

## Property in Licences and the Law of Things

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Article abstract

A theoretical account of property rights needs to identify what, if anything, is distinctive about property rights as opposed to other sorts of rights; what makes them the sorts of rights that they are. An important and prominent account of the distinctiveness of property rights claims that they are rights to things. I argue against this view: I show that a government-issued licence (to fish or to drive a taxi or to operate a radio station, say) is not a right to a thing but should nevertheless count as a property right. I consider two different arguments for this rights-to-things view: one is based on the Hohfeldian structure of property rights, and one relies on the importance of information costs in the law of property. While each of these arguments teaches us important lessons about property, none can properly support the conclusion that property is rights to things. I suggest that abandoning the rights-to-things view of property can lead to important insights into property theory more generally.

## PROPERTY IN LICENCES AND THE LAW OF THINGS

*Christopher Essert\**

A theoretical account of property rights needs to identify what, if anything, is distinctive about property rights as opposed to other sorts of rights; what makes them the sorts of rights that they are. An important and prominent account of the distinctiveness of property rights claims that they are rights to things. I argue against this view: I show that a government-issued licence (to fish or to drive a taxi or to operate a radio station, say) is not a right to a thing but should nevertheless count as a property right. I consider two different arguments for this rights-to-things view: one is based on the Hohfeldian structure of property rights, and one relies on the importance of information costs in the law of property. While each of these arguments teaches us important lessons about property, none can properly support the conclusion that property is rights to things. I suggest that abandoning the rights-to-things view of property can lead to important insights into property theory more generally.

Pour expliquer les droits de propriété par le biais de la théorie, il faut identifier ce qui rend ces droits distinctifs par rapport aux autres types de droit. Autrement dit, il faut identifier ce qui les rend le type de droit qu'ils sont. Une démarche importante du caractère distinctif des droits de propriété prétend que ces droits portent sur des biens. Je m'oppose à ce point de vue : je démontre qu'un permis accordé par le gouvernement (par ex. pour pêcher, conduire un taxi ou exploiter un service de radiodiffusion) ne confère pas de droit à un bien mais devrait être considéré comme un droit de propriété tout de même. Je prends en considération deux arguments différents pour élaborer cette idée : le premier se base sur la structure des droits de propriété proposée par Hohfeld, et le deuxième concerne l'importance des coûts d'information. Même si chacun de ces arguments peut nous faire des leçons importantes en matière de la propriété, aucun ne permet de conclure de façon adéquate que les droits de propriété sont des droits à un bien. Je suggère qu'on abandonne la perspective selon laquelle le droit de propriété porte sur des biens; cet abandon peut nous mener à des idées importantes en théorie de la propriété plus généralement.

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## Introduction

You've probably heard that property is a right, not a thing.<sup>1</sup> This idea is hardly news—indeed, it's a part of the so-called “bundle of rights” view of property, the predominant view since the middle of the twentieth century at least. Recently, however, some theorists have tried to restore the central role played by things in our understanding of property, while at the same time recognizing the obvious plausibility of the “rights, not things” idea, by claiming that property is, distinctively, rights *to things*.<sup>2</sup> In this article, I show why this claim is mistaken. But I do so in a non-skeptical way. Let me begin by explaining what I mean by that. The best way to do so is with a brief tour of some aspects of the historical development of property theory.

In the beginning there was Blackstone.<sup>3</sup> His well-known account depicts (or is said to depict) property rights as absolute rights to exclude others—the “sole and despotic dominion”—from “the external things of the world.”<sup>4</sup> However, in the twentieth century, property law and theory were dominated by the rejection of Blackstone's view and the embrace of the bundle of rights picture of property.<sup>5</sup> This rejection had two parts. One—the one that gets most of the press—was a rejection of Blackstone's absolutism. Early into a property law course, students learn that, in fact, the dominion of an owner over her property is often neither sole (co-

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<sup>1</sup> The phrase is CB MacPherson's. See his introduction in CB MacPherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) at 2–3.

<sup>2</sup> See e.g. Henry E Smith, “Property as the Law of Things” (2012) 125:7 Harv L Rev 1691 [Smith, “Law of Things”]; JE Penner, *The Idea of Property in Law* (New York: Oxford University Press, 1997) [Penner, *Idea of Property*]; Ben McFarlane, *The Structure of Property Law* (Portland, Or: Hart, 2008) [McFarlane, *Structure*].

<sup>3</sup> Well, not *really*. Of course there were theories of property before Blackstone's: Plato's, Aristotle's, Aquinas's, Grotius's, Hobbes's, and Locke's, to take just a few examples. But Blackstone's account plays an important originating role in Anglo-American legal thinking about property. For discussion of Blackstone's influence, see e.g. Carol M Rose, “Canons of Property Talk, or, Blackstone's Anxiety” (1998) 108:3 Yale LJ 601.

<sup>4</sup> William Blackstone, *Commentaries on the Laws of England*, 2d ed (Oxford: Clarendon Press, 1767) vol 2 at 2. The parenthesized phrase in the text is a reference to the idea that, taken as a whole, Blackstone's account of property is far more subtle than the famous “sole and despotic” description leads one to think. See e.g. David B Schorr, “How Blackstone Became a Blackstonian” (2009) 10:1 Theor Inq L 103; Rose, *supra* note 3.

<sup>5</sup> Three representative works are AM Honoré, “Ownership” in AG Guest, ed, *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961) 107; Charles A Reich, “The New Property” (1964) 73:5 Yale LJ 733; Thomas C Grey, “The Disintegration of Property” in J Roland Pennock & John W Chapman, eds, *Property: NOMOS XXII* (New York: New York University Press, 1980) 69.

ownership, leases, mortgages) nor despotic (nuisance law, easements).<sup>6</sup> The other—my concern here—was a rejection of Blackstone’s idea that property rights are rights to “the external things of the world.” Again, this move is familiar to anyone who paid attention in their property law course: we now think about property not just in terms of land and chattels, but also in terms of intangibles such as choses in action, intellectual property, and other more unusual entities (markets in hot news, professional licences, business goodwill, commercial exploitation of public images).

We can trace this second part of the rejection of Blackstone to the legal realists. Based on Hohfeld’s explanation of private law rights in terms of his “fundamental legal conceptions”,<sup>7</sup> the realists argued that property “has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations.”<sup>8</sup> But this view of property as a bundle of rights is tied to a sort of *skepticism* about property rights; for the realists, there is no “there” there when it comes to property. This skepticism leads to both theoretical and legal problems: theoretically, it abandons the plausible and intuitive idea that the concept of property has content (that is, that it is the concept of some *thing*)<sup>9</sup>, and legally, it causes trouble for those questions (about bankruptcy, takings, marriage, and so on) that turn on whether or not a given right is a property right. Vandavelde captures the gist:

Once property was reconceived to include potentially any valuable interest, there was no logical stopping point. Property could include all legal relations.

...

[I]f property included all legal relations, then it could no longer serve to distinguish one set of legal relations from another. It would lose its meaning as a category of law.

...

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<sup>6</sup> A lot of contemporary property theory engages in debates about whether property rights confer something like a Blackstonian dominion. This isn’t really my concern here. For discussion, see e.g. Thomas W Merrill, “Property and the Right to Exclude” (1998) 77:4 *Neb L Rev* 730; Hanoeh Dagan, *Property: Values and Institutions* (Oxford: Oxford University Press, 2011) ch 2.

<sup>7</sup> See Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23:1 *Yale LJ* 16 [Hohfeld, “Some”]; Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26:8 *Yale LJ* 710.

<sup>8</sup> Arthur L Corbin, “Taxation of Seats on the Stock Exchange” (1922) 31:4 *Yale LJ* 429 at 429.

<sup>9</sup> For more on this point, see JE Penner, “The ‘Bundle of Rights’ Picture of Property” (1996) 43:3 *UCLA L Rev* 711.

[T]he determination of whether an interest was property was not one of logic, but of politics.<sup>10</sup>

This is the reason that the deconstruction of property was, for some, intentional: their idea was that policy decisions should be made based on explicit political grounds rather than based on a discredited legal conceptual category. Thus we see the skepticism of the bundle of rights view of property: it is a skepticism about the distinctiveness of the legal concept of property in favour of what is taken to be a pragmatic view about policy decision making.<sup>11</sup>

This skeptical view of property as a bundle of rights is now the dominant one.<sup>12</sup> Recently, however, some prominent property theorists have begun to move away from the skepticism that is central to the bundle of rights view of property. These scholars have instead attempted to take seriously the conceptual structure internal to property law and tried to make sense of it on its own terms. Henry Smith's "architectural approach" to property law illustrates the point: Smith argues that even the metaphor of a "bundle" of rights fails to explain the juridical fact that property entitlements tend to be grouped together in certain distinctive ways, and he argues that failing to notice this "architecture" of property law is a significant drawback of the bundle of rights view.<sup>13</sup>

Instead, Smith and others have offered a non-skeptical view about the nature of property. According to this view, roughly, the distinctiveness of property rights—what makes them the rights that they are—is that they are rights to exclude others from things. The view is non-skeptical because it attempts to explain property on its own terms and to make sense of the idea that there is such a thing as the law of property.

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<sup>10</sup> Kenneth J Vandeveld, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 *Buff L Rev* 325 at 362, 364. See also Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge University Press, 2003) ("[o]nce the concept of property has been extended beyond land and tangible things, there is no way of saying what is property, or what is not property, without consulting a particular system of law at a particular time" at 174).

<sup>11</sup> On skepticism and pragmatism, see John CP Goldberg, "Introduction: Pragmatism and Private Law" (2012) 125:7 *Harv L Rev* 1640.

<sup>12</sup> Just take a look at the opening pages of a property law textbook: see e.g. Mary Jane Mossman & William F Flanagan, *Property Law: Cases and Commentary*, 2d ed (Toronto: Emond Montgomery, 2004) at 1–2; Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 2; Joseph William Singer, *Property*, 3d ed (New York: Aspen, 2010) at 2; William B Stoebuck & Dale A Whitman, *The Law of Property*, 3d ed (St Paul, Minn: West, 2000) at 6; Jesse Dukeminier et al, *Property*, 7th ed (New York: Aspen, 2010) at 83.

<sup>13</sup> Smith, "Law of Things", *supra* note 2.

Substantively, the non-skeptical view is in some ways a return to the Blackstonian view. Just as in Blackstone's case, the view has two interesting parts. One part claims that property rights are rights to exclude; as I've already said, this part of the view is not my interest here and so I'll leave it aside. The other part—the subject of this article—claims, just as Blackstone did, that property rights are *rights to things*. Indeed, one recent article by Smith is called “Property as the Law of Things”; I'll adopt that title and refer to the view shared by Smith and others as the “law-of-things” view of property.

This non-skeptical view that property rights are rights to things has been taken in two directions, each premised on a different understanding of “things”. One understanding takes “things” to mean, roughly, concrete physical things—basically, land and physical objects. This “concrete” view essentially rejects the lessons of the twentieth century and denies what most take to be trite law—that there exists intangible property. It is hard to see how this could be a plausible way of looking at property law; nevertheless, I'll consider one recent account that takes this line, because seeing why it fails on its own terms will be helpful in rejecting more plausible views. The other prevalent version of the law-of-things view—Smith's own—takes a much wider view of its core concept. For Smith, the theory itself “defines what a thing is to begin with.”<sup>14</sup> This is not as circular as I am making it seem; rather, Smith has a way of defining what counts as a “thing” that allows him to say that property rights in intangibles also count as rights to things. As we'll see, however, this thought is subject to problems of its own.

Now I can properly explain what I meant when I said at the outset that I would propose a non-skeptical denial of the claim that property rights are rights to things. The bundle of rights view that dominated property theory in the twentieth century is a skeptical denial of the claim: it says that property rights are not rights to things because, basically, there is nothing distinctive about property rights at all. The law-of-things view rejects that skepticism and tries to provide an account of property that makes sense of its distinctiveness. In what follows, I'll suggest that this is where property theory took a wrong turn, but I'll do so non-skeptically. I agree that we must take property's internal conceptual structure seriously and try to make sense of the law on its own terms. But I think that we can and should do that without committing to the law-of-things view.

My way of entry into the argument will be to consider the idea that the rights conferred on the holder of a government-issued licence to par-

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<sup>14</sup> *Ibid* at 1703.

ticipate in some activity (like a taxi licence or a fishing licence or a radio spectrum licence) might be property rights. Intuitively, I think that these rights *are* property rights. The law seems (generally) to agree.<sup>15</sup> In this article, I'll investigate this intuition with an eye, ultimately, to vindicating it, and in so doing to further our understanding of the law of property.

My thought will be that the fact that the rights of a licensee count as property rights gives us good reasons to doubt the law-of-things view, because the considerations that count in favour of that view can be accommodated just as well by a wider view of the nature of property rights. According to that wider view, property rights can be understood as (potentially) transferable or alienable rights, good against the world, that others not perform some action without the owner's permission. I'll consider the two arguments that I mentioned above about property as rights to things, and aim to show that this alternative view of property better addresses those concerns, while also vindicating the intuition that a licensee has a property right.

My plan is as follows: First, I need to make two methodological comments (Part I). The article's main arguments begin (Part II) with an introduction to licences and their key features; here I also introduce what I call the Ideal Licence, a thought experiment that allows us to better see the nature of property rights and their (nonexistent) relationship to things. Then I turn to the claim that property is the law of things. I consider and reject two recent arguments that it is.<sup>16</sup> First (Part III), I reject the extreme form of the argument, based on the Hohfeldian structure of property rights, which claims that only rights to land and tangible physical things can count as property. Next (Part IV), I consider a different sort of argument—exemplified by Smith's view—that in effect *defines* things according to the law of property. I then (Part V) consider the relationship between the Ideal Licence and actual licences. And I close with some discussion of the further questions raised by my arguments here.

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<sup>15</sup> For a recent case, see *Saulnier v Royal Bank of Canada*, 2008 SCC 58, [2008] 3 SCR 166 [*Saulnier*]. See also *V(GG) v V(J)* (1992), 98 DLR (4th) 265 (*sub nom Verschuur v Verschuur*), 72 BCLR (2d) 387 (CA) [*V(GG) v V(J)*]; *Attorney General v Chan Nai-keung*, [1988] 1 HKLR 70, [1987] 1 WLR 1339 PC [*Chan Nai-keung*].

<sup>16</sup> Another argument, which I don't consider here, says that rights to things, in contrast with the rights of a licensee or holder of other intangible property, have some sort of pre-legal existence tied to the physical control of the physical object (for such an argument, see Boudewijn Bouckaert, "What is Property?" (1990) 13:3 Harv JL & Pub Pol'y 775 at 797). The argument fails because property rights distinctly provide protection *absent* physical control, allowing owners to *have* property rather than merely *hold* it. So there really are no rights to physical things absent the state, and the fact that the licensee's rights depend on the state cannot distinguish the two cases. See Immanuel Kant, *The Metaphysics of Morals*, ed and translated by Mary Gregor (Cambridge: Cambridge University Press, 1996) at 42, Ak.6:253.



## I. Two Methodological Comments

Before the argument of the article begins, I want to make two methodological points. The first is about my choice to argue against the law-of-things view based on the claim that a licensee can have a property right. The second is about why it is important to try to provide a non-skeptical account of property law at all.

First, why spend so much time on property in licences, a question that after all seems rather peripheral?<sup>17</sup> I think that property theorists ought to consider the project of providing an analysis of the core features of the concept of property—in the common law as well as in our social lives more generally—through an investigation of some peripheral and controversial cases of property. While much important work on property has been done by focusing on the core cases—basically, property in land and in tangible physical goods—further (or different) progress can be made by investigating non-core cases and asking what it is about them that leads us to think that they do (or do not) count as instances of property.<sup>18</sup> By non-core cases, I mean those that seem property-like in some ways and not very property-like in others. Consider as an easy example the definition of property found in the Canadian *Bankruptcy and Insolvency Act*:

“property” means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property.<sup>19</sup>

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<sup>17</sup> This is as good a place as any for me to flag an awkward terminological point: the word “licence” in the law of property sometimes refers to a government-issued privilege to, say, drive a taxi or fish or operate a radio station, and other times to a permission to enter or use another’s property. My interest here is the former and not the latter; I also make no claim about any relationships between the two senses of “licence”. For recent discussion of the property status sort of licence, see Christopher M Newman, “A License is Not a ‘Contract Not to Sue’: Disentangling Property and Contract in the Law of Copyright Licenses” (2013) 98:3 Iowa L Rev 1101.

<sup>18</sup> Hanoch Dagan has suggested to me that my selection of “core cases” here is problematic. *Shouldn’t intellectual property be on the list?* he asks. For my part, I am not sure. There are arguments that intellectual property is a form of property, and there are arguments that it is not. At the least we can agree that “it is hard to categorise intellectual property rights” (McFarlane, *Structure*, *supra* note 2 at 134). So it seems to me that this is an open question and not a point we should begin with. Rather, the only truly uncontroversial cases of property rights seem to me to be rights in land and physical goods. Following my own methodological advice, I hope in the future to consider what other forms of peripheral property tell us about property in general.

<sup>19</sup> RSC 1985, c B-3, s 2.

The definition is extremely broad: it includes the core cases (land, personal property), but also quite a lot of other cases (even including “obligations”). Compare it to a definition of property rights offered in an important British property text: “A property right has two key features: it relates to the use of a specific thing; *and* it imposes a prima facie duty on the rest of the world. ... A *thing* [is] an object that can be physically located.”<sup>20</sup> This latter definition plainly excludes much of the statutory definition above (where are “obligations” physically located?). In a different work, its author suggests that “a conceptual definition [of property rights] should be distinguished, for example, from the question of what meaning should be given to the term ‘property’ or ‘property right’ in the context of a particular statute.”<sup>21</sup> But why? Even granting that there are core cases of property, and that these core cases are, roughly, rights in land and in moveable physical goods, we might wonder why the law—and much of the rest of the social world in which a concept of property is active—seems to think that the concept has a much wider application than these core cases.

We can get at the point better by returning to the statutory definition. Given that the purpose of the definition in the context of the *Act* relates to circumscribing what assets of a bankrupt debtor are subject to seizure and division among creditors, it is not hard to see why the definition has the breadth that it does. But we might wonder why the *Act* bothers to claim that this is a definition of “property”: Why not just say that it is a definition of the debtor’s *assets*, and then say that it is her assets that are subject to seizure and division upon bankruptcy? Why use the word “property” at all? I suggest that we should look at these non-core or peripheral cases of property to see what it is about them that leads legislatures and courts and people to think of them as property. Our working hypothesis should be that, when legislators and courts and other people talk about these non-core cases as cases of property, they are not just employing a sort of *façon de parler* but are actually relying on an underlying conceptual connection between the core and peripheral cases.

My hope will be this: that these peripheral cases will help us to understand property is because, lying as they do at the *periphery* of property, they provide us with a much better vantage point from which to view its borders than does its centre. Now I’ll turn to the licence-as-property question directly, taking it for granted that a licence, if it is a form of property, is a peripheral form. And then the proof of the pudding will be in the eat-

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<sup>20</sup> McFarlane, *Structure*, *supra* note 2 at 132.

<sup>21</sup> Simon Douglas & Ben McFarlane, “Defining Property Rights” in James Penner & Henry E Smith, eds, *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2013) 219 at 239, n 88.

ing: if, by thinking about property in licences, I can make some interesting or novel claims about property, then I think I will have shown that thinking about these peripheral cases can be theoretically profitable.

My second methodological comment is about the notion of distinctiveness that I think is at play in claims about what is distinctive of property rights. We can get at the notion by beginning with what it is not: it is not the notion of the *subject matter* of the rights in question. Those who think that private law rights can be helpfully sorted into distinctive categories see a division between contract rights and property rights as a paradigmatic instance of such sorting. Yet A's right that B not paint her house red could be a contract right, or it could be a right under a restrictive covenant. More generally, an account of the distinctiveness of a sort of right in terms of its subject matter would need to be accompanied by an account of the distinctiveness of subject matter generally: Why are, say, foxes and houses similar enough that they can both be the object of property rights, whereas foxes and people are not? A more promising approach is to focus on the *form* or *structure* of the rights in question.<sup>22</sup> To show that an area of law is distinctive because of its form is to show that it operates with its own distinctive set of concepts and inferential relations among them.<sup>23</sup> This form can be filled in with various contents.<sup>24</sup> The most well-known and successful version of this kind of analysis is the so-called bilateralism critique of the economic analysis of law, which showed that distinctive of private law is the bilateral relationship between plaintiff and defendant: defendant is defendant not just because he acted wrongly (or inefficiently or whatever) but because he wronged plaintiff and, conversely, that plaintiff is plaintiff not just because she was injured wrongly but because she was injured as a result of defendant's wronging her.<sup>25</sup>

Thus, my hope in talking about the distinctiveness of property rights is to show that the form of property is distinctive not because of anything to do with "things", but rather because of the way in which property rights

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<sup>22</sup> This approach is associated most closely with Ernest Weinrib's views, as in Ernest J Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995). For interesting criticism of this sort of view, see Hanoach Dagan, "The Limited Autonomy of Private Law" (2008) 56:3 Am J Comp L 809; Waddams, *supra* note 10 at 194.

<sup>23</sup> See Benjamin C Zipursky, "Pragmatic Conceptualism" (2000) 6:4 Legal Theory 457; Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatic Approach to Legal Theory* (New York: Oxford University Press, 2001).

<sup>24</sup> And, as such, this account is at least not at odds with Henry Smith's account of formalism as context-invariance; see Henry E Smith, "On the Economy of Concepts in Property" (2012) 160:7 U Pa L Rev 2097.

<sup>25</sup> I try to show how property law has that bilateral form in Christopher Essert, "The Office of Ownership" (2013) 63:3 UTLJ 418 [Essert, "The Office"].

impose duties on others not to act in certain ways.<sup>26</sup> The claim that property is the law of things can be understood as a claim about the *form* of property rights. This is not a claim about what property rights people have, but rather a claim about how those rights—whatever their content—are distinct from other rights. Contract rights have a bilateral *in personam* form, since they are rights that obtain solely against the counterparty to the contract; a plaintiff's remedial rights also have a bilateral form, since they obtain against the defendant in the case (as per the text above). Property rights, in the law-of-things account, are multilateral or omnilateral *in rem* rights, which obtain against the world, and are also transferable or alienable, which distinguishes them from body or personal rights—the rights protected by the torts of battery, negligence, defamation, etc. This claim about form is consistent with one I made in an earlier article<sup>27</sup> that owners are the holders of a legal office, such that part of what is distinctive about ownership (and thus about property) is the way in which the rights of owners (whatever the substance of those rights) are owed not to a given individual, but rather to an office and its holder. It is also, importantly, consistent with a wide variety of claims about the substance of property rights. That is, it might be the case that whatever the form of property rights, in our legal system that form may only be properly filled out by certain content or subject matter. And it might be the case that the idea of a “thing” plays some role there. I will talk about this briefly at the end of this article. I'll turn now to my argument.<sup>28</sup>

## II. Licences

Simply put, a government-issued licence to engage in some particular activity can be an extremely valuable asset. A fishing licence on the east coast of Canada can be worth over \$150,000.<sup>29</sup> A New York City taxi medallion can be worth over \$1,000,000.<sup>30</sup> Because these assets are so valuable, people treat them as property. And when things go bad, sometimes

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<sup>26</sup> Henry Smith at least sees his law-of-things account in explicitly formalist terms (albeit, as he put it to me in correspondence, “functionally motivated formalist” terms): see Smith, “Law of Things”, *supra* note 2 at 1692, 1710–12.

<sup>27</sup> Essert, “The Office”, *supra* note 25.

<sup>28</sup> For an interesting recent article that takes both of the comments of this section into account and applies them to an analysis of the concept of property in American constitutional law (reaching a different result than the one I argue for here), see James Y Stern, “Property’s Constitution” (2013) 101:2 Cal L Rev 277.

<sup>29</sup> In *Saulnier* (*supra* note 15 at para 6), four fishing licences were found to be worth over \$600,000.

<sup>30</sup> See Michael M Grynbaum, “2 Taxi Medallions Sell for \$1 Million Each”, *The New York Times* (20 October 2011), online: The New York Times City Room <cityroom.blogs.nytimes.com>.

people go to court over the value of these assets in situations where entitlement to the asset's value depends on whether or not the asset counts as a form of property. Two such situations are most familiar from introductory property law textbooks—bankruptcy and divorce. Suppose that L holds a taxi licence, and uses that licence as collateral for a loan from X, which he spends on the materials he needs to run a taxi business (a car). And then suppose L goes bankrupt: Can X seize the licence as part of the bankruptcy proceedings? Or suppose that L is married to Y but that things go south and L and Y divorce. Upon dissolution of the marriage, when the property of the couple is divided, does the licence count as something that must be divided—that is, as property?<sup>31</sup>

These questions arise because licences have some of what we tend to see as the core features of property while at the same time are missing some other of those core features. To see this point, we can compare L's legal position as licensee to A's legal position as owner of a bicycle.<sup>32</sup> As we've seen, the licence is a valuable asset, just like the bike. The licence is also transferable. Just like it does for the bike, it makes sense to talk about a creditor seizing the licence or an ex-spouse "getting" it in the divorce in a way that it does not make sense to talk about seizing or getting someone's skills or talents. This is putting things too simply, because licences are often issued in a way that limits the legality of transferring them, effectively making them non-transferable. But this non-transferability could apply to a bike, too—it does apply to other physical things that we think of as property, such as prescription drugs<sup>33</sup>—and, more importantly, this sort of legal non-transferability is very different than the sort of non-transferability that applies to our skills and talents. While the taxi licence that is mine today could be yours tomorrow, the same is not true of my law society membership, which is necessarily mine and nobody else's.<sup>34</sup>

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<sup>31</sup> I'll sometimes follow common non-legal usage and refer to licences as property, but we should keep in mind that the real question is, does the *right* conferred upon the licensee count as a property right?

<sup>32</sup> Here I say "legal position" to remind us of Hohfeld's central insight that ownership involves a variety of legal relations—rights and duties, powers and liabilities, privileges and no-rights, immunities and disabilities—between owners and others (see Hohfeld, "Some", *supra* note 7). But going forward, if every time I talked in general terms about property, I used the phrase "legal position" or some longer phrase invoking all of the Hohfeldian incidents, things would get ugly in a hurry. So I am going to just say "property rights" unless the context requires me to be more specific about the Hohfeldian incidents that are relevant.

<sup>33</sup> See *Food and Drug Regulations*, CRC, c 870, s G.02.001.

<sup>34</sup> This is actually a pretty subtle point, which I explore in detail in "Inalienability and Property" (unpublished, manuscript on file with the author), and in less detail in "The

Two apparent contrasts between L's right as licensee and A's rights in the bicycle do stand out. First, A's rights seem to be rights to a particular physical thing—the bike—in a way that L's do not. And next, A's rights are “good against the world” in a way that L's rights may not be. Let's consider them in turn. A fishing licence is the right to (catch) fish, not the right to (a given) fish. Similarly, while in New York City the taxi medallion is an actual physical medallion that needs to be attached to the car, it's clearly possible that a taxi licence could be a completely intangible right—to engage in the activity of driving a taxi in a particular jurisdiction—whose existence is merely noted on some regulator's ledger.<sup>35</sup> These licences are not in any plausible sense rights to tangible physical things.

What about the “good against the world” part? Here things are tricky because, as in the case of transferability, the conceptual question tends to be clouded by the legalities. Start with this: Suppose L holds a licence to  $\phi$ .<sup>36</sup> It's clearly the case that L has a right that others—X, Y, and Z—do not have. So L's right is in some sense *exclusive*, since anyone who doesn't have the licence to  $\phi$  is not allowed to  $\phi$ . Of course this is similar to A's rights in the bike: A has the right to ride the bike, which X, Y, and Z do not. There are complications here, but in this way licences are like core property rights, because they give the holder of the right a legal privilege to do something, a privilege that others do not have.

But A's right is better thought of not just as a privilege to *do* something, but rather as the right to *prevent* others from doing that thing (or to control how they do it): what A has is the right that nobody else ride her bike (at all or without her permission). And if X infringes on that right by riding the bike, X has wronged A, and A has a claim against X in tort. Licences tend not to work like that: if you drive around in an unlicensed cab, it's not at all clear that the owners of the valid medallions have a claim against you (in fact it's rather clear that they do not).

Careful attention reveals that this difference between L's rights as licensee and A's rights as owner of the bike are, like the differences in transferability, just a matter of legal technicalities. That is because it is a

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Office” (*supra* note 25). Penner (*Idea of Property, supra* note 2, ch 5) also has a great discussion. Here I'll just assume without arguing that property rights are, at least in principle, transferable in a way that skills and talents are not.

<sup>35</sup> In law, actually, the taxicab medallion is an intangible asset: see *Golden v Winjohn Taxi Corp*, 311 F (3d) 513, 517 (2d Cir 2002), citing *Re Property Clerk, Police Department, City of New York v Rosea*, 472 NYS (2d) 657 at 658 (Sup Ct App Div 1984).

<sup>36</sup> To save words I'm going to follow a philosophers' convention and use the Greek letter  $\phi$  (“phi”) as a variable standing in for an action verb. So when I say “suppose L holds a licence to  $\phi$ ,” I mean to include licences to fish, licences to drive taxis, licences to produce milk or tobacco, licences to operate a radio station, and so on.

simple matter to imagine a licence that is not subject to these limitations; that is, it is simple to imagine a licence that does confer a right “good against the world” on its holder. We need to suppose that such a licence could exist in order to see if there are any genuine conceptual differences between the licence-holder’s and the bicycle-owner’s rights. As we will see, there aren’t. Once we have done that, we can return to the legal technicalities and see how important they are in understanding property rights.

Let me say a bit more about the role of the imaginary licence in the arguments of this article. The claim that property rights are rights to things is a *conceptual* claim—that is, it is a claim about what is true of property rights just insofar as they are property rights, a claim about what makes property rights the rights that they are.<sup>37</sup> Because it is a conceptual claim, it is subject to objections that it does not properly account for potential, but non-actual, instances of property.<sup>38</sup> So if we can imagine some potential right that seems to be a property right but is not in any plausible way thought of as a right to a thing, the proponent of the law-of-things view is forced to decide, were this potential right to exist, whether it would be a property right. If the answer is no, the law-of-things proponent needs to explain why we might erroneously think that the right is a property right. If the answer is yes, the rights-to-things view is in trouble. And this is all true even if the imagined right doesn’t exist, since the claim is a conceptual one.<sup>39</sup>

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<sup>37</sup> James Penner is explicit that he is making a conceptual claim about the nature of property and its relation to things (Penner, *Idea of Property*, *supra* note 2 at 2–3).

<sup>38</sup> A parallel point can be seen in an important debate in general jurisprudence. Some—John Austin, Jeremy Bentham, James Madison—think that sanctions are necessary for the existence of a legal system; Madison’s famous quote, “If men were angels, no government would be necessary,” illustrates the underlying idea (“The Federalist No. 51” in *The Federalist with Letters of Brutus*, ed by Terence Ball (Cambridge: Cambridge University Press, 2003) 251 at 252). Others—H.L.A. Hart, Joseph Raz—say that even in a society of angels, the “confused man,” as Hart put it, who just wants to do the right thing, would sometimes need the law to tell him what the right thing is. (Kant makes a similar claim but for different reasons.) Although no such society of angels exists, and sanctions are in fact a (practically) necessary part of every existing legal system, the possibility of a sanction-less legal system shows that sanctions cannot be, as Austin thought they were because of their role in defining commands, the “key to the science of jurisprudence.” Henry Smith makes a similar point in discussing language: “If all languages have a certain feature but languages could have been otherwise, *that* is a fact worth explaining. In other words, we want to explain why universal structures are universal and why we do not find the ones that are universally absent” (“Law of Things”, *supra* note 2 at 1699).

<sup>39</sup> For more on the notion of a conceptual argument I am employing here, see e.g. Coleman, *supra* note 23; Zipursky, *supra* note 23; Scott J Shapiro, *Legality* (Cambridge, Mass: Harvard University Press, 2011) at 13ff; Christopher Essert, “Legal Obligation and Reasons” (2013) 19:1 *Legal Theory* 63 at 68, n 20. This kind of conceptual analysis,

So let's imagine. Consider what I will call the *Ideal Licence*. Suppose that some jurisdiction issues to a single individual,<sup>40</sup> L, the exclusive right to operate a taxi business within that jurisdiction. L, and only L, can operate a taxi business, although the details of the business, the number of taxis, etc., are all within L's sole discretion. L is granted a private right of action<sup>41</sup> against anyone else in the jurisdiction who purports to operate a taxi business (by, say, driving taxis); of course this is a right of action, so L need not pursue such claims and is free to waive them if she wishes. L also has the right to subauthorize others to drive taxis on her behalf. And L's right is completely alienable, so that L can sell or grant it to whomever she wants.

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we can note, is plainly suited to understanding social institutions like property or law, and is not committed to the thought that property has anything like an "essence". That said, I do think that, while property is evidently a (partially) socially constructed institution, the law of property does provide us with good grounds for thinking that there is something distinctive about property that we can grasp through conceptual analysis.

<sup>40</sup> Another distinction between (real, rather than ideal) licences and property in tangible things might be thought to arise here—namely, the facts that property in tangible things tends to be held by one person, and licences tend not to be exclusive. Who ever heard of a town with a single taxi driver? The size of the set of right holders is certainly a factor that we will want to think about in understanding property, generally and in licences. I'll say some more about it in Part V, below. But let me make two comments here that should at least dispel the impression that this is a serious problem, in favour of the thought that it is a mere technicality. First, while sole ownership may be the norm when it comes to tangible goods and land, it is of course not the only option; the common law has not one but two forms of co-ownership. And second, while multiple licence-holding may be the norm, it is not the only option. A single taxi licence-holder might seem like an idealized case, but as Katrina Wyman pointed out to me, in Los Angeles in the past, taxi licences were actually assigned to individual holders on a geographic basis (see Ross D Eckert, "The Los Angeles Taxi Monopoly: An Economic Inquiry" (1970) 43:3 S Cal L Rev 407); this was also true, basically, of American air routes before airline deregulation (see Michael E Levine, "Is Regulation Necessary? California Air Transportation and National Regulatory Policy" (1965) 74:8 Yale LJ 1416 at 1421–22). For a great deal more information on taxi licences (real, rather than ideal), as well as an interesting law and economics analysis of the property issues they give rise to, see Katrina Miriam Wyman, "Problematic Private Property: The Case of New York Taxicab Medallions" (2013) 30:1 Yale J on Reg 125. In addition, consider (i) radio licensing (about which more at the end of Part III, below), where only a single person can hold a licence to broadcast at a given frequency, and (ii) the Ontario *Public Vehicles Act* (RSO 1990, c P.54), which governs intercity bus transportation in Ontario, and allows for the possibility that a single licence holder will be permitted to operate an intercity bus service between two cities (as in fact is the case between Kingston, Ontario and Toronto, Ontario) (see Jessica McDiarmid, "Coach Canada Threatens Students' Fledgling Queen's University Bus Service", *The Toronto Star* (4 January 2013), online: The Toronto Star <www.thestar.com>).

<sup>41</sup> Most (real, rather than ideal) licensees lack such a right, but I think this is a technicality related to the one mentioned in the previous note. More on this in Part V, below.



Because it shares so many of the features of core property rights, the Ideal Licence seems to me to count as a kind of property.<sup>42</sup> In what follows, I'll defend the claim that the Ideal Licensee holds a property right. I'll do so by considering some arguments that property rights are rights to things and showing that the considerations that lead toward these arguments can be adequately addressed by accepting a different view of property rights, one that allows for property in licences. This different view, I claim, will thus be superior because it *both* addresses the considerations that seem to favour a law-of-things view *and* makes sense of the intuition about property in licences.<sup>43</sup> Let's turn now to the law-of-things arguments.

### III. Things and *In Rem* Claim Rights

A particularly stark account of property as rights to things is argued for, jointly and severally, by Simon Douglas and Ben McFarlane (whom I'll call "D&M").<sup>44</sup> In this account, property rights "are those rights which have the two characteristics of being exigible against the world and relating to a physical thing."<sup>45</sup> They offer various justifications of this view but none hold up to scrutiny. At one point, for example, McFarlane appears to defend the account based on information costs, arguing that physical existence makes it easier for owners to control objects and for third parties

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<sup>42</sup> The legal analysis in various *non-ideal* licence cases (see *supra* note 15) suggests that the law would agree with me here.

<sup>43</sup> You might worry here that I've chosen the Ideal Licence precisely because it proves my point, in that it shows the conceptual issues in a light that makes my argument about the law-of-things view seem especially plausible. That is true in a way, because the Ideal Licence is a kind of property right that clearly and undeniably is *not* a right to a thing. I could have chosen other examples—intellectual property rights (which I discuss briefly toward the end of the article) or natural resource rights such as riparian rights or rights to oil, gas, or wind. I didn't choose those rights because in those cases it is too easy to characterize those rights as rights to things, albeit erroneously. More importantly, though, I chose the Ideal Licence because, as it will emerge below, there is a sense in which it is the paradigmatic property right, since it lays bare the formal structure of property rights in a way that helps to clarify what all property has in common. This is a parallel point to the thought that, rare though it may be, a harmless trespass is the paradigmatic trespass since it shows us what is really wrong with all trespasses, even those that cause harm: see Arthur Ripstein, "Beyond the Harm Principle" (2006) 34:3 *Philosophy & Public Affairs* 215.

<sup>44</sup> See Simon Douglas, "The Argument for Property Rights in Body Parts: Scarcity of Resources" (2014) 40:1 *Journal of Medical Ethics* 23 [Douglas, "Body Parts"]; McFarlane, *Structure*, *supra* note 2; Ben McFarlane, "Equity, Obligations and Third Parties" (2008) *Sing JLS* 308 at 311–12; Douglas & McFarlane, *supra* note 21.

<sup>45</sup> Douglas, "Body Parts", *supra* note 44 at 23. See also McFarlane, *Structure*, *supra* note 2 at 131–32.

to know their obligations.<sup>46</sup> This argument fails, as I'll show in Part IV, where I consider Smith's much more sophisticated version. Elsewhere, Douglas claims that the contours of legal doctrine can justify his view: "[M]any of the rules that constitute the law of property presuppose the existence of a physical thing and become incoherent when applied to rights which do not relate to physical things."<sup>47</sup> For example, the law requires physical possession to become owner of, say, a fox, but it is impossible to take physical possession of an idea (or, in this context, we can assume, the Ideal Licence), it cannot be the subject of a property right. This is a very bad argument: different acts are required to establish ownership of different kinds of physical goods,<sup>48</sup> and it is an easy step to see that in the case of non-physical objects the acts required to establish ownership would be different still.<sup>49</sup> So far we do not have a good argument for this very austere version of the law-of-things view.

In a recent paper,<sup>50</sup> Douglas and McFarlane defend their account based on a close examination of the structure of the Hohfeldian entitlements that property owners have. This argument fails, too, but it's very worth our while to consider why. They begin by wondering about the owner's so-called right to use her land. It's plainly the case that B, owner of Blackacre, is allowed to do pretty much whatever she wants on Blackacre. But we might wonder just what kind of "right" this is. D&M suggest that the "right to use" Blackacre isn't a right in Hohfeld's sense at all but rather a *privilege* to use Blackacre. We know this because the jural correlative of a privilege is a no-right, whereas the jural correlative of a right is a duty.<sup>51</sup> And it is a no-right that much better describes the jural position of non-owners (X, Y, Z, etc.) with respect to B's use of Blackacre: they have *no right* that B not use Blackacre as she sees fit, since B does not (*prima facie*) wrong X in her use of Blackacre. By contrast, the entire idea

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<sup>46</sup> *Ibid* at 135–36.

<sup>47</sup> Douglas, "Body Parts", *supra* note 44 at 23.

<sup>48</sup> Compare the tests required to establish ownership in, for example, *Pierson v Post*, 3 Cai R 175 (NY 1805); *Swift v Gifford*, 23 Fed Cas 558 (Dist Ct Mass 1872); *The Tubantia*, [1924] P 78, [1924] All ER Rep 615; *Popov v Hayashi*, 2002 WL 31833731 (Cal Super Ct).

<sup>49</sup> See Abraham Drassinower, "Capturing Ideas: Copyright and the Law of First Possession" (2006) 54:1&2 Clev St L Rev 191. However, Douglas does help us to see how abandoning the law-of-things view opens an extremely interesting research program in property law: if property rights are not just rights to things, then we need broader explanations of many of the core doctrines of property law (like rules about possession, transfer, etc.), which explanations presumably would show how the thing-based versions of those doctrines are special cases of more general phenomena.

<sup>50</sup> Douglas & McFarlane, *supra* note 21.

<sup>51</sup> Hohfeld, "Some", *supra* note 7 at 30.

of B's having a (claim-)right against X to use Blackacre is difficult to understand. D&M note, relying on a remark of Finnis's, that a (claim-)right is not a right to do something, but a right that *someone else* do something.<sup>52</sup> So a (claim-)right to use Blackacre would need to be correlated with a duty in X (Y, Z, etc.) that they *do or not do* something. And the most plausible candidate would seem to be a duty that they not interfere with B's use of Blackacre.

The next move in the argument is to show that, as a matter of law and as a matter of legal principle, B does not have such a right, since X is *not* in general under a duty not to interfere with B's use of Blackacre. This point is easiest to see by reference to nuisance-type cases where the defendant stands successfully on his right to build up on his own land.<sup>53</sup> If I build a garage on my land that blocks the sun to your lemon tree and thus interferes with your use of the land, I do you no wrong. Conversely, if I knock my garage down and take away the shade in which you sit to drink lemonade, again you have no cause of action against me, even though in both cases I have interfered with the use you were making of your own land.<sup>54</sup> So owners of real property do not have a right that others not interfere with their *use* of their property. (The argument also goes, say D&M, for chattels. I've omitted it here to save space.) The question is, what does this tell us about the rights that owners *do* have? D&M take it to show that what an owner must have is a right that others not interfere with the thing itself.<sup>55</sup> The argument has one premise—there is no duty not to interfere with use—which is supposed to lead to the conclusion—there is a duty not to interfere with the thing.

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<sup>52</sup> Douglas & McFarlane, *supra* note 21 at 221, 226–27; John Finnis, “Some Professorial Fallacies About Rights” (1972) 4:2 Adel LR 377 at 380.

<sup>53</sup> See e.g. *Fontainebleau Hotel Corp v Forty-Five Twenty-Five*, 114 So (2d) 357 (Fla Dist Ct 1959).

<sup>54</sup> These are examples are from Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009) at 77–78. The point is even easier to see with respect to ownership of chattels. Two recent UK cases illustrate. In one, a defendant government agency's carelessness in issuing a detention notice to a cruise ship owner, which prevented the owner from being able to use his ship, was held not to be wrongful since the negligence involved no interference with the ship itself (since the plaintiff was free to sail the ship, just not to use it as a cruise vessel): *Club Cruise Entertainment and Traveling Services Europe BV v Department for Transport (The Van Gogh)*, [2008] EWHC 2794 (Comm), [2009] All ER (Comm) 955. In the other, a similar instance of government carelessness in issuing a quarantine order against the plaintiff's pigs was held not to be wrongful since the pigs themselves were not interfered with: *D Pride & Partners v Institute for Animal Health*, [2009] EWHC 685 (QB) (available on QL). These cases are both cited by D&M.

<sup>55</sup> And they marshal a series of cases that demonstrate that an owner is wronged whenever someone interferes with the physical object that she owns, a point I am happy to grant.

That argument is invalid. Interpreting D&M charitably, we can make the argument valid by adding the additional premise that these are the only two duties that a non-owner could owe an owner. (I implied the premise at the end of the paragraph before the last, when I suggested that the “most plausible candidate” for the owner’s right was the right that others not interfere with a thing’s use.) But while adding this premise makes the argument valid, it doesn’t make it sound. The additional required premise is not plausible. There are an indefinite number of duties that a non-owner could owe an owner; in excluding the vast majority of these, D&M rely, I think rightly, on the case law discussing what kinds of actions by a non-owner constitute a wrong against the owner. Their thought here, I take it, is that only a duty not to interfere with the physical thing itself can make sense of all of the particular wrongs that the law displays. But this move does not work. It is well-known that an indefinite number of rules can be constructed consistent with a set of past actions.<sup>56</sup> But we can even set aside the conceptual point, and focus on what the argument is designed to show. A better version of D&M’s suggestion is that a duty not to interfere with the thing is the *simplest and most obvious* way to account for all of the wrongs that the common law contemplates as falling under the property torts in a way that is consistent with the *in rem* nature of the owner’s right. Unfortunately even this is wrong. To see why, we need to explore the alternative possibilities.

We can turn to the Ideal Licence in order to illustrate the problem with D&M’s argument. In fact we can go through D&M’s argument to show how a licence *could* satisfy property law’s apparent requirement that property rights be rights good against the world.<sup>57</sup> The first step, again, is to acknowledge the distinction between privileges and rights. If the Ideal Licensee is genuinely the holder of a property *right* (as I say she is), then that cannot be the right to operate a taxi service, since that’s a

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<sup>56</sup> See Saul A Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* (Cambridge, Mass: Harvard University Press, 1982).

<sup>57</sup> I say apparent here for the following reason: consistent with the methodological point I made in the introduction that we ought to think seriously about peripheral property claims, I am not sure that I actually want to argue that property rights are necessarily good against the world. My worry arises from questions about property in corporations, shares, bonds, funds, and choses in action generally. Many of those things are treated as property for the purposes of things like the bankruptcy statute that I cited above. So I want, actually, to hold off on making a determination on that issue. For the purposes of this article, I will simply grant for the sake of argument that property rights are good against the world, and show how that does not count against thinking of licensees as holders of property rights. I’ll save the substantive question about “good against the world” for another day. For discussion of the way that the good against the world requirement functions in respect of property and contract, see Ernest J Weinrib, “Private Law and Public Right” (2011) 61:2 UTLJ 191 at 204–06.

privilege and not a right. By operating the taxi service, the licensee wrongs nobody. D&M's key point means that the licence is only a right if it correlates with a duty that others do or not do some action. In the case of "normal" property rights, D&M argue that the right could only correlate with a duty not to interfere with the thing, and that there is no right correlative to a duty not to interfere with the use of the thing. But in the case of the licence, there is *no thing* on which to base such a distinction. Instead the parallel division might be between, on the one hand, a duty not to interfere with the licensee's exercise of the privilege granted by the licence and, on the other hand, a duty not to do *that thing which the licensee is granted the privilege to do*. That is, the licensee could have an *in rem* right that others not do what she is allowed by the licence to do. So the holder of my Ideal Licence has a right that nobody else drive a taxi within the relevant jurisdiction.<sup>58</sup>

This interpretation of the Ideal Licence, if it is correct, tells us something significant about the structure of property rights more generally. Recall that D&M's claim was that, in the normal property case, the owner of a thing has a privilege to use it, but no (claim-)right to use it since there is no correlative duty on others not to interfere with its use. Instead, the thought is that an owner has a (claim-)right that others not interfere with the thing. But if I am right that licences are a form of property, what we need to do is to look for a way to describe both the right that a licence holder has and the right that a "normal" owner has. And the answer is simple: *each has the right to determine how, by whom, and to what extent certain privileges will be exercised*. Look at this suggestion made by Arthur Ripstein: "The basic rule of property, then, does not give you notice that you [i.e., a non-owner] cannot change a thing or take advantage of its empirical features. It tells you only that you cannot determine how it will be used to the exclusion of others."<sup>59</sup>

The core idea of the "basic rule of property", for Ripstein, is the idea that it is the owner who gets to make decisions to the exclusion of others. Here he puts the same point slightly differently: "Either you are the owner, in which case you are entitled to determine how the thing is used, or you are not, in which case you may not determine how it is used except

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<sup>58</sup> I noted above (in Part II) that, subject to the exceptions in note 40, actual licensees do not have, as a matter of positive law, any private right of action against someone who does what she is allowed to do as licensee. But this is a legal technical problem, not a genuine conceptual problem. That is, there is no reason why the holder of the taxi licence couldn't have such a right. The argument also suggests—happily, since I think this is right—that the licensee does not have any right that others not interfere with her business by, say, changing the circumstances so that she cannot run her taxi business profitably (by selling cars or renting bicycles very cheaply, perhaps).

<sup>59</sup> Arthur Ripstein, "Possession and Use" in Penner & Smith, *supra* note 21, 156 at 177.

with permission of the owner.”<sup>60</sup> But if I am right about how we should understand the licensee’s right, and I am right that the licensee can be seen as an owner, then we need to rephrase Ripstein’s claim, because as I said, there is no *thing* whose use the licensee gets to determine. Instead, we should say something like:

Either you are the owner, in which case you are entitled to determine *whether others*  $\varphi$ , or you are not, in which case you may not  $\varphi$  except with the permission of the owner.

I’ve just substituted “ $\varphi$ ” for Ripstein’s idea of the use of a thing. So now we have a description of an owner’s right that is applicable both to the case of the licence (where  $\varphi$  = “drive a taxi”) and to the normal property case (where  $\varphi$  = “use the thing”).

Let me make this point clearly. My claim is that we can understand the distinctiveness of the form of property rights according to the following thesis: *A has a property right when A has the (transferable) right, good against the world, that others not  $\varphi$  without her permission.*<sup>61</sup> Thus both B’s rights to Blackacre and L’s rights as licensee count as property rights.

Even better, this is consistent with the thought that there is some sort of formal continuity between the rights that owners have in regard to their property and the rights that we all have in our person. Here’s Ripstein again:

You are master of your own body, but not of mine, and I am master of mine but not yours. Taken together, these thoughts turn out to be equivalent to the more general thought that each of us is *sui juris* as against the other, that is, the normative structure is relational. In the case of property, each property owner is master of his or her property, as against others.<sup>62</sup>

Ripstein’s thought suggests that the simple answer I articulated above is overbroad: when I described the right of an owner (either of some physical thing or of a licence) to determine whether or not all others will be able to  $\varphi$ , I might also have been describing the rights that we have in our bodies (and pretty much everyone agrees that those rights are not property rights). But the solution to that problem is just the recognition that a fundamentally important feature of property is that the rights of owners are not the rights of the people who happen to be owners, but rather the

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<sup>60</sup> *Ibid* at 167.

<sup>61</sup> Keeping in mind that I am assuming the transferability point without arguing for it (see note 34, *supra*) and assuming the good-against-the-world point for expository ease (see note 57, *supra*).

<sup>62</sup> Ripstein, “Possession and Use”, *supra* note 59 at 176. I discuss the relational structure of ownership in Essert, “The Office”, *supra* note 25.

rights of the office of ownership, exercised by the person who holds the office.<sup>63</sup> That recognition explains why our rights to our person are not property rights, since it is only we who can exercise them. This is a much more formally rigorous distinction than the distinction between rights to a thing and rights to a person. It is a distinction between the form of the rights (i.e., transferable or not) rather than between the subject matter of the rights (i.e., to a thing or not). Thus an investigation into the Hohfeldian form of property rights actually supports the idea that licences are property, and so that property rights are not just rights to things.<sup>64</sup>

Before leaving this section of the article, let me make one more comment based on the argument here. Thomas Merrill and Henry Smith have at times criticized the account of property that they take to be prevalent in law and economics scholarship, including that of Ronald Coase, on the grounds that it is not sensitive to (what they say is) the fact that property is about rights to things.<sup>65</sup> Merrill and Smith argue that the economists' picture of property as "a collection of use rights authoritatively prescribed by the state for each resource" is problematic in that it "obscure[s] the *in rem* character of property rights."<sup>66</sup> That criticism is sound, but the arguments in this section show that we can accept it without committing to what Merrill and Smith take to be its upshot, that property is better seen as rights to things. That's because, as I've just shown, it is possible to take a *via media*, and see a property right as a kind of (*in rem*) claim-right to determine whether or not others  $\varnothing$ . To illustrate this point briefly, we can consider Merrill and Smith's discussion of radio broadcast rights.

According to Coase's proposal, a radio spectrum right is "the right to use a piece of equipment to transmit signals in a particular way."<sup>67</sup> As we've just seen, of course, this is better seen not as a right but as a privilege. So property, on this view, is a collection of use privileges. Merrill and

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<sup>63</sup> See *ibid.*

<sup>64</sup> James Penner suggested to me in conversation that physical things are inherently rivalrous in a way that, say, driving a taxi is not, and that this difference could ground a relevant distinction between these two sets of rights. But in fact the idea of something's being rivalrous is not as simple as it appears, and once you start to see property rights in terms of the action (various " $\varphi$ "s) whose performance by others the owner controls, the idea and its purported relation to property rights become difficult to grasp clearly. This is related to the point I made above (*supra* note 49) that abandoning the law-of-things view opens new and interesting questions in property theory.

<sup>65</sup> See Thomas W Merrill & Henry E Smith, "What Happened to Property in Law and Economics?" (2001) 111:2 Yale LJ 357; Thomas W Merrill & Henry E Smith, "Making Coasean Property More Coasean" (2011) 54:4 JL & Econ S77 [Merrill & Smith, "Coasean"].

<sup>66</sup> *Ibid* at S80, S82.

<sup>67</sup> RH Coase, "The Federal Communications Commission" (1959) 2 JL & Econ 1 at 33.

Smith contrast Coase's view with a contemporary alternative view, Jora Minasian's, according to which radio spectrum rights were defined "in reference to a particular segment of bandwidth that could be broadcast over in a particular area—with the owner given a right to exclude all admissions by others into this frequency in this area."<sup>68</sup> For Merrill and Smith, this latter view is "squarely grounded in a conception of property as an in rem right of exclusion"<sup>69</sup> over a thing.<sup>70</sup> But the arguments above can help us to see that this latter view can be accommodated without having to say that the spectrum or frequency is a "thing" in which there is a property right. Rather, much more intuitively and simply, the right is just the right to control who gets to  $\phi$ , where  $\phi$  = "broadcast at a given frequency in a given area."<sup>71</sup> The *via media*, then, is to see that the property right is neither a right to a thing nor a set of use privileges but rather a (possibly transferable, good against the world) right to determine how others act.

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<sup>68</sup> Merrill & Smith, "Coasean", *supra* note 65 at S86. The alternative view is set out at length in Jora R Minasian, "Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation" (1975) 18:1 JL & Econ 221.

<sup>69</sup> Merrill & Smith, "Coasean", *supra* note 65 at S86.

<sup>70</sup> Smith has confirmed to me in correspondence that he sees this latter view as "more based on a thing" than the former view.

<sup>71</sup> Note that, consistently with my suggestion, Minasian sets out the right at length without any mention of a thing. My emphasis below emphasizes the thought:

A set of property rights in electromagnetic radiation that incorporates the desirable economic attributes discussed above would consist of the following:

(1) *Emission Rights*

Emission rights would consist of the right to radiate energy on a specified frequency bandwidth, at a specified time within a three-dimensional space defined in terms of a power level not to be exceeded at its boundaries. ...

(2) *Admission Rights*

*The right holder would have the right to refuse others permission to radiate energy in excess of a pre-determined level on the frequency and within the space to which his rights pertain, and at the time to which his rights pertain.*

(3) *Use*

The uses to which a right holder puts his property would be determined by him—he would be free to choose from among those alternatives legally open to him. These rights are, therefore, comprehensive of all the permissible actions and uses which are not declared illegal in the society.

(4) *Transferability*

As with rights in other resources, admission and emission rights in radiation would be transferable to others, in whole or in part, at the discretion of the right holder (*supra* note 68 at 232 [emphasis added]).



#### IV. Information Costs, “Things”, Interests, Concepts

I'll turn now to Henry Smith's own powerful law-of-things account of property. Smith begins by noticing that a crucial feature of the *in rem* nature of property rights is the costs they impose on their duty-bearers, namely, everyone else. A contract can be as complicated as the parties want it to be, since the parties, having participated in drafting the contract, will be fully aware of the duties imposed by its terms. Property isn't like that: property imposes duties on everyone regardless of any agreement that they have entered into. This suggests that property duties must be easy to understand.<sup>72</sup> What are the implications of this idea?

A particularly implausible suggestion might be that only duties not to interfere with physical things could satisfy that requirement.<sup>73</sup> But, again, the case of the Ideal Licence helps to see that this is not the way to go. How difficult is it to understand the duty correlative to the right of the Ideal Licensee? All X, the non-owner, needs to know is that *he, X*, does not have the right to drive a taxi.<sup>74</sup> He does not actually need to know the identity of the licensee or any special facts about taxi driving. All he needs to do is *not drive a taxi*. The taxi licence involves an *in rem* right that others not  $\phi$ , where  $\phi$  here has nothing at all to do with interfering with a particular physical thing (the duty is obviously not a duty not to interfere with the taxi or with some physical instantiation of the licence). This is really not a very difficult duty to understand at all.

Perhaps one might object that I am making the duty appear simpler than it actually is. To prohibit “driving a taxi” appears simple but in fact it isn't: Does the duty prohibit driving a jitney? Or pulling a rickshaw? Or operating a New-York-City-outer-borough-style car service that cannot pick passengers up on the side of the road? Certainly these questions do not have obvious answers. But it's hard to see how they are more complex than the associated questions about non-interference with, say, land: Does my emission of smoke onto your land count as a trespass? What about set-

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<sup>72</sup> See e.g. Henry E Smith, “The Language of Property: Form, Context, and Audience” (2003) 55:4 *Stan L Rev* 1105; Thomas W Merrill & Henry E Smith, “Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle” (2000) 110:1 *Yale LJ* 1.

<sup>73</sup> A suggestion hinted at in McFarlane, *Structure*, *supra* note 2 at 135–36.

<sup>74</sup> A point made by Smith on the duties owed to owners of tangible property: “[property] gives an owner control over uses of a thing by defining the thing in an on/off manner that indirectly relates to those uses, *thereby sending a simple message* to outsiders to respect the boundary” (“Law of Things”, *supra* note 2 at 1709 [emphasis added]); “trespass and conversion send a simple message of ‘keep off’ and ‘don’t take’ (without permission)” (*ibid* at 1717). See also Penner, *Idea of Property*, *supra* note 2 at 23–27, 73–75; Essert, “The Office”, *supra* note 25.

ting up a fan that blows over your daffodils and kills them?<sup>75</sup> In both cases, the costs of determining what counts as conformity with the duty are low, but they are not zero and never will be.

What if the non-owner wants to deal with the owner—perhaps to ask her permission to drive a taxi some of the time or to buy the licence from her? Here, too, things are no more difficult than they would be with a piece of tangible property. Suppose I want to buy or lease an uninhabited field close to my farm. Since it is uninhabited and the owner never seems to be there I cannot just wait around to ask her if she wants to make a deal. Instead my best bet is to go to the land registry and inquire as to the identity of the owner. Things are no different in this case than they are in the case of the taxi licence: I can call the taxi licence-issuing authority to ask the identity of the taxi licensee and get in touch with her that way.

So the requirement that the duty be one that is not too difficult to comply with cannot ground a view in which property rights are just rights to physical things. A much better argument is Smith's own. Smith's account of property is a rich and subtle one, to which I cannot hope to do justice here. But, really briefly, I think we can capture the core insights that are relevant to my investigation in this article as follows. Smith's thought is that a fully explicit Hohfeldian decomposition of the legal relations arising out of each piece of property *could* be done: B's ownership of Blackacre would be decomposed into a set of claim rights that B has that X, Y, Z, etc., not enter Blackacre without B's permission; a set of liberties that B has to use Blackacre to  $\phi$ ,  $\psi$ ,  $\xi$ , whatever; a set of no-rights for X, Y, Z, etc., to use Blackacre in those ways; a set of powers for B to transfer Blackacre to C, D, E, etc.; a set of powers for B to create various easements and other servitudes; and so on. But while we *could* understand property this way, Smith says, it would plainly be too costly to do so in a world (such as ours) of transaction and information costs.<sup>76</sup> Instead we organize property into *modules*, a system that "allows chunks or components of the system to be partially walled off and the interconnections between these chunks and the rest of the system to be deliberately limited."<sup>77</sup>

The core idea is that we *define* things in the law of property in a way that serves to minimize these costs. Here Smith explains the basic idea:

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<sup>75</sup> This example is from Japa Pallikkathayil, "Persons and Bodies" [forthcoming in Sari Kisilevsky & Martin J Stone, eds, *Freedom and Force: Essays on Kant's Legal Philosophy* (Oxford: Hart, 2014)].

<sup>76</sup> Brian Angelo Lee & Henry E Smith, "The Nature of Coasean Property" (2012) 59:2 *Int'l Rev Econ* 145 at 147–48.

<sup>77</sup> Smith, "Law of Things", *supra* note 2 at 1701.

Because it makes sense in modern property systems to delegate to owners a choice from a range of uses and because protection allows for stability, appropriability, facilitation of planning and investment, liberty, and autonomy, we typically start with an *exclusion* strategy. ... The exclusion strategy defines a chunk of the world—a thing—under the owner’s control, and much of the information about the thing’s uses, their interactions, and the user is irrelevant to the outside world. Duty bearers know not to enter Blackacre without permission or not to take cars, without needing to know what the owner is using the thing for, who the owner is, who else might have rights and other interests, and so on. ...

*The exclusion strategy defines what a thing is to begin with.* A fundamental question is how to classify “things,” and, hence, which aspects of “things” are the most basic units of property law. ...

Property clusters complementary attributes—land’s soil nutrients, moisture, building support, or parts of everyday objects like chairs—into the parcels of real estate or tangible and intangible objects of personal property.<sup>78</sup>

And in a footnote on the same page he says, “The definition of a legal thing is facilitated by the identification of separable collections of resource attributes.”<sup>79</sup>

An example might make the idea clearer. In the case of property in Blackacre, property law does not list the complete set of Hohfeldian incidents I alluded to above, but rather clusters those incidents into the module, *Blackacre*. When property law talks about B’s rights as owner of Blackacre, then, this is a sort of *shorthand* for all of those various Hohfeldian incidents.<sup>80</sup> So while B, as owner of Blackacre, really does have a set of claim-rights, duties, liabilities, powers, etc., with respect to a

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<sup>78</sup> *Ibid* at 1702–3 [footnotes omitted, emphasis added].

<sup>79</sup> *Ibid* at 1703, n 44. In another article, Smith argues that, “[t]o get from unfair competition to full-blown property rights, we need to define a thing to be the object of exclusive rights against the world. I have argued elsewhere that the ‘thing’ here, whether it is culturally or legally defined, can be regarded as the byproduct of delineating exclusion rights” (Henry E Smith, “Intellectual Property as Property: Delineating Entitlements in Information” (2007) 116:8 Yale LJ 1742 at 1755 [Smith, “Intellectual Property as Property”]). The “elsewhere” in the previous passage refers to this statement: “In ordinary legal discourse we speak of things and rights to them when, partly for reasons of information costs, we have chosen to employ the exclusion strategy rather than a governance strategy focused on activities and ‘externalities’” (Henry E Smith, “Property and Property Rules” (2004) 79:5 NYUL Rev 1719 at 1745).

<sup>80</sup> See Smith’s recent elaboration of this idea in terms of the distinction between intentions and extensions. More on this in a moment.

wide range of other people, property law economizes by simply talking about Blackacre as a modular thing that B has a right to.<sup>81</sup>

Crucially, Smith's argument is meant to apply to a case like the Ideal Licence. After all, he talks at the end of that last quote about "tangible or intangible objects of personal property." The licence, even though it is in no plausible sense a physical thing, is for Smith a *modular thing for the purposes of the law of property*.<sup>82</sup> We can talk about the licensee's right to drive a taxi as a shorthand for all of the various Hohfeldian incidents that the licensee has. So the licence, for Smith, *is* a thing (at least as far as the law of property is concerned), and its status as a kind of property does not after all count against seeing property as the law of things. Is my argument sunk?

Not quite. Smith, of course, is free to define his terms however he likes. And of course there is no harm in saying that property is the law of things *where by things we mean a modular collection of Hohfeldian incidents that need not themselves relate to any pre-existing thing*. But that is, I take it, a very different sort of claim. And if our goal here is—as I think it must be—to understand the law of property, then there are reasons to be worried about talking about property as the law of things, even if we are clear about defining things in the way that Smith asks us to. For one, there is a tension between Smith's embrace of the idea—which he shares with James Penner<sup>83</sup>—that property protects an interest we have in using things, and this claim that things are defined by the law of property. In addition, the kinds of considerations that Smith relies on in his most recent work (about the nature of concepts) do not, it seems to me, justify the claim that property is a distinctive area of law.<sup>84</sup> I'll take these worries in turn.

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<sup>81</sup> You might deny Smith's claim here on the grounds that there are lots of features of physical objects and land—such as their appearance or the shadows they cast—that are not grouped together with the other features as part of the "thing" that the owner has a right to. I'll leave this objection aside and grant Smith this point.

<sup>82</sup> Smith makes this claim in the context of patent law: "[W]e are implicitly treating an invention as a thing when the interest in its use—the various activities—are described at a high level of generality not tied directly to the activity itself" (Smith, "Intellectual Property as Property", *supra* note 79 at 1755).

<sup>83</sup> See Penner, *Idea of Property*, *supra* note 2 at 49–51; Smith, "Law of Things", *supra* note 2 at 1693, n 5.

<sup>84</sup> McFarlane's view, which I mentioned at the start of this Part, shows us another reason: his argument tries to rely on Smith's own views about information costs and modularity to claim that only tangible physical things can be the subject of property rights (McFarlane, *Structure*, *supra* note 2 at 135–36). But it is clear that it is not Smith's own view, and moreover that it is not a plausible view, as I've already shown, because the kinds of information-cost considerations that Smith relies on count just as much in favour of

*First worry: “Things” and Interests.* James Penner, like Henry Smith, thinks that property is the law of things. And Penner, like Smith, thinks that what counts as a thing is in some sense dependent on the institution of property:

The beginning of wisdom here is to realize that there is not a world of “things” out there all ready to be appropriated as property. “Thing” here is a *term of art* which restricts the application of property to those items in the world which are contingently related to us.<sup>85</sup>

Penner’s account, too, is rich and subtle, and I cannot go into its details here.<sup>86</sup> I do want to touch on one aspect of Penner’s account that Smith seems to have adopted. That aspect is the claim that property, as an institution, is justified by our “interest in using things.”<sup>87</sup> Here is Smith again:

The purposes of property relate to our interest in using things. Desirable features of a system of property—stability, promotion of investment, autonomy, efficiency, fairness—relate to the interest in use. There is no interest in exclusion per se. Instead, exclusion strategies, including the right to exclude, serve the interest in use; by enjoying the right to exclude through torts like trespass, an owner can pursue her interest in a wide range of uses that usually need not be legally specified.<sup>88</sup>

Briefly, Smith claims that we have an interest in using things, and the rules of the system of property work, although not always directly, to promote that interest.

The problem here is this: we cannot say, on the one hand, that property is justified by our interest in the use of things and then, on the other hand, that what a “thing” is is determined by the law of property. That is circular, or close to it. And even if it isn’t circular, the claim that we have an interest in the use of things, which seems plausible enough on its face, loses a great deal of that plausibility once it is expanded to include any set of entitlements that are lumped together for information cost reasons. Our lives might go better in some particular way if we can have access to land, bicycles, pickles, etc., and to the ability to do what we like with them. However, it is not at all clear how that interest can also provide a distinctive justification for monopolies on economic activity, protection of

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some forms of intangible property (licences, IP) as they do in favour of tangible physical property.

<sup>85</sup> Penner, *Idea of Property*, *supra* note 2 at 126 [emphasis added, footnote omitted].

<sup>86</sup> I go into some (critical) detail in Essert, “The Office”, *supra* note 25.

<sup>87</sup> Penner, *Idea of Property*, *supra* note 2 at 68–74. Penner thinks that this interest serves to define property as a distinct part of the legal system: *ibid* at 49–56.

<sup>88</sup> Smith, “Law of Things”, *supra* note 2 at 1693 [footnote omitted].

inventions and expressions, and all of the other kinds of intangibles that, at least *prima facie* (consistent with my methodological point from Part I<sup>89</sup>), count as kinds of property.<sup>90</sup>

*Second Worry: “Things” and Concepts.* A different sort of worry about Smith’s account arises upon considering the implications of his recent suggestion that the modularity of property is similar to the modularity of concepts. Here Smith draws on the thought that concepts help us to organize the world by organizing particulars together into easier-to-manage groupings, an idea he traces back to Locke. So, the concept HORSE<sup>91</sup> organizes into one grouping all of Bucephalus, Secretariat, and Pie-O-My; we can refer to all of those different particulars with the single concept.<sup>92</sup> The same particulars can be referred to by different concepts. Famously, the distinct concepts MORNING STAR and EVENING STAR refer to the same particular, the planet Venus. And in such a case, sometimes—and this is the crucial point for Smith—one concept will be easier to use than the other. In Smith’s example, an early riser will find MORNING STAR an easier concept to use to refer to Venus than EVENING STAR, which would better suit a night owl.

Smith applies this notion to property: he says, roughly, that the fully decomposed set of Hohfeldian incidents that exist in a given society are like particulars, and that the “things” of property are like concepts, in that they organize together the particulars into groupings, which are easier to

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<sup>89</sup> And also, I think, on Smith’s view: see e.g. Smith, “Intellectual Property as Property”, *supra* note 79.

<sup>90</sup> There is much more to say about what interest(s) support the law of property. Perhaps we might say that the interest is a deontic or normative interest (in the sense proposed in David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012)) in having (perhaps transferable, perhaps good-against-the-world) rights that others not  $\phi$ , but that would be a totally different claim and not at all one about things. Ripstein (“Possession and Use”, *supra* note 59) raises some related ideas, in effect seeming to suggest that we have an interest in exclusion. Another idea—in some respects not far off from Smith’s own account—might be that property is appropriate only when its particular form is necessary to protect some other interest. This seems to be the interpretation of Locke suggested by Seana Valentine Shiffrin: “So, for those items that have a use that requires exclusive possession, the institution of private property would be justified and consistent with the purposes of God’s grant” (“Lockean Arguments for Private Intellectual Property” in Stephen R Munzer, ed, *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 138 at 146–47).

<sup>91</sup> Here I’m following another philosophers’ convention, which uses SMALL CAPS to refer to concepts.

<sup>92</sup> I am simplifying some of Smith’s linguistic-philosophical apparatus here. Sometimes he talks about what I am calling “concepts” in terms of Fregean “senses” or “intensions”; similarly he talks about what I am calling “particulars” in terms of Fregean “referents” or “extensions”. See Henry E Smith, “Emergent Property” in Penner & Smith, *supra* note 21, 320 at 325–27.

grasp and to use. Rather than talking about all of the possible particular duties owed by everyone to B, the owner of Blackacre, not to step onto Blackacre, ride a bicycle across Blackacre, dig ten or fifteen or eighteen feet underneath Blackacre, throw a pickle through the airspace above Blackacre, and so on, we can talk instead of a general duty not to interfere with Blackacre. The cost savings are clear even from that simple example. Smith's thought is that property law in effect *defines* Blackacre as a thing when it does this grouping. The problem here is that this process, I think, is by no means unique to the law of property, and even when it does operate in the law of property, it need not make reference to "things".

Take this last point first. One way that, for Smith, "things" (as defined by law) are important to property law lies in the way that a right that others not interfere with the thing groups a set of Hohfeldian incidents into a "baseline" entitlement of the owner.<sup>93</sup> But as Smith himself has shown in a different context, the law of property sometimes sets this baseline not by use of modular "things", but instead by making reference to pre-existing customs.<sup>94</sup> He discusses *Miller v. Shoene*,<sup>95</sup> where the Supreme Court of the United States held that a certain regulation—one that, in order to control a fungus that infected apple trees and red cedars and killed the apples, prescribed cutting down the cedar trees (but not the apple trees) without any compensation (for the lost value of the trees) for the cedars' owners—was not a taking. Smith argues that the decision was based on an "established and well-known custom" that cedars would be cut and apple trees saved to fight the rust,<sup>96</sup> and so the owners of the cedars were not deprived of any right. It seems obvious that the cedar-owners and the apple-owners each had roughly the same "thing", namely the land and the trees. But *what* they owned was different: the apple-owners had the privilege to remove the cedars whereas the cedar-owners had a duty not to remove the apple trees. The point is that it was the *custom* that set these entitlements, rather than any considerations about what "thing" each set of parties owned. And because the custom was "established and well-known," relying on it was cheap from an information costs standpoint. This suggests that, at least in some cases, the kind of work that Smith wants his conception of "things" to do is done without any reference to things at all.

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<sup>93</sup> Merrill & Smith, "Coasean", *supra* note 65 at S98–99.

<sup>94</sup> Henry E Smith, "Community and Custom in Property" (2009) 10:5 *Theor Inq L* 5 at 36–41 [Smith, "Community and Custom"].

<sup>95</sup> 276 US 272, 72 L Ed 568 (1928).

<sup>96</sup> Smith, "Community and Custom", *supra* note 94 at 39–40. Smith relies in part on an insight in William A Fischel, "The Law and Economics of Cedar-Apple Rust: State Action and Just Compensation in *Miller v. Shoene*" (2007) 3:2 *Rev L & Econ* 133.

More generally, the process of organizing particulars into coherent groups, which Smith points to as a central core of the law of property, is by no means unique to the law of property. For example, Section 265 of the Canadian *Criminal Code* reads, in part, “[a] person commits an assault when without the consent of another person, he applies force intentionally to that other person, directly or indirectly.”<sup>97</sup> Clearly this provision employs concepts in the same way that Smith says property law does: it just mentions “force”, rather than saying that a person commits an assault if they punch or kick or slap someone, whether they do so with their hands or feet or a stick or a baseball bat or a hockey stick or a pickle, and so on. The tort of negligence provides another example, in its insistence that we take reasonable care for the safety of others: the genius and importance of *Donoghue v. Stevenson* and *MacPherson v. Buick Motor Co* lie in part in their recognition that this broad concept of reasonable care counts as “some general conception of relations ... of which the particular cases found in the books are but instances.”<sup>98</sup> And this applies to our normal lives, too: that’s why everyone remembers and repeats the summary of Polonius’s advice to Laertes, “To thine own self be true,” rather than the lengthy set of particulars that precede it.

The fundamental point can simply be put as follows: concepts do the work in the law of property just as they do elsewhere. Just as we have a concept ENTERING BLACKACRE that we use to understand the rights that B has as owner of Blackacre, we have a concept DRIVING A TAXI that we can use to understand the rights that L has as holder of the Ideal Licence. And in neither case do we need any special notion of a “thing”, as defined by law or otherwise, to understand the nature of these rights. Smith is right to say that we use concepts in our lives to save on the cost of thinking and communicating about particulars; moreover, he is correct that property law needs some form of grouping in order to reduce information costs associated with its duties.<sup>99</sup> But, as concepts can do this work in the law of property just as well as they can in the rest of our social lives,

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<sup>97</sup> RSC 1985, c C-46, s 265(1)(a).

<sup>98</sup> *Donoghue v Stevenson*, [1932] AC 562 at 580, 1932 SC (HL) 31; *MacPherson v Buick Motor Co*, 217 NY 382, 111 NE 1050 (1916).

<sup>99</sup> In his recent paper, “Emergent Property” (*supra* note 92), Smith discusses my article “The Office” (*supra* note 25) and suggests that the result of the analysis there can be accomplished more easily by attending to the distinction between intensions and extensions in property law. I agree with his analysis and with his claim that we need to group Hohfeldian incidents together somehow, but I think that my suggestion that ownership is a kind of office is plausibly understood as a different account than Smith’s of what the relevant intension is in the law of property; that is, I think we might better conceive of property in terms of modular “offices” than modular “things”.



Smith's insight does not require us to say that property is the law of things.

## V. Ideal and Actual Licences

I used the Ideal Licence to suggest that the kinds of considerations that some have suggested count in favour of the law-of-things view of property do not actually lead us to that view. Nevertheless, I hope to have shown how each of those considerations helps us to see something important about property more broadly. In this section, I want to consider some of the “ideal” features of the Ideal Licence and ask whether the fact that most genuine licences do not have these features presents a problem for my arguments. I'll concentrate on three ways in which the rights of the holders of actual licences, unlike those of the Ideal Licensee, seem to diverge in their legal form from the rights of owners: (i) generally there are a lot of licence holders; (ii) generally licence holders do not have a remedial claim against those who act without a licence (or purport to use the licensee's licence without her permission); and (iii) generally licence holders do not have the power to authorize others to act under their licences.<sup>100</sup>

Before I un-idealize, however, I want to briefly make things even more unrealistic to really drive home the point about the nature of property and the fact that its distinctiveness is not located in its relation to things. We can see this point most clearly by noticing that, even in a world without things, there could still be property rights. Imagine a society of angels. Angels have no need for food, shelter or any permanent physical location, or any physical goods whatsoever. We can imagine that they are physically embodied but that, wherever they are located, they are the only things that are physically embodied. Clearly such angels could have a law of torts and a law of contracts; indeed, they could have a legal system.<sup>101</sup> But could they have a law of property? I think they could, given the conception of property I offered above. The property that these angels would have would consist in their transferable, exclusive rights to determine who performs certain activities. So one angel could have the right to decide who can dance a waltz and another could have the right to decide who could sing “Sugar Mountain” and so on. We might wonder *why* these angels would want enforceable property rights in such activities, but our focus on the form of property abstracts away from any questions about the justifi-

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<sup>100</sup> I'm skipping a fourth, that licences are generally not transferable, because I set transferability aside here. See *supra* note 34.

<sup>101</sup> This is a well-known argument in analytic jurisprudence. For examples and discussion, see Joseph Raz, *Practical Reason and Norms*, 2d ed (Oxford: Oxford University Press, 1999) (“[e]ven a society of angels may have a need for legislative authorities to ensure co-ordination” at 159). See also Shapiro, *supra* note 39 at 173–74.

cation for them. This, to me, suggests quite definitively that “things” are not central to making property rights the rights that they are.<sup>102</sup> But enough about angels. Let’s step back into the real world to consider the potential problems I mentioned in the last paragraph.

*First Problem: Numerous Right-Holders.* While there is only one person who has the rights provided by the Ideal Licence, in the real world things are usually very different. Taxi licences, fishing licences, and so on, are generally spread out among a large group of licensees, such that each licensee has a far from exclusive privilege to participate in the activity; by contrast, ownership of real and personal property is generally concentrated in a single person. It’s easy to see, however, that this contrast is overdrawn—there are real-world licences where a single party is the licensee<sup>103</sup> and the common law contains not one but two forms of co-ownership. Moreover, a consistent theme in political theory about property has been the insistence that we recognize other forms of property ownership, like common property and collective property,<sup>104</sup> for at least some of which there is no single person who can be said to own anything. So the lines are not nearly as bright as they might seem. Moreover, since the point I am trying to make using the Ideal Licence is conceptual, this legal technicality doesn’t really matter: as long as we can imagine a real licence that has a single owner, the fact that none might actually exist is immaterial.

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<sup>102</sup> Smith’s claim that property rights would not exist in a world without transaction costs (since in such a world we could costlessly enumerate the complete set of *in personam* claims between every pair of individuals: see Smith, “Law of Things”, *supra* note 2 at 1699–1700; Merrill & Smith, “Coasean”, *supra* note 65; Lee & Smith, *supra* note 76) is interestingly relevant here. We can suppose that the world of the angels would have transaction costs just like the real world does; on that supposition, Smith’s thought about the relationship between transaction costs and property rights seems correct. Again, though, Smith’s argument does not require us to conclude that property is the law of things, since in the world of the angels there are no things.

<sup>103</sup> The radio spectrum licensing proposal suggested by Jora Minasian (and discussed in *supra* notes 65–71 and accompanying text) provides an example of a case in which a single licence-holder is required by the nature of the licenced activity. A radio spectrum licence provides for broadcasting rights over a given frequency in a given geographical area, and because of the nature of electromagnetic radiation, only one radio station can broadcast on each frequency. So while of course there are lots of radio stations in any given area, we should think of the electromagnetic spectrum as being divided into given frequencies and the right to broadcast each on each frequency as being the right of a sole right-holder. Moreover, it is arguable—as we will see in the next paragraph—that a patent is a (transferable, *in rem*) licence with a single holder, albeit a time-limited one. See also *supra* note 34.

<sup>104</sup> See Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 37–46.

*Second and Third Problems: Remedial Claims and Authorizations.*

Here we have more difficult questions. I've suggested in the past that an owner's power to bring a claim against someone who has violated a duty owed to her is a central feature that needs to be accounted for in understanding property law as a branch of private law.<sup>105</sup> But most licences don't have such a private right of remedial action. This problem might be, factually at least, related to the previous one. Where many individuals hold the same type of licence, it would be very difficult to institute any remedial right held jointly or in common by those individuals against people who purport to perform the relevant activity when they lack a licence. A solution in such a case might lie in seeing the government's administrative actions against unlicensed activity as a sort of vicarious power held in trust for the licensed parties. More importantly, however, we might be able to find licences that do provide remedial powers if we broaden our investigation.<sup>106</sup> It seems to me that some intellectual property rights come very close to looking like the rights of the Ideal Licensee. There are of course complications here, having to do with the limited time frame of intellectual property rights and so on, but the basic idea of an intellectual property right as a transferable *in rem* claim that others not do something—reproduce this expression, work this invention, take advantage of this goodwill—seems to me at least *prima facie* plausible.<sup>107</sup>

The Ideal Licensee can sublicense others to drive her taxi for her and can also choose *not* to pursue the remedial claim she has; similarly B, as owner of Blackacre, can of course allow others onto Blackacre and can choose to waive her rights to bring actions in trespass. By contrast, a typical real licensee cannot sublicense others to participate in the relevant activity; nor can she decide, if others do participate in the activity without a licence, to let things slide (since, as we have already seen, she has no remedial power to waive). The suggestion that we can understand intellec-

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<sup>105</sup> Essert, "The Office", *supra* note 25.

<sup>106</sup> The *Public Vehicles Act*, which governs intercity bus transportation in Ontario, allows for the holder of a licence (as an "interested person") to start a proceeding to determine if another person is operating without a licence, but does not provide any remedial claim to the licensee (*supra* note 40, ss 1(1), 11(1)). Benjamin L. Fine proposes an interesting idea for a pre-capture right in wild animals under pursuit, which can be understood as a licence providing an exclusive right to determine who may pursue the animal ("An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations" (1983) 50:3 U Chi L Rev 1116 at 1126–31). *Popov v Hayashi*, *supra* note 48, could be seen as vindicating that suggestion.

<sup>107</sup> A different tack might be to abandon the idea that the remedial power is central to the concept of property, and that owners need not have any private law recourse when others violate the duties owed to them. Larissa Katz suggested this possibility to me; I am not sure if she actually believes it. I don't, for the reasons set out in Essert, "The Office", *supra* note 25.

tual property rights along the model I've suggested here helps us to see that this is not as much of a problem as it might seem to be. Moreover, as I said in regard to the first problem, since the question is conceptual, what really matters is not whether there *is* a licence that looks like the Ideal Licence, but whether there *could be*, and what we would say about that case.<sup>108</sup>

Of course, I shouldn't push this point too far. When the rubber hits the road and courts need to make actual decisions about whether or not some actual, real-life licence provides its holder with a property right, questions about the nature of the governmental regulation over the licence, the ways in which the licence is transferable, the rights that the licensee has, and so on, are going to be the key questions on which the case turns.<sup>109</sup> But my central claim here is the conceptual one about the Ideal Licence and its implications for property theory, so I leave the specifics of any particular licence aside.

## Conclusion

To conclude, I want to mention two implications of the arguments of this article.

First, Smith's version of the law-of-things account is much more successful if we understand it not as a conceptual claim but rather as a set of empirical (or perhaps functional) claims. These empirical claims would be roughly of the following sort: they would be claims about why property rights, understood as (perhaps transferable, perhaps *in rem*) rights that others not  $\phi$  without an owner's permission, have certain of the features that they do in our actual world of positive transaction costs. In particular, Smith's arguments are particularly well-suited to explain why property rights *tend* to be rights to things and why property rights *tend* to have the architecture that they do. These are important and valuable claims, but I do think it is important that we keep in mind that they are not conceptual claims about what property is.

Second, if we abandon the law-of-things account as a conceptual analysis of property, a wide variety of important theoretical questions about

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<sup>108</sup> That point also tells against a final potential objection, which is that, at least in the US, some licences are explicitly deemed by legislation not to count as property (to avoid takings protection). Here of course we have the clearest example of a contingent legal, as opposed to conceptual, fact that one could find, and so this is not really an objection to the argument I make here. In fact, it strengthens it, since if these licences were not the sort of rights that could plausibly be understood as property rights, there would be no need for such legislative deemings.

<sup>109</sup> See e.g. *Saulnier*, *supra* note 15.

property open themselves up to investigation from new and important directions. Should property be understood as the right to exclude, or as some sort of authority over others?<sup>110</sup> What is the role of scarcity in property? Some say that “scarcity ... is a presupposition of all sensible talk about property,”<sup>111</sup> but the account offered here might suggest that we can have property absent scarcity, and so we need an explanation of its importance.<sup>112</sup> And finally, consider the question of what interest or interests justify the law of property. As I said above in criticizing Smith for relying on an interest in the use of things as part of this account of property, it seems hard to imagine that a single interest can be behind the rights that we have in land, in bicycles, in pickles, in our expressions and inventions, in the use of our images for advertising, and in the licences that we hold. Perhaps different property institutions, as Hanoach Dagan calls them, are explained by reference to different interests (or “regulative principles”);<sup>113</sup> perhaps interests are not part of the explanation of property;<sup>114</sup> or perhaps a different answer is required.<sup>115</sup> These are all questions best left for another day. But if my arguments here are correct, we are much better placed to answer them.

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<sup>110</sup> See Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58:3 UTLJ 275.

<sup>111</sup> Waldron, *supra* note 104 at 31.

<sup>112</sup> The same goes for rivalry. See note 64, *supra*.

<sup>113</sup> “Pluralism and Perfectionism in Private Law” (2012) 112:6 Colum L Rev 1409.

<sup>114</sup> See Ripstein, “Possession and Use”, *supra* note 59.

<sup>115</sup> See note 90, *supra*.