

# Reason or Mumbo Jumbo: The Common Law's Approach to Property

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## 1. Introduction

FROM A NON-LAWYER'S POINT OF VIEW, reasoning in common law cases and in the commentaries built upon them appears as nowhere more arcane than when it is dealing with property. It is supposed to be concerned with who owns what, or has rights and responsibilities in respect of which, resources; but it is sprinkled with technicalities and in-bred conceptualisations. The legal historian, F. W. Maitland, once wrote that English real property law was full of rules 'which no one would enact nowadays unless he were in a lunatic asylum'.<sup>1</sup> Our property-holdings are important. Why should they be at the mercy of a tortuous vocabulary that most people cannot be expected to grasp?

In the second section of this lecture, I investigate some reactions, in the history of political philosophy and social theory, to these peculiarities of the common law. In the third I consider the claim that, within the law of modern property systems and especially those derived from the common law, the concept of property has disintegrated, so that it no longer means anything to say that a person 'owns' a resource. In the fourth, I try to show how, despite its technical overlays, the common law does deploy conceptions of ownership. That, I shall suggest, is the key to the ethical underpinning of common law reasoning in relation to

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<sup>1</sup> F. W. Maitland, 'The Making of the German Civil Code', in H. A. L. Fisher, ed., *The Collected Works of Frederick William Maitland*, vol. 3, pp. 474–88 at 486.

property. In the fifth section I consider instances of purely doctrinal reasoning. I suggest that what looks like dogma for dogma's sake may, after all, have ethical foundations. My conclusion is that, at its best, the reasoning of the common law, like other juristic doctrine, represents a specialist variety of social convention whereby the mix of sound property-specific justice reasons is made concrete. Surface reasoning is peculiar to lawyers. Underlying justifications are not.

## 2. The peculiarities of common law reasoning

When, in justification of an article of English common law, calling uncles to succeed in certain cases in preference to fathers, Lord Coke produced a sort of ponderosity he had discovered in rights, disqualifying them from ascending in a straight line, it was not that he *loved* uncles particularly, or *hated* fathers, but because the analogy, such as it was, was what his imagination presented him with, instead of a reason, and because, to a judgment unobservant of the standard of utility, or unacquainted with the art of consulting it, where affection is out of the way, imagination is the only guide. . . .

Not that there is any avowed, much less a constant opposition, between the prescriptions of utility and the operations of the common law. . . . The cobwebs spun out of the materials brought together by 'the competition of opposite analogies', can never have ceased being warped by the silent attractions of the rational principle: Though it should have been, as the needle is by the magnet, without the privity of conscience.<sup>2</sup>

So wrote Jeremy Bentham in 1789. Bentham was an enthusiastic supporter of the institution of private property. Nothing but property (he maintained) could supply the necessary incentive for industry. Nothing else could provide that security of expectations which was so necessary to the individual's life-plans. So much was this the case that any property distribution, no matter what its basis, should be largely left in place<sup>3</sup>—a conclusion that, starting from quite different premises, modern libertarians also embrace.<sup>4</sup>

<sup>2</sup> Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart (1970), pp. 22, 24.

<sup>3</sup> Jeremy Bentham, *Principles of the Civil Code*, in Bentham, *The Theory of Legislation*, ed. C. K. Ogden (1931), pp. 109–22.

<sup>4</sup> See, for example, the argument of Loren Lomasky to the effect that human persons have basic rights by virtue of being project pursuers, that such rights require inviolable ownership of resources and that, since nothing rationally dictates any system of title, any conventionally arising system should be maintained—Loren E. Lomasky, *Persons, Rights and the Moral*

However, Bentham was no fan of the common law. He attacked it with increasing venom, not because of the distribution of resources to which it gave rise, but because of what he perceived as the obscurantism of its reasoning processes.<sup>5</sup> Bentham supposed that anyone who believed he had reasons to offer for supporting or opposing some proposition of law or morality must either appeal to consequences (as a good utilitarian should), or else simply announce his subjective likes or dislikes. In the latter case, he would be appealing merely to what Bentham disparagingly described as ‘the principle of sympathy and antipathy’.<sup>6</sup> But then, looking about him at the ramshackle inheritance of feudal concepts within the common law property system of his day, he spied something else going on. He did not, as a modern advocate of critical legal studies might, suppose that fallacious reasoning was a smokescreen to hide illegitimate structures of hierarchy and differentiation.<sup>7</sup> He concluded that there was a special quirky kind of legal imagination which did duty as a reason.<sup>8</sup>

In the passage quoted above, he chose a good example to make his point. He was evidently referring to the *hereditas non ascendit* rule whereby an intestate’s property might descend to issue or to collaterals, but could not ascend to ancestors.<sup>9</sup> The rule was enunciated in Ratcliff’s Case.<sup>10</sup> One of the reasons given in support of the rule<sup>11</sup> was that an inheritance, having weight, must naturally go down and not up since everything that is heavy travels downwards—‘omne grave fertur deorsum’.<sup>12</sup>

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*Community* (Oxford, 1987), ch. 6. Compare Richard Epstein’s aspiration to found libertarian outcomes on historical entitlements, discussed in Section 3 below. F. A. Hayek, discussed later in this section, reaches similar conclusions but without postulating either basic rights or historical entitlements.

<sup>5</sup> For detailed analysis of Bentham’s attacks on the common law, see Gerald Postema, *Bentham and the Common Law Tradition* (Oxford, 1986), chs. 2 and 8. See also N. E. Simmonds, *The Decline of Juridical Reason* (Manchester, 1984), ch. 5.

<sup>6</sup> Bentham, *Introduction to the Principles of Morals and Legislation*, pp. 22–5; *The Theory of Legislation*, pp. 6–13.

<sup>7</sup> See R. M. Unger, *The Critical Legal Studies Movement* (Cambridge, Mass., 1986).

<sup>8</sup> David Hume had already suggested that imagination plays a role in the law’s approach to property, but he was much more sanguine about it than was Bentham—David Hume, *A Treatise of Human Nature* ed. T. H. Green and T. H. Grose (1874), vol. 2, pp. 283–4.

<sup>9</sup> For this suggestion I am indebted to Dr Michael McNair of St Hugh’s College, Oxford.

<sup>10</sup> (1592) 3 Co. Rep. 37a at 40a–40b, 76 ER 713 at 725–7.

<sup>11</sup> The other reason was Biblical authority—see Numbers, ch. 27, vs. 8–11.

<sup>12</sup> (1592) 3 Co. Rep. At 40b, 76 ER at 727.

Such grotesque examples of juristic imagination are, we may hope, a thing of the past.<sup>13</sup> Nevertheless, modern property theory<sup>14</sup> has to wrestle with the jejune concepts of the common law. If a political philosopher consults his lawyer-colleagues about the meaning of property he is likely to be advised, as Andrew Reeve complains, that the only way to understand the matter is to immerse oneself in the technicalities of 'seisin', 'remainderman' and 'estate pur autre vie'.<sup>15</sup>

For Bentham, the alternative to the juristic imagination which he mocked was utility (the 'rational principle'). Fortunately, there was no complete opposition between utility and the operations of the common law. The judges had, after all, established a system of private property and any such system was a blessing. What was required was rational codification to clear away the dead wood. In this way the touch paper was lit for an intermittent project of reform of English property law which continues to this day. The courts work out solutions to particular problems as they arise, in part through the competition of opposite analogies. Law reformers assess the consequences. Practitioners lobby.<sup>16</sup> Parliament, sometimes, intervenes with piecemeal, or even radical, conceptual restructuring.

There are those who cry 'havoc!' The Benthamite project, by denigrating evolutionary common law and by elevating the sovereign legislature as the primary source of law, threatens just that security of expectations which Bentham himself prized. Once allow that the only authority for

<sup>13</sup> The *hereditas non ascendit* rule was abrogated by the Inheritance Act 1833, section 6.

<sup>14</sup> Writings within this burgeoning area of scholarship include: Lawrence C. Becker, *Property Rights: Philosophic Foundations* (1977); Alan Ryan, *Property and Political Theory* (Oxford, 1984); Andrew Reeve, *Property* (1985); Jeremy Waldron, *The Right to Private Property* (Oxford, 1988); Stephen R. Munzer, *A Theory of Property* (Cambridge, 1990); James Grunebaum, *Private Ownership* (1991); Stephen Buckle, *Natural Law and the Theory of Property* (Oxford, 1991); Margaret Jane Radin, *Reinterpreting Property* (Chicago, 1993); John Christman, *The Myth of Property* (Oxford, 1994); Carol M. Rose, *Property and Persuasion* (Boulder, Col., and Oxford, 1994); J. W. Harris, *Property and Justice* (Oxford, 1996); James Penner, *The Idea of Property in Law* (Oxford, 1997); Gregory S. Alexander, *Commodity and Propriety* (Chicago, 1997); Richard Pipes, *Property and Freedom* (1999); Roy Vogt, *Whose Property* (Toronto, 1999); Joseph Singer, *Entitlement: The Paradoxes of Property* (Princeton, NJ, 2000).

<sup>15</sup> Andrew Reeve, 'Convention and Justification', *Oxford Journal of Legal Studies*, 19 (1999), 323 at 327–8.

<sup>16</sup> For contrasting assessments of the motives which impelled professional conveyancers to oppose Benthamite reforms in the nineteenth century, see Avner Offer, *Property and Politics 1870–1914: Landownership, Law, Ideology and Urban Development in England* (Oxford, 1981); and Stuart Anderson, *Lawyers and the Making of English Land Law 1832–1940* (Oxford, 1992). Offer sees little else but financial self-interest. Anderson insists that the practitioners had sound objections to bureaucratic centralisation.

those rules which underpin our property-holdings is the *ipse dixit* of the sovereign, and we will be faced, not just with technical adjustments, but with substantive redistribution in the name of ‘social justice’. I recall the occasion of a lecture delivered 30 years ago at the London School of Economics by F. A. Hayek. It had been advertised as ‘The Destruction of Liberalism by Logical Positivism’. Philosophers turned up in droves, intrigued by a suggested connection between such disparate systems of thought, only to be told: ‘There has been an error in the notice. Professor Hayek’s lecture is entitled: “The Destruction of Liberalism by *legal* Positivism”.’

Hayek argued that development through incremental steps, in the manner of the common law, is the only rational approach to societal conflicts. No sovereign legislator possesses godlike fore-knowledge of the consequences of his blueprints and none begins from an Archimedian point of neutrality. Instead, the power of the legislature is seized by permanently warring interest-groups. Organic development of custom, on the other hand, yields ‘rules of just conduct’ which protect persons and their property. The soundness of any particular rule may be tested from within a juristic tradition, by asking whether its current formulation is compatible with the ‘order of actions’ established by all the other rules. Private property and the market are safe with the common law.<sup>17</sup> Hayek offers this analysis as a critique of legal positivism; but he says little by way of illustration of the positive merits of common-law compatibilist reasoning,<sup>18</sup> and nothing at all about how it is worked out through common-law property terminology.

What Bentham called ‘imagination’, Max Weber called ‘legal logic’. In Weber’s contention, ‘from the point of view of legal logic’, it is ‘irrational’ to seek the ‘economic and utilitarian meaning of a legal proposition’. ‘This is just as true of the English law which we glorify so much to-day,

<sup>17</sup> F. A. Hayek, *Law, Legislation, and Liberty*, vol. 1, *Rules and Order* (1973), pp. 11–15, 17–20, 26–9, 48–52, 65–71, 85–97, 106–11; vol. 2, *The Mirage of Social Justice* (1976) pp. 24–7, 34–44, 107–12, 123–32, 135–47.

<sup>18</sup> It is a controversial question whether ‘coherence’ should play an independent justificatory role within legal reasoning. For arguments that it should, see Neil MacCormick, ‘Coherence in Legal Justification’, in A. Pecznik *et al.*, eds., *Theory of Legal Science* (1985) pp. 235–51, and R. Alexy and A. Pecznik, ‘The Concept of Coherence and its Significance for Discursive Rationality’ *Ratio Juris*, 3 (1990), 131–47. For arguments that it should not, see J. Raz, *Ethics in the Public Domain* (Oxford, 1994), pp. 261–309. This abstract question is subsumed, so far as common-law property institutions are concerned, within the issues dealt with in Sections 4 and 5 below.

as it has been of the ancient Roman jurists or of the methods of modern Continental legal thought.<sup>19</sup>

To understand what Weber had in mind by ‘legal logic’, we must distinguish between ‘law’ in the sense of a momentary legal system, and ‘law’ as materials historically invoked within some official tradition.<sup>20</sup> Weber recognises that law is commonly conceived of as constituted by ‘prescriptive, prohibitory, and permissive’ propositions.<sup>21</sup> This is, I would submit, an accurate account of a momentary legal system. It is the conception of law presupposed in the introduction to any textbook which announces that the law set forth is that in force at a certain date. Granted such a conception, juristic science assumes that logical conflicts are to be ruled out.

That view is not universally accepted. Hans Kelsen, for example, changed his opinion, during the last decade of his life, on the question whether contradictory norms could be simultaneously valid.<sup>22</sup> The time dimension attributed to the propositions under consideration is all important. If, as Kelsen supposed, they must have been created—posited as legal norms—at some historical date and then continue in existence until brought to an end by some repealing or derogating act of will, then, indeed, any two of them may be in conflict. If, on the other hand, the only relevant time-frame is the present instant, contradiction defies logic. One cannot affirm the existence, and also the non-existence, of a legal duty covering the same act-situation on the same occasion. As Neil MacCormick has argued, the ‘requirement of consistency’ imposes a fundamental restraint on legal reasoning. It requires courts ‘not to institutionalize conflicting rules; but rather to give only such rulings as can be fitted without inconsistency into an already established body of rules.’<sup>23</sup> Legal logic of this kind merely parallels classical propositional logic.

For the most part, however, Weber conceives of law as a historic accretion of norms, principles, maxims, definitions, and classifications, forming part of a particular juristic tradition. When a proposition (constituting part of the present law) may be formulated in different ways,

<sup>19</sup> Max Weber, *Law in Economy and Society*, ed. Max Rheinsten, trans. Edward Shills and Max Rheinstein (Cambridge, Mass., 1954), pp. 307–8.

<sup>20</sup> I have discussed this distinction in J. W. Harris, *Law and Legal Science* (Oxford, 1979), especially at pp. 10–14, 41–3, 65–73, 97–103, 111–22.

<sup>21</sup> Weber, *Law in Economy and Society*, p. 99.

<sup>22</sup> See my ‘Kelsen and Normative Consistency’, in Richard Tur and William Twining, eds., *Essays in Honour of Kelsen* (Oxford, 1986), pp. 201–28.

<sup>23</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford, 1978), pp. 196–7.

doctrinal reasoning indicates which formulation is correct by reference to the inherent conceptual structure revealed in the historic system. The legal logic, peculiar to the professional lawyer, is that process of conceptual sublimation which articulates this inherent structure. Professional legal rationality is 'formal', in one of two senses, depending on the class of 'legal *honoratiore*s' who control it.<sup>24</sup> First, it may be casuistic. Casuistry ('cautelary jurisprudence') insists that the ruling in a case must be based on precedent, or on analogy with some earlier ruling.<sup>25</sup> Secondly, professional legal rationality may be 'logically formal'. In this case, concepts are subsumed, in accordance with their intrinsic meaning, under highly abstract propositions, forming a consistent and 'gapless' juristic system. New legal questions may then be answered, not by reference to the facts or concepts forming the *protasis* of some particular legal rule, but by derivation from the second-order abstract propositions by which the intrinsic meanings of all legal concepts within the system are tied together.<sup>26</sup> Casuistry was typical of early Roman law and of common law systems. It was, Weber claimed, a 'lower' kind of legal science, when compared with the logically formal rationality deployed by modern continental European legal scholars.<sup>27</sup>

Consider two recent examples of what would, in Weber's terms, amount to conceptual casuistry, both involving decisions of the House of Lords. In one (the Prudential Assurance case), the House reasserted a time-honoured proposition that a contract conferring exclusive possession of land for an indefinite term cannot constitute a lease, with the result that landlords who had contracted not to terminate a tenancy unless the land should be required for a road-widening scheme could ignore that restriction. The House so ruled even though the majority of their Lordships could see no good reason for this limitation on freedom of contract.<sup>28</sup> The other case concerned complaints by residents about disruptions caused by the Canary Wharf development in London's Dockland. The majority held that, irrespective of social considerations to the contrary, what was done could not constitute a legal nuisance to members

<sup>24</sup> For a discussion of the varied and sometimes inconsistent senses in which Weber employs the concepts of rationality and formality, see A. T. Kronman, *Max Weber* (1983), ch. 4.

<sup>25</sup> Weber, *Law in Economy and Society*, pp. 61–4, 73–4, 178, 198–204, 209–20, 315–18, 349–56.

<sup>26</sup> *Ibid.*, pp. 61–4, 145, 204–5, 220–3, 266–9, 274–9, 296–8, 303–15, 349–55.

<sup>27</sup> *Ibid.*, p. 316. I have argued that reasoning of all the kinds differentiated by Weber is to be found in English property law—see Harris, 'Legal Doctrine and Interests in Land', in J. M. Eekelaar and J. Bell, eds., *Oxford Essays in Jurisprudence*, 3rd Ser. (Oxford, 1986), pp. 167–97.

<sup>28</sup> *Prudential Assurance Co Ltd v. London Residuary Body*, [1992] 2 AC 386.

of households other than owners. Owners' spouses or lodgers had no standing to complain.<sup>29</sup> Furthermore, contrary to Weber's suggestion, instances of what he called 'logically formal' reasoning are to be met with in common law decisions. They occur when what is invoked is not so much the boundary of some particular concept—what is a 'lease'? what is a 'nuisance'?—but rather a higher order maxim delimiting all concepts within a branch of the law. It is settled, for example, that there is a *Numerus Clausus* of proprietary interests in land so that parties to transactions may not invent novel ones at their pleasure.<sup>30</sup> I shall return to these examples later in this lecture.

The writers so far considered concur in supposing that common law reasoning is peculiar—peculiarly capricious (Bentham); peculiarly apposite as a bastion against positivism (Hayek); peculiar to experts trained within a certain tradition (Weber). However, if it were really true that legal reasoning about resource-holdings is somehow sealed off from the normative concerns of non-lawyers, why should citizens be expected to defer to it? It would indeed then look like caste mumbo jumbo. Most contemporary jurisprudential opinion, positivistic or not, denies that there is any such sealing off.<sup>31</sup> For example, Joseph Raz insists that, when reasoning according to law goes beyond invocation of authoritative sources, it is 'quite commonly straightforward moral reasoning',<sup>32</sup> but

<sup>29</sup> *Hunter v. Canary Wharf Ltd*, [1997] 1 AC 655.

<sup>30</sup> *Keppell v. Bailey*, (1834) 2 My & K. 517, 39 Eng Rep 1042. *Hill v. Tupper*, (1863) 2 H & C 121. *Ashburn Anstalt v. Arnold* [1989] Ch. 1. *London and Blenheim Estates Ltd v. Ladbroke Retail Parks Ltd* [1993] 4 All ER 157.

<sup>31</sup> Ernest Weinrib might be thought to dissent from this view, since he espouses 'legal formalism'—Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass., 1995). His conception of 'formalism', however, differs from Weber's precisely in that it incorporates ethical justification. By insisting on the bipolarity of private law relations Weinrib seeks to isolate private law, not from ethics, but from distributional considerations. I would suggest that this aspiration, whatever its merits in relation to tort or contract, cannot succeed for those aspects of private property law which govern the acquisition of original titles or titles which prevail against a range of persons (bankruptcy creditors and so on). The autonomy-promoting and distributional aspects of a property institution may be combined within a Hegelian framework—see Harris, *Property and Justice*, pp. 232–8; M. G. Salter, 'Hegel and the Social Dynamics of Property Law', in J. W. Harris, ed., *Property Problems: From Genes to Pension Funds* (London, The Hague, and Boston, 1997), pp. 257–73; and, for a more general Hegelian account of the common law, Alan Brudner, *The Unity of the Common Law* (Berkeley, Calif., 1995). Whether the literature on economic analysis of law is to be understood as sealing off law from ethics depends on whether we are to understand its exponents to be offering 'efficiency' as a criterion that is simultaneously cogent and amoral.

<sup>32</sup> Joseph Raz, 'On the Autonomy of Legal Reasoning', in Raz, *Ethics in the Public Domain* (Oxford, 1994), pp. 310–24, at 317.

that ‘doctrinal reasons . . . have a role to play when natural reason runs out.’<sup>33</sup>

This trend in modern jurisprudential opinion suggests that cogency can be attributed to doctrinal reasoning only after cogency has been located in moral reasoning, the priority of ethics over law. Where, however, within the immense array of ethical theorising are we to find the blueprint for what Raz calls ‘straightforward moral’ or ‘natural’ reasons? Within the space of this lecture I can do no more than announce that I find no satisfactory answer in those theories which aspire to derive all ethical conclusions from a unique starting-point. The best known are utilitarianism and Kantianism. The former rightly stresses the ethical importance of consequences, but wrongly insists on a single matrix within which all other ethical considerations can be dissolved. The latter rightly stresses the ethical significance of choice, but wrongly supposes that an adequate body of moral norms may be derived from the mere idea of abstract human agency.

Another trend in modern ethical theory is to turn away from supposed Archimedean starting-points and to place ethical reasoning within concrete traditions in an Aristotelian fashion. This approach is adopted with enthusiasm by Alasdair MacIntyre<sup>34</sup> and more guardedly by Bernard Williams.<sup>35</sup> We are recommended to pay attention, not merely to the rights and duties conferred and imposed by some system of rules, but also to thick ethical concepts, such as desert, gratitude, friendship and loyalty, and to the interactive roles into which we are born within traditional forms of human association. Now the common law is certainly replete with thick concepts. The trouble is that it is no longer a thick tradition. There may have been a time when its requirements were known as part of an informal, oral tradition participated in by a small coterie of judges and sergeants centred around the inns of court in London.<sup>36</sup> The common law has, however, during the past two centuries evolved into a supra-jurisdictional reasoning structure sharing only a conventional deployment of concepts and a loose deference to certain written sources.<sup>37</sup>

<sup>33</sup> *Ibid.*, p. 323.

<sup>34</sup> Alasdair MacIntyre, *After Virtue*, 2nd edn. (1985), especially chs. 5 and 12–15; and *Whose Justice? Which Rationality?* (1988), especially chs. 7, 8, 11, and 18.

<sup>35</sup> Bernard Williams, *Ethics and the Limits of Philosophy*, 3rd edn. (1993), especially chs. 3 and 10 and postscript.

<sup>36</sup> For the argument that this was once the case, see A. W. B. Simpson, ‘The Common Law and Legal Theory’, in A. W. B. Simpson, ed., *Oxford Essays in Jurisprudence*, 2nd Ser. (Oxford, 1973), pp. 77–99.

<sup>37</sup> See my ‘The Privy Council and the Common Law’ *Law Quarterly Review*, 106 (1990), 574–600.

Nevertheless, the traditional view of ethics, as compared with its Archimedean counterpart, is suggestive for our quest for rational cogency to this extent. A common law judge, dealing with property matters, administers situated justice. Resource-holdings are for the most part already allocated in ways it is not for him to gainsay. He has a battery of conventional legal concepts to hand. Weber's typology illuminates the kinds of surface reasoning in which he may engage. He is not, however, as I shall suggest, sealed off from the moral considerations which underpin that property distribution. The real-world deployment of the two species of 'legal logic' presupposes, and their concrete implementation stands in dialectical relationship to, those arguments which are taken to render private property institutions justifiable features of political association.

In my *Property and Justice* I endeavoured to demonstrate the rational defensibility of a mix of 'property-specific' justifications and disjustifications—autonomy, incentives, valuable markets, independence from government, labour-desert, privacy, avoidance of illegitimate domination, basic-needs-satisfaction and (in very special contexts) equality of resources; together with the bearing of social convention on all of these.<sup>38</sup> The cogency of common law reasoning in relation to property ultimately derives, I shall argue, from these property-specific justice reasons. That claim runs counter to the view, espoused by some contemporary theorists, that there no longer is, especially in common law systems, any coherent concept of property. To that challenge I turn in the next section.

### 3. The 'disintegration' of property

It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate legal structures of the advanced capitalist economies could easily do without using the term 'property' at all. . . .

We have gone, then, in less than two centuries, from a world in which property was a central idea mirroring a clearly understood institution, to one in which it is no longer a coherent or crucial category in our conceptual scheme. The concept of property and the institution of property have disintegrated.<sup>39</sup>

So wrote Thomas Grey in a much-cited essay twenty years ago. It is but an extreme version of a perennial problem which arises when commentators seek to bring the thoughts about property of political philosophers,

<sup>38</sup> J. W. Harris, *Property and Justice* (Oxford, 1996), part ii.

<sup>39</sup> Thomas C. Grey, 'The Disintegration of Property', in J. Rowland Pennock and John W. Chapman, eds., *Property: Nomos xxii* (New York, 1980), pp. 69–86, at 73, 74.

on the one hand, and those of lawyers, on the other hand, into some sort of mutual focus. Political philosophers investigate the putative moral foundations for the exercise of political authority and the terms of just association between the members of political societies. Among other things, they debate the justice of ‘property’, it being assumed that there is a singular concept for which the term stands. Practising lawyers typically aspire to no global explication of the concept. They are concerned, rather, with what ‘property’ means when it is deployed dispositively within some constitutional, code, statutory or case-law rule or principle.

This characteristic dissonance between philosophers’ and lawyers’ concerns bedevils much of modern property theory. It is especially acute in English-speaking countries because of the common law. Property institutions in common law jurisdictions differ enormously, one from another, in their detailed provisions. Much is, in any case, governed by legislation. What they have in common, however, is a baggage of concepts derived from a feudal English inheritance; together with a preparedness to accept, as persuasive authority, guidance across common law jurisdictions about how such concepts should be understood or developed. Land has pre-eminence within the teaching academy, just because mysterious notions of estates and interests, which have no parallel in lay discourse, have to be mastered. Then there is the division between legal and equitable interests, which transcends all forms of property-holding. In addition, the prevalence of corporate holdings allows for proprietary entitlements to be fractured in all sorts of ways. Add the rise of intellectual property, which may now be becoming the most economically important foundation of private wealth. Above all, people’s holdings are no longer theirs to dispose of as they please in view of the regulatory encroachments of the modern state—what I have called ‘property-limitation’ and ‘expropriation’ rules.<sup>40</sup>

Grey draws the conclusion from all this array of legal particularity that the concept of property has disintegrated. Whatever the merits of the arguments advanced in the seventeenth and eighteenth centuries for asserting a moral basis for property institutions, they have no application today since ‘property’ no longer means anything at all. That branch of political philosophy which nowadays goes under the name of ‘property theory’ should be abandoned.

I would summarise the aspirations of modern property theory<sup>41</sup> as follows: 1. To identify its subject; 2. To investigate normative considerations

<sup>40</sup> Harris, *Property and Justice*, pp. 33–6, 37–8.

<sup>41</sup> See works cited at n. 14 above.

pertinent to that subject; and 3. To address past or contemporary political culture in the light of 1 and 2. On the disintegrationist account, such aspirations, so far as modern culture is concerned, must be abandoned at the first hurdle. There is no subject to which they can relate. All that theory can do is to announce that impasse.

Most philosophers employ the concepts of ‘ownership’ and ‘property’ interchangeably.<sup>42</sup> The same is true within the disintegrationist account. It is not alleged that non-ownership proprietary conceptions, such as easements or profits a prendre, are devoid of meaning. The target is ownership, in the sense of what Tony Honoré described as the ‘full liberal’ concept of ownership.<sup>43</sup> Thomas Merrill has recently suggested that the view that property/ownership is an empty label is today ‘more or less the orthodox understanding of property within the American legal community’.<sup>44</sup>

Strange paradoxes emerge when this nostrum is applied to the constitution’s protection of property. Bruce Ackerman tells us that, whereas non-lawyers think they own things, ‘the dimmest law student’ soon learns that nobody ‘owns’ anything.<sup>45</sup> But then Ackerman also finds that most American judges, who presumably were once very bright law students, reason as if lay notions of ownership were correct after all.<sup>46</sup> Jennifer Nedelsky records that the Federalists, who were principally responsible for the structure of the constitution, took it for granted that there was a coherent common-law conception of property.<sup>47</sup> But since (she says) today we all know that property has disintegrated, it is a mysterious

<sup>42</sup> For example, Frank Snare begins his analysis of ‘the concept of property’ by pointing out that, but for Lockean usage, he might just as well have spoken of ‘the concept of ownership’—‘The Concept of Property’, *American Philosophical Quarterly*, 9 (1972), 200. James Grunebaum investigates the logical criteria for systems of ‘ownership’, starting by mentioning that what he has in mind is what others (infelicitously, in his view) have referred to as ‘property’—*Private Ownership* (1991), pp. 3–4.

<sup>43</sup> A. M. Honoré, ‘Ownership’, in A. G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford, 1961), pp. 107–47. A revised version of the essay appears in Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Oxford, 1986), pp. 161–92.

<sup>44</sup> Thomas W. Merrill, ‘Property and the Right to Exclude’, *Nebraska Law Review*, 77 (1998), 730–55 at 738. Merrill himself dissents from this orthodoxy. For other critics of Grey’s disintegrationist account, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass., 1985), pp. 20–4; Stephen R. Munzer, *A Theory of Property* (Cambridge, 1990), pp. 31–5; John Christman, *The Myth of Property* (Oxford, 1994), pp. 20–3.

<sup>45</sup> Bruce A. Ackerman, *Private Property and the Constitution* (Princeton, NJ, 1977), pp. 26–7.

<sup>46</sup> *Ibid.*, pp. 66, 86, 129–31 and *passim*.

<sup>47</sup> Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago, 1990), ch. 2.

‘puzzle’ that we still find millions of Americans, laymen and lawyers, who go on supposing that they have property rights.<sup>48</sup>

Ackerman recognises that continental European lawyers, not having derived their land law from common law categories, are still in the dark on the matter.<sup>49</sup> Even they ought to have grasped Ackerman’s main objection to speaking of ‘owning’ things, which is that the law never assigns to any single person ‘the right to use anything in absolutely any way he pleases’. He apparently supposes that laymen (and continental lawyers) think that that is what the law does. Speaking personally, I have never encountered anyone, layman or lawyer, of any nationality, who gave it as his view that the law permits an owner to use what he owns in absolutely any way he pleases. There are always what I have called ‘property-independent prohibitions’—universal bans on using things which are not specifically addressed to owners.<sup>50</sup> No admirer of private property has ever contended that I may beat out my neighbour’s brains with a mattock, provided I own the mattock.

If it were true that property is no longer a coherent concept, a fatal blow would be dealt to those theories of justice which uphold historical entitlement on the basis of natural right—the most celebrated being that of Robert Nozick.<sup>51</sup> Such theories suppose that our holdings are just if derived from someone who first came to own a previously unowned resource. Of course they must be rejected if it makes no sense to speak of anyone owning anything.

Nozick does not confront the disintegrationist challenge, but Richard Epstein does. He argues that it can be met from within the common law itself. He maintains that we are faced with the following stark alternatives (in a manner reminiscent of Hayek’s critique of Benthamite positivism). Either we are in a Hobbesian world in which our claims to use resources derive from governmental choices, or we are in a Lockean world in which such claims derive from supra-legal moral entitlements.<sup>52</sup> The American constitution, he contends, presupposes the latter—a ‘natural law account of property that is able to resist legislative nullification’.<sup>53</sup> Epstein claims that his account is perfectly compatible with the complexity of modern

<sup>48</sup> *Ibid.*, pp. 223–31.

<sup>49</sup> Ackerman, *Private Property and the Constitution*, p. 26 (n. 3).

<sup>50</sup> Harris, *Property and Justice*, pp. 32–3.

<sup>51</sup> Robert Nozick, *Anarchy, State, and Utopia* (Oxford, 1974), pp. 150–83. I criticise such theories in *Property and Justice*, chs. 11 and 12.

<sup>52</sup> Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass., 1985), pp. 3–19.

<sup>53</sup> *Ibid.*, p. 304.

property law. Original titles to material objects arise from first possession, not Locke's labour-mixing theory. First possession is a universal moral principle, shared by common law and civil law systems. Experience of the working of the principle demonstrates its superiority to any alternative.<sup>54</sup>

The first possession principle, Epstein contends, operates in conjunction with a conceptual stipulation. The rights of ownership in a given thing 'consist in a set of rights of infinite duration', comprising the three incidents of possession, use and disposition.<sup>55</sup> It is here that the common law injects its own particularities. The common law restricts uses by owners which harm other owners through the tort of nuisance and, to the extent that government regulation mimicks nuisance law, owners whose use-privileges are reduced are automatically compensated by being granted rights correlating to other owners' obligations.<sup>56</sup> More importantly, the common law defines the ways in which owners may use their unlimited rights of disposition so as to create the multifarious proprietary elements (tangible and intangible) known to modern law. It is not the case that property has disintegrated. On the contrary, argues Epstein, the common law itself allows for disaggregation precisely because it is rooted in a concept of full ownership. By virtue of the right of disposition, the original rights of use and possession 'can be transferred, pooled and divided at the pleasure of buyer, seller, donor and donee, mortgagor and mortgagee and so on'.<sup>57</sup> The moral status conferred on owners by first possession of tangible objects is thus transmitted to owners of patents, copyrights, trade marks 'and other forms of intangible wealth which have value in use and disposition even if they cannot be reduced to physical possession'.<sup>58</sup> It seems to follow that I am the just owner of the pound in my pocket because (and only because) someone, at some time in the past, took possession of some previously unowned tangible object, since when there have been a series of valid common law transactions, ending with the one which placed the pound in my pocket.

I would suggest that the common law, whatever its virtues, cannot sustain the moral burden Epstein throws upon it. First, there is the problem of history itself. We know that resources were in the past wrongfully taken. As to that, Epstein insists that our political response should

<sup>54</sup> Richard A. Epstein, 'Possession as the Root of Title', *Georgia Law Review*, 13 (1979), 1221-43; *Simple Rules for a Complex World* (Cambridge, Mass., 1997), pp. 59-63.

<sup>55</sup> Epstein, *Takings*, p. 58.

<sup>56</sup> Epstein, *Takings*, pp. 96-9, 112-15; *Simple Rules for a Complex World*, pp. 132-7.

<sup>57</sup> *Takings*, p. 61.

<sup>58</sup> *Ibid.*, p. 62.

be modelled on the law's rules about adverse possession and relative title. That is necessary, he says, for consequentialist reasons to do with incentives and public order.<sup>59</sup> Such rules are, however, for the most part of statutory origin and vary from one jurisdiction to another. If their basis is utilitarian, it is always open to argument that they should be modified as social conditions change—for example, the English Law Commission has recommended that the adverse possession rules which apply to registered land should be radically reconstructed since, in their present form, they are adapted for the era when all titles to land were established at common law by title deeds.<sup>60</sup> Be that as it may, a limitation system is necessarily a departure from pure historical entitlement and is not inherent to common law transmission powers. If there were a defensible moral principle which conferred full ownership on he who first takes possession of an unowned thing, it could hardly be an application of that principle to expropriate the owner when someone else takes possession after twelve, twenty, sixty, or any other arbitrarily fixed number of years. There are good reasons for having limitation periods, but most of them have nothing to do with natural right.

Secondly, there is the problem of the diversity of proprietary subjects. Property institutions apply to money, cashable rights (bank accounts and company shares and so forth), and ideational entities of various kinds (intellectual property), as well as to land and chattels.<sup>61</sup> The common law has not, pace Epstein, been the sole begetter of this array of resource-holdings. Corporation law, securities law, insolvency law and intellectual property law are largely the creature of statutes, most of which seek to implement the public interest rather than to perfect historically derived natural rights. Even if we had unlimited historical information, it is most unlikely that my title to the pound in my pocket could be traced, through purely common law transmissions, back to someone's first possession of an unowned object.

There are many other objections to a historical-entitlement theory, such as Nozick's or Epstein's, which I shall not repeat here.<sup>62</sup> Nevertheless, Epstein is right, and the disintegrationists are wrong, in the following respect. Despite the complexity of modern property institutions, rules of

<sup>59</sup> Epstein, *Takings*, pp. 346–50; *Simple Rules for a Complex World*, pp. 63–7.

<sup>60</sup> The Law Commission, *Land Registration for the Twenty-first Century*, *Law Com*, no. 254, 1998, x, paras 1–78, pp. 202–36.

<sup>61</sup> See Harris, *Property and Justice*, pp. 42–55.

<sup>62</sup> See my 'Is Property a Human Right?', in Janet McLean, ed., *Property and the Constitution* (Oxford, and Portland, Oregon, 1999), pp. 64–87 at 79–84.

both common law and statutory origin systematically presuppose ownership conceptions. This is true of the very property-limitation rules and expropriation rules which disintegrationists invoke in support of the claim that ownership no longer means anything. If owners are prohibited from building, or cutting down trees, on their land without first obtaining the permission of some public agency, it is presupposed that, but for the restrictions, these are things they, as owners, could have done. If a court or a trustee in bankruptcy orders money to be taken from X's bank account to meet X's obligations, it is presupposed that, before the intervention, it was X, and no-one else, who owned the money.

Herbert Hart once warned us to beware, in the field of modern jurisprudence, of both 'the nightmare' and 'the noble dream'—casting legal realism for the former and Ronald Dworkin's rights thesis for the latter.<sup>63</sup> I suggest that comparable extremes are to be avoided in property theory. To understand property as it is we must eschew both disintegrationist nihilism and historical-entitlement fantasy. We must take property institutions to pieces and then display the various ways in which the bits may be fitted together.

The essence of a property institution consists, in my submission, of the combination of two elements. There are what I have called 'trespassory rules', which ban everyone except a privileged individual or group from meddling with some resource; and there is an 'ownership spectrum', comprised of a range of ownership interests—that is, combinations of open-ended use-privileges, control-powers and powers of transmission. Ownership interests are taken-for-granted organising ideas in daily life and they surface frequently in judicial reasoning.<sup>64</sup> Ownership is a malleable conception, but that does not rob it of meaning. The fact that there are limitations no more entails that ownership has disintegrated than the fact that there are restrictions on free speech means that the idea of freedom-to-speak has disintegrated.

The claims contained in the last paragraph are intended to apply to all property institutions. 'Ownership interest' and 'trespassory rule' are heuristic terms by reference to which different institutions may be compared. In the next section they will be applied specifically to common law systems.

<sup>63</sup> H. L. A. Hart, 'American Jurisprudence Through English Eyes: the Nightmare and the Noble Dream', *Georgia Law Review*, 11 (1977), 969–89.

<sup>64</sup> *Property and Justice*, part i.

#### 4. Common law ownership

[A fee simple] confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination, including the right to commit unlimited waste; and, for all practical purposes of ownership, it differs from the absolute dominion of a chattel, in nothing except the physical indestructibility of its subject.<sup>65</sup>

The above statement was made, almost as an aside, by H. W. Challis in a classic work on real property. Yet the opposite view, that the common law knows nothing of ownership (at least in the case of land), is regularly voiced. It is one of the planks of the disintegrationist account. The explanation lies in a perennial confusion between ownership and title.

Imagine that you overhear a conversation between two strangers in which one protests to the other: 'I *own* that rubber duck!' If you had the temerity to intervene with inquiries, one of three situations might be revealed. Perhaps the speaker is claiming that, because the rubber duck is his, someone else who removed it without his permission was at fault. Or it might be that he is refuting a suggestion that he ought not to have disposed of the duck as he did. Or, again, he might be pointing out that the thing belongs to him because he bought it or someone gave it to him.

Assertions that X 'owns' R may, depending on the context, have implications of one of three kinds concerning respectively protection, jural content, or title. First, the implication may be that for anyone else to meddle with R without X's consent would be wrongful. X is protected by trespassory rules, usually embodied in law in the form of civil or criminal prohibitions. Secondly, the implication may be that X can do what he likes to or with R—property-independent prohibitions always excepted—subject to any relevant property-limitation rules. That is the open-ended content of his ownership interest, as in the above citation from Challis. Thirdly, the implication may be that X has, through purchase, gift or whatever, acquired a good title to R.

When theorists who reject the disintegrationist account seek to substitute a univocal 'right to property', they may emphasise the first implication to the exclusion of the other two;<sup>66</sup> but more often they

<sup>65</sup> H. W. Challis, *Law of Real Property*, (3rd edn. by Charles Sweet) (1911), p. 218.

<sup>66</sup> For example, Thomas Merrill argues that the right to exclude is a sufficient, as well as a necessary, characterisation of the right to property—Thomas W. Merrill, 'Property and the Right to Exclude', *Nebraska Law Review*, 77 (1998), 730–55. It would presumably follow that those authorised to exclude others from a thing, but not to use it themselves, must be treated as

conjoin the first and second implications in some such combination as Epstein's possession, use and disposition.<sup>67</sup> In my submission, protection and jural content should be analysed separately, although they invariably come together within the reach of a property institution. Claim-rights vested in owners are the correlatives of the duties imposed by the relevant trespassory rules—rights that your goods not be stolen or converted or that your land be restored to you and so on. The precise terms of the trespassory rules vary from system to system and so accordingly do the correlative rights. That is the protection which owners enjoy. It is commonly spoken of, compendiously, as a single 'right to exclude' or 'right to possess'. The second kind of implication, jural content, is given by the relevant presupposed, socially derived, ownership interest. It will be more or less, depending where the interest falls along the ownership spectrum; but it always consists of a combination of open-ended privileges and powers. We may describe this jural content loosely as a right to use and a right to dispose. However, given the variability, my preferred terminology is that of open-ended use-privileges, control-powers and powers of transmission.

If these two conceptual pieces, protection and jural content, are not separated at a theoretical level, we will not understand the variety of ways in which they may be fitted together. Imagine that English law were changed in the following ways: all trespasses to land become criminal; land-owners no longer have a right of specific civil recovery against dispossessors; appropriation of a chattel is never theft when it is consented to by the owner, even if the consent is improperly obtained;<sup>68</sup> owners have a right to specific civil recovery of chattels even where damages would be an adequate remedy. The new provisions would alter owners' protection but they would not, of themselves, bring about any change in what is taken for granted that owners are free to do with or to the things they own.

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having a property right in it. Does that mean that systems which deny property in corpses to persons granted exclusive control of them must be committing conceptual error? Must we say that, to the extent that parents have the right to exclude others from their children, to that extent they have property rights in them?

<sup>67</sup> James Penner combines some aspects of jural content with protection by defining the right to property as the right to exclusive use. However, he limits the contential element because he insists that a bright line must be drawn between property and contract—J. E. Penner, *The Idea of Property in Law* (Oxford, 1997). Thus, for Penner, ownership implies the power to give, but it is some sort of conceptual error to suppose that it implies the power to hire or sell or (in the case of money) to spend.

<sup>68</sup> The opposite is currently English law—*R. v Hinks* [2001] 2 AC 241.

While property theorists tend to confound the first and second implications, protection and jural content, common lawyers more frequently confound the second and third, jural content and title. Common law property concepts have been evolved through medieval forms of action and centuries of conveyancers' practice. Actions were brought to recover seisin or possession, not ownership; and a conveyance transfers or creates an estate in land, not *dominion*. Even in the case of chattels, the torts of trespass, detinue and conversion were founded on possession or a right to possession; and common law larceny was a crime against possession. All this has been contrasted with classical Roman law. Roman actions alleged that the thing claimed was something to which the claimant had an absolute title. From these pleadings there was constructed a singular concept of '*dominium*' which was maintained, as a matter of legal dogmatics, even after it ceased to represent the substance of the law.<sup>69</sup> In the common law, actions for the recovery of land never do, and claimants in chattel torts need not, assert absolute title.<sup>70</sup> Hence, it is frequently said, the common law knows no 'ownership'.<sup>71</sup>

Title, relative or absolute, is one thing. What, supposing you have any kind of title, you are at liberty to do to or with the thing to which you have the title, is another.<sup>72</sup> In practice common lawyers employ the term 'ownership' and its cognates to stand sometimes for absolute title and sometimes for jural content (the latter being an incident of the fee simple in the case of land).<sup>73</sup> This oscillation between the two concepts—

<sup>69</sup> Barry Nicholas, *An Introduction to Roman Law* (Oxford, 1962), pp. 99–103, 125–8, 155–7. Peter Birks, 'The Roman Law Concept of *Dominium* and the Idea of Absolute Ownership', *Acta Juridica* (1985), 1–37 at 27–37.

<sup>70</sup> W. W. Buckland and Arnold D. McNair, *Roman Law and Common Law*, 2nd edn., revised by F. H. Lawson (Cambridge, 1952), pp. 67 ff.

<sup>71</sup> For a trenchant statement of this view, see A. D. Hargreaves, 'Modern Real Property', *Modern Law Review*, 19 (1956), 14. Modern land law textbooks often contain bald assertions such as the following. 'However, the common law has no concept of absolute title, property or ownership'—Kevin Gray and Susan Frances Gray, *Elements of Land Law*, 3rd edn. (2001), p. 96. 'Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned there is in England no law of ownership, but only a law of possession'—E. H. Burn, *Cheshire and Cheshire's Modern Law of Real Property*, 16th edn. (2000), p. 26. But compare: 'To Joshua Williams' statement that "The first thing the student has to do is to get rid of the idea of absolute ownership", Maitland added "And the next thing the student has to do is painfully to reacquire it" —Charles Harpum, *Megarry and Wade, The Law of Real Property*, 6th edn. (2000), p. 54 (n. 53).

<sup>72</sup> See Honoré, *Making Law Bind*, pp. 184–7.

<sup>73</sup> For example, Kirby J. in the High Court of Australia, dealing with the question of when past grants of land must be taken to have excluded common law use-rights comprised within native title, said that a fee simple interest 'being the local equivalent of full ownership, necessarily expels

absolute-titular ownership and contential ownership—may be illustrated from within one and the same speech in the House of Lords in the *Canary Wharf* case,<sup>74</sup> one of the decisions mentioned earlier in connection with conceptual casuistry.

There were two questions before their Lordships. First, could residents of a household who had no proprietary interest in the land sue in the tort of nuisance? To that, the majority answered ‘no’. Secondly, did the erection of a tower that interfered with neighbours’ television receptions constitute a nuisance? They answered unanimously ‘no’. In the context of the first question, the majority recognised that a claimant could sue even if all that he had was a defeasible, possessory title to an estate. In this context Lord Hoffmann cited the following passage from Cheshire and Burn’s *Modern Law of Real Property*:

All titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned there is in England no law of ownership, but only a law of possession.<sup>75</sup>

However, in answering the second question, Lord Hoffmann himself employs the concept of contential ownership, on at least three occasions that I have counted.

The general principle is that at common law anyone may build whatever he likes upon his land. If the effect is to interfere with the light, air or view of his neighbour, that is his misfortune. The owner’s right to build can be restrained only by covenant or the acquisition (by grant or prescription) of an easement of light or air for the benefit of windows or apertures on adjoining land.<sup>76</sup>

In the absence of agreement, therefore, the English common law allows the rights of a landowner to build as he pleases to be restricted only in carefully limited cases and then only after the period of prescription has elapsed.<sup>77</sup>

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any residual native title in respect of such land’—*Wik Peoples v. Queensland* [1996] 187 CLR 1 at 250. In that case the majority of the court held that statutory ‘pastoral leases’ might not have the same effect. Their reasons, it is suggested, amounted to this: common law leases confer an estate, an incident of which is a limited ownership interest which would entail use-privileges and control-powers inconsistent with native title; but the circumscribed terms of the statutory pastoral leases did not confer such ownership interests.

<sup>74</sup> *Hunter v. Canary Wharf Ltd* [1997] 1 AC 655.

<sup>75</sup> Cheshire and Burn’s *Modern Law of Real Property*, 15th edn. (1994), p. 26, cited at [1997] 1 AC 703.

<sup>76</sup> [1997] 1 AC at 709.

<sup>77</sup> *Ibid.*

The common law freedom of an owner to build upon his land has been drastically curtailed by The Town and Country Planning Act 1947 and its successors. . . . But when your Lordships are invited to develop the common law by creating a new right of action against an owner who erects a building upon his land, it is relevant to take into account the existence of other methods by which the interests of the locality can be protected.<sup>78</sup>

The case also illustrates another distinction. Where what is at stake is the correct understanding of some concept peculiar to common law systems, persuasive authority is typically accorded only to decisions of courts in other common law jurisdictions. On the question whether a plaintiff in a nuisance action must have an interest in land, their Lordships considered, but the majority declined to follow, Canadian and American cases. However, contentual ownership is a pre-legal, social and economic conception and hence is shared by all modern property systems. Thus, in answering the second question (whether building the tower was wrongful), persuasive authority was also accorded to a decision of the German Federal Supreme Court which had ruled that no action lay where a building interfered with television reception. The judgment of the court stated:

In respect of the so-called negative adverse effects there is no gap in the [civil] Code; on the contrary, it deliberately leaves it to the freedom of the owner to use his property as he wishes within the framework of the Code, as long as he does not cross the boundary of neighbouring land by the emission of imponderables.<sup>79</sup>

On this decision, Lord Goff commented:

The German principle appears to arise from the fact that the appropriate remedy falls within the law of property, in which competing property rights have to be reconciled with each other. In English law liability falls, for historical reasons, within the law of torts, though the underlying policy considerations appear to be similar.<sup>80</sup>

Ever since Hohfeld's seminal analysis of fundamental legal conceptions,<sup>81</sup> it has been customary to speak of ownership or property as a

<sup>78</sup> Ibid. at 710.

<sup>79</sup> *G. v. City of Hamburg*, Decisions of the Federal Supreme Court in Civil Matters, vol. 88, 344 at 348, translation cited by Lord Cooke in *Hunter v. Canary Wharf Ltd* [1997] 1 AC at 720.

<sup>80</sup> [1997] 1 AC at 686.

<sup>81</sup> W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Princeton, NJ, 1919), pp. 71 ff.

‘bundle of rights’,<sup>82</sup> although Hohfeld himself never employed this metaphor.<sup>83</sup> The ‘bundle’ idea is misleading in so far as it implies a very large, but nonetheless finite, collection of items. I have argued that ownership conceptions are essentially amalgams of open-ended *prima facie* use-privileges, control-powers and powers of transmission.<sup>84</sup> The law does not say: because X owns something, he is entitled to do the following A—Z things in relation to it. Rather, when some particular disputed use arises, the law says: since X is owner, he may act in that way unless there is some reason against him doing so. The concrete situation in relation to a resource is the product of the applicable ownership conception and particular property-limitation rules.<sup>85</sup>

The common law presupposes a non-technical, lay conception of contentual ownership. The same was true of classical Roman law, notwithstanding its obsession with absolute title.<sup>86</sup> Roman lawyers defined usufruct and the various classes of praedial servitudes; but they did not have to delineate what a person who had dominion over a farm or a cow was thereby at liberty to do, because everybody would know that already.<sup>87</sup> Modern civil law systems do proffer definitions of ownership, but in terms so abstract that real content is still given by extra-legal, social presuppositions.<sup>88</sup>

<sup>82</sup> For criticism of this idea, see J. E. Penner, ‘The Bundle of Rights Picture of Property’, *University of California Los Angeles Law Review*, 43 (1996), 711–820.

<sup>83</sup> Gregory Alexander suggests that the first explicit use of the ‘bundle of rights’ metaphor may have been in a treatise on the law of eminent domain written by John Lewis and published in 1888—Alexander, *Commodity and Propriety*, p. 322 (n. 40).

<sup>84</sup> See Harris, *Property and Justice*, pp. 64–8 and *passim*.

<sup>85</sup> It is sometimes suggested that, because of the environmental restrictions which current law imposes on land-use, the concept of private property in land has already disappeared—see William R. N. Lucy and Catherine Mitchell, ‘Replacing Private Property? The Case for Stewardship’, *Cambridge Law Journal*, 55 (1996), 566–99. For the reasons given in the text, that suggestion seems to me to be clearly mistaken. That is not to say that environmental progress might not be advanced if a conception of land-ownership lower on the ownership spectrum than full-blooded ownership comes to be, or even already has been, accepted—see Harris, *Property and Justice*, pp. 75–9.

<sup>86</sup> Nicholas, *An Introduction to Roman Law*, pp. 153–7. Joshua Getzler, ‘Roman Ideas of Landownership’, in Susan Bright and John Dewar, eds., *Land Law: Themes and Perspectives* (Oxford, 1998), pp. 81–106 at 82–5.

<sup>87</sup> See Peter Birks, ‘The Roman Law Concept of Dominium and the Idea of Absolute Ownership’, *Acta Juridica*, (1986) 1 at 27. Birks distinguishes the ‘concept’ of ownership from its ‘content’. It is clear, however, that there are two conceptions in play. By the ‘concept of ownership’ he means absolute-titular ownership. That which is subject to the restrictions he surveys is contentual ownership. A prohibition on building near an aqueduct does not affect the content of one’s title. It has precisely the same effect whether one is Quiritary Dominus, bonitary owner or good faith possessor.

<sup>88</sup> As Wolfgang Mincke has shown, those systems which reserve a word translatable in English as ‘property’ or ‘ownership’ for interests in tangible resources, nevertheless treat intangible

The common law, as it emerged from feudalism, made fairly robust assumptions about the content of ownership of an individualist or 'liberal' kind—in Challis's words, 'every act of ownership which can enter into the imagination'. In that respect, Epstein is right. However, common law ownership is not a timeless or static concept. It is developed by courts in response to changing social assumptions, in different ways in different jurisdictions. What are taken into the law are preconceived social understandings of what an owner ought to be at liberty to do; and such preconceptions may be tested for rational cogency against that mix of property-specific justice reasons to which I have referred—autonomy, incentives, valuable markets, independence from government, labour-desert, privacy, avoidance of illegitimate domination, and the rest.

If Counsel can muster some normative ground for denying that an owner's privileges and powers should entail P, she may advance that argument as one of common law although, given the weight traditionally attached to property freedoms, she may not convince the court. For example, common law jurisdictions have given different answers when the owner of commercial premises insists that he may exclude someone from his property, while the person so excluded maintains that his personal and speech liberties would be illegitimately denied. In such circumstances, both the Supreme Court of Canada<sup>89</sup> and the English Court of Appeal<sup>90</sup> have ruled in favour of owners. A different view was taken by the Supreme Court of New Jersey. It favoured the evolution of a new property-limitation rule whereby owners of commercial premises have, at common law, no right to exclude patrons unreasonably.<sup>91</sup> The United States Supreme Court has fluctuated over the question whether private owners' powers of exclusion may be challenged on the ground that they infringe the freedoms of expression conferred by the 1st amendment to the constitution.<sup>92</sup> In a recent case, a majority of three to two of the House of Lords ruled that the owner of a highway could not, as a matter of

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resources—cashable rights and intellectual property—in much the same way as do property systems with different dogmatics—'Property: Assets or Power? Objects or Relations as substrata of Property Rights', in J. W. Harris, ed., *Property Problems: From Genes to Pension Funds* (London, The Hague, and Boston, 1997), pp. 78–88.

<sup>89</sup> *Harrison v. Carswell* [1976] 62 DLR (3rd) 68. See also *Russo v. Ontario Jockey Club* [1988] 46 DLR (4th) 359.

<sup>90</sup> *CIN Properties Ltd v. Rawlins* [1995] 2 EGLR 130.

<sup>91</sup> *Uston v. Resorts International Hotels Inc.*, 445 A 2d (1982). The court ruled that the owners of a casino could not deny access to their black jack tables to the plaintiff merely for the reason that he had devised a successful system for playing the game.

<sup>92</sup> See the decisions reviewed in *Pruneyard Shopping Center v. Robins*, 447 US 74 (1980).

common law, exercise his power to exclude where that would prevent a peaceful, non-obstructive assembly.<sup>93</sup>

Such balancing of ownership freedoms against excessive domination of the lives of non-owners goes on all the time in common law jurisdictions. Non-owners are most likely to win, although victory is not assured, where title is understood to have been vested for some public purpose.<sup>94</sup> Such cases are not usually cited in books with ‘property’ on the title page. The latter are principally concerned with title to, and transmission of, estates and other specialised proprietary interests. Even such technical conceptualisation is, however, constantly infused with the presupposition that estates carry open-ended ownership interests, while lesser non-ownership proprietary interests do not.<sup>95</sup> When the House of Lords re-affirmed the traditional common law rule that restrictive covenants rank as proprietary interests binding successors to freehold land, but positive covenants do not, it was said that the former merely ‘deprive the purchaser of some of the rights inherent in the ownership of unrestricted land’, whereas ‘a positive covenant compels an owner to exercise his rights’.<sup>96</sup>

These are run-of-the-mill common law ‘ownership’ citations. In more unusual cases, regularly cited by property theorists, the common law has to accommodate, or to decline to recognise, novel proprietary items. This is done by extending, or refusing to extend, trespassory protection.

The majority of the California Supreme Court refused an action for conversion to John Moore in respect of his excised spleen (which the defendants had turned into a cell-line worth three billion dollars), because they thought there were good incentive and market-instrumental grounds for denying a patient-source ownership of bits taken from him by

<sup>93</sup> *DPP v. Jones* [1999] 2 AC 240. The case concerned the construction of a statutory prohibition of ‘trespassory assemblies’. It was accepted that the issue turned on whether the defendants would, at common law, be committing a trespass as against the owner of the subsoil of the highway. It was stressed, both in the majority opinion of Lord Irvine LC and the minority opinion of Lord Hope, that it made no difference whether the owner of the highway was a private individual or a public agency—*ibid.* at 257–8, 276–7.

<sup>94</sup> For discussion, see Kevin Gray and Susan Frances Gray, ‘Private Property and Public Propriety’, in Janet McLean, ed., *Property and the Constitution* (Oxford, and Portland, Oregon, 1999), pp. 11–39; and my ‘What is Non-Private Property?’, in J. W. Harris, ed., *Property Problems: From Genes to Pension Funds*, pp. 175–89.

<sup>95</sup> See Susan Bright, ‘Of Estates and Interests: a Tale of Ownership and Property Rights’, in Susan Bright and John Dewar, eds., *Land Law: Themes and Perspectives* (Oxford, 1998), pp. 529–46 at 535.

<sup>96</sup> *Rhone v. Stephens* [1994] 1 AC 310 at 317 *per* Lord Templeman.

doctors.<sup>97</sup> They reversed the decision of the California Court of Appeals, which had awarded conversion to Moore largely on privacy grounds.<sup>98</sup>

If trespassory protection is extended to something new, it need not follow that the protected party acquires what I have called ‘full-blooded ownership’.<sup>99</sup> In the celebrated *International News* case, the majority of the United States Supreme Court held that a news agency was entitled to an injunction restraining a rival agency from selling news taken from bulletins issued by the complainant or from newspapers published by its members.<sup>100</sup> Pitney J., delivering the leading opinion, said that information gathered about events of public interest was not ‘susceptible of ownership or dominion in the absolute sense’.<sup>101</sup> The gatherer had no right against the public at large that they should not make any use they wished of such information. On the other hand, there was a right to restrain use of the news by a commercial rival. As between the complainant and the defendant, fresh news must be regarded as ‘quasi property’.<sup>102</sup> ‘It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition.’<sup>103</sup> The complainant ought to be awarded this limited form of property, both because it would secure added profit ‘so necessary as an incentive to effective action in the commercial world’,<sup>104</sup> and because it would be unfair if profit was diverted ‘from those who earned it’<sup>105</sup> (a labour-desert argument). Thus the complainant was awarded ownership which would endure only for a time, and be protected only against commercial rivals.<sup>106</sup>

<sup>97</sup> *Moore v. Regents of the University of California*, 271 Cal. Rptr. 146 (1990).

<sup>98</sup> *Moore v. Regents of the University of California*, 249 Cal. Rptr. 494 (1988). I have discussed the Moore case in *Property and Justice*, pp. 353–9.

<sup>99</sup> ‘Full-blooded ownership of things entails a relationship between a person (or group) and a thing such that he (or they) have, prima facie, unlimited privileges of use or abuse over the thing, and, prima facie, unlimited powers of control and transmission, so far as such use or exercise of power does not infringe some property-independent prohibition’—*Property and Justice*, p. 30.

<sup>100</sup> *International News Service v. Associated Press* 284 US 215 (1918).

<sup>101</sup> *Ibid.* 236.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.* 240.

<sup>104</sup> *Ibid.* 238.

<sup>105</sup> *Ibid.* 240.

<sup>106</sup> The case has been cited subsequently as though it had established, without qualification, that commercial information is ‘property’, when the Supreme Court held that criminal legislation protecting ‘property’ should be applied to such information—see *Carpenter v. United States*, 108 S. Ct. 316 (1987). A different view has been adopted by the Supreme Court of Canada—see *Stewart v. R.* [1988] 58 DLR (4th) 1.

The majority of the High Court of Australia, in its path-breaking ruling in the Mabo case,<sup>107</sup> held that, according to the common law of Australia, the ‘radical title’ to land acquired by the Crown on settlement was burdened by the ‘native title’ of any aboriginal clan or group which was in occupation of any distinct portion of territory at that time and had continued to be so to the present. Such a community’s claim was based on first possession or occupancy. Nevertheless, contrary to Epstein’s conceptual premise, the community did not acquire full ownership—that is, it was not vested with an ordinary fee simple estate in the land which would have full-blooded ownership of the land as its incident. So long as it persisted, the community’s native title had the benefit of trespassory protection against the rest of the world. However, all questions about its detailed incidents were to be settled, as questions of fact, by reference to the community’s evolving traditions.

The twinned conceptions of what I have called ‘trespassory rules’ and ‘the ownership spectrum’ are at hand to shape and police the boundary of common law property. The court may pull down trespassory protection and recognise full-blooded ownership, as would have happened if John Moore had won. Or it may grant trespassory protection, but award some more constrained ownership interest, as in the International News case; or even some wholly novel *sui generis* interest, as in the Mabo case.

Common law reasoning in relation to property derives its cogency, such as it is, from the normative grounds invoked, or taken for granted, when a common law court rules that ownership freedoms are (or are not) outweighed by some other value; or when the common law’s proprietary embrace is (or is not) widened by extending trespassory protection. The all-or-nothing contrast offered by Epstein—either Lockean full-blooded ownership or else Hobbesian state control—is a false one. There is a mix of property-specific justice reasons available for pushing property-institutional design in one direction or another. True, property freedoms rank high in common law, as in other, Western systems; but they need not be, and never have been, all that is at stake.

## 5. Pure doctrine

There are certain known incidents to property and its enjoyment; among others, certain burthens wherewith it may be affected, or rights which may be

<sup>107</sup> *Mabo v. State of Queensland (No 2)* [1992] 175 CLR 1.

created and enjoyed over it by parties other than the owner; all which incidents are recognised by the law. . . . But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given. . . .

In a word, will the law recognise the devoting a house to this or that trade, and impressing upon it into whose hands soever it may come, the obligation to carry on the trade for the benefit of the manor or of the other property of the party covenantee, to whom the house originally belonged? The law cannot do so without sanctioning the creation of a new species of tenure by means of such covenants.<sup>108</sup>

The foregoing much-cited comment of Lord Brougham LC is an instance of what may be called ‘pure doctrine’. Common-law property doctrine is ‘pure’ when it is not, as in the examples given in the last section, deploying presupposed conceptions of ownership interests shared by lawyers and laymen but, instead, seeking to draw normative conclusions from technical concepts invented for inward-looking professional use.

Property institutions deal with elements other than ownership interests. They grant trespassory protection to non-ownership proprietary interests (easements, mortgages and so forth). Then questions arise about whether some novel variant should be added. These are property lawyers’ concerns, *par excellence*. (Philosophers typically discuss only ownership/property.) On such matters judges and commentators engage in conceptual casuistry or even Weberian logically-formal rationality, enough to make Bentham spit. Yet even here, in my view, the mix of property-specific justice reasons may be at the back of it all. True, in any particular case a judge may simply affirm that, in our law, it just is the case that an easement must accommodate a dominant tenement and hence *cannot* exist in gross; or that our law draws a line between rights *in personam* and rights *in rem* which *must* be respected. However, much that is detail within any property institution is the result of convention and, as I have argued elsewhere, juristic doctrine is a specialist variety of social convention.<sup>109</sup> What rules and principles, what conceptual categories, we ought to have, in the service of autonomy, valuable markets, avoidance of illegitimate domination and the rest, is debatable. Demonstrable determinate solutions are often lacking. People may have organised their affairs in reliance on the inherited structure. Whether or not litigation outcomes are really more predictable, lawyers can run through day-to-day problems more

<sup>108</sup> *Keppell v Bailey* [1834] 2 My & K. 517 at 535, 536, 540, 39 Eng. Rep. 1042 at 1049, 1051.

<sup>109</sup> See *Property and Justice*, pp. 323–30.

quickly and cheaply if there is a well-defined battery of technical concepts.

All this provides moral justification for arcane-seeming conceptualisations. But it does not justify dogma for dogma's sake. Courts and commentators should maintain a beady eye on invocations of pure doctrine, as on appeals to ownership, just in case what Bentham dismissed as 'cobwebs spun out of competing analogies' may have departed too far from any combination of 'rational principles'.

Recall the examples of Weberian conceptual casuistry and logically-formal rationality which were given in section 2 above. In answering the first question in the *Canary Wharf* case, the majority of their lordships insisted that to bring an action for a nuisance which was alleged to interfere with the enjoyment of land one must have an interest which carried exclusive possessory rights. In reaching that conclusion they overruled a decision of the Court of Appeal which had held that the daughter of a householder could bring such an action against a former boyfriend who was persecuting her with telephone calls.<sup>110</sup> The instinctive reaction of most people would probably support the Court of Appeal. How appalling that a conceptual categorisation should stand in the way of upholding such an action!<sup>111</sup>

Now by the time the House of Lords ruled on the matter, Parliament had introduced a tort of harassment so that one aspect of the problem was no longer pressing. However, their Lordships made it plain that, even had that development not occurred, the received boundaries of the tort of nuisance must be respected by a common law court. Why should that be so? One can read the speeches of the majority as sheer deference to doctrinal dogma, or one can attribute to them a justificatory basis something like the following. We need to keep our tort categories distinct—harassment, negligence and nuisance—because of the way in which liability filters into parties' transactions. Where torts protect persons, they may transact away their personal rights. There are good grounds—derived ultimately from the moral and economic arguments which support property freedoms—for allowing only persons with ownership interests in land to be the ones to contract out of the trespassory protec-

<sup>110</sup> *Khorasandjian v. Bush* [1993] QB 727.

<sup>111</sup> Peter Cane, commenting on the *Canary Wharf* case, writes: 'To allow the preservation of the supposed conceptual integrity of this structure to influence the law's approach to social problems is to allow the tail to wag the dog'—'What a Nuisance!', *Law Quarterly Review*, 113 (1997), 515 at 520.

tion provided by nuisance law.<sup>112</sup> Therefore, only persons with such interests should be claimants in nuisance suits. Whether that argument is ultimately convincing depends on how we suppose that the mix of all sound property-specific justice reasons relates to the whole of the law. The point I wish to make is that surface reasoning which is conceptual-casuistic may be purportedly bottomed in justificatory arguments about property institutions.

In the *Prudential Assurance* case, in which their Lordships re-affirmed the proposition that the grant of exclusive possession for an indefinite term cannot constitute a lease, the majority could find no good reason for the rule. Perhaps the rule operates as a rough-and-ready device for relieving landlords from contractual bargains which have turned out to be exceptionally improvident.<sup>113</sup> Perhaps it exerts a discipline on conveyancers which, in the long run, serves the values underlying our property institution. Suppose, however, the majority were right and there are no sound reasons for the rule. Why on earth should it be maintained? The answer which they gave was that people might have relied upon it and such reliance would be unfairly prejudiced were it changed.<sup>114</sup>

That seems a weak reason. It would be a perverse draftsman who drew up a transaction in reliance on the belief that the law would rule it to be a nullity; and those who successfully steered clear of the rule by ensuring that exclusive possession was granted for a definite term hardly suffer if it were later decided that their caution was unnecessary. Perhaps their Lordships had in mind that parties, supposing that they or their predecessors had blundered into nullity, might have settled their affairs on that basis

<sup>112</sup> Lord Goff expressly stated that one advantage of maintaining the traditional rule would be that owners could negotiate terms with potential nuisance-creators. 'The right to bring such proceedings is, as the law now stands, ordinarily vested in the person who has exclusive possession of the land. He or she is the person who will sue, if it is necessary to do so. Moreover he or she can, if thought appropriate, reach an agreement with the person creating the nuisance, either that it may continue for a certain period of time, possibly on the payment of a sum of money, or that it shall cease, again perhaps on certain terms including the time within which the cessation will take place.'—*Hunter v. Canary Wharf Ltd* [1997] 1 AC 655 at 692–3.

<sup>113</sup> See Susan Bright, 'Uncertainty in Leases—is it a Vice?', *Legal Studies*, 13 (1993), 38–51. Peter Sparkes, 'Certainty of Leasehold Terms', *Law Quarterly Review*, 149 (1993), 93–113 at 110–13.

<sup>114</sup> 'No one has produced any satisfactory rationale for the genesis of this rule. No one has been able to point to any useful purpose that it serves at the present day. If, by overruling the existing authorities, this House were able to change the law for the future only I would have urged your Lordships to do so. But for this House to depart from a rule relating to land law which has been established for many centuries might upset long established titles'—*Prudential Assurance Co Ltd v. London Residuary Body* [1972] 2 AC 386 at 396–7 per Lord Browne-Wilkinson. Lord Griffiths (at 396) and Lord Mustill (at 397) agreed with these comments. The other members of the House, Lord Templeman and Lord Goff, accepted existing doctrine without adverse comment.

and that such settlements might be unfairly re-opened were the law changed. If that was what was envisioned, it should have been spelled out; for it would then have had to be considered alongside the fact that the rule had for many years been in abeyance. In the case itself, negotiators presumably had contracted in reliance on an opposite view of the law. If so their expectations were certainly upset. If it could have been shown that no genuine reliance interest was at stake and if the majority were right in supposing that there was no good reason for the rule, they should have exercised the power which all ultimate appellate courts have to alter or (as some would say) to develop the common law.

Consider now the citation from Lord Brougham with which this section began. It affirms the *numerus clausus* of interests in land which, as mentioned in section 2 above, is an instance of what Weber called ‘logically-formal rationality’. Lord Brougham invokes ‘the science of the law’, which no doubt refers to abstract conceptual symmetry of the sort which Weber claimed was far better achieved in Continental scholarship than within the common law. But Lord Brougham also appeals to the ‘public weal’. What did he mean by that? On the face of it, he may be referring simply to conveyancing considerations and thus to market-instrumental arguments. Bernard Rudden notes that the *numerus clausus* rule is a feature of all non-feudal property systems. He finds, nevertheless, that there are no sound economic reasons for it.<sup>115</sup> That view has been disputed.<sup>116</sup> Even if Rudden is right, judges may have (mistakenly) supposed that real costs would emerge were it abandoned.

Be that as it may, there may have been other more elusive moral factors at play. Ownership freedoms represent worthwhile exercises of autonomy. The law allows a variety of restraints, including those imposed when parties key into one of the recognised interests in land. However, to allow people to impose any kinds of restraints on all succeeding owners that their fancies might suggest—in the way that feudal law did—gives them an unacceptable power to dominate the lives of others. We have the circumscribed, post-feudal system of leasehold tenure which allows for domination enough. Let us not, said Lord Brougham, sanction the backdoor creation ‘of a new species of tenure’.

<sup>115</sup> Bernard Rudden, ‘Economic Theory Versus Property Law: the Numerus Clausus problem’, in J. M. Eekelaar and J. Bell, eds., *Oxford Essays in Jurisprudence*, 3rd Ser. (Oxford, 1987), pp. 239–63.

<sup>116</sup> See Michael A. Heller, ‘The Boundaries of Private Property’, *Yale Law Journal*, 108 (1999), 1163–1223.

## 6. Conclusion

In the last two sections I have endeavoured to identify three different ways in which underlying ethical considerations are filtered through common law property concepts. What may the future bring?

First, and most obviously, ownership freedoms are pitted against other values. This can be done even in the case of land because ownership interests are incidents of legal estates. It remains to be seen to what extent the common law will be developed by taking account of the jurisprudence of the European Court of Human Rights, especially its interpretation of Protocol 1 to the European Convention which affirms everyone's entitlement 'to the peaceful enjoyment of his possessions'.

Secondly, in exceptional instances, the common law is called on to extend its embrace to novel resource-holdings. The pincers of trespassory rules and the ownership spectrum are always at hand. In this age of biotechnology, data protection and the proliferation of electronic communication systems, the pincers might be used to tweak out novel kinds of property; or, instead, everything may be left to detailed statutory regulation without benefit of proprietary notions.

Thirdly, pure doctrine will no doubt continue as before to bury ethics beneath technical conceptualisations. That is not necessarily a bad thing. Everyone benefits if most day-to-day problems affecting resource-holdings can be rapidly disposed of by specialists without unearthing ethical foundations. All is well so long as dogmatics can, on demand, be revealed as a servant and not a tyrant.

At its best, the reasoning of the common law, like other juristic doctrine, represents a specialist variety of social convention whereby the mix of sound property-specific justice reasons is made concrete. Such conventions are, however, never static; and part of their fluidity derives from the fact that technical conceptualisation about property presupposes lay (non-technical) assumptions about ownership interests, themselves the subject of evolution and contest. Surface reasoning is peculiar to lawyers. Underlying justifications are not. It is my contention that, whether made explicit or not, either a rational relationship exists between ethical considerations and specialist doctrine, or common-law property talk really is mumbo jumbo.