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OWNERSHIP AS AUTHORITY

Dan Fuller

'Ownership is a bundle of rights.' That maxim is often repeated and as often denied. It has formed the central focus of debates about the meaning of ownership for decades. That focus has meant even its critics tend to define ownership in one way or another as the maximal set of entitlements a person can have in respect of others in relation to a thing. Yet this conception of ownership as a 'maximal set' has little analytical or normative value. A mere empirical or logical definition of it sheds little light on the nature of other property rights, their distributions and derivations. Those can be illuminated only by an analytical or normative theory tying the members of the set and explaining how they contribute and relate to its 'maximal' character. Yet once we have this wider explanatory theory, the 'maximal set' becomes mostly redundant as a distinct concept and so then does ownership. To give the concept of ownership a distinct analytical or normative meaning, we must turn our focus away from the particular, individual owner and their outward-projecting relations with others. We must look more broadly at the thing that is owned and its life, the persistent position of authority over it and the wider social justificatory function of that authority. This compels us to return to the lay concept of ownership that property law too quickly rejects. Ownership in this light is the position of private normative authority over the life of a thing. The owner thus occupies a central social position in respect of the things they own, rooting the networks of property rights in respect of those things and infusing those networks with their personal authority.

Property law teaches us to distrust the layperson. Its first lesson is that the layperson is wrong to think of property as a 'thing'. Property is not a 'thing' but a set of relations between the holder of the thing and others taking the thing as their object (more or less remotely). The scope and definition of this set are contested. On one view it contains in essence only a single 'right to exclude' or some version of that right.¹ On another it is an indefinite field of rights, powers and privileges, defined negatively by reference to social property rules and the duties they entail.² Another defines the set positively like the first, but denies it can be reduced to a single encompassing right and so expands it to a more or less

¹ See, eg, James E Penner, 'The "Bundle of Rights" Picture of Property' (1995-96) 43 UCLA L Rev 711; Eric R Claeys, 'Property 101: Is Property a Thing or a Bundle?' (2008-09) 32 Seattle U L Rev 617; Thomas W Merrill & Henry E Smith, *Property: Principles and Policies* (1st ed. Foundation Press, New York 2007).

² See, eg, James W Harris, *Property and Justice* (Clarendon Press, 1996); Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58(3) U Toronto L J 275; Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James E Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, Oxford 2013).

extensive collection of rights, privileges and other 'incidents'.³ It is this latter view of property that is usually labelled the 'bundle of rights' view. No doubt proponents of the others would renounce that label for them. But their broad perspective is the same. They all share a view of property that is fundamentally oriented toward the individual property-holder and the extent of their entitlements at a given moment in time with respect to others in relation to the thing. Each takes the particular thing-holder as its focus and defines their property by reference to the freedoms entailed by their relations with others.

So it is also with ownership. The owner is the person with the most extensive or maximal set of entitlements society allows a person in respect of a thing. They are the person with the right to exclude all others from the thing within legal limits. Or they are the person with the fewest socially admissible limits on their domain of free dealing with the thing. Or, on the traditional 'bundle of rights' view, they are the person with the most extensive set of positive entitlements and incidents (and the most minimal set of negative incidents) society allows in respect of a thing. Ownership is in each case a matter of the extensiveness of the owner's entitlements to deal with a thing framed in terms of their relations, either generally or individually, with other members of society. And here, too, the lay conception of ownership is sacrificed at the altar of theoretical abstraction.

But there is a fundamental problem with the abstraction of ownership as the maximal set of entitlements a particular person can have in respect of others in relation to a thing, 'bundle of rights' or otherwise. Conceiving ownership in this way drains it of analytical and normative value. For the concept of the 'maximal set' to be a useful analytical or normative benchmark for understanding property rights, their derivations and distributions, some meaning must attach to its 'maximal' character. We need to know the analytical or normative sense in which the ownership set is 'maximal' and how and why its members constitute it and interrelate in respect of it before we can make any useful statements about its position in the social complex of property. We cannot identify this 'bundling mechanism' by reference to empirical commonality between instances of observed ownership, or to cases, or to some logical appeal to character or definition. We need some higher-level theory that explains why the 'maximal set' is normatively significant. Yet even if we can formulate this theory, the concept of the maximal set in itself is redundant unless any narrowing of it always has a fixed normative impact in reference to the normative value of the whole. Otherwise, we cannot say a detraction from the maximal set is significant just because it is a detraction from the maximal set. It is only significant if and in the way our higher-level normative theory says it is. And even if we can come up with a moral theory of ownership in which its normative value is tied in this necessary way to the maximal nature of the set of entitlements it contains, its analytical and normative value is limited to explaining immediate restrictions on that set. It cannot provide an adequate normative explanation of more remote limitations or 'carved out' property rights.

³ See, eg, A M Honoré, 'Ownership' in Anthony G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford 1961); Lawrence C Becker, *Property Rights: Philosophical Foundations* (Routledge & Kegan Paul, London 1977).

The problems with these conceptions of ownership have three main sources. The first is their focus on the individual, momentary owner rather than the broader position or situation of ownership. The second is their inattention to the broader social justificatory function ownership plays in the property regime. The third is that they marginalise the normative importance of the thing itself. These problems direct us back to the lay conception of ownership. Ownership in the lay sense is the position of private normative authority over the life of a thing. The owner occupies a position that allows them to direct the path the thing takes through the world, the rights that surround it and the relations of others with respect to it. They are not necessarily the person with *practical* control over the thing at a given time. They are the normative anchor of the network of relations that attend it. That authority is founded in the framework of legal property rights, liabilities and duties surrounding things but is abstracted from it. It does not just embody the present, static distribution of rights. It reflects their past and future, their transitions and relations. It abstracts from the whole network of rights, historical and persistent, through which normative authority is communicated to society and recognised by it. In this way, we construct ownership as a normatively essential social position centring on the persistent social lives of the things that are its objects. This gives an analytically and normatively meaningful definition to ownership in a way that typical owner entitlement-focused definitions cannot.

THE VALUE OF THE BUNDLE OF RIGHTS

It seems there are two main ways in which a conception of ownership may be valuable. It may be valuable analytically. It might shed some helpful light on the way in which ownership and other property rights are structured in law and society, or on their scope or contents or relations with one another, or in some similar way that helps us to analyse the institution of property from a social, legal or other analytical perspective. It may also be valuable normatively. It may help us not only (or at all) to analyse how property is distributed and understood and applied in law and society but also how it should be. What rights should we allow in respect of things? Who should be able to exercise them? How should one form of property be able to derive from and relate to another?

Honoré's 'Ownership' is the source of much of the modern 'bundle of rights' discourse.⁴ It elaborated eleven 'standard incidents of ownership' that Honoré thought necessary to understand the full liberal conception of ownership. He says the owner in this standard liberal sense is the person with rights to possession, use, management, income, capital, security and transmissibility, duties to prevent harm, liabilities to the execution of judgment debts and on insolvency and rights to the residue when lesser interests end, all for an indefinite term. These incidents could be identified by observing liberal societies and their laws. In this way his project was avowedly empirical. His concern was not to describe all instances of ownership across all systems. Nor did he intend

⁴ Honoré (n 3).

his list of incidents to be definitive even of full liberal ownership. He sought only to describe on an empirical basis the normal incidents in a mature liberal society of the maximal entitlement set a person can have in respect of a thing. A similar descriptive or empirical claim may be made in other ways. We might look to case law and ask what courts mean when they talk about ownership, as Douglas and McFarlane have done from the 'duties' perspective.⁵ Or we might go beyond observation and make a kind of logical or *a priori* claim about what a 'maximal' set of rights in relation to a given thing must necessarily be (by the logic of 'maximal'). We might collect these methods for convenience under the heading 'non-normative' methods of definition.

Of course, these are plainly not value-free or value-neutral methodologies.⁶ No social empirical methodology is. But the values built in to the maximal set by these 'non-normative' definitions are only perpetuated by secondary or external processes. They are perpetuated by the processes of propagating, discussing and using the definitions themselves in law, academia and society generally. There is no direct or internal claim about the contribution of individual members of the set to some larger value that the maximal set represents. Thus we might say that Honoré identifies his incidents of ownership from a liberal perspective and thereby builds liberal values of personal autonomy, liberal democracy and so forth into his definition of ownership. We might say that by using this definition in law, academia and society generally we implicitly promote and perpetuate those liberal values. But although we might say Honoré's ownership *manifests* liberal values in this external sense, we cannot claim that his ownership *embodies* some maximal conception of liberal values to which each incident contributes in an identifiable way. The same is true of the other theories here labelled 'non-normative'. They are non-normative in the sense that they do not build in any internal theory about how members of the set relate normatively to the maximal whole. They only claim that there *is* a maximum with a definable membership, although this cannot be identified in an entirely value-free way and may be used externally to promote certain values.

Yet it is this absence of normative connective tissue between members of the maximal set and the maximal set as a conceptual whole that seems to deprive these non-normative definitions of ownership of any significant analytical or normative use. It is hard to see any analytical or normative value in a mere comparison between a given form of property and an empirically defined 'maximal' conception of property. We may be able to identify features of this property form that are missing compared with the maximal form, or even some that are additional. But this is meaningless without some understanding of what makes their presence or absence important in defining the maximal set. We cannot understand why these sub-maximal forms exist, or how they come to exist, or whether they are more or less valuable compared with the maximal ownership form, by mere empirical comparison. Nor does a mere empirical comparison allow us to produce any useful taxonomy of property rights, because

⁵ Douglas and McFarlane (n 2).

⁶ For an example see Richard A Epstein, 'Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property' (2011) 8(3) *Econ Journal Watch* 223, who quite expressly uses the bundle of rights theory 'externally' to promote a broad interpretation of 'takings' clauses.

we lack any sophisticated understanding of what connects the rights in the maximal set and what connections may therefore form and break outside it. Nor does a mere ‘snapshot’ comparison of rights in the different bundles tell us anything useful analytically or normatively about the distribution of property in society, because we have no understanding about the ways the different forms of property relate to each other and how they might transform. In short, a ‘bundle of rights’ theory needs to tell us what its ‘bundling mechanism’ is.⁷ Pointing to observation or abstract logic will not do.

We can generalise these points to all ‘feature set’ comparisons. We cannot usefully compare two forms or instances of something just by looking at their ‘objective’ features, regardless of the values involved in the process of identifying those features. Thus, we do not draw any useful conclusion from the mere act of comparing the feature set of some car or computer or species in the same genus of animal with some identified maximal form (the car or computer or animal with the ‘most features’ from a certain perspective). The mere feature set comparison tells us nothing useful. We can make it meaningful only by adding something else. In cases where we wish to compare discrete instances of a type of thing, as in the case of the car or computer, we can find some common benchmark we can apply to all different feature sets to provide a locus of comparison. We might choose speed for a car, or processing power for a computer. Or we can create some more complex index that takes in a wider spectrum of our ‘normative’ concerns (aesthetic value, ease of use and so forth). And we can then examine how each feature of the thing contributes to the benchmark and identify interrelations between features, perhaps even broader properties of certain clusters of features, that might allow us to produce a meaningful taxonomy, for example a luxury car versus an SUV. We can of course identify different features in a purely objective way, but we cannot adequately analyse them or give them meaning without a broader understanding of what they are directed to achieving. Similarly, in some cases we will wish to compare instances of a thing that are not discrete but that we know are connected by some process, as in the animal case. Here we need to formulate or locate some explanation of the mechanism by which one ‘feature set’ becomes another. We need to know how and why certain features are gained, lost or transformed from our ‘maximal set’. In the animal case, this is broadly speaking the theory of evolution. By superimposing this procedural framework on to our feature sets, we can now meaningfully compare, for example, *Homo sapiens* and *Homo erectus* in a way that a mere objective feature comparison without that framework could not.

A full understanding of property seems to require both kinds of comparison and therefore both kinds of ‘bundling mechanism’. In some cases we might wish to compare discrete forms of property to understand how their features relate to some analytical or normative ‘exemplar’. But our understanding would seem to be incomplete if it did not also encompass the interrelations between different forms of property, their sources and how they shift and transform. So we need

⁷ Cf Penner (n 1) 741 (describing typical bundle of rights theories in terms of an ‘aggregate of fundamentally distinct norms’); Claeys (n 1) 618 (‘ad hoc bundle’).

both a normative or analytical benchmark for comparing discrete forms of property and a general framework capable of linking forms of property in a procedural sense. The question is whether the concept of ownership as a maximal set of entitlements (whether defined positively as a right or bundle of rights or negatively by reference to others' duties) can assist in these respects. The answer is that its assistance will at best be minimal.

Suppose we can formulate a theory by which ownership in the sense of some particular maximal set of rights (or single encompassing right or minimal set of restrictions on rights) is normatively significant. In other words, we have a normative theory in which there is some normative value associated with having or there being the most extensive set of rights in respect of a thing identified from a particular normative perspective. This gives the concept of 'maximal' itself, and therefore the concept of ownership, some normative meaning. But is this really significant? That depends on how the rights in the set (or the duties that define it) contribute to the normative value of the whole. On most normative models, we would not expect every limitation on ownership — every detraction from the maximal set — to have the same or indeed any normative impact in reference to the normative value of the whole. Suppose, for example, our maximal set is defined according to some simplistic standard of personal autonomy. We are able to define a set of rights that represents the maximal autonomy we think a person can have in a mature liberal society in respect of a given thing. But our definition could surely not be so comprehensive and visionary to permit us to say definitely that every deviance from that maximal set would detract from our notion of a person's autonomy in respect of the thing. Surely we would need to examine each deviance to consider whether it does *actually* detract from a notion of autonomy (and then, if it does, to justify it as such). For example, we may say that a landowner granting a short-term lease or a limited easement is not really a detraction from our conception of autonomy in the circumstances. But in saying this we admit that our *maximal* conception of ownership has no normative value in itself. We admit that our conception of autonomy, which we say justifies the maximal set we define as ownership, is inherently fuzzy in terms of the rights it admits. There is no value then in just comparing a 'lesser' set of rights with the maximal set, because we must ask in each case whether and how it detracts from the wider justifying principle. Inserting this intermediary concept of ownership as a maximal right or bundle of rights or duty-defined domain adds nothing.

But what if we could formulate a normative theory of ownership in which *any* detraction from the maximal set would invariably produce a normatively inferior position? If this were possible then we would need to concede some inherent normative value to the concept of the maximal set in itself. It would be relevant in some normative sense *just* to compare a given set of property rights with the maximal set. But what would be the extent of this value? Although we could say any detraction from the maximal results in a property that is 'inferior' in some normative sense, we could not say precisely (or even broadly) in *what* sense or by how much. We could not adequately explain the position of rights further than one step removed from ownership because we could only refer simplistically back to their deviance from the maximal set and the 'ideal'

position it represents. We could not say anything useful about how lesser forms of property relate to one another, or derive from one another, or even from ownership. In short, we could not say anything useful about the justifications for or the structure and processes of property except in the most simplistic sense that any detraction from the maximal set is normatively detrimental. To say anything useful we would still need to look behind the mere fact of the maximal set and its own inherent value. We would still need to examine the nature of the normative system supporting it and the ways in which lesser forms of property fit within that normative system and are related in its framework. The concept of the bundle of rights, the maximal set in itself, makes only a token contribution.

Even on the most generous view, then, it is conceptually unhelpful to speak of the maximal ‘bundle of rights’. So it is also with those other theories of ownership focused on the owner’s maximal domain of relations with others in respect of a thing, which differ in definition and substance but take ultimately the same form. This inadequacy seems inherent in any theory that focuses on the owner’s domain of rights and entitlements in a time-insensitive way without paying sufficient attention to the sources of those entitlements, their movements over time and how they slot together in an overarching theoretical framework centred on the thing itself.

OWNERSHIP AS PRIVATE AUTHORITY

It is possible to build this alternative theoretical framework of ownership, although here only shortly. We have come to this dead end by attempting to formulate a maximal conception of ownership. Ownership has seemed to occupy a position of hierarchical superiority over other property rights in terms of what it gives the owner. It has seemed the ‘ideal’ or ‘perfect’ form of property for its holder in that it maximises their own entitlements with respect to a thing. But this is not the way in which the layperson thinks of ownership. Plainly in the ordinary world we do not call only the person with the maximal bundle of rights the ‘owner’. The lessor of freehold land remains ‘owner’ regardless of the extent of rights they retain. The home ‘owner’ now commonly has a 50-year mortgage giving their bank wide-ranging veto powers over otherwise free uses. The ‘owner’ of heritage-listed property is effectively a government-regulated conservator. The trustee who ‘owns’ trust property is a privately regulated conservator. And most are comfortable calling both the trustee and beneficiary ‘owners’ despite their considerably different rights.

Is there anything tying these seemingly disparate usages of ownership? Or are we just butting up against the chameleonic nature of the English language? Any candidate we might put up for a right or correlative duty common to all usages of ownership, such as the regularly suggested ‘right of exclusion’ or loosely correlative ‘duty of non-interference’, seems bound to be defeated by counterexamples: the government-regulated building, the permanent easement, and so forth. That is indeed why property law theorists have resorted to abstraction and ‘general incidents’ to describe ownership. Nor, for the same

reasons, will we ever form from common usage a neat 'spectrum of ownership' as Harris suggests,⁸ or be able to draw a neat line on that spectrum separating what is 'ownership' from what is not. In real life, ownership is inherently context-dependent. It depends on the nature of the thing and its holder and the social setting in which they sit. On this basis we could just throw up our hands and say in agreement with Grey that ownership is really a meaningless construct with no theoretical value at all.⁹ But this seems an unsatisfying path. We cannot shake the fact that there seems to be something significant, at least at a social level, in the concept of ownership. It has persisted across societies and centuries. These may not be directly questions for lawyers, in the day-to-day run of cases, particularly in an English law that functions on relativity of title.¹⁰ But that does not mean ownership lacks any legal force. The law is a social institution like any other. We should be slow to dismiss from it concepts that seem to hold such normative social sway.

It is here that our inattention to the layperson has led us astray. The layperson's understanding of ownership is far from simplistic. In ordinary language we can call something ownership in one place and not in another *because* of our sophisticated intuitive understanding of the ways in which our relations with things change between these contexts and take meaning from different aspects. But what seems to run in the essence of this lay conception of ownership is a sense of *authority*. Ownership seems to be at base the position of private normative authority over the life of a thing.¹¹ What it means to say that there is ownership of a thing is that society has set up a position in which some entity or set of entities has the authority to direct the life of a particular thing. The authority is 'private', not in the sense that there can never be state or government ownership of a thing, but in the sense that it is an authority separate from the general social regulation of things by laws and otherwise. It is in this sense that it is more apt to speak of ownership as 'authority' rather than 'dominion', as the Roman law language would translate. The owner is not the exclusive sovereign of a thing. Their authority is given by society and subject to its institutional limits. Hence we should expect owners in different socio-legal contexts to have different spheres of power. But within those spheres they are normatively authoritative.

When we speak of owning 'things', we are not speaking exclusively in terms of tangible objects. Anything can be owned if a society considers it may be subject to a position of private normative authority over its life. This includes

⁸ Harris (n 2).

⁹ Thomas C Grey, 'The Disintegration of Property' in J Roland Pennock and John W Chapman (eds), *Nomos XXII: Property* (NYU Press, New York 1980).

¹⁰ Cf A D Hargreaves, 'Modern Real Property' (1956) 19 MLR 14, 17, describing ownership as a philosophical, social, economic or political problem but not a legal problem.

¹¹ Cf Jeremy Waldron, *The Right to Private Property* (Oxford University Press, Oxford 1990), 39, 60. Waldron also describes ownership in terms of 'ruling' over a thing but ties it more specifically to the owner having the 'final say' in a dispute resolution system in respect of the thing. The problem with this is that, depending on the allocation of property rights at a given time, the particular owner may not have this say. The view presented here of ownership as a position of persistent normative authority does not require that a given owner have the final say in this sense.

incorporeal ‘things’ that are in reality no more than rights but that society considers should be subject to ownership in the same sense as a tangible thing. All that is necessary is that the ‘thing’ is thought of as in some sense able to persist in the world. Whether or not a given thing *can* be owned depends on the moral basis for allowing things to be privately owned in the first place. The theory of ownership as private normative authority is agnostic as to what moral basis should be adopted. But it does tell us that what we need from this underlying moral justification is a moral basis for placing particular members of society in a position of normative authority over the life of a thing within the sphere permitted by social rules.

What exactly is meant by ‘normative authority over the life of a thing’? Ownership is the position from which the owner can direct in a normatively authoritative way what happens to a thing, who accesses and uses it, what it is turned into, its purpose and who it benefits, and so forth. The owner’s position is *normatively* authoritative in that the owner will of course not always have practical control over the thing. Nor will they always have the immediate power to determine users or uses or to distribute rights in respect of the thing. But it is the owner’s authority that anchors the network of practical control and use rights in respect of the thing. It is the position of owner that is the ultimate source of normative validity and acceptability of this distribution. Even if the person in the owner’s position lacks at a given moment any significant practical control over the thing they own, that control, now in others, traces back ultimately to the authority constituting the owner’s position.

We can see this in an example from outside the property context. We often speak in our daily working life of a particular person having ‘ownership’ of a work project. This does not mean they necessarily have practical day-to-day control over it, though we might expect them to have some in order to justify the ‘owner’ label (the extent of which will depend on our particular working environment and how it usually operates). But they are the ‘figurehead’ of the project, the one seen by the work community as being in charge of its life, whatever practical work they do, and to whom responsibility for it will ultimately be directed. The structure of the project and who does what in respect of it is seen as a manifestation of the owner’s authority. The project, or at least its perception, organises around this conception of its owner. In this respect ownership plays a meaningful normative role in the wider work community.

This example shows that what gives the position of owner its normative authority is not the simple present, static combination of legal rights, duties and powers they have in respect of the object of their ownership. Authority is a social construction. It depends on social recognition of its holder’s position in the framework of norms regarding its object and the legitimacy and normative influence that recognition entails. The objects of ownership in the property context are things and our social norms regarding things are mainly embodied in law. We recognise that law provides most of our social normative infrastructure for dealing authoritatively with them. This means we recognise authority in respect of things mainly through a legal lens. That is why rights and other legal relations play a particularly important part in establishing and maintaining the

authority that constitutes ownership. But what is relevant is the whole persistent and dynamic framework of legal norms within the wider structure of social norms in which it is understood. Thus, my authority in respect of a thing depends not only or even mainly on the rights I now have over it. My authority depends to a significant extent on how I got to the position I am now in. What rights did I formerly have in respect of the thing? Where did these rights and the rights I now have come from? Were they from an owner or a non-owner? If they were from an owner, did I succeed to all of their rights or did I take only some? By what type of transaction did I get them? And how, and to what extent, and to whom, and by what type of transaction, have I now been divested of some of the rights I once had? What is the social importance of these rights relative to others in constituting authority? My authority also depends on the future. Do I have residual powers to get back rights in respect of the thing when those rights are now embodied in someone else? Can I control the exercise of those rights in someone else's hands and, if so, to what extent? Do I have continuing duties or liabilities relating to those rights and if not, why not? And my authority depends on the authority others have in respect of the same thing. What is the extent of this extrinsic authority? Did it derive from me, or the state, or someone else? Do I have practical control over it? Does it terminate, and if so, does it revert to me or my nominee or to another person or nobody? It is by synthesising all of the answers to these kinds of questions that society constitutes the ownership position. It is an abstraction drawn from a complex interplay of persistent legal relations as they are socially perceived.

A residential lease is a simple example. If I buy a house and then lease it to someone else, I am still the owner. That is not because of the particular legal rights I currently have. It is because of the whole network of past, present and future legal norms associated with my position in respect of the thing and how that network is understood in its broader social framework. It is partly because of the way I acquired the house, by voluntary transaction with the person formerly recognised as owner to succeed their position. It is partly because of the limited nature of the rights I divested and the fact that it was within my power to choose whether or not to make that divestment, to whom and on what terms. It is partly because of the authority I still have in respect of those rights, including a future right to take the reversion and rights in respect of the continued running of the lease through repair covenants and the like. And it is ultimately by the members of society looking at the historical and continuing position I occupy in respect of the house relative to the lessee's position, in light of their understanding of its attendant legal relations, that my authority over its life as owner is recognised and thereby constituted. Of course, in practice, we will tend to apply heuristics in these simple cases. Often these will be based on the legal symbols involved. So the purchaser under a standard form residential sale contract who leases under a standard form residential rental agreement will usually be seen as owner of the house because that is what those kinds of legal symbols usually entail. But that is what they usually entail because what underlies them is usually a particular network of past, present and future legal relations held by the buyer-lessor in respect of the house. It is a network of legal relations that we see, in its social context, as constituting them in the position of

ultimate organising authority for the house's life. Like the 'owner' of a project, they are abstracted as its point of normative reference.

The nature of ownership as an abstraction from persistent networks of legal relations is why we cannot speak about the 'owner' in a purely individual sense. Ownership is a *position* or, in Humean terms, a 'situation' with respect to a thing.¹² It is not about the entitlements of a particular individual at a particular point in time. It is about the constitution of a broader position that persists over the life of a thing and may be occupied by multiple persons across and even at the same time. Thus, for example, a 'maximal set' view has trouble explaining why a person should be called an 'owner' when they succeed to an owner who has carved out a significant number of 'rights' to others in a way that binds the successor. The successor appears to be in an inferior state compared with the 'maximal set', and not by exercise of their own powers. But this does not trouble us if we can explain and justify the ability to carve out those rights and the process of succession as elements of the broader persistent position of authority. The successor has just succeeded to that persistent position in a way that preserves its authoritative character. The ownership position is 'sticky' in this sense. But that does not mean it is unresponsive to the successor's situation and conduct. Thus, we are also not so troubled by the prospect of multiple people simultaneously being 'owners' of a thing, even if they have quite different powers. Who occupies the position of owner at a given time depends not only upon the rules about succession of owners but also upon the situations of the person or persons who succeed. The situation of a successor may be so entwined with that of another person that neither can be considered independently to have the normative authority over the life of the thing. Both are then rightly described as owners. This will be the case, for example, with co-owners, whose contractual connections are such that they cannot be separated as normative authorities.

The trustee-beneficiary relation illustrates clearly this character of ownership as an abstract position of normative authority. Trustees have legal title to the trust assets. In the common law's blinkered view, they have full authority over the lives of those objects. But that is plainly not reality. Equity is clear that the trustee's authority is custodial. Their authority over the subject matter of the trust must be directed by the beneficiaries' interests as defined by the trust deed if it exists. It must be conducted along the lines their interests dictate. Those interests stem from the beneficiaries' own present or future or contingent authority with respect to the trust subject matter or its fruits. It is the fact that the trustee's exercises of authority must at all times have the beneficiaries and their interests as their object that gives the beneficiaries their own authority over the life of the trust subject matter. That is true whether they are absolutely entitled or currently benefiting from the trust assets or not. It is not an authority that depends on present entitlement or factual exercise of power. Rather, it depends on equity requiring that the beneficiaries and their interests stemming from their actual or potential future authority with respect to the trust assets guide *now* the trustee's authority with respect to them. The beneficiaries' authority with respect to the trust subject matter is a 'proprietary' interest in the way that authority over

¹² David Hume, *A Treatise of Human Nature* (1739), 489.

the life of an object is proprietary at law. Equity constitutes the beneficiaries' interests as lines within which the trustee's dealings with the trust subject matter must be conducted. The only difference is that the 'conductive' authority it thereby gives the beneficiaries is mediated by the trustee's own authority. In this sense it is an authority equity 'enjoins' with the trustee's. And it is this enjoined authority, combining the trustee's and beneficiaries' distinctive but interlocking positions, that constitutes the ultimate private normative authority over the life of the trust objects. Trustee and beneficiaries occupy the ownership position together.

The fact that ownership is an abstraction from social networks of legal relations means those relations maintain their own normative force. Rights, duties, relative titles and so forth remain the stuff of day-to-day legal work. They remain the concrete objects of legal disputes. What ownership does is to abstract from them, their interconnections, their history and their future to constitute an overarching organising conception of normative authority in respect of things. In this way it constitutes a central normative guiding point by which to justify and modify the law it reflects. Thus, we can understand the rules about creating and passing legal title in terms of the effective expression of authority in respect of things within their social network rooted by the owner. Title expresses proprietary authority in legal terms. The fact that authority is about social recognition means shifts in authority must be manifested in society to be recognised as shifts in ownership or lesser property. Because authority is abstract, this usually requires an act of communication. That helps preserve the integrity of the normative network in respect of the thing and protects the owner's position at its base. Rules about creating and passing titles are mainly rules about effective communication of authority in this network. This explains rules requiring formalities and registration schemes in cases where clear communication is particularly important. And it helps to explain and justify cases in which I can recover things I have given to someone else. Thus, title does not pass in cases of 'fundamental mistake' as to identity or subject matter because saying I will give something to someone while giving it to someone else or giving them something completely different amounts to communicative nonsense. Society does not recognise a manifestation of my authority at all. Therefore the thing never ceased to be mine. It is similar with rescission, which can make title revert on the basis that I can disclaim a communication of title induced from me by my communicative weakness. Conversely, resulting and constructive trusts are based on the fact that the trustee *has* objectively communicated that their authority is enjoined with the beneficiary's. The beneficiary thus has rights *in rem* that can found proprietary restitution. Trust beneficiaries have these rights *in rem* because they occupy the ownership position together with the trustee. That is also why, for example, beneficiaries can give their interests as security, why creditors can attach to them and why they fall into the beneficiary's estate. It is why third parties to whom beneficiaries choose to give their interests in the trust succeed to the beneficiaries' authority rather than getting merely personal rights. It is equally why beneficiaries can generally recover trust assets from third party donees or purchasers with notice to whom the trustee wrongly gives them.

Ownership as authority also guides the creation of new property rights more broadly. We have seen that the question whether or not something should be able to be taken into ownership becomes a question about whether we can and should give a private individual or group of individuals ultimate normative authority over the life of the thing. And when we are asking about whether someone should be permitted to create ‘lesser’ property rights, we are asking in what circumstances and to what extent the owner should be permitted to ‘delegate’ their authority in respect of a thing to others, consistently with whatever our justification is for allowing private authority in respect of the thing in the first place. We must locate the position of the ‘lesser’ property-holder within the framework rooted in the owner’s normative authority and justify the owner’s ultimate authority over its life. The *numerus clausus* problem thus becomes a problem about forming and maintaining networks of authority in a socially stable way.

None of these issues are illuminated just by looking at a snapshot of the property rights in respect of a thing, weighing up the relative sizes of the bundles they comprise and trying to compare them against some hierarchically superior ‘maximum’. They require an overarching normative framework to provide a reference point focusing on the broader situation of the owner and their normative function in the wider social structure in which the things they own are situated. Ownership as authority constitutes that framework.

CONCLUSION

The ‘bundle of rights’ conception of ownership has little inherent analytical or normative value. Nor does any other conception that focuses on defining the maximal set of entitlements a particular owner has at a particular time, whether that is a single overarching ‘right’ or an indefinite domain defined in terms of correlative duties or their source rules. A maximal set that is merely empirically or logically defined cannot provide any useful basis against which to benchmark other property rights or by which to understand property derivations and distributions. It cannot do so without some superimposed analytical or normative theory, the ‘bundling mechanism’, that provides a common standard to which rights in the bundle build or a general framework for understand the transformation of property rights between forms. But even then the concept of the ‘maximal set’ does little work because we care about how and to what extent particular rights contribute to the ultimate standard itself, and about rights that are more than one step removed from the maximal set, which it cannot tell us much useful about. Fundamentally, the problem is that we are scrutinising too closely the particular owner and their particular outward-projecting relations with others. What we need to do is to look more broadly at the thing itself and its life, at the persistent position of general authority over it and at the wider normative framework for which ownership is the anchor. We can do this, contrary to popular thought, by looking at what the layperson understands ownership to mean. That examination suggests ownership is a position of private normative authority over the life of a thing. The particular rights a particular

owner has fluctuate over time and with context, as does their practical power, but the normative authority of the ownership position remains and infuses the network of property rights operating in respect of the thing. In this sense we might do better to describe ownership as the normative root of a tree of rights rather than a bundle of them.