the individual to act in a unitary way to appropriate property to himself. In fact, because Locke also supposes a moral duty to preserve one’s life, one has a duty to extend the *sum* and make use of the Plenty of the world. Carmichael and Locke share the view of property that places individual action rather than interaction between men at the origin of the acquisition of private property. The implications of this theory of property that rejects consent as its foundation are perhaps most clearly seen in contrast to the view espoused by one of the modern proponents of the bundle view, Demsetz:

In the world of Robinson Crusoe property rights play no role, Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others. These expectations find expression in the laws, customs, and mores of a society. An owner of property rights possesses the consent of fellowmen to allow him to act in particular ways. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights (Demsetz 1967, 347).

Demsetz argues that property can only make sense when it arises from the consent of those around him. Although Carmichael relies heavily on the role of social interaction to justify private property, he resists the notion that they therefore arise directly as a result of such interaction. And Locke places self-ownership, which also does not depend on the consent of others, at the heart of his theory of property and builds his metaphor of the mixing of labor with the external world in an effort to avoid giving consent a role in the foundation of property.

Carmichael's and Locke's descriptions illustrate the most clear qualitative difference between the in rem and in-personam perspectives of property. Property that arises without consent, through some form of extending the suum into the external world, is much more intimately tied to our natural rights to life and liberty. The similarity between real rights and natural rights highlights the notion that real rights arise from the extension of the suum from our person out into the world. By drawing the comparison, Carmichael illustrates his stance on one of the key issues at the heart of the debate between the bundle view and the in-rem view. The fact that property is the quintessential real right, that it specifically pertains to a thing, is important for how we think about how property operates. If property rights arise when we incorporate something external into the sphere of what is our own, property is more like our natural liberty than a contract.

Emphasis on the unitary and unique nature of ownership does not preclude Carmichael from recognizing the ability of the owner to transfer certain rights away from the whole. He notes that:

...full ownership of a thing, as it arises from the modes of acquiring reviewed above, combines several rights which may be regarded as

distinct, since it is capable of producing several different effects. Any of these may be separated from the complex (which will still retain the name of ownership) by one of the acts by which rights are transferred from one man to another, with the effect that it will belong to someone other than the owner of a thing. (Carmichael, 2002 (1724), p. 101)

A proponent of the bundle view might point to this passage and argue that Carmichael agrees substantially with the bundle metaphor. After all, one of the main points of the metaphor is to explain how property combines several distinct rights which may be separated from property without abolishing the whole. It does not immediately seem improper to argue that property is simply the label for the bundle of these “several rights.” However, Carmichael proceeds to emphasize that even the particles separated from full ownership are different from the personal rights that arise from contracts, and preserves the terminology consistent with a thing-oriented picture of property. All of the freedoms and flexibility within ownership still rests in the owner, who still cannot be said to have a circumscribed list of rights.

Carmichael notes, “such distinct rights are *real rights* in the full sense, since they terminate in the thing itself and so are valid against any possessor of it” (Carmichael, 2002 (1724), p. 100). Even separated from the whole the individual rights operate in an exclusive way mediated by the external thing rather than bearing directly on any particular person. We can think of full ownership as composed of multiple real rights that terminate in the thing and which are held against all others. Though each of these rights is naturally part of the whole of full ownership, they are not permanently stuck together.

Carmichael describes how the separation of real rights from the full ownership is in some sense an anomaly and that:

...since they are marked by those particular names only when they are separated from ownership (as we have said), they are commonly said to be created or constituted precisely when they are separated from the ownership, and are said to be abolished at the point when they are again consolidated with it. (Carmichael, 2002 (1724), p. 101)

His description works against the bundle metaphor in that it encourages us to see ownership as a unitary whole. Parts of that whole can be removed and named, even in regular and predictable ways, but they are absorbed in rather than bundled into ownership when they return to the owner. The bundle metaphor does not allow for any notion of full ownership or even the idea that property could be incomplete. A bundle is no more or less complete when a unitary stick is added or taken away. Carmichael suggests a different mental image of some definite set of rights that, when mixed together, make up a single whole. Instead perhaps a “body of rights” is more appropriate in that a body might suggest a natural wholeness that is missing from the bundle metaphor.

Carmichael explains the separation of certain real rights from ownership in the same way as he does the separation of personal rights from natural rights. Of personal rights he writes:

...for a perfect personal right is simply a certain particle of a man’s natural liberty which is transferred to another man by some act or event, and takes on the character in this man of a *personal right* valid against the other... that same right, when it returns to its natural subject and is consolidated with the rest of his natural right, loses its character as a *personal right* and recovers the name of *natural liberty*. (Carmichael, 2002 (1724), p. 78)

Natural liberty, like property, clearly produces several effects, and when we start to list the types of personal rights that can arise when a certain particle of a man’s natural liberty is transferred to another, we can build an extensive list of those effects. However, we cannot accurately describe natural liberty as the sum of all those personal rights. In a

similar way, the full right of property belongs to the owner; he may transfer particles of that whole to another, but property is more than just the sum all such possible transactions. The parallel establishes firmly the idea that property entails much more than a circumscribed list of rights, it actually defines a sphere of the external world over or within which individuals can exercise their natural liberty. Full ownership has a definite, though open-ended, nature, just as natural liberty is characterized by the “power, of ordering one’s actions as one pleases within the broad limits of the common divine laws” (Carmichael, 2002 (1724), p. 78).

It is clear that Carmichael purposefully and thoughtfully separates property from contracts in for many of the reasons the modern critics of the bundle metaphor advocate an in-rem view of property. His division of adventitious rights into real and personal is purposeful and allows him to draw out the parallels between natural rights and real rights. By emphasizing the parallels between natural liberty and real rights, Carmichael makes it clear that property has unique attributes that make it unlike personal rights. He argues forcefully against placing consent at the foundation of ownership, further increasing the distance between contracts and ownership. The notion that property deals with things rather than people underpins all of his distinctions and cannot merely be explained as a linguistic convenience. For these reasons, Carmichael surely could not agree that property is well described as a bundle of rights, nor could he admit that scholars could do without the term ‘property’ at all.

1.5 Francis Hutcheson

Regarding the key propositions of the modern proponents of the in-rem view – that property is primarily concerned with things and that it naturally contains certain core rights consisting of some sort of exclusive authority – Francis Hutcheson generally affirms a similar description of property to that proposed by Carmichael. However, Hutcheson’s unique approach to the theory of property arises as a result of his theory of the moral sense, which itself is an attempt to provide a coherent account of human action outside of pure self-interest.⁴ His attempt to develop a theory of human activity that makes sense of benevolent behavior without explaining it in terms of self-interest affects his entire approach to natural law; like Carmichael, Hutcheson develops his theory of property within a comprehensive discussion of natural rights and obligations.

Although Hutcheson’s focus was dissimilar in some ways from Carmichael, Hutcheson praised Carmichael’s notes on Pufendorf’s text, and much of his theory of property follows along similar lines with Carmichael’s. He follows a similar argumentative line, beginning with an account of human nature and proceeding through discussions of man’s relationship to God, of virtue, of natural law, and only then to relationships among men, where he writes of property. However, Hutcheson’s theory of the moral sense, along with the emphasis on the general good rather than on individual good, has important implications for how he discusses all rights, including the right to property. For Hutcheson, the moral sense forms the basis for moral judgment, and arises from a complex theory of beauty and admiration. Hutcheson attempts to ground his moral philosophy in a naturalistic framework that begins to look more like what we see in

⁴ Specifically, Hutcheson develops his theory of the moral sense in reaction to Locke’s attempt to ground human action in self-love. (see Buckle, 1991, 197).

Adam Smith's *Theory of Moral Sentiments*. Buckle argues, "Hutcheson transforms the notion of a right by his extremely restricted conception of what counts as a moral effect. On his view all moral effects can be reduced to one, to the tendency to enhance the general good" (Buckle, 1991, p. 214). Hutcheson evaluates all institutions in terms of how they contribute to the general good, even when that leads him to sanction limits on ownership.

Through his theory of the moral sense, Hutcheson is able to organize different rights into a hierarchy based solely on their contribution to the general good. He writes, "Rights according as they are more or less necessary to the preservation of a social life are divided into *perfect* and *imperfect*" (Hutcheson, 2007 (1742), p. 113). Rights are measured by the role they play in preserving the social life, which Hutcheson argues is necessary for human flourishing and even survival.

Buckle also argues that while Hutcheson in some ways develops his theory of the moral sense in direct response to Locke, he also accepts and strongly affirms some of Locke's improvements on the accounts of Grotius and Pufendorf. With regard to property, Buckle argues that Hutcheson basically accepts "the central right of Locke's political theory: the inalienable natural right to life and liberty, the property in one's person" (Buckle, 1991, p. 222). Hutcheson also enthusiastically affirms Locke's assertion that human labor makes up the greatest part in the value of things we enjoy in the world. Drawing from these two areas of agreement, Buckle argues that Hutcheson follows also in the tradition of the *sum*, in emphasizing the role of extending the realm of what is

proper to one's self to acquire property. Illustrating the balance between the right to extend the suum with the concern for the common good, Hutcheson writes:

...every one is conceived to have a right to act or claim whatever does no hurt to others, and naturally tends to his own advantage, or to that of persons dear to him. And yet this we must still maintain, that no private right <to act, possess, or demand from others> can hold against the general interest of all. For a regard to the most extensive advantage of the whole system ought to controll and limit all the rights of individuals or of particular societies. (Hutcheson, 2007 (1742), p.112).

As with Carmichael, the idea that property arises on the basis of extending the realm of the suum separates property from other types of rights. It suggests that property is not merely a bundle of other rights, but is instead more closely related to natural liberty.

Hutcheson begins with a contemplation of the natural state of man, a sort of musing on how rights might arise outside of and prior to society as it exists. He notes that, "Our state is either that of the <unbound> *freedom in which nature placed us*; or an *adventitious* state introduced by some human {acts or} institutions" (Hutcheson, 2007 (1742), p. 127). His description of the natural state is unlike Hobbes' natural state in that peace and goodwill dominate over violence due both to the innate sense of duty and to rational self-interest. From the natural state, individual liberty allows man to appropriate other rights, the adventitious rights, to himself with no authority other than his own. Because the state of nature is characterized by harmony, and because individuals are not inevitably in conflict as regards their needs and wants, agreement is less vital to establish ownership.

From the state of nature Hutcheson explains that we should think of rights as private, public, or common to all. The private rights we know from our own sense experience and appetites, while public rights pertaining to society and common rights pertaining to all mankind require us to look beyond our self-interest. The private rights he further divides into natural and adventitious, corresponding to their origin. Hutcheson follows Carmichael closely: “[Natural rights], nature itself has given to each one, without any human grant or institution. The adventitious depend upon some deed or institution” (Hutcheson, 2007(1742), p. 129). Natural rights can be perfect, and therefore justly enforceable by the government, or imperfect, depending on how vital they are to the general good. Hutcheson writes, “Each one also has a natural right to the use of such things as nature intended to remain common to all; that he should have access with others, {by the like means,} to acquire adventitious rights” (Hutcheson, 2007 (1742), p. 130). Like Carmichael, Hutcheson argues that individuals must have a fundamental right to appropriate the common things of the world to private use.

Hutcheson poses the question of the origin of property himself:

For in all our inquiries into the grounds or causes of property, this is the point in question, ‘what causes or circumstances <and what conditions of goods> show, that it is human and equitable toward individuals, <fit> and requisite also to the maintenance of amicable society, that a certain person should be allowed the full use and disposal of certain goods; and all others excluded from it? (Hutcheson, 2007 (1742), p.138)

Like Blackstone, and the proponents of the in rem theory of property, Hutcheson from the start frames property in terms of full use and of exclusion. He proceeds to argue that our moral sense tells us that property arises when individuals labor in the world, they obtain rights to the objects of their labor. He says that property begins as soon as the

individual begins to cultivate what was previously unoccupied, and even when he marks in some way the portion he intends to cultivate. Throughout his discussion, he makes it clear that he does not believe property rights can originate from agreement. Instead, he argues that our moral sense leads us to see the justice, that fruits of a man labor are his property. He notes, “’Tis plainly unjust to obstruct any innocent labours intended, or to intercept their fruits” (Hutcheson, 2007 (1742), p. 140). His argument foreshadows Adam Smith’s later discussion of the role of the impartial spectator in the origin and justification of property. Hutcheson appeals to our own sense of justice to argue that property rights arise without the need to appeal to agreement. Each individual’s inclination toward benevolent action forms the foundation for private ownership.

Hutcheson carefully argues for a fairly broad interpretation of both the nation and the individual’s rights to acquire property. He acknowledges:

The abilities of the the occupier with his assistants must set bounds to his right of occupation. One head of a family, by his first arriving with his domesticks upon a vast island capable of supporting a thousand families, must not pretend to property in the whole. He may acquire as much as there’s any probability he can cultivate, but what is beyond this remains common. (Hutcheson, 2007 (1742), p. 140)

The common good trumps the ability of an individual to extend the realm of what belongs to him beyond what he can reasonable cultivate. Hutcheson cannot morally sanction excess in appropriating what is common to a single individual, family, or nation. He acknowledges, however, that these calculations are complicated and he admits:

...that both individuals and societies should be allowed to acquires stores of certain goods far beyond their own consumption; since these stores may serve as matter of commerce and barter to obtain goods of other kinds they may need. (Hutcheson, 2007 (1742), p. 141)

Although he cautions that the suum cannot extend indefinitely, he clearly sees the fundamental need for man to possess the moral right to appropriate external resources to himself beyond the requirements of mere consumption.

Hutcheson also notes that property is the exemplar of a real right, as the real rights “terminate upon some certain and definite goods; the personal terminate upon some person, {not particularly respecting one part of his goods more than any other}” (Hutcheson, 2007 (1742), p. 133). In the second part of this statement, Hutcheson makes an interesting distinction between real and personal rights, highlighting the fact that personal rights do not really directly concern material things. His description highlights an interesting complementarity between real and personal rights: personal rights pertain to people and not to any thing in particular, and real rights pertain to things and not to any person in particular. When I have a personal right against someone: he owes me money, for instance, I do not have a claim to any specific coins, but rather a claim that the person must give me some coins that come to a certain value.

The distinction between real and personal rights is ignored in modern property theory, where all adventitious rights seem to be personal. When Coase writes, “It would be simpler to discuss what we should be allowed to do with a gun,” he is essentially addressing the same question Hutcheson addresses when he differentiates between rights that pertain to things and those that pertain to persons (Coase 1959, 34). Coase’s emphasis suggests that rather than talking about what it means to own a gun, we should instead concentrate on the relationship between persons. What can and cannot be done with a gun is determined simply by what sort of claims people have against one another.

The things a man can do with a gun expressed, in Hutcheson's terminology, "not particularly respecting one part of his goods more than any other" (Hutcheson, 2007 (1742), p. 133). So the gun owner has a duty not to shoot another person, but that duty really arises out of a personal right not to harm a person in general terms. The gun itself adds nothing of real consequence in Coase's world. In Hutcheson's world, however, ownership of a gun represents a different category of altogether from the duty not to molest another individual. My right to the gun prohibits others from messing with it, while it is my duty to respect another's natural liberty that restrains me from shooting someone else.

Hutcheson sees real and personal rights two kinds of rights operating in parallel ways to allow the myriad of social relationships we see in the real world. Property rights can be traded and, as with Carmichael, full ownership can be thought of as composed a number of real rights, which can be separated by way of exchange. In wording very similar to Carmichael, he argues that property originally contains four separate rights; the right to retain possession, the right of all manner of use, the right of excluding others from any use, and the right to transfer, either in whole or in part or to particular uses to others. Hutcheson compares the division of property into component parts to the transfer of personal rights from the state of natural liberty. Echoing Carmichael, Hutcheson writes:

Personal rights are founded on our natural liberty, or right of acting as we choose, and of managing our own affairs. When any part of these original rights is transferred to another, then a personal right is constituted <to him>... Derived real rights are either certain parts of the right of property, subsisting separately from the rest. (Hutcheson, 2007 (1742), p. 145)

Complete property is to contracts what natural liberty is to personal rights. They are both the defaults against which other rights can arise through exchange.

Just as there are limits beyond which an invasion of natural liberty is prohibited by a moral code, property ownership contains certain inviolable principles that should not be circumvented or divided without consent. The right to appropriate to oneself what is previously common, within the bounds of natural law, is one of the perfect rights of which Hutcheson writes:

...are of such necessity that a general allowing them to be <disregarded or> violated must entirely destroy all society <and union>: and therefore such rights ought to be maintained <and preserved> to all even by violence: and the severest punishments inflicted upon the violation of them. (Hutcheson, 2007 (1742), p. 113)

The necessary primacy of “the right of taking full use” becomes clearer through Hutcheson’s description of the origin of property rights. He provides a two-sided justification for property that originates with labor. First, he appeals to an ancient argument in favor of property acquisition that man must appropriate things out of nature for his own preservation and the preservation of those he loves because uncultivated nature cannot alone provide for man’s myriad of needs. Second, he notes that a man’s sense of right and wrong will lead him to recognize that it is wrong “for one who can otherwise subsist by his own industry, to take by violence from another what he has acquired or improved by his {innocent} labours” (Hutcheson, 2007 (1742), p. 135). Because man must labor, and because it is generally wrong to take from others, Hutcheson concludes that property originates in labor. Without such a guarantee, he notes that no other affection or generosity could induce a man to labor sufficiently. Despite his

emphasis on benevolence, he recognizes the need to provide the proper material and social frame within which virtue can operate, and he relies on the logical need for a frame to establish a labor theory of property.

So like Carmichael, Hutcheson further defends his labor theory of property on the grounds that “no man would employ his labours unless he were assured of having the fruits of them at his own disposal” (Hutcheson, 2007 (1742), p. 136). At first blush, the instrumental justification for property rights on the grounds that they induce men to labor does little to separate Hutcheson from Coase or Demsetz. And unlike Carmichael, Hutcheson does not make any specific appeal to the impossibility of contractual rights at the origin of property that, for Carmichael, provides conceptual distance from the bundle of rights theorists. But if property rights originate without reference to consent, it seems to follow that they would continue to be characterized by relationships with things first and foremost, and between people only secondarily.

1.6 Conclusion

The metaphor that property is a bundle of rights, or sticks, strongly suggests the idea that property is no more than a collection of various other rights with no true meaning of its own. Carmichael and Hutcheson clearly proposed a view of property which conflicts with that suggestion. They both speak of the necessary role that property plays in empowering individuals to survive and thrive in the world. For both practical and moral reasons, they argue that property is an extension of the natural liberty each person has in their own self. As they each belong to the natural law tradition, and employ the concept of the *sum*, they suggest an alternative metaphor: that of extending the sphere of

personal sovereignty out from one's self into the external world. This alternative metaphor is closer the modern proponents emphasis on the boundary, and on exclusivity, in property. The strong tie between personal liberty and property emphasizes the uniqueness of property.

Neither Carmichael nor Hutcheson proposes an origin of property that requires or benefits from a conception of property as a circumscribed list of rights. Both begin by defining property as the quintessential real right, and each affirms that property arises from our interaction with the external world, through the extension of what belongs to us. A theory of property based on the extension of the *sum* requires that property be recognized as first and foremost an institution concerned with the relationship of a person to the external world, rather than a relationship between persons. Carmichael and Hutcheson thereby develop a theory of property that cannot be completely aligned with the Coase's bundle of rights theory. The "in rem" perspective of property rights advanced by Carmichael and Hutcheson emphasizes the parallel to natural liberty and, if taken seriously, their theories suggest that the bundle of rights theory that has been so widely accepted by modern Law and Economics requires serious reconsideration.

“IN REM” PROPERTY IN ADAM SMITH’S LECTURES ON JURISPRUDENCE

2.1 Introduction

In a recent and growing literature, a number of property theorists, particularly in law and philosophy, have argued against the conventional wisdom that property is well described as a “bundle of rights” (see Merrill and Smith 2001 and 2011; Penner 1995; Mossoff 2003; Katz 2008; and Claeys 2008 and 2009). The bundle of rights view essentially describes property as a collection of rights with respect to other persons, as opposed to physical things.

As an alternative, these scholars each promote an idea, with some variation, that property grants presumptive authority to the owner by imposing duties of non-interference on non-owners. The alternative view has carried a number of labels, including exclusionary, “in rem,” and physicalist, and these labels hint at the common theme that property is based on a relationship between a person and an external object, rather than on relationships between individuals. Critics of the “bundle” view have proposed a variety of arguments for the superiority of their alternative views of property, both theoretical and practical; one common contention is that the “bundle” view departs radically from the conventional view of historically significant thinkers in our legal and economic traditions. Adam Smith is among the thinkers whom the critics have claimed as historical predecessors of their perspective on property. The critics of “bundle” maintain

that, in departing from this earlier tradition, modern property theory goes awry both analytically and morally.

For decades, the dominance of the bundle of rights view of property has been so complete in modern scholarship that in 1980 Thomas Grey writes, “property ceases to be an important category in legal and political theory... specialists who design and manipulate the legal structures of the advanced capitalist economies could do without using the term ‘property’ at all” (Grey 1980, 73). In the bundle of rights perspective, “property right” is a superfluous label given to a set of rights held by an individual against a number of other individuals. Legal scholars and economists are free to talk about rights and duties and gain no conceptual benefit or clarity by labeling certain rights “property” rights. As Merrill and Smith write, “By and large, this view has become conventional wisdom among legal scholars: Property is a composite of legal relations that holds between persons and only secondarily or incidentally involves a ‘thing.’ Someone who believes that property is a right to a thing is assumed to suffer from a childlike lack of sophistication – or worse” (Merrill and Smith 2001, 358).

The phrase “bundle of rights” frames the discussion of property in modern scholarly work across a number of disciplines. Coase writes that, “We may speak of a person owning land and using it as a factor of production but what the land-owner in fact possesses is the right to carry out a circumscribed list of actions” (Coase 1960, 44). Likewise Harold Demsetz writes, “When a transaction is concluded in the marketplace, two bundles of property rights are exchanged. A bundle of rights often attaches to a physical commodity or service, but it is the value of the rights that determines the value

of what is exchanged” (Demsetz 1967, 347). And again, Carruthers and Ariovich write, “Property involves a bundle of rights, including the rights of usufruct, exclusivity, and alienability” (Carruthers and Ariovich 2004, 24). The use of the metaphor of the bundle of rights, or bundle of sticks, is widespread across disciplinary lines as well as throughout the political spectrum; it would be unfair to attribute any single narrow conceptual interpretation of the “bundle” to all those scholars who have employed the metaphor. According to some of these theorists, property is the name for an ad hoc collection of rights, with no unique character to set it apart from any other collection of rights that can be exchanged. Grey’s declaration that legal scholarship can do without property at all displays the boldest and most thorough homogenization of property and contracts.⁵ Other scholars, notably Epstein (2011), argue that the metaphor can be used more narrowly to illuminate the way property can be divided and traded.

Despite variation among the proponents of the bundle view, the common thread is that ownership is characterized by a bundle of individual rights that can be combined, separated and traded into innumerable configurations. The tractability represented by the bundle metaphor seems to many to be compatible with both modern economics’ emphasis on efficiency and with the classical liberal’s desire for individual sovereignty. However, critics have argued that the very use of bundle of rights metaphor in any of its interpretations is unavoidably laden with a number of additional concepts regarding the nature of ownership and property, and that these additional concepts are neither efficient

⁵ Walter Hamilton made a similar declaration decades before, defining property as, “a euphonious collection of letters with serves as a general term for the miscellany of equities that persons hold in the commonwealth” (Hamilton and Till, 1937).

nor healthy for liberty.

The ubiquitous and varied use of the bundle of right metaphor has prompted a number of related but distinct critiques from scholars in law, economics and philosophy. Despite the variety, many of the criticisms share a key assertion built on the presupposition that the bundle view is a historically traceable misstep from a more robust theory of property found in earlier treatments of political economy and law. Merrill and Smith have traced the rise of the bundle of rights view of property in the 20th century, and have argued that the adoption of the phrase grew to dominance as a result of political forces in the 1920⁶, and from a subsequent adoption by Coase in his seminal works.⁷

The critics of the bundle view argue that modern theories of property misconstrue property on a few key points. First, they argue that property is only meaningful if it is specifically differentiated from contracts because of a relationship between owners and the things they own. We cannot accept Coase's (1960) recommendation to simply talk about the ways someone can use a gun without first establishing what it means to own a gun. Laymen and experts will not understand one another if experts cannot account for what a person means when he says "this land belongs to me" or more simply "this land is mine." These common utterances certainly suggest that property and ownership are

⁶ An Ngram shows that the phrase actually began to rise to prominence in the late 19th century, with the first use relevant to property rights in 1888 (Klein and Robinson, 2011).

⁷ Merrill and Smith argue that the Legal Realists, beginning with Wesley Hohfeld, abuse the language of in rem rights and misconceive the qualitative difference between rights held in things and rights held between persons. They explain Coase's adoption of the bundle view as a historical convenience, and argue that, "Coase, being a man of his times – and, one might add, being someone with little interest in legal concepts – wholeheartedly embraced the bundle of rights picture as his understanding of property" (Merrill and Smith 2011, 11).

experienced with some kind of default attributes; we understand, or at least have an idea, of what kind of claims a person makes when he says a thing is his. Penner's (1995) critiques of the bundle view are especially illustrative of this line of criticism.

Regarding the negative aspects of the bundle view, Penner writes, "this 'dominant paradigm' is really no explanatory model at all, but represents the absence of one. 'Property is a bundle of rights' is little more than a slogan. The use of the word 'slogan' is not intended to be merely polemical. By 'slogan' I mean an expression that conjures up an image, but which does not represent any clear thesis or set of propositions" (Penner 1995, 714). He argues that by corrupting the essential components of property, the bundle of rights theory destroys itself in the end. It refers to nothing, and adds nothing to a discussion of human interaction.

In place of the bundle view, Penner suggests the in-rem perspective of property and says, "Property... isolates a particular area of human practice, dealing with things, as opposed to the practice of dealing with other people..." (Penner 1995, 800). Penner argues that the layman's understanding of property is that it entails a right to a thing and that the layman knows something is wrong when a person interferes with his things and understands that he has a duty not to interfere with property that is not his own. Importantly, the layman does not have to know who is on the other side of the right-duty relationship, the obligation to 'not mess with' property that is not one's own is general and anonymous.

Second, the critics argue that the bundle of rights view, fully realized, would put non-owners in the impossible position of navigating a world where each object is divided

into innumerable sets of right-duty relationships (Merrill and Smith, 2011). The informational burden of such a world would be overwhelming and would counteract any gains realized by efficient distribution of variously bundled rights. Merrill and Smith have advanced an argument emphasizing the efficiency reasons for returning to an in rem boundary approach to property. In rem rights differ from in-personam rights in that they apply to all persons rather than to specific persons, as in contracts. In rem rights are important for their universality and their basic simplicity, which makes for a kind of uniformity. They act as a default from which contractual exchange begins. Ultimately, Merrill and Smith argue that, “property rights are in rem, in that they create duties of noninterference with things marked in conventional ways as being owned, which duties apply as a matter of law to all persons” (Merrill and Smith, 2011, p. 9).

Thirdly, critics argue that property and ownership are connected with sovereignty (Katz 2008). Causal agnosticism cannot remain sensible in a world of sovereignty. Katz sums up the positions well when she writes:

[W]hat we mean when we say that ownership is exclusive is that owners have a right to exclude and that the right to exclude has a certain effect: the indirect creation of the space within which the owner’s liberty to pursue projects of her choosing is preserved” (Katz, 2008, p. 281).

The in-rem perspective presumes the sovereignty of man over the tangible goods that he owns. According to Katz and others, property ought to be recognized as a singular and special institution, separate from contracts, with a unique character and naturally inherent content.

Lastly, the many of the critics share the assertion that the bundle of rights metaphor tends to weaken presumptions against infringements on natural liberty by the

administrative state (Klein and Robinson, 2011). Klein and Robinson emphasize that the word “bundle” carries the natural connotation of an act of deliberate gathering together (bundling) of a finite number of definite elements that pre-existed as separate entities prior to the act of bundling - like a bundle of groceries or a bundle of sticks - a connotation that makes the content of ownership sound very plastic and amenable to manipulation by the bundler (Klein and Robinson, 2011). Some of the critics have noted that, far from being a boon to individual liberty in exchange, the bundle view is linked with a peculiar progressive political agenda associated, for example, with the Legal Realists of the 1920s.⁸

This last criticism applies to even the more conservative interpretations of the bundle of rights metaphor wherein the bundle view is intended as a benign conceptual tool, or even as a “bulwark against statist conceptions of property” (Epstein 2011). Klein and Robinson assert that the metaphor is fundamentally inappropriate and insidious to sound classical liberal understandings of property.

As a corrective to the bundle view and the authority of Coase, Demsetz, Wesley Hohfeld, Epstein, and others who have made extensive use of the phrase in their scholarly work, the critics also support their perspective by pointing to an array of historical sources. The alternative framework for understanding the nature of property, the critics argue, is to be found in a long tradition that includes William Blackstone and Adam Smith, who promote an exclusion-based understanding of the way property originates and

⁸ The implication that the bundle is a progressive metaphor has not gone wholly unchallenged. Epstein in fact states his belief that “the bundle-of-rights image, rightly understood, offers the best path to preserving the institution of limited government” (Epstein 2011).

operates.

Thomas Merrill and Henry Smith take Blackstone's definition to be characteristic of the historical view when he described property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (Blackstone, 1768). Furthermore Merrill and Smith claim in their 2001 paper *What Happened to Property in Law and Economics* that "[Adam Smith] was even more explicit than Blackstone about the in rem nature of property" (Merrill and Smith, 2001, 360). It is clear that exclusion formulations of property go far back, certainly to Grotius, Pufendorf, and Locke.

Despite a general agreement among the critics of the bundle view that Blackstone and Smith essentially had the right ideas regarding property, the critics propose a variety of alternative - and sometimes competing - interpretations regarding the precise meaning of exclusivity (see Claeys, 2006, 2011; Mossoff, 2011; Merrill and Smith, 2001, 2011). The disagreements over the precise implications of the non-bundle approach, coupled with the general acknowledgement of Adam Smith as a paramount non-bundle thinker, indicate that a thorough examination of Smith's theory of property with reference to the debate over the bundle view can be fruitful. The goal of this paper is to examine Smith's view of the institution of property as conveyed especially in *The Theory of Moral Sentiments* as well as in his *Lectures on Jurisprudence*.

In this paper, I am concerned with the extent to which Adam Smith can be understood to be solidly in the tradition of exclusion theorists. Merrill and Smith claim his authority with regard to the "in rem nature of property" generally and they point out

that Adam Smith discusses the benefit of property rights that operate against anyone in the world. Smith's text also usefully provides a discussion of the difference between contracts and property, which allows us to examine the extent to which he saw the two as essentially different, as the critics of the bundle view suggest. Smith's method of analysis is unique in that it is informed by the 'impartial spectator' who serves as a moral judge as well as the justification for conceptual notions about justice. Through the lens of the impartial spectator, Smith discusses how rights to things are qualitatively different from other kinds of rights. In this paper, I will argue that Smith is indeed a leading figure of the traditional perspective on property.

2.2 Property in Smith

I believe the best way to understand to understand Smith's views about property, justice, ownership and rights is to consider three separate but related themes:

1. Smith's use of the civil-law taxonomy of rights to frame his discussion of justice;
2. Smith's interpretation and use of concepts developed by David Hume;
3. Smith's unique use of the impartial spectator to judge moral and political interactions in society.

Smith develops a unique theory of property by way of a synthesis of ideas adopted from his predecessors and contemporaries along with his own peculiar theory of the impartial spectator. In the following sections, I will treat each of these themes in turn in order to show how Smith might approach the modern debate over the status of property among other rights. As a preliminary, however, I think it is useful to

acknowledge that Smith's text, simply taken at face value, clearly separates property from rights acquired through contract.

2.3 Property and Contract

One part of the fundamental disagreement between the traditionalists like Merrill, Henry Smith, Claeys, Mossoff and Katz and the proponents of the bundle view represented by Coase, Demsetz and Epstein is a disagreement over whether the term "property right" serves as a conceptual label for something other - or even more - than other rights. The first step of my analysis is to discern where Adam Smith comes down on this argument. Before I attempt to examine why Smith might think it worthwhile to separate the two, I want to establish firmly that Smith did in fact think of property as something other than a "bundle" of rights. When we consider the distinctions Smith makes between property and contracts it becomes clear that Smith certainly considered property to be a separate and special type of right, set apart from contracts.

There can be no doubt that at the simplest level, Smith's text disagrees with the assertion that we can do without a distinction between property and contracts. Property and contracts are treated separately in the *Lectures on Jurisprudence* as well as in the *Theory of Moral Sentiments*, and furthermore are explicitly contrasted with one another. Smith opens his discussion of rights in the 1762-63 set "A" *Lectures on Jurisprudence* (hereafter LJA) with this description:

Now what is it we call ones estate. It is either first, what he has [in his] immediate possession, not only what he has about his person as his [clothes]... but whatever he has a claim to and can take possession of in whatever place or condition he finds it... Or secondly, what is due to him

either by loan or by contract of whatever sort, as sales... The first is what we call real rights or a right to a particular thing. The second is called a [personal] right or a right against a particular person. (Smith LJA, 8)

Smith thus begins his introduction to the ways a man's rights may be violated by drawing a distinction between contracts and property. I will return to the quote later; I merely want to note that a brief examination shows us that Smith at the very least follows along with an earlier tradition in which property and contracts are understood to be separate kinds of rights. Following the linguistic conventions of earlier writers does not necessarily indicate agreement with those writers' conceptual distinctions. In fact, I will later examine how Smith's unique theory of the impartial spectator sets Smith's theory apart from that of his predecessors though his language follows theirs closely. Even so, the burden of proof rests squarely on those who might argue that the distinction between property and contracts in Smith's analysis is in fact a hollow distinction for Smith. Approaching property and contracts through Smith's work would guide a student of the field to treat the two as separate categories of rights.

Later, in his discussion of the methods of acquiring property, he also notes that the Romans distinguished between rights that pertain to things and rights that pertain to individuals:

The Romans considered servitudes as being either real or personal; i.e. as being due by a certain person or by a certain thing. (Smith LJA, 9)

Smith later explains that all servitudes, such as an easement, ought to be originally considered personal rights, as they always arise as a contract. He goes on to allow that a government can turn servitudes into real rights, but he firmly insists that

agreements that arise between individuals cannot originally be real rights. His argument that “a contract can produce nothing but a personal right” strengthens the case that Smith’s examination of rights begins with clear rules in mind that divide personal and real rights (Smith, LJA, 78). Additionally, the fact that Smith allows that the government can, through decree, change a personal right into a real right suggests that there is something to be gained by doing so. There is an advantage in turning servitudes into real rights only if the differences between the two are real and consequential. Smith’s insistence on conceptual clarity does not indicate why he considers the distinction between contracts and property important, but his underscoring the difference should alert us to later passages in which Smith contrasts one with the other.

These two examples provide some evidence that Smith would not accept Grey’s assertion that specialists “could do without the term property at all.” Acknowledging that Adam Smith certainly conceived property to be a distinctive kind of right that is not commonly understood to be identical to other rights, such as the rights that arise from contracts, we can look first at how Smith’s analysis follows his predecessor’s in the civil-law tradition. To ascertain Smith’s commitment to the terminological divide, I will now consider Smith’s use of civil-law categories in his discussions of justice and property.

2.4 Smith and the Civil-law Taxonomy

Smith synthesizes a wide history of moral and analytic thought in his treatment of justice; there can be no doubt that he relied heavily on his predecessors in Scotland in his

treatment of justice.⁹ Smith's predecessors in the jurisprudential tradition had by Smith's time developed a vocabulary for discussing the concept of rights, and, in the *Lectures on Jurisprudence*, Smith adopts that vocabulary to a large degree. For the purposes of my present examination, I am especially interested in Smith's explanation of the distinctions between perfect and imperfect rights, between personal and real rights, and between natural and adventitious rights. These distinctions are important to the question of whether property is qualitatively different from contracts in Smith's view.

Smith first divides rights into perfect and imperfect rights. Perfect rights are those that are entailed in commutative justice, and comprise those duties that we can demand, or even compel, one another to perform. Of commutative justice and perfect rights, Smith notes in TMS that these are the rights, "the observance of which may be extorted by force, and the violation of which exposes to punishment" (Smith TMS, 269). Smith begins his examination of justice by exclaiming that the "first and chief design" of civil government is the protection of commutative justice – and so perfect rights. The most obvious perfect right is one's right to his person, which Smith notes can be violated, "either by killing, wounding, or maiming... or by restraining his liberty" (Smith LJA, 8).

Imperfect rights, on the contrary, are entailed in distributive justice, which in Smith's taxonomy of justice consist in moral duties that are presumptively outside of the purview of law and compulsion, "not belonging properly to jurisprudence, but rather to a

⁹ Haakonssen notes that "Smith was obviously very strongly indebted to the Continental natural law tradition of Grotius, Pufendorf, and others, and especially to the form which this tradition had been given by his teacher, Francis Hutcheson. He was also heavily influenced by Montesquieu and by his old mentor, Lord Kames" (Haakonssen, 1981, p. 2). Gregg further asserts that Carmichael and Hutcheson were indebted to both the early-modern natural law tradition as well as the pre-modern scholastic natural law tradition (Gregg, 89). Smith did not set out to answer problems identical to these scholars, but it is clear that Smith inherited a from a long tradition of natural law scholarship on property.

system of morals as they do not fall under the jurisdiction of laws” (Smith LJA, 9). Smith says that although imperfect rights correspond with duties “which ought to be performed to us by others,” that these ‘rights’ are only metaphorically ‘rights’ because we actually have no right to compel the corresponding duties (Smith LJA, 9). Smith regards both property and contracts as perfect rights, both legitimately protected by law, though we will see later that Smith considers violations of property more serious than violations of contract.

Secondly, Smith groups rights into real rights and personal rights. Real rights, he says, pertain to particular things and which can be claimed *a quocumque possessore*, or against any counterparty whatsoever. The characteristic trait of a real right in Smith’s taxonomy is that it represents a claim to a thing, which is good against anyone, at any time, in any condition. Smith clarifies that, “a real right is that whose object is a real thing... such are all possessions, houses, furniture” (Smith LJB, 399). Furthermore, real rights do not emerge from any sort of mutual consent, and in fact bear upon individuals who know nothing of one another just as they bear upon neighbors. Personal rights, conversely, “arise either from contract, quasicontract, or delinquency” (Smith LJB, 472). Smith gives debts and contracts as examples of personal rights. Both real and personal rights may fall under the category of perfect rights, and so can be enforced by law, and exacted from those who refuse to comply. The differences between real and personal rights will play a key role in my examination of how Smith might view the modern tendency to call property a bundle of rights.

Finally, Smith references a distinction between natural and adventitious rights, in some cases identifying the later as acquired rights. Smith spends a great deal of time explaining the operation of adventitious rights, and little time on natural rights. Natural rights pertain to some of our most fundamental liberties, and Smith makes it clear that the protection of natural rights is crucial for a just system of government.¹⁰ For example, Smith writes of the right to bodily safety, along with “the right to free commerce” and “the right one has to the free use of his person and in a word to do what he has a mind when it does not prove detrimental to any other person” (Smith LJA, 8). In *Lectures on Jurisprudence*, Smith claims that natural rights generally need no explanation:

Now we may observe that the original of the greatest part of what are called natural rights {or those which are competent to a man merely as a man} need not be explained. That a man has received an injury when he is wounded or hurt in any [way] is evident to reason, without any explanation; and the same may be said of the injury done one when his liberty is any way restrain'd; any one will at first perceive that there is an injury done in this case. (Smith LJA, 13).

Or otherwise:

The origin of natural rights is quite evident. That a person has a right to have his body free from injury, and his liberty free from infringement unless there be a proper cause, no body doubts. (Smith LJB, 401).

Natural rights, as described by Smith, share many of the properties of real rights; though Smith does not himself draw out the connection. The individual's right to be free from harm places an obligation indiscriminately upon all others not to harm or restrain that individual, without an appeal to mutual agreement. The rights and obligations do not

¹⁰ Smith includes a discussion on the natural right to reputation in his discussion on natural rights laid out in LJ. However, Mark Bonica (2013) assesses the treatment of reputation in Smith's body of work and argues that it remains unclear how committed Smith was to grouping the right to one's reputation with other natural rights, such as property. Bonica notes that Smith leaves room for uncertainty about how and when reputation can be defended by compulsion or protected by law.

even require communication between the parties involved; without additional information to the contrary, every person is presumptively burdened with the obligation not to harm another in his person or liberty.

Adventitious rights, on the other hand, require much more explanation, as their origin is not as evident. Smith notes that these rights in particular vary according to the society in which they arise and so adventitious rights receive more attention in civil law. Only adventitious rights are divided into personal and real rights, and therefore either relate to individuals or to things. Property is perhaps the most prominent adventitious right, judging by Smith's treatment. He writes, "Property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government" (Smith LJB, 401). Contracts are also adventitious rights and so the distinction between natural and adventitious rights is, in direct terms, less important to my examination. However, an examination of two other key components of Smith's thought on property, the influence of Hume and Smith's notion of the impartial spectator, indicates that Smith's views on natural and adventitious rights may be important to his understanding of what makes property unique.

By and large, Smith seems to follow his immediate predecessors in the civil law tradition with regard to the distinctions between perfect and imperfect rights as well as between real and personal rights. Smith fairly precisely defines the content of each of these categories of rights, compared to the relatively sparse treatment of the category of natural rights. The alignment between Smith and his predecessors with respect to the

distinction between natural and adventitious rights is perhaps not so complete, though it seems clear that Smith recognized an important difference between those rights men acquire by action and those that inhere in men without any effort on their part.

2.5 Hume and Smith

While it is clear that the civil law tradition provides Smith with the much of the language he uses to describe various rights, I believe we can look at Smith's connection to Hume to get a better sense of how Smith interprets the purpose of the civil law categories. Looking to the similarities between Hume and Smith will again give us a better understanding of how property might be different from contracts in Smith's unique worldview. It seems that Smith's view of the distinction between natural and adventitious rights was in part influenced by Hume's own critical view of the distinction between natural and acquired rights.

Unlike his predecessors, Carmichael and Hutcheson, Hume goes to great lengths to downplay the difference between natural and adventitious rights in his treatment of justice. Hume writes:

I must here observe, that when I deny justice to be a natural virtue, I make use of the word, natural, only as opposed to artificial. In another sense of the word; as no principle of the human mind is more natural than a sense of justice; so no virtue is more natural than justice. Mankind is an inventive species; and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as anything that proceeds immediately from original principles, without the intervention of thought or reflection (Hume, 1738).

Hume thinks that, for justice and property, the distinction between natural and adventitious rights amounts to almost nothing. According to Hume, if the term natural is

correctly understood as the opposite of arbitrary, one may just as appropriately call property natural as call it artificial.

Of justice, Hume writes, “there are some virtues, that produce pleasure and approbation by means of an artifice or contrivance, which arises from the circumstances and necessity of mankind. Of this kind I assert *justice* to be” (Hume, 1969 (1739), p. 529). Later, Hume emphasizes that, “after this convention, concerning abstinence from the possessions of others, is enter’d into, and every one has acquir’d a stability in his possessions, there immediately arise the ideas of justice and injustice; as also those of *property, right, and obligation*” (Hume, 1969, (1739), p. 542). Hume argues that justice and property are both artificial, in that they do not arise directly from human nature, but rather as a result of human interaction. Hume later goes on to say that we may as well consider justice and property natural because they arise inevitably in society.

Hume’s approach to the distinction between natural and artificial rights likely influenced Smith’s own view. While Smith certainly employs the language of his predecessors in the civil law tradition, Haakonssen argues that “Smith adopts the traditional distinction between natural and acquired rights as a mere heuristic device to draw attention to the significant differences in moral urgency...of the various rights which are protected by law” (Haakonssen, 1981, p. 102). Smith clearly accepts that certain violations of justice are more severe than others and part of his project is to describe how and why certain unjust acts excite a greater degree of disapproval than others. Haakonssen’s argument helps to explain why Smith is willing to give so little explanation of natural rights: Smith uses the civil law categories to efficiently set aside

the most obvious rights, and in fact builds on those rights which he treats as given to develop the remaining categories of rights. Unlike his predecessors in the civil law tradition, Smith avoids giving a thorough explanation of the natural rights, and instead relies on universal recognition for rights “competent to a man merely as a man” (Smith LJA, 13).

Haakonssen’s interpretation of Smith’s attitude leads him to the conclusion that it “inevitably recalls Hume’s distinction between natural and artificial virtues and his treatment of justice as an artificial virtue” (Haakonssen, 1981, p. 102). I think that Haakonssen is correct to argue that Smith did not view the distinction between natural and adventitious rights as quite so stark as his predecessors. For Smith, the impartial spectator is the presumptive judge of all actions, and all rights, be they natural or adventitious. It is not quite so important to the impartial spectator whether those rights arise from human action alone or human interaction; the impartial spectator takes a broad view and considers the whole context of the situation, including the origin of the rights in question. In some cases, primarily where natural rights are concerned, one hardly needs to imagine the impartial spectator to understand the proper judgment or course of action. The result of blurring the lines between natural and adventitious rights is that the two are put on more equal footing, making the difference between the two a matter of degree rather than fundamental kind.

Haakonssen concludes that Smith employs the language of the civil law tradition in order to emphasize differences within each category of rights as well as differences between these categories. Smith uses the traditional distinctions to emphasize how the

protection of certain rights excites more moral urgency than others. The idea that not all rights are equal is vitally important to Smith's distinction between commutative and distributive justice, but it is also important that not all perfect rights—each a part of commutative justice—are equal. Smith uses the notion of the impartial spectator to examine the differences in moral urgency among various rights; the impartial spectator, it seems, is not restricted to merely approving or disapproving an action, he is free to go along by degrees and recognize that some actions can be more right or more wrong than others. In fact, the impartial spectator must make those distinctions because he judges, for example, the reaction of a man who has been wronged by measuring that reaction in proportion to the severity of the wrong. I will discuss influence of the impartial spectator on Smith's analysis of justice and property more in the following section.

There is a further subtle connection between Hume and Smith regarding the origins and nature of property that begins with Hume's discussion of justice and property. Hume asserts that justice and property are both emergent conventions that arise from two qualities of man, namely "selfishness and limited generosity" (Hume, 1969 (1739), p. 546). When coupled with scarcity of external objects relative to the wants and desires of men, justice and property must emerge for man to interact. He notes:

if every man had a tender regard for another, or if nature supplied abundantly all our wants and desires, that jealousy of interest, which justice supposes, could no longer have a place; nor would there be any occasion for those distinctions and limits of property and possession" (Hume, 1969 (1739), p. 546).

Justice, and so property, is contingent on scarcity, either of material goods or of benevolence. If either of the two remains scarce, according to Hume, men must have property to engage in society.

Smith picks up on the importance of Hume's argument, especially in *WN*, where he writes, "In civilized society he [man] stands at all times in need of the co-operation and assistance of great multitudes, while his whole life is scarce sufficient to gain the friendship of a few persons" (Smith *WN*, p. 18). Affection, which "is in reality nothing but habitual sympathy," is necessarily scarce because habit operates over time (Smith *TMS*, p. 220). Smith understands that benevolence will always be a scarce resource because time is finite. Because benevolence is always then a scarce resource in civilized society, property is a necessary institution even though it is not natural in the sense meant by Hume in his *Treatise*.

Smith certainly relies on the insights of the civil law tradition while incorporating some more modern notions of evolutionary institutions, especially into his treatment of natural and adventitious rights. However, his most unique contribution to the conversation, the theory of the impartial spectator, impacts the way he incorporates all of these insights into his own coherent theory of justice and property.

2.6 Property and the Impartial Spectator

Sympathy, and specifically the sympathy of the impartial spectator, gives the contours of Smith's moral system. By way of imagined identification with an impartial spectator, an individual is better able to reason toward virtuous action. The supposed impartial spectator guides us to identify justice, both commutative and distributive. While rejecting casuist examinations of morality, Smith employs the notion of the impartial spectator to explain how we are able to fine-tune our sense of rightness and wrongness in proportion to the particular circumstances surrounding an action or sentiment. In *TMS*,

Smith frequently identifies the limit of the impartial spectator's willingness to go along with an individual's sentiments; proximity to the sentiment of the impartial spectator determines the degree of rightness or wrongness of the sentiment or action.

The impartial spectator not only judges the propriety of a given action, it also enables us to see the proper response to that action. In regard to injustice, Smith says, "the punishment of the offender is reasonable as far as the indifferent spectator can go along with it" (Smith LJB, 136). By incorporating the impartial spectator into the discussion of justice, Smith shows that he recognizes that different acts of injustice violate our moral sensibilities to varying degrees. Thus Smith is able to examine in TMS the huge spectrum of offenses against individual's rights and group them generally into those which fall under commutative justice and those which fall under distributive justice. Additionally, the impartial spectator differentiates between offenses within each category of justice; operating through sympathy, the impartial spectator helps us see how severely any given violation of commutative justice ought to be punished. The impartial spectator is satisfied when punishment, disapproval, or reaction is precisely calibrated with the severity of the offense.

Smith employs terminology associated with the impartial spectator most frequently in TMS, but he references the spectator frequently in LJ as well. In fact, he references his own exposition of the impartial spectator in TMS at the outset of his lectures on jurisprudence. At the beginning of the discussion of property in In LJA:

The first thing to be attended to is how occupation, that is, the bare possession of a subject, comes to give us an exclusive right to the subject so acquired... From the system I have already explained, you will remember that I told you we may conceive an injury done one with an

impartial spectator would be of opinion he was injured, would join with him in his concern and go along with him when he defended the subject in his possession... (Smith, LJA, p. 16).

Smith appeals to the impartial spectator both to identify the rules by which ownership is established and illuminate the practical operation of ownership in society – as well as to examine what constitutes a breach of ownership. The impartial spectator is referenced repeatedly throughout the passages about the modes of acquiring property, in particular when Smith makes fine distinctions between situations in which property is established and when it is not. Haakonssen points out that “what the impartial spectator recognizes as injury is definitive of absolute rights and justice” and that although never explicit, “is simply taken for granted throughout” (Haakonssen, 1981, p. 100).

Now, having established that Smith’s perspective on property represents the distillation of ideas found in the civil law tradition as well as from Hume, all through the prism of his own unique interpretation of the role of the impartial spectator, I will turn specifically to examine how Smith’s notions of property might address the debate over the propriety of calling property a bundle of rights. I will discuss the three major themes I mentioned in the introduction, and examine how Smith’s own theory might apply to each in turn. First, property rights denote a relationship between a person and a physical object; second, property rights broadcast information efficiently to non-owners; and third, property rights represent a domain of liberty for the owners.

2.7 Importance of “the thing” in Smith

As I noted earlier, Smith's lectures on jurisprudence make it fairly clear that he inherited civil law terminology that indicated a distinction between real and personal rights. In his Lectures on Jurisprudence, he says:

he has [in his] immediate possession, not only what he has about his person as his [clothes]... but whatever he has a claim to and can take possession of in whatever place or condition he finds it... Or secondly, what is due to him either by loan or by contract of whatever sort, as sales... The first is what we call real rights or a right to a particular thing. The second is called a [personal] right or a right against a particular person. (Smith LJA, 8)

At this point I am not as concerned with the inherited language, instead I want to examine the extent to which Smith intended the distinction to signify a meaningful difference, as the critics of the bundle formulation suggest. Based on the discussion that follows, it seems clear that Smith thought the differences between the two kinds of rights were morally significant. In fact, he describes how the categories correspond to differences in the way individuals, society, and the impartial spectator, perceive rights in the real world.

Smith tells an interesting anecdote about the difference between a relationship with a person and a relationship with a thing. He writes, "If I buy a horse from a man and before delivery he sell him to a third person, I cannot demand the horse from the possessor but only from the person who sold him. But if he has been delivered I can claim him from any person" (Smith LJB, 469). In the first case, the only relevant right is in personam, and so although there has been a breach of contract, the specific physical good is not yet involved and there is no ownership relationship of the owner-to-be over the horse. In the second case, the new owner has established a relationship to the horse,

and can therefore claim “possession of in whatever place or condition he finds it” (Smith LJA, 9). Although it may seem that, strictly speaking, the owner-to-be of the horse is deprived of the same value in either case, Smith asserts that it is not so. Smith emphasizes that that the key to property in this case is possession, and so transfer of the actual good from the original possessor to the buyer is required for the buyer to establish ownership (Smith LJB, 469). Even in the case of immovable objects, such as houses or land, Smith notes that symbolic transfer of possession traditionally takes the place of actual transfer, such as the exchange of keys to a house.

By reiterating the importance of possession for the establishment of a real right, Smith emphasizes that that real and personal rights are not identical. Once the buyer and seller have exchanged a promise to sell for a promise to buy, and cash has exchanged hands, commutative justice already dictates that a right and an obligation have been established. The impartial spectator already would disapprove of a violation of this contract on the part of the seller. In the case of the man who purchased the horse, the impartial spectator agrees with legal action against the double-crossing seller. The personal right does not bear on anyone else, however, and so although the impartial spectator may have sympathy for a man who paid for the horse, he would not approve of efforts on his part to retrieve the horse from the second buyer who was also duped by the seller. The second buyer owes nothing to the first because possession, which had not yet been established, is the determinant factor in this case in differentiating a personal right from a real right.

Additionally, Smith’s anecdote about the horse suggests that the second buyer’s

knowledge has little effect on the moral calculus of the scenario. He explains that once the first buyer has in some way had the horse in his possession, even if he gives it back to the seller to keep for a time, he has established the real right and can claim it from anybody whatsoever. So even if the second buyer is just as unaware that he is being fooled, the determinant factor in the impartial spectators judgment of the case is whether or not the first owner credibly established possession through physical contact. Physical contact between the owner and the thing owned establishes the in rem right and transforms a personal right into a real right. The initial agreement between individuals does not have that power, despite the fact that the entire agreement is focused on the physical thing in question.

Elsewhere Smith clarifies that value changes with possession and writes: “Breach of contract is naturally the slightest of all injuries because we naturally depend more on what we possess than what is in the hands of others. A man robbed of five pounds thinks himself much more injured than if he had lost five pounds by a contract” (Smith WN, 472). Smith asserts that the qualitative difference between property and contract is sufficient such that even when the economic value of the injury in both cases is clearly equivalent, we are more hurt by violation of our property and violation of a contract. In his system, possession helps to differentiate rights to a thing from rights between persons, which Smith uses to explain why the protection of property arises in society before the protection of contracts. Smith takes for granted that people in general perceive property and contracts differently, and, through the mechanism of the impartial spectator, this general perception translates into differences in moral urgency.

A critic might say that despite our perception, we have lost just as much when robbed of five pounds than when we have lost five pounds by a breach of contract, and ought to treat the two as perfectly identical; that property ought not to be treated with more weight than contracts. In the case of the robbery and the breach of contract, a truly just system of morals would recognize the equality between the two. In the same way, the fact that ownership deals specifically with a physical object in the world ought not to be the cause of higher valuation of rights to things than if we parse them out as rights between individuals. However, Smith is well aware of the divergence between a line of reasoning and the way men experience the world; he asserts that at times experience trumps the dictates of refined reasoning. He displays this understanding in *TMS* when he discusses the influence of fortune on our judgments of merit and demerit in action (Smith *TMS*, 97-104). He argues that the results of action, not merely the motives to action, can and should be considered when determining the merit and demerit of that action. If a man accidentally injures another, it is right, according to Smith, to judge and treat him more harshly than his motives alone warrant. Likewise, it is natural to feel that ownership consists in a relationship with a thing, and that the relationship lends it more value than it would otherwise have.

A separate reason to think that Smith recognized the importance of the link between the owner and the owned object is that Smith's predecessors in Scotland had already grappled with the issue. Prior to Smith, Carmichael and Hutcheson argued that interaction with the physical world enabled a unique kind of right separate from the rights

generated through agreement between individuals.¹¹ Locke also differentiated his theory of property from his theory of governance describing the origins of ownership in terms of individual action rather than through mutual consent. For these scholars, purposive action on the part of an individual, rather than agreement between individuals or the consent of the government, forms the moral basis for ownership. On the other hand, Samuel Pufendorf, proposes a slightly different account of the origins of property. He argues that, “it is impossible to conceive how the mere corporal act of one person can prejudice the faculty of others, unless their consent is given” (Pufendorf, 1927 (1673), IV.4.5.). Smith would certainly have been aware of the differences between Carmichael and Pufendorf’s depictions of the origin of ownership.

For Locke, Carmichael, and Hutcheson, the origins of ownership lay in the interaction of the individual with the world, as opposed to the interaction of men with other men. The distinction was not accidental; each scholar perceived difficulties with a theory of ownership that merely treated property as an agreement between individuals in society.

Locke described the foundation of the right to a thing in property in terms of mixing labor with nature,¹² and some of his ideas are carried through in the work of

¹¹ Samuel Pufendorf, although an important figure in the development of natural law during this same period, proposes a slightly different account of the origins of property. He argues that, “it is impossible to conceive how the mere corporal act of one person can prejudice the faculty of others, unless their consent is given” (Pufendorf, IV.4.5.).

¹² Locke’s writes, “Whatsoever then [man] removes out of the state that nature hath provided, and left it in, he hath mixed his labour with and joined to it something that is his own, and thereby make it his property” (Locke 1698, 18). Stephen Buckle (1991) argues that Locke’s theory is more aptly understood as an extension of the *sum* – what is one’s own – rather than through the metaphor of mixing labor with

Gershom Carmichael in his commentary on Samuel Pufendorf. Carmichael writes:

it is therefore essential that the occupation of such things should confer on the occupier a right of using them for his own purposes in perpetuity or until they have been consumed, of barring others from random use of them, and of disposing of them in favor of whomever he wants (Carmichael, 2002 (1724), p. 94).

Carmichael emphasizes occupation rather than labor as the foundation of ownership, but explains that occupation is the natural result of man's need to work in nature to provide for his survival. The idea, in Smith, that a real right is established by the interaction between a person and a thing is in the tradition of both Locke and Carmichael.

Carmichael makes an even bolder claim that puts him directly at odds with modern economic theory. He writes that "even when other men do not exist, it is possible for a right to exist which would be valid against others if they did exist; hence there is no reason why one man, even if he were alone in the world, might not have ownership of certain things" (Carmichael, 2002 (1724), p. 93). Modern critics of the bundle simply emphasize that the relationship between the owner and the thing serves to mediate the personal relationships (See Penner 2011). Carmichael's much stronger claim paves the way to making property presumptively beyond the domain of social planning.

Smith's own teacher, Francis Hutcheson, explains the origin of property in great detail, still with great emphasis on the importance of the interaction between man and the physical world. Hutcheson defends the labor theory of property on the grounds that "no

nature. He argues that, "Locke draws the conclusion that, because property in things is necessary for protecting property in one's person, the right to preserve oneself extends to an exclusive right to use things, as long as such uses conform to natural law" (Buckle 1991, 174). Locke's theory is based on extending one's claim of something like self-ownership over the physical world through action, similar to Grotius description, as well as those of Carmichael, Hutcheson, and Smith.

man would employ his labours unless he were assured of having the fruits of them at his own disposal” (Hutcheson, 2007 (1742), p. 136). Hutcheson in particular concerns himself with the necessity of the convention, and specifically the connection between property and liberty.¹³ Each of these predecessors to Smith develop an in rem conception of property on the basis that property arises at the moment that man interacts with the physical world.

Although Smith follows Carmichael and Hutcheson in explaining that property originates from man’s interaction with nature, Smith, like Hume, leaves the justification for property largely in the hands of social interaction. However, the causal importance of social interaction in the creation of property does not mean that Smith gives up the conceptual importance of a relationship between an owner and the thing-owned.

2.8 The Right Against the World

The second theme I noted in the criticisms of the bundle view is the idea that property is unlike contracts in that it should be understood first of all as characterized by simple messages communicated to all non-owners. The critics argue that property is much more efficient if it bears on all non-owners rather than if it merely labels an enormous but finite set of contracts between the owner and each non-owner. Merrill and

¹³ Hutcheson also justifies the labor theory of property with arguments about virtue and a good society. “Without thus ensuring to each one the fruits of his own labours with full power to dispose of what’s beyond his own consumption to such as are dearest to him, there can be no agreeable life, no universal diligence and industry: but by such ensurance labours become pleasant and honourable, friendships are cultivated, and an intercourse of kind offices among the good: nay even the lazy and slothful are forced by their own indigence, to bear their share of labour” (Hutcheson, 2007 (1742), p. 136).

Smith make this case most clearly:

The costs of communicating information about rights and duties in a world that consists solely of in personam or A-to-B rights would be significant. Each person would have to be aware of and comprehend all the obligations that they had personally undertaken or that had been imposed upon them. The costs of communicating information about in rem rights and duties which apply to “everyone” are potentially much greater. If every property right was described by a customizable list of permitted uses – as Coase imagined with respect to stones from different quarries or individual British lighthouses – and these rights had to be understood and respected by all the world, the resulting information costs would be staggering (Merrill and Smith, 2011, p. 24).

Property, in this view, is most effective when we take it to represent something more than merely whatever rights happen to be bundled together in particular relationships between an owner and each non-owner. In a sense, the institution of property is a shortcut: a norm that helps to increase efficiency in social interactions.

For Smith, the contrast between property and contracts gives information to the owner and helps to justify the legal and moral difference in cases like the horse that was never delivered to the buyer. After the contract, but before the delivery of the horse, the owner-to-be only has a moral and legal claim against one person, while after the horse is in his possession, his claim to it holds against all persons. Beyond the moral differences between contracts and property, Smith shows that he is also clearly aware of the efficiency advantages of in rem rights over in-personam rights. Speaking of the full right of property, he notes that the property owner “can hinder any other not only from intermeddling with any of the products but from walking across his field” (LJ (A), 10). By and large, the owner has the liberty to act with complete sovereignty with regard to the land he owns. However, he quickly acknowledges the exception to the rule:

Thus I may have a liberty of passing thro' a field belonging to another which lies between me and the highway, or if my neighbor have plenty of water in his fields and I have none in mine for my cattle, I may have a right to drive them to his. Such burdens on the property of another are called servitudes. These rights were originally personal, but the trouble and expense of numerous lawsuits in order to get possession of them... induced legislators to make them real, and claimable a quocuque possessore (Smith LJ (B), 400).

Smith acknowledges that the practical consequence of interacting with the world by way of contracts between persons in every instance is costly and inefficient. In the case of servitudes, the lawmaker intervenes—for the sake of efficiency—to reclassify a personal right as a real right in order to ensure that the exclusionary rights of the owner do not extend to preventing his neighbors from accessing some resource that is deemed a public good.

The passages on servitude highlight an important nuance in Smith's view of in-rem property in the way that he explains the right of a non-owner to walk across owned land. In the introductory passage on property, Smith is very clear that the owner of land does not merely possess the right to exclude others from the products of his property, but from any sort of interaction with it in general. The default arrangement in society is that property broadcasts a very simple but very powerful message to all non-owners, and that is something very like "keep off." Although the message is crude, its simplicity makes it a cheap signal to communicate. But Smith understands that other costs, namely the cost of bargaining to obtain rights to certain uses of owned land by non-owners, can be very high when property grants relatively absolute authority. In the passage regarding the creation of servitudes, Smith allows that legislators can intervene on the behalf of non-owners who seek to cross the owned field. In doing so, Smith's analysis explicitly

highlights the efficiency advantage of in rem rights over in-personam rights. By identifying servitudes as an in rem right, the arrangement is once again broadcast to the whole world in a simple message. The right is claimable “a quocumque possessore” and so bears on all potential future owners of that land. The servitude effectively acts as an extension of the sovereignty of the neighbor who crosses the physical property of another and cannot be abrogated by any other contract made by the owner of that property and a third party.

I have already alluded to the fact that Smith’s treatment of servitudes seems to allow for the government to restrict the liberty of the owner with respect to his property, as he assesses that the inefficiency of a world of A-to-B rights is significant enough to justify “a relaxation of the exclusive right of property” through legislative action (Smith LJA, 10). Smith’s acknowledgment that legislative action produces socially desirable outcomes by creating a real right to a servitude highlights the point made by the critics of the bundle of rights that a world populated by innumerable arrangements of rights pertaining to property is hopelessly costly in a very practical sense.¹⁴ The institution of property lowers the costs of social interaction, especially when it is composed of a sort of relationship different than rights that arise from contracts.

However, Smith also expresses an animus against social contract theory that buttresses the case against collapsing ownership into a bundle of contract rights. Following Hume’s analysis in “Of the Original Contract,” Smith’s clearest argument

¹⁴ Smith also makes it very clear that although servitudes are a real right, they are not identical to the full right of property. Smith observes that all exclusive rights are real rights, in that they are claimable against any person whatsoever. Only property grants the space for liberty wherein we “can hinder any other person from using in any shape what we possess” (Smith LJA, 10).

against the notion that property acting on everyone is identical to contracts acting on each non-owner simultaneously is found in his rejection of social contract theory. Smith argues that convention rather than contract forms the content of, and prompts obedience to, justice. He rejects the supposition of a social contract on the grounds that, no “common porter or day-labourer” will ever “mention a contract as the foundation of his obedience;” and that, out of necessity, the poor are “obliged to stay not far from the place where they were born...[and] cannot be said to give any kind of consent to a contract” (Smith LJB, 403). His objection to the idea of the original contract is not that society does not operate as if the original contract exists, his objection is that by definition, the social contract would entail explicit mutual consent among society. In a similar way, it is difficult to imagine the common porter mentioning a contract as the foundation of ownership.

Again, like Hume, Smith concludes, “Contract is not therefore the principle of obedience to civil government, but [rather] the principles of authority and utility [are]” (Smith LJB, 404). Hume explains it somewhat differently: “We find also everywhere subjects who acknowledge... and suppose themselves born under obligations of obedience to a certain sovereign... These connections are always conceived to be equally independent of our consent” (Hume 1742). We are motivated by different sentiments when we obey the government or when we accede to the stipulations of a contract. Smith and Hume both acknowledge that obligations can come from other sources than contract and deny that implicit consent necessarily requires explicit mutual consent.

2.9 Property, Sovereignty, and Personal Liberty

By defining property in terms of a claim to a thing against the world, Smith draws conceptual parallels between the ownership of property and the “obvious and simple” claims to natural liberty. Some of the modern critics of the bundle view single out the loss of default content for property as its single greatest drawback. The default for ownership they envision is that property is an extension of the rights of natural liberty, and that property should be understood as entailing a domain within which an individual is entitled to exclusive authority in setting the agenda for any and all resources.

In his list of real rights, Smith calls the first “Dominium” which is “the full right of property. By this a man has the sole claim to a subject, exclusive of all others, but can use it himself as he thinks fit, and if he pleases abuse or destroy it” (Smith LJA, 10). Under the full right of property, non-owners possess no power to constrain the actions of an owner toward his property. Smith reiterates:

Property is to be considered as an exclusive right by which we can hinder any other person from using in any shape what we possess in this manner. A man for instance who possesses a farm of land can hinder any other man not only from intermeddling with any of the products but from walking across his field (Smith LJA, 10).

Property establishes a presumptive dominion for the owner that, at least as far as commutative justice is concerned, admits no outside interference. An owner has a corresponding presumptive right to prevent the use of his property by another whether or not he has any justification other than his own preference. More importantly, he would thus be free to act upon his property in any way he pleases so long as he does not violate another man’s property or person.

Smith is not alone in describing property by way of an emphasis on exclusive dominion and a parallel to the content of personal liberty. Lord Blackstone famously wrote, property is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe” (Blackstone, 1768). And Carmichael explicitly describes the relationship between property and contract with the same language in which he describes the relationship between personal rights and natural liberty. Of liberty Carmichael writes:

a perfect personal right is simply a certain particle of a man’s natural liberty which is transferred to another man by some act or event, and takes on the character in this man of a *personal right* valid against the other... that same right, when it returns to its natural subject and is consolidated with the rest of his natural right, loses its character as a *personal right* and recovers the name of *natural liberty*. (Carmichael, 2002 (1724), p. 78)

When I accept payment in exchange for some agreed upon service in the form of labor, for instance, I give up a discrete particle of my natural liberty to you in the form of a personal right. You have a right to claim that labor from me in the way we have determined, but possess no rights over me in any way that does not directly pertain to the agreement. Once I have performed the labor, the personal right disappears and ceases to act as an obligation upon me. Just as natural liberty provides the base around which personal rights can arise and to which they must return, property rights are a base around which contracts can arise such that Carmichael says that:

since they [contracts] are marked by those particular names only when they are separated from ownership (as we have said), they are commonly said to be created or constituted precisely when they are separated from the ownership, and are said to be abolished at the point when they are again consolidated with it”¹⁵

¹⁵ Penner makes the same point, and argues that it is in fact logically untenable to hold a view that says all possible rights to property exist in a bundle of rights and so

(Carmichael, 2002 (1724), p. 101).

As with Smith, natural liberty is the title for a man's claim to be unmolested as he does not interfere with another man's stuff, and it is incorrect to call natural liberty a bundle of rights.¹⁶

The effect of indicating that property denotes something like the extension of one's natural liberty into the world is a presumption against government interference, which is characteristic of Smith's work. In Smith's analysis, the chief business of law is to support naturally liberty, and by extension, property. Liberty is a guiding presumption in Smith's conception of the purpose of law, and property represents a natural constitution of liberty into the physical world.

2.10 Conclusion

The critics of the bundle view of property are right to claim Adam Smith as an authority and a focal figure for a traditional in-rem view of property. Smith's perspective, presented in his Lectures on Jurisprudence as well as in his written work in TMS and WN, is incompatible with the modern scholarship that defines property as simply "a bundle of rights." Smith develops a theory of property that has its roots in the civil law tradition; he clearly and purposefully describes the differences between property, which is based upon a relationship between a person and a thing, and contract, which labels

can be exchanged. Instead, contracts that arise from property rights represent the creation of a new legal relationship (See Penner 2011).

¹⁶ In Hohfeld, liberty is precisely that which resists the right/duty classification. Merrill and Smith criticize Hohfeld for applying the right/duty framework to property, but if property is an extension of natural liberty, Hohfeld's framework can properly explain the Enlightenment perspective.

agreements holding between individuals. His careful attention to describing how different sorts of rights excite different levels of moral urgency brings the qualitative aspects of property ownership to the fore, and he uses the impartial spectator to explain how society comes to judge violations of property more harshly than violations of contract. And Smith's rejection of social contract theory again confirms his in-rem view, as the rejection does not accept calling social conventions "contract."

Smith work illustrates the importance of each of the modern criticisms of the bundle of rights view and a careful examination of Smith's own theory suggests that he would agree with those criticisms. The modern view of property, by defining property as a bundle of contract rights, downplays, even strips away, the liberty of the owner. It is not fair to say that the owner has a list of circumscribed rights describing what he can and cannot do by virtue of owning something. Smith's view instead emphasizes the presumption of liberty for the owner, who, on such presumption, would be free to do anything he wishes with the property so long as it does not impinge on the liberty of another.

The centrality of the impartial spectator in Smith's analysis led him to emphasize, rather than downplay, the moral weight we tend to assign to things that we call our own. Smith indicates that the impartial spectator approves of our tendency to value those things in our possession more heavily than our rights that we obtain through agreement with another. If Smith is correct, economists and legal scholars who take property to be synonymous with contracts held between an owner and all non-owners simultaneously will underestimate true value of property. The role of the impartial spectator in Smith is

often to show us where perception and pure reason lead society to dissimilar conclusions about what is good or right. In the case of property, the impartial spectator guides us to see how property in a thing is established, why it is valued more than contracts, and why it operates much like an extension of our natural liberty. The impartial spectator thus serves to guide our theory of property to identify more closely with the way property is actually experienced, and so should enable us to provide a more accurate account of what individuals and society really mean when they talk about ownership.

GOLDILOCKS, ARAGORN, AND THE ESSENCE OF PROPERTY

3.1 Introduction

In the fairy tale commonly known today as “Goldilocks and the Three Bears,” we read a whimsical tale of a young woman’s misadventures in a home belonging to a family of three bears. Goldilocks breaks into the bears’ house while they are out on a walk and makes a mess of the bears’ food, furniture, and beds. In earlier version of the story from the late 19th century, the trespasser was not a young girl, but instead an old woman described as an impudent vagrant. The children’s story expresses poetically the moral norms surrounding ownership, and particularly non-ownership.

In an early version of “The Story of the Three Bears,” we read¹⁷:

One day, after [the three bears] had made the porridge for their breakfast, and poured it into their porridge-pots, they walked out into the woods while the porridge was cooling, that they might not burn their mouths, by beginning too soon to eat it. And while they were walking, a little old Woman came to the house. She could not have been a good, honest old Woman; for first she looked in the window, and then she peeped in at the keyhole; and seeing nobody in the house, she lifted the latch. The door was not fastened, because the Bears were good Bears, who did nobody any harm, and never suspected that anybody would harm them. (Jacobs 1890, 94)

After the old woman makes her way through the house, availing herself of the bears food and goods, the story ends:

¹⁷ The version found in *English Fairy Tales* (Jacobs 1890) is very similar to the original printed by Robert Southey in 1837. Later versions change the old woman to Goldilocks and tame the story somewhat.

Out the little old Woman jumped; and whether she broke her neck in the fall; or ran into the wood and was lost there; or found her way out of the wood, and was taken up by the constable and sent to the House of Correction for a vagrant as she was, I cannot tell. But the Three Bears never say anything more of her. (Jacobs 1890, 94)

Part of the value of fairy tales is that they introduce and reinforce basic moral norms for their audience. They do not present anything like a fully developed legal or ethical catalogue of behavior, but they excel at illustrating moral intuitions within and appealing frame. The moral intuition illustrated in the story of the three bears is the simple admonition: “do not mess with others’ stuff.” The story tells us the basics of how we are to interact with things that do not belong to us by showing us an unattractive character who gets it wrong. We should not, however, mistake the intuitive simplicity of the message for conceptual emptiness. Some concrete observations about property arise directly from the way ownership is depicted in the fairy tale.

The author presumes that the house itself is more than sufficient to communicate to the old woman all she needs to know about her relationship to that domain – it belongs to someone else and should not be messed with. Despite the fact that the meeting between the old woman and the bears occurs so late in the story, there is no question of any confusion on the part of the old woman regarding her rights to the bears’ things. She has committed a violation merely by messing with them. The physical property itself conveys enough information about the ownership that by violating it, the old woman is justifiably called a vagrant and judged as falling below common virtue. We do not need to be informed of any particular arrangement of rights to go along with the narrator’s assertion

that merely by breaking into the bears' home and using their things, that she is neither good nor honest.

The simplicity of the fairy tale contrasts with the sophistication of specialist accounts of property in economics, law, or political philosophy. The specialist will rightly explain that actual relations surrounding property are far more complex in the real world. The story brings the reader along as it passes moral judgment on the woman who would avail herself of those things that do not belong to her. It emphasizes the basic premise that if something does not belong to you, then you should leave it alone. On the other hand, the story does not make any claim that the prohibition against messing with other people's stuff is absolute, nor should it. We can imagine a number of scenarios in which the reader would more readily sympathize with the old woman: if she was on the point of starvation or perhaps even if the bears had somehow done her wrong in a way that left her without other recourse. In those ways she could trump the prohibition, but the story of the three bears focuses instead on the presumption against violations of property. It gives the reader a good rule-of-thumb. We are constantly surrounded by, and interact with, things that are not our own, and in such a world, a "don't mess with other people's stuff" heuristic is plainly useful.

Most readers almost certainly do not approach the story of the three bears as a powerful pro-private-property tract, but the tale as a whole would be incomprehensible without a notion of property as an institution that excludes non-owners in some way from the thing owned. The moral judgment depends upon

shared moral norms about how to interact with things that do not belong to you. Without purposefully advancing a pro-free market agenda, the story fosters an anti-socialist conception of property.

David Henderson points out a somewhat similar phenomenon in popular movies: Henderson's Law states that films invariably depict heroes and villains in a way that is consistent with a libertarian outlook, even in the case of films, such as "Wall Street," that on the surface seem to be anti-free market (Henderson 1989). Specifically, the villains tend to be those who initiate coercion against others in the films, whether they are capitalists or otherwise. The Law seems to hold for other forms of art as well, in particular other stories that intentionally or implicitly deal with ownership. Among the more well-known fairy tales, a fair number follow the pattern described by Henderson's Law: "Little Red Riding Hood", "Snow White", "Hansel and Gretel", "Sleeping Beauty." Henderson points out that certain folk tales resonate with his Law: even the story of Robin Hood seems to be anti-capitalist until you realize that he is stealing only from the rich who themselves have already stolen from others. Henderson argues that our great and lasting stories tend to affirm commutative justice and its flipside, liberty; they also often have positive things to say about the exclusionary principle of ownership.¹⁸

¹⁸ Henderson's point about the initiation of coercion is relevant for evaluating the message of those tales in which the relevant property owner initiates coercion against others. Where the owner does not initiate coercion, property tends to be treated with a great deal of reverence. On the contrary, while the stories still highlight the importance of the bond between a villain and the things he owns, they tend to approve of violation that ownership for some good.

3.2 The debate surrounding property

The phrase, “bundle of rights,” was used in connection with property as early as 1888. In his *Treatise on Eminent Domain*, John Lewis wrote, “The dullest individual among the people knows and understands that his property in anything is a bundle of rights. It is no more common for ordinary people to speak of things as property than it is for them to speak of their rights in things, as the right to dispose of a thing in this way or that, the right to use a thing in this way or that, the right to compel a neighbor to desist from doing this or that, etc.” (Lewis 1900, subsection 55). Since Lewis’s time, the phrase “bundle of rights” has become the standard formulation for describing property rights, in economics, law, and sociology. As a consequence of the bundle formulation, it has become common in the Law and Economics literature to describe property rights as merely a right between persons, only secondarily involving a thing.

In recent decades, however, a number of scholars have objected to the description of property as a bundle of rights, and to the idea that property is characterized by the relationship between persons with no regard to the things owned (see Merrill and Smith 2001 and 2011; Penner 1997; Mossoff 2003; Katz 2008; and Claeys 2008 and 2009). To illustrate an alternative perspective, many of these scholars point to Sir William Blackstone, who famously wrote that property is, “that sole and despotic dominion in which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe” (Blackstone 1791). They also appeal to Adam Smith as an authority in economics who held a view of property that gives prominence to an individual’s dominion over some external thing. The critics of

bundle suggest that the term property has traditionally been laden with more content than modern scholars presume. They argue that ownership is characterized by a right to exclude, or by a moral claim to determine exclusively the use of some material good.

All of these theorists have in common the idea that the bundle formulation is a wrong turn from the traditional view developed in the Western legal tradition. They argue both that ownership ought to be singled out in as a unique kind of right in our scholarship, and that it actually is treated as unique by the culture and even in the courts, as something more than a mere bundling of contract rights (Katz 2008, 313). In the course of their arguments, many of these critics of bundle appeal to commonly understood notions of property as one component their critiques (Claeys 2008). Likewise, the bundle theorists make an appeal to ordinary experience, like Lewis's appeal to the 'dullest individual.' Both sides of the issue agree that common moral intuitions about ownership play some role in how the social institution operates.

Adam Smith also appealed to actual experience when he described how the impartial spectator approves of how individuals interact with the things they own. Smith writes of how "the bystander would immediately agree that my property was encroached on" if someone were to come snatch an apple he had picked out of his hand (Smith LJ (A), 65). Property rules rely on shared perceptions and expectations in order to most effectively function, and Smith recognized that we form those expectations by observing those around us.¹⁹ Later he writes about the theft of an animal after a hunter has caught it,

¹⁹ Smith accounts for common understanding in his own reflections on more than just property: he argues the proper duties of government are "plain and intelligible to common understanding" (Smith, WN). More generally, the impartial spectator operates, roughly speaking, by aggregating common perceptions of right action across society.

“the trespass here is plainly against the exclusive privilege of the hunter” (Smith, LJ(A), 115). Again he appeals to his audience’s common sense in recognizing that what actions establish ownership and what that ownership entails.

Thus, the disagreement over the character of property and ownership is not merely an abstract and theoretical debate. Ownership and property are both concepts with which non-academics are intimately concerned. It is clear that individuals operate daily with an understanding, often unarticulated, of what it means for something to be his own. An individual is almost certain to have an idea of what property and ownership mean, and even if his idea is not the same as the idea of his neighbor, or the idea of the economist, he operates with some idea in mind. Violations of our notions of ownership and property cause many of the conflicts we encounter on a regular basis. Even if an individual cannot give a precise definition of property, he will easily be able to tell you when he feels his rights of ownership have been violated.

Though the bundle of rights theorists and the traditionalists appeal to common notions of property, most of the attention has been paid to the way common notions have played out in the court system. But because it is such an inescapable part of human interaction, our implicit understanding of property appears outside of our specifically economic relations, in much of our art and literature. Though there is no doubt that theory and case law both play a primary role in telling us what property looks like and what it ought to look like, there are a number of other available approaches to understanding the cultural norms that inform our notions of ownership and property. Smith, for instance, attempts to account for the cultural context surrounding property through the impartial

spectator, who judges the intentions and expectations of each party. Another possible approach to shared moral notions is through literature.

This paper takes the position that an alternative method can provide useful insight into the common understanding of a concept like property. Storr and Butkevich argue that studying cultural stories is an important way for a sociologist or economist to get closer to knowledge of that culture. In a paper on entrepreneurship in the Caribbean, they write:

[E]fforts to score cultural traits must necessarily reduce cultures, which are inherently rich, dynamic and complex, to collections of measurable characteristics (eg indices of individualism and masculinity). The colour, the verve, the flavour of the different varieties of entrepreneurship that exist get lost in this move to come up with quantitative measures of culture. (Storr and Butkevich 2007 , 252)

The same can be said of many ideas which influence the way members of a society interact. So in a debate where much depends on how property is actually experienced and explained by both owners and non-owners, the insight offered by stories are vitally important to an accurate understanding of what property is and should be.

Through an examination of the folklore and fairytales – mostly those that originated in, or were filtered through, the United Kingdom in the last two centuries – I attempt in this paper to provide some insight into how property is experienced and thought of in the specifically Anglo-American tradition. I make no claim that the stories I intend to examine are representative of the whole Western canon or of its depiction of ownership; nor do I argue that the stories prove one way or another the validity of the in rem view. The stories simply illustrate characteristics of ownership that align with the traditional, or in rem, view and illuminate some related insights about reciprocal

influence and social responsibility, which could be useful for the debate regarding how scholars ought to talk about property.

Stories like “Goldilocks and the Three Bears” and “Cinderella” also help us to clarify the differences between the in-rem formulation and the bundle formulation. I will discuss how the relationship between persons and things tends to be portrayed as an essential component of human experience in certain stories. The treatment of ownership in the literature examined here highlights the sovereignty of the owner, but also the way things influence their owners. Social responsibility and moral duties are tied up with ownership in these stories in a way not entirely obvious in either side of the property debate. The stories treat ownership with even more reverence than the critics of the bundle formulation seem to, and the picture of property that is suggested in the tales is remote from the modern bundle formulation in a number of respects.

In the first section, I will briefly describe the history of the two conflicting views of property, with a special focus on the cultural origins of each. Although I do not claim to provide a representative sample of literature, I intend for the stories to be relevant to the debate, and describe the cultural and historical lineage of the alternative views of property. In the second section I will examine some popular folklore and fairy tales, and argue that the in-rem formulation of property best accounts for the attributes of ownership illustrated in the stories. I argue, however, that something like stewardship seems to be an important theme in the stories and that it is too little discussed in law and economics. I conclude with some suggestions as to how the qualitative aspects of

ownership and property displayed in the stories can inform future debates over property theory.

3.3 Bundle of Rights Property and Exclusion-based Institutions

For decades, the dominance of the bundle of rights formulation of property has been so complete in modern scholarship that Thomas Grey writes, “property ceases to be an important category in legal and political theory...specialists who design and manipulate the legal structures of the advanced capitalist economies could do without using the term ‘property’ at all” (Grey 1980). Inside the bundle of rights perspective, a property right is merely a superfluous label given to a set of rights held by an individual against a number of other individuals. As Merrill and Smith write:

By and large, this view has become conventional wisdom among legal scholars: Property is a composite of legal relations that holds between persons and only secondarily or incidentally involves a ‘thing.’ Someone who believes that property is a right to a thing is assumed to suffer from a childlike lack of sophistication – or worse”(Merrill and Smith 2001, 358)

The phrase “bundle of rights” frames the discussion of property in modern scholarly work across a number of disciplines. In that vein, Ronald Coase writes that, “We may speak of a person owning land and using it as a factor of production but what the land-owner in fact possesses is the right to carry out a circumscribed list of actions” (Coase 1960).²⁰ Likewise Harold Demsetz writes, “When a transaction is concluded in the marketplace, two bundles of property rights are exchanged. A bundle of rights often

²⁰ In addition to his assertion that property in fact consists in a right to carry out a circumscribed list of actions, Coase draws a distinction between how we speak and what we mean. The critics of the bundle formulation have challenged his assertion that the owner merely possesses a right to carry out a circumscribed list of actions on philosophical grounds. My additional purpose here is to argue that specialists should not be too quick to dismiss the first clause, that “we may speak of a person owning.”

attaches to a physical commodity or service, but it is the value of the rights that determines the value of what is exchanged”(Demsetz 1967, 347). The conversations about property rights are set up to take place within the framework dictated by a picture of ownership characterized by a bundle of individual rights that can be combined, separated and traded into innumerable configurations.

Part of the justification for looking at property as a bundle of discrete rights is that it provides more clarity by treating property more mathematically and less as a vague moral claim. However, the bundle of rights formulation comes laden with a number of conceptual positions regarding the nature of ownership and property. Among these is the idea that property rights are held in personam, that property rights are characterized by agreements between people rather than by relationships between individuals and the material world. Like other rights, property rights are created by society, and arise because they set the stage for interaction between the individuals within.

More importantly, the language of bundle is laden with a number of nefarious preconceptions and connotations. First, that ownership originates in some sort of bundling of things that had a prior existence as separate, discrete, and definite items. Second, that the finite number of things have been brought together. And third, that some individual did the bundling. All of this makes the bundle language open to a great deal of interpretation, and fails to exclude from the notion of property certain arrangements of rights that fail to emphasize the exclusive properties of ownership. Klein and Robinson argue that, “as the universe of all possible bundles is open-ended and unspecified, ‘bundle’ talk tends to blur the boundaries that had become focal in liberal ideas of

commutative justice”(Klein and Robinson 2011). They argue that the gravest problems with the bundle are semantic.

Merrill and Smith have traced the rise of the bundle of rights view of property in the 20th century, and have argued that the adoption of the phrase arose as a result of political forces in the 1920s, and from a subsequent adoption by Coase in his seminal works.²¹ They argue that the in-rem boundary formulation of property is more efficient, in Coasean term, than the bundle formulation. In-rem rights differ from in-personam rights in that they apply to all persons rather than to specific persons. Ultimately, Merrill and Smith argue that, “property rights are in rem, in that they create duties of noninterference with things marked in conventional ways as being owned, which duties apply as a matter of law to all persons”(Merrill and Smith 2011, 9).

From another perspective, Penner has written about the conceptual emptiness of the bundle of rights view. Regarding the negative aspects of the bundle formulation, Penner writes:

this ‘dominant paradigm’ is really no explanatory model at all, but represents the absence of one. ‘Property is a bundle of rights’ is little more than a slogan. The use of the word ‘slogan is not intended to be merely polemical. By ‘slogan’ I mean an expression that conjures up an image, but which does not represent any clear thesis or set of propositions. (Penner 1995, 714)

Penner argues that by corrupting the essential components of property, the bundle of rights theory destroys itself in the end. It refers to nothing, and adds nothing to a

²¹ Merrill and Smith argue that the Legal Realists, beginning with Wesley Hohfeld, abuse the language of in-rem rights and misconceive the qualitative difference between rights held in things and rights held between persons. They explain Coase’s adoption of the bundle formulation as a historical convenience, and argue that, “Coase, being a man of his times – and, one might add, being someone with little interest in legal concepts – wholeheartedly embraced the bundle of rights picture as his understanding of property” (Merrill and Smith 2011, 11).

discussion of human interaction. In its place, Penner suggests the in-rem perspective of property and says, “Property, on this view, isolates a particular area of human practice, dealing with things, as opposed to the practice of dealing with other people...” (Penner 1995, 800). Here Penner echoes the treatment of property in literature from the 18th century in Britain and Scotland wherein property is set apart from contracts based on a difference between relationships involving only persons and those involving a person and a thing (see Carmichael 1724, 92; Hutcheson 1747, 147; Smith 1762-63, 107; Blackstone 1765, book 2, chapter 2). We cannot, as Coase (1959) says, simply talk about the ways someone can use a gun without first establishing what it means to own a gun. The first point of contention between the bundle and in-rem views is the centrality of the thing in property. A second related contention is the connection the in-rem view draws between ownership, dominion, and exclusion.

In their papers on the subject, Merrill and Smith place great emphasis on the ability of material objects to broadcast simple messages to non-owners (Merrill and Smith 2011). Merrill and Smith go on to argue that the in-rem formulation is superior to the bundle formulation on efficiency grounds. Material goods that broadcast information about ownership allow us “to solve many problems ‘wholesale’ through in-rem rights – including core property rights – which impose automatic duties of noninterference on all persons who may or may not encounter the owned property, whoever they may be” (Merrill and Smith 2011, 40). The essential point for Merrill and Smith here is that non-owners ought to be able to know how to act when they encounter someone else’s property. The bundle formulation seems to allow for infinite malleability in the terms of

the contract. The knowledge conveyed through property is that a non-owner is to keep off, or at least respect the authority of the owner. As one alternative, Thomas Merrill writes that a better metaphor for property might be that of a prism where looking at property from different angles shows different features (Merrill 2011). As in the story of the three bears, the stranger sees property from a simple angle: “keep off.” A specialist could see more nuances, but those nuances or complex sets of rules actually get in the way of the layman’s understanding of the institution.

The practical inference of Merrill and Smith’s assertion is that property should be understood as communicating the duty of non-interference. Even in circumstances wherein the owner and a non-owner have had no interaction, the non-owner should know how to act when he encounters property that is owned. If he did not, we could hardly blame him for violations of property. But as a society we have an expectation that non-owners understand that ownership directs them to refrain from interference.

The descriptions of the in-rem formulation of property vary greatly in their particulars, but Katz sums up the positions well when she writes:

[W]hat we mean when we say that ownership is exclusive is that owners have a right to exclude and that the right to exclude has a certain effect: the indirect creation of the space within which the owner’s liberty to pursue projects of her choosing is preserved. (Katz 2008, 281)

The essence of the in rem perspective is that property is about dominion over physical goods. According to Katz and others, property ought to be recognized as a singular and special institution, separate from contracts, with a unique character and naturally inherent content.

As evidenced by strong legal traditions on both sides of this property debate, each side makes a plausible case. The critics of the modern bundle formulation have been making their case for over a decade, but they still see their side as the underdog (Claeys 2009). Although the proponents of the in rem view point to cases like *Jacque v. Steenburg Homes* (see Claeys 2008; Katz 2008) the bundle of rights paradigm plays out in legal texts in cases like *Ploof v. Putnam*. And both sides use certain cases, like *Sturges v. Bridgman*, to explain their own positions (see Claeys 2008; Coase 1960). Because the debate is largely a debate over emphasis and the naturalness of certain characteristics of property, examinations of case law necessarily leaves room for disagreement.

Both sides, however, appeal to arguments outside of case law to make their point. Lewis (1888) appeals to common understanding when he argues for a certain perspective on eminent domain. Likewise, Williams (1998) appeals to common sense and intuition to justify the ad hoc perspective of property rights. And on the other side of the debate, Claeys (2008) insists that both bundle theorists and in rem proponents must appeal to moral intuition to ground their arguments. Though each side focuses mostly on conceptual theory and case law, each at least acknowledges the need for treating property as it is seen and felt in common usage.

One possible way to contribute to the debate is to examine more closely the sources that can communicate to us how property and ownership are commonly understood. Surely, common understanding can be incorrect or misleading, but norms that arise from common understanding are an important component of the common law system (Merrill and Smith 2001). “Political rhetoric, legal argumentation, and cultural

framings,” are all components that shape the contours of property and ownership. Much of the current debate takes place in the realms of political rhetoric and legal argumentation, while cultural framing remains a valid and important driver of conceptual property.

3.4 Method

Property and ownership are both concepts that owe much of their rhetorical and moral legitimacy to their cultural underpinnings. To understand the shape ownership ought to take in our theoretical work, we must understand how it is actually experienced by the owners and the non-owners in the society. Though the law itself dictates a significant portion of the experience, many of the qualitative aspects of ownership are determined elsewhere. Storr and Butkevich argue that, “We get at culture by reading cultural texts. To get a sense of a people’s world views and values, watch the films and television shows that they watch, read the books and poems that they read and write, listen to their folktales, examine the photographs they take and the art (paintings, sketches, and sculptures) they produce”(Storr and Butkevich 2007, 253). Like other cultures before us, Americans have borrowed much of our literature from a number of other cultures, and the stories that make up America’s folk tradition are understandably varied. I examine both stories written by modern British authors as well as tales that our culture merely adapted from older sources.

We can get a sense of how ownership and property are experienced and understood in a broader context of social interaction. Fairy tales explicitly deal with a world that is not the one we live in, but that does not mean they do not communicate

important information about how individuals in a culture perceive the world. Stories, especially fairy tales, are “not primarily concerned with possibility, but with desirability” (Tolkien 2008, 353). And the communication of the desirable is not limited completely to the impossible. The people who participate in telling and listening to stories reveal beliefs about what should be, but also implicitly about the world as it is (see Dundes 1971; and Wongthet 1989). The discussion surrounding ownership relies heavily on how people think about what they own and what others own. Examining the stories that flourished in the same culture that formed the common law system that influenced our own should give us insight into what sort of norms the common law arose to protect.

The class of story most accurately described as a fairy tale did not originate in England, but a number of stories told by English authors fit inside that category. In particular, Joseph Jacobs (1854-1916), George MacDonald (1824-1905), Oscar Wilde (1854-1900) and J.R.R Tolkien (1892-1973) have all written stories in that genre. In Tolkien’s words, “The definition of a fairy-story – what it is, or what it should be – does not, then, depend on any definition or historical account of elf or fairy, but upon the nature of Faerie, the Perilous Realm itself, and the air that blows in that country” (Tolkien 2008, 322). Tolkien suggests that stories have likely been told since language began, but for the purpose of this paper, it is enough to note that stories of this kind enjoyed widespread popularity in Western Europe, England, and America, that these stories capture something in the imagination of the society in which they are told, and that they are passed on to each new generation.

In addition to considering a few classic fairy tales that appeared early first in French and German collections, the stories treated here tend to be both longer and more explicitly concerned with ownership than some of the older stories. Tolkien, in particular, wrote in the fairy tale tradition, and his works are especially useful for illustrating how these stories treat ownership and property.²² Stories written by Tolkien, Wilde and MacDonald, along with the stories collected by Jacobs, and even tales with no singular author, such as the Arthurian legends, all speak to the concept of ownership.

3.5 Making a Becoming Use of What Is Our Own: The Responsibility of Ownership

There is not complete consensus regarding the exact nature of in-rem ownership; but there are at least two characteristic claims with which its proponents seek to differentiate the in-rem view from the bundle of rights view. The claims are 1) the presumption of the right of owners to set the agenda for a resource, and 2) an emphasis on the centrality of the person-thing direction of ownership. The critics argue that the bundle language obscures the importance of these claims and paves the way for

²² I include Tolkien's work for two additional reasons. For one, Tolkien rose to prominence during the same time Coase's work on the social costs, in which he popularized the bundle of rights description of property, was becoming widely read among economists and legal scholars. Tolkien's works especially captured the American popular consciousness in the 1960s, and have been popular ever since. Secondly, the growth of literature in the genre is deeply indebted to Tolkien's creation. Similarly, Coase is recognized as one of the founders of the law and economics discipline. The simultaneous rise of these two men, one very much the father of a new academic tradition, and the other, wildly popular and widely imitated, provides motivation enough to examine their concepts side-by-side. I will make an effort to show that the relevant concepts are not unique or even new to Tolkien, but were simply most expanded versions of older themes and ideas.

encroachment on property. Both of these points speak to the dominion of the owner over certain external things, a relationship that gives character to the nature of ownership.

But the stories suggest additional characteristics of ownership that are not well captured in the typical treatments by the in rem theorists. An owner is influenced by his ownership of the thing. In that sense, the thing influences its owner. The thing changes the way the individual interacts with those around him. Once we admit that the thing-owned influences the owner, we easily understand that it also affects the owner's moral duty toward those around him.

Indeed, if the things you own affect your identity, they also affect your social responsibilities. These responsibilities are a component of distributive justice, as Adam Smith would define it, "the becoming use of what is our own." In some mundane ways, we can see how property ownership could influence a person's identity in society: a land-owner will be called generous under different circumstances than a non-owner, and likewise, industriousness will manifest differently if I own tools. Some duties perhaps, in the stories at least, are entirely dependent upon the objects we own. The responsibility to lead or protect may arise precisely in the ownership of some thing.

3.6 Authority Over Space: Aragorn and the Selfish Giant

Those scholars who advocate for an in-rem view of ownership emphasize that property creates a sphere of authority for owners that bears on non-owners. In the stories, property seems to broadcast rights of exclusion and dominion to non-owners. *The Lord of the Rings* and Oscar Wilde's "The Selfish Giant" each contain narratives that fit well with this part of the in rem description of ownership. The character of land ownership in *The*

Lord of the Rings and in other folktales of the British tradition seems to emphasize the right of owners as sovereign over their property. There is not so much a question of what an owner is or is not permitted to do within their realm of ownership so much as a moral limit against violating the realm of another owner.²³

The Lord of the Rings is complex tale set inside of an even more complex mythology. Among the many subplots in the story is the story of Aragorn, who is a heroic figure who we first meet as a sort of wild man. Over the course of the story, we discover that he is the last surviving descendent of the High Kings, and must take up the mantle of leadership and authority over his kingdom if the good people of Middle Earth hope to defeat the villain of the tale. Though he is resistant at first, he accepts that it is his responsibility to become the High King. He is responsible for leading the battle against the primary villain of the story, Sauron, in part by rallying the rest of mankind together into an alliance. As the insipient High King of men he has a great deal of authority over other characters in the tale, and that authority is amplified by the moral urgency of his task. Authority and responsibility are key themes surrounding Aragorn's role in *The Lord of the Rings*.

A passage in the second installment of Tolkien's trilogy, *The Two Towers* illustrates the notion of sovereignty within a physical space. Aragorn is visiting a lesser king who has been corrupted and is being held hostage by a sorcerer. Aragorn has just recently taken possession of his sword, 'Anduril,' which is symbolic of his kingship, and

²³ Claeys (2008) and Katz (2008) emphasize sovereignty in particular as one characteristic of property that both bundle of rights theorists and even some exclusion theorists gloss over. Claeys writes, "Property therefore consists not so much of specific entitlements as a general domain of practical discretion in relation to an external asset" (Claeys 2008, 23).

upon entering the lesser king's home is asked to surrender it to the guards. His authority, in neutral territory, is greater than anyone else's; but inside another man's property, he declares he would submit even to the lowest peasant's will. At first, however, Aragorn is resistant, and tempted to refuse because his guardianship of the sword is also an important duty. In this scenario, Aragorn's moral duty as incipient king clashes against the sovereignty of another ruler and property owner.

Aragorn stood a while hesitating. 'It is not my will,' he said, 'to put aside my sword or to deliver Anduril to the hand of any other man.'

'It is the will of Theoden,' said Hama.

'It is not clear to me that the will of Theoden son of Thengel, even though he be lord of the Mark, should prevail over the will of Aragorn son of Arathorn, Elendil's heir of Gondor.'

'This is the house of Theoden, not of Aragorn, even were he King of Gondor in the seat of Denethor,' said Hama, stepping swiftly before the doors and barring the way. His sword was now in his hand and the point towards the strangers.

'This is idle talk,' said Gandalf. 'Needless is Theoden's demand, but it is useless to refuse. **A king will have his way in his own hall, be it folly or wisdom.**'

'Truly,' said Aragorn. 'And I would do as the master of the house bade me, were this only a woodman's cot, if I bore now any sword but Anduril....'

Slowly Aragorn unbuckled his belt and himself set his sword upright against the wall. (Tolkien 1994, 511).

Aragorn starts to challenge the authority of Theoden even though he is ruler over that space. When confronted, he points out that his position, as king of Gondor, is greater than that of Theoden. But in the situation at hand, his relative position is irrelevant to his duty to do as the master of the house wills. Aragorn is bound to his sword by responsibility as much as ownership, yet he ultimately yields to the sovereignty of the ruler of the house. He expresses an essential aspect of ownership; the master of the property ought to be able to dictate the rules of behavior within his own domain,

regardless of the relative social status of his guest. Gandalf says, “a king will have his own way in his own hall, be it folly or wisdom.” Authority is not based on social optimization, but ownership. Sovereignty, as a rule, allows not only freedom for noble uses of a resource, but also for poor uses. Deviations from sovereignty are exceptions to the rule. And although Aragorn considers whether he might have a trump to Theoden’s authority over that space, he acquiesces to Theoden’s claim.

Gandalf’s quip acknowledges that dominion over one’s property does not always pave the way to the best outcomes. Another fairy tale in which the ownership of property plays an important role is the story “The Selfish Giant” by Oscar Wilde. In it, a Giant who owns a garden goes away from his property for a time. While away, children begin to play in the garden. Upon his return, the giant expels the children, and only lets them back into the garden when he sees that not until the children are allowed back in will Spring arrive. He bluntly claims his absolute right of authority over the garden as property owner, “‘My own garden is my own garden,’ said the Giant; ‘any one can understand that, and I will allow nobody to play in it but myself.’ So he built a high wall all round it, and put up a notice-board” (Wilde). The giant’s actions are proof of his selfishness. Later in the story, after a winter that lasts a year, the children sneak back into the giant’s garden and Spring returns with them. The second half of the story tells of the figurative Eden the giant enjoys with the children after he decides to share his garden with them.

It is easy to interpret the story as a wholehearted disapproval of the type of ownership described by Blackstone as ‘despotic.’ Jarlath Killeen observes, “The

problem at the heart of the story is the clash between two radically different conceptions of land and ownership...Traditionally, absolute property right was combined with the principle of paternalism whereby the moral economy had to be respected. The landlord was a paternalist, as well as a property owner, and he would exercise 'absolute' rights and responsibility in tandem" (Killeen 2007). Far from approving of the absolute right of the owner to wield his authority over his property, Wilde leads the reader to judge him for his cold heart. We pity the children, who were making such innocent use of the garden, and finally sympathize with the giant's decision to destroy his wall. We are invited to celebrate the destruction of the boundary and approve of the giant's regret at having excluded others.

Critics of the in-rem view can certainly use Wilde's tale to foster sympathy for the bundle formulation. One of the presumed benefits of the bundle formulation is that by breaking up the sticks of ownership, each stick can be more easily given to those who make the best use of it. Perhaps in this case, the selfish giant makes poor use of the use-stick and society would be better off if he was not allowed to hold it. However, the tale contains a moral as well as a social dimension, and the moral dimension leaves room for an alternative conclusion. At the end of the story, the giant is told by one of the children, the one he loved most: "You let me play once in your garden, to-day you shall come with me to my garden, which is Paradise" (Wilde). The giant is redeemed because he chose to open his garden to the children by his own choice. Presumably, he would not have been so rewarded if some higher

authority preemptively took from him the option to invite the child into the garden. His dominion over the garden allowed him to be selfish, but it also allowed him to be generous. Proponents of the in-rem view of property have often made the same point about the role of property in cultivating virtue. Hutcheson wrote, “by such ensurance [of private property] labors become pleasant and honorable, friendships are cultivated, and an intercourse of kind offices among the good” (Hutcheson, 136).

“The Selfish Giant” can be used to cultivate feelings of resentment toward property owners, but proponents of the in-rem view can celebrate its message as well. Ownership, when taken to mean exclusive authority over some thing, creates the opportunity to be good, creative, and generous. Henderson made a similar point when he argued that *A Christmas Carol* is “a profoundly profreedom story” because by the end, Scrooge is elated at the opportunity to be able to give voluntarily to the poor. The Giant had absolute authority in deciding what could be done on or with his property. Wilde’s point was that the Giant was wrong to exclude the children from his property on moral grounds, but the moral of the story relied on the Giant’s sovereignty. It turns out, the most joyful part of the story depends on not overriding the presumption of exclusivity, and instead allowing the owner to exercise it to good purpose. Sovereignty or dominion is a precondition to higher virtues.

These tales suggest a picture of ownership that emphasizes the open-endedness of ownership and the way property bears on non-owners. Within the realm of his property, the owner wields authority to freely determine who to exclude and how non-owners may interact with his property. Even higher authorities respect the authority of the owner to

set the agenda within his own domain. However, we see that social duties accompany ownership and bear on owners. We may admit an owners right, grammatically speaking, to exclude others from his property, but he may still fall short of higher virtues.

Finally, as I illustrated at the beginning, “The Story of the Three Bears” also illustrates the centrality of authority over space conferred by ownership. The house, or property, alone broadcasts a message of non-interference to any passers-by. The reader must appreciate that message if he hopes to go along with the storyteller’s verdict against the trespassing woman. Of course, since the bundle formulation relies on contracts to explain the interaction between individuals, the bundle proponents can make sense of the story by arguing that the old woman violated an implicit contract in her action. But the ad hoc nature of property rights in the bundle paradigm makes this claim somewhat more troublesome than the in rem perspective. If property has no universal characteristics, we cannot expect it to broadcast information very effectively. There is no logical incompatibility with the story and the bundle paradigm, but it does seem that the in rem perspective, defined by Merrill and Smith (2001), makes more sense of the moral censure directed at the old woman. In an in-rem world, we are less likely to excuse her behavior on the basis of misunderstanding.

3.7 Property, Identity, and the Importance of the Thing

Proponents of the in-rem view argue that property is unique in that it concerns first the relationship between owners and the things they own, and only second the

relationship between owners and non-owners.²⁴ The connection between a person's will or mind and their body is a sticky philosophical issue, and one I wish to avoid here. At the very least, we generally agree that a person's body metaphorically belongs to them. An individual has authority to exclude anyone else from their body and the body has a recognizable boundary. We easily understand the duty we each have not to mess with someone else's stuff when that stuff is their very person. It is also easy to detect violations, such as an assault. The in-rem view extrapolates from that plain intuition to the slightly less obvious realm of other objects.

A very simple example of the bond between an owner and a thing-owned comes from the story of Cinderella. Charles Perrault first introduced the glass slippers into this ancient tale, and the slippers have since become emblematic of that story. Although the moral of the story has little to do with property ownership, Perrault makes the slippers crucial in bringing about the resolution of the story and leading to the happy ending. After Cinderella inadvertently drops one of her slippers as she escapes from the ball, the "king's son caused a proclamation to be made by the trumpeters, that he would take for wife the owner of the foot the slipper would fit" (Perrault). Although, from haste, Cinderella had abandoned the slipper, it still belongs to her, and had become a relevant part of her identity, as the future wife of the king's son. Conversely, Cinderella's sisters are defined by their status as non-owners of the slipper. I do not mean to overstate the

²⁴ If property first concerns a relationship between the owner and the thing owned, it seems the relationship could exist prior to social relations. Even if society needs to recognize the relationship for it to mean much, its origin could still remain outside the social relations. Gershom Carmichael writes that "even when other men do not exist, it is possible for a right to exist which would be valid against others if they did exist; hence there is no reason why one man, even if he were alone in the world, might not have ownership of certain things" (Carmichael 1724, 93).

importance of the relationship between Cinderella and the thing-owned, the slipper, when it plays only a passing role relative to the other aspects of her character. But we should not ignore the connection between the thing-owned and the identity of the owner.

In other fairy tales, individuals often possess a very strong connection to the material world around them. The connection is sometimes emphasized with a magical or mystical quality, and it displays a feeling that the relationships between persons and things often define the persons themselves. The stories suggest that people think of their property not first in terms of their relationships with other people, but in terms of the things themselves. They convey an idea that in some sense a thing can be a part of a person.²⁵ Though nobody need make that claim literally, the idea underscores the notion that violations of property feel like violations of self. Tolkien's *The Lord of the Rings*, George MacDonald's "The Giant's Heart," and the tales of King Arthur all display the kind of strong connection between an owner and a thing owned that the in rem theorists talk about.

In *The Lord of the Rings*, the One Ring is a magical item created by Sauron, the Dark Lord, which allows him to attain great power and to do evil. Of its origins, Tolkien writes, "secretly Sauron made One Ring to rule them all...and much of the strength and will of Sauron passed into that One Ring..." (Tolkien 1999, 287). Tolkien is not merely speaking poetically here; in Middle Earth we understand that Sauron is able to literally imbue the ring with his strength and will. In a magical and mysterious way he deposits

²⁵ Scholars dealing with ownership are not unfamiliar with the notion that of incorporating external things into what properly belongs to oneself. Stephen Buckle writes extensively about the concept of the *suum*, which are those things that are proper to oneself, starting with one's own person. Of property, he writes, "Private property (as we know it) is the set of extensions to the *suum*, and for this reason private property laws become an essential part of the system of natural justice" (Buckle 1991, 30).

some part of his soul into his creation. And although we cannot, in the real world, accomplish such a feat, we do talk of how we put our ‘blood, sweat, and tears’ into some grueling labor. It is not difficult for us to accept that a craftsman puts something of himself into his creations. Sauron accomplishes this on a grander scale and so the ring really does belong to him in a way analogous to the way a person’s arm or finger belongs to him. So much so that he is weakened when separated from his ring, much as if he were to lose a part of his actual person. Actual harm comes to him when he loses that particular object that belongs to him.

When Sauron loses his ring in the midst of battle, he loses a great deal of his power, to the point where, for centuries, the world at large forgets he existed. The protagonists of the story understand that if Sauron ever regains possession of the One Ring, his power will return and the heroes of Middle Earth will be defenseless to stop him. Even without possession of the ring, Sauron exercises a sort of exclusivity over the ring; we see that even though others physically possess it, they cannot claim it for themselves in any real way, and any use of the ring immediately seems like a precarious interruption of its rightful owner’s dominion over it. The connection between Sauron and his creation is a key element of the entire adventure, it is a bond that cannot be broken easily, and which, if broken, destroys Sauron. The ring belongs to Sauron in a sense that cannot be overridden by any external mandate. Ownership in this case begins at the creation of the object, and ends with its destruction. The depiction of property falls in line with Carmichael’s (1724) assertion that ownership particularly concerns the relationship

between a person and a thing rather than between persons. All other beings in Middle Earth are excluded from ownership of the ring because it belongs to Sauron.

In the case of Sauron, the relationship between the owner and object is a manifestation of his destructive and coercive power. Sauron poured his spite and wickedness into the ring. The story is not a model of how owners and their possessions ought to interact! Throughout *The Lord of the Rings*, the protagonists are motivated by their desire to rid the world of the One Ring, and thereby of the Dark Lord. At various points throughout the story, characters feel tempted to use the ring for their own dark ends, or even for the thoroughly admirable goal of defeating Sauron, but again and again we see that they cannot use, and should not try to use, something that is so thoroughly connected to Sauron. In the end, the protagonists must destroy the ring that indisputably belongs to Sauron. In the course of normal events, we might object to violence against another's things just as we would violence against another person. In this case, we cheer the destruction of the ring just as we affirm the destruction of Sauron, for he *initiated* coercion against others.

The important part of the tale is not so much that it is a good model of how property law operates, but how it depicts a very close bond between the individual and the thing owned. Tolkien addresses the ancient origin of the motif of the crucial connection between a person and an object that exists in the external world. He points to an Ancient Egyptian folktale in which a boy says, "I shall enchant my heart, and I shall place it upon the top of the flower of the cedar... when thou hast found it, put it into a

vase of cold water, and in very truth I shall live” (Tolkien 1947). The motif has often been illustrated in a heart kept outside of the body.

George MacDonald makes use of the idea in his story, “The Giant’s Heart.” In that story, an evil giant is concerned that he may have hidden his heart in an unsafe location. MacDonald writes, “It was quite a common thing for a giant to put his heart out to nurse [grow], because he did not like the trouble and responsibility of doing it himself; although I must confess it was a dangerous sort of plan to take, especially with such a delicate viscous as the heart.” The protagonists of the story discover where his heart is hidden and discuss what they ought to do with it. At the end of the tale, the confrontation between the giant and the protagonist ends when the giant’s heart, still outside of his body, is stabbed and he is killed. Similarly, in the final books of J.K. Rowling’s *Harry Potter* series, we learn that the villain, Voldemort, has split his soul into pieces and stored them in a number of relics. As with Sauron and the evil giant, Voldemort dies when the last of these relics is destroyed. The recurring theme suggests a common warning against attaching oneself too fully to material objects and suggests a moral limit to claims to external things.

As concerns the argument over property, we do not need to agree that a person can in any real sense deposit their soul in another material object, but the stories suggest a feeling of connectedness to the material world that is underemphasized in modern economic analysis of property. Coase’s claim that “what the land-owner in fact possesses is the right to carry out a circumscribed list of actions” explicitly puts that connectedness to the side in analyzing the practical import of ownership (Coase, 1960). A connection to

the material world informs our relations with other persons, and any description of property that marginalizes the importance of the things we own will fall short of describing ownership as we tend to experience it. I do not mean to suggest that the bundle proponents universally neglect the relationship between the owner and the thing entirely, but some have certainly downplayed the importance of the thing (such as Grey, 1980, saying that we can do without the category altogether). The difficulty with the bundle language is that the metaphor, with its connotations as explored by Klein and Robinson (2011), opens the door to interpretations like Grey's where the thing can be set aside as irrelevant.

In addition to the motif of a person depositing a part of their being, soul, or essence, outside of their body, there is a second way these tales often depict the tie between a person and a material object. There is a suggestion in the stories of the tradition of objects that cannot be rightfully used unless property owners have possession of them. In *The Lord of the Rings*, the character Aragorn is the heir to the throne of the high king. Only the rightful heir can use the sword of his ancestors, and the sword remains broken until remade specifically for Aragorn's use. The sword is made significant because it belongs to the King, and Aragorn in part is significant because of his ownership of the sword. The sword is symbolic of his calling and position in reference to those around him; their reverence of his position and their reverence of the sword are linked. Aragorn plays no role in creating the sword, but we see that no other person can rightfully wield it. Simultaneously, Aragorn cannot fulfill his purpose until he decides to claim his right to the sword.

The same theme arises in the legend of the sword in the stone and many of the stories surrounding King Arthur. There are many versions of the Arthurian legend, but the sword plays an important role in all. The legend tells of a sword stuck in a stone that can only be removed and recovered by the rightful king. The relationship between the owner of a thing and the thing itself is enforced by magic. In both stories, it is not the sword that makes the man worthy to be king, but in each, the sword is central to the man's journey to kingship. Here too, the relationship between a person and an object is exaggerated, and it is not precisely ownership that we see. We cannot say for certain, but it seems that if either man tried to sell his sword, we would likely be horrified by the impropriety of his actions. Though the parallels to ownership are imperfect, the stories still hint at the potential of a strong bond between a person and a thing. They also suggest the notion that the objects over which we have authority also place moral responsibilities upon us.

It seems that although each of the fairy tales is consciously written outside of reality, the feeling of ownership in each is merely an exaggeration in degree rather than difference in kind from the way people actually think of our property. Although we do not often find people claiming that their soul is literally stored in a material object, it is not entirely uncommon for an individual to express their love of a thing by using a similar metaphor. In reference to, say, a lost or destroyed family heirloom, we might hear someone say of the loss of an important heirloom, "I lost a part of my soul," meaning that she felt a special tie to the object and it hurt her deeply to lose it. We need not assign any mystical truth to the statement to observe that the mode of discussion fits with the fairy

tale motif in which the destruction of an object can actually destroy a character's soul. The bond in these cases is like the bond between a self and their body. We recognize that an individual has clear dominion over his own physical person; he has a moral claim to his own limbs as much as to his own thoughts. These fairy tales suggest the idea that this dominion can be extended out into the world.

Furthermore, the illustrations of ownership and property in these stories highlight the reciprocal influence in ownership. The objects themselves oblige their owners to act in particular ways. The objects containing the souls of the owners call on those owners for protection, and the swords point to their owner's responsibility. Aragorn and Arthur each experience the call to lead not merely as an option, but as a duty. Ownership is not only the source of a moral claim; it communicates duties in a concrete expression to the world. Far from being incidental, the relationships between owners and the things they own help define their role within society. The connection strengthens the arguments of the in rem theorists by indicating that the objects themselves are an important part of informing the identity of the owners, and thereby the relation of the owners to the rest of society.

3.8 Conclusion

The current debate over conceptual property theory is in many ways a debate over semantics. But semantics are vitally important. The formulations we use to describe property matter in that they influence the legal and political conversation about property rights and ownership. The critics of the bundle formulation argue that it obscures key attributes of property that serve to protect the coherence of the institution against

infringement by the state. They argue the bundle formulation and legal positivism generally aid and abet political attitudes that are dismissive of, or hostile to, definitions of property that emphasize consistent patterns in property as a social institution (T. Merrill 2011). The bundle formulation suggests that when an owner says to another, “This belongs to me,” he says virtually nothing. Because the bundle can contain or exclude any number of individual rights, the non-owner knows nothing for certain about how he ought to interact with the things he does not own.

In this paper, I have attempted to show how stories can illuminate property as a social institution. Folktales and fairy stories can help to inform a debate that fundamentally relies on metaphors to communicate our actual experience. Stories allow us to get at the more elusive facets of social life. These fairy tales emphasize the connections between man and the material world. And in these tales, the connection between owners and things owned is of a mystical quality. Things owned receive their character from the owners, and owners are often characterized by the things they own. Indeed, often ownership is too bare a phrase to capture the content that these stories illustrate. The relationship between an owner and a thing-owned in the stories highlights both ownership, with its emphasis on dominion, and stewardship, with connotations of responsibilities and duties to others. The folktales suggest the idea of a relationship between persons and things such that the thing, or the relationship to it, influences the person. The things that belong to us influence our identity and our relationship to society. Far from being incidental to our relations with others, the stories suggest that the things owned are central. If we take this suggestion seriously, we see that property is a unique

and important area of human interaction. Furthermore, we see that the bundle formulation misleads us when it suggests that property can be composed of any combination of contract rights. Certain attributes of property— dominion, sovereignty – are essential not only to its operation as a social institution, but also to its ennobling potentialities.

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BIOGRAPHY

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