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Of Landlords and Tenants: Property in the Midst of a Pandemic

Edward S.W. Ti^{*,*}

This is an unprecedented Bill to deal with an unprecedented crisis. Over the coming months, every aspect of the way that we do things in Britain will come under strain. As in wartime, we will have to change the way that we do things, and when it is all over things will not revert to business as usual. Some things will have changed forever, and the way that we do business here will assuredly fall into that category. I am sure that everyone in your Lordships' House wishes the Government well as they grapple with coronavirus. But democracies never give the Executive a blank cheque. As a Parliament, we must retain our critical faculties and, if we do so, it will help the Government and the country to get through this crisis together (Hansard HL Deb, vol 802, col 1659, 24 March 2020).

1. INTRODUCTION

The coronavirus epidemic has caused global ruin, with no country spared. The grim statistics show that in the United Kingdom alone, some 4.4 million people have been infected by the virus, leaving more than 150,000 dead.¹ Lockdowns in countries, cities, and villages have left many businesses in despair. In response to the outbreak, governments have been working round the clock devising policies and enacting laws to stem the human and economic devastation caused by the virus. When faced with such a catastrophe, it would appear that the government may be unquestionably justified to enact emergency legislation. But as astutely stated by Lord Newby in the epigraph, there ought to be even in difficult times, a rationale which underpins legislative discretion and principled justifications even in the enactment of emergency laws.

The government has a long history in enacting laws deviating from 'normal' private law principles in exigencies,² and the current pandemic is the most recent event where such emergency laws have been adopted providing the context of this paper's schema. The paper considers one aspect of government response to the coronavirus: the protection of business tenancies in the United Kingdom.³ The regulations impose a moratorium preventing landlords of commercial property from enforcing their contractual

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¹ Daily UK Statistics <<https://coronavirus.data.gov.uk>> (accessed 26 April 2021).

² KD Ewing 'Covid-19: Government by Decree' (2020) 31 KLJ 1, 3.

³ Compared to residential leases, the academic output relating to the 'development and refinement of controls in relation to commercial leases' has been far more modest. See M Haley 'The Statutory Regulation of Business Tenancies: Private Property, Public Interest and Political Compromise' (1999) 19 LS 207, 208.

rights against tenants for non-payment of rent, whether this is via court action for damages or in specie remedies such as forfeiture or distress.

Unlike public health regulations which apply uniformly to all residents (such as wearing a face covering), laws preventing landlords from enforcing their legal rights against a breaching tenant usurp existing contractual rights. In the enactment of coronavirus-specific legislation, lawmakers have deemed it necessary to protect business tenancies in light of broader concerns of the economy. As a chattel real, a lease straddles both contract and property, and depending on the context, the nature of one may dominate over another.⁴ In this paper, I argue that the emergency laws usurp the freedom of contract but not the property aspect of business tenancies. In other words, it is permissible for the State to impose temporary restrictions on landlords' rights as to do so does not violate property. The aspect of 'property' which this paper adopts is premised on Honoré's theory that ownership of property comes with the duty to prevent harm to others.

Obligations and duties are inherent to ownership and requiring landlords to temporarily refrain from enforcing rent covenants can be seen as part of the ownership duty to prevent harm, due to the multitudes of harms that would ensue if all landlords were allowed to enforce their strict rights in the midst of the pandemic. Though differing in opinion when such obligations arise or in what form they should take, that ownership includes positive duties to non-owners is advocated by several leading theorists, apart from Honoré.⁵ Indeed, the idea that there should be limitations to property is hundreds of years⁶ if not millennia old.⁷ In this paper, I suggest that a modified⁸ version of Honoré's incident of ownership preventing harmful use of property—when ownership increases risk to others—provides a cogent basis to explain the law protecting business tenancies.

Following this introduction, Part 2 provides an overview of the regulatory protections given to business tenancies during the pandemic, as well as under the Landlord and Tenant Acts 1927 and 1954. The special responsibility owners have to not use their property in a harmful manner provides a strong basis to justify these regulations. Part 3 presents the main argument explaining why a modified version of Honoré's incident of ownership not to use property in a harmful manner is advocated. Drawing

⁴ See *Hammersmith and Fulham LBC v. Monk* [1992] 1 AC 478.

⁵ See JW Singer *Entitlement: The Paradoxes of Property* (Yale University Press Ithaca 2000), G Alexander 'The Social-Obligation Norm in American Property Law' (2009) 94(4) *Cornell L Rev* 745, L Katz 'Spite and Extortion: A Principle of Abuse of Property Right' (2013) 122 *Yale LJ* 1444, R Ellickson 'The Affirmative Duties of Property Owners: An Essay for Tom Merrill' (2014) 3 *Brigham-Kanner Property Rights Conference Journal* 43, H Dagan 'The Social Responsibility of Ownership' (2007) 92(6) *Cornell L Rev* 1255, K Gray and S Gray 'The Idea of Property in Land' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP Oxford 1998).

⁶ PJ Proudhon 'Qu'est que la propriété Ou recherches sur le principe du droit et du gouvernement' (first published Paris: 1840) in D Kelley and B Smith (trans), 'What is Property' (CUP 1994) laments that 'Property is Theft': '[An owner] can let the crops rot underfoot, sow his field with salt, milk his cows on the sand, turn his vineyard into a desert, and use his vegetable garden as a park', 35.

⁷ Leviticus 23:22: 'When you reap the harvest of your land, do not reap to the very edges of your field or gather the gleanings of your harvest. Leave them for the poor and for the foreigner residing among you'. This Pentateuchal passage has been noted in E Claeys 'Virtue and Rights in American Property Law' (2009) 94(4) *Cornell L Rev* 889, 934 and E Peñalver 'Reconstructing Richard Epstein' (2006) 15(2) *William & Mary Bill of Rights Journal* 429, 432.

⁸ D Faraci and PM Jaworski 'To Inspect and Make Safe: On the Morally Responsible Liability of Property Owners' (2014) 17(4) *Ethical Theory and Moral Practice* 697.

on theory, policy and the doctrine of frustration, this section explains why Honoré's incident provides the conceptual and ethical basis to justify not only the enactment of the coronavirus-inspired laws protecting business tenancies but more generally, when property rights can be statutorily interfered with. Part 4 concludes.

2. THE STATUTORY PROTECTION OF BUSINESS TENANCIES

To landlords, the payment of rent is 'the rationale for the very existence of the lease.'⁹ Apart from suing for money owed, landlords can distrain¹⁰ the tenant's goods for rent arrears or have the lease forfeited, which normally takes the form of an action for possession. Exceptionally, the emergency regulations prevent landlords from seeking enforcement whether via damages, distress, forfeiture or winding up. Davey observes that 'there is a marked reluctance on the part of the legislature to interfere with the commercial property market, save where it has been considered absolutely necessary to protect tenants against an abuse of power by landlords.'¹¹ Haley similarly notes that 'the area of commercial landlord and tenant has never enjoyed a high political profile.'¹² Being less politicized than residential tenancies, examining the regulation of commercial leases allows for a clearer analysis why, and perhaps more importantly, when, property rights can be justifiably recast.

(A) Protecting Business Tenancies in the Pandemic

Under the Coronavirus Act 2020 section 82, the right of forfeiture and re-entry for non-payment of rent in respect of business tenancies is temporarily suspended. The only criteria to receive section 82 protection is that the tenancy must be one defined under the Landlord and Tenant Act 1954 Pt II.¹³ If tenants are unable to pay their rent, no enforcement action can be taken against them, until after the relevant date, currently stated as 30 June 2021.¹⁴ Where the tenant is a company, the Corporate Insolvency and Governance Act 2020 (CIG Act) section 1(A21)(1)(a) provides that landlords may not exercise a right of forfeiture for non-payment of rent by re-entry during the moratorium period, currently 30 September 2021,¹⁵ except by leave of court.

Landlords will also find it onerous to seek recompense for rental arrears. Since April 2014, landlords' rights at common law to distrain for arrears of rent were abolished, pursuant to the Tribunals, Courts and Enforcement Act 2007, section 71. This was replaced with a now statutory scheme for commercial rent arrears recovery (CRAR),

⁹ R Abbey and M Richards *A Practical Approach to Conveyancing* (21st edn OUP Oxford 2019), 375.

¹⁰ The common law right to distress is statutorily abolished pursuant to the Tribunals, Courts and Enforcement Act 2007 section 71. This has been replaced with a statutory scheme for distrain known as commercial rent arrears recovery (CRAR), under the Taking Control of Goods Regulations 2013 Pt 7.

¹¹ M Davey 'Privty of Contract and Leases – Reform at Last' (1996) 59(1) MLR 78.

¹² M Haley 'Business Tenancies and Interventionism: The Relegation of Policy' (1993) 13 LS 225, 239.

¹³ In contrast, Australia adopts a more discriminating approach, protecting only small and medium enterprise tenants (defined as having a turnover up to A\$50M/year (~£28.6M/year)) that are suffering 'financial stress or hardship' due to the coronavirus. 'National Cabinet Mandatory Code of Conduct (SME Leasing Principles During COVID-19)' (3 April 2020), <<https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf>>.

¹⁴ Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2021, r 2.

¹⁵ Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021, r 3(3).

under the Taking Control of Goods Regulations 2013 Pt 7. CRAR ordinarily allows a commercial landlord to serve notice and appoint an enforcement agent to seize and sell a tenant's goods at auction, where only seven days of rent is in arrears.¹⁶ The Taking Control of Goods and (Amendment) (Coronavirus) Regulations 2021 however require that the amount owed must be for at least 457¹⁷ or 554¹⁸ days of rent before CRAR is permitted.¹⁹ Collectively, the moratorium precluding possession actions and the strict CRAR framework are significant legislative amendments, resulting in landlords being potentially out-of-pocket for a protracted period.

The use of statutory demands and winding up petitions under the Insolvency Act 1986 section 123 where a company cannot pay its bills (including rent) due to the coronavirus, for demands served between the relevant period from 1 March 2020 to 30 June 2021 is also prohibited, pursuant to the CIG Act Sch 10.²⁰ Schedule 10(2) requires a creditor who seeks to present a petition during the relevant period to have reasonable grounds that the coronavirus has not had a 'financial effect' on the defendant company. Furthermore, Sch 10(5) states that the court can only wind up the company 'if satisfied that the applicable ground would have arisen even if coronavirus had not had a financial effect on the company'. The use of statutory demands and the threat of insolvency are thus inapplicable in enforcing rent arrears, unless COVID-19 did not financial affect the defendant company, with the burden lying with the creditor landlord to prove this. In this regard, the courts have taken a robust approach in protecting tenants. In *Re: A Company (Injunction to Restrain Presentation of Petition)*,²¹ Morgan J granted an injunction to prevent the presentation of a winding up petition against a high street retailer for its inability to pay rent, even though the CIG Act was not in force yet. Judgment in that case was rendered on 2 June 2020 while Royal Assent for the CIG Act was given on 25 June 2020. In referencing (and essentially applying) the contents of the CIG Act in its Bill form, the court noted that the tenant in the case was financially affected by the coronavirus. The High Court held that 'when deciding whether to grant relief, and in particular, relief which involves the court controlling or managing its own processes, it can take into account its assessment of the likelihood of a change in the law which would be relevant to its decision.'²² The decision by Morgan J follows in the footsteps of *Travelodge Ltd v. Prime Aesthetics Ltd*.²³ In that case, Birss J dealt with almost identical facts and reached the same conclusion even before a draft of the CIG Bill was written; the High Court in that case relied merely on ministerial statements describing the intended CIG Bill in coming to its decision. In both cases, the judges took a proactive willingness in applying the contents of the CIG Act to protect commercial tenants even before the CIG Act came into force.

¹⁶ Taking Control of Goods Regulations 2013, r 52 read with the Tribunals, Courts and Enforcement Act 2007, section 77(3).

¹⁷ For actions on or before 23 June 2021.

¹⁸ For actions on or after 24 June 2021.

¹⁹ Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020, r 2(6)(b)(2).

²⁰ As amended by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021, r 3(4).

²¹ [2020] EWHC 1406.

²² *Ibid* [24].

²³ [2020] EWHC 1217.

This paper argues that the emergency laws protecting business tenants accord with Honoré's incident of ownership to prevent harm. The theory is also internally consistent as preventing the harmful use of property also justifies the protections given to tenants under the Landlord and Tenant Acts 1927 and 1954.

(B) Preventing Harmful Use of Property Justifies the Protections Given to Tenants under the Landlord and Tenant Acts 1927 and 1954

An overview of the Landlord and Tenant Acts 1927 and 1954 is apt because these Acts present prior occasions where Parliament intervened in the area of business tenancies, most significantly, by providing security of tenure via the Landlord and Tenant Act 1954. Starting from the end of the 19th century, the mischief complained of was that some landlords held their tenants to ransom by demanding an inflated rent as a condition of a lease renewal.²⁴ In Haley's historical charting of how business tenancies came to be regulated, he observed that prior to each of the World Wars, the shortage of new buildings coupled with competition for business premises created a seller's market in which landlords were able to abuse their superior bargaining power vis-à-vis their sitting tenants.²⁵ The revival of trade and commerce also meant there was demand to either purchase properties with established goodwill,²⁶ or evict existing tenants to redevelop the premises for large corporate tenants.²⁷ The two post-war periods thus catalyzed the enactment of the Landlord and Tenant Act 1927 and the Landlord and Tenant Act 1954 respectively. Materially, the Landlord and Tenant Act 1927 section 1 allows the tenant to claim compensation for approved structural improvements that increase the value of the land, and which cannot be removed as tenant's fixtures. Without the prospect of recompense at the end of their terms, tenants would be reluctant to deploy capital and thereby enhance the value of the demised premises.²⁸

Under the Landlord and Tenant Act 1954 Pt II, most tenants²⁹ of business premises with a lease of more than six months, or if they have been in occupation for at least 12 months, have security of tenure. This gives tenants the security of business continuity, with the right to continue to occupy the premises after the lease has come to an end under the terms of the original lease. The Landlord and Tenant Act 1954 contemplates that if negotiations for continued occupation fail at the end of the original lease, the tenant can apply to court for a new lease.³⁰ Security of tenure thus gives business tenants a unilateral option to have the lease continue; negotiations between landlord and tenant are thus made in the context that the Act empowers the court to have the lease renewed, as well as decide the terms therein, if the parties cannot come to a mutual agreement. The landlord is limited to resisting a new tenancy pursuant to

²⁴ Haley (1999), above n 12, 207.

²⁵ *Ibid.*

²⁶ *Ibid* 212.

²⁷ *Ibid* 218.

²⁸ *Ibid* 212.

²⁹ Landlord and Tenant Act 1954 section 43 excludes certain agricultural and mining tenancies from the protection that security of tenure provides.

³⁰ Landlord and Tenant Act 1954 section 29. The court may also determine the rent payable, if parties cannot come to a mutual decision (s 34).

the grounds under section 30 of the Act.³¹ Security of tenure does not, of course, give the tenant the right to remain if they do not keep to their end of the bargain. Landlords can forfeit the lease and seek other forms of enforcement such as court action, should the tenant breach the lease contract. The Landlord and Tenant Act 1954 is thus premised on giving the tenant security, but only if the tenant can afford to pay market rent upon renewal.

While a derogation from the common law rights of the landlord, the Landlord and Tenant Act 1954 Pt II was ‘intended to make only limited inroads on the free market.’³² In enacting the Landlord and Tenant Act 1927 (which laid the framework of the 1954 Act), the government stance was that ‘reasonable [landlords] would have nothing to fear from an enactment framed ... to protect the tenant against the action of a harsh and unconscionable landlord’,³³ as the rationale was ‘merely to do no more than codify the current practices of reasonable landlords.’³⁴ Interestingly, in the case of the Landlord and Tenant Act 1954, there has been a readjustment back from status to contract. Following amendments made in 2004, security of tenure can be contracted out pursuant to the Landlord and Tenant Act 1954 section 38A, so long as the landlord serves a ‘health warning’ to the tenant 14 days before the tenant commits itself to the lease,³⁵ the tenant acknowledges the notice, and both the notice and acknowledgement thereof is referenced in the lease.³⁶

The compensation given for tenants’ improvements under the Landlord and Tenant Act 1927 and security of tenure under the Landlord and Tenant Act 1954 can be understood to have been promulgated to counteract landlords’ abuse of their superior bargaining power,³⁷ or in other words, obviating the harmful use of property. Compensation for improvements and security of tenure can be viewed as part of landlords’ duty not to use their properties harmfully. The statutory interventions relating to business tenancies under the Coronavirus Act 2020 as well as the Landlord and Tenant Acts 1927 and 1954 may thus be defended pursuant to the duty of landlords’ not to use their property in a harmful manner—in both contexts, the lack of statutory intervention would have resulted in widespread harms to the community stemming from the use of property. This duty arises due to the multitude of harms to the community stemming from the numerosity of leased business premises, in the midst of the pandemic, a point I explain in more detail in the following section.

The extent of statutory intervention in the current pandemic is more drastic than providing tenancies with security of tenure under the Landlord and Tenant Act 1954. The Coronavirus Act 2020 and related regulation usurp existing, accrued rights of the landlord in the midst of an otherwise valid tenancy agreement. Where security of tenure is imposed by the 1954 Act, the landlord is not caught unaware as the parties’ contract subject to the legislation. Because the current incursions to business tenancies

³¹ These grounds include among others, the tenant’s persistent non-paying of rent and other breaches or should the landlord intend to occupy the demised premises.

³² Haley (1993), above n 12, 239.

³³ HL *Official Report* (5th Series) col 330 at 2307, 29 November 1927.

³⁴ Haley (1999), above n 12, 214.

³⁵ This notice must conform to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, Sch 1.

³⁶ Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, Sch 2.

³⁷ HC *Leasehold Committee Final Report* Cm 7982, June 1950.

are drastic, it is essential to find an ethical basis for their justification. In the next part of this paper, I argue that Honoré's incident of ownership to prevent harm satisfies this criterion. The duty to prevent harm arises when ownership increases risk to others, justifying the temporary suspension of the rights of landlords. When the pandemic passes, emergency laws will be repealed and the rights of landlords will once again revert to the norm, as the enforcement of business tenancies will no longer be considered collectively harmful.

3. HONORÉ'S THEORY OF OWNERSHIP IMPOSING THE DUTY TO PREVENT HARM JUSTIFIES PROTECTING BUSINESS TENANCIES

*Yet it would be a distortion—to speak as if this concentration of patiently garnered rights was the only legally or socially important characteristic of the owner's position. The present analysis, by emphasizing that the owner is subject to characteristic duties and limitations, and that ownership comprises at least one important incident independent of the owner's choice, redresses the balance.*³⁸

This part of the paper argues that the protection of business tenancies is consistent with Honoré's conception of property, as preventing the harmful use of property is intrinsic to ownership. Preventing harm to society justifies protecting business tenancies against enforcement for non-payment of rent in the context of the pandemic because allowing *carte blanche* enforcement of pre-pandemic tenancies would be a breach of the 'special responsibility'³⁹ that owners have to society not to use their property in a harmful manner. Faraci and Jaworski seek to explain this incident of Honoré's by viewing ownership as creating a moral duty when it 'increases risk to others'.⁴⁰ This is adopted as the cogent justification of the 'special responsibility' that ownership entails. I also argue that while each particular landlord may not come under a discrete duty not to enforce a pre-pandemic tenancy had there been but a single tenancy, *the collective of landlords* have a common duty not to do so, due to the aggregate risk to society.

(A) Honoré's Incidents of Ownership

Bell and Parchomovsky state that contemporary property scholarship clusters around four questions: (i) which legal entitlements qualify as property rights; (ii) against whom do the rights apply; (iii) what is the content of property rights; and (iv) what should be the remedies for property right infringement.⁴¹ Honoré's incidents of ownership offer a noted articulation of the third question raised by Bell and Parchomovsky: the content of property rights. These incidents have received wide acclaim because they capture much of the realities of ownership. One of Honoré's incidents is a limitation of ownership—the duty not to use one's property to harm others,⁴² which I argue is a universally accepted limitation of property providing a reasoned basis to justify the

³⁸ AM Honoré, 'Ownership' in *Making Law Bind* (Clarendon Press New York 1987) 166.

³⁹ *Ibid* 174.

⁴⁰ *Ibid*.

⁴¹ A Bell and G Parchomovsky 'A Theory of Property' 90(3) (2005) Cornell L Rev 538.

⁴² In the original version of *Ownership* (1961), Honoré described this incident as the 'prohibition of harmful use'. In revising the essay, Honoré amended this to 'the duty to prevent harm' which requires the owner to use and manage his property in a way that does not harm others, and also prevent others from using the thing owned from harming society: Honoré (1987), above n 38, 174.

legislative amendments. Allowing landlords to enforce their strict legal rights against their tenants would, in the light of the pandemic, tantamount to using property in a harmful manner. As Hamill notes, while there is significant disagreement over what exactly property is, 'it is generally accepted that property law is a way of managing resources.'⁴³ One way of managing resources is thus to articulate why and when the limitations of ownership arise.

Honoré defined ownership as the greatest possible interest in a thing which a mature system of law recognizes.⁴⁴ According to him, 'Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility, the incident of absence of term, the duty to prevent harm the liability to execution and the incident of residuary.'⁴⁵ While some have remarked that *Ownership* cannot be a theory of property,⁴⁶ others have stated that Honoré 'played a decisive role'⁴⁷ in advancing the bundle of rights metaphor, with Penner noting that Honoré's incidents and his bundle of rights analysis serve as a 'dominant paradigm' for practitioners and academics alike to attend to particular problems in the law of property.⁴⁸ Faraci and Jaworski state that Honoré has captured what many believe to be the best account of what property amounts to.⁴⁹ It is apposite to first situate Honoré's work among other theories.

Evident from his list of incidents, Honoré belongs to the camp that sees property as a 'bundle of rights.'⁵⁰ The phrase 'bundle of rights' was first used by Lewis⁵¹ but Hohfeld is generally credited for having created an entirely new understanding of property as a bundle of rights,⁵² with Barnett also recognizing Honoré as a joint pioneer.⁵³ Hohfeld's analysis of legal concepts as a series of bipolar 'jural relations' laid the groundwork for a conception of property as a collection of socially contingent entitlements.⁵⁴ Hohfeld conceives of property as a collection of more fundamental legal relations that were inter-related as correlates and opposites.⁵⁵ Property consists of rights, privileges, powers, and immunities, with the party at the other end of the relation having corresponding duties, liabilities and disabilities. An important aspect of Hohfeld's theory is his assertion

⁴³ S Hamill 'Common Law Property Theory and Jurisprudence in Canada' (2015) 40 *Queen's LJ* 679, 682.

⁴⁴ AM Honoré 'Ownership' in AG Guest (ed.), *Oxford Essays in Jurisprudence* (OUP Oxford 1961) 123.

⁴⁵ Honoré (1987), above n 38, 165.

⁴⁶ T Merrill and HE Smith *Property: Principles and Policies* (3rd edn Foundation Press USA 2016) 16: 'Ownership is compatible with and premised on the assumption that there is one correct meaning of property'.

⁴⁷ Bell and Parchomovsky, above n 41, 546.

⁴⁸ JE Penner 'The Bundle of Rights Picture of Property' (1996) 43 *UCLA L Rev* 711, 713.

⁴⁹ Faraci and Jaworski, above n 8, 702.

⁵⁰ Hamill (2015), above n 43, 683 states that Honoré provides the 'clearest discussion' of the bundle theory.

⁵¹ J Lewis *A Treatise on the Law of Eminent Domain in the United States* (2nd edn Callaghan Chicago 1900) 57.

⁵² T Merrill and HE Smith 'The Property/Contract Interface' (2002) 101 *Colum L Rev* 773, 783: 'Although Hohfeld did not adopt the metaphor of a 'bundle of rights' [his work] ... directly anticipates [the] adoption ... [favoured] by the Legal Realists'; CC Tedrowe 'Conceptual Severance and Takings in the Federal Circuit' (2000) 85 *Cornell L Rev* 586, 589: 'Hohfeld first attempted to construct a theory of property out of the bundle-of-rights metaphor'; Penner, above n 48, 724–5: 'Hohfeld provide[d] the frame in which the bundle of rights picture is constructed'.

⁵³ K Barnett '*Western Australia v Ward*: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' (2000) 24 *MULR* 462, 469: 'The bundle of rights theory is the dominant paradigm applied by Western legal philosophers, combining the theories of Hohfeld and Honoré'.

⁵⁴ T Merrill 'Property and the Right to Exclude' (1998) 77(4) *Neb L Rev* 730, 737–8.

⁵⁵ W Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale LJ* 28.

that the crux of property is not a relationship between a person and an object (à la Blackstone) but rather a nexus of legal relations among people regarding an object.⁵⁶ He reasons that where there is a right, there must necessarily be a correlative duty; an object cannot owe a duty.⁵⁷ Thus, while Hohfeld lists ownership as his paradigmatic example of a right *in rem*, he subsequently reconceives these as mere expressions of rights *in personam* vis-à-vis an indefinitely large class of people.⁵⁸ Hohfeld's analysis has been criticized for not being entirely clear whether property should properly be viewed as a right *in rem*,⁵⁹ with Kocourek also remarking that the problem with reducing property's *in rem* aspect to numerosity of duty-bearers fails to capture the indefiniteness and open-endedness of the class of duty-bearers.⁶⁰ Despite these criticisms, Hohfeld's novel views leading to the 'bundle of rights' conception of property has been described as 'the most pervasive concept of property... still rul[ing] the academic field'.⁶¹

More recently however, Hamill expresses the view that the bundle of rights idea has fallen out of favor with no dominant vision to replace it.⁶² Penner also critiques the Hohfeld-Honoré synthesis underpinning the 'bundle of rights' theory. He argues that their concepts of property do not integrate well because while Hohfeld is analytical, Honoré, as seen from his 'functional' list of incidents, is not. According to Penner, this functionality is patent because Honoré 'describes the situation of the owner, not principally in terms of his Hohfeldian powers, duties, and rights vis-à-vis others, but in terms of the social or economic advantages that an owner has by virtue of his position, and the terms and limitations of those advantages'.⁶³ Penner thus concludes that one cannot simply regard Honoré's incidents as substantial juridical norms which fill in or complete the battery of Hohfeldian rights so as to generate a complete bundle of rights which an owner is supposed to have.⁶⁴ One point made by Penner to support this premise is that the 'bundle of rights' theory has no core or essential structure to ownership. Because one can assemble any of the different rights, duties, powers and so on into one or more bundles, each can be called 'property'.⁶⁵ Honoré implicitly acknowledges such nominalism as he does not appear to give primacy to any of the eleven incidents. In the same vein, Tarrant is of the view that Honoré's incidents do not provide a theory that can be applied to identify new property rights that might come to be recognized.⁶⁶ While Penner's criticism of the 'bundle of rights' theory is forceful, it is noted that Penner is not saying that the incidents are anti-property, as they still serve a functional purpose. Rather, Penner believes that as a concept, the bundle of rights theory 'does not generate any genuine insights and that it leads to mistaken ideas about property'.⁶⁷

⁵⁶ Ibid 32.

⁵⁷ Ibid.

⁵⁸ W Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710.

⁵⁹ Bell and Parchomovsky, above n 41, 545.

⁶⁰ A Kocourek 'Rights in Rem', (1920) 68 U Pa L Rev 322, 335.

⁶¹ Bell and Parchomovsky, above n 41, 546.

⁶² S Hamill 'Community, Property, and Human Rights: The Failure of Property-as-Respect' (2017) 27 Journal of Law & Social Policy 7, 11.

⁶³ JE Penner *Property Rights: A Re-Examination* (OUP Oxford 2020) 6–7.

⁶⁴ Ibid.

⁶⁵ Ibid 37.

⁶⁶ J Tarrant *Legal and Equitable Property Rights* (Federation Press Sydney 2019) 14.

⁶⁷ Penner (2020), above n 63, 4.

Regardless whether one rejects the ‘bundle of rights’ conceptually, the incidents of ownership have practical value as Honoré succeeds in listing aspects of ownership which represent interests with common features transcending any one particular system. Even if not collectively seen as a theory of property, many of the incidents, and in particular it is argued, the duty to prevent harm, is both a practical and *necessary* limitation of ownership. Even the fiercest critic of Honoré would agree that using property in a harmful manner is unacceptable, for ‘without them ownership would be a destructive force.’⁶⁸ While the bundle theory implies that ownership rights are severable, the obligation not to use property harmfully is a necessary aspect of property ownership.

(B) Preventing Harm Is a Necessary Aspect of Property Ownership

*Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist.*⁶⁹

Honoré asserts that the presence of all eleven incidents constitutes the fullness of ownership and an absence of all 11 negates ownership as a mature legal system would understand it, though he does not give primacy to any of the eleven.⁷⁰ Accordingly, like any of the other incidents, it could be argued that ownership does not invariably require the duty to prevent harmful use. However, while it is not the case that even the slightest of harms triggers incursions to property, there is broad consensus that the use of property will always be limited when the harm or potential harm goes beyond a certain threshold. Honoré was critical of the Blackstonian view, which saw property as the concentration of absolute rights of use, exclusion, transfer and immunity from expropriation and saw his list as an important alternative. He thus emphasized that ownership may be subject to limitations, including the prohibition of harmful use: ‘An owner’s liberty to use and manage the thing owned as he chooses is in mature systems of law, as in primitive systems, subject to the condition that uses harmful to other members of society are forbidden.’⁷¹

Resonating with Honoré’s incident against harmful use, Gray notes that ‘deep at the heart of the property concept lies a fusion of individual right and social responsibility,’⁷² as ‘the purchase of a bundle of rights necessarily includes the acquisition of a community-oriented obligation.’⁷³ Shoked argues that property rights should be subject to an explicit community interest. While made in the context of preserving the character of neighborhoods, the relevant point is that property ownership creates externalities and society should be empowered to step in to preserve the stability of a community.⁷⁴ Dagan states that ‘a theory of property that excludes social responsibility is unjust.’⁷⁵ He explains that ‘when incorporating social responsibility into our understanding of property, the challenge is to show that the concept of property can encompass social responsibility without destabilising the effects of ownership in protecting

⁶⁸ Honoré (1961), above n 44, 123.

⁶⁹ JW Singer *Entitlement: The Paradoxes of Property* (Yale University Press New Haven 2000) 18.

⁷⁰ Honoré (1987), above n 38, 165.

⁷¹ Honoré (1961), above n 44, 123.

⁷² K Gray ‘Equitable Property’ (1994) 47(2) CLP 157, 188–9.

⁷³ *Gazza v New York State Department of Environmental Conservation* 679 NE2d 1035, 1039 (1997).

⁷⁴ N Shoked ‘The Community Aspect of Private Ownership’ (2011) 38 Florida State University L Rev 759 at 762.

⁷⁵ H Dagan ‘The Social Responsibility of Ownership’ (2007) 92(6) Cornell L Rev 1255 at 1259.

individuals.⁷⁶ Gray and Gray's concept of property in land comprising 'competing models of ... property as a right and property as a responsibility'⁷⁷ has also captured the interest of planning law. As a justification for compulsory purchase and other types of land use control imposed by the State, the obligation to do no harm has been extended as 'part of the burden of common citizenship'⁷⁸ as the 'give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest.'⁷⁹ As Honoré's articulation of the harm principle applies to planning and environmental law, it can also justify regulating potentially harmful effects of business tenancy relationships in these unprecedented times. As owners of the residuary estate, landowners ultimately benefit from a recovered economy, and the intervention of the law is needed to prevent a 'tragedy of the commons.'⁸⁰ Without intervening legislation, each landlord would act independently according to their own self-interest and such rent-seeking behavior in all senses of the phrase, amounts to a dereliction of the duty to avoid harmful use of property in the context of the pandemic.

The belief that ownership and the responsibility to do no harm is virtually unanimous. Indeed, several theorists go further than this and suggest virtuous behavior from owners. Singer and Beermann state that because property is a social construct, 'it is imperative that we shift the discussion from identifying core property rights to begin talking about what is good for human beings.'⁸¹ Alexander's view of the social-obligation norm is probably one of the most onerous to owners—he argues that the obligation of property owners to help fellow human beings flourish extends to the State being empowered and even obligated to compel the wealthy to share their surplus with the poor so that the latter can maximize their human dignity.⁸² In contrast, Ellickson disagrees with Alexander, arguing instead that affirmative duties impinge on an owner's freedom, disproportionately add complexity to property law via transaction costs and diminish intrinsic motivations to act ethically.⁸³ Katz says that ownership is about the authority to set the agenda for a thing.⁸⁴ By placing emphasis on why owners choose to use their property in a certain way, she expresses the view that such authority exceeds the jurisdiction of ownership when an owner decides to use property just to produce harm. In other words, the subjective motives of the owner should matter, for an otherwise (non-illegal) use of property without spiteful or ulterior ends would be permissible.⁸⁵

Honoré's theory avoids the weaknesses in the arguments made by Singer and Alexander. There are legitimate concerns about social engineering via property and there is value to rely instead on a welfare state to mitigate inequality while keeping

⁷⁶ Ibid 1263.

⁷⁷ Gray and Gray, above n 5, 18.

⁷⁸ *Keane and Naughton v An Bord Pleanála* [1998] 2 ILRM 241 at 260–2.

⁷⁹ *Grape Bay Ltd v. AG of Bermuda* [2000] 1 WLR 574, 583C (Lord Hoffman).

⁸⁰ G Hardin 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

⁸¹ JW Singer and J Beermann 'The Social Origins of Property' (1993) 6(2) *Canadian Journal of Law & Jurisprudence* 217, 241.

⁸² G Alexander 'The Social-Obligation Norm in American Property Law' (2009) 94 *Cornell L Rev* 745–6.

⁸³ Ellickson, above n 5, 50.

⁸⁴ L Katz 'Exclusion and Exclusivity in Property Law' (2008) 58(3) *U Toronto LJ* 275, 277–85.

⁸⁵ L Katz 'Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right' (2013) 122 *Yale LJ* 1444, 14446: One example given by Katz is the action of one developer to intentionally place a steel sculpture *on its own* building (having obtained a building permit to do so) in order to block light access to a neighboring building owned by a rival developer; the first developer wanted to create leverage to force the sale of the affected lot.

property separate.⁸⁶ At the same time, Katz's focus on bad faith agenda-setting is not directly applicable to the paper as landlords' insisting on their contractual rights in collecting rent cannot be considered malicious. While most theories seem to either emphasize the rights of owners or the social obligations of property, Honoré's pioneering concept of ownership is uniquely centrist. While his eleven incidents read like a list suggesting rights-based conceptualism, two of these incidents—the duty to prevent harm⁸⁷ and the liability to execution⁸⁸ are limitations of ownership. Honoré himself explains: 'If we adopted the fashion of speaking of ownership as if it were just a bundle of rights, at least two items in the list would have to be omitted.'⁸⁹ Allen states that Honoré's theory includes these limitations against harmful use as an essential part of the conception of ownership rather than something external.⁹⁰ Becker endorses a lightly modified version of Honoré's list of incidents⁹¹ and notes that as each of the incidents is capable of a variety of definitions, the prohibition of harmful use may range from preventing physical harm, prohibiting economic and/or aesthetic injury and even shade into a requirement of productive use.⁹²

(C) The Duty to Prevent Harm Arises due to the Risk Caused to Others

One critique that Penner makes is that many of Honoré's incidents 'have their origin in the law of obligations, not the law of property.'⁹³ This may stem from the fact that Honoré appears to cite several tortious examples when discussing the incident prohibiting harmful use (in his original 1961 essay): 'Nowhere may he use [an umbrella] to poke his neighbour in the ribs or to knock over his vase.'⁹⁴ And again:

I may use my car freely but not in order to run my neighbour down, or to demolish his gate, or even to go on his land if he protests; nor may I drive uninsured. I may build on my land as I choose, but not in such a way that my building collapses on my neighbour's land. I may let off fireworks on Guy Fawkes night, but not in such a way as to set fire to my neighbour's house. These and similar limitations on the use of things are so familiar and so obviously essential to the existence of an orderly community that they are not often thought of as incidents of ownership; yet, without them 'ownership' would be a destructive force.⁹⁵

⁸⁶ See HE Smith, 'Property as the Law of Things' (2012) 125(7) *Harvard L Rev* 1691, 1699.

⁸⁷ In the original version of the essay (1961), which Honoré later described as 'too narrow', the incident was described as the 'prohibition of harmful use'.

⁸⁸ Honoré (1987), above n 38, 175: "Without such a general liability... ownership would be an instrument by which the owner could freely defraud his creditor".

⁸⁹ Honoré (1987), above n 38, 166.

⁹⁰ T Allen *The Right to Property in Commonwealth Constitutions* (CUP Cambridge 2009) 144.

⁹¹ LC Becker 'The Moral Basis of Property Rights' (1980) 22 *Nomos: Property* 187, 190: 'AM Honoré has given an analysis of the concept of full ownership that with some modifications, provides a very clear overview of the varieties of property rights. I have found his analysis—or rather, my version of it—to be an adequate tool for analyzing every description of ownership I have come across, from tribal life through feudal society to modern industrial states. The definition of the elements of ownership that he identifies will vary from society to society, as will the varieties of ownership that are recognized. But ownership is always, as far as I can tell, analyzable in the terms he proposes'. Becker's modifies Honoré's list of incidents by splitting the fifth incident (the right to the capital) to three parts—the right to consume, the right to modify and the right to alienate.

⁹² *Ibid* 206.

⁹³ Penner (2020), above n 63, 6.

⁹⁴ Honoré (1961), above n 44, 108.

⁹⁵ Honoré (1961), above n 44, 123.

In other words, it could be argued, the incident against harmful use is not so much an aspect of property as it is part of the general law of obligations to not harm's one neighbor. Waldron objects that prohibitions against harming have no essential connection with property or ownership: 'these prohibitions are better regarded as general background constraints on action than as specific rules of property.'⁹⁶ In his revised version of *Ownership* however, Honoré clarified that while no one may use things in a way which harms others (Harris calls these 'property-independent prohibitions'),⁹⁷ owners have a special responsibility to see to it that their property is not used in a harmful way (by themselves or others).⁹⁸ Faraci and Jaworski vividly make the point:

[S]urely it is still the case that including the prohibition on stabbing someone with your knife would be redundant. Not only is it wrong to stab someone with a knife you don't own, but owning the knife surely does nothing to alter the seriousness of the wrong. It would be patently bizarre for someone to condemn Paul saying: "Paul stabbed Mary! And, what's more, he did so with his knife!" (Indeed if anything, we might think it was worse if he did so with hers!)⁹⁹

Thus while everyone owes general duties (to not stab Mary), the owner of the knife is also under a duty not to allow his knife to be used harmfully. While Honoré simply explains that ownership brings with it this 'special responsibility', Faraci and Jaworski seek to explain this incident by viewing ownership as creating a moral duty *when it increases risk to others*;¹⁰⁰ this is adopted as the cogent justification of the 'special responsibility' that ownership entails. Honoré says that an owner of a car cannot drive uninsured. By extension, a car owner is also under a duty not to allow an unlicensed or intoxicated individual from driving his car. This could be rationalized on the basis that ownership of potentially harmful property increases risk to others. Thus, ownership of premises that were subject to pre-pandemic business tenancies increases risk to others because enforcing lease covenants in the midst of the pandemic is harmful. Honoré explains that the duty to prevent harm means that an owner must not use his property to harm others and also prevent others from using his property from harming others.¹⁰¹ This is an expanded version of the harm principle, which originally only advocated the prohibition of harmful use. In the case of a tenancy, only the landlord can seek to have the lease vis-à-vis landlord, enforced. The use¹⁰² and ownership of the business premises are thus inextricably entwined and enforcing a tenancy is thus necessarily an act done qua owner.

The application of Honoré's exhortation to prevent harm in this context, must however, be premised on the duty of property owners, collectively understood. While *each*

⁹⁶ J Waldron *The Right to Private Property* (Clarendon Press Oxford 1988) 49.

⁹⁷ JW Harris *Property and Justice* (OUP Oxford 1996) 32–3.

⁹⁸ Honoré (1987), above n 38, 174.

⁹⁹ Faraci and Jaworski, above n 8, 703–4.

¹⁰⁰ *Ibid.*

¹⁰¹ Honoré (1987), above n 38, 174.

¹⁰² 'Use' here does not refer to the occupying tenant but the right of the landlord ordinarily to enforce lease covenants in the event of non-payment of rent.

landlord may not come under a discrete duty not to enforce a pre-pandemic tenancy had there been a single tenancy, *the collective of landlords* has a duty not to do so. This can again be understood in the context of increasing risk to others. The first cars were introduced in the United Kingdom in the late 19th century, and there was understandably limited regulation regarding the use, licensing, and insuring of vehicles at the time. With few cars on the roads, owning a vehicle created only limited risk to others. As vehicular use became more prevalent over the years however, the aggregate risk to society increased explaining why the State not only governed the use of vehicles but also imposed duties on *owners* to reduce misuse. In both examples involving the regulation of automobiles and tenanted commercial property in the midst of the pandemic, it is the numerosity of potential harms increasing risk to others that explains why the ‘prevention of harm’ aspect of property is engaged.

(D) The Collective Duty of Landlords to Prevent Harm Arises from the Potential Multitude of Harms

Where the law polices the activities of a single user (say a landowner who emits noxious fumes on his land), Honoré’s duty to prevent harm is engaged because the harm caused by even that single harmer is contrary to ownership. Enforcing business tenancies even in the midst of a pandemic is different because there is no discrete wrong committed by any landlord, nor has the pandemic been severe enough to necessarily allow for tenancies to be frustrated. Rather, because the aggregate effect of not protecting business tenancies in the midst of the pandemic would cause significant and widespread harm, Honoré’s theory imposes on owners a collective duty not to use their property harmfully.

The Hansard also provides some support for the application of the prevention of harm principle I suggest underpins the regulation. The handful of parliamentary quotes available suggest that lawmakers have enacted these measures because they believe that greater harms would result if no intervention to protect commercial leases took place. Bill Esterson MP noted during the second Reading of the Coronavirus Bill that hundreds of thousands of workers would be affected if businesses fail.¹⁰³ In the third Reading of the CIG Bill, Lord Callanan stated that the purpose of the enacted law is to provide support for ‘[businesses] to keep themselves afloat, thereby preserving jobs and maintaining productive capacity, enabling the foundations to be laid for this country’s economic recovery.’¹⁰⁴ It is the potential of broad and numerous harms that thus justifies protecting business tenancies. Indeed, barring a gross violation of the arm’s length principle, common law systems do not intervene merely to avoid hardship to an individual. As Penner explains, giving the example of rent control legislation, the justification for the law’s intervention to adjust ‘rights to title and contract’ is to correct for ‘inequalities in bargaining power, information asymmetries, unconscionable exploitation, and so on.’¹⁰⁵ In such cases, sanctity of contract is curtailed to prevent specific injustice. In contrast, preventing hardship to individuals per se is not the motivation of the COVID-19 inspired laws. The Coronavirus Act 2020 provides relief to

¹⁰³ Hansard, HC Deb, col 674, col 73, 23 March 2020.

¹⁰⁴ Hansard, HL Deb, col 804, col 225, 23 June 2020.

¹⁰⁵ Penner (2020), above n 63, 204–5.

business tenancies despite the fact that in most cases, the tenants in question would not have qualified to have the lease set-aside under the doctrine of frustration. Although frustration discharges the contract while the emergency laws only temporarily suspend the landlord's rights, the point remains that the coronavirus-inspired laws have societal welfare rather than individual interests in mind.

(i) *Individual Tenancies Would Not Be Discharged due to Frustration*

When it comes to leases, the doctrine of frustration is particularly reticent. Prior to the Lords decision in *National Carriers Ltd v Panalpina (Northern) Ltd*,¹⁰⁶ it was generally thought that a lease could never be frustrated, even if the building on the land was destroyed, as the risk to the leasehold estate was passed to the tenant upon execution. This makes sense from the paradigm that views a lease purely as an estate in land. While this position was reversed in *National Carriers*, their Lordships kept the application of the doctrine to leases decidedly narrow. *National Carriers* concerned the 20-month closure, by the local council, of the only vehicular access to a tenanted warehouse. As the warehouse was unusable for the 20-month period due to the lack of access, the tenant of the ten-year lease stopped paying rent, declaring the lease frustrated and hence discharged. While a majority of the court held that frustration could apply to leases in principle, the facts at hand were insufficient for the doctrine to apply given the remaining length of the lease, some three years, after the supervening interruption. The 20 months of rent were thus held to be due and payable to the landlord even though the tenant could not use the property for the period in question. The loss in the use of the premises suffered by the tenant in *National Carriers* is probably more than that suffered by tenants affected by COVID-19. In other words, even tenants affected by the pandemic appear unlikely to obtain relief arguing frustration at common law. As *National Carriers* remains good law, it is clear that the purpose of protecting business tenancies is to minimize harm to the community at large; alleviating individual hardship is not the aim—it is the numerosity of affected business tenancies that triggers the harm principle and justifies owners to accommodate. Comments made by MPs about alleviating hardship are necessarily in the context of broader concerns to protect the economy as a whole, ie Parliament must intervene because of the numerosity of harms.

Thus, the implementation of the 'prevention of harm' incident this paper advocates is premised on avoiding harms to a group/community/society, rather than to *individuals*, for to hold otherwise is simply an assertion that courts should more readily allow for leases to be frustrated. This is consonant with Dagan's and Gray's view that ownership and social responsibility are deeply intertwined. In identifying the prohibition of harmful use (which he later describes as the duty to prevent harm), Honoré also links the social aspect of ownership with its limitations.¹⁰⁷ Thus, while isolated hardships may be occasioned by tenants unsuccessful in pleading frustration, whether in the context of a pandemic or not, this is not the harm the thesis envisions prevented, but rather the prevention of community harms stemming from the collective duty of landlords not

¹⁰⁶ [1981] 2 WLR 45.

¹⁰⁷ Honoré (1961), above n 44, 144–5: '...ownership has never been absolute. Even in the most individualistic ages of Rome and the United States, it has had a social aspect. This has usually been expressed in such incidents of ownership as the prohibition of harmful use, liability to execution for debt, to taxation and to expropriation by the public authority.'

to use their properties in a harmful manner. Referencing Faraci and Jaworski's work, such a duty emerges when ownership increases risk to others.¹⁰⁸ The numerosity of tenancies¹⁰⁹ increases risks to others and explains why such a collective duty arises—if landlords were allowed to enforce pre-pandemic tenancies, the resultant harm to tenants, businesses, employees and ultimately even landlords would be devastating. While Honoré explains the harm principle on a discrete basis (do not use *your* umbrella to poke your neighbour's ribs), the modified approach I am advocating has significant explanatory power to determine when accrued or existing legal rights can be adjusted: when ownership causes harm to the collective because of how each owner is rationally expected to use their property. The numerosity of potential harms explains why the government has placed a collective duty on landlords not to use their property in a harmful manner.

An external change of the environment, through no fault of anyone, has made the previously non-harmful activity of adhering to a tenancy agreement potentially harmful, due to the increased risk caused by the collective way in which owners would rationally use their property. Society is empowered to stop landowners from using their tenanted properties in a harmful manner as landlords cannot be expected to voluntarily cease enforcing their pre-pandemic business tenancies. Permitting landlords to insist on their strict contractual rights in the midst of a pandemic is thus harmful.

5. CONCLUSIONS

*The government seems to assume that every single imbalance is where the landlord has a lot of power and the tenant has next to none. Well, that is certainly not always the case. And we say to the government: the onus is on you when you promulgate these regulations to get this right, because people's lives and livelihoods will be in jeopardy if you get this wrong. If people lose their sole source of income, people who have got nowhere else to go, then the government will be held responsible for the consequences of that. They have been given enormous power, they are seeking enormous power. They must be held accountable for how that is used, because we are talking about real people's lives: tenants and landlords.*¹¹⁰

Honoré's incident of ownership advocating the duty to prevent harm rationalizes the protection of business tenancies. More than simply an endeavor in re-labeling the actions of lawmakers, adopting a modified version of Honoré's theory provides an ethical framework to explain why the rights of landlords are justifiably, temporarily stayed, and contributes toward a more holistic understanding of what property rights entail. There are at least two justifications for the thesis.

First, the legitimacy of the regulation is promoted because the principle of preventing harms appeals to one's innate sense of rationality and fairness. Because the suggested rationale does not violate property, since intrinsic to ownership is the duty to prevent harm, Honoré's incident brings greater legitimacy than exhortations that the law is needed simply for the greater good. The incident to prevent harm provides the

¹⁰⁸ Faraci and Jaworski, above n 8.

¹⁰⁹ It is the numerosity of affected tenants that engages the duty to prevent harm on the part of the landlord, not the number of owners per se; in a mall for instance, a single owner may be landlord of hundreds of shops.

¹¹⁰ Victoria, *Parliamentary Debates*, Legislative Council, col 1216, 23 April 2020. This was made in the context of enacting Australia's *SME Commercial Leasing Principles during COVID-19*. Like the Coronavirus Act 2020, this protects business tenancies against landlord enforcement in light of the coronavirus.

ethical underpinning to justify why accrued legal rights in relation to property can be curtailed.¹¹¹ Unlike theories posited at a high level of abstraction, Honoré's concept of ownership is decidedly practical. His incidents of ownership not only propose what property is but also provide guidance in resolving outstanding issues in property. This functional benefit is laudable; Wyman¹¹² observes that theories supporting such conceptual analysis are increasingly relevant, and hence important to the development of the common law.¹¹³ Protecting business tenancies are justified not simply because doing so is for the greater good, but because allowing landlords to enforce their pre-coronavirus leases in the midst of a pandemic would breach the collective duty of landlords' not to use their property in a harmful manner.

Second, adopting Honoré's incident to prevent harms has signaling value in providing guidance going forward when authorities should curtail legal rights, ie when the societal harm occasioned by ownership is an affront to property. As preventing harm as opposed to seeking utilitarian gains is championed, the mind shift sought necessarily limits the extent of injustice when laws are enacted. Blandy, Bright, and Nield observe that the norms that touch on property relationships are not rigid 'but evolve responsively to the spatial, temporal and lived dimensions of property in land.'¹¹⁴ As such dimensions take into account the reality of the environment, an interpretation of property which adopts Honoré's concept of ownership including the duty to prevent harm provides a principled justification to legitimize the interference of the rights of commercial landlords as an evolution of 'property'.

(A) The Avoidance of Harm, Not Utilitarianism Is Sought

While seeking to extend Honoré's incident of ownership when harm is caused to the many, I am not advocating for a utilitarian calculus. Indeed, the prevention of harms is a better ethical yardstick than weighing net utils. First, utilitarianism faces the practical problem of implementation because of the need to measure or at least estimate the expected utility derived from any given decision. The second weakness of utilitarianism is that it is consequentialist in nature. Taken to its logical conclusion, an outcome may be warranted even if injustice occurs, so long as the net utility is positive. In the context of America's Affordable Care Act, Mankiw rejects a utilitarian policy framework, advocating instead for the 'do no harm' principle.¹¹⁵ Similarly, Finsterbusch rejects utilitarianism on the basis that it sacrifices democracy, equality, justice, liberty and virtue to the altar of the 'maximum happiness principle.'¹¹⁶

Admittedly, there will always be some elements of utilitarianism or weighing of interests, often imprecisely, in law-making.¹¹⁷ Even if a blended approach in policy-making

¹¹¹ Albeit in a different context, B Björkman and SO Hansson 'Bodily Rights and Property Rights' (2006) 32(4) *Journal of Medical Ethics* 209 has adopted Honoré's prevention of harmful use to justify the principle of bodily rights.

¹¹² K Wyman 'The New Essentialism in Property' (2017) 9(2) *Journal of Legal Analysis* 183, 187.

¹¹³ See S Balganes and G Parchomovsky 'Structure and Value in the Common Law' (2015) 163 *U Pa L Rev* 1241.

¹¹⁴ S Blandy, S Bright and S Nield 'The Dynamics of Enduring Property Relationships in Land' (2018) 81(1) *MLR* 85, 86.

¹¹⁵ G Mankiw 'When the Scientist is also a Philosopher' *New York Times* (22 March 2014) <https://www.nytimes.com/2014/03/23/business/economic-view-when-the-scientist-is-also-a-philosopher.html?_r=0> (accessed 13 January 2021). Mankiw is a chaired Professor of Economics at Harvard University.

¹¹⁶ K Finsterbusch 'How Should Policy Decisions Be Made?' (1989) 7(4) *Impact Assessment* 17, 18.

¹¹⁷ The examples are countless: Do we increase the speed-limit by 10 km/h on an expressway knowing that statistically five more people will die each year in exchange for generating \$x more in implied efficiency? The converse shows that neither query is trite: Do we abolish cars on roads to statistically save 300 lives per year at a cost of \$y in lost GDP?

were adopted, leading with Honoré's incident preventing harm as the premise for justifying the protection of business tenancies, and affirming property rights in general, provides a better validation than pure utilitarianism. Because the theory is grounded in property, the temporary suspension of landlords' rights can be justified and explained on the basis that ownership, particularly of an enduring asset, carries with it the social responsibility of ownership to both occupiers and society at large. Furthermore, because preventing harm rather than maximizing net utility is the goal, Honoré's incident necessarily blunts the extent of injustices when enacting new laws. Adopting a framework which seeks the avoidance of using property harmfully is an improvement over utilitarianism and there is merit in viewing these incursions from the perspective of not using property in a harmful manner. Thus, even if the decision to intervene is normatively correct, which this paper assumes, it may be insufficient for parliamentarians to simply assert that so-and-so law or amendment is in the best interests of society. Accordingly, the paradigm shift sought is away from utilitarianism and toward a concept of ownership justifying the prevention of harm that Honoré advocates.

(B) Honoré Provides a Rational Basis to Explain Shifting the Economic Burden from Tenants to Landlords

In describing the origins of land law, scholars invariably commence their sojourn with the feudalistic doctrine of estates where allodial title belongs to the Crown alone. Below the peak of the pyramid, a series of fiefdoms, overlords, and other lesser landlords ultimately lease estates in land to tenant peasant-farmers, the individuals who actually worked the land. To students of the common law therefore, the narrative that landlords are not a vulnerable class needing protection is perhaps influenced by this romanticized caricature of the landed gentry. Such sentiments are by themselves insufficient to justify curtailing the rights of landlords.

Property is an institution, a fundamental part of what North describes as 'rules of the game' that structure social interactions and affect economic outcomes.¹¹⁸ The United Kingdom has enacted laws seeking to support business tenancies as part of its collective response to the pandemic as it believes that at least in these limited circumstances and scope, the adaptation of property rights in favor of communitarian interests are justified. Like much of policy-making, this is a delicate process with subjective elements. In enacting laws that have the effect of usurping landlord's rights, there is always a concern that because landlords do not appear to be a vulnerable group requiring protection, and more cynically, because they are a voting minority, they can be made to bear a higher share of the burden in an economic fallout. In the context of the landlord lobby seeking to resist greater protections for tenants after the First World War, Englander observed that 'property owners ... failed to convince vote-hungry politicians that they possessed policies with attraction sufficient to still an ever clamorous electorate', and that 'in political terms landlords were a liability. Members of Parliament hastened to flee from them as if before a plague.'¹¹⁹

¹¹⁸ D North *Institutions, Institutional Change, and Economic Performance* (CUP Cambridge 1990) 7.

¹¹⁹ D Englander *Landlord and Tenant in Urban Britain 1838–1918* (Clarendon Press Oxford 1983) 78–80.

In contrast to the parliamentary debates which provide cursory explanations of ‘protecting the economy as a whole’, I present a principled approach grounded in property which applies a modified version of Honoré’s incident of ownership preventing harm, to justify the enactment of the laws protecting business tenancies. This provides an improved basis to justify the emergency regulations. While politicians may not necessarily make sound policy and legislative changes based on hard data or sound dogma, where property rights are concerned, there should be cogent reasons from deviating from the norm.¹²⁰

Furthermore, while on this occasion it fell on landlords to alleviate harm, it is conceivable that the same principles articulated would, in the context of an alternative maelstrom, require tenants to have their rights adjusted to prevent harm to others. For instance, if the economy were facing high inflation rates (though below the threshold to trigger frustration), it may be necessary to allow landlords to collect inflation-indexed rents notwithstanding the parties’ contractual agreements, if a failure to intervene would cause significant, widespread harms. In the context of the enactment of the Landlord and Tenant Act 1927 and Landlord and Tenant Act 1954, Haley explains that reforms came about in both post-war periods when the ‘appetite for change was whetted by extreme market distortions, an anti-profiting ethos and the need to achieve economic recovery’¹²¹ and consequently, that the ‘public interest must predominate over rights of private property.’¹²² I suggest that Honoré’s duty to prevent harm provides the ethical basis to explain when recasting of these rights should be allowed to take place.

(C) Quantifying the Extent of Harms

An interesting question that arises is how much harm is needed before intervention can take place: Honoré himself did not mean that ownership rights should be curtailed by even the slightest of harms,¹²³ and even the welcomed addition of Faraci and Jaworski’s ‘exposure to risk’ requirement to the incident prohibiting harmful use provides the ethical justification for intervening, but provides no instruction as to the harm threshold when intervention can begin. Indeed, any tenant or groups of tenants facing hardship would always plead for relief. In determining how much harm is needed before triggering a response, the focus is on avoiding harm to the community at large, rather than a utilitarian cost–benefit exercise. In a pre-coronavirus situation, enforcement action by a landlord against a tenant for non-payment of rent cannot be considered a harmful use of property because ownership does not increase risk to society, even if adhering to the contract mean that certain particular tenants suffer hardship. In the context of a pandemic however, the enforcement of pre-coronavirus commercial leases clearly poses a serious risk to the community and the temporary suspension of enforcing rent covenants are thus justifiably curtailed.

¹²⁰ E Ti ‘Politics and Policy: Chinese Money And Its Impact on the Regulation Of Residential Property in the West’ (2019) 83(3) *Conv* 371, 389.

¹²¹ Haley (1999), above n 12, 227.

¹²² *Ibid.*

¹²³ Honoré (1961), above n 44, 123: ‘There may, indeed, be much dispute over what is to count as “harm” and to what extent give and take demands that minor inconvenience between neighbours shall be tolerated.’

Despite not articulating where the line in the sand is drawn, the thesis is not weakened. The gradations and shades of meaning ascribed to proof, loss, liability and categorization in the common law have always been limited by language, and this has not hampered its development. As Endicott writes, while vagueness is an intrinsic feature of the law,¹²⁴ discretion on the part of officials in resolving these uncertainties is not necessarily contrary to the rule of law.¹²⁵ Accordingly, while an exact answer to ‘how much harm’ cannot be given, adopting Honoré’s incident of ownership regarding the prevention of harm presents a workable yardstick to guide lawmakers when to intervene and make adjustments when needed, to accrued legal rights affecting property.

¹²⁴ T Endicott ‘Vagueness and Law’ in G Ronzitti (ed.), *Vagueness: A Guide* (Springer 2011) 177. One example cited by Endicott at 172 is the Criminal Justice and Public Order Act 1994 section 63(1) which states that the police are empowered to order a rave to be called off if the music ‘is likely to cause serious distress to the inhabitants of the locality’.

¹²⁵ Ibid 188.