
Towards an Essentialist Legal Definition of Property

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TOWARDS AN ESSENTIALIST LEGAL DEFINITION OF PROPERTY†

*Dr. Glen Anderson**

CONTENTS

| | |
|---|-----|
| INTRODUCTION | 481 |
| I. A STARTING POINT | 483 |
| II. DEFINITIONAL APPROACHES | 484 |
| A. <i>Exclusionist</i> | 485 |
| B. <i>Bundle of Rights</i> | 492 |
| C. <i>Socially Constructivist</i> | 504 |
| CONCLUSION | 514 |

INTRODUCTION

To the lawyer and non-lawyer alike, property is a ubiquitous phenomenon; we are surrounded by it, it dominates much of what we do, and its protection and regulation are among our legal system's most preeminent concerns. Exactly what property is, however, is a moot point.¹ Can it be defined merely as ownership of objects, resources, or interests? Does property only exist when there is a right to exclusion over objects, resources, or interests? Does property connote not only rights, but also responsibilities? Are the limits of property circumscribed by social, moral, and technological factors? It can be said that there are no certain answers to these and many other questions relating to property. Correspondingly, there is no single definition of property—only an array of contested possibilities. Perhaps the only thing

† This Article discusses sources of law from four different jurisdictions, and each of these jurisdictions has distinct citation conventions per the 20th edition of *The Bluebook: A Uniform System of Citation*. This Article and the source citations therein will reflect these varying citation conventions.

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1. A concise answer might be “a jurisprudential conundrum.” Penner has sardonically suggested that, “[p]roperty is a bore. It rarely contributes meaningfully to a conversation. It’s an annoying old idea that, given half the chance, will sit down beside you and maunder on” JAMES E. PENNER, *THE IDEA OF PROPERTY IN LAW* 1 (1997).

that can be said with certainty about property is that it is an essentially contested concept *par excellence*.²

Yet, perhaps because of its ubiquity, it is necessary to investigate the definition of property. How, for instance, is it possible to litigate with respect to property if it cannot be determined what property is? If, as Bentham suggests, law and property are symbiotic,³ what is it that makes “property”? Supervening all of this is the intrinsic interest—which has endured for millennia—in investigating the “what is property” question.

In the course of investigating definitions of property, the present Article is principally concerned with a legally-orientated analysis of property’s *essence*. It is not focused upon the equally important normative question of how property should be used. The two areas of discourse are, however, closely aligned. A definition of property, whatever its contours might be, is by necessity inducted into normative theories⁴ as they advocate for specific property-owning regimes. Moreover, if it is accepted that social mores and norms might limit property, then normative theories will surely inform these limitations. To reiterate, however, the present Article’s principal function is to provide a legally-orientated analysis of property’s *essence*—not to provide a normative account of how property should be used.

Nor is the present Article focused on taxonomical property classifications, such as real, personal, legal, equitable, present, future, corporeal, incorporeal, private, public, individual, common, and so on. These classifications, although important, tend to elicit property’s manifestation, as opposed to definitional essence, and are thus mostly excised from the proceeding discussion.

This Article primarily analyzes the exclusionist, bundle of rights, and socially constructivist definitional approaches to property. Investigation of these approaches reveals that although each is useful for divining property’s essence, none, in isolation, is entirely satisfactory. In short, each of the three approaches exhibit conceptual weaknesses. The Article concludes by postulating an essentialist legal definition of

2. See Walter Bryce Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC’Y* 167, 169 (1956) (describing “concepts which are essentially contested, [as] concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users”); Eugene Garver, *Rhetoric and Essentially Contested Arguments*, 11 *PHIL. & RHETORIC* 156, 156–58 (1978); Wibren van der Burg, *Law as a Second-Order Essentially Contested Concept*, 8 *JURISPRUDENCE* 230, 231–33 (2017).

3. JEREMY BENTHAM, *THEORY OF LEGISLATION* 113 (Richard Hildreth trans., 1894) [hereinafter BENTHAM, *THEORY OF LEGISLATION*] (“Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”).

4. Such as Capitalism, Marxism, and Lockean labor theory, among many others.

property that draws upon the influences of all three approaches and neutralizes the weaknesses identified in the preceding discussion.

I. A STARTING POINT

A definition seeks to lay down the meaning of a concept with reference to a word.⁵ It is possible, of course, to define any concept in any way, and this will remain logically satisfactory so long as it is employed consistently. As intimated by Aristotle,⁶ however, in order to make a definition useful, it must possess some connection with a concept's essence.⁷ Although in modern philosophy the search for essentialist definitions has been subject to criticism,⁸ the reality for lawyers is that words and their meanings have important consequences. Indeed, much of what lawyers do involves the construction of words, and this process, either implicitly or explicitly, is informed by essentialist definitions.

As indicated by the *Oxford English Dictionary*, “property”⁹ has two principal meanings in the modern English language. The first meaning refers to an “attribute or quality” of something.¹⁰ A functional example might be: “The text you are now reading has certain visual properties.” The second meaning, and the one which is the present Article’s focus, refers to “[a] thing or things belonging to someone; possessions

5. Rand has suggested that “[a] definition is a statement that identifies the nature of the units subsumed under a concept.” AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY 40 (Harry Biswanger & Leonard Peikoff eds., 2d ed. 1990).

6. Cohen, for example, has suggested that “Aristotle links the notion of essence to that of definition (horismos)—‘a definition is an account (logos) that signifies an essence.’” S. Marc Cohen, *Aristotle’s Metaphysics*, STAN. ENCYCLOPEDIA PHIL. (June 11, 2012), <http://plato.stanford.edu/archives/sum2012/entries/aristotle-metaphysics/>.

7. For Aristotle, the quest for definitional essentiality is a metaphysical one. See RAND, *supra* note 5, at 51.

8. BERTRAND RUSSEL, A HISTORY OF WESTERN PHILOSOPHY 210 (1945). For a legal author who decries essential definitions of property, see Barry Hoffmaster, *Between the Sacred and the Profane: Bodies, Property, and Patents in the Moore Case*, 7 INTEL. PROP. J. 115, 127–30 (1992).

9. The etymology of the term “property” can be derived from the Latin term *proprietas* meaning “ownership, a property, propriety, quality,” or “special character.” This definition was adopted by the Old French *proprieté*, which was modified by the Anglo-French *properte* to mean “individuality, peculiarity; property.” At its very genesis then, property is connected with concepts of ownership, individuality, and specialness or differentiation. See *Property (n.)*, ONLINE ETYMOLOGICAL DICTIONARY, https://www.etymonline.com/word/property#etymonline_v_2687 (last viewed Mar. 7, 2019). For a judicial discussion of the etymology of “property,” see *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 506 (Allegra, J.) (“What is property? The derivation of the word is simple enough, arising from the Latin *proprietas* or ‘ownership,’ in turn stemming from *proprius*, meaning ‘own’ or ‘proper.’”).

10. *Property*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/property> (last viewed Mar. 7, 2019).

collectively.”¹¹ A functional example might be: “The text you are now reading is property protected by copyright.”

Subject to any special rules of statutory construction,¹² the lawyer’s search for an essential definition of property often begins with caselaw. Unfortunately, many such definitions are either vague¹³ or prone to taxonomy,¹⁴ thereby rendering them of limited assistance.¹⁵ In order to investigate property’s essence more fully, it is fruitful to critically analyze the three primary definitional approaches.

II. DEFINITIONAL APPROACHES

As noted above, the three primary definitional approaches to property are the exclusionist, bundle of rights, and socially constructivist. However, this should not be taken to suggest that each approach is monolithic. Some exclusionists prefer to stress legal relations with re-

11. *Id.*

12. Property can be subject to a special rule of statutory construction. See *Yanner v Eaton* (1999) 201 CLR 351, 389 (Gummow J) (Austl.); *Kirby (Inspector of Taxes) v. Thorn EMI plc* [1988] 2 All ER 947, 953 (Nicholls LJ) (UK). Even in the presence of a statutory rule of construction, however, definitional ambiguities will remain. Section 9 of the *Corporations Act 2001*, for example, defines “property” as “any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action.” *Corporations Act 2001* (Cth) s 9 (Austl.). Although section 9 indicates an expansive definition of property, its precise limits are nonetheless unclear. It is impossible to tell, for example, whether section 9 extends to allow property rights to be asserted in human tissue. Statutory definitions are therefore only of partial use when attempting to construe the definition of property.

13. In *Jones v. Skinner*, Lord Langdale MR stated: “[P]roperty’ is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have.” (1835) 5 LJR (Ch) 87, 90 (UK). This formulation was approved by Acting Chief Justice Isaacs in *Commissioner of Stamp Duties (Queensland) v Donaldson* (1927) 39 CLR 539, 550 (Austl.) and Justice Murphy in *Dorman v Rodgers* (1982) 148 CLR 365, 372–73 (Austl.). Another vague discussion of property was undertaken by Lord Bramwell B in *Queensbury Industrial Society v. Pickles* (1865) 1 LR Exch. 1, 4–5 (UK). In *In re Earnshaw-Wall*, Justice Chitty stated: “[P]roperty’ may denote the thing to which a person stands in a certain relation, and also the relation in which the person stands to the thing.” [1894] 3 Ch 156, 157 (UK). A further vague definition has been rendered by Lord Wilberforce in *National Provincial Bank Ltd. v. Ainsworth*: “Before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.” [1965] AC 1175 (HL) 1247–48 (UK). This was approved by Justice Ryan in *Western Mining Corporation Ltd v Commonwealth* (1994) 121 ALR 661, 682–83 (Austl.).

14. In *Zhu v Treasurer of the State of New South Wales*, Chief Justice Gleeson, and Justices Gummow, Kirby, Callinan, and Heydon stated: “‘Property’ is a comprehensive term which is used in the law to describe many different kinds of relationship between a person and a subject-matter; the term is employed to describe a range of legal and equitable estates and interests, corporeal and incorporeal.” (2004) 218 CLR 530, 577 (Austl.) (internal citation omitted).

15. One of the better judicial expositions has been provided by Chief Justice Gleeson and Justices Gaudron, Kirby, and Hayne in *Yanner v Eaton* (1999) 201 CLR 351, 365–66 (Austl.), which is quoted *infra* note 74.

spect to things; others stress legal relations between human beings concerning things. Some exclusionists focus on corporeal property, whilst others canvass corporeal and incorporeal property. Nor is each approach mutually exclusive. The exclusionist approach might be validly posited as a limited bundle of rights approach. Alternatively, aspects of the exclusionist approach might be detected in the socially constructivist approach.

A. *Exclusionist*

The most influential exclusionist definition of property has been rendered by the English jurist and legal philosopher Blackstone¹⁶ in his *Commentaries on the Laws of England*. Writing in 1765, Blackstone defined 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.”¹⁷ Perhaps reflecting on an essential aspect of the human psyche, Blackstone also noted that, “There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.”¹⁸

Three elements can thus be isolated from Blackstone’s definition: dominion, exclusion, and external things. *Dominion* refers to the control that one person—real or juristic (such as a corporation)—has over a “thing.” *Exclusion* connotes a legally-enforced ability to prevent others from using or enjoying a particular thing. *External things* (taken literally) include corporeal objects such as land and chattels.¹⁹

Despite its influence, however, there are some problematic aspects to Blackstone’s definition. First, it is relatively absolutist in scope, suggesting that ownership rights operate “in total exclusion of the right of any other individual in the universe.”²⁰ This absolutist conception of property, however, is seldom reflected in reality. Although I may own a motor vehicle, there are many rules I must observe in order to ensure the safety of passengers and other citizens. A similar point can be

16. Sir William Blackstone (July 10, 1723–Feb. 14, 1780) was an English jurist and Oxford law professor who produced the historical and analytic treatise on the English common law entitled *Commentaries on the Laws of England*, first published in four volumes over 1765–1769. It was an extraordinarily successful work, reportedly bringing the author £14,000 in royalties and to this day still remains an indispensable source on classical views of the common law and its principles.

17. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

18. *Id.*; see also Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 127 (1990) (quoting BLACKSTONE).

19. It may also include incorporeal property interests too. See discussion in the paragraph containing *infra* note 39.

20. 2 BLACKSTONE, *supra* note 17, at *2.

made with respect to land: Although I have a right against trespassers, legislation may grant a right of access to a neighbor to enable essential maintenance activities.²¹ Water provides another example: Although an underground aquifer may pass beneath my property, legislation may impose limits upon the quantum I can pump for irrigation or sale. Property rights are thus anything but absolute, despite the tenor of Blackstone's definition.²²

This is not to say that Blackstone may not have recognized the limitations of an absolutist approach: "Property in the *Commentaries* . . . was full of complex arrangements of rights, creating communities with respect to specific assets and recognizing the rights of the community in what was nominally private property."²³ Blackstone's definition may have therefore functioned as a starting point, "designed merely to guide the general reader painlessly and uncontroversially into more rigorous matters."²⁴

If there is an inconsistency between Blackstone's definition and subsequent elaborations in the *Commentaries*, it might be asked why this has not been more readily recognized by scholars? A possible answer is that Cohen's influential *Dialogue on Private Property*²⁵ popularized Blackstone's definition without alluding to the possibility of qualification. Cohen's *Dialogue* was in turn cited by increasing numbers of scholars who failed to read the *Commentaries* in their totality.²⁶ It may also be that Blackstone's definition was popularly

21. See, e.g., *Access to Neighbouring Land Act 2000* (NSW) (Austl.).

22. See generally John Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 6 (1986). See also *State v. Shack*, 277 A.2d 369, 372-73 (N.J. 1971) (Weintraub, C.J.) ("[A]n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago.").

23. See David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 105-06 (2009). For example, Blackstone also notes that the apparent absolutism of property is tempered by law: "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." See 1 WILLIAM BLACKSTONE, COMMENTARIES *138. Other authors to note the dissimilarity between the oft quoted Blackstonian definition and the content of the *Commentaries* include: Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 30-36 (1996); Robert P. Burns, *Blackstone's Theory of "Absolute" Rights of Property*, 54 U. CINCINNATI L. REV. 67, 67 (1985); and Frederick G. Whelan, *Property as Artifice: Hume and Blackstone*, in NOMOS XXII: PROPERTY 101, 118-20 (J. Roland Pennock & John W. Chapman eds., 1980).

24. I. G. Doolittle, *Sir William Blackstone and His Commentaries on the Laws of England (1765-9): A Bibliographical Approach*, 3 OXFORD J. LEGAL STUD. 99, 100 (1983).

25. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 370.

26. Schorr stated that, "[t]hrough I have no way of proving it, my intuition is that 'sole and despotic dominion' was popularized through the good offices of Felix Cohen." Schorr, *supra*

received as a “pre-modern” and “outdated” starting point for further definitional inquiry, thereby ensuring that it was engaged with only fleetingly.²⁷

A further criticism of Blackstone’s definition is its cultural rigidity. Hepburn, for instance, has stressed the importance of not placing conceptions of property within a cultural straightjacket:

The primary defining feature of a property relationship in Western society is the existence of a right to exclude. In Western society, all property relationships will confer upon the holder rights to exclude the rest of the world. This makes the Western conception of the property relationship private in nature. This is not a characteristic inherent to indigenous relationships with land²⁸

The idea of “dominion” and “exclusion” over “external things” could legitimately be considered Western-centric, thereby rendering Blackstone’s definition acentric to communally-orientated, indigenous societies. The consequence for indigenous societies has been unfortunate and undeniable. In *Milirripum v Nabalco*,²⁹ Justice Blackburn—in line with Blackstone’s definitional legacy—denied that the Yolngu people in Australia’s Northern Territory held a proprietary interest in traditional lands subject to a Federal bauxite mining lease because, *inter alia*, they did not possess the right to exclusion:

I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist before there can be a proprietary interest, or deny that each of them may be subject to qualifications. But by this standard I do not think that I can characterize the relationship of the clan to the land as proprietary.

It makes little sense to say that the clan has the right to use or enjoy the land. Its members have a right, and so do members of other clans, to use and enjoy the land of their own clan and other land also. The greatest extent to which it is true that the clan as such has the right to use and enjoy the clan territory is that the clan may, in a sense in which other clans may not (save with permission or under special rules), perform ritual ceremonies on the land. That the clan has a duty to the land—to care for it—is another matter. This is not without parallels in our law, which sometimes imposes duties of such a kind on a proprietor. But this resemblance is not, or at any

note 23, at 124. The same author continues in a footnote, “[f]ramed differently, the phrase was cited seven times in the half century before the *Dialogue*, and nearly 300 times in the ensuing half-century.” *Id.* at 124 n.136.

27. *Id.* at 125.

28. SAMANTHA HEPBURN, AUSTRALIAN PROPERTY LAW: CASES, MATERIALS AND ANALYSIS 2 (3d ed. 2015).

29. (1971) 17 FLR 141 (Austl.). This decision antedated the Australian High Court’s recognition of native title in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1. See *infra* notes 153–157 and accompanying text.

rate is only in a very slight degree, an indication of a proprietary interest.

The clan's right to exclude others is not apparent: indeed it is denied by the existence of the claims of the plaintiffs [Yolngu people] represented by Daymbalipu. Again, the greatest extent to which this right can be said to exist is in the realm of ritual. But it was never suggested that ritual rules ever excluded members of other clans completely from clan territory; the exclusion was only from sites.

The right to alienate is expressly repudiated by the plaintiffs in their statement of claim.

In my opinion, therefore, there is so little resemblance between property, as our law, or what I know of any other law, understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests.³⁰

Culturally rigid definitions of property can therefore have meaningful consequences.

Another criticism of Blackstone's definition (and which overlaps with the previous point) is that it unduly emphasizes the right to exclusion as integral to establishing property. By so doing, the definition builds inflexibility into its scope: if there is no right to exclusion, there can be no property. In this sense, Blackstone is not alone. Merrill, for example, has written:

[T]he right to exclude is more than just "one of the most essential" constituents of property—it is the *sine qua non*. . . . [T]he right to exclude others is a necessary and sufficient condition of identifying the existence of property. Whatever other sticks may exist in a property owner's bundle of rights in any given context, these other rights are purely contingent in terms of whether we speak of the bundle as property. The right to exclude is in this sense fundamental to the concept of property.³¹

Although property will typically involve the right to exclusion, this may not always be the (immediate) case. The laws relating to bailments and leases are excellent examples.³² Moreover, incorporeal her-

30. *Id.* 272–73.

31. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730–31 (1998).

32. With regard to bailment, the "bailor" transfers possession or personal property (personalty) to a "bailee" for the latter's use or to undertake a specified task for the bailor. Although the bailee does not have ownership in the personalty, their temporary possession of the property may inhibit the bailor's right to exclusion in an immediate sense. Similarly, the "lessor" transfers possession of realty to the "lessee," and although the lessee does not have ownership in the realty, their temporary possession inhibits the lessor's right to exclusion in an immediate sense. On bailment generally, see NORMAN E. PALMER, *PALMER ON BAILMENT* (3d ed. 2009). Concerning leases, see generally PETER BUTT, *LAND LAW* 275–437 (6th ed. 2010); BRENDAN EDGEWORTH, *BUTT'S LAND LAW* 299–479 (7th ed. 2017).

editaments, such as easements and *profits à prendre*, involve not so much a right to exclusion, but instead a right to accommodation.³³ Native title rights are another example: within indigenous societies, land is not something to be individually owned and controlled, but rather to be communally respected, forming the basis of spiritual beliefs and tribal law. Yet another example is afforded by the *Countryside and Rights of Way Act 2000*: this legislation provides a public “right to roam,” including activities such as walking and picnicking over millions of acres of privately-owned land in England and Wales.³⁴ An inflexible emphasis on exclusion therefore unduly limits what property can be.³⁵

A further problem with Blackstone’s definition is that its emphasis on “things,” if taken literally, requires that incorporeal property is “reified” so as to become physicalized. Property rights no doubt attach to shares, copyrights, trademarks, and patents, yet these could hardly be described as “things.” The same could be said with respect to incorporeal hereditaments such as easements and *profits à prendre*.³⁶ Debts are another example: they are not things, but rather in-

33. *Contra* Merrill, *supra* note 31, at 748 (“[A]lthough the holder of the interest does not have a general right to exclude others from defined metes and bounds, such a person is given a full panoply of legal rights to protect the limited interest that they have from interference by others.”).

34. *Countryside and Rights of Way Act 2000*, c. 37 (UK). No compensation is payable to landowners. See Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539, 546–47 (2006) [hereinafter Anderson, *Comparative Perspectives on Property Rights*]. See generally Jerry L. Anderson, *Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks*, 19 GEO. INT’L ENVTL. L. REV. 375 (2007); Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917 (2017). Another example of “right to roam” legislation is the Land Reform (Scotland) Act 2003 (ASP 2). See generally Gregory S. Alexander, *The Sporting Life: Democratic Culture and the Historical Origins of the Scottish Right to Roam*, 2016 U. ILL. L. REV. 321 (2016); W. David H. Sellar, *The Great Land Debate and the Land Reform (Scotland) Act 2003*, 60 NORSK GEOGRAFISK TIDSSKRIFT 100 (2006). Also noteworthy is that in Sweden and Norway, *allemansrätten* or *allemansrätt*, based upon custom, provides a right to traverse the uncultivated lands of another and to temporarily camp. It extends to picking mushrooms, berries, and flowers. See generally Anderson, *Comparative Perspectives on Property Rights*, *supra*, at 548; Richard Campion & Janet Stephenson, *The ‘Right to Roam’: Lessons for New Zealand from Sweden’s Allemansrätt*, 17 AUSTRALASIAN J. ENVTL. MGMT. 18 (2010); Matti La Mela, *Property Rights in Conflict: Wild Berry-Picking and the Nordic Tradition of Allemansrätt*, 62 SCANDINAVIAN ECON. HIST. REV. 266 (2014); Klas Sandell & Peter Fredman, *The Right of Public Access – Opportunity or Obstacle for Nature Tourism in Sweden?*, 10 SCANDINAVIAN J. HOSPITALITY & TOURISM 291 (2010).

35. Vincent Chiappetta, *The (Practical) Meaning of Property*, 46 WILLAMETTE L. REV. 297, 314 (2009) (describing Blackstone’s exclusionist approach as “extreme” and a “straw man”).

36. Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 360 (1980).

corporeal choses in action.³⁷ Property can therefore be of an incorporeal nature, and it is not the “thing” which is integral, but rather the legal rights which attach to it. Such rights can, of course, attach to corporeal and incorporeal property. Hohfeld, recognizing this problem, propounded a new de-physicalized definition of property, which emphasized that, “all legal interests are ‘incorporeal’—consisting, as they do, of more or less limited aggregates of *abstract* legal relations.”³⁸ By doing so, Hohfeld escaped the physicalist conception of property and the corresponding need to reify incorporeal property interests.

In Blackstone’s defense, however, his usage of the word “thing” might not correlate with modern idiom. Schroeder has argued that in the 18th century, a thing was something other than the human person and was a meaning that philosophers had employed before and after the *Commentaries*: “The objects of dominion or property are *things*, as contradistinguished from *persons*”³⁹ If this is accepted, it would mean that Blackstone’s definition can span corporeal and incorporeal property, thereby overcoming the criticism of physicality and reification.

A final problem with Blackstone’s definition is its tendency to obscure that property rights exist *in rem*. This is because it suggests property is a right to exclusion held by a human over things, rather than a right to exclusion held by a human opposable to all other humans. Although it might be suggested that Blackstone touched upon property’s *in rem* status with his reference to “any other individual in the universe,” the fact remains that his definition primarily emphasized the legal relation between human and thing.⁴⁰

Another prominent exclusionist definition has been propounded by Snare in his article, *The Concept of Property*, published in the *Ameri-*

37. On the nature of a chose in action, see Kevin B. Sobel-Read, Glen Anderson, & Jaakko Salminen, *Recalibrating Contract Law: Choses in Action, Global Value Chains, and the Enforcement of Obligations Outside of Privity*, 93 TULANE L. REV. 1, 11–12 (2018).

38. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 24 (1913–1914) [hereinafter Hohfeld, Yale article]. Hohfeld’s contributions to the definition of property are discussed *infra* notes 47–50 and accompanying text.

39. 2 BLACKSTONE, *supra* note 17, at *15. See generally Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994).

40. For judicial remarks focusing on the legal relation between human and thing, see *GLS v Russell-Weisz* [2018] WASC 79, ¶ 110 (Martin CJ) (Austl.) (“In a broad sense, ‘property’ may be used to describe a legal relationship between a person and a thing.”); *Hung v Warner, in the matter of Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* [2013] FCAFC 48, ¶ 29 (Jacobson, Gordon, & Robertson JJ) (Austl.) (“A property right is a relationship between a person and an object; the right to an object”).

can *Philosophical Quarterly*.⁴¹ Snare formulaically suggests that property exists when three primary rules are satisfied, namely (1) A has the right to use P, (2) others may use P if, and only if, A consents, and (3) A may permanently transfer the rights under 1 and 2 to other specific persons by consent. To these three primary rules, three supplementary rules can be added, namely (4) punishment rules detailing what may happen to B if she wrongfully interferes with A's use of P, (5) damage rules requiring B to pay compensation if she damages P without A's consent, and (6) liability rules specifying that if A's use of P results in damage to others then she will be held responsible.⁴²

In common with Blackstone's definition, Snare elevates the right to exclusion as a *sine qua non* of property. Beyond this, however, subtle points of differentiation emerge. First, Snare's use of the clinical descriptor "P" means that the definition is better able to grapple with incorporeal property overcoming the need for reification. Second, Snare's definition is more explicit in recognizing rights beyond exclusion, such as the right to transfer. Third, by laying out supplementary rules, Snare's definition provides a more nuanced explanation of property that focuses not just on rights, but also on responsibilities. By doing so, it is better able to acknowledge property's *in rem* status.

This latter point also emerges from consideration of Cohen's *Dialogue on Private Property*, published in *Rutgers Law Review*.⁴³ Building upon the work of Hohfeld, Cohen suggested that the definition of property does not center on legal relations with "things" but rather legal relations *between human beings* concerning those things, particularly the right to exclusion:

C. . . . I could charge you for walking across Brooklyn Bridge if you were willing to pay for it and that would not be proof that I had a property right in Brooklyn Bridge, would it?

F. No, but in that case I could walk across Brooklyn Bridge without paying you

. . . .

C. Well, then, we are really talking about a right of exclusion, aren't we? What you are really saying is that ownership is a particular kind

41. See generally Frank Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200 (1972).

42. With a reasonably similar definition, R.C. Nolan has remarked:

[A]n interest referable to an asset is termed "property" or "proprietary" when the component parts of that interest include a primary right to exclude any one of a very large and indefinite class of people from access to some enjoyment of the asset, whether or not those people have in fact consented to such exclusion, and secondary claims to vindicate that primary right.

R.C. Nolan, *Equitable Property*, 122 L.Q. REV. 232, 235 (2006).

43. Cohen, *supra* note 25.

of legal relation in which the owner has a right to exclude the non-owner from doing something or other. . . .

F. Yes, I think that is where [to] find a difference between property and other rights.⁴⁴

By explicitly stating that a right to exclusion is opposable against “non-owners,” Cohen creates a definition that emphasizes property’s *in rem* status. This is reflected in Cohen’s formulation of property rights:

To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state.⁴⁵

The foregoing exclusionist definitions take us some way to divining property’s essence. However, one insurmountable problem always remains: the proper accommodation of property rights which do not involve a right to exclusion. The bundle of rights definitional approach solves this problem.

B. *Bundle of Rights*

The bundle of rights definitional approach to property—sometimes referred to as the bundle of “sticks” approach—stresses the need for flexibility.⁴⁶ While the bundle of rights approach does not negate the utility of a right to exclusion as an *indicium* of property, it instead prefers to emphasize a plurality of rights and responsibilities that can be tailored to the property in question.

The genesis of the bundle of rights approach can be traced to Hohfeld, who in the course of an essay delineating the distinction between rights *in rem* and *in personam*, argued that property was not a physical or corporeal phenomenon but rather a legal rights-based, de-physicalized, incorporeal one:

44. *Id.* at 370.

45. *Id.* at 374.

46. The phrase “bundle of rights” was apparently first used in JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 43 (1888) (“The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights.”). It has been suggested that Justice Cardozo, writing in *Henneford v. Silas Mason Co.*, “transformed the bundle of rights into a bundle of sticks.” See Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 774 (2002); see also *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1936) (Cardozo, J.) (“The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. . . . A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively.”). On the historical origins and usage of the phrase “bundle of rights,” both within and anterior to property law discourse, see Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 367–69 (1998); Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 LEGAL THEORY 1, 3 (2014).

[A]ll legal relations are “incorporeal”—consisting as they do, of more or less limited aggregates of *abstract* legal relations The legal interest of the fee simple owner of land and the comparatively limited interest of the owner of a “right of way” over such land are alike so far as “incorporeality” is concerned; the true contrast consists, of course, primarily in the fact that the fee simple owner’s aggregate of legal relations is far more extensive than the aggregate of the easement owner.⁴⁷

Hohfeld thus distanced property from the notion of legal rights over “things” to a new modality of thinking which centered on property as “more or less limited aggregates of *abstract* legal relations” between people.⁴⁸ Property was therefore an *in rem* phenomenon. From this foundation, Hohfeld was able to devise the initial bundle of rights definition of property: “Suppose, for example, that A is fee-simple owner of Blackacre. His ‘legal interest’ or ‘property’ relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities.”⁴⁹ This definition, however, was incomplete. It was unclear whether property should only be conceived of as incorporeal “rights (or claims), privileges, powers, and immunities” or whether these should be coupled with responsibilities. Moreover, it was unclear exactly what the incorporeal “rights (claims), privileges, powers, and immunities” might consist of, and whether any of these were necessary or sufficient for property.⁵⁰

These concerns were addressed by Honoré in his essay, *Ownership*, which outlined eleven rights and incidents that might be applicable to the establishment of property, namely the right to possess, the right to use, the right to manage, the right to the income, the right to the capital, the right to security, the power of transmissibility, the absence of term, the prohibition of harmful use, liability to execution, and residuary rights.⁵¹ Importantly, Honoré argued that it was not necessary

47. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 30 (Walter Wheeler Cook ed., 1919) [hereinafter HOHFELD TEXT]; see also Hohfeld, Yale article, *supra* note 38, at 24.

48. HOHFELD TEXT, *supra* note 47, at 30; Hohfeld, Yale article, *supra* note 38, at 24.

49. HOHFELD TEXT, *supra* note 47, at 96.

50. *Id.* Despite its incompleteness, Hohfeld’s definitional approach quickly gained a cadre of supporters, often termed the “legal realists.” For this group of scholars—disconnected and not formally organized—Hohfeld’s emphasis on incorporeal legal relations opened the way to view property as a legally regulated social phenomenon, which resulted in winners and losers. The old Blackstonian conception of property, which emphasized a legal relation between owner and “thing” failed to acknowledge this truism. Hohfeld’s insights were especially compelling during the Great Depression. See Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 250 (2007); Jane B. Baron, *Rescuing the Bundle of Rights Metaphor in Property Law*, 82 U. CINCINNATI L. REV. 57, 63 (2013).

51. Anthony M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 113 (A.G. Guest ed., 1961).

for all these rights and incidents to exist before property would coalesce.

Of the eleven points listed by Honoré the most important is the right to possess, which includes two aspects: “[T]he right (claim) to be put in exclusive control of a thing and the right to remain in control, *viz.* the claim that others should not without permission, interfere.”⁵² This suggests a linkage with Blackstone’s earlier definitional legacy, which emphasized the notions of dominion and exclusion. Honoré argues that the right to possess is *in rem* in nature but stresses that it is not without qualification: “[A] largish number of officials have the right of entering on private land without the owner’s consent, for some limited period and purpose.”⁵³

The right to use is based on the notion of liberty and overlaps with the right to manage and the right to income.⁵⁴ The right to manage endows a property owner with the ability to “decide how and by whom the thing owned shall be used.”⁵⁵ The right to income allows an owner to enjoy the fruits of property.⁵⁶ Examples include profit from shares, rents, or crops.

The right to capital is less intuitive and includes “the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it.”⁵⁷ The most important aspect of the right to capital is the power of alienation which can be made “during life or on death, by way of sale, mortgage, gift or other mode.”⁵⁸ Alienation may be in part or total.

The right to security is described by Honoré as the right to avoid expropriation. Hence, where an owner remains solvent, security of title to property will be guaranteed. If expropriation is to take place, such as when the state reclaims property (typically land), then adequate compensation must be paid.⁵⁹

Honoré frames the power of transmissibility not as a right but rather as an incident of ownership. The power of transmissibility ensures that an owner is able to transmit property to successors without disruption. Since property cannot be enjoyed by the deceased, the power of transmissibility ensures that commodities and other forms of proprietary interests are placed under the control of those who con-

52. *Id.*

53. *Id.* at 114.

54. *Id.* at 116.

55. *Id.*

56. *Id.* at 117.

57. Honoré, *supra* note 51, at 118.

58. *Id.*

59. *Id.* at 119.

tinue to live. The underlying rationale, presumably, is that living persons are better able to manage social resources and protect value.

What Honoré describes as the absence of term is also framed as an incident of property ownership rather than a right. Essentially the absence of term compliments the power of transmissibility, providing that the duration of ownership is determinable: “The rules of legal systems always provide some contingencies such as bankruptcy, sale in execution, or state expropriation on which the holder of an interest may lose it.”⁶⁰ Absence of term can therefore terminate a property owner’s title and hence is not a right in the usual sense of that term.

In liberal societies, the harm principle articulated by Mill⁶¹ permeates social behavior and hence property usage. The prohibition on harmful use of property ensures that owners do not use their property in a deleterious manner *vis-à-vis* others. Honoré gives the following illustrative examples of this important incident of ownership:

I may use my car freely but not in order to run my neighbour down, or to demolish his gate, or even to go on his land if he protests; nor may I drive uninsured. I may build on my land as I choose, but not in such a way that my building collapses on my neighbour’s land. I may let off fireworks on Guy Fawkes night, but not in such a way as to set fire to my neighbour’s house.⁶²

As previously noted, liability to execution forms an integral aspect of the absence of term. Honoré elevates this incident to its own heading, suggesting that without it, “growth of credit would be impeded and ownership would . . . be an instrument by which the owner could defraud his creditors.”⁶³ Liability to execution therefore provides a mechanism whereby overall economic growth and social stability is maintained.

The final point developed by Honoré is the incident of residuary.⁶⁴ This point is perhaps best illustrated by example: a landlord may execute a lease to a tenant, which will entail the loss of access to that property (with some minor exceptions). During the lease term, however, the landlord is not displaced by the tenant, as only the former has the ability to obtain full ownership rights at the lease’s conclusion. The landlord’s rights are thus of a residuary character. Residuary is therefore another defining aspect of the property “bundle.”

60. *Id.* at 122.

61. David Brink, *Mill’s Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Oct. 9, 2007), <http://plato.stanford.edu/archives/fall2008/entries/mill-moral-political> (last updated Aug. 21, 2018).

62. Honoré, *supra* note 51, at 123.

63. *Id.*

64. *Id.* at 126–27.

Overall, Honoré's definitional approach is systematic and broad. It attempts to cover a wide variety of rights and incidents (many of which overlap) and therefore has inherent flexibility. This allows it to dexterously account for property in varied contexts and manifestations. As one scholar has put it, the bundle of rights approach "captures the truism that property is an artifact, a human creation that can be, and has been, modified in accordance with human needs and values."⁶⁵ The bundle of rights approach is thus able to grapple with enduring property interests, such as the classic fee simple, or nascent 21st century information-based interests, such as electronic databases and records, "which lie in a kind of netherworld between property, privacy, and intellectual property."⁶⁶ This dexterity arguably accounts for judicial endorsement of the bundle of rights approach in, *inter alia*, *Minister for the Army v Dalziel*,⁶⁷ *McCaughey v Commissioner of Stamp Duties*,⁶⁸ *Andrus v. Allard*,⁶⁹ *Kaiser Aetna v. United States*,⁷⁰ *Nollan v. California Coastal Commission*,⁷¹ *Loretto v. Teleprompter Manhattan CATV Corporation*,⁷² *Keystone Bituminous Coal Ass'n v. DeBenedictis*,⁷³ *Yanner v Eaton*,⁷⁴ *Osoyoos Indian Band v. Oliver*

65. Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1532 (2003).

66. Baron, *supra* note 50, at 61.

67. (1944) 68 CLR 261 (Austl.). Justice Rich intimated support for the bundle of rights definitional approach stating that, "Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle." *Id.* at 285.

68. (1945) 46 SR (NSW) 192 (Austl.). Chief Justice Jordan postulated the following definition: The word "property" is used in different senses. It may denote either objects of proprietary rights, such as pieces of land, domesticated animals, and machines; or the proprietary rights themselves In common parlance it is usually employed in the former sense, but in the language of jurisprudence in the latter Property, in the sense of proprietary rights, may exist in relation to physical objects, or to intangible things such as debts or patent rights. Each separate piece of property consists of a bundle of proprietary rights relating to a particular object, including rights of administration and rights of enjoyment, the totality of which may be vested in a single person, or may be divided amongst a number of persons, as for example when they are shared by several who together own them all, jointly or in common.

Id. at 201.

69. 444 U.S. 51 (1979). Here, Justice Brennan noted that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66.

70. 444 U.S. 164, 176 (1979) (Rehnquist, J.) ("[T]he owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.").

71. 483 U.S. 825, 831 (1987) (Scalia, J.) (describing the right to exclusion as "one of the most essential sticks in the bundle of rights that are commonly characterized as property") (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (Marshall, J.)).

72. 458 U.S. at 433 (Marshall, J.) (citing *Kaiser Aetna*, 444 U.S. at 176 (Rehnquist, J.)).

73. 480 U.S. 470, 497 (1987) (Stevens, J.) (citing *Andrus*, 444 U.S. at 65-66 (Brennan, J.)).

(Town),⁷⁵ *Manrell v. Canada*,⁷⁶ *United States v. Craft*,⁷⁷ *Esposito v Commonwealth*,⁷⁸ and *Henderson v. United States*.⁷⁹

One of the most understated contributions of the bundle of rights approach to definitional discourse is its recognition that property is not simply a rights-based phenomenon.⁸⁰ This point—superficially obscured by the shorthand label “bundle of rights”—is reflected in Hohfeld’s portrayal of property as an *in rem* phenomenon between people, which necessarily requires that property has a social valence, and is therefore composed not just of rights but also responsibilities. More explicitly, Honoré’s recognition of incidents, such as the absence of term, the prohibition of harmful use, and liability to execution, confirms that purely rights-based accounts of property are inadequate.

74. (1999) 201 CLR 351 (Austl.). Chief Justice Gleeson, and Justices Gaudron, Kirby, and Hayne made the following observations:

The word “property” is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, “property” does not refer to a thing; it is a description of a legal relationship with a thing [JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation* 337 n.1 (W. Harrison ed., 1948); Kevin Gray & Susan Francis Gray, *The Idea of Property in Land*, in *LAND LAW: THEMES AND PERSPECTIVES* 15, 15 (Susan Bright & John K. Dewar eds., 1998)]. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of “property” may be elusive. Usually it is treated as a “bundle of rights” [see, e.g., *Minister for the Army v Dalziel* 68 CLR at 285 (Rich J)]. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said [Kevin Gray, *Property in Thin Air*, 50 *CAMBRIDGE L.J.* 252, 252 (1991)], that “the ultimate fact about property is that it does not really exist: it is mere illusion”. Considering whether, or to what extent, there can be property in knowledge or information or property in human tissue may illustrate some of the difficulties in deciding what is meant by “property” in a subject matter.

Id. at 365–66.

75. [2001] 3 S.C.R. 746, 782 (Iacobucci J with whom McLachlin CJC, Binnie, Arbour, and LeBel JJ agreed) (Can.) (“[T]he law views property as a bundle of rights . . .”).

76. [2003] 3 F.C. 128, ¶ 24 (Sharlow JA with whom Strayer and Sexton JJA agreed) (Can.).

77. 535 U.S. 274, 278 (2002) (O’Connor, J.) (“A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.”).

78. (2015) 235 FCR 1, ¶ 54 (Austl.). Chief Justice Allsop and Justices Flick and Perram noted, “the content of the bundle of rights constituting the fee simple is governed by common law, parts of which are nearly 800 years old.” *Id.*

79. 135 S. Ct. 1780, 1784 (2015) (Kagan, J.) (“By its terms, § 922(g) does not prohibit a felon from *owning* firearms. Rather, it interferes with a single incident of ownership—one of the proverbial sticks in the bundle of property rights—by preventing the felon from knowingly *possessing* his (or another person’s) guns. But that stick is a thick one, encompassing what the criminal law recognizes as ‘actual’ and ‘constructive’ possession alike.”). Facts discussed in the paragraph containing *infra* notes 93–95.

80. In his dissent in *Moore v. Regents of the University of California*, Judge Mosk stated, “Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations.” 793 P.2d 479, 509 (1990) (Mosk, J. dissenting) (quoting *Union Oil Co. v. State Bd. of Equalization*, 60 Cal. 2d 441, 447 (1963)).

An apt demonstration that property can consist not just of rights, but also responsibilities, is provided by *Backhouse v Judd*.⁸¹ The basal facts were that an owner of ten horses depastured on agistment failed to provide them with proper and sufficient food. He was charged under the *Prevention of Cruelty to Animals Act 1908* (SA). Justice Napier, when construing the applicable statute, expounded:

There is nothing novel in the idea that property is a responsibility as well as a privilege. The law which confers and protects the right of property in any animal may well throw the burden of the responsibility for its care upon the owner as a public duty incidental to the ownership.⁸²

A more pronounced example of the responsibilities that can attach to property is found in *Abeziz v. Harris Estate*.⁸³ In that case, a question arose about an executor's disposal of a human corpse. In line with the *dicta* in *Haynes' Case*,⁸⁴ it was decided by Justice Farley that there was no property *right* in a corpse but “only obligations”⁸⁵ and that the executor was required to ensure that the corpse was “appropriately dealt with”⁸⁶ and “disposed of in a dignified fashion.”⁸⁷ Although the decision has been criticized for going too far, stressing the absence of any legal rights on an executor's part, such as seeking the lawful return of the corpse as the result of theft,⁸⁸ it nonetheless shows the importance of not conceiving of property as a purely rights-based phenomenon.

The bundle of rights approach is not, however, without criticisms. One of the principal points of attack is that it amounts to nothing more than “nominalism,”⁸⁹ lacking any overall definitional unity or

81. [1925] SASR 395 (Austl.).

82. *Id.* at 21 (Napier J). See also the discussion in ROBERT CHAMBERS, AN INTRODUCTION TO PROPERTY LAW IN AUSTRALIA 89 (4th ed. 2018).

83. [1992] OJ No 1271 (Ont. Gen. Div.) (Can.).

84. (1614) 77 Eng. Rep. 1389 (Eng.); see also *Williams v. Williams* [1882] 20 Ch D 659, 662–65 (Kay J) (UK).

85. [1992] OJ No 1271 (Ont. Gen. Div.), 16 (Can.).

86. *Id.*

87. *Id.*

88. BRUCE ZIFF, PRINCIPLES OF PROPERTY LAW 3–4 (5th ed. 2010); see also *Edmonds v. Armstrong Funeral Home Ltd* [1931] 1 D.L.R. 676 (Harvey CJA) (Can.). In that case, Edmonds sued Armstrong Funeral Home Ltd for allowing an autopsy on his wife's body without his consent. Harvey CJA emphasized that Edmonds had certain rights: “[T]he plaintiff had the right to the custody and control of the remains of his deceased wife” and further held that “any unauthorized interference with that right . . . was an invasion of his right” *Id.* at ¶ 20.

89. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 545–46 (2005); Cohen, *supra* note 25, at 378; Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 919–20 (2013); Merrill, *supra* note 31, at 737 (“[Nominalism] views property as a purely conventional concept with no fixed meaning—an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs. On this view, the

coherence.⁹⁰ It is alleged that the bundle of rights approach is just a vacuous shell under which other rights and responsibilities can be marshalled in *ad hoc* fashion. It has been characterized as a “befogging metaphor,”⁹¹ offering a mere “‘laundry list’ of substantive rights with limitless permutations.”⁹² The bundle of rights definitional approach is therefore said to be misleading, as it purports to delineate property but instead only offers an abstracted intellectual chimera.

To some extent, these criticisms have weight. After all, the very *discrimen* of the bundle of rights approach is its innate flexibility and adaptability. And yet, this source of criticism is simultaneously the bundle of right’s greatest strength; the nominalism which some rail against allows for the limitless arrangement of rights and responsibilities, thereby accommodating an endless array of property interests. Surely, defenders of the approach would assert, there is a difference between the rights and responsibilities which attach to a share, life estate, coffee mug, easement, gun, native title, bailment, or copyright. Only the bundle of rights approach is able to properly grapple with this eclecticism.

Furthermore, there may be instances where it is necessary to conceive of separate rights and responsibilities with respect to property, and then to disaggregate (pluck certain rights and responsibilities from the bundle) in light of other overriding legal requirements. In these instances, the nominalism, flexibility, and adaptability of the bundle of rights approach can be advantageous. This is underscored by the U.S. Supreme Court in *Henderson v. United States*.⁹³ The facts involved a U.S. Border Patrol agent, with the felony offense of distributing marijuana, who was prohibited by virtue of a federal statute from maintaining possession of his firearms. Upon being released from prison, Henderson sought to transfer possession of the firearms to a friend for an undisclosed value, but was denied by the Federal Bureau of Investigation (FBI), on the grounds that this would amount to constructive possession. Henderson then returned to court and ar-

right to exclude is neither a sufficient nor a necessary condition of property. It may be a feature commonly associated with property, but its presence is not essential; it is entirely optional. A legal system can label as property anything it wants to.”); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372 (2003). It has been suggested that property is nothing more than “a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.” See Walton H. Hamilton & Irene Till, *Property*, in 11 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 528, 528 (Edwin R.A. Seligman & Alvin Johnson eds., 1937).

90. Baron, *supra* note 50, at 67–68.

91. Merrill, *supra* note 31, at 755.

92. Dagan, *supra* note 65, at 1534.

93. 135 S. Ct. 1780 (2015) (Kagan, J.).

gued that the firearms should be given back to his friend or his wife. Justice Kagan, delivering the unanimous opinion of the Court, stated that the relevant statute did not prevent the ownership of firearms but merely their possession.⁹⁴ In making this finding, her Honor made recourse to the bundle of rights definitional approach, suggesting that the right to possession was a “thick” stick in the bundle, and that it encompassed actual and constructive possession.⁹⁵ In this way, Henderson was permitted to own firearms, but he was prohibited from taking possession—actual or constructive. The bundle of rights definitional approach was therefore deployed to precisely fashion the ownership rights and responsibilities to the factual circumstances.

Another criticism of the bundle of rights metaphor is that it unduly reinstates, by covert means, the physical approach to property often associated (perhaps somewhat unfairly) with Blackstone.⁹⁶ Schroeder, for example, has suggested that the bundle of rights metaphor is phallic, representing the sensuous grasping of desired physical objects (sticks). By so doing, she argues that our understandings of property are covertly infected with biases, based upon masculine physicality and conceptions of control and domination.⁹⁷ Moreover, Schroeder argues that by adopting a sensuous and physical metaphor, the bundle of rights approach departs from true Hohfeldian theory which emphasizes property’s essentially incorporeal nature.

Although Schroeder’s concerns are not without merit, they tend to place unnecessary emphasis on the metaphor, which is used to convey the more abstract underlying concept, namely that property is an essentially incorporeal phenomenon consisting of various *in rem* rights and responsibilities. The fact that a physical metaphor is utilized to convey this abstract understanding should not be invoked as a primary ground upon which to invalidate the bundle of rights approach. Indeed, when considering the bundle of rights approach, it is incumbent not to fetishize the metaphor, but to instead engage with the conceptual substance which underpins it.

The bundle of rights approach has also been said to militate against the proper recognition of Australian native title claims.⁹⁸ Barnett has argued that:

94. *Id.* at 1784.

95. *Id.*

96. See discussion in the paragraphs containing *supra* notes 36–39.

97. Schroeder, *supra* note 39, at 242–43.

98. In Australia, native title is defined in Sections 223(1) and 223(2) of the Native Title 1993 as follows:

The bundle of rights view of property is an attenuated version of the doctrine established in *Milirrpum v Nabalco Pty Ltd* — whilst native title is now recognised by the common law, the bundle of rights analysis demands that incidents of indigenous ownership display characteristics similar to Western property rights if native title is not to be extinguished.⁹⁹

The same author continues, “the bundle of rights theory allows native title to be divided up and extinguished accordingly.”¹⁰⁰ According to this view, the bundle of rights approach is a mechanism to water down the practical implications of native title. This would not be possible, it is alleged, if a more holistic approach to native title was employed and the bundle of rights metaphor was removed from native title discourse.

These concerns are not without force,¹⁰¹ and they highlight the practical weaknesses of the recognition of native title in a country with a fundamentally incompatible Western-centric property-owning system. Indeed, it can only be conceded that native title claims are an imperfect and incomplete method of bringing justice to indigenous societies. A further question, though, is whether the bundle of rights

Common law rights and interests

(1) The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), **rights and interests** in that subsection includes hunting, gathering, or fishing, rights and interests.

Native Title 1993 (Cth) ss 223(1)–(2).

99. Katy Barnett, *Western Australia v Ward: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis*, 24 MELBOURNE U. L. REV. 462, 474 (2000).

100. *Id.* Similar concerns have been voiced by Glaskin:

The notion of partial extinguishment relies on the characterisation of native title as a bundle of rights and interests that can be separately identified, conceptually and legally separated, and found to be extinguished or extant. As Ritter . . . says, this would “appear to create a troubling capacity for the incremental erosion of native title.”

Katie Glaskin, *Native Title and the “Bundle of Rights” Model: Implications for the Recognition of Aboriginal Relations to Country*, 13 ANTHROPOLOGICAL F. 67, (2003) (quoting David Ritter, *Fin de Siecle: Western Australia v Ward*, 5 NATIVE TITLE NEWS 162, 162 (2002).

101. It is certainly arguable that the fractionation of native title rights into constituent elements has led to undue piecemeal extinguishment in certain cases. See, e.g., *Western Australia v Ward* (2002) 213 CLR 1, 89, 91–92, 94–95 (Gleeson CJ, Gaudron, Gummow, and Hayne JJ) (Austl.). This dicta has led to some rather unfortunate decisions. See, e.g., *Daniel v Western Australia* [2003] FCA 666, ¶¶ 253, 270, 281, 288–91 (Nicholson J) (Austl.).

approach is responsible for these shortcomings. The answer is “no”—responsibility ultimately lies with the hegemony of the Western-centric property-owning system. The bundle of rights approach is quite able to grapple with native title and Western-centric property rights. The fundamental problem is that in the event of inconsistency, Western-centric property rights are given preference over native title rights—something that no definitional approach is able to undo.

Furthermore, it should not be assumed that the bundle of rights approach, with its potential for malleability, always militates against native title claimants. In the case of statutorily-created “pastoral leases,”¹⁰² for example, it is arguable that the bundle of rights approach facilitates, rather than undermines, recognition of native title rights. This is because it allows for an accommodation between competing stakeholders—pastoral lease holders (tenants) and native title claimants (non-tenants). If a more absolutist, exclusionist definition of property was to be adopted, then perhaps, in line with the minority in *The Wik Peoples v Queensland*, there would be no recognition of native title rights over land subject to pastoral leases.¹⁰³

A further criticism of the bundle of rights approach is that it fails to take environmental considerations into account. Duncan, for example, has argued that, “while [the bundle of rights approach] . . . is a useful device for thinking about the rights that exist in a piece of land—the various sticks that make up the bundle—the metaphor’s focus on individual parts fosters a disregard of the parcel as a whole.”¹⁰⁴ The same scholar continues that, “[b]y considering the bundle complete in and of itself, the metaphor ignores the fact that landowners, and thus bundles, interact not only with neighboring landowners but with the public at large in ways that affect society’s desire and need for a healthy environment.”¹⁰⁵ The emphasis on separate bundles therefore overlooks the essentially interconnected nature of land law and the wider environment more generally.

A similar sentiment has been echoed by Arnold, who has emphasized the inherent value of property from an environmental standpoint:

102. A unique form of statutory lease was invented in Australia to facilitate the grazing of stock over vast areas of arid landscape. The leases can cover many thousands of square kilometers and exceed the area of a small country.

103. (1996) 187 CLR 1 (Austl.). Chief Justice Brennan wrote the minority decision, denying recognition of native title rights over pastoral leases, with which Justices Dawson and McHugh agreed. *Id.* at 76–78.

104. Duncan, *supra* note 46, at 775.

105. *Id.*; J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712 (1996).

[A]bstraction of property as a bundle of various rights, such as use, alienation, exclusion, and possession, is inconsistent with the fundamental tenets of an environmental ethic, which emphasize both context-specific interconnectedness and the value of the object itself. Contrary to the bundle of rights concept, the “thing” itself matters, both as an empirical and theoretical matter.¹⁰⁶

It follows that the thing itself may have a value which is relatively unrecognized by the bundle of rights metaphor. Objects of property may in fact be more appropriately conceived as fitting within a “web of interests.”¹⁰⁷

In a related vein, Goldstein has suggested that the bundle of rights approach makes no special provisions for real property, which is necessarily subject to ecological and environmental concerns. Goldstein laments that, “[i]n an effort to raise the theory of property to a universal and highly intellectual principle, the *res* [thing] was forgotten. The bundle of sticks has no ties to the ground.”¹⁰⁸ Goldstein proceeds to suggest that, “it is time for the common law to root the bundle of sticks for real property to the ground, and thereby ground the theoretical notion of property with the current reality of ecology and the societal values comprising environmental ethics.”¹⁰⁹ Goldstein thus advocates for the mandatory inclusion of “green wood”¹¹⁰ within the bundle of rights associated with land.

If the bundle of rights approach is interpreted as solely “rights” based, these environmental criticisms expose something of a conceptual Achilles’ heel: property entails more than just rights; it also requires limits (often subtle) on the use of property. As Honoré postulated, however, property does not just connote rights but also “incidents” that place limits on the use of property rights. Arguably, these incidents can account for environmental (and other wider social)

106. Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 283 (2002).

107. *Id.* at 282.

108. Robert Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 412 (1998). In another context the same author has similarly remarked,

To synthesize real property law, environmental ethics, and ecology, it is necessary to proffer the following hypothesis: The law of ownership, regarding real property, has evolved to a conceptual level that ignores the *res*, the property itself. Real property, land or earth, is sufficiently unique when viewed under the methodology of the ecologist to warrant consideration of its characteristics when aggregating the bundle of sticks. The consideration of these characteristics and the values appurtenant thereto cannot be made in a vacuum, but must be evaluated in light of the well-developed body of societal principles known as environmental ethics.

See id. at 407.

109. *Id.* at 412.

110. *See generally id.*

concerns. If understood in this way, the bundle of rights approach is perhaps more conceptually satisfactory than its detractors might suggest.

C. *Socially Constructivist*

A further definitional approach to property—which might for convenience be termed the “socially constructivist”¹¹¹ approach—has been propounded by Gray, in an article entitled *Property in Thin Air*, published in the *Cambridge Law Journal*.¹¹² Beginning in a manner similar to Blackstone, Gray suggests to us:

If our own travels in search of “property” have indicated one thing, it is that the criterion of “excludability” gets us much closer to the core of “property” than does the conventional legal emphasis on the assignability or enforceability of benefits. For “property” resides not in consumption of benefits but in control over benefits. “Property” is not about *enjoyment of access* but about *control over access*. “Property” is the power-relation constituted by the state’s endorsement of private claims to regulate the access of strangers to the benefits of particular resources.¹¹³

At this point, however, Gray moves beyond Blackstone’s definitional approach by considering precisely *why* a given resource may or may not be the subject of exclusion:

If, in respect of a given claimant and a given resource, the exercise of such regulatory control is physically impracticable or legally abortive or morally or socially undesirable, we say that such a claimant can assert no “property” in that resource and for that matter can lose no “property” in it either. Herein lies the important key to the “propertiness” of property.¹¹⁴

From this analysis, Gray suggests to us three important conclusions about what property is. First, he suggests that property is a relative concept. In other words, the legal, moral, and technological conditions of excludability may vary according to time and circumstance. Property is therefore not an absolute or fixed concept.¹¹⁵ Second, Gray theorizes that property has moral limits. This means that property is a value-laden phenomenon which is dictated by prevailing social mores and norms. Where a potential property right might infringe a more basic human right or freedom, the latter will prevail and the property

111. Essentially meaning “construed from social mores and norms.”

112. Kevin Gray, *Property in Thin Air*, 50 *CAMBRIDGE L.J.* 252 (1991). For general discussion, see NICOLE GRAHAM, *LAWSCAPE: PROPERTY, ENVIRONMENT, LAW* 157–58 (2011).

113. Gray, *supra* note 112, at 294.

114. *Id.*

115. Gray cites the interesting example of emerging technology relating to cloud formation; does this allow a property right to exist in clouds? *See id.* at 296.

right will be denied.¹¹⁶ Here we must bear in mind the interconnection between points one and two—namely that social mores and norms are themselves constantly shifting, and so property is not an absolute or fixed concept. Third, Gray suggests that property is a term of wide signification. This means that property could potentially be found in a very wide selection of resources. The limitations on this potentially wide field of operation are, according to Gray, set “not by the ‘thin-glikeness’ of particular resources” but by the legal, moral, and technological criteria of excludability.¹¹⁷

Gray’s definition is therefore quite relative, unlike, for example, that of traditional exclusionists. Essentially, Gray argues that although “excludability” and “control over access” (exclusion and dominion) help to define property, the quest for precise definition is ultimately futile as social mores, norms, and technological innovation all impact upon what resources might be excludable. A precise definition of property is thus a “mere illusion.”¹¹⁸ To use Gray’s famous analogy, “[property] is a vacant concept—oddly enough rather like thin air.”¹¹⁹

If it is accepted that Gray’s definitional approach to property is correct, how then are the social and moral expectations of what may or may not constitute property to be determined? Courts and legislatures must decide whether a given object, resource, or interest can constitute property.¹²⁰ These *fora* find their compass in the collective social and moral expectations of society. Perhaps the quintessential example of this process is the prohibition on slavery, or property rights in human beings.¹²¹ In *Somerset v. Stewart*¹²² it was decided by Lord Mansfield that slavery was contrary to common law:

116. Gray cites the dictum of the Supreme Court of New Jersey in *State v. Shack*, namely, “[p]roperty rights serve human values. They are recognised to that end and are limited by it.” *See id.* at 297 (quoting 277 A.2d 369, 372 (N.J. 1971) (Weintraub, C.J.)).

117. *Id.* at 299.

118. *Id.* at 252.

119. Gray, *supra* note 112, at 252. See also Young, Croft, and Smith, who assert that, “[i]t is difficult, if not impossible, to find a clear and useful definition of ‘property.’” PETER W. YOUNG, CLYDE CROFT, & MEGAN LOUISE SMITH, *ON EQUITY* 560 (2009).

120. In *Dorman v Rodgers*, Justice Murphy alluded to this process: “[Legal rights] might first be formulated as social claims with no legal recognition. As they become accepted by reason of social or political changes they are tentatively and then more surely recognized as property. The limits of property are the interfaces between accepted and unaccepted social claims.” (1982) 148 CLR 365, 372 (Austl.).

121. *See, e.g.*, William R. Cotter, *The Somerset Case and the Abolition of Slavery in England*, 79 HISTORY 31 (1994); Edward Fiddes, *Lord Mansfield and the Sommersett Case*, 50 L.Q. REV. 499 (1934); Daniel J. Hulsebosch, *Nothing but Liberty: Somerset’s Case and the British Empire*, 24 L. & HIST. REV. 647 (2006); James Oldham, *New Light on Mansfield and Slavery*, 27 J. BRIT. STUD. 45 (1988).

122. (1772) 98 Eng. Rep. 499 (Gr. Brit.).

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only by positive law [legislation], which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.¹²³

This prohibition was legislatively reinforced by the Slavery Abolition Act 1833 that outlawed slavery throughout the British Empire.¹²⁴

A less peremptory example of deciding the social and moral limits of property is provided by *Victoria Park Racing and Recreation Grounds Company v Taylor*.¹²⁵ In that case, Taylor was the owner of land that was very near to the Victoria Park Racecourse, in Sydney, and erected a platform which allowed him to view the track. A race caller, Angles, would then use the platform to call the race for the radio station 2UW, the consequence of which was that less people attended the racecourse. This led to a diminished take of admission monies and the racecourse sought an injunction to prevent Taylor from using the elevated platform.¹²⁶ The majority decided that there was *no property* interest in a spectacle.¹²⁷ Chief Justice Latham stated:

It has been argued that by the expenditure of money the plaintiff has created a spectacle and that it therefore has what is described as a quasi-property in the spectacle which the law will protect. . . . What it really means is that there is some principle (apart from contract or confidential relationship) which prevents people in some circumstances from opening their eyes and seeing something and then describing what they see. The court has not been referred to any authority in English law which supports the general contention that if a person chooses to organise an entertainment or to do anything

123. *Id.* at 510.

124. Slavery Abolition Act 1833, 3 & 4 Will. 4 c. 73 (repealed Nov. 19, 1998) (UK). There were, however, some notable exceptions (later repealed in 1843) relating to the territories in the possession of the East India Company, Ceylon, and Saint Helena. In the contemporary Australian context, the Criminal Code similarly prohibits slavery. *Criminal Code Act 1995* (Cth) ss 270.1–270.3. In the European context, see Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, *opened for signature* Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953). In the U.S. context, see the Thirteenth Amendment of the U.S. Constitution, which was passed by Congress on January 31, 1865, and ratified on December 6, 1865. See generally G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 1 (1974).

125. (1937) 58 CLR 479 (Austl.).

126. See generally Michael Kirby, *Privacy in the Courts*, 24 U.N.S.W. L.J. 247 (2001); Megan Richardson & Marc Trabsky, *Radio and the Technology of the Common Law in 1930s Australia: Victoria Park Racing v Taylor Revisited*, 20 GRIFFITH L. REV. 1020 (2011).

127. *Victoria Park Racing* (1937) 58 CLR at 496 (Latham CJ), 507–08 (Dixon J), 524 (McTiernan J) (Austl.).

else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see.¹²⁸

Justice Dixon similarly held:

English law is, rightly or wrongly, clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or of other persons who enable themselves to overlook the premises. . . . It is not a natural right for breach of which a legal remedy is given, either by an action in the nature of nuisance or otherwise.¹²⁹

By so ruling, the majority decided that social mores and norms did not allow any property right to be vested in a mere spectacle. The definition of property was therefore unmet in this particular instance.

Having said this, in other common law jurisdictions social mores and norms, as given effect through the courts, can generate the opposite conclusion with respect to broadly analogous circumstances. An example is the U.S. Supreme Court decision of *International News Service v. Associated Press*.¹³⁰ The facts, stated succinctly, were that two rival news publishers, International News Service (INS) and Associated Press (AP), were involved in reporting on World War I throughout the United States. Integral to these activities was the transmission of information over telegraph lines. INS, however, was accused by the United Kingdom and France of unduly favorable reporting towards Germany and Austria. This prompted the allies to ban INS from using allied telegraph lines. AP, however, retained unfettered telegraph access. To compensate for its restriction, INS managed to access AP bulletin boards and source early editions of AP newspapers. INS employees would read the materials, and then at high speed, re-write the news and publish it without attribution. Particularly in the western United States, this meant that AP held no advantage over INS, despite the allied telegraph ban. AP applied to enjoin INS from re-publishing AP-sourced news.

Writing for the majority, Justice Pitney declined to treat the dispute through the lens of copyright, as it related to matters that were “*publici juris*” or “the history of the day.”¹³¹ Instead, Justice Pitney utilized the principle of unfair competition, finding that the news was “quasi property,” as it was “gathered at the cost of enterprise, organization, skill, labor, and money” and was “distributed and sold to those who

128. *Id.* at 496.

129. *Id.* at 507–08.

130. 248 U.S. 215 (1918) (Pitney, J.). The case was discussed by Justice Dixon in *Victoria Park Racing* (1937) 58 CLR at 508–09 (Austl.).

131. *Int'l News Serv.*, 248 U.S. at 234.

will pay money for it.”¹³² The protection afforded over this quasi-property, however, was circumscribed; the “misappropriation”¹³³ doctrine “only postpones participation by [a] . . . competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of [the] complainant’s efforts and expenditure.”¹³⁴ In this instance, the threshold of property—informed by social mores, norms, and wartime public policy—was met.¹³⁵ The diverging results in *Victoria Park Racing and Recreation Grounds Company v Taylor*¹³⁶ and *International News Service v. Associated Press*¹³⁷ thus speak to property’s innate plasticity and the social mores and norms which, from time to time, inform it.¹³⁸

Another case demonstrating the adjudication of property with respect to social and moral expectations is *Doodeward v Spence*.¹³⁹ In that case, a stillborn baby with unusual physical abnormalities was preserved in 1868 by the attending doctor, Dr. Donahoe. When Donahoe died in 1870, the preserved specimen was sold as part of his personal effects and came into the possession of Doodeward. A police officer confiscated the specimen, arguing that the baby required a proper Christian burial. The High Court decided that although there was no property in a human corpse,¹⁴⁰ where a person has superadded by lawful skill and work something to the deceased, differentiating it from a mere corpse, then there will be a property right.¹⁴¹ An example

132. *Id.* at 236.

133. *Id.* at 240.

134. *Id.* at 241.

135. See also generally Rudolf Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595 (1942); Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992); W. Edward Sell, *Doctrine of Misappropriation in Unfair Competition: The Associated Press Doctrine After Forty Years*, 11 VAND. L. REV. 483 (1958).

136. (1937) 58 CLR 479 (Austl.).

137. 248 U.S. 215 (1918) (Pitney, J.). The case was discussed by Justice Dixon in *Victoria Park Racing* (1937) 58 CLR at 508–09 (Austl.).

138. For another U.S. case of a similar character, see *Twentieth Century Sporting Club, Inc. v. Transradio Press Serv.*, 300 N.Y.S. 159 (N.Y. Sup. Ct. 1937) (rival broadcaster placed spotters on rooftops and combined this with information obtained from the exclusive licensee (NBC) to produce its own simulated ringside commentary).

139. (1908) 6 CLR 409 (Austl.).

140. As established in *Haynes’ Case* (1614) 77 Eng. Rep. 1389 (Eng.). See also *Williams v. Williams* [1882] 20 Ch D 659, 662–65 (Kay J) (UK).

141. Celia Hammond, *Property Rights in Human Corpses and Human Tissue: The Position in Western Australia*, 4 U. NOTRE DAME AUSTR. L. REV. 97, 109 (2001); Prue Vines, *The Sacred and the Profane: The Role of Property Concepts in Disputes About Post-Mortem Examination*, 29 SYDNEY L. REV. 235, 238 (2007). Taylor has noted of the rule in *Haynes’ Case* (1614) 77 Eng. Rep. 1389 (Eng.), “[n]o other rule of law can claim as macabre a passage through history as the common law rule that there is ‘no property in the human body’. Slavers, grave robbers, grieving

might be a mummy or other enhanced physical specimen. Chief Justice Griffith (Justice Barton agreeing) remarked that:

It is idle to contend in these days that the possession of a mummy, or of a prepared skeleton, or of a skull, or other parts of a human body, is necessarily unlawful; if it is, the many valuable collections of anatomical and pathological specimens or preparations formed and maintained by scientific bodies, were formed and are maintained in violation of the law.

In my opinion there is no law forbidding the mere possession of a human body, whether born alive or dead, for purposes other than immediate burial. *A fortiori* such possession is not unlawful if the body possesses attributes of such a nature that its preservation may afford valuable or interesting information or instruction. If the requirements of public health or public decency are infringed, quite different considerations arise.

To apply these principles to the present case. Neither public health nor public decency is endangered by the mere preservation of a perhaps unique specimen of malformation. Public decency may, perhaps, be offended by the public exhibition of such an object. But the fact that an object may not be publicly exhibited affords no criterion for determining the lawfulness of the possession of that object. In my opinion it is not *contra bonos mores* to retain such a specimen unburied. If one medical or scientific student may lawfully possess it, he may transfer the possession to another. Nor can the right of possession be limited to students. The manner of use may be controlled, but the possession is not of itself unlawful.¹⁴²

It follows that in a world of rapidly advancing medical knowledge, a total prohibition on the ownership of a corpse was no longer sustainable. As society developed new needs for specimens (cadavers) for medical learning, qualifications to the common law rule articulated in *Haynes' Case*¹⁴³ were necessary.

A similar outcome to that in *Doodeward v Spence*¹⁴⁴ was achieved in *Moore v. Regents of the University of California*.¹⁴⁵ In that case, the California Supreme Court was confronted with circumstances where a property right was asserted over human tissue. Moore had Leukaemia and was treated by Dr. Golde of the University of California. Golde had advised Moore to have his spleen removed for medical reasons, and Moore consented. Importantly, however, Moore was not informed that his spleen was going to be used to develop a cell line

widows, freak show exhibitors and harvesters of body parts have featured prominently." Richard Taylor, *Human Property: Threat or Saviour?*, 9 MURDOCH U. ELECTRONIC J.L. (2002).

142. *Doodeward* (1908) 6 CLR at 413–14 (Austl.).

143. (1614) 77 Eng. Rep. 1389 (Eng.).

144. (1908) 6 CLR 406 (Austl.).

145. 793 P.2d 479 (Cal. 1990).

which would be patented and would generate financial gain for Golde and the Regents of the University of California. Moore was thus attempting to assert ownership rights in his surgically-removed tissue.¹⁴⁶ Justice Arabian stated the philosophical dilemma thus:

[The p]laintiff has asked us to recognize and enforce a right to sell one's own body tissue *for profit*. He entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.¹⁴⁷

The court held that Moore did not have a property interest in the spleen cells which were the result of skill and work of Golde and his team.¹⁴⁸ However the court did find that Moore had a claim for a breach of fiduciary duty, as he was not fully informed of what would happen to his spleen before surgical removal.¹⁴⁹

A more recent reiteration of the *ratio* in *Doodeward v Spence*¹⁵⁰ can be found in *Jocelyn Edwards; Re the estate of the late Mark Edwards*.¹⁵¹ In that case, Mr. Edwards was fatally injured at his workplace and his wife, upon attending the hospital to identify his body, sought to have his sperm preserved so that she might conceive a child with him. The Supreme Court duty judge, Justice Simpson, was contacted for authorization and issued an order allowing the extraction

146. The claim centered on the tort of conversion.

147. 793 P.2d at 497 (Arabian, J. concurring).

148. *Id.* at 492–93 (Panelli, J. with whom Lucas, C.J., Eagleson, and Kennard, J. agreed). See generally Helen R. Bergman, *Case Comment: Moore v. Regents of the University of California*, 18 AM. J.L. & MED. 127 (1992); Lynden Griggs, *The Concept of Property: Unresolved Tensions Between the Individual and the Collective*, 7 AUSTRALIAN PROP. L.J. 1 (1999); Hoffmaster, *supra* note 8; Jennifer Lavoie, *Ownership of Human Tissue: Life After Moore v. Regents of the University of California*, 75 VA. L. REV. 1336, 1363–64 (1989).

149. 793 P.2d at 484–86 (Panelli, J. with whom Lucas, C.J., Eagleson, and Kennard, J. agreed), 497 (Arabian, J.), 498 (Broussard, J.). It should be noted, however, that the fiduciary remedy may not be available in Australia given the different approaches to fiduciary law in the two jurisdictions. See *Breen v Williams* (1996) 186 CLR 71, 83 (Brennan CJ), 107 (McHugh & Gaudron JJ) (Austl.). The latter, for example, stated that,

As the law stands, the doctor-patient relationship is not an accepted fiduciary relationship in the sense that the relationships of trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company and partners are recognised as fiduciary relationships [*Hospital Products* [1984] HCA 64; (1984) 156 CLR 41 at 96]. In *Hospital Products* [[1984] HCA 64; (1984) 156 CLR 41 at 97], Mason J pointed out that in all those relationships “the fiduciary acts in a ‘representative’ character in the exercise of his responsibility”. But a doctor is not generally or even primarily a representative of his patient.

Id. at 107. On *Breen v Williams*, see generally Samantha Hepburn, *Breen v Williams*, 20 MELBOURNE U. L. REV. 1201 (1996).

150. (1908) 6 CLR 406 (Austl.).

151. [2011] NSWSC 478 (Austl.).

and preservation of Mr. Edwards's sperm pending further order. Ms. Edwards subsequently sought a declaration as the administrator of her late husband's estate that she was entitled to possession of the sperm. Examining the issue, Justice R. A. Hulme stated:

Applying Griffiths CJ's test in *Doodeward v Spence* to the facts of the present case, the removal of the sperm was lawfully carried out pursuant to the orders made by Simpson J. Work and skill was applied to it in that it has been preserved and stored. Accordingly, on this long standing and binding authority the sperm removed from the late Mr Edwards is capable of being property.¹⁵²

Ms. Edwards was thus granted a property right in her late husband's preserved sperm.

A final example of the social and moral expectations informing what may or may not constitute property is the recognition of Australian native title rights in *Mabo v Queensland (No. 2)*.¹⁵³ In that case Eddie Mabo (and others) sought a declaration of native title over the Murray Islands (located between Australia and Papua New Guinea). The plaintiffs were successful, the Australian High Court deciding that their rights were enforceable against the Queensland government.¹⁵⁴ Prior to this decision, native title rights were unrecognized by the common law, Australia being (inappropriately) regarded *terra nullius* upon European colonization.¹⁵⁵ By introducing native title rights into Australian law, *Mabo v Queensland (No. 2)*¹⁵⁶ arguably reacted to changing social and moral expectations throughout the non-indigenous community of what could be property.¹⁵⁷ Whereas in past decades, the injustices perpetrated against indigenous Australians by European colonization were simply forgotten or drowned away in a

152. *Id.* ¶ 82.

153. (1992) 175 CLR 1 (Austl.).

154. *Id.* at 15 (Mason CJ & McHugh J) (“[S]ix members of the Court (Dawson J. dissenting) are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands . . .”).

155. Meaning without inhabitants. Although it was known by European colonizers that indigenous people existed throughout Australia, their culture and civilizations were dismissed under the “enlarged notion” of *terra nullius*. On the “enlarged notion,” see *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 36 (Brennan J with whom Mason CJ and McHugh J agreed). On the pre-*Mabo (No. 2)* application of the *terra nullius* doctrine, see *Cooper v Stewart* (1889) 14 App. Cas. 286, 291 (PC) (appeal taken from NSW) (Lord Watson); David Ritter, *The “Rejection of Terra Nullius” in Mabo: A Critical Analysis*, 18 SYDNEY L. REV. 5 (1996); Lisa Strelein, *From Mabo to Yorta Yorta: Native Title Law in Australia*, 19 WASH. U. J.L. & POL’Y 225 (2005).

156. (1992) 175 CLR 1 (Austl.).

157. It should still be noted, however, that the High Court’s ruling was met with considerable negative social and political reaction, referred to as “Mabo madness.” See generally RICHARD H. BARTLETT, *NATIVE TITLE LAW IN AUSTRALIA* 42–43 (2015); KEN MACKIE, ELISE BENNETT HIRSTEAD, & JOHN PAGE, *AUSTRALIAN LAND LAW IN CONTEXT* 90–91 (2012).

vortex of racial discrimination, by the end of the 20th century this position was no longer tenable. Although legitimate criticisms have been made of the effectiveness of native title as a means to address injustices perpetrated against indigenous Australians upon European colonization, the fact remains that the recognition of native title would not have been possible without a shift in the collective social and moral expectations of the wider non-indigenous Australian community.

Technological capabilities can also have an impact upon property rights and excludability. This will naturally cross over with the evolution of social mores and norms. For example, if human aging can be halted and even reversed, would it be morally desirable to assert ownership rights and excludability over such a technology? If brainwave scanning is perfected, should information obtained remain private, or can it be traded for advertising and other commercial purposes?

As humans develop better deep-sea submersible capabilities, will it become necessary to “rent” or “own” certain areas of the Earth’s oceans, which are currently part of our underwater commons?¹⁵⁸ Will deep-sea submersible tourism force a new property-owning regime around shipwrecks such as RMS Titanic, HMS Hood, or underwater thermal vents and volcanoes?

As human civilization becomes spacefaring, a new round of questions will emerge regarding ownership of celestial objects such as asteroids, comets, moons, planets, and stars.¹⁵⁹ Although this may seem farfetched, private companies such as Space-X are already planning to conduct space tourism and exploratory missions to the Moon and Mars.¹⁶⁰ Plans have been announced to mine helium-3 (an isotope of

158. See generally Trevor Brown, *Space and the Sea: Strategic Considerations for the Commons*, 10 *ASTROPOLITICS* 234 (2012).

159. See generally Ram Jakhu & Maria Buzdugan, *Development of the Natural Resources of the Moon and Other Celestial Bodies: Economic and Legal Aspects*, 6 *ASTROPOLITICS* 201 (2008). For the legislative response in the United States, see U.S. Commercial Space Launch Competitiveness Act, Pub. L. 114-90 (codified in 42 U.S.C. §§ 18322, 18351). See also generally P.J. Blount & Christian J. Robinson, *One Small Step: The Impact of the U.S. Commercial Space Launch Competitiveness Act of 2015 on the Exploration of Resources in Outer Space*, 18 *N.C. J.L. & TECH.* 160 (2016); Stephen DiMaria, Note, *Starships and Enterprise: Private Spaceflight Companies’ Property Rights and the U.S. Commercial Space Launch Competitiveness Act*, 90 *ST. JOHN’S L. REV.* 415 (2016); Elliot Reaven, *The United States Commercial Space Launch Competitiveness Act: The Creation of Private Space Property Rights and the Omission of the Right to Freedom from Harmful Interference*, 94 *WASH. U. L. REV.* 233 (2016).

160. Rafi Letzter, *Why the SpaceX Lunar Tourists Won’t Walk on the Moon*, *LIVE SCI.* (Sept. 19, 2018, 7:20 AM), <https://www.livescience.com/63617-spacex-tourist-walk-on-moon.html>; Jackie Wattles, *SpaceX Will Take a Japanese Billionaire on a Trip Around the Moon*, *CNN* (Sept. 18, 2018, 5:20 PM), <https://money.cnn.com/2018/09/17/technology/spacex-moon-tourist-mission/index.html>. On space tourism, see generally Stephan Hobe, *Legal Aspects of Space Tourism*, 86 *NEB. L. REV.* 439 (2007).

helium rarely found on Earth) from the Moon's surface for thermonuclear fusion power reactors.¹⁶¹ The European Space Agency has already managed to land a robotic probe on the comet P67 during its Rosetta mission. With the further advance of robotic technology, it will become necessary to consider whether private companies can assert ownership rights in mineral-rich asteroids.¹⁶²

Looking even further into the future, the Russian astrophysicist Nikolai Kardashev has theorized that there are three types of galactic civilizations: *type one*, in which the civilization can harness all the energy falling on a planet's surface; *type two*, which can harness all the energy of a star; and *type three*, which can harness all the energy of a galaxy.¹⁶³ Is it possible that humans could one day create a "Dyson sphere"¹⁶⁴ (a theoretical collection of artificial satellites placed around a star to capture and control its energy), thereby creating a right to exclusion? Would an individual, company, or other future human organization have the legal right to exclude others (including bacteria, plants, animals, and sentient beings) from the full effects of a star's radiation?

Such questions (thankfully) remain purely theoretical due to the current limitations of human civilization. Yet, as time passes by and technological capabilities increasingly expand, new forms of property rights will inevitably require moral and legal consideration.

161. Bilder has stated that:

He-3 . . . is theoretically an ideal fuel for thermonuclear fusion power reactors, which could serve as a virtually limitless source of safe and non-polluting energy. For example, it is estimated that forty tons of liquefied He-3 brought from the Moon to the Earth—about the amount that would comfortably fit in the cargo bays of two current U.S. space shuttles—would provide sufficient fuel for He-3 fusion reactors to meet the full electrical needs of the United States, or one quarter of the entire world's electrical needs, for an entire year.

See Richard B. Bilder, *A Legal Regime for the Mining of Helium-3 on the Moon: U.S. Policy Options*, 33 FORDHAM INT'L L.J. 243, 246 (2009). See generally *id.*; Blake Gilson, *Defending Your Client's Property Rights in Space: A Practical Guide for the Lunar Litigator*, 14 FORDHAM L. REV. 1367 (2011). India and China have announced plans to obtain Helium-3 from the Moon's surface. See respectively David Meyer, *India's Mission to Find and Mine Futuristic Nuclear Fuel on the Moon Is About to Launch*, FORTUNE (June 27, 2018), <http://fortune.com/2018/06/27/india-moon-helium-3/>; Jeremy Beck, *China's Helium-3 Program: A Global Game-Changer*, SPACE SAFETY MAG. (Mar. 19, 2016), <http://www.spacesafetymagazine.com/space-on-earth/everyday-life/china-helium-3-program/>.

162. See generally Brian Abrams, *First Contact: Establishing Jurisdiction over Activities in Outer Space*, 42 GA. J. INT'L & COMP. L. 797 (2014); Matthew Feinman, *Mining the Final Frontier: Keeping Earth's Asteroid Mining Ventures from Becoming the Next Gold Rush*, 14 J. TECH. L. & POL'Y 202 (2014).

163. See generally Nikolai Kardashev, *Transmission of Information by Extraterrestrial Civilizations*, 8 SOVIET ASTRONOMY 217 (1964).

164. See Freeman J. Dyson, *Search for Artificial Stellar Sources of Infrared Radiation*, 131 SCIENCE 1667, 1667–68 (1960).

The foregoing discussion has demonstrated that the dividing line between what can and cannot be property is informed by social, moral, and technological factors. As these factors are in a constant state of flux, the definition of property is therefore dynamic rather than static. Certain objects, resources, and interests will attract a proprietary status according to prevailing social, moral, and technological factors, whilst other objects, resources, and interests will not.

The strength of the socially constructivist approach is its relativism and flexibility. This comes at a cost, however, as the definition is unable to provide a tangible statement as to what property actually is. Perhaps to compensate, it relies upon a right to exclusion as an important starting point. This, however, has its limitations, including failing to recognize that not all property interests require an immediate right to exclusion. Moreover, by emphasizing the importance of exclusion, the bundle of rights definitional approach—which prefers to tailor rights and responsibilities to property—is unfortunately overshadowed.

CONCLUSION

Realizing the definition of property is akin to reaching for an ever-distant vanishing point—it always remains tantalizingly just beyond reach.¹⁶⁵ This should not, however, deter lawyers from trying. In light of the foregoing discussion, the following essentialist legal definition of property is postulated:

Subject to any special rules of statutory construction, “property” can be defined as the constellation of legal rights and responsibilities, which attach to certain objects, resources, or interests. Legal rights may be exercised by owners (human or juristic), in rem against non-owners. Typically (although not necessarily), the right to exclusion will constitute one such right. Legal responsibilities are owed by owners (human or juristic) in rem to non-owners. Social mores, norms, and technological capabilities will inform whether certain objects, resources, or interests are incapable of attracting a proprietary status.

165. As noted by the Minnesota Supreme Court in *Alevizos v. Metropolitan Airports Comm'n*, “[a]ny statement of what constitutes ‘property’ can only be nebulous at best.” N.W.2d 651, 661 (Minn. 1974) (Kelly, J.). The Australian High Court in *Yanner v Eaton* has similarly suggested that, “[t]he concept of ‘property’ may be elusive.” (1999) 201 CLR 351, 366 (Gleeson CJ, Gaudron, Kirby, and Hayne JJ) (Austl.).

The definition commences by alluding to the importance of positive law laid down by the legislature. This is necessary, as the exact parameters of any legally-orientated definition of property can be subject to legislative control. This is most likely to occur in the context of tax cases or new medical procedures, particularly those dealing with human reproduction.

Although the definition draws upon all three definitional approaches, fundamentally, it is an example of the bundle of rights definitional approach. This is evident from the fact that property is defined as “the constellation of legal rights and responsibilities which attach to certain objects, resources, or interests.” Noteworthy is that property is not defined purely as a rights-based phenomenon but also includes responsibilities. In this way, the definition is able to account for criticisms levelled broadly at the bundle of rights approach, namely an alleged emphasis on disaggregated individual rights at the expense of more interconnected social and environmental responsibilities. Also noteworthy is that the definition emphasizes that property rights and responsibilities are respectively held and owed *in rem*, thereby overcoming the conception of property merely as rights over things.

Although the definition is fundamentally an example of the bundle of rights definitional approach, it still takes into account the importance of the right to exclusion. However, unlike exclusionist definitions, it does not make the right to exclusion a *sine qua non*. This generates three important effects. First, conceptual difficulties associated with property rights, which do not involve an immediate right to exclusion, such as bailments, leases, and incorporeal hereditaments, are neutralized. Second, the culturally imperialistic implications of a Western-centric exclusionist definition of property are avoided, with the result that communally orientated indigenous societies are less susceptible to wrongful expropriation of their property rights. Third, the definition is able to accommodate communal rights that suspend or remove a right to exclusion over property, such as the right to roam over private land.¹⁶⁶

The definition is commensurate with the socially constructivist approach as the types of objects, resources, or interests which might constitute property are ultimately limited by social, moral, and technological factors. This allows the definition to account for why

166. See Countryside and Rights of Way Act 2000, c. 37 (UK); Land Reform (Scotland) Act 2003 (ASP 2); discussion of *allemansträtten* or *allemansträtt*, *supra* note 34.

certain objects, resources, or interests are incapable of attracting a proprietary status.

As the definition is fundamentally an example of the bundle of rights definitional approach, it resists the futility of definitional exactitude,¹⁶⁷ instead providing a conceptual superstructure. In this sense, the definition draws upon Aristotle's philosophical influence, namely, that the degree of exactitude sought in any intellectual endeavor should be guided by the subject matter and task.¹⁶⁸ As property is such an essentially contested and variable concept, it is submitted that a definition that is more akin to a conceptual superstructure is to be preferred to one that is unnecessarily exacting (and therefore unnecessarily limiting), such as, for example, the exclusionist approach (exclusion is a *sine qua non*).

Finally, the philosophical notion that property cannot exist divorced from law, synonymous with the writings of Bentham, underpins the definition.¹⁶⁹ This is because it is nonsensical to speak of "rights" and "responsibilities" without the corollary of a legal system to provide the possibility of redress should a right be violated, or a responsibility be neglected. This should not, however, be read as an attempt to limit the concept of property to societies with one particular legal system or another. Nowhere in the definition is a particular legal system mandated or preferred with the result that any such system will be sufficient.

No definition of any concept is forever static, impervious to criticism, or insusceptible to revision. Indeed, property has been, and will continue to be, an essentially contested concept *par excellence*. Despite this truism, it is important to define property's essence, as it exerts such tremendous influence on the human psyche and law. It is time that we moved towards an essentialist legal definition of property.

167. As with exclusionists, for example. Why make the right to exclusion a *sine qua non* if it is not a universal constant of property?

168. See Aristotle, *Nicomachean Ethics*, MIT CLASSICS, <http://classics.mit.edu/Aristotle/nicomachaen.1.i.html> (last viewed Mar. 7, 2019).

169. BENTHAM, *THEORY OF LEGISLATION*, *supra* note 3, at 113 ("Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.").