



## ACQUIRING THE RIGHT TO GET TO THE LIGHT AT THE END OF THE TUNNEL: RATIONALISING PROPERTY THEORY

*Jonathan T. Ward*<sup>1</sup>

### Abstract

The framework of private property theory has come under increasing scrutiny over recent years. The orthodox bundle theory of ownership and labour principle of first acquisition has been the subject of attack and scepticism. This discussion suggests a new approach to the analysis of property, focus on synthesis rather than contrast. Further, the classic differences between Roman Law and Anglo-American common law, it is argued here, are in fact more apparent than real – their similarities reveal the basis for a universal grammar in property discourse. An examination of the contemporary property theories identifies that it is time to shift focus to a unifying concept and synthesis of canonical concepts.

### Keywords

Jurisprudence, ownership, property rights, *in rem*, *in personam*, Roman law,

### Introduction

The scene for this discussion may best be set by the words of Sir William Blackstone:

There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; ... [yet few] will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with possession ... we think it enough that our title is derived by the grant of the former proprietor ... not caring to reflect that there is no foundation in nature ... why a set of words on parchment should convey the dominion of land'<sup>2</sup>

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<sup>1</sup> Jonathan expects soon to qualify as a solicitor, he is currently working as a senior lawyer in recognised private practice and nearing completion of the Legal Practice Course. In January 2016 he commences a PhD with Plymouth University entitled *Geothermal Technology and the Challenge of Property Rights*. He is the winner of The Gard and Co Solicitors Prize for the Best Law Graduate, 2015 and has been placed on the Dean's List. He is also the winner of the Wolferstans Best Property Law Student Prize. He can be contacted at [jonathan.t.ward@students.plymouth.ac.uk](mailto:jonathan.t.ward@students.plymouth.ac.uk).

<sup>2</sup> Blackstone, W. *Commentaries on the Laws of England: Book 2 The Rights of Things*, (2015 Digital Reprint, Amazon UK).

These questions agitated critics before and after Blackstone and over the centuries a canon of thought emerged; that common and civilian models of property cannot be reconciled. Lines were drawn between the naturalists, the utilitarians and the libertarians. Property Rights have been dubbed bundles of sticks<sup>3</sup> and even subatomic particles.<sup>4</sup>

The orthodox theory that property is a bundle of rights and incidents, such as the right to exclude and the right to income,<sup>5</sup> has recently come under attack from emerging univocal models linking the person and the thing.<sup>6</sup> The academic players are now bundle theorists or anti bundle theorists.

The object of this article is to rationalise this debate; it proposes a new focus, that of synthesis and pluralism. The thesis is that there is a universal grammar behind property discourse. The entrenched distinctions between civilian and common law property systems are more apparent than real and the rationale for this lies in the philosophical justifications for acquisition of property.

This discussion commences with structural examination of rights *in rem* and the distinctions between bundle and univocal theories. Against this background it then challenges the canonical view of the differences between Roman and Anglo-American common law property institutions. Finally, it proposes a pluralist approach to justifications of private property systems.

## **1 On Distinguishing Rights *in Rem* and Rights *in Personam***

These terms are borrowed from Roman Classical law<sup>7</sup> but function differently in that Roman lawyers would not have spoken of rights or *iura* in a way recognisable to common lawyers.<sup>8</sup> Instead interests in a *res* were protected by *actio legio in rem* and personal interests arising from for example a contract or delict, by *actio in personam*. It is within the action that the right lay – ‘*actio autem*’ says Justinian ‘*nihil aliud est,*

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<sup>3</sup> Cardozo, B.N., *The Paradoxes of Legal Science* (1928) p.129.

<sup>4</sup> Lewis, D., *2 Philosophical Papers* (1987), ix.

<sup>5</sup> Honoré, A.M., ‘Ownership’, in Guest, A.G., *Oxford Essays in Jurisprudence* (1961).

<sup>6</sup> Penner, J., *The Idea of Property in Law*, (2003, Oxford, OUP).

<sup>7</sup> Sandars, T.C., *The Institutes of Justinian*, (1853, Digital Reprint Amazon UK) p.48 para.64 (*Hereafter Inst. Just.*).

<sup>8</sup> Buckland, W.W. and MacNair, A.D., *Roman Law and Common Law*, (2008, New York, Cambridge University Press), p.89.

*quam jus persecuendi iudicio quod sibi debetur.*<sup>9</sup> This is conceptually discreet from Anglo – American common law where a right must exist to ground an action.<sup>10</sup>

In common law, the distinction is analogous to that of real rights and personal rights; the former availing against all the world as regards a thing and the latter against a specific person or persons. They may be regarded respectively as proprietary rights and as obligations.<sup>11</sup>

Hohfeld termed rights *in personam* as paucital rights; unique rights residing in one person and availing against one or a small determinate number of persons. He regarded rights *in rem* as multital rights, a class of ‘fundamentally similar yet separate’ rights held by an individual but availing against a large and ‘indefinite class’ of persons.<sup>12</sup> In contrast to Austin’s suggestion<sup>13</sup> that one right exists binding people universally or generally, Hohfeld argued there are many individual rights binding a large number of people but individually as to each party. This reduces a multital right to a bundle of rights *in personam*, the distinguishing feature between the two being that a multital right is a paucital right with many companion paucital rights. Yet Hohfeld offers no explanation for this distinction. This may be called the quantitative analysis of rights *in rem*. Campbell identifies a corollary of this analysis; that rights *in rem* are non-substitutionally accretive, so by operation of law the right will hold against other persons, irrespective of whether it has ceased to hold against another.<sup>14</sup> Penner, albeit objecting to this analysis, suggests that where A transfers Blackacre to B, all the duties owed by all the world to A necessarily change to be owed to B.<sup>15</sup> Campbell’s proposition appears sound if the quantitative analysis is accepted but, it does not resolve the flaw identified. Qualitative analysis is required. Rights *in rem* are primarily negative or prohibitory in nature (‘primarily’ is an important qualification, the two are not definitively bifurcated in this way, consider contractual rights which impose negative obligations) where rights *in personam* impose positive

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<sup>9</sup> *Inst. Just.* p.526 ‘An action is nothing else than the right of suing before a judge for that which is due to us’.

<sup>10</sup> See Grantham, R.B., and Rickett, C.E.F., ‘Property Rights as a Legally Significant Event’, (2003) 62 *The Cambridge Law Journal* 03, pp.717-749.

<sup>11</sup> Grantham and Rickett, *Property*, p.728.

<sup>12</sup> Hohfeld W.N., *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, (1964, Connecticut, Greenwood Press) p.72.

<sup>13</sup> Austin, J., *Lectures on Jurisprudence or the Philosophy of Positive Law*, (1869, reprint 2012 London, Forgotten Books) p.383.

<sup>14</sup> Campbell, K., ‘On The General Nature of Property Rights’, (1992) *Kings College Law Journal* 3, p.88.

<sup>15</sup> Penner, J., *The Idea of Property in Law*, (2003, Oxford, OUP) p.23.

obligations.<sup>16</sup> In English land law, two examples spring to mind *viz* generally positive covenants cannot bind the land and drainage easements cannot impose positive obligations on the servient owner to maintain the drain, either obligation would necessarily be *in personam*.<sup>17</sup> The distinction is between substance and form. Rights to light or rights to support are seemingly positive rights *in rem*. Yet they are rights of non-interference. There is no positive obligation on the servient tenement to provide light or support, simply a requirement not to interfere therewith.

Caution is needed - there are exceptions, for example a right to have a fence maintained.<sup>18</sup> Gale dislikes the treatment of this as an easement but it is accepted by the Courts and may be obtained by grant, statute or prescription.<sup>19</sup>

Whilst easements generally cannot impose positive obligations, such as to repair the drain above, there can be a resulting obligation; if X has a right to lay pipes over Blackacre, he must keep them watertight, to allow water or otherwise to escape is trespass.<sup>20</sup> This obligation is arguably grounded in branches of law outside the law of property<sup>21</sup> (although the individuation of property law might be an exercise in conceptual simplification) but betrays a symmetry, or at least a rational and dialectic relationship, between rights and duties. It erodes the idea that rights *in rem* are distinguished by their exclusionary character. The exceptions do no violence to the nature of the rule, in fact they may be part of it.<sup>22</sup> Furthermore, the obligation operates whether or not pipes are laid. The duty not to trespass is correlative, if anything, with the right *in rem* of the owner of Blackacre. The laying of pipes might present an opportunity for trespass but the obligation not to is analytically prior to the opportunity.

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<sup>16</sup> Honoré, A., M., 'Rights of Exclusion and Immunities Against Divesting', (1960) *Tulane Law Review* 34, 453, p.460 suggests a restriction on trade covenant

<sup>17</sup> *Tulk v Moxhay* (1848) 41 ER 1143; *Duke of Westminster v Guild* (1985) QB 688, a useful discussion of which may be found in Birks, P., 'Five Keys to Land Law' in Bright, S., and Dewar, J., *Land Law Themes and Perspectives* (2008, Oxford, OUP) at p.470.

<sup>18</sup> See *Jones v Price* [1965] 2 QB 618; 3 WLR 296; 2 ALL ER 625 CA, *Crow v Wood* [1971] 1 QB 77; [1970] 3 WLR 516.

<sup>19</sup> Gaunt, J., and Morgan, P., *Gale On Easements Nineteenth Edition*, (2012, 19<sup>th</sup> edition, London, Sweet and Maxwell) p.46; S.62 Law of Property Act 1925, see *Egerton v Harding* [1975] QB 62; [1974] 3 WLR 437; 3 ALL ER 689; *Jones v Price* [1965] 2 QB 618; 3 WLR 296; 2 ALL ER 625 CA.

<sup>20</sup> Gale, *Easements*, p.55 quoting Sir John Romilly M R in *Ingram v Morecraft* [1863] 33 Beav 49 at 51,52.

<sup>21</sup> Lawson, F.H., and Rudden, B., *The Law of Property*, (2010, Oxford, Clarendon) pp.90-91 and p.63; see Penner, *Idea*, at p.32 et seq on the individuation of property law.

<sup>22</sup> Schauer, F., 'Exceptions', 58 *Chicago LR* (1991) 871 at 893.

The argument, even when expressed subtly differently (and persuasively), that rights *in rem* are protected by 'claims to abstentions' or 'a general prohibition of interference' in contrast to positive performance obligations, is not infallible- all prohibitions (negative obligations) could be expressed positively. A duty to forbear requires a positive decision not to act when the opportunity presents. Eleftheriadis argues that a duty to forbear and a duty to act are both a species of obligation and so are of the same deontic character, in that the duty to forbear from x is the same as the positive duty to do *not-x*. This is incorrect. Where x describes an action bringing about a change and entails the duty to *not-x* being regarded as a duty to do a not-change, then the duty must be that the duty-bearer should actively prevent a change in a state of affairs. Correctly expressed, the duty is to *not-do x*.<sup>23</sup>

If X transfers Blackacre to Y, prior to which transfer C was present on Blackacre by way of licence, C was not interfering with any right *in rem*. At the point of transfer, C has a duty *in rem* not to interfere with Y's right *in rem*. The position changes, C involuntarily becomes a trespasser. His normative action, or obligation, is now positive, he must remove himself from Blackacre. This is significant in adverse possession and was the issue in *JA Pye (Oxford) Ltd v Graham*.<sup>24</sup> Graham's occupation was originally lawful, he occupied by way of licence *in personam*. His licence came to an end but his occupation continued whereupon he became a trespassor *de jure* and *de facto*. Was the higher duty on Graham to vacate the land or on Pye to take action to remove him? By remaining on the land, Graham's occupation matured into a species of right. Until maturity it could be said he was the subject of a duty, the significance is the character of the duty.

A better view is to identify the independence inherent in a right *in rem* as distinct from a right *in personam*. The former normatively survives alienation, the latter, without more, does not. Honoré regards this 'immunity from divesting' as a defining characteristic of the distinction between rights *in rem* and *in personam*.<sup>25</sup>

The right *in rem* might survive the alienation of the *res*, but it cannot survive its destruction.<sup>26</sup> The reverse is true for a right *in personam*; *viz* if Cicero grants a

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<sup>23</sup> Eleftheriadis, P., 'Analysis of Property Rights', (1996) *Oxford Journal of Legal Studies* 16(1), 32 p.48; Honoré, *Exclusion*, p.458, at p.463 suggests that if non-interference amounts to co-operation then this is a positive act.

<sup>24</sup> *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30.

<sup>25</sup> Honoré *Exclusion*, p.465.

<sup>26</sup> Birks 1985 49-50, referred to in Penner, *Idea*, p.31.

licence of a seat (a right *in personam*) in his theatre to Chrysippus and the seat is destroyed by Proudhon (in protest that this stands for all ancient philosophy has to say of property),<sup>27</sup> it is reasonable for Chrysippus to regard Cicero's duty undischarged.<sup>28</sup> However, unless Proudhon had merely stolen the seat, it is absurd for Cicero to claim a right *in rem* against Proudhon, for there is no *res* in which to ground the right, such a claim must be *in personam*, therefore the right *in rem* cannot survive the destruction of the *res*.<sup>29</sup> This stands for two propositions; (1) a distinguishing feature of rights *in rem* and *in personam* is exigibility. As to the former it is located in the *res* and the latter in a defined person;<sup>30</sup> (2) a direct jural relationship between persons and things.

Three viable lines of enquiry arise; (1) the role and structural *locus* of the protective claim; (2) the correlativity of the duty; (3) closer analysis of exigibility.

Honoré suggests the distinction between the claims protecting rights *in rem* and *in personam* is that the correlative duty in the former arises out of a general title, being a subject of a legal system, where any other title, as in the latter, is particular and need not apply to all subjects.<sup>31</sup> This restates the assertion that rights *in rem* bind indefinite numbers and *in personam* specific numbers of persons- it is a species of Hohfeldian bilateral claim/duty argument. However, it suggests that the duty *in rem* is not directly correlative with the right *in rem*.<sup>32</sup> Penner's analysis, whilst departing from orthodoxy, is alluring; to owe separate individual duties to individual owners, it must be possible to identify the owner and the extent of their property. It is neither possible nor necessary, therefore, there is one single duty held by individuals not to interfere with the property of others, generally.<sup>33</sup>

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<sup>27</sup> Proudhon, P.J., *What is Property? An inquiry into the principle of right and Government*, (Amazon UK reproduction, undated) xlii.

<sup>28</sup> Birks, *Five Keys*.

<sup>29</sup> Penner, *Idea*, p31. This vignette is an abridged version of Birks' in *ib id* whose protagonist was Daisy the cow.

<sup>30</sup> Birks, *Five Keys* p.473.

<sup>31</sup> Honoré, *Exclusion*, p.456.

<sup>32</sup> Honoré does not use the term Duty in Rem but Penner does (*Idea* p.26) and Eleftheriadis does so too, *Analysis*, p.51.

<sup>33</sup> Penner, *Idea*, p.27.

An asymmetry is clear between rights and duties *in rem*. This non-Hohfeldian conclusion can be made out. If the duty and right *in rem* are not directly correlative, then something is required to mediate between the two. This surely, is the *res* itself.<sup>34</sup>

It is not the *res* but the right *in rem* which grounds action. Yet how can it be said to be breached if there is no correlative duty? Is the right *in rem* inert? It is submitted that it is not. It should be regarded as a primary or institutional right, protected by a secondary or remedial right *in personam* to institute a claim against a specific trespasser.<sup>35</sup> This right is in addition to rather than instead of the supervening right *in rem*; Penner's objection that proximity should not dictate the nature of the right is met.<sup>36</sup> This resembles the *vindicatio* action in Roman law. The character of the right *in rem* lying behind a claim is significant in terms of equitable remedy. The proprietary character of the right attracts proprietary remedy. Without this distinction, breaches might attract damages only; more a species of booby prize than a remedy.<sup>37</sup> The corollary is that the right *in rem* is of higher normative order,<sup>38</sup> or, that it is the core right, where the remedial *in personam* right is derivative.<sup>39</sup>

The issue whether a right *in rem* is a right to a thing or a relation of right and duty between subjects (agents) persists but is readily disposed of. Possession of property is a close, factual, physical nexus or relationship between agent and property. It may even be legally significant. It is not, without more, a legal relationship, which requires the normative force of an abstract right. This right is meaningless unless it regulates relations between persons. These relations are always *res* centric. The role of the *res* distinguishes rights *in rem* and *in personam*. The argument about exigibility appears sound and these are rights between persons in respect of things.<sup>40</sup>

Comparison between rights and duty based theories illuminates the distinction between *in rem* and *in personam*.<sup>41</sup> The relationship between rights and duties may be justificatory rather than one of logical equivalence, resonant of the Kantian view

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<sup>34</sup> See Penner, *Idea*, Harris, J. M., *Property and Justice*, (2003, Oxford, OUP), Birks, *Five Keys*.

<sup>35</sup> Grantham and Rickett, *Property Rights* suggest the order of the court is remedial.

<sup>36</sup> Penner, *Idea*, p.31.

<sup>37</sup> That is not to say that rights *in personam* cannot admit proprietary remedy.

<sup>38</sup> See von Wright, G.H., *Norm and Action: A Logical Enquiry*, (1963, Oxford, Basil Blackwell) and discussion herein.

<sup>39</sup> Raz, J., 'On the Nature of Rights', (1984) *Mind* Vol. XCIII, 194-214 p.198.

<sup>40</sup> Munzer, S., R., *A Theory of Property*, (1992, Cambridge, Cambridge University Press) so called sophisticated conception at p.17.

<sup>41</sup> Waldron, *Private Property*, pp.62-73.

that people are naturally inclined to submit to legal discipline; this shapes the duty based paradigm.<sup>42</sup> The point is that a right is derivative from a deeper, or higher, duty. Rawls' analysis of principles of natural duty and obligation supports this – he identifies a natural duty to support just institutions.<sup>43</sup> This presupposes that property is both an institution and a just one; but if true, the view supports the conceptual analysis proffered earlier, that rights *in rem* are a (species of) higher order of norm; the duty exists howsoever property and ownership is organised in any momentary legal system. Property rights are a response to a natural duty.

Dworkin makes a similar distinction adding a goal based criteria applied to property rights, suggesting the goal is the fundamental component in analysis, that being of socially efficient land use.<sup>44</sup> Dworkin does not adequately apply his own analysis; he correctly identifies that where standards of behaviour are the primary concern, a duty based argument is appropriate but he should apply this to property rights broadly, the socially efficient use of land is a fractional component of the property institutions.<sup>45</sup> If the goal is of such wide application, it contributes to a more fundamental duty and is consistent with a duty based argument, if this is so then the right is derived from the duty.

Raz insists that rights are grounds for duties which damages this thesis. In applying his analysis to promises and agreements, his argument is unassailable.<sup>46</sup> This attracts analysis of rights based theory, which prescribes an application of a code of conduct to individual interests and persons, should they seek to enjoy its protection.<sup>47</sup> This requires consent, in the absence of which a clear objection manifests that such a theory is vulnerable to give rise to competing rights.<sup>48</sup> Nozick posits that in such circumstances the duty is to act (or presumably forbear) so as to not violate another's rights. For no matter how much an agent may prevent the interference of the right by others, he may not interfere with it himself.<sup>49</sup> This does not answer the objection and in fact supports a duty based theory. A better view is that right based theory lends

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<sup>42</sup> Kant, I (Transl. Beck, L.,) *Critique of Practical Reason*, (1975, Indiana, Bobbs Merrill) pp.81-86.

<sup>43</sup> Rawls, J., *Theory of Justice*, (1999, Massachusetts, Harvard University Press) p.98.

<sup>44</sup> Dworkin, R., *Taking Rights Seriously* (1977, London, Duckworth) p.171.

<sup>45</sup> This view is proffered by the author. It is interesting that Waldron, *Private Property* (at pp.71 and 73) does not notice, or does not mind, that Dworkin in fact expressly excludes property rights from his duty based theory.

<sup>46</sup> Raz, *Nature*, p.199.

<sup>47</sup> Dworkin, *Rights* p.176.

<sup>48</sup> Waldron, *Private Property*, p.76.

<sup>49</sup> Nozick, R., *Anarchy State and Utopia*,(1992, Oxford, Blackwell) p.29.



itself to individual self-interest. For example, duties flowing from a contract are *per se* derivative of the rights created consensually by the contract. The analytical starting point is the entitlement of the beneficiary, the correlative duty is instrumental and specific.<sup>50</sup> This appears consistent with Raz's analysis that a duty becomes specific when it becomes operative. In the case of rights *in rem*, the duty is always and generally operative, does not require an event and is not a species of response. That is not to say that the rights which are derived are not an event or the rights which protect them are not a response, it is to say that the focus is the duty (*viz* the duty is analytically and philosophically prior) and therefore a duty-based analysis is appropriate.

Rights *in personam* attract a rights-based theory analysis. The duties are grounded by the rights. The duties are not operative until an occasion arises for their performance and such occasion cannot arise until the right presents.

Waldron posits a benefit-theory. To establish a primary right it must be the case that a rule exists for the purpose of securing a benefit which forms the character of the right. It grounds the duty but does not impose it.<sup>51</sup> This reinforces the view that rights and duties need not be correlative.

Philosophical, conceptual and logical distinctions exist rights *in rem* and *in personam*, which derive from myriad characteristics; yet the common denominator is the idea that rights *in rem* are a species of higher norm. The distinction is significant, not only structurally and in terms of an understanding of the nature of property and property rights but because in pointing to a natural or higher order of right, it commands an analysis of the justifications of property and the acquisition thereof as well as whether property is a singular right *in rem* or in fact a bundle or series of rights, powers to exclude trespassers and privileges.

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<sup>50</sup> Dworkin, *Rights*, at p.172 suggests the code of conduct is instrumental, from which it could be said the duty created by the code of conduct and engaged by the contract, is instrumental.

<sup>51</sup> Waldron, *Private Property*, p.82.

## 2 On the Distinction Between Roman Law and Anglo-American Common Law and Property as a Bundle of Rights – or dominium and ownership

For all its naïveté, the popular conception that something belongs to someone introduces the concept of private property, from which the idea of ownership is derived.<sup>52</sup> This may be seen in Roman law; '*private sunt*' says Gaius '*quae singulorum sunt*.'<sup>53</sup> Notably, '*singulorum*' is in the genitive or possessive case. The literal translation is 'of individuals'. This suggests unequivocal connection between person and thing the sense of which is 'belonging to'.<sup>54</sup> Roman law recognised the doctrine of *dominium* which, whilst not identical to ownership has been described as the 'ultimate right to a thing, the right which had no right behind it' yet it might have been a 'mere *nudum ius* with no practical content.'<sup>55</sup> Gaius proscribed '*nam aut dominus quisque est aut dominus non intellegitur*'<sup>56</sup> - a man is either an owner or not. *Dominium* was absolute, inviolable and indivisible.<sup>57</sup>

This colours *dominium* as an abstract concept devoid of the relativity of title or doctrine of estates pervasive in Anglo-American common law, yet this is a distinction of form rather than substance.<sup>58</sup> *Dominium* was neither unrestricted nor unqualified. *Dominium* could not be enjoyed unlawfully, so as to harm or interfere with others' *dominium*.<sup>59</sup> There were restrictions on development.<sup>60</sup> *Dominium* was vulnerable to *usucapio*, the *dominium bonitarium* could claim against the *dominus* and *longi temporis praescriptio* became a positive mode of acquisition.<sup>61</sup> This erodes inviolability.

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<sup>52</sup> For an interesting discussion on this see Waldron, *Private Property*. p.39.

<sup>53</sup> Muirhead, J., et al, *The Institutes of Gaius and Rules of Ulpian* (1880, Digital Reprint, Amazon) (hereafter *Inst. Gai.*) at p.77 'Those are private that belong to individuals'.

<sup>54</sup> The, rather rudimentary, grammar is proffered by the author – no doubt an elementary text such as Kennedy's Latin Primer would develop this. The literal translation is also proffered by the author. Professor Muirhead's more elegant translation is not dissimilar but it is necessary *arguendo* to reduce the statement thus.

<sup>55</sup> Buckland, W.W., *The Main Institutions of Roman Private Law*, (1931, Cambridge, Cambridge University Press) p.93 (hereafter *Buckland Inst.*); Buckland, W.W., *A Textbook of Roman Law from Augustus to Justinian*, (1921, Cambridge, Cambridge University Press) p.189 (hereafter *Buckland Textbook*)

<sup>56</sup> *Inst. Gai.* p.86.

<sup>57</sup> Nicholas, B., *An Introduction to Roman Law*, (1976, Oxford, Clarendon) pp.99-154.

<sup>58</sup> In particular the doctrine of estates. This is not rehearsed here but magisterial treatment may be found as to the history in Holdsworth, W., *A History of English Law*, (1966, London, Methuen)

<sup>59</sup> Nicholas, *Introduction* p.154.

<sup>60</sup> Getzler, J., 'Roman Ideas of Land Ownership', in Bright, S., and Dewar, J., *Land Law Themes and Perspectives* (2008) p.85.

<sup>61</sup> *Inst. Just.* 2.6 at p.232. Loosely, the *dominium bonitarium* was he who was in the process of acquiring *dominium*.

The indivisibility of *dominium* is questionable. An owner was at liberty to grant servitudes (for example rights of way) over his property *pactionibus stipulatoibus*.<sup>62</sup> Such right was then protected by *actio publiciana*; an action at law where the claimant was able to claim as if he were *dominus*, and thereby obtain *vindicatio*, a vindication of proprietary rights which is comparable to proprietary remedy. This is clear fractionation of ownership.

Additionally, '*ususfructus*', says Justinian, '*a proprietate separationem recipit*.'<sup>63</sup> This unequivocally states that the usufruct may be separated from the property. It is difficult to approximate the usufruct with a common law concept but there are characteristics which it is instructive to compare. Indeed, it has been said that as the doctrine of estates characterises the common law, so the usufruct characterises the Civil law.<sup>64</sup> The usufruct is the right of using a thing belonging to another and is itself capable of fractionation, for example the bare use or right to inhabit a house may be granted out of it.<sup>65</sup> It is said that a usufruct was inalienable<sup>66</sup> but this is questionable – '*Nec ulli*' says Justinian '*alii jus quod habet, aut locare aut vendere aut gratis concedere potest; eum is qui usumfructum habet, potest haec omnia facere*'.<sup>67</sup> The language is significant, the literal translation refers to the usufruct 'having the power to ... let, sell or gift.' Notably, the usufruct is limited in time.

The Institutes refer to a usufruct granted to a legatee where, for example, the heir took only bare ownership subject to the usufruct of the legatee.<sup>68</sup> Aside from the divisibility of ownership, this resembles life interests in English law. Alienability is freer in English law, but it is clear that a usufruct is divisible. Furthermore, Justinian prescribes that '*placuit certis modis extingui usumfructum et ad proprietatem reverti*' viz there should be a means by which the usufruct may be extinguished and revert back to the property.<sup>69</sup> This resembles the concept of reversion or residuary in English law.

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<sup>62</sup> *Inst Just.* 2.3 at p.212. 'By agreement and stipulation', this is borrowed from Gaius.

<sup>63</sup> *Inst Just* 2.4 p.217 'The usufruct is detached from the property'.

<sup>64</sup> Nicholas, *Introduction* p.148.

<sup>65</sup> *Inst Just.* 2.5 at p.223.

<sup>66</sup> Buckland, *Textbook*, p.269.

<sup>67</sup> '[he who has the naked use of lands] cannot let, or sell, or give gratuitously his right to another, while he who has the usufruct has the power to do all of this'. 2.5 at p.223. This is the author's translation and is more literal than that offered by the translator of the text. At the expense of some elegance, the language used by Justinian is revealing, potestas, power, is a strong word in Latin.

<sup>68</sup> '*nam heres nudam habet proprietatem, legatarius usumfructum*' *Inst Just* 2.4 p.217.

<sup>69</sup> *Inst Just* p.217 at 2.4.

*Emphyteusis*, by the time of Justinian, was the grant of land to the holding *emphyteuta* forever, or long periods, in exchange for a rent. The holding was protected by an *actio in rem*. This is clearly analogous to a long lease (save as to perpetuity but consider the reality of a 999 year term) in English law<sup>70</sup> and is arguably a species of ownership. It challenges the concept of *dominium* reducing it to a *nudum ius*.<sup>71</sup>

Roman law, superficially, does not recognise the relativity of title characteristic of English law; a Roman ownership right or *ius quiritium dominium*, is the best right, prevailing against all rival claims. English law considers only whether the right of the claimant is relatively better than that of the defendant. Historically, in English law, a party needed to show only that he had an immediate right to possession, better than that of his opponent. Prior possession was probative. The *probatio diabolica* in Roman law, was the requirement of proof of absolute title; a requirement to trace an original mode of acquisition.<sup>72</sup> Of course, *usucapion* rescued claimants from such undertakings. The prominent feature of *usucapion* is possession for a requisite period, and so the orthodox Anglo – Roman conceptual distinction is blurred. Furthermore, the possessory interdicts existed to assist the *bona fide* possessor whose claim was good against all except the true owner – a clear exception to notions of indivisibility and comparable with common law relativity of title.

There are undoubtedly differences between Roman Law and English common law, particularly that the latter has no concept of *dominium* and the former, whose *dominium* is blind to the *tertium quid* of the estate or (*pace usufructus*) divisibility over planes of time, has little which is doctrinally comparable to the estate.<sup>73</sup> Yet with the advent of compulsory title registration under Land Registration Act 2002, the absolute title which the Romans so jealously guarded and which common law institutionally resisted is now enshrined in common law. Ownership of land is no more and no less than an entry on a register of titles.<sup>74</sup> Possession is no longer the root of title and as

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<sup>70</sup> Nicholas, *Introduction*, pp.148-149, Buckland *Textbook*, pp.274-275.

<sup>71</sup> Getzler, *Roman Ideas*, p.85 and Buckland *Textbook*, p.189.

<sup>72</sup> Nicholas, *Introduction* p.155.

<sup>73</sup> Getzler, *Roman Ideas* and Buckland, *Institutions* p100, this is of course Maitland's famous analysis of the estate.

<sup>74</sup> Gray, S., and Gray, K., 'The Rhetoric of Realty', in Getzler, J., *Rationalizing Property, Equity and Trusts. Essays in Honour of Edward Burn*' (2013, Oxford, OUP).

for relativity, the register is conclusive. The true owner, unless he is the registered proprietor, except in limited circumstances, finds his interest at risk.<sup>75</sup>

This leads to the conclusion that the role of *dominium* became at least conceptual and more probably political rather than of practical application. The absolutism of Roman ownership was an exercise in instituting rational, clearly defined property structures facilitating trade in a liberal climate. The late 19<sup>th</sup> century heralded a bourgeois reform of the German legal system, a demand for equality before the law and legal systematic utopia providing certainty and rational ordering of land and ownership, in which absolute ownership was regarded as progressive and affording protection from the chains of feudalism.<sup>76</sup> However this seems intended to be politically neutral rather than advancing capitalism. The continental lawyers turned to the rational prescriptions of the Roman law and consequentially *dominium* received exaggerated status as a notion of supreme power over property constrained only by the state who sought to uphold institutions of private property.<sup>77</sup> Yet the entrenched common law property regime, which survived an industrial revolution, far from being undeveloped, with its sophisticated concepts of estates, relativity and division of proprietary rights, evolved to better respond to social, political and economic exigencies.<sup>78</sup>

Structurally, the Roman law of *dominium* is an aggregate of remedies. This led to the intellectualisation of *dominium* in the post classical era as capable of reduction to the person with a *titulus* recognised by the state and the *ius utendi, fruendi, abutendi viz.* the right to the use, the fruits and the right to abuse (in effect to consume and, significantly, to alienate). Justinian considered the right to use the same as the right to inhabit (*'de usu et habitatione'*) which is consonant with possession.<sup>79</sup> The divisibility of *dominium* reinforces this, these rights may be alienated by their owner but the residual interest is retained by the *dominus*.

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<sup>75</sup> Schedule 4 and S58 Land Registration Act 2002 wherein reference to the registered proprietor is vaguely couched, yet reference is made later to the powers of the 'Owner'.

<sup>76</sup> See Getzler, J., 'Theories of Property and Economic Development', (1996) 26 *The Journal of Interdisciplinary History* 4, 639 at p648, John *op cit*.

<sup>77</sup> Birks, *Five Keys*.

<sup>78</sup> John, M., 'The Peculiarities of the German State: Bourgeois Law and Society in the Imperial Era', (1988) *Past and Present* 119, 105-131.

<sup>79</sup> *Inst. Just.* 2.5, p.222.

Medieval English law attempted to reconcile *dominium* with the English doctrine of estate. Bracton, who drew greatly on the Roman law,<sup>80</sup> recognised the divisibility of *dominium*; ‘*ut si quis*’ he says, ‘*in fundo dominium habuerit merum ius et proprietatem, feodum et liberum tenementum, et usumfructum*’ – ‘he who has dominium in an estate the mere right and the property, the fee and the free tenement of the usufruct.’<sup>81</sup> The word ‘*merum*’ is interesting. Whilst the direct translation is ‘mere’ the meaning has changed since the 13<sup>th</sup> century. The word ‘pure’ is closer to the historic meaning of ‘mere’.<sup>82</sup> This suggests property or ownership exists as a higher norm. However, the word ‘*merum*’ is synonymous with ‘bare’, as the *nudum ius* considered earlier and nothing is lost in literal translation.

What then, of ownership in English common law. The orthodox starting point is Honoré’s eleven incidents of ownership. Not all incidents are advantageous to the right holder or owner.<sup>83</sup> They are the rights (1) to possess; (2) to use; (3) to manage; (4) to the income of the thing; (5) to the capital; (6) to security (or immunity from expropriation); (7) the rights or incidents of transmissibility; (8) absence of term; (9) the prohibition of harmful use; (10) liability to execution; (11) the incident of residuary.<sup>84</sup>

The right to possess as an incident of ownership seems uncontroversial. Analysis of possession is not offered here but Honoré suggests this means exclusive control and a claim that others without permission should not interfere. The synthesis between the incidents is apparent, as an example those of residuary and income; *viz* if a freeholder has granted a 999 year lease out of his fee simple, his right to physical possession and exclusive control is severely limited. Yet he retains the powers and rights (and obligations) of a landlord, he is entitled to receive the rent, he is entitled to the reversion and he has the right to possess and exclusively control his freehold, (subject to the lease). The lease could only be granted in exercise of his rights and with his consent, it did not exist prior to the exercise of the rights of the owner.<sup>85</sup> Such freeholds are traded for value. It is rational to recognise the right to possess even

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<sup>80</sup> Guterbock, K.E., *Bracton and His Relation to the Roman Law*, (1866, Philadelphia, Elibron) p.12.

<sup>81</sup> Thorne, S., *Bracton On the Laws and Customs of England* (Vol. II) (1977, Massachusetts, Harvard University Press) p.127.

<sup>82</sup> McSweeney, T. J., ‘Property Before Property: Romanizing the English Law of Land’, (2012) *Buffalo Law Review* 60, 1140 p.1188.

<sup>83</sup> Munzer, *Theory*, p.24.

<sup>84</sup> Honoré, A.M., ‘Ownership’, in Guest, A.G., *Oxford Essays in Jurisprudence* (1961) p.112.

<sup>85</sup> Penner, J.E., ‘The Bundle of Rights Picture of Property’, (1996) *43 UCLA Law Review* 711 p.757.

when the *res* is merely a residuary. It is a further incident of ownership that there is a correlative right to recover possession from a wrongful dispossessor<sup>86</sup> – the point is that present physical control may be probative but is not conclusive. The availability of these remedies demonstrates recognition of ownership in English law.

Immediate right to possession does not necessarily entail a right to recover or protect it. Where X loans Blackacre to Y for a week's holiday, Y (who possesses under licence) has a right to a species of possession. He has no protective claim, save for damages. The absence of trespassory rules excludes proprietary protection. This is uncontroversial amongst jurists, save the distinction drawn by Penner that the right to possession may be subsumed under the right to exclusive use; this is the core of his 'anti-bundle' definition of property.<sup>87</sup> Harris posits an ownership spectrum, ranging from 'mere property' to 'full blooded ownership' on which possession lies at the lower end.<sup>88</sup> This has merit, protected possession may not entail other incidents of ownership but enjoy protection nonetheless. Further, adverse possession is capable of maturing into 'full blooded ownership'. The significance of possession justifies abstracting notions of the right to possession from Penner's supervening 'exclusive use' criteria.

Honoré suggests coalescence between the right to use, manage and to income. This is rational - generation of income and management of property is clear use of it. As in Roman law, this is not an unqualified right unrestricted by state regulation. Without state protection, the concept of ownership is meaningless. With state protection freedom to use is curtailed. Were Y not forbidden to use his bulldozer to trespass on and raze Blackacre, X (as its owner) could not be said to have any meaningful property in Blackacre. The incidental prohibition from harmful use is thus made out. This suggests that the right to the use is better described as a right to the non-interference of permitted enjoyment. This represents the question of whether the right or the duty is analytically prior. It may be objected that for a duty to be analytically prior to the right, there is necessarily an assumption that all property is owned. This need not be the case. Property is distinct from the right; property may well exist prior to right(s) of ownership. If a property right is conceived of as a legally significant event, *viz* it has been acquired through some just and recognised means, then the duty is capable of being engaged. The right does not entail the duty (which may be

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<sup>86</sup> Honoré, *Ownership*. p.115.

<sup>87</sup> Penner, *Bundle* p.749.

<sup>88</sup> Harris, J. M., *Property and Justice*, (2003), pp.28-29.

said to exist *in rem*), it grounds the claim to benefit from the duty in the form of a new *in personam* claim, leaving the higher right and duty intact. Otherwise, there would be a presumption in favour of a dispossessor that all property is vulnerable to acquisition by another unless the owner, or person with a better claim, stands continuously prepared to assert his rights. This is not unrecognisable (*pace* relativity of title) but for the subtle difference that the assimilation of such a presumption would have a probative effect which would destroy the notion of protected property institutions.

The right to manage is abstracted from the supervening right to use for the following analysis. The owner of property may grant both proprietary and non-proprietary interests, for example leases or licences. This introduces the question of bundles of rights. If a lease or licence is created by an owner, (his power to do so is an incident of ownership, little turns here on whether this incident is abstracted from others) then the question is has a right been created *de novo* (the anti-bundle view) or has the owner transferred one of his existing rights to another? The answer lies in a synthesis between the two theoretical solutions; by granting a right the owner has created a new bundle of rights, the owner of the new right (the transferee of part of the old) is subject to the (new bundle of) incidents of ownership so far as they attach to the right he has acquired. To this end, the right is *de novo*. This is incomplete, the transferor can only have effected this by the transfer of one of his existing rights. All the time the *res* is not destroyed, the use-right transferred is not destroyed but no longer lies with the transferor. If the transfer is a legally significant event which creates a new right *in rem* which (in deference to Hohfeldian principles) creates a new aggregate of rights and remedies of which one is the transferred right, then the two arguments coalesce. This issue manifested in Roman law, in the question whether or not *dominium* was conceptually transferred and a new *dominium* created as a result of the transfer of an existing right, or if the *dominium* itself was transferred. Classical and Justinianic jurists spoke of both *translatio rei* and *proprietary transferre*, the latter of which suggests transfer of the right.<sup>89</sup> The significance of this is seen in adverse possession. No new easements can arise on creation of a possessory title. Title acquired by adverse possession may be considered a statutory title but, it is *de novo*, not a statutory conveyance; there is no disposition and no easement can arise by implication or operation of law. This suggests that there is, in consensual dispositions, transfer of an existing right. Penner objects that the corollary is there are sufficient rights in any bundle of ownership that everyone may

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<sup>89</sup> Buckland, *Institutions*, p.95 referring to *Inst. Just. Modes of Acquisition*.



be licenced to do everything by an owner; but, unless the licence was entirely revocable this would amount to abandonment. If Penner's argument is considered to its logical conclusion, there is only one right, that of ownership. An owner may do all or nothing with his property. Penner says 'anything or nothing' but this is not what his argument permits.<sup>90</sup>

The right to income is largely self-explanatory other than to observe that income may sometimes take the form of a claim *in rem* (the fruits and certain profits) and sometimes *in personam*, particularly when in the form of money. It is worth abstracting this from the right to use, because it is comparable to the *ius fructum* in Roman law.

The right to the capital in a *res* is important in economical terms. It permits disposition for consideration such as sale, legacy, gratuitous transfer or mortgage. These powers are central to a liberal construction of ownership and are a core value in a free market economy. Conceptually, however, ownership does not entail the power of disposition, for example in estates 'owned' by the National Trust the core properties are inalienable. Penner incorporates this in the right to exclusive use. His objection is that Honoré reduces the right to distinctions that are drawn between different uses.<sup>91</sup> This is specious and unsatisfactory; such distinctions may be made in respect of state regulations to control harmful uses or even to assign regulations and behaviour to particular branches of the law. Honoré examines a normative and doctrinal distinction identifying a key characteristic in ownership, resembling *ius abusus* in Roman law.

Liability to execution should be considered alongside the right to the capital. Without this incident, the growth of credit would be impeded and ownership capable of being deployed as a means of defrauding creditors.<sup>92</sup> It is difficult to reconcile this liability with the concept that there should be an advantage to the right-holder connected to the obligation.<sup>93</sup> However, the capital value becomes economically sterilised if the right holder cannot expose it to such risks. Furthermore, where it is liable to execution to recover unsecured debts, then this surely is a manifestation of the entitlement to the capital. Otherwise, a diligent debtor seeking to discharge his

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<sup>90</sup> Penner, *Bundles* p.758.

<sup>91</sup> Penner, *Idea* p.118.

<sup>92</sup> Honoré, *Ownership* p.123.

<sup>93</sup> Munzer, *Theory* p.24.

liabilities could not enjoy the benefit of liquidating assets to meet them – a clear disadvantage. Between liability to execution and the right to the capital lies the incident of transmissibility. The fee simple becoming heritable marked a shift towards modern notions of private ownership in English law and eroded the distinction between civil and common law conceptions of property.

The intractable question is, which of these incidents are necessary and sufficient to establish ownership. What Honoré refers to as residuary character might establish an irreducible minimum in ownership and represent the characteristic which unites Roman and common law. This is cautiously posited, it flies in the face of Honoré's own view that it is merely another standard incident, undeserving of special status. Concerned not to confuse expectancy and split ownership with residuary, he analyses *emphyteusis* and considers the difficulty in whether the owner was the reversioner (*dominius*) or the *emphyteuta*.<sup>94</sup> This is readily answered. In Roman law, the owner is *dominus*. There is no further right behind him, there is behind the *emphyteuta*. It is an empty right, a *nudum ius* but it is the reversionary right nonetheless. The English law position is complicated by the availability of the leasehold estate, ownership can be split between freeholder and leaseholder both of whom own (a transitive verb which necessarily admits an object) estates. However, if residuary is an incident of ownership then the ultimate owner in English law is the freeholder, as the *dominus* in Roman law. Where subject to a 999 year lease, this residuary interest in the freehold reduces to a similarly *nudum ius* as the *dominium* subject to *emphyteusis* in Roman law. Honoré wrote without the benefit of the Land Registration Act 2002 when relativity of title was more pronounced in English law. On either analysis, the incident of residuary is worthy of greater prominence than afforded in the paradigm model of ownership.

Given the cohesion between individual incidents of ownership, it is clear why commentators have sought a univocal definition of property. Their definitions however do not survive scrutiny, their justification relies on an assimilation of the incidents discussed herein. By grouping them under the same *genus* they help themselves to what is at issue, a higher norm capable of reduction to independent constituent incidents. Penner's definition starts 'The right to property is...' and is followed by a list of divisible rights.<sup>95</sup>

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<sup>94</sup> Honoré, *Ownership* p.128.

<sup>95</sup> Penner, *Bundles* p.742.

This reveals a universal grammar in property. The distinctions between civil and common law property systems are beyond doubt; but the similarities are illuminating and suggest the distinction is one of form not substance. From both systems emerges an organising idea or higher order of norm. As to the former, the idea directs a legal system to respond to the need to organise the allocation of material resources. As to the latter, ownership may be regarded as a unifying concept. This might be the correlation between individual names and objects, the organisation of which is a matter for individual legal systems. The response of the legal systems is a conceptualisation of the higher concept.<sup>96</sup>

The resulting structure, particularly in Anglo-American common law, has prompted jurists to lament the disintegration of property and the death of ownership and redundancy of the term 'property'.<sup>97</sup> Indeed, in litigation a claim to ownership is not set up. A litigant simply seeks to prove, and a practitioner only interested in, whether his right is relatively better than that of his opponent. It is an inevitable consequence of the development of capitalism that as the marketplace has evolved (particularly intellectual property), as financial institutions and instruments, corporations, trade mechanisms and other sophisticated divisions of resources have developed, the law of property has responded by facilitating the division of assets, distribution of claims and ordering of security. The bundle of rights making up the system of property may be seen less as a hangover from feudal tenure fuelled by archaic doctrine and more the logical and sophisticated exercise by the state of a liberal facilitative approach to the regulation of private property. Yet the rhetorical power of the lay notion of property pervades and the superior normative weight of abstract property remains intact.

### **3 On the Justification of Private Property**

The starting point is the doctrine of first possession which features prominently in both common law and in the Roman law *viz* acquisition of a *res nullius*. The effect of the doctrine in both systems is to give rise to an original acquisition being regarded as a root of title. Distinction must be made between property which belongs to no one and property which belongs to everyone;<sup>98</sup> in Roman law this was the identification of

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<sup>96</sup> Waldron, *Private Property* p.52. Conceptually this necessarily extends to corporeal and incorporeal property.

<sup>97</sup> Kohler, P., 'The Death of Ownership and the Demise of Property', (2000) *Current Legal Problems* 53, 237; Grey, *Disintegration* p.73.

<sup>98</sup> Pufendorf, S., *De Jure Naturae et Gentium*, trans CH and WA Oldfather (1934, Oxford, Clarendon Press) book IV, iv, 2-6.

*res commune* and other species of property which were not vulnerable to private acquisition.<sup>99</sup> What is sought, is the justification for deriving a juridical right from first acquisition in order to protect it.

There are various canonical theories explaining justice in acquisition (and preservation). In contemporary literature at least, these may be described as (1) the labour theory (which reduces into the 'why-not' labour theory and the labour-desert theory);<sup>100</sup> (2) utility (which incorporates or divides over economic efficiency and social stability); and (3) political liberty *viz* the notion that, if property acquisition is inevitable human behaviour then it would be a curtailment of freedom to prevent it.<sup>101</sup> Something must be said of natural arguments, those which concern property outside (or prior to) the legal system.

Much literature seeks a dominant theory. Even where a pluralist theory is posited or a presumption that each theory carries equal weight, the inherent difficulty remains that where the differing theories are complementary other, they also conflict; reconciliation is the intractable problem.

Locke, the progenitor of the labour theory of primitive acquisition, suggests isolating the property in an individual's labour in themselves and the mixing of their labour with a thing so as to 'change ... it from its natural state' makes the thing their property, subject to the qualification that 'at least where there is enough and as good left in common for others.'<sup>102</sup> Elements of this theory are compatible with other theoretical propositions. The idea of making use of a resource is inherently utilitarian. If considered in terms of the labour-desert proposition that a person deserves reward for production of resources which may be used by others, it is not a great stretch of the imagination to recognise some hint of capitalist economic efficiency. The qualification may be reconciled with concepts of pareto optimality and thus economic theory. At its most literal, Locke's theory is not infallible. Rather than the mixing of labour being acquisitive of property, it might be divestitative of labour.<sup>103</sup> Locke's justification is that it is a matter of justice that labour should be rewarded.<sup>104</sup> The

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<sup>99</sup> Getzler, *Roman Ideas*.

<sup>100</sup> Becker, *Property Rights Philosophical Foundations* p.193.

<sup>101</sup> Becker, L, 'The Moral Basis of Property Rights', in Pennock, J R and Chapman, J., *Property Nomos XXII* (1980, New York, New York University Press).

<sup>102</sup> Locke, J *Two Treatises*, II, sect 27 (Digital reprint undated) p.193.

<sup>103</sup> Nozick, *Anarchy*, pp174-175.

<sup>104</sup> Becker, *Property Rights*, p.36.

utility and economic benefit in engaging resources and encouraging the investment of labour is a similar justification, suggesting synthesis between the theories.

Locke posited that private property exists prior to state and regulation and is a principle of natural justice.<sup>105</sup> It is objected that there cannot exist in nature as concise a definition of property as that offered by a system of law. This proposition stands for itself. If nature provided a rational system of regulation then civilised society would not take the form it does. A more promising argument is that the introduction of money and market forces facilitated inequality. Thus, the power of natural property norms became vulnerable to acquisitive human behaviour. This is consistent with the germination of capitalism or the development of political self-consciousness and a move towards the social contract.<sup>106</sup> Property, even in a primitive form is conceivable in the state of nature. Therefore, it may be regarded as a higher norm the legal structuring of which is a response.

Were property to exist in a state of nature then there must be some consent amongst individuals, at least some tacit recognition of and respect for *de facto* possession. Proponents of this view suggest this consent created title.<sup>107</sup> Locke considered this impractical;<sup>108</sup> two objections arise. Firstly, consent need not be a positive expression given by all mankind. It may be passive acquiescence;<sup>109</sup> indeed acquiescence is of normative significance in prescriptive acquisition of easements. It also formed the basis of acquisition of a *res nullius* or *res derelicta* in Roman law. Secondly, arguably first possession is not true ownership until it is validated by transfer to another. The justification being that the original possessor's worth is grounded in the common will of both possessor and transferee.<sup>110</sup> Consent to ownership, or recognition of ownership by others grounds title.

This is insufficient justification. It advances sound argument for the protection of *de facto* possession but, whilst the labour theory is not unmeritorious, there is nothing within it which necessarily institutes private property.

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<sup>105</sup> Locke, *Two Treatises* sects 3, 124, 134, 136.

<sup>106</sup> Waldron, *Private Property* p.165.

<sup>107</sup> Rose, C.M., 'Possession as the Origin of Property', (1985) 52 *University of Chicago Law Review* 73 p.74.

<sup>108</sup> Locke, *Two Treatises* 28.

<sup>109</sup> Rose, *Possession*. p.74.

<sup>110</sup> Brudner, A., *The Unity of the Common Law*, (1995, 1<sup>st</sup> Edition, London, Routledge) p32

Hegel offers insight here, suggesting that without property, an individual is an abstract personality. Acquisition of property is a necessary expression of his will into the external world. Every individual has an absolute right to acquisition. Acquisition of property is thus the perfection of the will of the individual, who is a free will when he achieves ownership.<sup>111</sup> This underlines the importance of property as a genus of political freedom and in so doing elevates the normative status of ownership. Philosophically, property is a relation which exists inchoately prior to the law – the legal system evolves to recognise and perfect the relationship and the personality of the individual.<sup>112</sup>

Theories of utility offer justification. Property rights are a necessary means of human happiness.<sup>113</sup> References to pleasure and happiness abound the orthodox utilitarian commentary but should be regarded cautiously. Munzer proposes preference-satisfaction as a more tangible end.<sup>114</sup> This is more appropriate terminology in contemporary analysis. The advantage is that this serves to reduce subjective speculation about what happiness or pleasure really is, or should be; it is easier to reconcile arguments about economic efficiency and optimality with standards of preference satisfaction, not to mention an inherent reasonableness in drawing together utility-efficiency arguments with Rawlsian notions of rationality (it is noted that Rawls rejects the suggestion that individuals in the original position would adopt utility but it is suggested with the refinement proposed and the assimilation with efficiency, the theories may be compatible) and optimality in distributive justice.

A criticism of utilitarianism is that it ignores distinctions between individuals; the doctrine ‘trades-off’ the happiness of one individual for the happiness of the majority. More guarded criticism recognises the teleological underpinnings of traditional utilitarianism as a proponent of individual liberties but nonetheless criticises the conflation of preferences as if they were a whole.<sup>115</sup> Yet if utilitarianism is founded on the notion of happiness and preference satisfaction, how can it be measured if not by the satisfaction of individual preferences?<sup>116</sup> Society as a whole cannot be satisfied without the satisfaction of its individual constituents. Further, it is difficult to reconcile Rawls’ criticism with the distributive theory of justice and fairness he proposes. He

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<sup>111</sup> Hegel, G.W.F., (Transl. Knox), *Outlines of the Philosophy of Right*, (2008, Oxford, World Classics). 41-61

<sup>112</sup> Brudner, *Unity* p.12.

<sup>113</sup> Becker, *Property Rights* p.57.

<sup>114</sup> Munzer, *Theory*, p.197.

<sup>115</sup> Rawls, *Justice*, pp.25, 26, 59

<sup>116</sup> Waldron, *Private Property*, p.74.

assumes that persons in the original position would 'choose a principle of equal liberty and restrict economic ... inequalities ... it is not impossible that the most good is produced but it would be a coincidence.' This is incompatible with arguments in favour of distributive pareto optimality advanced later in his treatise and his analysis of the rationality of the original parties.<sup>117</sup>

Returning to Becker's utility argument, the suggestion is that security of possession and use must be enforced and modes of acquisition controlled to facilitate acquisition and preservation of things and thus maximise social satisfaction. This is proved in that a lack of security of possession and uncontrolled acquisition would cause instability. The organising idea behind this protective and facilitative system is one of private property and a system of private property rights is justified.

The appeal of the utilitarian argument is that not only does it justify the institution of property, the abstract protection of possession, use and any other incidents, but also the rights, practices, juridical procedures and the like.<sup>118</sup> In a capitalist or free market society, this is crucial.

Utility based arguments may be reduced further as to economic utility<sup>119</sup> and efficiency.<sup>120</sup> Both are considered against the concept of Pareto optimality and Pareto superiority.<sup>121</sup> Let there be two states of affairs (here this may be differing allocation of property rights)  $S_1$  and  $S_2$ .<sup>122</sup>  $S_2$  will be Pareto superior if moving to this state from the former will increase the welfare (preference-satisfaction) of at least one individual, without decreasing the preference-satisfaction of any individual. Either state will be Pareto optimal where it exists and it is impossible to change to another state to increase the preference satisfaction of any individual without decreasing the preference satisfaction of at least one individual. This system avoids conflation of preferences which grounds the criticism of utilitarianism considered earlier.

This is not a sufficient justification for the institution of private property or the individual distribution of it, which must admit normative and other principles in order

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<sup>117</sup> Rawls, *Justice*, p.27, 59, 213

<sup>118</sup> Becker, *Property Rights* p.59.

<sup>119</sup> *Ibid* p.69.

<sup>120</sup> Munzer, *Theory* p.200.

<sup>121</sup> Devised by Vilfredo Pareto.

<sup>122</sup> The explanation offered here is the standard Pareto paradigm but the explanation is borrowed from Munzer, *Theory*, p.200.

to be just.<sup>123</sup> Rawls suggests it cannot stand alone as a principle of justice.<sup>124</sup> Becker identifies a serious flaw; if property is designed as a coercive institution then where a state sanctioned change is implemented in the name of efficiency, property rights may be vulnerable to all manner of interference. This undermines what is in issue—any meaningful recognition of property and ownership.<sup>125</sup> This objection might be met by the assimilation of utility based and efficiency based arguments. If part of utility is protection of rights then it is simply given priority over efficiency based arguments for systemic reconstructions. If Pareto tests are applied then it need be the case that only one individual's welfare is reduced and there is no justification for the change (at least none which is derived from the argument), even were the rest of the world to be advantaged. This suggests efficiency forms a useful balance against utility and combining the two justifies public and private property.<sup>126</sup>

Utility and efficiency arguments are compatible with arguments from political liberty, which offer a general account of why people should have the opportunity to have private property to enjoy, for example, their individualism, privacy and reasonable levels of freedom.<sup>127</sup> This concept of political liberty absorbs Hegel's suggestion that the acquisition of property completes the personality of the individual.<sup>128</sup>

The foregoing analysis points to an emerging pluralism (*quare* eclecticism) in justificatory theories in property discourse.

### **Concluding Remarks**

Theories of property present inconsistencies and conflicting justifications. A rejection of the orthodox view on the structure of ownership emerges in the literature, yet it does not survive scrutiny. From the foregoing analysis has emerged a universal grammar in property discourse, a system of logic which, as Lawson found, is unmatched elsewhere.<sup>129</sup> There are features remarkably similar in otherwise distinct legal systems which ground unity. The Roman law and Anglo American common law appear to differ more in form than substance. Throughout this discussion, property has been isolated as a genus of higher norm.

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<sup>123</sup> Becker, *Property Rights* p.72 and Munzer *Theory* p.202.

<sup>124</sup> Rawls, *Justice* p.62.

<sup>125</sup> Becker, *Property Rights* p.74.

<sup>126</sup> Munzer, *Theory* p.207.

<sup>127</sup> Waldron, *Private Property*, p.284.

<sup>128</sup> Hegel, *Philosophy*.

<sup>129</sup> Lawson, F.H., *The Rational Strength of English Law*, (1951, London, Stevens and Son).



A sensible justification of private property must strike a balance between political prescription and sociological description. The last two centuries provide a wealth of evidence to inform reflective rather than prescriptive accounts of the reality of property.

The traditional narrative, whilst outmoded and lacking in the conceptual sophistication necessary for reconciliation with the political, social and economic exigencies of contemporary free market society, provides a doctrinal background which has survived changing legal and social landscape. Yet the more promising justificatory framework is pluralist.

The unification of property theory lies not in some panacea which emasculates all prior rhetoric, nor in any narrow criticism of the canons of analysis; but rather in a contextual and cohesive reconstruction of an institution of venerable heritage, drawing on the plurality of concepts which despite their inconsistencies are irreducible – a focus instead on reconciliation.

Property has evolved. It is not the disintegration of property that should excite academic debate, but the synthesis.