

THE OWNABILITY OF LAND:
PROPERTY RIGHTS, NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION

By

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ABSTRACT

Restrictions on the kinds of things people can own and on the uses to which people can put their property is as familiar an idea as that of property itself. A consequence of this familiarity is that it is easy to overlook the reasons why we can own a sandwich but not a smile. A second consequence is that it is not always clear when or whether restrictions on how we use the things we own undermine our ownership.

In this paper, I will discuss a theory of property recently offered by James Penner. Penner seeks to replace the so-called “bundle of rights” picture of property which he claims suffers from internal conceptual tension and which offers little real help to lawmakers when it comes to making decisions about property. Penner attempts to unify the bundle of rights by focusing instead on the *interest* we have in owning things. It is not that we have a certain kind of right that puts us in a property relationship with something, it is that the right we have protects *the interest we have in owning it*.

The primary thesis of this paper is that restrictions on the use of natural resources, when they are enacted to protect the environment “for its own sake” undermine the possibility of a property relationship with those resources. Ownership is generally the right to exclusively determine the use of a thing. But when the things we ‘own’ have legally protected interests in how they are used, then it can no longer be said that our determination of their use is exclusive, and ownership of those things becomes impossible.

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For Maya, my dearest friend and greatest inspiration.

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Introduction

This paper is about property. Property is like sunshine, like fresh air, like clean water. Everyone wants it, everyone needs it (even if they think they don't), and the idea of it is so familiar to us that it is easily taken for granted. Disputes about who owns what are common, as are those about who *ought* to own what. Less common are those about what ought to be, or even can be owned. You cannot own a sunset¹, a mother's love is not for sale. You might own (some of) your organs, but that does not mean you can sell them. People should not be property, but animals sometimes should be; certainly, both *can be* and have been. One of the paradigmatic examples of what can be owned is land. Land and the resources it provides are the primary source, directly or indirectly, of virtually everything else that is usually considered property. In what follows, I will argue that there are certain conditions, namely those involving the legal protection of natural resources, which render those resources 'unownable', and moreover this can occur quite by accident. It is primarily a discussion about *interests*, and so begins with a few interesting cases.

In 1973 a nongame species of bird known as the *Palila* was discovered on the slopes of Mauna Kea in Hawaii. Local sheep and cattle farmers however were using the slopes of the volcano as grazing pastures, a practice that was devastating

¹ Except, perhaps, on the island of Santorini where a cheeky restaurateur tries to charge everyone standing outside his restaurant for the sunset each evening. The price is 5000 drachmas.

the natural habitat of the bird, whose numbers were at the time only in the hundreds. The Palila's discovery coincided with the new American Endangered Species Act of 1973, which proved to be serendipitous. In 1978 the (then called) Sierra Club Legal Defense Fund and the Hawaiian Audubon Society filed a suit on behalf of the Palila. The case was not the first to utilize the endangered species act, but it was the first case in America in which the plaintiff was *not a human*. Rather, the Sierra Club Legal Defense Fund and the Hawaiian Audubon Society were acting as proxies for a *species*. The case was even filed as *Palila v. Hawaii Department of Land and Natural Resources*.² Furthermore, the *Palila* won the case, and Hawaii was given two years to remove all grazing from the slopes of Mauna Kea.

Ecuador became the first country in the world to constitutionally recognize legally enforceable rights of nature as part of a new constitution, when they voted in a new constitution in 2008. The section dedicated to the rights of nature included clauses such as: "Art. 1. Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution," and "Art. 2. Nature has the right to an integral restoration. This integral restoration is independent of the obligation of natural and juridical persons or the State to indemnify the people and the collectives that depend on the natural systems."³

² *Palila v. Hawaii Department of Land and Natural Resources*

³ The original constitution can be found online at:
http://www.asambleaconstituyente.gov.ec/documentos/constitucion_de_bolsillo.pdf. The

In February 2009, the town of Shapleigh, Maine passed an ordinance that seeks “to safeguard the water both on and beneath the Earth’s surface, and in the process, safeguard the rights of people within the community of Shapleigh, and the rights of the ecosystems of which Shapleigh is a part.”⁴ Ecosystems, especially Shapleigh’s natural aquifers, which had caught the attention of a certain corporation interested in bottling their water, *have the right* not to be exploited by corporations. And the citizens of Shapleigh have a duty to make claims on behalf of the ecosystems of which they are a part, according to the ordinance.

Awareness of the impact of human activities on the rest of the natural environment has become as fashionable as it is vital to creating sustainable policies in the future. Whereas not too long ago, the curious cases of the Pali bird and the rights-bearing rivers of Maine might have been easily dismissed simply as some quirky consequences of a complex legal system, they now appear to reflect a burgeoning and pervasive attitude that the law has a major role to play in protecting not only human beings and their interests, but the natural environment *apart from the human interests in it*. Environmental protection in many countries makes reference to doing things ‘in nature’s interest’, ‘for the sake of nature,’ and similar formulations. That is, there is an attempt at least being made to distinguish the interests human have in nature (e.g. to exploit its resources, enjoy its beauty etc.) and those interests the natural environment may itself have (e.g. the

unofficial translation by Genevieve Campbell used above (I could find no official translation at the time of writing) is available at http://en.wikipedia.org/wiki/Constitution_of_Ecuador#cite_note-0.

⁴ Preamble, *Shapleigh Water Rights and Self Government Ordinance*, 2009

availability of clean air, water, food, shelter and living space for animals). As environmental protection legislation has sprung up throughout the developed world in the last sixty years, we are compelled to ask what, if any effect such protection has or might have on other more established areas of law. One branch of law which already comes into close contact and often conflict with environmental protection is property law.

Now, discussion of property is usually focused on the idea of property *rights*. Our rights to use the things we own have been increasingly regulated in the last few decades in the name of ‘environmental protection’, at least in North America and much of Europe. Restrictions, of course, are nothing new. It is almost quixotic to think that owning something gives one the right to use it however she pleased – what a world that would be! Many recent property theorists have focused on the *justification* for (private) property rights, or the (moral and legal) possibility of owning things like genes, cells, and even the news. What is usually taken for granted is that humans have *an interest* in owning things and always have. The germ of ownership is in the mere ability to exclude others from using something one has an interest in using. One cannot eat what one cannot keep in one’s hands. When discussing any species of rights, it is useful to keep the interests being served by them in mind, and the way those interests shape the rights.⁵

⁵ Those who support a Will Theory of rights will not find this especially obvious. Support for this claim will be offered in Chapter 2.

This is especially useful when discussing the restrictions on property rights that come about through laws that claim to have the goal of protecting nature ‘for its own sake’. For while in some rare cases, like in Ecuador and Maine, nature is granted legal *rights*, the more common and more modest goal of protecting nature for its own sake seems to recognize only the legal *interests* of nature. The challenge for anyone wishing to investigate how environmental protection might affect the idea of property is that most theories of property pay scant attention the role interests play in shaping rights and focus more on what the rights are (or ought to be) and how they work (or ought work). What happens to the right protecting our interest in using things exclusively when the things we own are also interested in how they are used?

An interest based theory of property is useful beyond simply discussing environmental protection. James Penner offers an interest based theory of property that is meant to help clean up the analysis of property generally. He offers several arguments against what has become the standard kick-off point for most theories of property, the notion that property is a bundle of rights. This picture of property has come to us as a fusion of the analysis of rights provided by W.H. Hohfeld and the analysis of the standard incidents of ownership provided by A.M. Honore. Many theorists take the combined efforts of these philosophers to be the starting point for more interesting problems such as the justification of private property. In Chapter 1, I will briefly outline the structure of the bundle of rights picture of property and some of the difficulties that philosophers like

Penner have with it. He argues on the one hand that the theories of Honore and Hohfeld may not be as compatible as many believe and further that the view itself is unhelpful in answering some fundamental questions about property such as how to identify existing property relationships and what sorts of things are in fact 'ownable'. The theory he offers in place of the bundle of rights picture focuses on the interest people have in *owning things*, that is, in exclusively determining their use. We can better distinguish which laws and rights are properly said to be creating or referring to a property relationship by asking whether or not they serve this interest.

Supporting Penner's critique is not the primary focus of this paper, however, I agree that the bundle of rights thesis leaves something to be desired when it comes to answering questions about why some things are ownable and others are not. Focusing on the interest we have in owning things provides some guidance, but more is needed in order to explain why some things simply are not fit objects of property rights at all. Some objects, e.g. humans, cannot be owned because the law has explicitly identified them as unownable. Others, notably intangibles like ideas, stories etc. are trickier. Why would ideas be fit for ownership through things like patents, but not, say, one's personality, or his friendships? Penner answers that things which are inseparable from ourselves, things to which we stand in a particularly unique way cannot be considered suitable objects for ownership.

While this second aspect of Penner's is interesting in its own right and will strike a chord with many environmental philosophers who would seek to raise the status of nature in the law, e.g. by granting it rights, this paper will focus mostly on how environmental protection law is more commonly found today. That is, it will focus on the effect of restrictions on use that are motivated by a respect for the interests of nature. Chapter 1 will hopefully offer a fair account of Penner's complete theory and show that it is useful in discussing this issue. Again, while I do not endeavour to offer a complete argument in support of Penner's theory or of his critiques of the bundle of rights picture, I do hope to show it is useful for understanding property beyond the small issue I wish to engage in the remainder of this paper.

Once it has been established that we can defensibly have a theory of property that focuses on interests, we will be well positioned to discuss how the interests of nature conflict with human interests in owning it. Chapter 2 focuses primarily on establishing the conditions under which a thing or class of things can become unownable. Penner argues that, provided a thing is 'separable', that someone can stand in essentially the same relationship to it as someone else, then a thing can be made 'unownable' through a willful act of legislation. This will normally take the form of a restriction on the use of the object, specifically the kind of use that would normally characterize ownership of it, e.g. by prohibiting the renovation, inhabitation or sale of houses. Penner thinks that such restrictions can only undermine the property-like nature of relationships to such objects if the

restriction is explicitly intended to do so, that is, to render the thing or class things unownable. If the restriction on selling houses is enacted to prevent the spread of disease for instance, then it fails to undermine the ownability of houses even though selling them is a normal use associated with owning houses. The goal of Chapter 2 is to show why this idea is mistaken or at best incomplete. The ownability of an object might also be undermined by a single or combination of restrictions if they have the aggregate effect of undermining the interest someone might have in owning that kind of thing.

Finally in Chapter 3, I will show how environmental restrictions can undermine the ownability of natural resources in the way described in Chapter 2. By admitting the interests of the natural resources allegedly being owned into the law we establish an obligation to restrict the use of the thing on account of the thing's own interest in how it is used. This undermines the exclusivity of the determination of how natural resources are used by their "owners" and undermines the property-like nature of the use rights they have in them. This is by no means a straightforward argument. A good deal needs to be said about the interests of nature I claim are being recognized, *how* exactly the law is recognizing them and whether or not it is defensible to claim that these interests are competing with a putative owner's interests in the thing in a way that undermines the property nature of the relationship. To keep things simple, I will focus on the Canadian *Environmental Protection Act*, and some decisions made by the Supreme Court of Canada that make reference to these issues as an

example of the kind of legislative undermining I have in mind. I will also discuss in some detail the arguments put forward by Joel Feinberg about the interest of future generations. Feinberg believes, and he is not alone, that any talk that environmental protection has something to with anything other than human interests is confused. While I do not support this conclusion, the theory of interests he presents that leads him to it is nevertheless a powerful one, and useful for the argument of this paper.

Feinberg offers a clear and convincing case for attributing interests and rights to large groups, e.g. the human population of the year 2509 CE. While Feinberg does not think that his argument can be transferred to other species, I argue that it can, at least in a way that allows us to recognize the interests of species in the present. The upshot of this is it allows us to make sense of the distinction judges and legislators have been making between the interests of humans and those of nature without accusing them, as Feinberg does, of conceptual confusion.

The final conclusion reached in this paper is that once the interest people have in owning things is recognized as a key feature to identifying property relationships, we see that under certain contingent legal conditions 'the land' can be rendered unownable. This can be done quite by accident, that is, the intention of recognizing the interests of nature may not be motivated in the slightest by the desire to render it unownable. Nevertheless it may do so. It is worthwhile stressing that this in no way entails the need for any change in policy. The

conclusion rather arises *out of* policy. That said, it may be that once a society has reached the point where it recognizes the interests of nature in such a way as to render it unownable it will of its own accord take its policies in directions it might not have previously considered.

Chapter 1 - Some Rights Come in Bundles

1.1 Introduction to Chapter 1

The aim of this first Chapter is to discuss some criticisms of the bundle of rights picture of property and look at the theory James Penner develops as an alternative. First, I will look at the bundle of rights picture, its origins with the work of Hohfeld and Honore and the way several prominent legal theorists have justified its use. Then, I will discuss the two central concerns Penner has with it, namely that it is prone to misuse leading to injustice and more curiously that it fails to be a theory of property at all. Finally, I will give a reading of Penner's own attempt to supply a workable theory of property as "an idea in the law".

Both Penner's critique of the bundle of rights picture and his own theory rely heavily on the work of Joseph Raz on law's normativity. The central notion Penner utilizes is that legal rights are a species of legal norm that provide reasons for action to subjects of the legal system. Furthermore, such reasons for action exclude the possibility of a subject's considering certain other reasons for action; rights provide *exclusionary* reasons for action. This is on account of their ability to guide subjects towards the realization of *interests*.

Interest-based theories of rights are one of two main camps of a central debate about the nature of rights. The opposing camp supports a Will Theory of rights. While Penner briefly identifies himself in the Interest Theory camp he does not offer a sustained argument for interests-based approaches generally. I

will therefore supply a very brief survey of some of the arguments for Interest Theories and against Will Theories in the hopes of bolstering the plausibility of Penner's account.

The notion that rights and legal rules generally promote and protect interests is central to Penner's take on property. Whereas many property theorists have taken the Hohfeld-Honore analysis as merely a starting point for the more interesting work of *justifying* private property, they have remained ambiguous as to how to recognize the members of the set of ownables. Penner's answer is to provide two theses, the Separability Thesis and the Exclusive Use Thesis which when combined form the basis for the legal idea of property. They outline what can be owned and what owning entails respectively. Both theses promote or protect, indeed are entailed by, what Penner suggests are the interests we have with respect to property, that is, our interest in owning things. This interest-based approach to law and to property specifically will better serve our analysis of the effect environmental protection has on the ownership of natural resources than the standard Hohfeld-Honorean analysis. While the Hohfeld-Honore 'bundle of rights' picture of property provides valuable insight into how property rights function, their relationship to powers and duties and the role 'standard incidents' of ownership play in identifying property relationships, a complete theory of property requires more. One thing the Hohfeld-Honore picture does not fully explain is *why* a given set of use rights are 'standard', that is, why is the right to alienate or destroy a thing a standard incident of ownership? This is important

because we need to be able to distinguish between those cases where someone has the right to alienate or destroy a thing and yet *does not* stand in a property relationship to that thing. A farmer may have the right to kill a fox who is feasting on his chickens, but such a right does not exist in order to establish a property relationship – the farmer does not, on account of that right, *own* the fox. Identifying what interest the farmer's right to kill predators aims to serve (say, to protect his flock) *does* allow us to distinguish it from the right he has to destroy his barn in order to build a new one.

In the introduction, it was asserted that some developed societies are recognizing the need to protect natural resources for their own sake, that is, for reasons beyond the interests humans have in them. If Penner is correct that identifying the interests involved is crucial to identifying property relationships, then, I will argue, we might also have to consider non-human interests when they are recognized in legislation concerning the use of a given thing. And such considerations may have an effect on the ownability of those things. But before any articulation or defense of either Penner's theory of property or my own analysis of its implications for the ownership of natural resources is possible, the bundle of rights picture and the shortcomings within it Penner seeks to improve upon must be given their due attention.

1.2 The Bundle of Rights Picture of Property

Property rights have come to be widely regarded as a bundle of specific use rights. This view emerged as a product of Wesley Hohfeld's influential analysis of rights¹ and A.M. Honore's account of ownership.² The image it conjures is one where I walk around with a bundle of sticks, each representing a different normative relation i.e. rights, powers, liberties etc. according the Hohfeldian analysis. For each 'thing' I own, there is a corresponding bundle, though there is no set number of or kind of 'sticks' or rights that is needed for it to constitute ownership of the thing – it varies depending on the object. There are however what Honore called the “standard incidents of ownership”, eleven rights, liberties, duties etc. almost any combination of which amounted to ‘limited ownership’, ‘ownership’ or, if all of them were present, the “full or liberal sense” of ownership. He says,

[o]wnership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary. Obviously there are alternative ways of classifying the incidents; moreover it is fashionable to speak of ownership as if it were just a bundle of rights, in which case at least two items in the list would have to be omitted.

No doubt the concentration in the same person of the right (liberty) of using as one wishes, the right to exclude others, the power of alienating and an immunity from expropriation is a cardinal feature of the institution. Yet it would be a distortion – and one of which the eighteenth century, with its over-emphasis on subjective rights, was patently guilty – to speak as if this concentration of patently garnered rights was the only legally or

¹ Hohfeld, Wesley Newcombe. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, W.W. Cooke (ed.), New Haven: Yale University Press, 1919.

² Honore, A.M. ‘Ownership’ in *Oxford Essays in Jurisprudence*, A.G. Guest (ed.), Oxford: Oxford University Press, 1961.

socially important characteristic of the owner's position. The present analysis, by emphasizing that the owner is subject to characteristic prohibitions and limitations, and that ownership comprises at least one important incident independent of the owner's choice is an attempt to redress the balance.³

In addition to the idea that there are standard incidents of ownership, rights etc.

which identify a relationship *as a property relationship*, he emphasizes the presence or absence of any one of these incidents is not necessarily enough.

While this is a crucial observation for understanding property, his analysis falls short of *explaining* why these incidents have historically been characteristic of property relationships. Despite the prevailing belief to the contrary, Honore's and Hohfeld's theories are star-crossed companions. They are problematic both in terms of compatibility and application.

Hohfeld's analysis in *Fundamental Legal Concepts* is, as the title suggests, about legal concepts generally. He was not especially concerned with putting forward a complete or even a partial theory of property rights. Rather he discussed property more to illuminate what he took to be the misuse of legal concepts. One interpretation of his analysis of property rights is that he was simply re-asserting a widely held view that property rights are relations between right and duty holders and not between owners and things.⁴ But there is some

³Honore, p. 112-3. Lawrence Becker divided the right to capital into the right to consumption, the right to modification and the right to alienation, expanding the list to 13. This is to account for tribes in which timbers for building huts may not be modified by the owner though they may be alienated. See: Lawrence Becker, 'The Moral Basis of Property Rights' in *Nomos XXII, Property*, J. Roland Pennock and John W. Chapman (eds.), New York: New York University Press, 1980. p. 191.

⁴James Penner, 'The "Bundle of Rights" Picture of Property' in 43 *UCLA Law Review*, February, 1996, p. 724.

reason to think he meant a good deal more, that these rights between people were of an aggregative sort. Indeed it is just such an interpretation that seems to have inspired the bundle of rights picture.

To begin, let us consider his definition of rights *in rem* ('paucital rights') and rights *in personam*:

A paucital right, or claim (right *in personam*), is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights actual and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of persons. A multital right, or claim (a right *in rem*), is always one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people.⁵

The distinguishing feature between the two is their scope; paucital rights are unique and occur between individuals or small groups, where multital rights come in bundles of fundamentally similar rights and apply between a person or small group and a large and indefinite group. If A makes a contract with B to stay at least hundred feet away from the boundary of his (A's) land in any direction in exchange for \$100, then they have created a right for A that B keep that distance. This is a unique relationship between A and B. A has no right that B act in this way without the contract they made. On the other hand, A's right that B keep off the land *within* the boundaries of his property rights is one A already has among

⁵ Hohfeld, p.74 .

the bundle of fundamentally similar rights he has with respect to C, D, E, F etc.⁶

Hohfeld asserts that this difference in scope is all that distinguishes rights in rem from rights in personam.

Further illustrating this point, Hohfeld described property in something as a “legal interest”, the nature of which is “a complex aggregate of rights (or claims), privileges, powers and immunities.”⁷ He says that:

all legal interests are incorporeal – consisting as they do of more or less limited aggregates of *abstract* legal relations....The legal interest of the fee simple owner of land and the comparatively limited interest of the owner of “right of way” over such land are alike so far as “incorporeality” is concerned; the true contrast consists, of course, primarily in the fact that the fee simple owner’s aggregate of legal relations is far more extensive than the aggregate of the easement owner.⁸

Hohfeld’s model describes ownership in a way that places the emphasis on interpersonal relations *with respect to things*, rather than about relations between people and things (perhaps with respect to other people). If this is to serve as the framework for a theory of property, then any attempt to fill in this kind of framework should be compatible with this description. Somewhat surprisingly, Honore’s theory of ownership appears to be in tension with it, even though most theorists think Hohfeld and Honore go together like spaghetti and meatballs.

Honore’s project was to provide the standard incidents of what is commonly referred to as “ownership”. Unlike Hohfeld, his project was not strictly analytical. Honore tried to accommodate both lawyers’ intuitions and

⁶ Id. p. 76-77.

⁷ Id. p. 96-97.

⁸ Id. p. 30.

laymen's intuitions. As such, it is apparent that each of his incidents relies to some extent on the layman's view that ownership is firstly about people and the use of things, and secondly about the relationships between people that arise *with respect to those things*.

Consider again the incidents he mentions:

Ownership comprises the right to possess, the right to use, the right to manage, the rights to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and the absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary...⁹

We do not have to imagine how each of these could be described by reference to things; Honore does it for us in his article. And since Hohfeld seems to regard the relationship between people as more central to property rights (indeed, to rights generally) than their relationship to things, this is the first indication that Honore's model might not fit as comfortably with Hohfeld's as many have believed.

We might look at the tension this way. If we take the Hohfeldian approach and describe property rights as essentially being between people and with respect to things, then the standard incidents of ownership would be things like making claims against others for damages or theft or trespassing etc. One does not usually buy a car so that he will be in legal position to make such claims. They are ancillary to the real reason (or interest, to anticipate Penner's argument,) he has in buying a car, namely in using it.

⁹ Honore, p. 112-113.

How then could we interpret each theory so as to make them compatible? The route taken by most bundle of rights proponents is to subject Honore's standard incidents to a Hohfeldian "fractionation,"¹⁰ explaining each right as a multitude of normative relations with everyone else. Such a bundle is then doubly so; it is a bundle of bundles. But if we take Honore's incidents seriously we still cannot escape the centrality of the 'thing' being owned in each of these bundles.

Penner calls this understanding of the bundle of rights thesis the 'substantive version'. But even this can be interpreted two ways. The 'modest interpretation' reduces simply to the idea that property rights are complex. That is, they are what most people think they are, rights to things, but that they can exist in numerous combinations.¹¹ Though it is 'modest', Penner thinks it is still unnecessarily complex. What is it about property rights that make them suitable subjects for Hohfeldian fractionation while other rights, derived from equally complex branches of private common law are not? Tort and contract law also involve a complex web of normative relations but we do not "thrash about in conceptual confusion because of it."¹²

The second interpretation he calls the 'disaggregative version' and is more radical than the first.¹³ On this interpretation, each right and fraction of a right can be bought sold or traded. That is, fractional rights can be added or subtracted

¹⁰ Penner, 1996, p. 734.

¹¹ Id. p. 733-734.

¹² Id. p. 739.

¹³ For an example of what Penner calls the disaggregative version of the bundle of rights picture see Bruce Ackerman, *Private Property and the Constitution*, New Haven: Yale University Press, 1977.

from ‘bigger’ rights which are themselves part of the ‘ownership bundle’. An example of fractional rights would be the rights to use one’s car for the day. I have a broad use right among my ownership rights with respect to my car. I can sell you the fraction of that use right that applies to today, tomorrow, the hours of three to five p.m. etc. As we can see, “[t]his view emphasizes in the strongest fashion that the very nature of property is that of an infinitely divisible composite, which can be disintegrated into or built up from less extensive rights.”¹⁴

One version or another of the bundle of rights view has been accepted by some of the largest figures in recent property theory and not without some justification. Stephen Munzer points out that one advantage of the Hohfeldian analysis is that it provides a neutral vocabulary for “cross-cultural application – that is, the idea of property, though perhaps not a moral and political theory of property, applies to all or almost all societies.”¹⁵ Honore himself began his landmark paper by stating that “[o]wnership is one of the characteristic institutions of human society.”¹⁶ Lawrence Becker also argued for the universality of property practices, pointing out that once we had the Hohfeld-Honore analysis we were able *to recognize* the practice of ownership in even ‘primitive’ societies.¹⁷ That is, once the “full or liberal sense” of ownership of a person having exclusive control over the use of a thing was exploded into hundreds of potential combinations of various normative relations between people

¹⁴ Penner, 1996, p. 735. He notes that this conception is particularly prevalent in lawyerly debate about the “takings” clause in the U.S. constitution.

¹⁵ Stephen R. Munzer, *A Theory of Property*, New York: Cambridge University Press, 1990. p 26

¹⁶ Honore, p. 107.

¹⁷ Becker, 1980. p. 212.

and a vaguely defined group of ‘things’ all sorts of practices could now be identified as ‘institutions of property’. Becker, however, passes off his description of property rights through the Hohfeld-Honore paradigm as mere “preliminaries” to the main task of his book – discussing various *justifications* for property.¹⁸ In other words, that property is a bundle of rights along the Hohfeld-Honore model is just the starting point for what many theorists think to be the bigger question – the justification of (usually private) property.

Neither the bundle of rights picture itself nor the apparent ease with which serious development of it has been elided by property theorists is contested. Even those who utilize it are aware of its limitations. Its neutrality has an analytical appeal but it cannot on its own solve any of the ‘bigger’ questions that concern us about the role of property in society. In many ways the various theories about the justification of property are attempts to ‘fill in’ the structure that the Hohfeld-Honore analysis provides. Penner has argued not only that the bundle of rights picture is merely a framework on which to hang more substantive arguments, but that the framework itself is unsoundly constructed. He is not alone, at least in his skepticism towards Hohfeld’s contribution to the picture.¹⁹

On Hohfeld’s analysis, a right to a thing is really a multitude of rights *in*

¹⁸ see: Lawrence Becker, *Property Rights: philosophic foundations*, London: Rutledge and K. Paul, 1977. Jeremy Waldron also begins his discussion of private property by outlining the Hohfeld-Honore picture of property rights generally. See: Jeremy Waldron, *The Right to Private Property*, Oxford: Clarendon Press, 1988.

¹⁹ P.B.H. Birks also argued for the importance of recognizing that some rights in rem cannot be separated from the ‘thing’ to which they pertain. It would be mad to think that if you eat my cake I still have a right in rem in the present tense with respect to that cake. All that remains is a right in personam that you pay me for the cake, which is a different right than I had when the cake existed. See: P.B.H. Birks, *An Introduction to the Law of Restitution*, Oxford: Clarendon Press, 1985. p. 49-50.

personam, that is, rights with respect to people. This means, for example, that for every thing in which I have a property right, I have a right *against every other person* not to be interfered with my use of that thing. The symmetry of Hohfeld's analysis then requires that this translates into a duty held by everyone not to interfere with my use of the object of my property right. Notice that this places the emphasis, not on one's relationship to the object of property, but on the interpersonal relationship between right and duty holders. My right (or claim) is not *to the object*, it is a right *against everyone else in the world* e.g. not to interfere with a certain action of mine (my using the object). This means we are all walking around with a myriad of rights and duties and creating a myriad of rights duties with respect to perfect strangers all around the globe. I have a duty not to interfere with the use of a British Columbian fisherman's nets even though I live several thousand kilometers away and have never met him.

The problem then, as Penner sees it, is twofold. On the one hand, the bundle of rights theory is not really a theory of property rights at all. He says, "the Hohfeld-Honore schema is little more than an association of the views of two legal philosophers. There is no canonical formulation of the bundle of rights picture, nor does the schema suggest any clear methodology for dealing with property issues."²⁰ And as was noted above, these two views are in tension with respect to which relationships are central to property relationships. Again, this has not escaped the notice of every philosopher who has utilized it. This problem

²⁰ Penner, 1996, p. 3.

is perhaps less one of theory and more one of practical application. There is nothing wrong with using the same specialized vocabulary to describe different theories. The problem is when judges, for instance, use the phrase “bundle of rights” as if it *were its own theory*, and use it to justify some novel decision about property. This can lead not only to theoretical confusion but also to a certain level of injustice. When a judge must decide whether one’s own tissue cells are his property²¹, it is unhelpful for the judge(s) to start with the premise that property is a bundle of rights. It does not provide sufficient guidance for identifying all kinds of property relationships nor in deciding what sorts of objects are appropriate for ownership. Yes, we have the right to put our bodies, or parts of our bodies to all sorts of uses. That is, we have a bundle of use rights with respect to our bodies. Is that all one needs to know in order to establish that our bodies are our property?

The bundle of rights analysis is capable of conforming (and thereby justifying) almost any decision a judge ultimately reaches on account of the very theoretical flexibility that has appealed to so many. There is nothing within the theory to prevent judges from interpreting identical cases as being matters of property law in one instance and, say, contract law in another. Obviously, precedent will provide much of the needed guidance on a daily basis. But to halt one’s explanation for why a certain bundle of rights counts as property at some judicial decision *and claim* that it is a principled classification strikes me as disingenuous.

²¹ *Moore v. Regents of University of California*, 703 P.2d 479, Cal.,1990.

The second problem is more technical and regards the nature of the analysis itself. Penner's concern is, first, that such an analysis fails to capture what the point of the legal practice of property *is*. That is, we have property laws to protect not an interest in placing duties on every other person in the world, but an interest in determining the use of *things*.

Hohfeld does not explain *why* some rights are rights in rem. What is it about the content or substance of a right (in rem) that would make it a multitude of fundamentally similar (i.e. in personam) normative relations? For Penner the answer is simple. For,

even the briefest of glances at their characteristic subject matter gives one reason to explain rights in rem in this way. The reason why a right to a material object would seem to entail something like a right in rem is simply that a material object, existing as it does in the world, is therefore in principle accessible by anyone and subject to the depredations of anyone.²²

Unlike Hohfeld, Penner thinks the origin of the right in the example above of A's contract with B to keep a distance from his property line establishes a substantive difference between A's right with respect to B and his right with respect to everyone else. Each right comes from a different branch of a pre-existing normative framework, the legal system. The right in personam is rooted

²² Penner, 1996, p. 727-729. Let it not be thought that only material objects can be subjected to rights in rem. Nor is it the case that anything subject to rights in rem are necessarily property. Intangibles, such as monopolies, patents, etc. and even states of affairs can be suitable objects of a right in rem. However, a right in rem to be free from bodily harm (a state of affairs) is not enough to conclude that one therefore owns that state of affairs. It is the impersonal nature of the right that makes it a right in rem. We have a negative duty to refrain from interrupting anybody's state of affairs through inflicting bodily harm. The challenge is that by reducing rights in rem to a myriad of rights in personam one removes that impersonal element and makes it manifoldly personal.

in contract law, the right in rem is rooted in property law. Penner invokes Raz's notion of laws being *exclusionary reasons for action* to make his case.²³ Consider the contract between A and B discussed above. The *reason* B has a duty to stay beyond 100 feet of A's property is because of his *specific* contract with A whereas the *reason* B has for staying off A's property is that there is *general* duty to stay of the property of others²⁴. He suggests that it is "a conceptual stretch" to regard the content of the duties in each case as the same, different only in extension, given that each case corresponds to *different interests* though situated in a normative framework that serves both.²⁵ A duty whose content reflects an interest in contract is meaningfully different from a duty whose content reflects an interest in property.

Secondly, Honore was operating from the starting point of a full and liberal notion of ownership. This notion of ownership constituted by the standard incidents altogether is meant to be reflective of what the 'common' understanding of ownership is. It is "the greatest interest *in a thing* admitted by a mature legal system."²⁶ That being said, we must be careful when attaching these theories to each other, since they emphasize the centrality of different aspects of the property relationship. This difference could be understood as a good reason to integrate them; perhaps the result is a more balanced theory. But such an integration must

²³ Penner, 1996, p. 727-729.

²⁴ I have in mind here Hart's distinction between special and general rights, outlined in H.L.A. Hart, 'Are There Any Natural Rights' in *Theories of Rights*, J. Waldron ed., Oxford: Oxford University Press, 1984.

²⁵ Penner, 1996, p. 727-729.

²⁶ Honore, p. 107, italics mine.

be done with care and with due attention paid to this difference in emphasis. Still, the question of whether such a theory is complete enough to adequately describe the idea of property in law, both in the sense of theoretical clarity and in practical applicability requires more defense than many theorists have given. This is apparent in the issue which is the focus of this paper, when the competing interests in the use of an object go beyond those of potential rights holders and duty owers and include those of the natural environment. For that, an alternative theory of property is needed.

1.3 An Alternative Theory of Property

The arguments so far advanced are neither sufficient to nor intended to assign the bundle of rights picture of property to the ranks of ideas tried, tested and trashed. The arguments above might only lead to the conclusion that the bundle of rights picture is simply incomplete. We shall next consider Penner's alternative theory of property and it will become clearer why the bundle of rights picture is inadequate and why we can be optimistic that property is not doomed to remain a hopelessly complex idea. As always, some preliminary work must be done before arriving at Penner's theory itself.

Normative Systems and Property

One of the challenges Penner raises for the Hohfeld-Honore bundle of rights picture of property is that it fails to address the reasons we have for

engaging in the practice of property in the first place. Property, as a branch of rights, exists in order to protect (and in some cases promote) a particular interest we as human beings have. Specifically, we have an interest in *using things*. As we just saw, the Hohfeldian aspect of the bundle of rights analysis is in tension with this, focusing instead on relationships people have with other people with respect to things. While this offered a certain tidiness to the analysis it loses some of its explanatory power once we recognize the interest the practice of property is meant to serve.

Penner grounds his theory of property in the picture of legal rules and normative systems put forward by Joseph Raz. The key feature of Raz' theory Penner relies on is the notion that norms generally speaking serve as reasons for action. Normative systems provide guidance for those everyday situations that call for practical reasoning. Norms serve as reasons to act one way rather than another, or effectively remove certain options from the range available.²⁷ Furthermore, some norms serve as *exclusionary* reasons for action, removing not just some of the considerations one may have for a given decision, but most or all of them. If I promise to take my friend Courtney out for a drink later today, but when the time comes I no longer feel much inclined to do so, my promise excludes my taking this new disinclination into account. I decide to go because of the promise and not because of any other first order considerations that are present at the time of my deciding (i.e. whether I still want to or not). The norm

²⁷ Joseph Raz, *Practical Reason and Norms*, Princeton: Princeton University Press, 1990, ch. 1.

of keeping promises is a rule that serves an exclusionary function in my practical reasoning. This is not true (or at least no longer true) of the norm of men holding the door open for women. If upon arriving at the pub it occurs to me that sometimes this act is understood as a chivalrous gesture, I may take this as a reason to open the door for Courtney. But nothing about this norm excludes my also considering the fact that Courtney may be the kind of person who finds such gestures archaic and insulting to gender equality.

Legal rules are norms of the exclusionary sort. They serve as both a first order reason and a general second-order reason that excludes our considering other first order reasons for action. Furthermore, unlike customs, which can acquire the force of norms over time, laws are created *in order to be* exclusionary reasons. One caveat to the categorical nature of second-order exclusionary reasons such as legal rules is their scope. The set of first order reasons they excluded is not limitless. The classic example of this point is a soldier's obligation to obey the orders of his commanding officer. This obligation is exclusionary of most first order reasons. However, the first order reason to honour human life and dignity is not excluded should the order come down to commit an atrocity like genocide, for instance.

Desires, Interests and Values

We may distinguish desires from interests by the “critical attitude” we take to the latter but not the former.²⁸ Desires arise *ex nihil*, whereas we come to recognize interests through reflecting upon what seems to be “best” for us in the long run. Clearly, legal rules, if they serve either, serve interests. When we, as individuals or as a society, define our interests we take into account our overall wellbeing as well as which desires will arise and how we ought to respond to them. Legal rules give us reasons to act in a way that best promotes those interests *by excluding* our making decisions based on our present desires alone. That is, legal rules, in their role as exclusionary reasons for action, help us to achieve or act to promote and preserve those interests that we have critically defined beforehand.

For Penner, our interests are bound up with an appreciation of values.²⁹ Like interests, values are critically recognized, but unlike interests (or desires) values are not localized to the individual person.³⁰ The value of a symphony is different than an individual’s interest in a particular aesthetic experience. As Penner puts it, “values are reduced to interests on the footing that something can only be a value if it contributes (positively) to the well-being of people and is therefore in their interest to realize.”³¹ And one way we realize these interests is

²⁸ Penner, 1997, p.10; Raz, 1990, p.34. Joel Feinberg uses a similar definition of desire, that it is non-cognitive, in ‘The Rights of Animals and Unborn Generations’, in *Philosophy and Environmental Crisis*, William T. Blackstone ed. Athens: University of Georgia Press, 1974.

²⁹ Penner, 1997, ch. 2.

³⁰ Id. p. 10.

³¹ Id.

to create norms, conformity to which will better promote their realization than if we (attempted to) comply with them directly.³²

More will need to be said about interests in the following chapters. For now, this explains how Penner justifies his claim that property can be identified as a branch of law by identifying the interests it serves. If legal systems are systems of norms and norms are used to better secure conformity to critically determined interests, then any analysis of the norms which constitute the practice of property is incomplete if it does not define or account for the interest(s) served by those norms and that practice. That this is *the* way to individuate laws Penner thinks is entailed by Raz' insight about the nature of legal rules to protect interests³³ in conjunction with the fact that "we think of the mass of legal material in terms of individual laws that have constancy, laws which are not reconceived each time we look at the legal material with a particular purpose in mind."³⁴ Laws cannot serve their normative function of guiding behaviour unless they remain more or less constant, if not in their specific formulation, at least in the interests they are trying to serve. We must not be able to regularly second guess what the law is trying to do, though we may question whether a particular law succeeds at doing it. The interests served by a branch of law then, are integral to the identity of the laws within it and so are a natural way by which to classify them.

³² Raz, 1990, p. 178-86.

³³ Penner, 1997, p. 12.

³⁴ Id. p. 40.

Penner argues that if Raz is right about this understanding of norms then there is no 'truer' way of characterizing the various norms of a given system.³⁵ He suggests that a failure on the part of judges to recognize what interests are being served by a given body of rules within the system will lead to confusion and eventually injustice. For, if judges do not properly categorize the laws then they risk failing to treat like cases alike.³⁶ If we do not find Penner's prediction compelling, and indeed this argument is left largely undeveloped in *IPL*, we may find more compelling evidence elsewhere. Neil MacCormick for instance has argued in great detail about the importance of normative coherence to maintaining the rule of law.³⁷ Such arguments deserve close attention, but we have other fish to fry. I am sympathetic to though not wholly convinced by the conclusion that this is the best way to individuate laws, but I do agree that Penner establishes both the possibility and usefulness of doing so. And this is all that my project in this paper requires.

1.4 Rights, Interests and Will

The framework we have established thus far is that legal rules, being normative, serve as exclusionary reasons for action. They help us to realize the interests we have critically determined to reflect values we hold by excluding certain first-order considerations (i.e. desires) from our process of practical

³⁵ Id. p. 12.

³⁶ Id. p. 13. See also p. 23 *supra*.

³⁷ See Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, New York: Oxford University Press, 2005.

reasoning in many common situations. We can distinguish branches of law by the interests they are said to protect or promote. Now, property, as a branch of law, protects our interests with both rules (e.g. do not steal) and rights (e.g. not to have one's property stolen). Hohfeld's analysis provided us with a good starting point for understanding how rights function, but does not address *why* we have the rights that we do. This is why Hohfeld's analysis is incapable of fully informing a theory of property. Nor is it the case, or so it has been argued, that Honore's incidents of ownership add the appropriate flesh to the Hohfeldian bones. Identifying what are generally considered to be the standard incidents of ownership does help us pick out a property relationship when we see it. However, without clearly explaining what makes them standard incidents begs the question. Certainly, a system of rules which are habitually obeyed by a community and violation of which is in some way sanctioned may be standard incidents of a legal system. But the picture becomes less clear if the reason the rules are obeyed is because they have been instated by an invading army of superiour strength. Similarly, we may look at a law that says to keep off the land marked out by another for cultivation as a clear indication of the existence of property laws. But if the law is there to ensure that lands are not subject to over-grazing by animals or inefficient cultivation through too many competing crops, then the law looks less like a property law.

Following the analysis above then we now must ask whether property rights, or rights generally, are normative in the same way as legal rules. That is,

do rights guide our decisions by providing reasons for action on the grounds that they will lead to the realization of our interests?

For Penner, the answer is a simple ‘yes’.³⁸ They do so in two ways. First, when the rights of others correlate with duties one has then they will obviously serve as reasons for one’s action. My duty not to cause bodily harm to others *excludes* that from my range of options for actions at any given time. Secondly, one’s own rights can guide her actions in the following ways. Some rights, e.g. bodily security, will alter her expectations of the actions of others. Without the right to bodily security she might choose to arm herself before leaving the house (assuming this right is generally respected and enforced). Other rights, such as *rights to liberties* alter the range of options we are required, or likely to consider. If I have a right to free expression then my decision about the subject of the opinion piece I am writing could be different than if I did not. Penner says that,

[t]he balance of reasons the agent faces is altered by these rights because, focused upon and justified by the interests of the right holder, these rights declare that, as far as the law is concerned, the right holder *may*, i.e. is permitted to, consider only his interests in deciding how to act.³⁹

This category of rights is not exclusionary in the sense that duties are, but nevertheless influences the range of options for action by telling what sorts of things we do not have to consider, such as the possibility of government sanction or censorship. Rights can therefore be regarded as normative, in the sense of

³⁸ Again, Penner is drawing mostly on Raz to get this analysis going. He uses Raz’ claim that rights exist whenever a duty is imposed for the purpose of promoting or protecting the interest of the right-holder. That is, if one benefits from another’s duty he is not necessarily a right holder. It is only when the benefit to the right-holder is the reason for the duty of the duty-holder. See Joseph Raz, ‘On the Nature of Rights’ in 93 *Mind*, 1984, p.195 and p.199.

³⁹ Penner, 1997, p. 16.

providing reasons for action in order to further or protect certain interests.

Understanding these interests is thus helpful, perhaps necessary, to fully understanding the content of a right and in determining the branch of law to which it belongs.

Interest based accounts such as this are not without their rivals. Rights theory is broadly speaking divided into two camps: interest theories and will theories. Matthew Kramer, a staunch supporter of interest-based theories explains the distinction with his usual analytical grace thus:

[A]n interest theory of rights would subscribe to the following two theses:

- (1) Necessary but insufficient for the actual holding of a right by a person *X* is that the right, when actual, preserves one or more of *X*'s interests.
- (2) *X*'s being competent and authorized to demand or waive the enforcement of a right is neither sufficient nor necessary for *X* to be endowed with that right.

...

[A]ll or most variants [of a Will Theory of rights] subscribe to the following three principles:

- (1a) Sufficient and necessary for *X*'s holding of a right is that *X* is competent and authorized to demand or waive the enforcement of the right.
- (2a) *X*'s holding of a right does not necessarily involve the protection of one or more of *X*'s interests.
- (3a) A right's potential to protect one or more of *X*'s interests is not sufficient per se for *X*'s actual possession of that right.⁴⁰

Kramer points out that 3a, actually applies to Interest Theories as well.⁴¹ This will be important later in this paper. For now, it is enough that we identify Penner

⁴⁰ Matthew Kramer, N.E. Simmonds and Hillel Steiner, *A Debate Over Rights: philosophical enquiries*, Oxford: Clarendon Press, 1998, p. 62.

⁴¹ Id. p. 62.

as within the Interest Theory camp and discuss some reasons in support of his being there.

One of the most counter-intuitive results of the Will Theory position is that it must deny rights to children and the mentally disabled. These groups are generally incompetent and unauthorized to enforce or waive any rights they could potentially have. An interest-based theory on the other hand can attribute rights to them solely on account of the duty imposed on the rest of us to provide for or protect certain interests they have i.e. in bodily security, having the necessities of life etc. A Will Theorist might qualify that children and the mentally disabled can have rights, but only insofar as there are legally recognized representatives to exercise their powers to enforce or waive them on their behalf.⁴²

There is a second consequence of the Will Theory approach that clashes with our intuitions about, or at least the way we commonly talk about the right to be free from unprovoked assault. In many established systems grievous assaults fall within the ambit of criminal law while minor assaults are transgressions of civil law. However, an individual is only empowered to enforce, i.e. by seeking protection from or reparations for violations under civil law. Does this mean that individuals in such a state have no right to be free from grievous and unprovoked attacks? While the beneficiaries of the duty imposed by criminal laws against

⁴² Hart took the stronger position in his paper 'Are There Any Natural Rights' (1955) but retreated to the qualified version in his later essay, 'Bentham on Legal Rights' in *Oxford Essays in Jurisprudence, Second Series*, Oxford: Clarendon Press, 1982, p.184-5. Kramer suggests that if a "leading spokesman for the Will Theory was daunted by some of its implications, then the opponents of that theory need feel no qualms about finding fault with it." Kramer, Hillel, Simmonds, p.70.

such behaviour are certainly individuals (as well as the state, which enjoys the harmony of a peaceful society), since they have no power to waive or enforce that duty they cannot on a Will Theory be said to have rights.⁴³ Now it is not difficult to accept the idea that we have a duty to the state not to commit violent crimes. Nor is it farfetched to suppose the state has a right that we as subjects do not commit them. The Will Theory *can* account for this right, i.e. the right of the state. Note that the Interest Theory is perfectly able to accommodate the state's right *as well as* the right we naturally suppose individuals have to be free from grievous unprovoked attacks.⁴⁴

These hardly constitute a complete critique of the Will Theory approach, but it gives one a sense of the kind of objections a Will Theorist has to answer that are not a problem for the Interest Theorist. Penner's theory of property, to which we next turn is merely an instance of an interest based theory of property rights, couched in Raz' interest based theory of law.⁴⁵

1.5 Interests and the Individuation of Law

It is common to talk about both individual laws and branches or areas of *the* law. It does not take much to see there a good deal of overlap among

⁴³ See Neil MacCormick, 'Rights in Legislation' in *Law, Morality and Society*, P.M.S. Hacker and Joseph Raz (eds.), Oxford: Clarendon Press, 1977. p. 189.

⁴⁴ Kramer, Hillel, Simmonds, p. 74.

⁴⁵ A helpful survey of some prevailing positions in the debate between Will and Interest theories can be found in "A Debate over rights..." One major criticism that Matthew Kramer raises is that theorists on both sides tend to politicize their accounts. That is, not all operate from a Hohfeldian framework which, for better or worse, has a starkly analytical appeal for Kramer. Joseph Raz, for instance is an exponent of the interest theory but does not accept Hohfeld's analysis, for some of the reasons discussed above as well as others. The arguments that I have suggested add weight to the interest theory's case do not hinge on Hohfeldian understanding of rights.

individual laws and among branches of law. Statutes about theft for instance might refer to property law, contract law, tort law, etc. The ability to distinguish clearly the boundaries of a given branch of law is useful (perhaps even vital) for both legal theorists and legal officials, especially judges. Understanding whether (and why) a given statute falls within the realm of contract law or tort law is helpful in creating an accurate description of the legal system and indispensable for ensuring a certain level of justice. Judges should at least be able to provide a principled reason for trying a case under contract law rather tort law or property law, since her ruling and any sanctions following from it will change depending on her interpretation. And since property law, contract law and tort law are intricately interwoven in many systems, such interpretation will be not be uncommon.

Some have argued that the law cannot be individuated in the way just described – that is, it is not organized into parcels ahead of time, but serves as a well of normative information into which we can dip in order to inform decisions about the law.⁴⁶ I will not argue the point in this paper. If we accept the thesis presented above, that legal norms are reasons for action that guide behaviour toward the realization of interests, it follows that we *can* individuate laws or branches of law by the interests they serve. We can for instance identify contract laws as those which serve the interest we have in having binding agreements with other people. Further, *it is useful* to do so even if this is not the only way or

⁴⁶ See J.W. Harris, *Law and the Legal Science: An Inquiry into the Concepts 'Legal Rule' and 'Legal System'*, Oxford: Clarendon Press, 1979. p. 84-106.

indeed the 'proper' way for it to be done. The concern in this paper is what interest(s) laws about property are trying to serve.

At long last, we can look at what Penner thinks is the interest we have in the practice of property. He says, "[t]he interest in property is the interest in exclusively determining the use of things."⁴⁷ This deceptively simple formulation needs significant unpacking. It is clear that even at a very basic level our interaction with things in the world is important to us. Our basic requirements of food and shelter ensure that using things is necessary for survival. Furthermore, we must in using things be able to exclude at least *some* others from using the same things we do while we're using them. You and I cannot both eat the same piece of bread, though we might divide it in order to share it. Nor can this process of division go on indefinitely – I can only divide the bread so many times before eating it becomes useless. So in deciding to share it with you and only you I have excluded the rest of the world less you from having a piece, and the rest of the world including you from using my piece.

Obviously not all instances of the use of things will be necessary for survival. But there are many other goals that require the exclusive use of things. Nor must all the goals be valuable. Penner says,

There are of course ways of dealing with things which serve no interest whatever. Certain, unfortunately realized architectural fancies spring to mind. But the freedom to determine the use of things is an interest of ours in part because of the freedom it provides to shape our lives. If we believe in any fairly robust interest in autonomy, the interest in determining the

⁴⁷ Penner, 1997, p. 49.

use of things is in part an interest in trying to achieve different goals... We can benefit from our failures as well as our successes.⁴⁸

Another consideration is the scope of one's interest in determining the use of things. Again, respecting autonomy suggests there should be no limits on the kinds of uses to which we put things. However, clearly there are certain uses which cannot be protected by a 'right' to exclusively determine the use of things i.e. a property right. For instance, ownership of a piano does not entail a right to demand piano lessons⁴⁹, nor a right to drop the piano from a window into a crowded square (though for different reasons, as we shall see). Nevertheless, there will be an unimaginably vast number of uses which *are* included. I can use my water bottle for carrying water, storing birdfeed or hammering you on the head. (Whether using it as a hammer *makes it a hammer* is a different and troubling question for some legal philosophers.)

Finally, we must be clear on what we mean by 'things'. What counts as a thing for the purposes of property will be a major concern of this paper. We may note here however that a thing does not need to be physical, i.e. patents, monopolies etc. Nor are all physical things necessarily the kinds of things we can own, e.g. one's kidneys. That is, we may stipulate that some things are unownable, and some things may be conceptually unownable on account of the kinds of things they are. This latter notion will be described in more detail below.

⁴⁸ Id. p. 49.

⁴⁹ Id. p. 50.

Penner describes two theses which constitute the basis for property rights: The Exclusion Thesis (ET) and the Separability thesis (ST). Let us first look at the Exclusion Thesis.

1.6 The Exclusion Thesis

Penner words ET like this: “the right to property is the right to exclude others from things which is grounded by the interest we have in the use of things.”⁵⁰ There are several things to note about this formulation. First, *things* have a central role in the interest he identifies. Compare this with Hohfeld’s focus on the right in personam *not to be interfered with by other people*. Penner certainly recognizes this as part of the right, but it is the use *of things* that must not be interfered with and this fact must take priority in our understanding of property.

Second, the use of things *justifies* the right to exclude others. It is our interest in using things, i.e. as part of our being autonomous agents, that gives us the right to exclude others from using them. Our interest in property is *not* an interest in preventing people from interfering with our using things, or it is so only in a secondary sense.

Finally, the right is a right *to exclude* not a right *not to be excluded*. The latter imposes a duty on others not to interfere if I want to use something I own, but does not necessarily imply that they do not have some weaker right to use it,

⁵⁰ Id. p. 71.

i.e. whenever I am not. The former more explicitly points out that my right is also a power to create duties for specific people not to use something I own whether I am using it or not.⁵¹

This formulation allows Penner to defend several claims about the nature of property rights. For one thing, while possessing a property right with respect to a thing either includes or entails the rights to license it, share it, give it away, leave it by will and abandon it, it does not include or entail the right to sell it. Property rights *may be* the object of market exchange, but their being so is not entailed by the right to property in the first place.⁵² If I transfer my use right to a house I own by licensing it to another for a given term under certain conditions, then I can still be regarded as using it myself. That is, I am adopting a certain meaningful disposition toward the house whereby my interests, e.g. to make money or to keep my house occupied while on an extended leave of absence, are being realized. In arranging to sell my house, i.e. via contract, I am abstracting my interests in the house from the house. The new owner will have no duty to consider what interests I might have in the house. It may be a family home of sentimental value that I would rather not see destroyed and turned into condominiums, and while the new owner might be sympathetic to this and choose not to do so of his own volition, he will not be under an obligation to abstain from

⁵¹ 'Use' is a very broad term. I am not 'using' my bed when I am up and about, but clearly I still own it. If I am hoarding cash in my mattress I am only using it in an abstract sort of way. Penner calls such instances "meaningful dispositions" towards the object and such dispositions are all that are required to identify 'use'. Id. p. 71. In this sense then, so long as I am excluding others from an object I could be said to be using it, because my excluding others is a 'meaningful disposition'.

⁵² Id. p. 74-104.

doing so.⁵³ Therefore, our interest in owning things cannot be served by a right to sell them, since upon sale my interests with regard to the object cease to be protected. This conclusion is meant to strike us as shocking, since Penner thinks property theory has been woefully marred by its intermingling with the role of contract in law.⁵⁴ But it is less shocking when we consider that an institution of market exchange need not exist in all societies. This is true even in a society that *does have* the institution of property. Gifting, inheritance etc., could all serve the function of transferring property without the need for a market system.⁵⁵

The final aspect of Penner's views on the "right to exclusive use"⁵⁶, and which will have to be addressed again later in this paper, is his account of *restrictions* on the use and alienability of property. The restrictions can be divided into those of scope and those of kind. First we may ask to what extent the scope of the use rights might affect the property right itself. That is, how far from Honore's "full liberal sense" of ownership can we get before the notion of ownership is lost? Is there a limit to the *number* of restrictions that can be imposed on the uses to which we could put something we own before we cease to own it? Secondly we can ask, for instance, if this is the *kind of object* that ought

⁵³ Sometimes there are traces of a previous owner's intentions toward a thing contractually attached to the sale. Such cases are not a paradigm case of selling, but they are not uncommon. But this is simply a function of the previous owner's right to alienate his property in different ways. This kind of sale is still not entailed by, nor constituting of the right to property itself. It is a contingent feature of *some* property systems.

⁵⁴ Penner, 1996, p.752-754; Penner, 1997, ch. 1.

⁵⁵ I am grateful to Wil Waluchow for this point.

⁵⁶ A term he uses interchangeably with 'property right'. Penner, 1997, p. 72.

to the subject of property rights, or if this is the *kind of relationship* we think people ought to have with such objects.

To the question of scope, Penner thinks the right to exclusive use is unlimited in the sense discussed above, or as Harris puts it:

The possessory owner has a prima facie privilege to do anything in relation to his land which the dominant culture of his society accords to a landowner. The set of privileges entailed is not a total set, because everywhere some things are excluded. It is, however, an open-ended set since its present content could never be exhaustively listed: and it is a fluctuating set, because cultural assumptions about what an owner may do vary.⁵⁷

Penner agrees that while the set is ‘internally’ unlimited there are nevertheless ‘external’ boundaries to the list of included uses. That being the case, Penner does not think that restricting the scope of the right to exclusive use alone is sufficient to undermine its being a property right. The law can restrict me from renovating, tearing down, rebuilding or selling my house and even though these are all paradigm uses for houses, the fact that the restrictions are so wide in scope does not undermine my ownership of the house. Restricting the scope can “diminish one’s recognition of a right as a property right only where the purpose of the restriction is just that, to prevent holders of the right from treating it as a property right.”⁵⁸

For Penner then, only the second kind of restriction can generally speaking undermine a right’s counting as a property right. Only when the restrictions are

⁵⁷ J.W. Harris, ‘Ownership of Land in English Law’, in *The Legal Mind: Essays for Tony Honore*, N. MacCormick and P. Birks (eds.), Oxford: Clarendon Press, 1986, p. 160.

⁵⁸ Penner, 1997, p. 101.

of a certain kind, that is, made with a specific intent can they render a right (which would otherwise be a property right) into something else. A government might, for instance, decide to pass legislation that turns all freeholds into ninety-nine year leases, effectively turning fee simple estates, the paradigm case of ownership, into long leases.⁵⁹ Such a maneuver could only be intended to undermine the (new) lessees (former) property right. It does not undermine the ownability of the land in general. Presumably, the state in such circumstances becomes the lessee, that is, the owner. This would be better classified as an instance of expropriation.

Another example Penner offers is that of historic buildings. Protection of historic buildings undermines the ‘ownability’ of the land because it restricts the “normal” use of such land, that of building and rebuilding on it. That is, the freedom to demolish buildings (or destroy property generally) is the kind of freedom that a property right is meant to protect. Instead, “the property right to a piece of land is replaced with a property right to an historic building with certain positive and negative obligations. The latter is what a sensible subsequent buyer would regard as the object of sale.”⁶⁰

An important feature of this example is the role ‘normal uses’ play in a thing’s being an object of property rights. It is not hard to imagine normal uses for most objects. Penner is saying that the government can undermine one’s ownership of something by restricting the ‘normal use’ of it, but *only if* the

⁵⁹ Id. p. 101.

⁶⁰ Id.

legislation was intended to undermine property rights in the thing. If I purchase an internal combustion automobile the day before parliament passes legislation prohibiting the use of anything but electric vehicles on all major roadways the normal use of my new car has certainly been curtailed, but on Penner's understanding my property right has not been undermined. This is not because the restriction is meaningfully different in this example. Rather it is because the *intent* of the legislation in the historical building example was to make it clear that future buyers were not to regard purchasing that land (with the old house it) as his acquiring property rights to the land. This is because property rights to land 'normally' include the right to level existing structures and building new ones. However, could the same not be said of the car? The intent of the legislation is to create a situation whereby if one purchases an internal combustion automobile one ought not to think of it as purchasing the right to use the car in ways cars are normally used (e.g. for transportation) but the right to maintain (or neglect) it and put it on display (or hide away) as an example of 20th century locomotion. The problem I think is that it is not always clear whether the intention was meant to undermine the property right in the thing or not. This question will be more fully explored in the next chapter. There I will discuss why the notion of legislative intent is problematic as a criterion for determining the effect of restrictions on use rights on the concept of property. However, if we look only to the function of restrictions, rather than their alleged intent, we see that some things, including

land, will be susceptible to becoming un-ownable almost accidentally. And this is ultimately what I will argue occurs.

Another way property rights in an object might be undermined has to do with the object, rather than with its use. The thought is that some things are not proper objects of property rights. Consider the case of body parts. A ban on the sale of body parts, or on surrogate motherhood contracts might not result from a concern about, say, safe medical practices so much as a belief that body parts and familial relationships are not the kinds of things that should be involved in market exchanges. One reason why these things in particular might not qualify to be the objects of property rights is provided by Penner's Separability Thesis.

1.7 The Separability Thesis

If the discussion about property rights is largely focused on the justification of private property, most discussion about defining the objects of property is focused on arguing for or against the inclusion of a) certain intangibles, e.g. intellectual property rights or b) body parts. That is, there are certain objects such as land, forests, houses, toothbrushes and toy cars which are rarely if ever targeted in the debate. Instead, most theorists try to point out how or why things like patents are similar or dissimilar to these objects insofar as the former *can be* objects of property rights. Waldron makes this move explicitly, defining property in terms of "material resources, that is, resources like minerals,

forests, water, land as well as manufactured objects of all sorts.”⁶¹ Not only is the distribution of such resources more ‘basic’ than that of, say, patents, but we usually talk of incorporeal property as some analogous to these more ‘universal’ resources.

Legal systems have recognized more and more things as appropriate objects of property rights in the last century. Money, patents, monopolies etc. are for the most part clear cases of the kinds of things we can own. The fact that the set of ownable things is flexible indicates that as culture and society change, so too can that which society considers ‘ownable’. An account of ‘ownability’ will have to accommodate this, and as we will see, Penner’s does.

According to Penner, we can capture what it is that makes things ‘ownable’ with a notion of *separability*:

Only those ‘things’ in the world which are contingently associated with any particular owner may be objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another.⁶²

There are some things from which one cannot be separated without significant changes to his identity. One’s friendships, personality, talents etc. are integral to his life – to not have them is to have a different life, a different identity. They are not contingently possessed but rather they are *constitutive* aspects of our lives. We do not think of friendships, or eyesight as the kinds of things that one could simply “take or leave”. Nor do we think of them as necessarily beneficial – one

⁶¹ Waldron, 1988, p. 33-37.

⁶² Penner, 1997, p. 111.

can have friendships that are detrimental. The point is that having or not having such things has real consequences to not just the kind of life you have, but the kind of person you are.

How we interact with these non-contingent facets of our identity also differs from how we deal with things we own; “We do not trade our talents, give away our personalities, license our friendships to others, or pay taxes with our eyesight.”⁶³ But these are ‘standard incidents’ of what we do with property. Furthermore, one can exploit one’s property to derive some benefit. Exploiting friendships in this way has immoral connotations.⁶⁴ If a normal and expected use of property is to exploit it for some benefit, any society that regarded itself as moral (though admittedly not all) would hesitate to regard anything which it is considered immoral to exploit in this way a good candidate for ownership.

1.8 Conclusion

This brief exposition of Penner’s theory is meant to show that a theory of property need not be hopelessly complex. Further, it is possible to avoid the more serious difficulties that were revealed with the so-called bundle of rights picture of property. We can identify the interest that property law, *as a branch of law*, is meant to serve and protect and thereby more clearly see its boundaries. Not only does this increase theoretical tidiness, it helps to ensure substantive justice at the

⁶³ Id. p. 112.

⁶⁴ Id. p. 111.

level of adjudication. Penner acknowledges that his theory leaves plenty of room for development. And that will be our next task.

In the next chapter, I will take a closer look at the exclusivity thesis and the separability thesis and how they apply to ownership of land and natural resources which are protected by environmental legislation. I will also raise a more thorough challenge to the claim that a thing is not a fit object of property rights only if it fails to satisfy the Separability Thesis *or* its suitability is *intentionally* undermined by an explicit restriction on some 'normal' use of it. Having done that, I will be well placed to make the central argument of this paper, that environmental protection can undermine the ownability of land and natural resources, without the explicit intent of legislators to do so, and that we may see such a thing happening already.

Chapter 2 - Deeming Things Unownable

2.1 Introduction to Chapter 2

In the last chapter we saw some of the challenges the bundle of rights picture presents for the idea of property in law. We also saw how James Penner suggests we rein the idea of property back into a manageable, distinct legal concept and what that concept contains. In this chapter we will look at one specific piece of the property puzzle, the effect of use restrictions on the ownability of certain classes of things. Penner gave us two theses, the Exclusivity Thesis, which outlined what ownership entails and the Separability Thesis, which described how to identify whether something could be the subject of property rights; i.e. whether it could sensibly be the subject of 'exclusive use'. In his discussion of these theses he touched only briefly on whether and how a curtailment of use rights might undermine property rights in a certain thing or class of things. What I hope to do here is more fully engage the question, specifically with reference to restrictions on land use and the ownability of natural resources. I will begin by assessing Penner's claim that legislation only undermines property rights when it is explicitly intended to do so. I will argue that at best this account is incomplete. This is because, first, Penner is unclear what counts as 'explicit' for the purposes of legislative intent, and second because it seems incapable of explaining intentions that emerge over time. That is, the intent that is only apparent after several distinct instances of legislation and

perhaps judicial decision have occurred. This notion will factor heavily in the positive argument in the next chapter that environmental restrictions can undermine the ownability of land and natural resources. I will also briefly discuss Penner's Separability Thesis in connection with the human relationship to the land. It is not my intent to engage in an esoteric argument about the ontological ownability of the earth or 'nature', but to suggest that when certain (contingent) social attitudes about the land become manifest in the law, they create a tension with the legal notion of property such that something has to give.

2.2 Ownability and Use Restrictions

It is easy to imagine a developed society that legislates in no uncertain terms that while we can own watches, waistcoats and other widgets we cannot own fields, fens or folds. The preamble to such legislation may include a statement about the society's belief that they have not inherited the earth from their ancestors but are borrowing it from their children. The motivation, in other words, might be to instill a sense of respect or a duty of stewardship towards the earth among its citizens. This would be a paradigm case of legislation explicitly taking aim at the ownability of a certain class of thing or things. Penner contends that there are less extreme examples of legislation that similarly strike at the heart of property rights. We will consider three examples Penner discusses in turn. But before we do let me first put down exactly what he has to say about legislation's ability to undermine property rights. The position he defends is that, "restrictions

on the scope of property rights diminish one's recognition of a right as property right only where the purpose of the restriction is just that, to prevent holders of the right from treating it as a property right."¹ Most restrictions on use are intended to prevent harm of one sort or another, e.g. highway speed restrictions. This is not a problem for property rights because most of us recognize that,

[a]n owner does not have a property right in each conceivable use that can be made of his property, so each limitation on his right to determine the use of property does not necessarily constitute an expropriation of his property. It only does so if it is the intention of the legislation. The legislature may, of course, do something of just that kind.²

Again, it is apparent that (in many jurisdictions) my property rights in my gun do not include the right to fire it within city limits or at people generally. But we do not think of this as undermining my ownership of the gun. I am still "the only person who has the right to determine the use of the property [i.e. the gun] with infinite variation."³ The law removes or restricts a specific use right that *would* otherwise be including owning a gun but does not undermine the ownability of the thing in question. Firing them is certainly a normal use for guns, and there is nothing about them in themselves that would prevent me from doing so within city limits. On the other hand, firing them within city limits or at people specifically is not a normal use itself, it is only one of many variations of the normal use. Restricting this particular use then does not threaten the property-like

¹ Penner, 1997, p. 101.

² Id. p. 101.

³ Id.

nature of the relationship between gun and owner because the intent is to prevent harm (and not to undermine the property-like nature of the right).

Many jurisdictions have laws to protect historically important sites. For instance, in Hamilton where I now write, we have several buildings deemed “heritage sites” by both municipal and federal laws. The buildings are still used mainly as private residences however there are restrictions on how the land and the buildings on the land can be used. For instance, it is generally⁴ forbidden to tear down buildings on heritage sites and build new ones. Rather there are guidelines, even duties imposed upon “owners” for the maintenance of the historic integrity of buildings on the site. According to Penner there are two ways we might interpret a situation like this. On the one hand it restricts the use of the land because,

the right to use the land in the normal way by building and rebuilding on it is replaced with a kind of duty of stewardship. Listing [as a heritage site] can also be interpreted as the law’s replacing one object of property with another...the property right to a piece of land is replaced with a property right to an historic building with certain positive and negative obligations.⁵

Furthermore, he says, “[t]he latter is what a sensible subsequent buyer would regard as the object on sale.”⁶ The first interpretation relies on an Honorean belief in some ‘standard incidents’ of owning land. And building is a standard incident of use with respect to land, especially urban land. The second interpretation is supposed to be distinct because it shifts the object of property from the land on

⁴ I say generally because it is sometimes the case that building as it stands poses safety hazards and is perhaps not worth the cost of repair – though it may be stipulated that the new building stays true to the architectural style of the period in which the original was built.

⁵ Id. p. 101.

⁶ Id.

which the building(s) sit to the building(s) themselves. The importance of this move is (presumably) because restrictions on *how* you build a building are less threatening to the property rights in that building because they are common enough to be *included in* the standard incidents of owning a building. Building codes and zoning restrictions for instance are surely a part of every municipality's body of law. One would never expect to buy a building to which restrictions of that kind do not apply.

There is a difficulty with the second interpretation in that it fails to explain what happens to the land once the property is deemed a heritage site. Imagine Battlefield House, a base of British military operations during the war of 1812, is owned and lived in by Smith. The municipality in which it is located decides it is of enough historical importance as to be deemed a heritage site under relevant national heritage preservation legislation. According to Penner's second interpretation, whereas Smith formerly had property rights *in the land*, including the right to build and rebuild on it, those property rights have been expropriated and replaced with property rights in the house which are subject to certain "positive and negative obligations". The question is what is the status of the land? Is it owned by anyone? Presumably not, because if it were owned by anyone then they would have the right to build or rebuild on the land, since building and rebuilding are standard incidents of land ownership. However, the legislation prevents this, as does Smith's ownership of the buildings. Nor could Smith grant permission for the buildings to be destroyed for this would presumably violate the

obligations set out in the heritage law. Nor is it clear that the government could be considered the owners of the land. This is because they could be equally bound by the heritage legislation, and restricted from using it in the same ways as a private owner. This is obviously true of the individual members of the government, who are subject to heritage laws as any subject would be. But it can also be true of the government as a body. Laws forbidding torture, for instance, can apply to governments just as they apply to subjects, and claims can be made against the government for violations. Obviously, the government may have the power to make its own actions an exception in all cases, or to make specific exceptions for itself or others in special circumstances, or to scrap a law which hinders its goals altogether. In these cases, the exceptions prove the rule. For unless the government's being *unbound* by the rules it creates *is the rule*, then the presumption must be that it is so bound. Why else would an exception be necessary? So it is possible for a law to be broad enough to presumptively bind the actions of a government, to the point where even the government could not own a given piece of land.⁷ The land becomes unownable so long as the heritage legislation remains in effect and is of sufficient breadth.

Notice the same consequence follows from the first interpretation. For if it is in fact the property rights in the land that are being restricted they are being done so in a way that threatens the very nature of property rights in land i.e. by

⁷ Though if it were not bound by its own heritage laws then a governing body could still be a potential owner, though I do not think this would happen by default. Some use restrictions do amount to expropriation, but whether the result is a property relationship between the land, buildings and the government will depend on what use the government intends to make of them and what they are by their own laws allowed to do.

removing one of the standard incidents of land ownership. If the law prevents me from realizing the interest I have in owning that piece of land, it can hardly be said to be serving my interest in owning land. In some instances, the government would continue to regard the land as subject to the property rights of Smith; in other cases the land would have been expropriated by the government while the property in the buildings remains as Penner described in the second interpretation; and in other cases the land and the buildings are expropriated outright. In any case, I suggest that where it is supposed the land continues to be owned by someone, in fact it may not be.

While the above two examples deal with use, the third deals with another specific incident of ownership which Penner has argued is ‘standard’: alienability. Whereas the Exclusivity Thesis and the Separability Thesis do not entail a right to sell what one owns⁸ they do entail a right to destroy it or abandon it. Now the outright destruction of land is not a realistic possibility, except perhaps in the cases of eroding seaside land. The right to abandon land is assured by the right to exclusive use because this must surely include the right to decide not to use a thing ever again. Land can be completely abandoned either by gifting, or by defaulting on the conditions required for maintaining title. I can default on a

⁸ This argument figured prominently in Penner’s book but was not addressed in the first chapter. Roughly, the argument is that whereas one’s interests in owning something can persist through transfer by gift or by licensing certain use rights to others, outright sale cannot be reflective of any interest someone has in owning an object. One can certainly benefit from the sale, perhaps the sale even realized the intended purpose of the original acquisition, but one cannot say that one has an interest in an object once all rights to that object have been relinquished to another. Exclusive use does, on Penner’s account include the right to abandon or destroy the object of the property rights since this would count as the owner realizing objectives that were entirely her own (vs. a sale which would also have the interest of the other party in mind.) See: Penner, 1996, p. 752-754.

mortgage, or stop paying taxes or give it away to the first person who tells me who won the 1967 World Series. That is, a transfer of title must occur. Now, it is usually within the power of a legislature to limit, even ban the transfer of property in various ways. That is, gifting might be banned, or selling through contracts might be banned. If this occurs, the way to ascertain whether this *in fact* strikes at the ownability of the class of objects whose transfer has been restricted, according to Penner, is to look at the *intent* behind the legislation. If the purpose of the legislation is explicitly to undermine the idea that the object(s) in question should be objects of property rights then we can say with certainty that they are ‘unownable’. The intent of the legislation is not always explicit however. If a general ban on the transfer of all houses, for instances, whether it be through gift, sale or abandonment were declared and no other intent explicitly stated (i.e. in order to prevent the spread of an infectious disease) then we can *assume* that the very root of property is being targeted.⁹ Of such restrictions Penner says, “[they] could hardly be regarded as not striking at the property-like character of the holding, unless there was an obvious reason of a different kind.”¹⁰

Identifying the harm involved in firing guns is easy, and so the potential for preventing harm by restricting their use is fairly obvious. However, even in this example “the purpose of the restriction” is not necessarily obvious itself. It may also be obvious, for instance, that the representatives in the legislature enacting such restrictions are in need of support from left-leaning anti-gun voters.

⁹ Id. p. 102.

¹⁰ Id.

By adding legislative intent as a criterion for a restriction's having the function of undermining the property nature of a right, Penner opens himself to the wide debate over how legislative intent is to be identified. Given his discussion of the examples above and the passage above where he says of a restriction's undermining the property-like nature of a right, "[i]t only does so if it is the intention of the legislation. The legislature may, of course, do something of just that kind," he appears regard the intention of the legislature (as a body) and the intention of the legislation as interchangeable. That is, the legislation's intent is whatever the the legislature says it is, or what it most plausibly is given the content of the restriction and the absence of "obvious reasons of a different kind." Since this is a contentious position, it may be more fair to characterize Penner's position as being *however* we decide legislative intent is to determined, it must be the intent of the legislation to undermine the property nature of the use rights it restricts in order for it to so. This does not avoid all the problems involved with interpreting legislative intent, but as I shall argue next, the requirement of intent itself, however we go about interpreting it, is itself problematic and should be abandoned.

2.3 Legislative Intent and Aggregative Principles

While Penner stresses the importance of the legislation's intent to determine if it undermines a property right, he is never explicit about the reason for this. Again, because no one thinks that the right to exclusive use means the

right to every conceivable use, restrictions only count as expropriation (where the private individual's property rights are undermined) "if that is the intention of the legislation."¹¹ In one example he offers, a government may wish to restrict the alienability of land by the Crown in order to prevent administrators from squandering public wealth. He continues,

[o]n the other hand, if the measure was intended to create a new relationship of the State to the land, in which, say, the land was treated as actually property of the Crown's subjects, over which it was merely a bailee (not even a trustee), then such a measure would change the character of the Crown's right from being a property right to something else.¹²

He also suggests that one reason a ban on surrogate motherhood contracts might be imposed is as "a legal attempt to prevent relationships of human reproduction being conceived of as market relationships."¹³ The point of his example seems to be that property is a *character* of a given set of use rights. That is, we may regard a set of use rights as having the character of property when we want it to carry the connotation of a full and exclusive right of determination (albeit restricted) over something. However, we might prefer to have the exact same use rights take on the character of just that – a set of specific use rights. How we choose to characterize them is determined by the intention of the body that creates them. Even "a complete ban on any kind of transfer or sharing, imposed for an indefinite period, would not strike at property if the reason, for example, is to prevent the

¹¹ Id. p. 101. See p. 51 *supra* for full quotation.

¹² Id. p. 102.

¹³ Id. p. 103.

spread of an infectious disease.”¹⁴ Certainly, legislative intent is important to determining the character of a law. But surely there is room for more factors in such determinations than Penner appears to allow.

There are several issues surrounding the use of legislative intent in this way which Penner does not address in his account of how the law can undermine the ownability of an object or class of objects. This is likely because, in part anyway, he wants the Separability Thesis to do most of the heavy lifting when it comes to determining the suitability of things to be objects of property rights. Aside from where it is *explicit* or *obvious* that a use restriction is intended to undermine one’s property right in a thing it does not. Penner is unclear whether, in instances where it *is* either obvious or explicit that restrictions are meant to undercut the notion that one has property rights to a things, such restrictions render the *thing* ‘unownable’ instead of merely undercutting the property nature of the rights of owners. We see evidence for the latter option in the interpretation he prefers for the heritage listing example. However, if it is possible for legal restrictions to undercut the property nature of specific instances of property rights then there is no reason to suppose more general restrictions cannot in effect remove objects from the realm of property rights. i.e. even if they do not satisfy the criteria set out by the Separability Thesis. Again, recall the heritage house example; on either interpretation the land on which the listed buildings sit will no longer be appropriate objects of Smith’s property rights. But more importantly,

¹⁴ Id. p. 102.

this will also be true for any subsequent owner of the property, so long as the buildings remain listed. This kind of ‘unownability’ is perhaps less entrenched than that established though the Separability Thesis, if only because social attitudes about what is inseparable from one’s character are subject to infrequent and gradual changes, while use restrictions can change quickly and frequently. Unownability created first through policy is only as durable as the reasons for enacting it in the first place. But there is no reason why the contingent ‘unownability’ of an object or class of objects cannot be legislated. That being said, let us take a closer look at how legislative intent might fit into this.

Even in cases where the intent to undermine ownability is explicit or apparent, sometimes part of a law’s function is hidden when a particular law is only considered in isolation. That is, sometimes the law serves a different function when it is considered in conjunction with other laws of the system. Imagine a law that denies women the right to enter the workforce. Such a law might be enacted because competition for jobs has been suggested as the cause for an economic downturn. Workers who feel less secure in their jobs are prone to saving against rainy days rather than spending. And since women make up a smaller percentage of the work force than men (and make less on average anyway), restricting them from the workforce is motivated and justified by economic expediency. Imagine a separate law that requires women not to walk on public sidewalks in urban areas, since studies have shown that the incidence of car accidents dramatically decreases when there are no women around to ‘distract’

male drivers. We can imagine several more laws along this vein. What should be clear is that while the obvious (i.e. explicitly stated) intent of each particular law is not to undermine the equal status of women in society, the *aggregate effect* is that it plainly does so. Each individual law may not be sufficient (or even necessary) to strike at the equal status of women, nor are they explicitly intended to do so, but it is clearly possible to have several laws which collectively *could not be thought of as doing otherwise*. Could such an aggregate of laws qualify for having ‘intent’ on Penner’s account? Clearly, there are some difficulties with attributing intent retroactively. Constitutional originalists argue that we ought to ask ourselves what the framers of a constitution would have or might have done if faced with a contemporary issue. While this is certainly controversial as a policy,¹⁵ it is not, I think, fruitless as part of a discussion about constitutional issues. I suspect it is plausible to attribute a certain intent or belief to legislators over and above those which they explicitly stated or even of which they were themselves aware. The legislators in the example above may have only had in the mind the practical reasons they stated, but it is clear that when we look at the collection of laws each of them imply and collectively manifest a statement about the civil equality of women. Laws can *be* discriminatory without *intending to be*.

¹⁵ Legal interpretation is a subject of wide debate. The difficulties critics see with an ‘originalist’ position are varied, but frequently involve skepticism regarding the possibility that interpretation will be free of the views or agendas of the interpreters, e.g. judges. The retroactive application of contemporary views onto the motives of past legislators, even ‘unknowingly’ is certainly a real danger, but not, I think insurmountable by experienced, rational judges and theorists. In the next chapter, I offer an interpretation of what legislators of environmental protection might mean by phrases like “protecting the interests of nature.” In other words, I give them the benefit of the doubt that they mean *something* by this, (and are not conceptually confused) and invite more experienced and more rational individuals to assess my interpretation.

There is another way to think about this idea of *aggregative* or *emergent intent*, and that is by analogy to legal principles. Legal principles, such as “like cases should be treated alike” are not always explicit or embodied in their own piece of legislation. They are sometimes included in constitutions and charters, or discussed in judicial decisions or in the preambles of legislation. Where they are not explicit (and even sometimes where they are) their interpretation is not uncontroversial. Even the role they play in legal systems is the subject of much spirited debate among legal theorists. However, it is generally accepted that they exist (in some form or another). An example will help illustrate the analogy I wish to draw between legal principles and the idea of ‘aggregate intent’: the well-known case of *Riggs v. Palmer*. In this case, the presiding judge ruled against a man who was a legal beneficiary in his deceased grandfather’s will, denying him his inheritance. The reasoning for the judge’s ruling was that the man in question had killed his grandfather, allegedly to prevent him from altering his will to the man’s disfavour. The judge was faced with a hard choice because there was no *explicit* law against inheriting from someone whom one has killed. The judge decided that it was a principle of the legal system of the United States at the time that no one should profit from his own wrongdoing.¹⁶ Now, once the ruling was made, and the principle had been articulated it could now, through common law practice, be referred to directly. Prior to the judgment however it could only be said to have been *implicit* in the laws and rulings made in the U.S. up until that

¹⁶ *Riggs v Palmer* 115 N.Y. 506, 1889.

point. Another way of interpreting this is to say that given what the (criminal) law *did say*, and how judges *had ruled* in the past could only have happened if such a principle was implicitly part of the legal system.

The aggregative intentions, like legal principles, are certain reasons for having the laws that we do which are not always apparent when each individual law is created. Legislators may state explicitly particular intentions at the time, but this is not to prevent other good reasons from emerging after the fact - reasons which, had the original legislators been presented with them, would have received their endorsement. Recall the case that Penner suggests, where a law is created that bans any transfer of land. Such instances, Penner said, “could hardly be regarded as not striking at the property-like character of the holding[s].” The force of this observation is that the *effects* that a law brings about are illustrative of the intention behind it. Consider a law that forbids black people from sitting at the front of public buses or using the same public washroom facilities as white people. Such a law could hardly be regarded as not striking at the civil equality of blacks. And this is true regardless of what the wording of the legislation or its stated intent is. The judge in *Riggs* was essentially declaring that one could hardly interpret the criminal law of the United States as not striking at the legality of profiting from one’s own crimes.

‘Intent’ is, admittedly, a problematic label for this aggregative feature of laws. For one thing, it is difficult to attribute some unconscious or hidden intent to legislators. They may be genuinely unaware of every implication of the laws

they create. It is also unlikely that the exact same legislators will be involved in the creation of each law in the aggregate, if any length of time is involved.

Finally, it may even be the case that once the implications of the aggregate of laws are revealed the legislators immediately change or scrap altogether the laws in question. That is, the implications may be wholly at odds with what they actually believe. To suggest that ‘intent’ could be accidental is a matter for debate.

‘Principle’ is perhaps a better term to describe this aggregative effect. It does not need to be located in any person or group of persons and so it avoids the difficulties associated with ‘intent’. Suppose that the content of the legislation concerning the preservation of heritage sites was not grouped as a single law but dispersed over several distinct areas of a city’s building code that had the aggregative effect of its unified legal cousin. An entrepreneur purchases a property on which there is a gorgeous Victorian era home which he intends to convert into a bed and breakfast. An attentive official at city hall realizes the aggregative effect of various building restrictions (perhaps he is familiar with the heritage site protection legislation in a neighbouring city). It could be said that he has noticed a *legal principle*, reflected in the city’s building code, along the lines of “buildings of historical importance ought to be preserved by their owners.”

It is unclear whether Penner would accept that these emergent principles could undermine the property-like nature of someone’s rights to a thing. For while he says that we can determine a law’s intent by its ‘obvious’ consequences,

he inserts the caveat “unless there was an obvious reason of a different kind.”

Again, consider the ban on the transfer of houses. If this was done to prevent the spread of an infectious disease then that is an “obvious reason of a different kind,” and thus, for Penner, nullifies the law’s effect of undermining my property rights in my house. I do not find this position persuasive. Again, laws that are discriminatory towards women undermine civic equality whether or not it is their explicit intent, or there are obvious reasons of a different kind for enacting them.

Another way to express this point is through HLA Hart’s well known discussion of the indeterminacy of language with respect to legal rules. Hart asks us to consider a legal rule, “no vehicles in the park.”¹⁷ The challenge as Hart sees it is determining what counts as a vehicle for the purposes of the rule. Does a bicycle or a toy car count as a “vehicle”? Such indeterminacies are among the sorts of things judges must deal with in certain ‘hard’ cases. Lon Fuller responded with a different example, a group of patriotic citizens who wish to install a truck used in war on a pedestal as a memorial.¹⁸ The truck is clearly a vehicle for the purposes of the rule *but it is not being used* as vehicles typically are. As such it ought not fall under that particular rule’s ambit. If we recognize that to call something an object of property is simply to say that it is protected by those rules or norms that apply to property, then we can see how the thing’s not

¹⁷ H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’, 71 Harv. L. Rev. 593, 1958, p. 608-15.

¹⁸ Lon Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’, 71 Harv. L.Rev. 630, 1958, p. 661-69.

being used *as property*, specifically as property of the kind that it is (see note 11), would remove it from being protected by those rules or norms. And if it is not protected by those rules then it is not property.

What I have tried to show in the last few paragraphs is how laws might have the aggregative effect of undermining the property-like nature of a person's right over something. Penner did not countenance the aggregate picture I have suggested, but had in mind only individual laws. Even so, the argument can be applied to these as well. Individual laws can have functions other than their stated and obvious ones, even when they are considered in isolation. The discriminatory laws imagined above could each be understood as striking at the heart of women's civic equality on their own. That it becomes more apparent as a principle of the system occurs when they are placed within a system containing other such laws, does not necessarily preclude a discriminatory character existing for each distinct law. The upshot of all this is that when discussing when and how restrictions on use can undermine the property-like nature of a right or set of rights it is not enough, as Penner suggests, to look merely at what is the stated purpose of the restriction. Rather, we must also consider *its actual functions*. For what would it mean to own something over which you had none of the rights commonly associated with ownership of that thing?¹⁹

¹⁹ To be clear on this, I am not suggesting that we need subscribe to Honore's incidents of ownership, though certainly I agree with Penner that rights to use, alienate, destroy and gift are required of virtually every kind of property relationship. What I mean here is that objects have their own list of standard incidents, and that to limit these uses would undermine the ownership by undermining the use right. For what would it mean to 'own' a painting which I was forbidden to

2.4 Separability

Let us next consider the way in which Penner thinks we can classify objects as unownable apart from any legislative attempt to do so, that is, the Separability Thesis. Whereas our discussion above was meant to show how something could be *legislated* out of the realm of ownable things, in this section we will look at those things which are unownable given the nature of the idea of property in law and in virtue of societal attitudes towards those things. The classes of objects most hotly discussed nowadays with respect to property rights are intangibles like ‘intellectual property’, and biological entities like cells and genes. Penner’s argument supposes that, legally anyway, these debates hinge on and are decided upon a determination of such things’ separability from people. Of course, there are other considerations. People are generally separable from each other, though we certainly do not think they can be owned in a legal sense. How should we classify this? Is it an instance of an otherwise ownable class of things subject to widespread use restrictions that target the ownability of people? What about people’s ownership of themselves, that is their physical bodies? Distinguishing between property rights which are wholly legal and personal and body rights²⁰ which have a non-legal moral aspect has been a major preoccupation of property theorists especially in the last thirty years. In these debates, people

hang, to view, show to my friends or leave to posterity? Possession alone is not synonymous with ownership.

²⁰ To use Munzer’s terminology from *A Theory of Property*.

often use societal attitudes with respect to the object in question or arguments about its moral status to help determine the appropriateness of owning that object or class of object. I suggest the inverse is also possible. The development of policy with respect to a class of objects, such as natural resources, can indicate an emerging social attitude that undermines the ownability of that class, not simply as a matter of policy but as a reflection of societal beliefs about the appropriateness of its ownability or even of its separability from us. This last claim will be discussed in the next chapter.

According to Penner, we may determine whether a thing is a fit object for property rights by answering of it: “does a different person who takes on the relationship to the thing stand in essentially the same position as the first person?”²¹ A positive answer demonstrates not only the *contingency* of the relationship between the first person and the thing, but the *similarity* between the relationship between second persons relationship with it and the first person’s. Contingency alone will not do. My leg can be separated from my body without my character changing all that much (though to be sure it might be affected). It is in that sense contingently related to me. But we do not call my relationship to my leg a property relationship. The personal nature of my relationship to my leg is revealed when we ask what the limb could mean to someone else. Will the relationship be *essentially* the same? Clearly it will not. Even a recipient of a limb transplant, while he may certainly develop his own personal relationship

²¹ Penner, 1997, p. 114.

with the new limb, will not have *essentially the same* relationship as the donor had.²² In most parts of the western world it is probably fair to say that he will not.

Penner recognizes that society's notion of what is separable has changed along with our technological capabilities.²³ That limbs or organs are examples worth considering is because we now have the ability to remove these things *in such a way* that the 'donor' will *not* be significantly altered, by dying for instance. This is also why some organs *can* qualify as property while others cannot. Our present state of technology is such that I cannot give away my brain *inter vivos* without significant damage to my personality – I would no longer be a hit at parties. Presumably the argument can be inverted as well. If it were discovered that the kidneys were the seat of the soul then we would have to re-revise our belief in their separability.

More intriguing is Penner's suggestion that social convention can affect our belief of what is separable from us. He asks us to imagine a society "in which a man's hair was considered to be essential to his physical strength or sanity. Cutting a man's hair...could count as an attack upon his personality, on himself, not as an attack on his worldly goods."²⁴ What this example reveals is that the effect of new technology on the ownability of organs is not that it increases the number of things that are actually physically separable but that it changes our *beliefs* about what can be separated without a significant impact on our character.

²² Id.

²³ Id. p. 121.

²⁴ Id. p. 122.

We can imagine a society that regards the soul as the ‘real self’ and places little personal importance on the physical body. So they might regard hearts and lungs as objects to be dispensed with at the earliest appropriate occasion. In such a society medical science would have very little to do with the question of whether hearts or brains could be objects of property since they are both physically separable and not believed to be significantly related to the individual’s personality.

A further consequence of this social determination aspect of separability is that non-body objects might also be considered ‘inseparable’. Imagine a society or class of warriors whose identity was inextricably linked to his weapon. To lose one’s sword was to lose one’s place in the society, to be excommunicated. One could no more sell or give away one’s sword than one could give away or sell one’s membership in the Catholic church. It can be abandoned, certainly. But it cannot be taken up by another in such a way that they stand in the same relationship to it as you did.

Realizing the role social values and attitudes play makes determining the separability of objects a more complex question than perhaps it seems at first. While we do not have to account for idiosyncratic attachments to particular things (family heirlooms, childhood treasures or superstitious tokens for instance), determining whether society thinks a certain thing is or is not separable in the way required by ST sometimes takes a little work and will not be uncontroversial. It is likely however that within a culture the controversy will only be at the fringes.

That is, there will be a ‘settled core’ of objects that are considered separable from individual people. The germ of wisdom is to recognize that when we are faced with determining whether or not a thing ought to be subject to property rights we are asking whether or not society considers it to be separable in the way discussed above.

2.5 Some Conclusions

The first aim of this chapter was to articulate how Penner argues use restrictions can undermine the ownability of a thing, or class of things. Namely, restrictions on ‘normal’ uses for a given thing can remove the property like nature of the rights held with respect to it *if that was the intention of the restriction*. I argued that it is not necessary for the restrictions to have been created with the obvious or explicit intent to undermine ownability, but that if they functionally do so it is enough.

Secondly, I discussed the Separability Thesis in more detail, including the role societal beliefs about the connection between personality or personal identity and objects might affect the ownability of a thing. It is fair to say that in contemporary Western society, land is generally regarded as separable in the sense intended by the separability thesis. We believe we can move from one piece of land to another without any necessary significant impact on our personalities. (Though as we will see this view is not shared by all.) That this is a contingent fact about a particular culture means that if land is to be considered

unownable it will be on account of restrictions placed on its use. The rest of this paper is dedicated to showing how restrictions on the use of land and natural resources can in fact be just the kind of restrictions that undermine their ownability. This is so even though the legislators who write the laws and the judges who apply them may lack the intention to do so. Environmental protection laws give rise to an emergent principle whereby land and natural resources are not the kind of thing over which someone can have “exclusive determination” with respect to their use. As the next chapter will show, this is because such laws are enacted and judicially applied with reference to non-human interests in those same resources. The language of protecting nature “for its own sake” is becoming prevalent in laws and decisions. What this phrase could possibly mean in a legal setting and how it affects the idea of property will be looked at in detail. Furthermore, it is interesting to speculate whether a clearer understanding of what “protecting nature for its own sake” means might reveal an emerging social attitude towards the natural environment that also changes how we regard our separability from it.

Chapter 3 - The Interest in Land

3.1 Introduction to Chapter 3

We are now positioned to discuss the central thesis of this paper, that the ownability of land and natural resources can be removed from the realm of ownable objects by means of legislation intended to preserve it. By now it should be clear that the first part of the claim, that land *can be* deemed unownable is not particularly troublesome. Such an effect can be achieved with use-restricting legislation designed *intentionally* and *explicitly* to undermine the ownability of land. This accords with Penner's narrow understanding of how use-restrictions work. Similarly, if society viewed individuals' identities as firmly connected to, say, their family homestead, or their ancestral territory, and this was clearly outside the 'settled core' of things regarded as separable by that society, then the land could not be subject to property rights.

The main issue this chapter will address are those instances where the use restrictions *do not* explicitly undermine land's ownability, but nevertheless do so. That is, if the arguments above are persuasive and it is possible to 'unintentionally' make land unownable, what might that look like? How might societal attitudes be tracked in order to trace the acceptance and rejection of objects into the 'settled core' of separable objects; i.e. of ownable things. In western democracies at least the actions of legislatures and judges are often (though not always) reflective of common social attitudes. If a value *emerges*

through restrictions on land use that undermines the ownability of land in certain circumstances, it may indicate a more general shift in how society regards land's *separability*.

The possibility that land does not in fact satisfy the criteria of separability is a more difficult case to make, because it relies on the existence of social attitudes which are by no means obviously apparent anywhere. On the one hand, it is quite clear that we can separate ourselves from any given parcel of land without significant effect on our personalities. On the other hand, except for in a highly artificial sense, the land does not come to us in parcels. That is, while it is clear to see how we can separate ourselves from a specific plot of land, we cannot separate ourselves from *land wholesale*. This can be interpreted as blandly or as esoterically as one cares to do, but for the purposes of this paper, it is taken as given that the earth as a whole can be regarded as a single ecosystem, comprised of smaller localized ecosystems and that all 'parcels' of land we care to mark off are not thereby separated from those ecosystems. Furthermore, it is taken as a given that regarded on the whole, these ecosystems and the resources they provide are the primary if not sole source of all the biological necessities of human existence. The upshot of assuming these premises is that they present a challenge to the separability of land from persons generally. Parceling off land as we do does not entail that when I take a step outside the legal boundaries of Greenacres I am now 'separate' from it. If we are only talking about the legal *boundaries* then my relation has perhaps meaningfully changed. With respect to the land *upon*

which those legally defined boundaries are drawn I have not separated myself at all. Furthermore, the food we eat and the air we breathe are the product of natural process *somewhere* (or perhaps everywhere, in the sense that the air I breathe in Hamilton has been around the world and participated in many ecosystems). We can abstract people from the earth intellectually, but people, collectively speaking, bear more resemblance to Aristotle's material and formal causes.¹ It is only in an abstract sense that people are separate from the land.

Whether or not we find this last point compelling evidence of the non-separability of people *individually* from parcels of land, the same observations ground in part the interest we, collectively and individually have in how people use the parcels of land they own. Consider the interests we have in a company not polluting a river running through its property. If we live down river then there are obvious threats to our health and safety, especially if the river is a water source for residents, as well as 'nuisances' in the form of odours or the loss of recreational space. These threats are not always immediate in time or space. That is, significant accumulation of a toxin may be required before it becomes hazardous. Or the worst damage may not manifest within the vicinity of the source of pollution. (Pesticides which landed on grass which was eaten by cows who produced milk that was fed to infants has been responsible for numerous

¹ I concede that in the hypothetical case of long term space exploration there may be children born in space never to set foot on Earth. I have not thought out all the implications of this case. Unless the technology to convert energy into matter (a la Star Trek's replicator devices) is also present, the ship, the air and the foodstuffs on board will all likely have a terrestrial origin.

health concerns and consequently for restrictions on the use of pesticides.² The affected infants could be in a different city or province even from the source of pollution.) There are then direct and indirect threats to our health and safety that we have an interest in avoiding. Furthermore, we are seeing, in Canada certainly and elsewhere as well, a recognition of an interest in protecting the environment *for its own sake*. That is we are recognizing that there is a certain value to healthy ecosystems distinct from the negative effects unhealthy ones have on us. That we would limit the use protected by property rights to protect *the object* of the rights suggests that the object *is not* the kind of thing we wish to regard as property. Or so it will be argued.³

I have limited the scope of this project to discussing “land and natural resources”. By this I mean the geographic formations of natural ecosystems. This includes things like rivers, lakes, oceans, forests, prairies, mountains, swamps, etc. At this point I must also add the non-human organisms for which they are a natural (or perhaps even an unnatural) habitat. While including wildlife in “land” introduces all sorts of complexities it cannot I think be avoided. This is in part because of the constitutive role organisms play in ecosystems generally. A field which may be used for farming is reliant not just on the presence of dirt, but of the various insects and microbes that recycle the nutrients necessary for the

² This sort of chain of effects was the focus of Rachel Carson’s *Silent Spring* (Boston: Houghton Mifflin, 1962) and this particular example was used by John Passmore in *Man’s Respect for Nature*, (London: Gerald Duckworth & Co., 1974, ch.3).

³ It may be that counter-examples to this line of reasoning, that is, other things that we consider property but are protected in this way, may simply fail to qualify as well. I will bite those bullets as they arise.

continuous cultivation of crops. What makes it arable land is the symbiotic relationship between the living and non-living components of the ecosystem. This point will be discussed more thoroughly below, but for now let it be granted that all indigenous life is integral in some way, if not always an 'equal' way, to its native ecosystem. This inclusion can be further justified when the target of this analysis, i.e. legislation, is considered. Environmental protection legislation often makes explicit reference to wildlife as both a direct beneficiary of protection (i.e. though restrictions on hunting) and an indirect one (i.e. by protecting the habitat which sustains it).

3.2. Pollution

The majority of environmental protection takes the form of restrictions on *pollution*. Consider the opening declaration of Canadian Environmental Protection Act (CEPA):

It is hereby declared that the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention.⁴

It is also worth recognizing what will become a central feature of this section's argument: the distinction between the goal of human health and the goal of protecting the environment. Whereas this first part of the declaration makes the obvious connection between the two, two further instances point them out as distinct goals:

⁴ *Canadian Environmental Protection Act*, 1999, c. 33

Whereas the Government of Canada is committed to ensuring that its operations and activities on federal and aboriginal lands are carried out in a manner that is consistent with the principles of pollution prevention and the protection of the environment *and* human health; (*italics mine*)⁵

And,

Whereas the Government of Canada recognizes the need to protect the environment, including its biological diversity, *and* human health, by ensuring the safe and effective use of biotechnology; (*italics mine*)⁶

Protecting the environment, its biodiversity and human health are recognized as separate goals (though obviously interrelated ones). Pollution then is any emission, effluent, or other waste that detracts from these goals. Indeed it is whatever degrades the quality of the natural environment and so is necessarily undesirable from the perspective of living organisms *qua* living organisms.⁷

It is not *the fact* that we legislate against pollution that undermines property rights in natural resources like land. Pollution is not a ‘paradigm’ use of land in any context, and so denying the right to pollute is simply removing one of the infinite conceivable uses there are for land. But what are the paradigm uses for land? Recall the example of the heritage site house. In an urban setting it is fair to say that one’s interest in determining the use of particular piece of land is going to be to build something (or use what is built already) on that land. Granted, many cities have parks and gardens both individually and municipally owned, but these are in a sense “built” as well. The further we move from cities the more varied the uses of land become. We might adopt the blanket term

⁵ Id.

⁶ Id.

⁷ Paul Taylor, *Respect For Nature*, Princeton: Princeton University Press, 1986, p.288.

“development” to describe all the relevant uses for land. This could include agriculture and resource extraction, as well as constructing facilities for manufacturing, retail, living and recreation. However we choose to delineate the paradigm uses of land, pollution will never be a *primary use* of land. (Though some have argued that pollution is a necessary *cost* of development. Developing countries especially take an economic approach to industrialization and environmental damage is but one component of a cost-benefit analysis, if it is considered at all.)⁸ It is instead a by-product of development. If it were the case that all development necessitated the production of uncontrollable pollution, then indeed development might have to be restricted altogether and land would in this way become unownable. Thankfully, this is not the case. Sustainable development⁹ is both possible and a recognized social goal, as is clear from the passages of the CEPA declaration quoted above.

Though restrictions on pollution are similar to, say, building codes, insofar as they are merely restrictions on the use of land (and thus no threat to the property-like nature of rights in land), they are different in another very important sense. Building codes are motivated primarily by health and safety concerns for people in and around the buildings. They might also reflect the eccentric aesthetic preferences of the locality where the building is constructed. And of course we

⁸ See Passmore p. 43-46, and Susan Hanna, Carl Folke and Karl-Goran Maler, “Property Rights and Environmental Resources” in *Property Rights and the Environment*, Susan Hanna and Mohan Munasinghe eds. Washington: Beijer International Institute of Ecological Economics and the World Bank, 1995.

⁹ Sustainable development here is not a technical term here but means what one might more or less think it means: the extraction or use of resources that seeks to maximize their value to humans in the long term while minimizing the impact of using them on the natural environment.

more recently find building codes with an aim to improving energy efficiency. (This last has benefits for both society by reducing strain on energy infrastructure and for the environment by reducing harmful emissions from fossil fuel burning generators and toxic waste from nuclear power stations. It is clear that in this respect building codes that aim to reduce energy use are another form of pollution control. The salient point about building codes is that, by and large, they reflect an interest in *human* safety or aesthetic preferences.) The motivation for preventing pollution, however, is *not* always solely to protect human safety. As we saw in the CEPA declaration, it is sometimes recognized that protecting the health of the natural environment is itself a legislative goal. We do not, on the other hand, create building codes with an eye to the welfare of buildings. Nor do we enact limitations on gun use to prevent wear and tear on guns.

3.3 Taking Pollution Seriously

In 1997, Hydro Quebec was charged with dumping polychlorinated biphenyls (PCBs) into a river. Initially, the PCBs were not on the list of toxic substances listed in the Environmental Protection Act, and so were not subject to regulation under section 34 of the act. However, section 35 of the act allows the Ministers of Health and the Environment, when they feel immediate action is required, to create an “interim order”, valid for 14 days, whereby a substance not listed can be regulated under section 34. Hydro Quebec brought a motion that sections 34, 35 and the interim order under which they were charged be declared

ultra vires the Parliament of Canada, on the grounds that they were beyond the ambit of federal power to impose criminal sanctions in this matter. (The penal sanction enforced under this legislation is, according to the Supreme Court, “undergirded by a valid criminal objective, and is valid criminal legislation.”¹⁰) The motion was granted at the provincial level but was appealed. The appeal made it to the Supreme Court, which granted the appeal. While the case is interesting for its discussion of legislative powers, the focus of my analysis will be on the way environmental interests are defined and utilized to justify criminal sanctions for polluting the environment. Specifically, it provides a clear example of environmental interests being considered separately from human interests. For instance, even the dissenting judges recognized that,

Although the protection of human health has been held to be a legitimate public purpose,...,the protection of the environment is also a valid purpose of the criminal law.¹¹

They also agreed that the force of the sections of the CEPA pertaining to pollution are not

just about *regulating* use.

In this case, the Quebec Court of Appeal held that, although one of the effects of Part II of the Act is to protect human life and health, its pith and substance lies in the protection of the environment (at p. 405):

[TRANSLATION] It can be seen from a careful examination of the provisions at issue that Parliament has chosen to regulate the release of toxic substances into the environment for the stated purpose of protecting human life and health. There is of course no question that one of the effects of the adopted measures is to promote the protection of human life and health. However, it is my view that the pith and substance of both the

¹⁰ R. v. Hydro-Québec, [1997] 3 S.C.R. 213

¹¹ Id.

Chlorobiphenyls Interim Order and the enabling provisions pursuant to which it was made [i.e. the CEPA] is the protection of the environment.¹²

To further emphasize the importance and character of the value being protected consider

this final statement by La Forest J:

I entertain no doubt that the protection of a clean environment is ... surely an “interest threatened” which Parliament can legitimately “safeguard”, or to put it another way, pollution is an “evil” that Parliament can legitimately seek to suppress.¹³

These examples further illustrate that in Canadian law protecting the environment is *not just* about protecting human interests i.e. in health. Furthermore, we see in this case that protection of the environment alone, apart from the health implications to humans is even sufficient to justify criminal sanctions on those who violate use restrictions.

We might impose duties for the preservation of historic buildings, important artifacts or works of art. Such restrictions amount to what we might call a duty of *stewardship* over the object of the so-called property rights. A duty of stewardship does not, in itself, undermine a thing’s ownability. Again, the motivation for preserving such things is not to protect some interest the objects possess (whatever that would mean). It is an interest we as society have in their being preserved. We have an interest in remembering our heritage or in the aesthetic value of architecture and art. While we certainly have similar interests with respect to preserving nature, such as an interest in appreciating its beauty or

¹² Id. para. 24.

¹³ Id. para. 124

in recognizing it as a part of our biological history, these do not seem to fully explain the obligation laws like the CEPA impose on us. What we have is the germ of a legal recognition of the *interests of nature*, though what those could be is not yet clear. It is difficult to make the same claim about a building however historic it might be. This orientation of legislation protecting the environment towards the object being protected itself is what makes the preservation of land different than the preservation of an historic building. And except for perhaps cases of gross negligence, building code violators are not criminals, and certainly not when their actions have ‘harmed’ nothing but the building itself. (That said, perhaps the builders of certain unfortunately realized architectural fancies ought to be locked up.¹⁴)

3.4 The Interests of Nature

While the CEPA and judicial commentary make it clear that protecting the environment is not just about human health, it is not entirely clear why not. Protecting human health and safety is surely enough to generate powerful restrictions and sanctions on pollution, so we need no *additional* justification for them. What is the point of expressing a commitment to preserving the environment over and above its affect on human health? What is the *interest* that this kind of law means to protect? Is it a human interest or are we recognizing the ‘interests’ of nature? In *R. v. Hydro Quebec*, it was pointed out that the CEPA

¹⁴ This is an adaptation of a glib remark of Penner’s and he deserves the credit.

does not require human health to be threatened for pollution to be considered a crime. Harm to the “environment itself” is enough.¹⁵

In both the CEPA and *R. v. Hydro Quebec* the notion of *harm* to the environment is discussed. This is a key difference between how we conceive of historic buildings and the duty to preserve them and the case of preserving the environment. The motivation behind the duty to preserve a building is fundamentally what *we get* out of its preservation. The motivation behind the duty to preserve nature is, in part anyway, to *protect it* from harm. We must consider at least two options in identifying what interest correlates with preventing harm to the environment. First, we might think that judges and legislators are confused, and that aside from perhaps some aesthetic and recreational benefits it provides, the human interest in the well being of the environment extends no further than the role it plays in the well-being of humans. That is, the goal of protecting the environment collapses into the goal of protecting human welfare. This possibility is not easily dismissed. However, for the purposes of this paper, I will assume that they do not collapse and attempt to present an interpretation of “the interests in nature” that accords with the wording of the *CEPA* and statements of the judges in cases like *Hydro Quebec*. If the

¹⁵ This is made quite clear by Iacobucci J: “It is not necessary that a substance constitute a danger to human life or health for it to be labeled “toxic” and brought under federal control; under s. 11(a), it is enough that it may have a harmful effect on the environment. It is not even necessary to show that the aspect of the environment threatened be one upon which human life depends; this is made a separate category under s. 11(b), and should not, therefore, be read into s. 11(a). A substance which affected groundhogs, for example, but which had no effect on people could be labeled “toxic” under s. 11(a) and made subject to wholesale federal regulation.” *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 para. 41

interpretation offered is plausible, then we may be able to give our lawmakers the benefit of the doubt, that they recognized a potential and important distinction in advance of their ability to clearly articulate it.

The option to be explored below is that the environment has interests of its own, and that we are under some obligation, or feel some imperative to protect them. One difficulty with this option is that we normally assign interests only to things that a) think or b) feel. Again, while I think it is certainly true that groundhogs have interests (in a more limited sense than humans perhaps, but interests all the same) it is more difficult to imagine the interests of trees, flowers, insects or ecosystems. Is the survival imperative of moss an interest? If so, is it an interest that ought to be protected by the law, indeed by criminal law? It certainly is not a crime to kill an ant colony – pesticides below a certain threshold of potency are not illegal in most jurisdictions. ‘Pollution’ connotes a scale that goes beyond individual creatures. But individual conscious animals, who are probably the best candidates in the non-human world for being interest-bearers, are not the target of pollution controls. Rather it appears that *species and ecosystems* are. The question a potential polluter ponders is not will polluting harm *this* groundhog, but will it harm *groundhogs*? This “ecosystem approach” seemingly adopted in acts like the CEPA, suggests the interests being protected are those of things like swamps and species *as a whole*. The idea that species and or ecosystems have interests is a challenging one, but not implausible, and it is to the defense of its plausibility we must now turn.

3.5 Looking Deep, Staying Shallow

The question before us now is, if a legal system recognizes that the protection of natural resources, or of 'nature' more generally, is not simply a matter of protecting human interests, as the CEPA and *Hydro Quebec* suggest, then whose interests are the laws reflecting? Are we talking about the interests of nature, or some extension of human interests? Even if it is the latter, that legislators and judges would talk about them as if they were different suggests a *prima facie* distinction between the two, even if it turns the former finds its ultimate source or justification in the latter. Philosophers have engaged questions about nature for a long time, though the development of a distinct branch known as environmental philosophy is arguably quite recent. The 'environmental crisis' in which we, as a global community, find ourselves today has made the development of a new environmental ethic an almost frantic concern for some. Therefore a little background on what has been said about environmental ethics generally will be useful in understanding what if anything is to be made of the distinction under discussion and its effect, if any, on the idea of property and ownership.

Modern environmental philosophy is inextricably tied to the contemporary scientific science known as ecology. Though this term is not entirely unproblematic, as we will soon see, it is enough for now to say that ecology is the study of systematic relationship between living things and their natural environment. That is, it aims in the first instance to describe how plants, insects

and animals interact with each other as well as with the landforms, atmospheric and geologic processes of the areas that support them. The first principle, if you like, is that all things in nature, indeed all things generally, participate in a complex relationship which has evolved over millennia and any changes in one area can have an effect on all the others.

One of the primary distinctions discussed in the literature is that between ‘deep’ and ‘shallow’ ecology. Both buy into the first principle of scientific ecology broadly outlined above. Where they differ is what this means to us as members of those ecological systems or ‘ecosystems’. Deep ecology holds that our (i.e. humankind’s) membership in the community of life is no more valuable than any other thing’s membership. We are no more important than bears and trees but also than rocks, streams and wind. This belief has led to a “land ethic” whereby human interests are weighed no more heavily than the interests of any other part of an ecosystem and at its most esoteric famously encourages us to think like a mountain.¹⁶ Clearly this requires not just a certain kind of ethical “program” for us to follow, but a radical shift of paradigm and lifestyle.

Shallow ecology takes a slightly different approach. While acknowledging the discoveries of ecological science, shallow ecologists see them more as an incentive to push forward the ethical progress made in the last two hundred years on issues of civil rights for blacks, women and rights for animals etc. That is, ecological science gives us reasons to expand our existing

¹⁶ See: Aldo Leopold, *A Sand County Almanac*. Oxford: Oxford University Press, 1966.

“anthropocentric” moral and ethical theories to include more of the natural world in some capacity, though rarely (if ever) an equal one to humans. Most political and social action taken in the last fifty years to protect the environment (what might generally be called “environmentalism”) is usually considered to be shallow ecology.

Deep ecology probably will not help the analysis at hand for the simple reason that it remains a highly controversial view whose plausibility has been insufficiently established. Most of us who style ourselves environmentalists will fall by default into the shallow ecology camp, even if we do not explicitly endorse it. The generality of this distinction (which I have admittedly made less nuanced than serious environmental philosophers would) makes this inevitable. This is not to say that shallow ecologists do not also sometimes argue for radical paradigm shifts. A shallow ecologist could still argue for the representation of animals or even plants in government for instance, which would I think require some serious adaptation on the part of the average contemporary citizen. Since the legal concept of property is a matter of social fact, there is some reason to prefer the theory that better reflects common attitudes towards a subject. There may be some deep ecologists sitting in courts or in legislatures, but it is more likely that, if they have any conscious alliance in the debate, it is with shallow ecologists.¹⁷

Furthermore, as will be discussed shortly, the conclusions regarding the

¹⁷ Indeed, one commentator suggests that actual policy changes might be no different at the outset between a group of deep ecologists and of shallow ecologists. See: Philip Elder, ‘The Wrong Answer to the Right(s) Question’, in *Environmental Ethics*, Raymond Bradley and Stephen Dugald (eds.), Burnaby: Institute for the Humanities, Simon Fraser University, 1989.

relationship between humans and land with respect to ownership that are made in this paper are more easily supported by deep ecology than shallow ecology. So even if deep ecology turns out to be plausible or even correct, the conclusions defended here will not suffer but rather will be bolstered. So for the purposes of the remainder of this paper, it will be assumed that the social attitudes reflected in the laws and judgments discussed is reflective of a (perhaps tacit) alignment with the principles of shallow ecology than with deep ecology.

However, before we put deep ecology to the side, let us look at one consequence the theory would have should it ever come to inform the decisions of lawmakers. If we accept the (presently considered somewhat radical) viewpoint that we are all connected in a great system of life¹⁸ in which we play no supremely important role nor deserve higher degree of consideration it is likely because we believe we are not really individuals. It is because we believe there is only nature and we *are* in a very real sense the mountains, mosses and mollusks around us. Were that the case, then land might not be separable in the sense required by Penner's theory. If *we are the land* then the land cannot be owned, because as we have seen you cannot own that which is integral to yourself. Again, whether or not this turns out to be the truth of things, I reject the possibility that this informs the interests of nature spoken of in Canadian law for the reasons stated above, that at present the theory is too controversial and of

¹⁸ Reference to this system is sometimes compared to the theory of an interconnected universe of A.N. Whitehead. See for instance: Nash, R.F. *The Rights of Nature*, Madison: University of Wisconsin Press 1989, ch. 3.

questionable plausibility to be held by Canadian Supreme Court judges, or legislators. I think it fair to assume that neither the drafters of the CEPA nor the judges in *Hydro Quebec* were deep ecologists. Admittedly, this is just an intuition. Either way, this quirky consequence to the concept of property is but one of many challenges that genuine deep ecology would raise for a legal system. Nevertheless, while extreme, this view does drive home the ecological principle of interconnectedness, a principle which shallow ecologists can accept and which may nevertheless cause problems for a 'shallow' theory of property. Those problems will be discussed shortly.

3.6 Feinberg's Future Friends

A good starting point for our discussion of how the interests of nature are represented in and protected by the law is Joel Feinberg's theory of interest based rights. According to Feinberg, rights both moral and legal can only be predicated of those things which have or are capable of having interests. According to this theory it is conceptually confused to talk about the rights or interests of entities like 'nature' or 'species' because they are not the kinds of things that are capable of having interests. The legal protection of plants, for instance, though plants rank slightly above 'mere things' like rocks, in that they have internal natural impulses towards certain states of being, must not be understood as protecting the interest of plants. Rather, he says, "'protective legislation' has to be understood

as legislation protecting the interests human beings may have in them.”¹⁹ This conclusion is, however, incomplete. For Feinberg does allow that animals can and do have interests and that those interests can be the target of legislation. If the law can protect the interests of animals then it follows that while plants themselves have no interests the protection of plants can serve *non-human interests*. The difficulty is that non-human interests are often attributed to species or to nature generally in protective legislation, even though, if Feinberg is correct, such entities are conceptually incapable of having them. This is in part why it is our duty to future generations of humans, i.e. to protect their interests, that grounds environmental protection legislation. More will be need to be said on why generations can rightly be said to have interests while species cannot. More apposite to the current project is whether lawmakers really are conceptually confused in discussing the interests of species and nature. As was discussed above, some are trying quite explicitly to undermine the idea that only human interests matter when it comes to environmental protection. One way to interpret lawmakers is to take words like “species” and “nature” to be placeholders for more complex formulae like “the living (or future) and interested animals of species X or region Y.” Understood in this way allows us to accept that laws can reasonably be said to serve non-human interests, without being (hopelessly) confused.

¹⁹ Feinberg, p. 53.

Feinberg develops the idea that preservation of the environment is largely on account of a duty imposed on us by future generations. They have a right to clean air, open spaces and healthy ecosystems and we must respect that right. The key feature of Feinberg's theory is that in order to be conceptually able to hold a right a thing must have interests that can be served by those rights. 'Mere things' like rocks not only do not have rights but it is conceptually confused to suggest they could. They simply are not the kinds of things that *can* have rights because rocks do not have interests. Obviously, people have interests and can therefore hold rights. The cases of the rights of the dead, the unborn or the incurably vegetative are illuminating, and Feinberg by and large remains consistent in applying his theory to each. Each of these are hard cases because at the time of their being unborn (or even newly born), deceased or vegetative these people do not have interests in a straightforward way. The dead have rights which are, in a sense, formed conditionally when the person was alive (e.g. through a will) and which only become rights upon death. The vegetative may have been fully interested humans prior to being so and in that case have residual rights. More important for Feinberg is whether there is any chance of their becoming interested beings in the future. If not, then they have no more rights than redwood trees or rose bushes.²⁰ This future-tensed interest is the key for unborn children. The rights we ascribe to fetuses, and newborns (who are only very slightly, if at all, more interested immediately after birth than a few days before), are based on the

²⁰ Id. p. 61.

expectancy of their becoming fully interested beings. The same is fair to say of future generations, according to Feinberg. If we assume that humans will be around in 500 years, then their potential existence as interested beings makes them conceptually coherent rights candidates.

Feinberg's argument emerges initially as a response to the question about the rights of animals. He argues that animals do have interests and thus can be rights holders. An interest for Feinberg is a desire or aim combined with a belief about its achievement. For instance, my dog might desire the cookie I am holding because a) it is a treat and b) he desires anything that is a treat. He also recognizes that getting the treat is contingent on his performing certain tricks to my satisfaction. That is, he has the capacity to form a belief that by rolling over he will earn the cookie and thereby satisfy his desire for treats. It is therefore in his interest to roll over. This cognitive element is key for attributing interests to things.²¹ Rocks and other mere things have neither desirous impulses, nor do they have any cognitive equipment – obviously. Plants, and to some extent vegetative humans may have self-regulating functions, and biological needs, even impulses towards that which satisfies those needs, but a 'brute impulse' is insufficient to identify an interest according to Feinberg.

The advantage of this interest-based understanding of rights attribution is that it allows us to speak coherently about giving rights to things that cannot *make claims*. That animals cannot make claims against human (or other animal) duty-

²¹ Id. p. 44.

owers who interfere with their interests has been offered as an argument for their not having rights. But we do give some sort of rights to newborn children, and dead and comatose adults. These often ‘make claims’ only through proxies of various sorts who act *on their behalf*.²² As Feinberg says, “a being without interests has no ‘behalf’ to act in and no ‘sake’ to act for.”²³

What then are we to make of the examples discussed above, where the environment seems to be distinctly recognized as having some sort of interest in being protected? If rights exist to protect interests and laws exist to serve them, then it is of paramount importance that we understand all the interests and interest holders involved. But in legal discourse this is often quite vague when it comes to the environment. Feinberg simplifies the problem greatly, saying simply that when it comes to legislation which aims to protect nature (in this case plants) for its own sake, we must “not take ourselves seriously....Plants need things to discharge their functions, but their functions are assigned by human interests, not their own.”²⁴ Any obligation we have to protect the earth is owed to future generations who have an interest in it “derived from our housekeeping role as temporary inhabitants of this planet.”²⁵ This, I think, is entirely too glib an understanding of the duty to protect natural ecosystems set down in environmental protection legislation. To be fair, Feinberg is not talking about legislation alone – his argument is aimed at as much at *moral* rights, though of course these are often

²² Recall that this is exactly what occurred in the case of the Palila in Hawaii. See p. 1, *supra*.

²³ Feinberg, p. 51.

²⁴ *Id.* p. 51-56

²⁵ *Id.*

reflected in legislation. But the housekeeping metaphor is troublesome for two reasons. For one, it suggests that there is a house-owner with respect to whom any given generation is merely a guest. (This will more clearly explored in the discussion of stewardship below.) More problematic I think is that the tenacity with which environmental issues are being addressed by the current generation is not captured by the idea of mere housekeeping; a dirty house is hardly a “crisis”, despite what our mothers may have told us.

While this last intuition suggests there are more important or at least other interests involved in environmental protection than the housekeeping metaphor has to offer, it is not an argument against the idea that it is the interests of future generations of humans alone that ground the moral duty behind such legislation. At the risk of getting carried away with the metaphor, a good deal hinges on what we mean by a “clean house”. For instance, lakes and rivers and streams can be clean and safe for humans while absent of other life entirely. Forests might succeed to a large extent to clean the air without the help of a great many of the creatures that currently depend on such ecosystems. That is, if all we were concerned about was clean and safe drinking water, breathable air, and a beautiful landscape or two to admire, then environmental legislation would probably look very different than it does.²⁶ If this were clearly the case at all we would not need to mention reasons other than human health or aesthetics in our explanations and

²⁶ See: Lawrence H. Tribe ‘Ways Not To Think About Plastic Trees: New Foundations For Environmental Law’, in 83 (7) Yale Law Journal, 1974, p. 1315.

justifications of such protection and yet we do.²⁷ Is this what Feinberg means when he says the functions of plants are determined by human interests alone? Surely, plants have functions that relate to other interested beings, such as animals. Could this not be reflected in legal talk about the interests of nature? As has been said, I am giving our lawmakers the benefit of the doubt, that they are not necessarily conceptually confused about attributing interests to nature, in order to investigate how environmental protection might affect the notion of property. Feinberg, on the other hand, does not assume this. The onus is perhaps on people like me to defend our assumptions, and I do so by attempting to provide a plausible interpretation of “the interests of nature” that accords with lawmakers’ usage. If the interpretation offered is convincing, only then will those who claim that talk of the interests of nature is confused be required to gauge its affect on their own (otherwise convincing and powerful) theories.

Clearly the first problem is that ‘nature’, or perhaps better, ‘natural ecosystems’ lack the cognitive element required by Feinberg’s theory of interests. Like plants, it is not taking metaphor too far to say that ecosystems can be healthy or unhealthy, and that some things are better, worse and necessary for it (i.e. its survival).²⁸ We can say without confusion that something is in this sense

²⁷ J.B. Callicott, for instance, famously augments environmental ethics with aesthetics and Hume’s theory of moral sentiments. See: Callicott, J.B. *In defense of the Land Ethic: Essays in environmental philosophy*, Albany: SUNY Press, 1989 and ‘Can a Theory of moral Sentiments Support a Genuinely Normative Environmental Ethic?’ in 35, *Inquiry*, 183. For arguments against this view see chapter 2 and 3 of *Land Value and Community* by Wayne Oudekirk and Jim Hill (eds.), Albany: SUNY, 2002.

²⁸ Though again, this is not uncontentious. Kristin Shrader-Frechette has argued that at the very least, notions like balance or homeostasis are difficult to define with respect to ecosystems and

‘needed’ by the ecosystem, or that its functioning will diminish without it. But this need is not an interest.

Ecosystems are trickier. This is because a crucial part of any ecosystem is the animal life. While an ecosystem can exist without animals there are few if any on earth that do. Many plants, for instance, rely on animals to spread their seeds as animals rely on plant life for food and shelter. If we take the principle of interconnectedness seriously it is impossible to say that it is acceptable (or at least not iniquitous) to harm or destroy plant life but not so animals (on account of their having interests). To harm the former is to harm the latter. So while plants may not have any interests themselves, the animals, including humans, who rely on them do have interests and among those are interests in the health and availability of the plants. This provides a rough sketch of how ecosystems might be thought to be interested. That is, we might regard the interests of all the conscious animal life within an ecosystem as a collective of interests, which are not tied only the animals themselves (i.e. to the well being of their bodies) but to the well being of all the elements of the ecosystem on which they rely. If all conscious animals are accounted for in this way, it is unlikely any aspect of the ecosystem could be hindered (or encouraged) without an effect on one of its interested members.

Thus while trees themselves add no interests to the collective interests of an

scientists have not agreed on how it might be done. Ecosystems are dynamic and changes occur naturally over time regardless of human interference. The question whether the rapidity rather the kind of changes that humans can cause is the really ‘detrimental’ factor because it fails to give extant species time to adapt. But then even rapid changes have been caused by non-human phenomena. Just ask the veloceraptor and tyrannosaurus rex. However, it is less contentious to say that dumping pollutants which cause harm to *all* life is therefore also harmful to the *ecosystem*, much in the way fluctuations in the stock market effect all aspects of the economy.

ecosystems, their well-being is nevertheless related to those interests which are part of the collective – the interests of the conscious animal life. But is this notion of collective interests with respect to animals and ecosystems plausible?

3.6 Species and Generations

Let us briefly consider why Feinberg says species (e.g. of animals) cannot have interests (and therefore rights) while future generations can. Both have or will have the basic requirements for health and safety. However, a ‘species’, as an entity has no cognitive ability to reflect on these needs and desires.

Generations, he suggests, are different. Generations are collections of individuals who do or will have interests when they are born; interests which can be represented in the present directly or by proxy. The challenge with ascribing interests to future generations is not, as some have argued, the strange metaphysics involved in attributing interests and rights to temporally distant, non-existent entities.²⁹ Rather the trouble is that the further away generations are, the more contingent they *as individuals* become.

Five centuries from now men and women will be living where we live now. Any given one of them will have an interest in living space, fertile soil, fresh air, and the like, but that arbitrarily chosen one has no other qualities in common we can presently envision clearly....Still, whoever these human beings turn out to be, and whatever they might be reasonable expected to be like, they will have interests that we can affect, for better or worse, right now.³⁰

²⁹ Feinberg, p. 65.

³⁰ Id.

In trying to clarify the difference between generations and species Feinberg points out that it is perfectly normal to talk about the rights of certain collectives such as corporations, churches, states etc. This is because “in the last analysis these are rights or duties of individual persons, acting in their “official capacities”. Earlier he says, “A corporate entity is, of course, more than a mere collection of things that have some important traits in common. Unlike a biological species, an institution has a charter or constitution, or bylaws, with rules defining offices and procedures and it has human beings whose function it is to administer the rules and apply the procedures.”³¹ The suggestion here seems to be that collectives such as generations can form interests *of a different kind* than those in things like clean water and living space. The collective interests of a human generation can include things like just societies, artistic expression etc. Non-humans cannot form these kinds of interests about generations. Similarly, species cannot form them because such interests are bound to change from generation to generation even while the interest in clean air, for instance, probably will not. So while a generation of humans can generate an interest in social equality for their generation, they do not necessarily generate the same interest for the species. However, we can be sure that, humans being what they are, they will generate interests *of this kind*, or at the very least will be capable of doing so. Interests that is that serve like a ‘charter’ for the generation.

³¹ Id.

Does this mean that any talk of protecting the interests of species is conceptually confused? On the one hand, yes; Feinberg's theory provides strong arguments to support this. On the other hand, such talk may be understood as being merely imprecise. What lawmakers mean when they talk about the interests of species is not what is good for the species as a collective, but rather what is good for the individual living and future members of that species. We cannot deny that individual animals have "welfare interests," humans included. Furthermore, the precise nature of those welfare interests will vary from species to species. "Clean water" might mean something different for small fish than it does for, say, hardier land mammals who can stomach a bit more toxin without detriment. That is, an interest in water of a pH level between 6 and 7 may be peculiar to a particular species, even though it is shared without the cognitive element demanded by Feinberg's theory. Is it conceptually confused to say that such a species has an interest in water within that range of acidity? I suggest, rather that it is merely imprecise. That is, "species" may simply be used as a placeholder for "*members of the species,*" or perhaps "*members of the current generation of the North American sub-species of...*" It makes perfect sense to talk about the collective *individual* interests of a group, if all members share them.

3.8 Interested Ecosystems

Recall the problem of defining the interests of ecosystems. Not all of its members have recognizable interests. However, it is possible to apply a similar

analysis to ecosystems as that we just applied to species if we focus on those things that do have interests.

Every animal within an ecosystem will have an interest in living space, fresh water, food and clean air. Protecting the interests of any given animal will mean protecting the normal functioning and general health of the plant life *as well as other animal life*. Because animals, unlike humans, do not by and large engineer the circumstances of their own food production, nor can they build shelter out of material other than what is at hand within their habitat, nor pipe water in from far away or from underground sources, they rely on the interplay of many things which are not directly used by or useful to them in an obvious way. Lions (not unlike many humans) care about grass because they feast on grazers.

This overlap of interests among the interested members of an ecosystem make a collective interest in the ecosystem's general health and well being. This is not to say that change is bad. The idea of balance or homeo-stasis within an ecosystem is a controversial one among ecological scientists.³² All I mean to suggest is that if it is possible to the collective individual interests of species in the way described above then it is plausible the same can be done with ecosystems. At the risk of taking analogy too far, we might even talk of "generations" of ecosystems. The ecosystem of a given area may look different from one century to the next or one millennium to the next, but it would take some pretty radical

³² Kristin Schrader-Frechette has engaged the problem of ecological holism in environmental ethics at great length. For further sources on the level of agreement among scientists about ideas of ecological holism see: Shrader-Frechette, K.S. & McCoy, E.D. 'Theory reduction and explanation in ecology' in 58 *Oikos*, 1990. pp. 109-114; K.S. & McCoy, E.D. *Method in Ecology*, Cambridge: Cambridge University Press, 1993.

changes for the various interests in clean air and water etc. to disappear or for the necessary interrelationship of species to become unnecessary.

None of this somewhat loose talk of the interest of ecosystems requires us to suddenly take up arms to protect plants, ants and antelopes alike. What it does suggest is that if we are going to take the interests of animals seriously we cannot discount what is good for mosses and mountains.

3.9 Owning Interested Things

Restrictions on use, as we have seen, do not necessarily undermine the property-like nature of use-rights one holds. They do so when the restrictions are either imposed with the intention to do so, as Penner argued, or if they function in a way that restricts the 'normal' usage of the object in question, as I have argued. According to the theory of property under discussion, we identify certain rights as property rights on account of the interest they protect or serve that people have in the exclusive determination of the use of things. I own my car because I have an interest in exclusively deciding when it is used i.e. who drives it and when etc. Other people surely have an interest in my car, especially if they have not a car of their own or if mine happens to be a particularly desirable car on account of its speed, sex appeal or cargo capacity. But my right to use the car is protected by

law in such a way that I have no obligation to consider the interests others may have in using it as well.³³ My interest is exclusively protected.

People will have interests in how *I* use my car that are protected. It is in the interest of others that I not drive on the wrong side of the road, at high speeds, drunk, through a school zone. But these restrictions are motivated by the interests people have in safety, security and the orderly conduct of traffic. They are not motivated by an interest people have in determining the use of *my car* specifically, or even cars generally. We have restrictions on bicycles, motorcycles, rollerblades, skateboards and pedestrians that all spawn from these interests. That is, it is not the case that the interest anyone has in safety or security or knowing which way traffic is coming from as he crosses the street in any way *competes* with my exclusively determining the use of my car. I am not *sharing* the determination of how I use my car.

When I rent a car, I have most of the same use rights (and restrictions) that I do if I owned it. However, there are some restrictions on my using the car which disqualify my use rights as property rights. I cannot alienate the car, for instance.

³³ One exception to this might be the interest a police officer has in using it in an emergency situation. This example of forced transfers occurs when the state has powers to further its own interests in using others' property. Such powers are not necessarily threatening to the owner's property right. For one thing, if they are built into the normative system in which the property institution is situated, one's right to exclusive use does not include the right *not* to have one's car seized by a police officer (or to have assets seized and sold for payment of debts). Furthermore, there are usually conditions under which such transfers can occur. A police officer is not empowered to seize any car at any time for any reason, nor is the seizure in this example going to be permanent (though some can be). Forced transfers then can sometimes be regarded as temporary interference with one's exclusivity right, or a legal form of transfer which under certain conditions terminates the property right altogether. If the state were free to seize any property at any time for any reason for any length of time, then it is not unreasonable to conclude that only in a very limited sense are citizens capable of owning anything. See: Penner p. 92-93

Alienation, as was mentioned above, is a normal use for anything over which one has exclusive determination. I am not at liberty to give it away or abandon it in a car park, or destroy it in a demolition derby. Nor am I permitted to continue using it beyond a certain date and time. These restrictions are motivated by the interest someone else, namely the rental company, has in the car I am renting specifically. The rental company is free to use the car the in the ways just mentioned, as well as free to to license its use out to others. It is under no obligation to consider my interest in using the car, but I am under an obligation to consider its interests when I use the car. I can certainly have use rights in that which I do not own, but so long as the interests another has in how I use it are also protected, that is, if another has a say in determining how I use a thing then, extensive though my use rights may be, they are not exclusive.

The same is true when I have use rights with respect to things that themselves have interests *which are protected*. People cannot be owned in part because any interest I have in using them a certain way must be balanced against the interest they have in how they are used. Certainly I can have a right to expect people to act in certain ways or do certain things on account of an agreement I have made with them. But such arrangements reflect an interest I have in making contracts with people, and so the rules governing them are aimed at protecting that interest. They are not in place to protect an interest in exclusively determining the use of people. There is nothing conceptually confusing about owning people. They are separable from me in the way demanded by the

separability thesis. I can stand in the same relationship to a given slave as the fellow who runs the plantation next door. However, once the law has made it impossible for me to stand in relation to a person such that I must not consider (and respect) the interests he has in how he is used then it is impossible for me to exclusively determine the use of that person. Now, the freed slave is not in any position to own himself either. He is not separable from himself in the relevant way. He cannot alienate himself or give himself away though he can certainly make contracts with others about uses to which he might be put. Under these conditions people become unownable altogether.

It may seem at first that this is no different than restrictions on the use of my car. I cannot drive any way I please, but must consider the interests of other people. Is it not then the case I am not exclusively determining the use of my car? Is not everyone else within the jurisdiction to which a given set of traffic laws applies helping me to determine how I use it? While it is certainly true that restrictions of all sorts protect the interests of others in a way that brings their interests into play in our determining the use of things, those interests are rarely oriented towards any particular thing. Laws that protect the interest in health, safety and security are not oriented towards guns, cars, moulds or shoddy building materials but rather towards *people*. The interest an individual has is not in telling me how to drive, but in being safe on the roads. On the other hand, in the case of interested 'objects' of property, like people, the competing interest is in the use of the same thing in which the putative owner has an interest. The interests of both

parties in this case are oriented towards the same thing, i.e. the use of the same object. This distinguishes those restrictions which are merely limitations on the otherwise unlimited number of uses we may make of a thing that we own and those which undermine the property-like nature of my use rights over a thing.

Any time we recognize that a thing has interests *and* those interests are protected by law, then any use rights with respect to that thing cannot be considered property rights. One caveat might be that the interests a thing has must be self interests for this to follow. We might imagine an entity that indeed has desires and the cognitive ability to reflect to some minimal degree about them, but whose interests never have to do with itself. Perhaps a species evolves to think only of its young. It does nothing, nor even has any desires towards its own preservation but only that of its offspring. In such a case, the interests of such a thing could be recognized and protected and *still* it could be owned given the argument just laid out. This is because the interests of such a creature would not conflict with the interests one might have in exclusively determining how it is used. It might say, (for we may as well imagine it speaks English while we're at it) "Do what you want with me but take care of my child!" The upshot of this example is that so long as we *do* recognize and protect interests that something *does have* in how it is itself used, then any further interests in determining its use can never be exclusive and thus will never warrant protection as *property* rights.

Finally, before exploring how the argument just advanced applies to land and natural resources, it should be noted that nothing said so far reveals a need for

any drastic overhauling of the law. The conceptual distinctions this argument relies on and the conclusions it reaches do not require those for whom it is applicable to make any changes to their behaviour. A good example is the case of livestock. If a jurisdiction has rules about the treatment of livestock written in a way that indicates a recognition of the interests such animals possess and with an aim to protect those interests (i.e. through prevention of unnecessary or excessive suffering) then, following what has been said those animals are *not* property. Or more precisely, the rights to use those animals are not property rights. This is so even if we allow many uses which are 'normal' for and generally protected by property rights. The right to destroy a thing, for instance, is one of those uses Penner suggests is distinctly property-like. Cattle farmers generally have the right to destroy their stock for any number of reasons. While this certainly looks like a property right, it is undermined if the cattle's interest in not suffering is protected by restrictions on *how* they are killed (or raised for that matter). The point is not, in this case, which uses are allowed, but *for what reason* they are restricted when they are. If they are restricted because an interest belonging to the alleged object of property has been identified and is sought to be protected, then the otherwise unlimited number of uses for the thing is limited in such a way as to undermine the exclusivity of the determination of its uses.

Again, all this can happen without the explicit intent of the legislators to do so. The noble goal of preventing suffering to animals is surely good enough to warrant restrictions on how they are used or treated. This is not to suggest that

any normative force is added to the legislation by pointing out it renders cows ‘unownable’. It is not more iniquitous or more illegal to cause them unnecessary suffering just because it not only violates laws against *but also* because it treats them *as though they were property*. It would I think be possible to make that case, but I do not think it is entailed by the argument presented here, nor will I argue for it. This should help allay concerns that my conclusions are somehow terribly radical and that we shall have to release from their cages the unownable prisoners of evil bondage and ask them to come for tea and bring any guest they choose. We may continue to treat them much as we do. Where change will occur is, as Penner pointed out, in dealing with disputes about such things we may no longer be able to classify them under property law but under something else. What exactly the relationship between a farmer and his cattle is to be called will be addressed in a later section. We might for instance want to put all cases of extensive use rights over interested objects under the heading of ‘stewardship’ (though to my mind ‘unwilling partnership’ is more descriptively accurate.) Stewardship has the advantage of being a much tossed about word when it comes to matters of the environment and animal rights, though as will be discussed below it is not entirely unproblematic.

3.10 Therefore...

It should be clear by now how the case for land natural resources’ being unownable will be made.

1) Property rights protect the interest in exclusively determining the use of things. 2) Some objects are interested in how they are themselves used. 3) If the interests of such objects are protected by law, then their interests in part determine how they are used. 4) Therefore, one cannot have a legally protected interest in *exclusively* using that thing. 5) Therefore such objects are unownable. 6) Land, understood as being comprised of ecosystems, can have interests. 7) Therefore land cannot be owned, when its interests are legally protected.

Understanding how the interests of ecosystems are analogous to the example of individual livestock requires some unpacking, for on first blush it might seem quite disanalogous. For one thing, ecosystems have no sense of self towards which the interests are directed. However, since the interests of ecosystems are a composite of the interests of those sentient beings who are part of them, it does make sense to say that the interests one part of the ecosystem (i.e. the animals) has is directed towards another part (i.e. the land, air, water, vegetation etc.) So long as we accept that ecosystems are to some degree integrated, then this is no stranger than saying a person has an interest in his arm not being chopped off. Certainly, his arm has no cognitive equipment to generate interests, but the brain does and they are part of an integrated system. The human interest in being free from harm is not limited to the seat of cognitive ability. That said, even if we acknowledge that ecosystems are integrated wholes, it is contentious whether they can be easily delineated, as was mentioned above.

This might also seem to be a bit of metaphysical slight of hand, but fortunately there are other ways to unpack the claim.

If the reader is unconvinced that ecosystems can have interests in the way described above, we can take one step back and discuss it in terms of species. If the interests of species, understood as a collection of individual animals, are protected, and those interests are directed toward the same natural resources that are putatively the object of a human owner's property rights, then we can say that the animals usage of those resources is protected. Like Locke's principle of 'leaving as good and as much'³⁴, environmental protection can be understood as saying, you may use resource X so long as your use does not interfere with Y's use, where Y represents any interested being who depends on X for its livelihood. In that case, your interest in exclusively determining the use of X is not protected, though your interest in having a share of X can be. You can be said to own that share, but not the resource *in toto*. You can have the right to draw a bucket of water from a stream, and you can own the water drawn, but you do not own the stream, nor even the section of the stream from which you draw the water.

This will strike many as an uninteresting or trivial conclusion. This is precisely how resource extraction *is* conceived of in the law in many places, as the right to draw a certain amount of a certain resource from a certain place. A property right to a given piece of land does not necessarily include mining rights, nor do mining rights necessarily include or constitute property rights in the

³⁴ John Locke *Two Treatises on Civil Government*, London: Routledge, 1884, sec.27.

surface land. This is no challenge to my argument. The claim is simply that where environmental protection restricts things like resource extraction, then the land could not be owned *even if they wanted to do so*. That this will make no great practical difference in jurisdictions where resources are managed this way only makes my humble argument more palatable, or at least less piquant.

A final way to view the argument presented is to consider the possibility that owning the land includes owning the interested animals that happen to reside there. Suppose I purchase Blackacres and it happens to be the winter home of a small caribou herd. The law might say that those animals are also my property for the time they live within Blackacres. They are the stock to my lock and barrel. That is, it might be a *legal fact* that “my land” and “my caribou” are integrated entities and to speak of the one is to speak of the other. In that case, supposing that while I am at liberty to hunt the beasts, I am not at liberty to torture them, then the interests ‘my land’ has in ‘itself’ is in a sense protected. Even the enforcement of “hunting seasons” could have this effect, since such rules may be in place at least in part for the well-being of the herd.

Any of the interpretations of the interests served by environmental protection just offered are sufficient to undermine the exclusivity of determination and thus the property-like nature of the use rights in natural resources. Indeed, different jurisdictions might better accord with one of them than others. It is nevertheless clear that once we have recognized what property rights are really

about, and acknowledged that environmental protection serves interests other than human users of resources we see that property rights to land can be undermined.

3.11 A Final Objection

The most ardent objection the argument above is likely to evoke is that it only proves that Penner's theory of property is misguided. The fact that we cannot own land in the circumstances suggested demonstrates that we *are* better off conceiving of property as a bundle of rights. After all, humans have owned land for thousands of years, so surely a theory a property must be able to account for that. This objection fails for two reasons. The first is that it fails to answer Penner's critiques of the bundle of rights picture. The ability to say we can own land no matter what is hardly a reason to hold on to a theory that leads to the kinds of inequality Penner argues a bundle of rights picture does. It does not help to delineate the boundaries of property law the way the Exclusion Thesis and the Separability Thesis do. If one is unconvinced of Penner's critique, then some other way of explaining why some things can be property while others cannot, and simply asserting, "Well, land can be property, that I know for sure," will not cut it.

Secondly, the objection fails because the argument advanced in this thesis *does not* entail that the long history of land ownership did not occur, or even that it was misguided. Environmental protection of the sort canvassed here is a relatively recent phenomena. To suppose that even our oldest legal and social

institutions are not subject to change is simply wrong, though I wholeheartedly acknowledge that one must do so with care. I have proposed no radical revision of the structure of the laws and institutions of any jurisdiction to which this argument applies, nor does the argument entail one. Rather it shines a light on a concept as old as civilization and says, “something’s changed.”

That said, I leave open the possibility that recognizing this change will have some visceral effects on how we make policy. It reveals, perhaps an emerging value that society may hold that if the land natural resources are worth protecting for their own sake, and indeed are not the kinds of things we can own, that maybe better care or respect may be afforded them. A paradigm shift of this kind does not necessitate any great change in behaviour, but it may nevertheless do so. And to my way of thinking such changes would be welcome.

3.12 Property’s Shoes

It remains only to discuss how to classify this newly recognized relationship between human society and the land. Frankly, any number of names could capture this ‘bundle of (not property) rights’ we can have with respect to nature. I will not tackle this question in any detail, though this may seem to be a cop out of sorts. I will discuss the most likely candidate, the notion of *stewardship* mostly because it is already thrown about in legal discourse about the environment. Whether ‘stewardship law’ ought to be recognized as its own branch of law, or a sub-branch of another is not a question I will attempt to

answer in any detail. Needless to say, I am hesitant to call it a sub-branch of property law for that would risk re-masking any clarity the above analysis has provided. On the other hand, it is not clear it would fit neatly under any other branch, contract or tort for example. Thus, recognizing it as its own distinct though related branch might be the best answer. After all, we individuate legal branches by the interests they serve and we can easily say that the interests environmental protection aims to protect are unique, if what has been argued holds any water.

“Stewardship” carries several connotations such as ‘caring for something’ and ‘managing something’, but might be minimally defined as simply ‘minding something’. A duty of stewardship over a thing is a duty at the very least to pay it some attention. We frequently ask others to mind our things if we have to leave a room in which we are working, or to mind our house for the weekend while we are out of town. We might similarly ask or hire someone to mind the children for an evening. The seriousness of the duty depends largely on the perceived value of the thing being minded, the duration of the absence, and the formality of the agreement. Is there a contract? How well do the parties know each other? How appropriate is the request? The answers to these will make the obligation stronger or weaker. But there is a difference between *stewardship* and *merely minding* something in that there generally a goal of sort that the minder is meant to pursue with respect to the thing over and above simply looking in on it. That is, one might fulfill an obligation to watch my house while I am away simply by driving

by everyday to make sure it has not burned down. They would not necessarily have to make sure my mail was picked up, my grass cut or other maintenance that became needed was carried out. (Though presumably they would have to either log or report immediately anything that threatened the house's general integrity.) Stewardship on the other hand implies a goal such as keeping my plants alive by watering them, or keeping my house in good repair, or keeping my children safe, clean and fed. Such goals in other words more often than not will require action above and beyond simply minding the thing. If John is babysitting Suzanne's children and one of them begins choking on a toy, John is obligated to do more than stand by and watch him choke.

The steward and the object of stewardship must of course be *different things*. This is part because it is supposed that the object is incapable of achieving the desired end or to do so in the manner desired completely on its own. One can be sure that if left unattended, children (of a certain age anyway) will find *something* to eat and fall asleep *eventually*, but that is not the same as ensuring they eat their dinner and are in bed by 9 o'clock. It is also supposed that the goals the steward is meant to achieve supervenes to some degree the inclinations had by the object. That is, a steward has a kind of authority over its charge. This authority is understood as having been (temporarily) transferred *from someone else* who stands in a position of authority of the object. By 'authority' here I simply mean something like the right to determine the use of a thing (e.g. with

property) or in the case of living things the right to determine the level and kind of care they receive (within limits of course).

There are several difficulties with applying this loosely defined notion of stewardship to the relationship between people and nature once their property rights in it have been undermined. One problem is tracing the authority we would allegedly have over how nature is ‘preserved’. The duty not to harm nature and the duty to preserve are not identical and it highly problematic to suppose humans have authority to determine ‘what’s best for nature’. And even if was believed that we did know what was best, who has given us the authority to act on it? The goal of preservation is both stated and interpreted by the same group charged with carrying it out. It is rather like applying to oneself for a job of one’s own description with title of one’s own choosing and supposing that one thereby created all the power and privilege it entailed.

Many environmental philosophers are uneasy with the notion of stewardship over the on account of its roots in the Judeo-Christian tradition. The first two books of Genesis tell us, for instance, that “the Lord God took [Adam], and put him in the garden of Eden to dress it and to keep it” and that we should “serve the garden in which we have been placed.”³⁵ Early property theorists took this quite seriously. Locke’s defense of private property, the starting point for most books on the subject, begins with the premise that God gave the earth to “mankind in common ... to make use of it to the best advantages of life, and

³⁵ *Genesis* 2:15

convenience.”³⁶ Christian stewardship has the advantage of being able to handle some of the problems the idea of stewardship has generally. It tells us who actually owns the earth and for whom we are minding it, namely, God. It also gives us guidance as to what end we ought to pursue, namely, whatever benefits humans. Since we also belong to God, whatever is good for us, is good for Him. Finally, it justifies the hierarchical structure of owner, steward and object. So long as humans are distinct from and ranked ‘above’ the rest of the natural world, we can use it in ways that service us in a way we cannot do when we follow, for instance, the biblical injunction to be our brother’s keeper. We are not stewards of our fellow humans the way we are of the rest of the planet.

The theory of natural selection which now informs our understanding of humankind’s relationship to the natural world has significantly undermined the tenability of the ‘so-called’ Christian notion of stewardship for property theorists and environmental philosophers alike. If we doubt that the earth was created for or given to humankind to make use of *as well as* take care of, then we must find other grounds for explaining and justifying our beings its stewards rather than equal participants with the rest of nature.

The one aspect of Christian stewardship we can, and I think should, salvage is the hierarchical structure. It is an empirical fact that we have an ability to greatly influence the functioning of the natural world. The scale on to which we have grown in terms of population and geographic dispersion and

³⁶ Locke, sec. 25-6

technological ability *does* make us different from most other participants. This fact is what motivates environmental protection in the first place. To seriously embrace the kind of parity of humans and nature that, say, deep ecologists have in mind seems to imply “an atavistic return to nature, that would be, if not utterly impracticable, for most people so unappealing as to be thoroughly unacceptable.”³⁷ This captures, I suspect, a sentiment many of us feel when presented with the idea of establishing a genuine parity between humans and the environment, whatever that means. Certainly, we can easily acknowledge it in the abstract, but from a policy perspective its helpfulness even in dealing with environmental crises is suspect. Maintaining even an artificial hierarchy allows us to acknowledge the importance our decisions have over the natural environment, compared with, say, the migratory ‘decisions’ of the Porcupine Caribou herd of the northern Yukon. What we do *does* make a difference and a big one at that. It is not (mere) arrogance to recognize this. And so this aspect of Christian stewardship, or of stewardship generally, that the stewards are somehow *more capable* than the things they mind.

The fact of our influence also gives us a kind of *de facto* authority over nature. Like it or not, we are in Hart’s gunman situation writ on a global scale. Of course this authority lacks the legitimacy of genuine stewardship. What might help justify it is a more clearly articulated ethic defining our *responsibilities*

³⁷ J. Baird Callicott, “*The search for and Environmental Ethic*” in *Matters of life and Death*, ed. Tom Regan Philadelphia, Pa: Temple University Press, 1979. This is taken somewhat out of context. Callicott thought this was an implication of what he called the “citizenship reading of the God-ordained relationship of man to nature”.

towards the natural world. Whether this ethic comes from moral premises about the environment or from scientific ones (or both) is open to debate. This ethic will also inform the 'goal' of our stewardship role, something the concept of stewardship cannot itself provide.

We might entertain other possibilities, again drawing from concepts already present in the law. 'Environmental protection' as a branch of law, might simply be expanded to include *all* laws governing relations between people and the natural environment, including those we now consider within the realm of property. This has the disadvantage of not readily accounting for the interest we have in *using* the world. Stewardship implies at least some freedom to use the object, so long as the goal of the stewardship continues to be respected.

This discussion is admittedly brief and unsatisfactory. The task of reclassifying a substantial chunk of a legal system is not small and requires its own sustained argument. This aim of this paper has simply been to show that a proper understanding of both property (with respect to land) and environmental protection reveals the two concepts, as legal concepts, are not entirely commensurable. If Penner is correct that property deserves to have its boundaries reined in and more clearly defined then it is inevitable that some things will be left out. Unexpected though it may be, the natural environment does just that when legislation designed to protect it does so when it recognizes its interests as distinct from those of humans.

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