Two Concepts of Property: *Ownership of Things* and *Property in Activities*

Hugh Breakey*

There is a distinct and integrated property-concept applying directly, not to *things*, but to *actions*. This concept of *Property in Activities* describes a determinate ethico-political relation to a particular activity – a relation that may (but equally may not) subsequently effect a wide variety of relations to some thing. The relation with the activity is fixed and primary, and any ensuing relations with things are variable and derivative. In what follows I argue that *Property in Activities* illuminates many of the vexing problem cases arising in property theory. Communal, intangible, fugacious, hunting, fishing, customary and recreation property rights are not ersatz instances of *owning things* – they are paradigms of *Property Protected Activities*. The same is true of the functioning of property in various cases in contemporary law, its use in philosophical arguments such as Locke's, and much of its historical application prior to the 19th Century. By illustrating how one stable concept can resolve this myriad of otherwise puzzling cases, I argue that *Property in Activities* is as important and influential a concept as *Ownership of Things*.

Recognition of this concept allows us to resolve an impasse in recent property theory. Of the two major contemporary theories of property, one – *Ownership* – is too comprehensive and stringent to make sense of the diversity of property entitlements called for by normative theory and found in lived reality. But its main rival – Bundle Theory – is too plastic and indeterminate to make sense of the substantive role that property attributions make in theoretical, lay and legal discourse. I argue that placing *Property in Activities* alongside *Ownership* grants us the flexibility required to explain property institutions without recourse to the deflationary Bundle Theory.

But the significance of understanding property is not limited to conceptual niceties. Policy is formed on the basis of the property-relationships legislatures and courts understand, recognise and enforce. The historic failure to recognise a property right – for instance a shared indigenous hunting right – because it does not present as ownership is just one of the countless ways our concepts can mislead our policy.[1]

My argument proceeds thus: I begin in §1 adumbrating property theory as it stands. In §2 I note the key problem-cases for the *Ownership of Thing* approach. Next, in §3 I outline the structure of *Property in Activities*. The substance of my argument is presented in §4 where I show how this concept explains and resolves the aforenoted problem cases. I conclude in §5 comparing and contrasting *Property in Activities* and *Ownership of Things*.

* The document is the Accepted Manuscript version of: Breakey, Hugh. 'Two Concepts of Property: Ownership of Things and Property in Activities.' *The Philosophical Forum* 42, no. 3 (2011): 239-65, available at https://onlinelibrary.wiley.com/doi/full/10.1111/j.1467-9191.2011.00390.x

[1] Carol Rose, *Property and Persuasion* (Boulder, Colo.: Westview Press, 1994) 295; Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1990) 23.

1. PROPERTY ORTHODOXY: THE MATTER AS IT STANDS

For much of the 20th century, the pre-eminent concept of property was a deflationary one: Bundle Theory.[2] Early in the century, in his groundbreaking analysis of the structure of rights, Wesley Hohfeld showed that the seemingly unified concept of property was in fact made up of a miscellany of diverse legal relations, including liberties, claim-rights, immunities and powers.[3] Hohfeld's conceptual apparatus did not *require* taking a position that these entitlements were easily or usefully separable, one from another, but in pressing home that property was not a relationship with a thing, but a host of relationships with other individuals regarding a thing, it made such disaggregation both salient and conceptually possible. When legal theorists were faced with the complexity of property-relations extant in the 20th Century, disintegration of the concept seemed unavoidable. Traditional lay notions of ownership struggled to explain problem cases where multiple owners held property in one object and where there appeared to be no stable set of entitlements connoted by the term.[4] Intellectual property, common property, quasi-property, and illusory property were all grist to this deflationary mill. With such cases in mind, it proved easy to conclude that property was an amorphous bundle of entitlements – "sticks" as they came to be called – with no conceptual integrity. Property was no more or less than the particular bundle of sticks that the law, in any given case, happened to grant to a property-owner. There was no prior abstract set of entitlements that constituted the true or core idea of property.

But Bundle Theorists' predictions of the demise of property as an organising concept proved overhasty. Their rejection of an integrated notion of property existing prior to and informing the law, and their intimation that the "sticks in the bundle" were largely separable from each other, failed to explain the clear meaning and use of the term in theory and practice.[5] A series of influential treatments in the final decades of the 20th Century accomplished an instauration of the concept. While these treatments differed in various ways from each other, their authors shared one important methodological decision. Exasperated at the strange forms of property thrown up as evidence by the Bundle Theorists, they returned to basics and took as their paradigm the relation an owner has to a physical resource – archetypically, a chattel.[6] The weight of these arguments established the current orthodoxy of the concept of *Ownership of a*

---

[2] See Adam Mossoff, "What Is Property?" *Arizona Law Review* 45 (2003): 371-443, 372-74; Kenneth Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property," *Buff. L. Rev.* 29 (1980): 325-67, 359-66.

[3] W. Hohfeld, *Fundamental Legal Conceptions, as Applied in Judicial Reasoning*, ed. W. Cook (New Haven: Yale University, 1946) 96-97.

[4] Thomas Grey, "The Disintegration of Property," in *Property: Nomos XXII*, ed. J. Roland Pennock and J. W. Chapman (New York: New York University Press, 1980) 70-72; Felix Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review* 35 (1935): 809-49, 814-820; Felix Cohen, "Dialogue on Private Property," *Rutgers Law Review* 9 (1954): 357-87, 370, 381-82; Vandevelde (1980): 358-66.

[5] Rose (1994): 280-81; J. Penner, *The Idea of Property in Law* (Oxford: Clarendon, 1997) 2-3, 59; James Penner, "The 'Bundle of Rights' Picture of Property," *UCLA Law Rev.* 43 (1996): 711-820, 714, 739; Jeremy Waldron, "What Is Private Property?" *Oxford Journal of Legal Studies* 5 (1985): 313-49, 331, 348.

[6] E.g. Waldron (1985): 318-322; Frank Snare, "The Concept of Property," *American Philosophical Quarterly* 9 (1972): 200-6, 202 (using an automobile); A. Honoré, "Ownership," in *Oxford Essays in Jurisprudence*, ed. A. Guest (London: Oxford University Press, 1961) 108 (an umbrella).

Thing (hereafter *Ownership*). Each of these theorists envisaged the standard case of property (and certainly the limit case of property) as involving:

1. The duty of non-owners to *exclude* themselves from the resource;
2. The owners' open-ended capacities to *use* the resource;
3. Powers to *alienate* one's ownership of the resource.[7]

There can be little doubt this threefold concept of *Ownership* informs some of what we mean when we use the language of property. The concept is neither peculiarly modern nor peculiarly Western. It correctly describes the property rights held over most chattels in most parts of the world, and at the very least it functions as an "ideal-type" in modelling many other properties – including various types of land and the family home.[8]

Yet many contemporary property theorists make claims about *Ownership* stretching far beyond these cases – *Ownership* is said to be *the* concept of property. But the difficulty with taking this position is that none of the original problem cases motivating Bundle Theory have gone away. Indeed, the situation on this front has grown decidedly worse. Legal and historical scholarship on real property, common property and resource property has flourished in the last several decades, and its persistent theme has been the breathtaking variability of lived property arrangements.[9] The incapacity of the philosopher's *Ownership* to assimilate these mounting problem cases has been cause for more than one barbed reference to the over-abstraction and armchair ahistoricity of contemporary political theory.[10]

What then, are the problem cases causing all this difficulty?

2. PROBLEM CASES

The key problem cases for *Ownership* can be grouped under seven heads:

- *Environmental property*: throughout modern history land use has been consistently and substantially limited by social, environmental, and ecological considerations.
- *Common property*: the rights of all members of a community to engage with a particular resource for a specified purpose – such as to forage or to pasture their livestock.
- *Resource property rights*: including rights to fugacious (flowing) resources, hunting rights, fishing rights, and the like.
- *Property in law*: various legal cases have property-rights extending beyond the boundaries of *Owned* resources to rights over public ways and control of others' capacities to subvert projects.
- *Property in political philosophy*: the interpretation of "property" as *Ownership* in various arguments (such as Locke's) and positions (such as holding property in one's body) makes these standpoints counterintuitive, if not incoherent.
- *Property in history*: prior to the 18th Century property was understood more broadly than mere rights to a thing, and was linked to the ancient idea of *propriety*. *Ownership* affords no explanation of these historical facts.

---

[7] Some theorists reject full alienation as a necessary condition: e.g. Penner (1997): 85-100; James Harris, *Property and Justice* (Oxford: OUP, 1996) 24-25, 31.

[8] See Joseph Singer, *Entitlement* (London: Yale University Press, 2000) 29-30, 83-84

[9] See Eric Freyfogle, "Private Property: Correcting the Half Truths," *Planning and Environmental Law* 59, (2007): 3-11, 7.

[10] John Meyer, "The Concept of Private Property and the Limits of the Environmental Imagination," *Political Theory* 37 (2009): 99-127, 101; Singer (2000): 31, 78, 173; Ellickson, "Property in Land," *Yale Law Journal* 102 (1993): 1315-1400, 1387, 1398-99.

- *Intellectual and intangible property*: including property in information, personas, events and data-bases, as well as copyright, patent and trademark.

While various *Ownership* advocates have tried to bring some of these forms of property within the fold,[11] the general response is to view these cases as marginal or analogical. *Ownership* is deemed the *limit case* of our property-concept, and weaker entitlements can be called property if they reach some threshold of similarity. There is a difference of degree, but not of type.[12] There is doubtless something to be said for this response. After all, any concept of property is going to have to admit metaphorical uses, and to accept limitations, regulations and exceptions to its idealised functioning in the abstract. But the central reason for hewing to the concept of *Ownership* in the face of these problem cases is the thought that any proprietary concept able to encompass such cases must be so plastic and ambiguous as to be quite unhelpful to analysis or explanation. It must, that is, force us back into all the problems besetting the Bundle camp.

But I argue that this thought is mistaken. *Property in Activities* captures all of these problem cases without in so doing becoming sufficiently inclusive as to be uninforming.[13] With this concept set alongside *Ownership*, I submit that property theory will find itself better served with two separate concepts of property than with one concept regularly deployed in thematic, qualified and ersatz fashions.

3. PROPERTY IN ACTIVITIES: DESCRIPTION AND STRUCTURE

Before outlining the structure of *Property in Activities* (hereafter *Property*[14]) it must be emphasized that the general possibility of something like this concept is hardly hitherto unknown. Not only are there analogies to easement and usufruct, we will also see that some previous analyses of common, environmental and Lockean property have arrived at similar conclusions. As well as lending a certain conceptual exactitude to previous analyses, the aim of this article is to show the concept's *comprehensiveness* – its applicability to more than one domain. While previous analysts have delineated entitlements similar to *Property* in order to account for the proprietary regimes governing their narrow area of expertise, what they have not recognised – what I will be concerned to demonstrate – is that the same stable, consolidated concept arises time and again in other realms, contexts, and spheres of thought.

To hold *Property in an Activity* is to have:

[11] E.g. Penner assimilates intangible property by saying that others are excluded from a monopoly on certain actions (Penner (1996): 816; Penner (1997): 109, 119). This is unsatisfactory – a monopoly already includes the notion of exclusion. Penner simply reifies the action-type in order to create a thing that can be the subject of his definition.

[12] See Snare (1972): 202; Waldron (1985): 318.

[13] That promised, in what follows I cannot – for brute reasons of space – show the *Property in Activities* resolution of every one of these problem cases. In particular, I will not deal with *intellectual property*. Delineation of the precise activities being *Property-Protected* by patent, copyright and trademark is a subtle business, and cannot be performed in the brisk manner I here apply to the other problem cases.

[14] Without capitalization and emphasis, I will use the term "property" as ambivalent between *Ownership* and *Property*. I typically use this neutral term before arguing that one or other concept provides the correct rendering of it.

- Rights of *access* to the natural resources generally required for □-ing, or to certain resources specifically tethered to the proprietor for this purpose of □-ing.
- Rights of *freedom* – of noninterference and liberty – to perform □ (within the tethered domain, if applicable).
- Rights that others do not behave in any way that *worsens* the proprietor's capacity to garner the natural fruits of that activity (this often includes a prohibition on others worsening a tethered resource in terms of its utility for the *Property-Protected* activity).
- Rights to use the *natural fruits* internal to the proprietor's □-ing in the manner delineated by the nature of □.

"Tethered resources" connotes the domain in which the person's *Property-Protected* activity takes place. While the concept of *Property* must advert primarily to an activity, it may secondarily include reference to a physical resource. In such cases, to have *Property in a Thing* (as distinguished from *Ownership* of a Thing) is for that thing (the *res*) to be a tethered resource in a *Property-Protected* activity. The activity sets the entitlements held over the res – requiring the *Property*-holder has access and use-rights to the res, claims against others interfering with her use of the res, and for the res not to be derogated in its capacity to play its role in the *Property-Protected* activity. Unlike *Ownership* therefore, we cannot know what rights someone who has *Property* in the res has until we ascertain the protected activity.

"Natural fruits" refers to the natural consequences internal to the described activity. The precise way the activity is described is therefore crucial to delineation of the fruits. These consequences are the desired profits of the action that redound to the actor provided they are broadly left free from the interference of others. The "allowed uses" of the fruits are often themselves set by the description of the activity (e.g. a proprietor may be restricted to purely personal uses, and so not be allowed to vend the fruits). In cases where the activity does not specify the uses of the fruits, they may be assumed to conform to the background status of other property in the realm (in some cases, of course, the fruits may therefore be *Owned*).

While a full philosophical exploration of what it is for the particular class of actions in question to have "internal consequences" would be desirable at this juncture, such a task is beyond my ambit here. I will assume we share to some workable extent an awareness of the natural fruits of the sorts of activities – hunting, fishing, pasturing – to be discussed. The short answer to any scepticism about whether actions *really* can have internal consequences is that the law in general,[15] and *Ownership* in particular,[16] require such consequences every bit as much as the concept of *Property*.

But such a *tu quoque* defence is unlikely to be necessary. It is, after all, a commonplace of philosophy of action that consequences can be conceptually internal to actions. Feinberg describes the "accordion effect" whereby actions can be redescribed ("stretched" or "puffed out") such that one action's effects are drawn into the new description and become part of the

[15] Anthony Kenny, "Intention and Purpose," *The Journal of Philosophy* 63 (1966): 642-51, 642; D. Raphael, "The Consequences of Actions," *Proceedings of the Aristotelian Society* 30 (1956): 100-19; Y. Chopra, "The Consequences of Human Actions," *Proceedings of the Aristotelian Society* 65 (1964-65): 147-66, 149.

[16] *Ownership* as found in law requires natural consequences to make sense of nuisance and do-no-harm doctrines (see references in notes 29 and 30 below). *Ownership* in analysis and justification requires natural consequences, for example, in order to explicate externalities.

action itself.[17] Indeed, this conceptual internalisation of consequences does not occur only in "puffed out" action-descriptions: it plays a role even in accounts of the most basic, primitive actions.[18] And the reason for this perennial reference to consequences in action-verbs is hardly mysterious. People perform acts for reasons, and very often those reasons include reference to the envisaged consequences (desired results, ends, goods, objects) of that act. As one action theorist puts it, "to do an action in the paradigm sense of 'doing an action' is to know the consequences of what one is doing."[19] This being the case, in discussing *Property* we could refer, if we liked, not to natural consequences but instead to the typical intentions, motives or expectations of the actor. And there would be a substantial historical warrant for doing so. Such expectations lie at the core of Bentham's account of property. When Bentham averred that property "is nothing but a basis of expectations" he was not, as he is sometimes taken to be, speaking of just any expectations legitimated by positive law. He was speaking of *natural* expectations – the expectations internal to a person's intentional activity:

> Law does not say to man, *Labour, and I will reward you*; but it says, *Labour, and I will assure to you the enjoyment of the fruits of your labour – that natural and sufficient recompense which without me you cannot preserve; I will insure it by arresting the hand which may seek to ravish it from you*.[20]

Bentham's use of the term "expectations" in his analysis of property has the advantage of adverting directly to the reason why the activity is being performed. But because we can also have expectations having little to do with the results of our personal actions, I proceed with the more specific term *fruits*.

One final feature merits emphasis; *Property* can be *layered*. That is, different groups can hold different *Properties* in the same resource. For example, one family might hold exclusive food-gathering rights over a territory where the entire community has hunting rights.[21] Such layered *Property* is the norm, not the exception.[22] This allows *Property* to explain the endless array of cases where several individuals have different proprietorial entitlements to the same resource.

---

[17] Joel Feinberg, "Action and Responsibility," in *The Philosophy of Action*, ed. Alan R. White (London: Oxford University Press, 1968) 106-7.

[18] As, e.g., in Davidson's primitive actions: Donald Davidson, "Agency," in *Essays on Actions and Events* (Oxford: Clarendon Press, 1980) 51.

[19] Chopra (1964-65): 161. The use of the word "consequences" here is deliberate: as distinct from words like "result", "effect", and "outcome", "consequences" has a tighter relationship to intentions, expectations, foresight and responsibility: Chopra (1964-65): 147-49; Raphael (1956): 103-4).

[20] Jeremy Bentham, "Principles of the Civil Code," in *Property: Mainstream and Critical Positions*, ed. C. B. Macpherson (Toronto: University of Toronto, 1978) 50; Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon, 1986) 160-62. Adam Smith's account of property also makes such expectations central: Amos Witztum, "Property Rights and the Right to the Fruits of One's Labor: A Note on Adam Smith's Jurisprudence," *Economics and Philosophy* 21 (2005): 279-89, 288.

[21] e.g. see Ellickson (1993): 1372.

[22] Since Blackstone is often taken to be a quintessential *Ownership* theorist, it is worth noting that for all of his talk of "sole and despotic dominion" his *Commentaries* teem with overlapping rights in fishing, hunting, travel, foraging, gleaning, pasturing, recreation and digging for turf or peat. See David Schorr, "How Blackstone Became a Blackstonian," *Theoretical Inquiries in Law* 10 (2009): 103-26, 109-13.

In all, *Property in Activities* supports a substantially broadened notion of noninterference applied to activities extended in time. Being at liberty to perform an action typically only protects the actor's moment-to-moment doings. Granting *Property-Protection* prohibits any actions by others directly preventing the activity from occurring, or from having the consequences it would otherwise have had.

4. PROBLEM CASES RESOLVED

In this section I demonstrate that the problem cases noted in §2 are in fact *Property-Protected Activities*. In the initial subsections – on Environmental and Common property – I shortcut lengthy investigation by noting how *Property* dovetails with property-concepts developed by theorists as specific to those applications. For the remaining applications I will detail the primary evidence – the specific property entitlements – more closely.

4.1. Social and Environmental Property

As we might expect, property theorists interested in environmental protection are keenly aware of the descriptive and normative weaknesses of the concept of *Ownership*. While some conservationist's rejection of *Ownership* offers little more than a return to Bundle Theory,[23] others move in a more promising direction. In *The Land We Share*, Eric Freyfogle briefly considers viewing the natural world as owned by the public, but with *specific land uses* granted, as tradable property rights, to individuals.[24] Freyfogle leaves this concept of use-right un-analysed,[25] but his suggestion nevertheless furnishes one example of a contemporary move against *Ownership* that avoids cascade into Bundle by focusing upon *use*. Various other legal and philosophical theorists have also taken this route, and emphasized the significance of use-based property rights. Ethicists Clark Wolf and Michael Peirce were led – by "respect for future generations" and "liberty-rights for all" respectively – to reject *Ownership* in favour of property-concepts largely modelled on usufruct and use-rights.[26] On a similar footing, legal theorist David Hunter expounded a context-specific "natural use" property doctrine, where land may only be used for those purposes that are consistent with its ecological function.[27]

Freyfogle joins with Joseph Singer in making a further point: there are significant tensions within *Ownership* itself. Many of these conflicts arise from *Ownership's* granting of unfettered liberties of use to property-owners *and* its protections against non-owners disrupting an owner's projects. As Singer and Freyfogle point out – and the general point is indisputable – in the environmentally porous and ecologically inter-twined world that is our Earth, one person's free actions on their own lands can subvert other landowners' quiet and profitable enjoyment of their land.[28] Freyfogle makes his case for quiet enjoyment by emphasizing the venerable *sic utere tuo*

[23] e.g. Meyer (2003): 118-19.

[24] Eric Freyfogle, *The Land We Share* (London: Shearwater Books, 2003) 239-40, 172-74.

[25] Freyfogle shares the Bundle Theorist's antipathy for abstract integrated concepts of property; Freyfogle (2007): 7.

[26] Clark Wolf, "Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations," *Ethics* 105, (1995): 791-818, 810-14; Michael Peirce, "Why Libertarians Should Reject Full Private Property Rights," *Philosophical Forum* 32, no. 1 (2001): 25-52, 38-40, 43.

[27] David Hunter, "An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources," *Harvard Environmental Law Review* 12 (1988): 311-83.

[28] Freyfogle (2003): 16-18, 217; Singer (2000): 18-27, 62-63, 210.

rule of property: "Use your own so as to cause no harm."[29] Earlier, Singer had built upon the property-holder's right of security against harm, in this case going so far as to envisage a property-concept (modelled on the law of nuisance) protecting certain sorts of projects and interests.[30]

Now it would be too much to suggest that any of these environmental theorists have delineated or defended the concept of *Property* in land.[31] However, Hunter's "natural use", Freyfogle's "single use" and Wolf's "usufruct" all suggest the relevance of an entitlement to pursue specific, set activities with a resource. Freyfogle's do-no-harm doctrine and Singer's "nuisance model" make central the "non-worsening" incident of *Property*. Putting these pieces together, we can begin to see how *Property's* specific use-entitlements (access, set-use, fruits) together with protection from harm (non-worsening) can provide environmental theorists with an integrated property right whose internal limits exclude freedoms to exploit, waste and degrade. *Property* can in this application do what *Ownership* cannot: *explain* what theorists have found in law and legal history and *express* what ethicists have argued is called for by our best normative theories.

4.2 Common Property

Common property is one subset of *Property* – occurring on a physical resource where the entitlement is shared across an entire community. Jeremy Waldron summarises the received view:

> In a *common property* system, resources are governed by rules whose point is to make them available for use by all or any members of the society. A tract of common land, for example, may be used by everyone in a community for grazing cattle or gathering food. A park may be open to all for picnics, sports or recreation. The aim of any restrictions on use is simply to secure fair access for all and to prevent anyone from using the common resource in a way that would preclude its use by others.[32]

While in environmental property we saw tantalising intimations of *Property*, here we have a clear adumbration of its four conditions. The commoners have, (i) rights to access the common, in order to (ii) freely use it for the specified purpose/s. There are (iii) restrictions to ensure that one person's use does not infract upon the other commoners' uses, and there is (iv) a presumption that the commoners have entitlements to the fruits of their activities – the food they gather, the health and subsequent produce of their pastured animals.

---

[29] Freyfogle (2003): 67-68, 83-84, 204, 215, 232, 262.

[30] Singer (2000): 87-94, 114.

[31] Use-rights in general are not the same as *Property*: they can be no more than rights of access and a liberty to perform some act. *Property* mandates two further elements (protection against worsening and ongoing property rights in the fruits of the activity). Furthermore, the use-rights put forward by these theorists generally allow a much wider set of activities than *Property* entitlements. The usufructuary rights of Wolf, for instance, are effectively *Ownership* minus certain rights to consume, modify and harm: Wolf (1995): 812. Like Freyfogle (Freyfogle (2007): 7), Singer's conceptual replacement for *Ownership* is deliberately imprecise. His "entitlement" amounts to presumptive "claims to be entitled to control a particular resource" – and he resorts to the plasticity of Bundle Theory and even of the ever-pliable term "rights" to characterise its shifting content: Singer (2000): 88, 91, 114, 209. It also must be noted that Singer's "entitlement" protects interests rather than activities: Singer (2000): 88-94, 144.

[32] Jeremy Waldron, "Property," (2004) http://stanford.library.usyd.edu.au/entries/property/. §1 [4].

Now it must be admitted – it is a point of considerable practical importance – that common property of this sort is in fact not very common. If it is kept firmly in mind that community access is *not* universal access (i.e. there is no access granted to outsiders[33]), the concept adequately models at least some foraging and gleaning rights, various travel rights and navigation servitudes,[34] and the recreation rights of, say, the villagers of Merrie ol' England to hold Maypole Dances on the manorial lands.[35] If we are willing to recognise the use and non-worsening provisions can be enormously complex and conditional, then at least some pasturing commons will also fit this mould.[36]

But very many ordinary "commons" either fail to impose the non-worsening condition (allowing overuse) or fail the community-wide access condition. These disjuncts are related: if full access is allowed, then there are good reasons over time for the resource to suffer and not be as useful for future generations, and so fail non-worsening.[37] This is not to say that commons, *pace* the tragedians Harold Demsetz and Garrett Hardin,[38] cannot thrive for centuries on end. They just can't do it *as* common property. In order to flourish, "commons" usually do not grant *Property* to every member of a community. I will refer to such property entitlements – where the entitlement is held by particular individuals in a community, rather than all its members – as being *Resource Property Rights*. Just as we found *Property in Activities* could account for the received understanding of Common Property, so too it is able to explain the more widespread institution of Resource Property Rights.

4.3. Resource Property Rights: Hunting, Fugacious and Fishing Rights.

4.3.1. Hunting Rights

In an influential article, Demsetz provides a historical case-study of the construction of property rights.[39] When commercial hunting for beaver-skins became possible in the early Americas,

[33] Excluding outsiders is almost always required: Ostrom (1990): 91; Rose (1994): 142, 164. This constraint is important not only for limiting the sheer volume of users, but also because close communities are far more capable of effective self-management. Such communities can ensure use is restricted to the privileged activity, and that it does not worsen the resource for other protected activities: Rose (1994) 124-26, 140-42.

[34] Inasmuch as the non-worsening and access conditions function as a genuine right preventing various sorts of enclosure and construction. See Anthony Scott, *The Evolution of Resource Property Rights* (Oxford University Press: 2008) 23, 58, 65; Rose (1994): 111, 117, 120-21, 139; Kevin Gray and Susan Gray, "Private Property and Public Property," in *Property and the Constitution*, ed. Janet McLean (Oxford: Hart, 1999) 20-31; Hunter (1980): 360-66.

[35] Rose (1994): 123, 134-35, 295.

[36] Ellickson (1993): 1388-90.

[37] Sometimes sustainable use requires restricting access to one member of a household unit (no matter how large that unit grows over generations). Pasturing (through a "wintering rule") and irrigation rights are often made proportional to private holdings or otherwise immunized from full community use: Ostrom (1990): 62-88. Curiously, even archetypes of common property such as public basketball courts and (surfer's waves at) beaches can be governed by (informal yet well-enforced) norms restraining access and rewarding the more skilled/committed: Ellickson (1993): 1386-87).

[38] Garrett Hardin, "The Tragedy of the Commons," *Science* 162 (1968): 1243-48; Harold Demsetz, "Toward a Theory of Property Rights," *American Economic Review* 57 (1967): 347-59.

[39] Demsetz (1967): 351-53.

over-hunting of local animals became for the first time a genuine possibility. Indian hunters responded by setting up hunting rights. These newly minted property rights allowed groups of hunters to husband the animals within their territory sensibly – and to enjoy the spoils of their doing so. But one group's property rights did not prevent other Indians from coming on "their" land. They did not even prevent other Indians from hunting "their" animals for food. Such hunters simply had to leave the pelt behind – ensuring the Indians who controlled the property were made no worse off, vis-à-vis the salient activity (fur-hunting), than they were previously.[40]

These are not rights of *Ownership*. There is no trespassory or exclusionary right over the land, or even over the animals on that land. There is no "open-ended" use being protected for the property holders – just one quite specific use. What we have is *Property in the Activity* of hunting local animals for their pelts in order to bring those pelts to market. The "tethered resource" is the Indian's hunting grounds. The natural consequences are the pelts that the *Property*-holding Indian obtains in his ongoing husbanding and hunting activities. Other Indians are not prohibited from coming onto the proprietor's hunting grounds (the tethered resource), but in being required to leave the pelts of any animals hunted for food behind, they are constrained from derogating the *Property*-holder's spoils. The activity includes bringing the pelts to market, so the goods in this case are alienable.[41] There is no presumption that the *Property-Protected* activity could itself be alienated (that is, that the hunting-right itself could be sold or bequeathed), but nor is there any reason to require that it could not be.[42] As David Schmidtz describes the result: "The new conventions went to the heart of the matter, privatising what had to be privatised, leaving intact liberties that people had always enjoyed with respect to other resources."[43] In many applications, this is the promise of *Property in Activities*: to do enough privatisation to ensure a proprietor can hold onto the fruits of their productive activity – and to do no more privatisation than that.

4.3.2. Fugacious Property Rights

Fugacious resources include all rights to flowing water, including for purposes of irrigation, panning for gold, removing waste and powering mills. In unpacking entitlements to flowing water we can discern both *Ownership* and *Property* at work.[44]

Historians describe three ways of organising property rights in flowing water in last several hundred years of Anglo-American law. First, around the beginning of the 17th Century there began a regime of water-usage allowing "appropriation". An individual who set up an industry using a certain amount of water acquired property in that flow of water and a right to noninterference with their ongoing use for that purpose.[45] This regime grants users *Property*:

---

[40] Demsetz (1967): 352.

[41] Note that the hunters could have allowed hunting for only personal and domestic uses (i.e. not for sale). This would have solved their over-hunting problem without recourse to delineated hunting grounds. This type of internal restriction on the activity is still used today, e.g. in cabining rights to drill and pump oil on one's property. Such a solution would not, of course, have been as efficient at generating wealth for the hunters.

[42] Bequeathal but not sale is typical in such cases: Elinor Ostrom and Charlotte Hess, "Private and Common Property Rights," (2007) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304699., 13.

[43] David Schmidtz, "The Institution of Property," in *Property Rights*, ed. Ellen Frankel Paul, Jeffrey Paul, and Fred D. Miller (Cambridge, England: Cambridge University Press, 1994) 52.

[44] Similar themes arise in oil and gas: see Vandevelde (1980): 355-57.

[45] Scott (2008): 65, 70-72; Rose (1994)172-77; Mossoff (2003): 409; Ostrom (1990): 71-73.

usually in the activity of milling or irrigation. The activity triggered the user's right to flowing water, set its bounds, and stipulated the compensation a court would award.[46] And should the user stop performing their activity for a substantial period of time, their property right dissipated.

Second, in the doctrine of *natural flow* the organizing idea was that riparians (those holding property on the riverbank) held a right to the continued flow of the river, in terms of its quality and quantity, as it was naturally or when they purchased their riparian land.[47] While the idea of *Ownership* does not mesh neatly onto fugacious resources, it seems plausible to describe natural-flow as at least modelled on this concept. The owner has entitlements to their set quality and quantity of water regardless of any use that they are currently or will in future put to the water.[48]

Third, the regime of *reasonable use*, arising in the mid-18th Century, held – unlike the doctrine of natural flow – that a certain amount and type of consumption, pollution and diversion were appropriate ways riparians could use their local waters.[49] Here, riparians have a set of *Property-Protected* ("reasonable") activities – including domestic and sometimes customary uses – such that they may newly draw, or continue to draw, upon the flowing waters in order to engage in these activities. Other activities – polluting and wasteful uses – were deemed *un*reasonable and beyond the scope of the riparian's right.[50] Holding *Property* allowed proprietors to access the flowing water under terms allowing them to freely perform the reasonable activities, and to be protected from other riparians engaging in actions worsening the status of the river as a resource for these uses.

In the first and third regimes, the use that is being made of the water is justifying and specifying the limits of the individual's entitlements to the river. The two *Property*-rights differ from each other inasmuch as the first grants *Property in an Ongoing Activity* (milling or irrigation) that is already being performed. Once begun the property-holder has a right to the continued use of the "tethered" quanta of water for the purpose in question. The third regime grants *Property in Certain Reasonable Activities* to all riparians – who may or may not have actually engaged in, or even plan to engage in, those activities. This allocation is not theirs to waste or sell however – it is alienable only to the extent that the land itself is alienable.

This sketch of fugacious rights draws out an oft-noted theme in recent property analysis: the answer to who gets what property-right in shared (and sometimes in private) resources, "depends ultimately, yet fundamentally, upon collective perceptions of the social permissibility or public merit attributable to various kinds of competing user of the resource in question."[51] As I would put it: as well as being faced with the question "what sort of things should be *Owned*?" communities, legislatures and courts are faced with a quite separate, and often prior, question: "what *activities* is it worth us *Property-Protecting*? Customary uses, agricultural uses, recreational uses, or industrial uses?"

---

[46] Scott (2008): 70-75.

[47] Scott (2008): 78-84. Note, though, that the natural-flow rule could be interpreted in such a way as to collapse it into the prior "appropriation" model. Freyfogle (2003): 66-69.

[48] Scott approaches the *Ownership/Property* distinction I present here by contrasting this "land-based right" with the other "use-based rights": Scott (2008): 63.

[49] Rose (1994): 165, 179-81. Scott (2008): 87.

[50] Scott (2008): 88.

[51] Gray and Gray (1990): 13. See similarly Freyfogle (2003): 20. For examples: Rose (1994): 167, 172, 178, 184, 190; Scott (2008): 64; on hunting, recreation and gleanings: Schorr (2009): 110-12.

4.3.3. Fishing Rights

Fishermen throughout history have been vested with entitlements coming close to (and in some cases constituting) *Property* in the activity of fishing – usually to bring the catch to market, but sometimes only for subsistence. They have held, and may hold to this day, substantive rights (resistant to regulation and statutory control) of access to fisheries, of freedom to fish and to perform ancillary tasks on land, and to their catch.[52]

Yet, for all this, many of these right-holders only came close to holding *Property* in fishing. The reason for this qualification is that these rights were often missing, both in law and in fact, the crucial third incident of *Property*: the legal guarantee that *others cannot worsen the resource vis-à-vis its Property-Protected use*. The most obvious way a fishing resource can be worsened is by *competitive use*. To be sure, at least as regards deep-sea fishing, there was a long period before boats and gear improved sufficiently to allow one group of fishers to genuinely affect the capacity of another fisher to make their catch – that is, to begin to have a deleterious effect upon overall ocean fish stocks. But once such worsening did become possible, perhaps around the turn of the 20th Century, it has proven difficult for governments to protect and police a fishing right that was *Property-Protected* in this important sense. Fishers had what we might term a *naked right of use*: rights of access, freedom to use, and entitlements-to-fruits – but no protection against others worsening the natural resource for that use. This is not an uncommon set of entitlements – it is, after all, the relationship that Hardin believed was characteristic of commons in general.[53]

The modern Individual Quota License (IQL) is perhaps one example of a fishing license that is genuinely *Property-Protected*. The IQL entitles its holder to a certain proportion of the Total Approved Catch for a given year (this number being revised annually, usually by a government body). To the extent that policing these licenses is effective (and in at least some jurisdictions it is largely so) the licensee is protected in their capacity to catch their quota of fish. This is, effectively, *Property in the Activity* of fishing – where the tethered resources are the allocated quota of fish residing in the fishery. The licensee has access to the fishery, freedom to fish, the right to the fruits of her fishing (up to the prescribed entitlement) and – pivotally – protection from their catch being worsened by the over-fishing of others. Note that *Ownership* does not give a plausible account of the IQL-holder's rights. Presuming we envisage the *Ownership* being over the quota of fish – and setting aside problems over there not being any specific fish that make up this quota – the licensee does not have anything like open-ended use over those fish. He cannot leave them to grow further and catch them next year. He cannot allow them to propagate and claim rights over their progeny. He cannot even exclude others from interacting with his quota of the fish (swimming with them, feeding them, scientifically studying them, and so on). His protection only ensures the fish are alive and available for him to catch if and when he decides to do so.

Many other types of fishing regulations do not succeed in creating *Property-Protection*. For instance, requiring that fishing only be done at certain restricted times in the year merely encourages fishers to invest in greater gear for landing as large a catch as possible in those times. Fishers working within the legal regulations will typically pursue the fruits of their labour expeditiously enough to ensure that none of them ultimately have *Property-Protection* in what they are doing. With the IPL however, fishers still pursue their fruits as expeditiously as possible, but their attention changes to the most cost-effective manner of landing their quota of fish and,

[52] See the cases set out in Scott (2008): 130, 138, 143-45, 165.

[53] Hardin (1968).

over the course of the year, optimally bringing those fish to market. Anthony Scott describes the transition as one of: "changing the fishery from a competitive race course to a place where ITQ-holders can work side by side."[54] In my terms, the transition is from a naked right of use – ushering in a zero-sum competitive regime – to a *Property-Protected* activity.

4.4. Property in Law

Property in law traces an elliptical orbit around the twin foci of *Property* and *Ownership*. Sometimes property is declared as *Ownership's* open-ended rights to use and dispose of some resource, and to exclude all others from it. But other times the law offers *Property's* substantive protection of key activities – protection at times allowing others use of the resource (so long as such uses do not infract upon the *Property-Protected* activity), but also imposing restraints on others well outside the physical bounds of the resource (to prevent their behaving in ways undermining the proprietor's *Property-Protected* activity). Let us consider a pair of illustrious cases where each view in turn is affirmed by the courts at the expense of the other.

In *International News Service v Associated Press*,[55] INS (the defendant) reprinted news stories published earlier by members of the AP (the plaintiff) on the East Coast of the US. The defendant inserted these reprints into their later newspaper editions on the West Coast. While there is no copyright in news, the US Supreme Court found that the plaintiff held a "quasi-property" in the news stories, sufficient to debar the defendant's rivalrous use. Focusing repeatedly on the importance of the activities of news-gathering and reporting, and the protection such activities can warrant in a Court of Equity, the court found the defendant was not entitled to reap where it had not sown, at least when its profits came at the expense of the plaintiff.[56] As the majority put it, "Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped."[57] In protecting the profits of the plaintiff's activity the court was well aware it was putting forward a curiously narrow rendering of property – not affording protection against the public in general, but only against those competitive commercial uses curtailing the natural profits of news research and publication. That is, the Court was protecting *Property* in the activity of vending gathered information to those willing to buy it. In so doing, the Court *expressly rejected* the applicability of the stronger exclusionary concept of property (i.e. *Ownership*) urged by the defendant's counsel and dissenting opinions.[58] The Court, that is, chose to uphold *Property* but not *Ownership*.

In *Victoria Park Racing v. Taylor* the primacy was reversed.[59] The plaintiff operated a racing business on their racecourse (Victoria Park). The neighbouring defendant built an elevated platform allowing view of the races and noticeboards, from which standpoint it was possible to describe the races and proceedings for broadcast purposes. This latter activity

[54] Scott (2008): 181

[55] *International News Service v Associated Press* 248 US 215 (1918). For similar cases see David Libling, "The Concept of Property: Property in Intangibles," *Law Quarterly Review* 94 (1978): 103-19.

[56] *INS*: 235-41. Note esp. "The right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired". *INS:* 236.

[57] *INS*: 240.

[58] Their point being that the plaintiff manifestly could not hold *Ownership* of the news: *INS*: 236, 246, 250.

[59] *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor* 58 CLR 479 (1937).

impacted substantially on the racecourse gate-receipts. At all sides it was agreed the standard incidents of property (i.e. *Ownership*) entitled the owner to restrict physical trespass and to build structures blocking outsiders' vision. But in finding for the defendant the Court held that if exploitation of those entitlements failed to achieve the desired enclosure of information, the law of property afforded the owner no further protection. The dissenting judges, however, argued the defendants were unjustifiably reaping where they had not sown, and were appropriating the plaintiff's profitable enjoyment of his land.[60] In effect they held that one of the *Property-Protected* uses of the plaintiff's tethered resources (the racecourse) included this form of commercial enterprise: *viz*. vending to those willing to pay the spectacle and results of the horse-race the plaintiff had organised. The defendant was infringing the plaintiff's *Property* by preventing him from reaping the profits the enterprise would have made in the absence of the defendant's use of his creations. The conceptual affinities with *International News Service* were apparent to the Court itself. In holding that the plaintiff could not hold property in a spectacle, Dixon J argued for the *majority* in *Victoria Park* by invoking the arguments of Brandeis J's *dissent* in *International News Service*.[61]

Commentators have noted the divergent property concepts at work in this famous case – and come to very different judgments about them. Kevin Gray approvingly notes the exclusionary tenor of the *Victoria Park* decision – envisaging property as "control over access" the majority observed that the defendant did not trespass and accordingly held in his favour.[62] For Gray and the *Victoria Park* majority, property is exclusion is *Ownership*. The minority held the mistaken (as Gray would have it) view that property protects "enjoyment of access" – i.e. protects the enjoyment of the profits of one's labours on one's land.[63] Observing that such enjoyment *had* been derogated by the defendant, the minority judged accordingly. David Libling's analysis of the property concepts at work is similar to Gray's, but his evaluation is the opposite. Libling faults the *Victoria Park* majority for thinking that property can only be *Ownership*, and in so doing legitimating the defendant's appropriation of profits created by the plaintiff's labour and investment.[64] For Libling, the court's overly narrow ruling failed to recognise that property includes the protection of a creator's commercial exploitation of their creation.[65] It includes, that is, various types of *Property*.

In each case, courts were asked to choose whether and to what extent *Ownership* and *Property* applied. Given that all sides agree news-gatherers have no *Ownership* over the news, should their activity of commercial news-gathering-and-vending nevertheless be *Property-Protected*? Given that all sides agree realty-holders have *Ownership* over their land, should their activity of commercial racing additionally be *Property-Protected*? Instead of arguing which *essence of property* is the correct one, the Courts' attention was better spent – as indeed much of it was – on the question of which activities have, in legal precedent and ethico-political significance, a claim on *Property-Protection*. Plausibly, the different answers in each case hinged at least somewhat on the socio-political importance of the activity of news-gathering as compared with commercial horse-racing.

---

[60] *VPR*: 501, 514-18

[61] *VPR*: 509.

[62] Kevin Gray, "Property in Thin Air," *Cambridge Law Journal* 50 (1991): 252-307, 294. Similarly, Cohen (1954): 381.

[63] Gray (1991): 294.

[64] Libling (1978): 106.

[65] Libling (1978): 104.

4.5. Political Philosophy: Locke

Earlier, I touched upon the applicability of *Property* to arguments in political philosophy when I suggested the primary emphasis of Bentham's property was on *action* rather than *thing*. But the most elegant philosophical application of *Property in Activities* is to John Locke's *Second Treatise of Government*, where Locke famously argued from individuals having property in their lives, labours and liberties to their acquiring property in land.

If we read Locke's appeal to "property" in *Ownership* terms then it appears Locke is somehow envisaging *Ownership* of labour – perhaps justifying this by means of a further premise of bodily-*Ownership*. On this reading, we will tend to construe labour as if it was a type of physical thing (like, say, tomato juice) and to take Locke's statements about mixing our labour with the earth quite literally.[66] The problems with this approach are legion. They begin with grammatical stipulations about the incapacity of our ordinary concept of "owned" to apply to activities like labour.[67] They encounter Nozick's pointed query: "why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?"[68] And they end with the harsh conclusion spelled out by Waldron: "our original hunch about a category mistake has led us to discover a much deeper flaw. The phrase 'mixing one's labour' is shown to have the logical form of 'mixing one's mixing'"[69]

So *Ownership* of labour is a conceptual disaster. Waldron observes: "What Locke needs is some intelligible sense for the idea of property rights in the *work* of one's body, in one's *actions* and one's *labour*."[70] Just so. All Locke's first-principles justifications for property – from God's intentions, natural law, custom and common law, virtue and desert, and social utility – defend a person's use of the raw resources of the world to fashion things necessary and beneficial to their life.[71] Locke's arguments directly justify *doing*, and only derivatively *having*. Fortunately for his purposes, Locke had ready to hand a consolidated property concept capable of capturing exactly this sort of entitlement.[72] As James Tully argues, 17th Century common law and political theory provided Locke with a vision of property based around access, use and fruits (Tully does not mention "non-worsening", but it is implicit).[73] Moreover, he argues, attribution of this vision of property fits neatly with Locke's argument.[74] While Tully has some idiosyncratic reasons for resisting viewing this fourfold right as *the* consolidated Lockean concept of property,[75] in fact it

---

[66] E.g. J. Day, "Locke on Property," *The Philosophical Quarterly* 16 (1966): 207-20, 208; See also Jeremy Waldron, *The Right to Private Property*, (Oxford: Clarendon, 1988) 398.

[67] Day (1966): 212.

[68] Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974) 174.

[69] Waldron (1988): 186, see also 398.

[70] Waldron (1988): 180.

[71] John Locke, *Two Treatises of Government* (New York: Hafner, 1947), I:41-42, 86-87, 92, 97, II:25-26, 28-32, 34, 37, 40-44.

[72] Re the availability of the concept in the 17th Century, see §4.6.1 below.

[73] James Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge: Cambridge University Press, 1980) 7, 79, 93, 112-15, 124.

[74] Tully (1980): 61, 102-5, 122.

[75] For three reasons: First, Tully's right is not consolidated. He envisages the "fruits" condition as a precept based upon the independent ground of "maker's rights", thus (a) making this specific condition free-standing, (b) requiring that the protected activities must be exclusively ones of "making", and (c) altering the scope of the final entitlements over the fruits; Tully (1980): 60, 42, 116-121. Second, Tully thinks Locke's fundamental concept of property is not *Property* but

makes perfect sense to think that Locke was justifying *Property* in the activity of *productive labour*.

By now application of the concept of *Property* should be becoming straightforward. Our Lockean *Property*-holder must have rights of, (1) *access* to the natural resources required for productive labour, (2) the *freedom* to work upon such, (3) protections over their tethered resources that others *not worsen them* as regards the work-related purpose, and finally, (4) entitlements to the *fruits* of that work as delineated by its larger purpose. From a straightforward application of these four incidents to the activity of productive labour we can follow Locke to many of his key conclusions.

First, the right of access to the required natural resources – typically virgin land – requires that property-appropriators ensure they leave "enough and as good" for all other (and future) *Property*-holders, thus explaining Locke's "sufficientarian proviso".[76] Second, from our *Property* in productive labour we can derive entitlements over our bodies. Not only must our land be free from others despoiling it but our bodies, as the *sine qua non* resource for ongoing labour, cannot be interfered with or despoiled. Far from being conceptually *problematic* for Locke, the movement from *Property-Protected* labour to tethered *Property* in our bodies is all but inescapable. Third, we have entitlements to the fruits of the activity in the manner specified by the original grant – we can use what we have created to further our sustenance and wellbeing and that of our dependents. But this entitlement stops short of vesting us with O*wnership* of those fruits. For instance, we are not legitimated in wasting them – thus making room for Locke's spoilation proviso.[77] Fourth, holding limited *Property* rather than comprehensive *Ownership* in land and the fruits of labour opens a space for government regulation of property.[78] And fifth and finally, unlike *Ownership*, there is no requirement that the initial *Property*-right is alienable. We can thus make sense of Locke's position on the illegitimacy of contracting into slavery.[79] While the power to enter into discrete wage-contracts is an entitlement *within* the aegis of the over-arching *Property*-right – that larger right *itself* may not be put up for sale.

As a substantive interpretation of Locke the general drift of the foregoing is not strikingly new.[80] What *is* significant in this treatment, however, is that it does not have to *explain away* Locke's use of the term "property". Quite the contrary. Understanding Locke as positing *Property in Labour* allows us to explain and delineate the nature of his arguments and their prescriptive outcomes.

One question remains. We might grant imputing *Property* to Locke makes sense of his theory, but nevertheless wonder why he used a term that could be so easily be misinterpreted as *Ownership*. The answer, as I noted briefly above, is that in the 17th Century "property" did not predominately connote *Ownership*. It is to this history we now turn.

---

effectively (resonant of Bundle Theory) any right or object that cannot be taken without consent: ibid: 114-15. Third, Tully's rendering contains further controversial elements, holding Lockean property in labour and land to be largely inalienable: ibid: 99, 122-23, 138-41.

[76] Locke (1947): II:27, 33-37.

[77] Locke (1947): I:92, II:31.

[78] Locke (1947): II:3, 45, 120, 139.

[79] The *Ownership* interpretation struggles here; see: Snare (1972): 204.

[80] E.g. Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991) 125-190; Waldron (2005): 88-97.

4.6. Property in the History of Ideas

4.6.1. Comprehensive property

Laura Underkuffler, C. B. Macpherson and others draw attention to an older "comprehensive" notion of property that was superseded by the concept of *Ownership* in the passage from the 17th to the 19th Century.[81] This earlier notion of property was extremely broad: it could encompass rights of inclusion, human rights, manorial revenues, ecclesiastical offices, positive welfare rights, franchises of monopolies and monopsonies, rights to the enjoyment of one's faculties, and rights of choice of occupation.[82] At various points and in various contexts therefore, "property" included almost everything that could now be described as a right. While any concept of property able to incorporate all these referents would be unworkably broad, there are nevertheless four recurrent themes of comprehensive property illustrating its affinity with *Property*. Holding *Property* in almost any activity will enable us to derive these four characteristics.

First, one had comprehensive property in one's life, liberties, labours and capacities. Underkuffler emphasizes our property in the use and enjoyment of our faculties,[83] while Macpherson extols the virtues of a property-concept modelled on the idea that "life is for *doing* rather than just *getting*."[84] The inclusion of rights, liberties, faculties and labours under the property rubric makes sense if we are speaking of *Property*. Our lives – including our faculties and capacities – are tethered resources needed for engaging in any activity, and they therefore must be *Property-Protected* against interference and worsening. Similarly, a key harvest we can reap from our activities consists in improvements to our faculties and capacities as we learn, train and practice. And as we saw above regarding Locke, labour itself is an activity. Thus, if someone has *Property* in almost any activity, then she necessarily has property rights in (at least some aspects of) her life, labour, capacities and liberties.

Second, property was not always a right to exclude others, but could also be a right to be included.[85] As we have observed several times, the right to *inclusion* can be a crucial incident of holding *Property in an Activity. Property* in hunting or gathering, and even to be a part of activities like maypole dances, centrally requires one's inclusion in the shared resources.

Third, comprehensive property often did not include powers of alienation for sale, but merely a right to use and dispose of a thing. In *Property*, reaping the fruits need not require the capacity to alienate those fruits. In our modern market economies, of course, most of our fruits are fungible. But it was not always so; the right to hunt local game *for his own family's*

---

[81] Laura Underkuffler, "On Property," *Yale Law Journal* 100 (1990): 127-48; C. B. Macpherson, "Human Rights as Property Rights," *Dissent* 24 (1977): 72-77; C. B. Macpherson, "Capitalism and the Changing Concept of Property," in *Feudalism, Capitalism and Beyond* ed. Eugene Kamenka and R. Neale (New York: St. Martin's, 1976). Natural lawyers termed this broad property *suum.* See Karl Olivecrona, "Locke's Theory of Appropriation," *Philosophical Quarterly* 24 (1974): 220-34, 225; Buckle (1991): 29-37, 85-92. Note also Schorr on the 18th Century: "Not only did 'absolute' ownership not exist in England, it was hardly discussed even as a mythological ideal type": Schorr (2009): 107.

[82] Macpherson (1976): 107-11; Rose (1994): 76; Underkuffler (1990): 135-39.

[83] Underkuffler (1990): 136-37. Underkuffler notes Joseph Story's assertion of property "in actions".

[84] Macpherson (1977): 77.

[85] Macpherson (1977): 73.

sustenance might historically have been a person's most valuable property right – notwithstanding that neither the game caught, nor the right to hunt itself, could be sold.

Fourth, comprehensive property was often a quite *sociable* institution. Property prior to the 19th Century was not a force exclusively representing the demands of the autonomous individual against the interests of the community, but was itself a point of balance between individual and society: "the inherent tension between the individual and the collective… now seen as something external to the concept of property – was in fact internal to it."[86] Now *conceptually* there is nothing inevitably social about *Property*: the activity of strip-mining a village could be *Property-Protected*. But in practical application *Property* has social requisites and outcomes. There are several reasons for this. First, because *Property* can be layered and common, use of the resource is often shared. A *Property*-holder can be working directly alongside her neighbours (under terms of non-interference and non-worsening) with all the social benefits accompanying such ongoing close-knitted-ness. Second, the particular *Property-Protected* activities usually need to be delineated and endorsed publicly by the courts or the community.[87] Third, in many cases *Property's* duties are easily breached and they require extensive community governance, monitoring and enforcement. These factors make the property-rule's justifiability to all affected a matter of substantial importance: "When participants do not look upon such rules as legitimate, effective, and fair, the capacity to invent evasive strategies is substantial."[88] Fourth, because the *Property-Protected* activity can be precisely specified it is easier to ensure it is not a right to perform antisocial actions such as spoiling or wasting. *Property* is rarely a right to do wrong. Fifth, the scope for limited powers of alienation allows the integrity of local communities to be upheld over generations.[89] In practice then, *Property* is often a sociable institution.

In sum, understanding early modern authors as speaking of *Property* allows us to make sense of the key differences scholars have discerned between their idea of property and our concept of *Ownership*.

4.6.2. Property as propriety

Moving back still further in history, the concept of property was linked to (and even interchangeable with) the idea of *propriety* – the social, political and economic entitlements that a person has as their due because of their particular role in the social order.[90] Propriety was usually hierarchical, specified to a social function, and it included the dues that were fit for the person's station as well as the resources required to perform their designated activities. From an *Ownership* footing, it is difficult to see any way of explaining the tight historical linkage between property and propriety. The entitlements of nobles, for instance, stretched far beyond their physical resources, and in any case they often did not *Own* such resources.

But propriety is not so distant from *Property*. For all the activities that are required of a person of a certain station, the necessary suite of resources, liberties and capacities allowing them to perform those activities *just are* their *Property*. The key differences between the two terms arise from propriety's close connection to hierarchical institutions, and to the dues appropriate to a person's station (without actually empowering them to do anything productive). As critique increasingly targeted these features of the political landscape,[91] it was predictable

[86] Underkuffler (1990): 129. See similarly Freyfogle (2003): 83, 204.

[87] As we saw in §4.3 and §4.4 above.

[88] Ostrom and Hess (2007): 29.

[89] See Ellickson (1993): 1376-78.

[90] Rose (1994): 52.

[91] See Rose (1994): 61, 76.

the two terms would become increasingly interchangeable in the 17th and 18th Centuries – to the point where *Property* would supersede the concept of propriety.

5. CONCLUSION: *PROPERTY* AND *OWNERSHIP* COMPARED AND CONTRASTED

We have seen how the concept of *Property in Activities* explains environmental property, common property, resource property rights, intangible properties in law, property as it appears in certain political philosophies, and the historical development of the term. If these arguments are cogent, then *Property in Activities* deserves to take its place alongside *Ownership of Things* as a descriptive and normative tool.

By way of conclusion, allow me to sketch some of the inter-relationships between the two concepts, and then to briefly answer several questions that may have occurred to the attentive reader: *viz*. Is *Ownership* the limit case of *Property*? Can *Property* and *Ownership* be mixed? Is it correct to view *Property* as a property-concept, as distinct from just a species of right? And, normatively speaking, which property-relation is more justified?

Let us begin by comparing and contrasting *Property* and *Ownership.* First the similarities: both involve *in rem* entitlements to resources allowing self-seeking usage. They are each negative liberties – rights to be left alone – and they each persist through time even when the proprietor is not directly engaged with or occupying the resource. When they are operating smoothly, both allow proprietors to focus their energies on their own labours and choices: to play a productive game against nature, as it were, and not a zero-sum game against other people.

Yet each concept offers different answers to the questions: "What is protected? How? Why?" Using a broad brush, *Ownership* protects *choice* and *discretion*, and it accomplishes this protection by vesting open-ended powers of use and disposition, and exclusionary duties over the resource in question. It does so in order to facilitate people's individuality, innovation, will, and/or market functioning. *Property*, on the other hand, protects *action* and *labour*, it accomplishes this protection by vesting rights of access, use, non-worsening and entitlements to fruits, and it does so in order to facilitate people's inclusions in shared activities, protect their attempts to better their material situation through their own productivity, and to fulfil their personality-based needs to engage in long-term, ongoing projects. We can expect *Property*, but not *Ownership*, to make reference to correct or approved uses, to afford no protection to wasteful or antisocial uses, and to protect approved uses even if such protection requires duties stretching well beyond restraints on physical trespass.

With this in mind, let us turn to the aforenoted questions. First, is *Ownership* the *limit case* of *Property*? If we *Property-Protect* enough activities, or one activity allowing vast scope for choice (the activity of "objectifying one's will in the world," say) then do we arrive at *Ownership*? *Perhaps*; though we must keep in mind that *Property-Protection* can extend beyond physical boundaries, so *Property-Protecting* all the activities that might be undertaken on a given resource would afford far greater entitlement than mere *Ownership*. But even if there is some subset of activities whose cumulative *Property-Protection* establishes *Ownership*, they are nevertheless distinct concepts. Individuals, communities and courts can have access to, or be thinking in terms of, one concept but not the other. *Ownership* takes as its object exactly what ordinary folk think it does: a *thing*. *Ownership's* "open-ended use" refers to the type of *de facto*

control held by someone possessing a chattel.[92] With *Property* the object and organising idea is of human action extended in time. The two concepts may in certain cases be extensionally equivalent, but they do not start from the same place.

That said (and this leads us to the second question), I do not want to suggest *Property* and *Ownership* cannot be mixed. For purposes of clarity I have focused upon pure cases of *Property* – where the entitlement can be explained with no recourse to *Ownership*. But many real-world entitlements will position themselves at some point between the two conceptual poles of *Property* and *Ownership.* For example, *Property* may apply to the types of activities an *Owner* of land is additionally protected in performing – those activities that count, for example, as a proprietor's "quiet enjoyment" of her land. For these privileged activities *Property-Protection* stretches out beyond mere constraints on trespass.

The next query concerns whether it is perspicuous to view the entitlement put forward here as "property" – rather than more minimally as a "right". The main reason for doing so is that the entitlement is in fact spoken of, in history, community, law and political philosophy, as property. As such, the onus is on those rejecting the established usage. That onus seems unlikely to be met for two reasons. First, the conceptual similarities between *Property* and *Ownership* noted above are substantial. In particular, holding entitlements persisting over time restraining another's access to or use of some resource is a peculiarly proprietorial entitlement – property is often distinguished from mere rights on precisely such grounds.[93] Nor is the issue here just conceptual; drawing a sharp distinction between naked rights of use and *Property-Protected* activities helps us avoid serious error. For instance, the conflation of open-access regimes with common property regimes popularised by Hardin has proven a substantial impediment to widespread understanding and appreciation of the latter.[94] Distinguishing the latter, and not the former, as property draws a line in a vitally important place. Second, terming the entitlement we have been studying a "right" prevents our language from expressing the conceptual unity of this entitlement. A "right" to hunt may be anything from naked use-rights to positive rights requiring others provide one with the requisites of hunting. If Bundle Theory was unattractive due to its uninformative plasticity, recourse to the term "right" must be a move in exactly the wrong direction.

Finally, which property entitlement is *more justified*? While this is obviously a contentious issue, the answer – if I may be permitted to turn conventional wisdom on its head – is probably one of courses for horses. That is, each way of parcelling up normative space can be appropriate in different cases. The responsiveness of *Ownership* to personal choice makes it apposite, at the very least, for people's homes and chattels. *Ownership* can provide – as *Property* cannot – the freedom to experiment in living. Few of us would want to live in a world where the only uses of a resource were those explicitly approved by judiciary or legislature. In the most personal realms, we are liable to agree with Charles Reich that "Liberty is more than the right to do what the majority wants, or to do what is 'reasonable.' Liberty is the right to defy the majority, and to do what is unreasonable."[95] Additionally, *Ownership's* duties are clear and understandable, and

[92] Most common law property entitlements can be fully analysed into rights of possession or rights to take possession: Bruce Welling, *Property in Things: In the Common Law System* (Gold Coast, Qld.: Scribblers Publishing, 1996) 29-30, 35.

[93] See, e.g., C. B. Macpherson, *Democratic Theory: Essays in Retrieval* (Oxford: Clarendon, 1973) 123-24; Waldron (1988): 181.

[94] Ostrom (1990): 8, 23-24.

[95] Charles A. Reich, "The New Property," in *Property: Mainstream and Critical Positions*, ed. C. B. Macpherson (Toronto: University of Toronto, 1978) 183.

make for streamlined recognition, monitoring and enforceability.[96] Finally, its discretionary powers allow scope for innovation and creativity, and its fungibility increases market efficiency. Yet *Property* has its own virtues. Its precision – vesting only the bare duties necessary to protect the project – make it relevant to areas where others' liberties are particularly important, to projects that span out into the world, to arenas like fisheries where *Ownership* ushers in its own tragedies, and to environments where misuse or waste are especially harmful.[97] Additionally, *Property's* capacity to be social, layered and inclusive allows increased balance and negotiation between individual and community. Finally, its limited powers of discretion render it less effective as a means to exercise sovereignty over others.

In all, *Property* and *Ownership* each have their own merits and demerits. So it worth being aware we have two distinct alternatives.

[96] Rose (1994): 13; Ellickson (1993): 1327-32.

[97] Ostrom and Hess (2007): 19.